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GENERAL INDEX, TITLE, &c.

TO THE

INDIAN LAW REPORTS,

MADRAS SERIES.

VOL. XIII.—1890.

JANUARY—DECEMBER.

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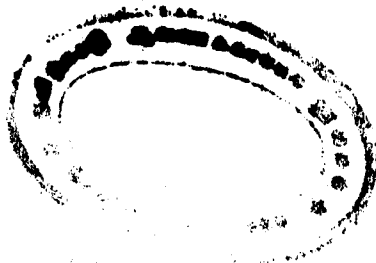
CASES DETERMINED BY THE HIGH COURT AT MADRAS
AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT.

REPORTED BY

Privy Council C. BOULNOIS, *Middle Temple.*
High Court K. BROWN, *Inner Temple.*

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JUDGES OF THE HIGH COURT.

1ST JANUARY—31ST DECEMBER 1890.

Chief Justice.

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

Puisne Judges.

Hon'ble T. MUTTUSAMI AYYAR, C.I.E.

„ G. A. PARKER.

„ F. WILKINSON.

„ H. H. SHEPHARD.

„ J. W. HANDLEY (*Offg.*).

Hon'ble J. H. SPRING BRANSON, *Advocate-General.*

MADRAS:

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The rules of English law, according to which the rights of the Crown or of riparian owners to accretions caused by alluvion are determined with reference to the character of the river and the manner in which the accretion is occasioned, are applicable in British India unless excluded by enactment or local usage. Accordingly where a rapid variation in the natural high water line of a tidal navigable river in Malabar had been caused by acts unlawfully done by the tenants of the riparian owner :—*Held*, that the Crown was entitled as against the riparian owner to the accretion caused by such variation.

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See LAND ACQUISITION ACT.

1871, IX :

See LIMITATION ACT.

- 71, XXIII:
See PENSIONS ACT.
- 72, I:
See EVIDENCE ACT.
- „ IX:
See CONTRACT ACT.
- 873, III:
See CIVIL COURTS ACT.
- 874, XIV:
See SCHEDULED DISTRICTS ACT.
- „ XV, ss. 3, 4 (Laws Local Extent Act):
See SCHEDULED DISTRICTS ACT.
- 1877, I:
See SPECIFIC RELIEF ACT.
- „ III:
See REGISTRATION ACT.
- „ XV:
See LIMITATION ACT.
- 1878, I:
See OPIUM ACT.
- 1879, I:
See STAMP ACT.
- 1881, XXVI:
See NEGOTIABLE INSTRUMENTS ACT.
- 1882, IV:
See TRANSFER OF PROPERTY ACT.
- „ V (Madras):
See FOREST ACT.
- „ X:
See CRIMINAL PROCEDURE CODE.
- „ XIV:
See CIVIL PROCEDURE CODE.
- 1884, IV (Madras):
See DISTRICT MUNICIPALITIES ACT.
- „ V (Madras):
See LOCAL BOARDS ACT.
- 1887, I (Madras):
See MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT.
- „ IX:
See PROVINCIAL SMALL CAUSE COURTS ACT.
- 1888, VII:
See CIVIL PROCEDURE CODE.
- 1889, I (Madras):
See VILLAGE COURTS ACT (MADRAS).

ALIYASANTANA LAW—Qualification of *qjama*n—Leprosy:

The last female member of an Aliyasantana family made an adoption without the consent of her son, who was suffering from ulcerous leprosy, which was not congenital:—*Held*, the son was entitled to have the adoption set aside.

Chandu v. Subba 209

ALLUVION:

See ACCRETION.

CIVIL COURTS ACT (MADRAS), ACT III OF 1873, ss. 12, 14—Court Fees Act—Act VII of 1870, s. 7, cl. 5—Suit to enforce registration—Jurisdiction:

Suit in the Court of a District Munsif to enforce registration of two instruments of gift. The property purported to be conveyed was the same in each instrument and its value was found to be less than Rs. 2,500, but the earlier instrument comprised also an assignment of the right to manage a charity. The later instrument was found to have been executed in super-session of the former, and the District Munsif passed a decree directing its registration alone:—*Held*, that the District Munsif had jurisdiction to entertain the suit.

Ramakrishnamma v. Bhagamma 56

2. —————, s. 13—Civil Procedure Code—Act XIV of 1882, s. 331—Appeal—Jurisdiction:

The plaintiff being the holder of a decree of a Subordinate Court for more than Rs. 5,000 was obstructed in execution by the present defendants. He applied to the Court for the removal of the obstruction, the property, which was the subject of the application, being valued at less than Rs. 5,000, and the Subordinate Judge directed that the application be registered as a regular suit under Civil Procedure Code, s. 331, and ultimately passed a decree in favour of the plaintiff:—*Held*, that the appeal against this decree did not lie to the High Court.

Kalima v. Nainan Kutti 520

CIVIL PROCEDURE CODE, s. 2—Rent Recovery Act (Madras)—Act VIII of 1865, s. 27—order under—Decree:

An order made under Rent Recovery Act (Madras), s. 27, is not a decree within the meaning of Civil Procedure Code, s. 2.

Perumal v. Rajagopala 248

2. —————, s. 11—Hindu Marriage Act (Act XV of 1856, s. 5)—Hindu Law—Widow re-marriage—Exclusion from temple—Excommunication—Jurisdiction:

The plaintiff, who was a *Smarta* Brahman, but had married a widow (whose first marriage had not been consummated), alleged that he had made a vow to present an offering in a certain temple, and that the defendants, who were the committee of the temple, had obstructed and prevented him from entering the inner shrine (where orthodox Brahmans usually make their offerings), asserting that he was disqualified to enter by reason of his having married a widow contrary to Hindu *sastras*; and he sued for damages for the above obstruction and imputation, for a declaration that he was entitled to enter the shrine as a Brahman, and for an injunction restraining the defendants from interfering with his exercise of this right:—*Held*, (1) that the right claimed was of a civil nature and within the cognizance of the Civil Courts; (2) that the question to be determined was not a question of the plaintiff's legal status since a Brahman widow is at liberty to re-marry under Act XV of 1856, but it was a question of caste status in respect of a caste institution; (3) that in order to determine the above question, the Courts must inquire (a) what was the usage of the temple as regards admission into the inner shrine for the purposes of worship at the date of the suit, or the presumable intention of the religious foundation as regards such admission and (b) whether according to such usage or presumable

intention of the foundation those who secede from the caste custom as to re-marriage of women are outside the class of beneficiaries as regards the right of admission into the inner shrine as above.

Venkatachalapati v. Subbarayadu 293

3. —, s. 13—*Regulation VI of 1831, s. 3—Suit for a declaration as to land alleged to be nattamai maniyams—Jurisdiction of Revenue Courts—Res judicata:*

Suit to establish plaintiffs' title to certain land alleged by the defendants, who were the Secretary of State for India in Council and the nattamaigar of a certain village, to be maniyam land attached to the office of the second defendant, and previously held to be such by a Revenue Court:—*Held*, the Court was not precluded either by Regulation VI of 1831, s. 3, or by the decision of the Revenue Court from granting the declaration prayed for.

Ravutha Koundan v. Muthu Koundan 41

4. —, s. 13—*Res judicata—Cause of action—Limitation Act—Act XV of 1877, sch. II, art. 91—Suit to cancel a document:*

On 23rd March 1878 plaintiff executed to defendant a document purporting to be a deed of gift. In 1886 plaintiff sued to cancel the document alleging that defendant on 11th May 1881 had agreed to execute a release but had not done so: that suit was dismissed for non-payment of duty due under the Court Fees Act. The plaintiff now sued in 1887 for a declaration that the document "was executed for nominal purposes and was not intended to take effect":—*Held*, (1) that since the cause of action in the suits of 1886 and 1887 were not the same, the claim in the latter suit was not *res judicata*; (2) that the suit was not barred by limitation.

Nagathal v. Ponnusami 44

5. —, s. 13—*Partition suit—Non-joinder—Declaratory decree:*

A suit for partition of certain land was withdrawn as against one of the defendants who was entitled to part of the land. The plaintiff and the remaining defendants entered into a compromise in the terms of which the Court passed a decree for delivery of a share of the land to the plaintiff. The decree-holder having died without executing the decree, his heir now sued for partition of the land and delivery of the above share, joining as defendants the various persons entitled to shares:—*Held*, that the decree in the former suit could only operate as a declaratory decree and did not preclude the plaintiff from bringing the present suit.

Beemabai v. Yamunabai 313

6. —, s. 13—*Rent Recovery Act (Madras)—Decision of Revenue Court as to landlord's title:*

In a summary suit filed by a landlord against his tenant in the Court of the Deputy Collector under the Rent Recovery Act (Madras), s. 9, to enforce acceptance of a patta by the defendant, it appeared that, in a former suit between the same parties in the same Court, it had been decided that the defendant was the plaintiff's tenant and as such bound to accept a patta from him in respect of the land in question in the present suit:—*Held*, that the defendant was not entitled in the present suit to dispute the plaintiff's title, since the former decision constituted it *res judicata*.

Venkatachalapati v. Krishna 287

7. —, ss. 13, 102, 158—*Failure to pay Commissioner's fee—Res judicata:*

A suit for land was dismissed in 1886 on the plaintiff's failure to comply with an order to pay a fee for the appointment of a commissioner to value the land. No issues were framed in the suit, and the order directing payment of the fee prescribed no time within which it was to be made. The plaintiff now sued the defendants again for the same land:—*Held*, that the claim was not *res judicata*.

Shahik Sahab v. Mahomed 510

8. —, s. 15—*ACT I OF 1889, s. 13—Jurisdiction of Small Cause Courts to hear suits cognizable by Village Munsif:*

The term "Court of lowest grade" in Civil Procedure Code, s. 15, refers only to Courts to which the Civil Procedure Code is applicable, and consequently Small Cause Courts have concurrent jurisdiction with Courts of Village Munsifs to hear suits which are cognizable by the latter.

Mirkhan v. Kadarsa 145

9. —, s. 25—*Order made under, without notice to the party not applying—Jurisdiction by consent—Waiver of want of jurisdiction:*

A suit for land was filed in 1883 in the Subordinate Court of Cochin. In 1884 the Government, by a notification under Act III of 1874, transferred the district where the land was situated from the jurisdiction of that Court to that of the Subordinate Court of Calicut, whereupon the plaintiff applied to the District Court to transfer the case to the file of the first-mentioned Court under s. 25 of the Code of Civil Procedure. The District Judge granted the application without notice to the defendants. The defendants went to trial, and also preferred an appeal against the decree, which was passed in favour of the plaintiff, without objection to the jurisdiction of the Court. In execution of the above decree, (which was affirmed on appeal) the plaintiff was obstructed. He, therefore, filed the present suit against the obstructors under the provisions of s. 331 of the Code of Civil Procedure, and they pleaded that the decree sought to be executed had been passed without jurisdiction:—*Held*, (1) that the want of notice to the defendants of the application made under s. 25 of the Code of Civil Procedure was immaterial; (2) that the defect, if any, of the jurisdiction of the Court passing the decree had been waived by the defendants, and that the present defendants were precluded from availing themselves of it.

Sankumani v. Ikoran 211

10. —, s. 32—*Joinder of new defendant:*

Suit upon a bond of which the obligor was therein described as the manager of a certain mutt. The defendants, who were the sons of the obligor (since deceased), pleaded that the debt was contracted by their father for the benefit of the mutt and as manager of the mutt. The Judge ordered that the representative of the mutt be joined as defendant in the suit under s. 32, and subsequently a decree was passed against him:—*Held*, that the order under s. 32 was right, although the plaint had prayed for no relief against the mutt.

Thirthasami v. Gopala 32

11. —, s. 50—*Inconsistent causes of action—Specific Relief Act—Act I of 1877, s. 40—Cancellation of instruments—Interest necessary to support the suit:*

In a suit for cancellation of a sale-deed by the person whose name appeared on it as executant, it was alleged in the plaint that it was a forgery, and that if it was not a forgery, its execution had been obtained by fraud and that it was, moreover, void for want of consideration. The plaintiff's interest in the property to which the instrument related had been assigned by her to another by a conveyance which contained certain covenants by her with regard to the land:—*Held*, that the plaintiff was not entitled to maintain the suit.—*Per cur*: The gist of the plaintiff's charge against the defendant was that she had never executed a sale-deed in his favour, and that the document set up by him was a forgery. It was not competent to the plaintiff to combine with this charge as an alternative the wholly inconsistent charge that if she did execute the document no consideration was received by her or that fraud had been practised upon her.

Iyyappa v. Ramalakshamma 549

12. —, ss. 231, 232—*Joint decree-holder—Application for execution of decree—Limitation Act—Act XV of 1877, sch. II, art. 179:*

A Hindu obtained in 1878 a decree for partition of certain property and applied in 1888 to have it executed. It appeared that the decree-holder's son, having obtained against him in 1881 a decree for a share of whatever he should acquire under the decree of 1878, had applied for execution of the

last-mentioned decree; and reliance was now placed on that application to save the bar of limitation:—*Held*, that assuming the decree of 1881 had effected an assignment by operation of law of the decree of 1878, the father and son were not joint decree-holders within the meaning of Civil Procedure Code, s. 231, and the father's application for execution was barred by limitation.

Ramasami v. Andu Pillai 347

13. ———, ss. 231, 258—*Limitation Act—Act XV of 1877, ss. 7, 8, sch. II, art. 179—Minority—Execution of decree:*

A member of an undivided Hindu family and his two minor brothers (who sued by him as their next friend) brought a suit for partition of family property against their father, and joined as defendants certain persons who were in possession of part of the property under alienations made by the father but alleged in the plaint to be invalid as against the family. In 1875 a decree was passed in favour of the plaintiffs in the above suit. No application for the execution of the decree was made by either the first or second plaintiff; but the third plaintiff, having attained his majority in June 1881, applied for execution in April 1884: his application was opposed by two of the defendants. The District Judge made an order granting his application in respect of the one quarter share to which he was declared to be entitled under the decree:—*Held*, that the order of the District Judge was wrong, as neither s. 7 nor s. 8 of the Limitation Act affected the case, and the application was accordingly barred by limitation.

Seshan v. Rajagopala 236

14. ———, s. 234—*Hindu law—Execution of a decree against the son of a Hindu judgment-debtor—Determination of questions as to the binding nature of the decree debt:*

In execution of a money decree passed against a Hindu, since deceased, ancestral property in the possession of his son was attached. A petition by the son objecting that the property was not liable to be attached in his hands was dismissed:—*Held*, that the order dismissing the petition was wrong, for when a judgment-creditor seeks to attach ancestral property after it has vested in the son by survivorship under Hindu law upon the father's death, he cannot be considered as executing the decree against the property of the deceased judgment-debtor within the meaning of s. 234 of the Code of Civil Procedure.

Venkatarama v. Senthivelu 265

15. ———, s. 244—*Appeal against order—Nomination by a pandaram under a decree—Revocation of such nomination by the pandaram's successor:*

The pandaram of a mutt being empowered under a decree to nominate a person to be the head of a subordinate mutt, subject to the approval of the Subordinate Court, made a nomination and died before the Subordinate Court had come to a determination as to the fitness of his nominee. His successor in office was brought on to the record and revoked his nomination and made a fresh nomination. The Subordinate Court treated the fresh nomination as a nullity and made an order confirming the first. The pandaram appealed against this order:—*Held*, (1) that an appeal lay against the order complained of; (2) that the person, whose nomination had been confirmed, was a necessary party to the appeal; (3) that the nomination first made was revocable for good cause, and that the fitness of the person nominated by the appellant should be investigated by the Subordinate Judge.

Gnanasambanda v. Viswalinga 338

16. ———, s. 244—*Execution proceedings—Limitation Act—Act XV of 1877, sch. II, arts. 29, 61, 62, 97, 120:*

In a suit of 1867 the present defendant obtained a decree for possession of a certain village and mesne profits for one year. Pending an appeal against that decree execution was stayed on the present plaintiff depositing a note for Rs. 15,000 as security. The decree was affirmed on appeal, and the present defendant had the note sold in execution and drew out of the proceeds a sum for mesne profits for subsequent years; but an appeal was preferred in

the execution proceedings to the High Court which set aside the execution so far as concerned the mesne profits for the years subsequent to that to which the original decree related. The present plaintiff thereupon attached and sold the village to recover the balance: before that amount was paid to the present plaintiff the present defendant brought a suit against him in the District Court and there obtained a decree for mesne profits for the subsequent years and in execution drew the amount of the decree out of Court. In second appeal however the High Court on 29th September 1881 reversed the decree of the District Court, whereupon the present plaintiff applied for restitution under Civil Procedure Code, s. 583, which application was ultimately disallowed. The present suit was brought to recover the amount to which that application related:—*Held*, (1) that the suit was not barred by the provisions of Civil Procedure Code, s. 244; (2) that Limitation Act, sch. II, art. 120, was applicable to the suit, which having been filed on 9th August 1887 was accordingly not barred by limitation.

Narayana v. Narayana 437

17. ———, ss. 244, 318, 334—*Petition by purchaser at Court-sale for possession—Obstruction—Appeal against order—Limitation Act—Act XV of 1877, sch. II, arts. 167, 179:*

On an application made in 1888 under Civil Procedure Code, s. 318, by the purchaser at a Court-sale (who was the assignee of the decree which was being executed), praying for delivery of possession of the property purchased, it appeared that the sale took place in 1885, that it was confirmed in 1886, and that in January 1887 an order was made for delivery of possession to the purchaser. The judgment-debtor had resisted the purchaser's efforts to obtain possession in 1887 and set up in bar of the application in 1888 an oral agreement alleged to have been made between him and the purchaser. The application was rejected:—*Held*, (1) that an appeal lay against the order rejecting the application; (2) that the application not being a complaint of obstruction, was not barred by limitation and should be heard and determined on the merits.

Muttia v. Appasami 504

18. ———, ss. 253, 546, 586—*Surety for the due performance of appellate decree—Mode of enforcing liability of such surety—Execution proceedings:*

When security had been given on behalf of the respondent to an appeal under s. 546 of the Code of Civil Procedure for the due performance of the decree of the Appellate Court and the appeal had been successful:—*Held*, that under the provisions of ss. 253, 583, the decree of the Appellate Court could be enforced against the sureties in execution proceedings. *Venkapa Naik v. Baslingapa* (I.L.R., 12 Bom., 411) approved.

Thirumalai v. Ramayyar 1

19. ———, s. 286—*Unascertained interest in a partnership:*

The plaintiff having purchased at an execution sale the interest of the judgment-debtor in a partnership, of which the undivided father (deceased) of the judgment-debtor had been a member, now sued the other partners praying that an account be taken and that the share of the judgment-debtor be paid to him:—*Held*, that the execution sale was not bad in law and that the present suit was accordingly maintainable. *Dugarika Mohun Das v. Luckhimoni Dasi* (I.L.R., 14 Cal., 384) dissented from.

Parvathesam v. Bapanna 447

20. ———, s. 272—*Post Office Act—Act XIV of 1866, s. 5—Attachment of letters in Post Office:*

An attachment was placed under Civil Procedure Code, s. 272, on letters in the post office addressed to certain judgment-debtors. The day before the attachment the senders of the letters had applied to have the letters returned to them:—*Held*, that the postmaster held the letters in trust for, or on behalf of, the judgment-debtors, and they were accordingly liable to attachment on the application of the decree-holder.

Narasimhulu v. Adiappa 242

21. —, s. 283—*Party to execution proceedings—Limitation Act—Act XV of 1877, sched. II, art. 11:*

A in execution of a decree against B attached a house. C intervened and the property was released from attachment. A then brought a suit against B and C to establish the title of B to the house and obtained a decree. B was *ex parte* throughout. In an appeal by C a decree was passed by consent of A and C reversing the decree appealed against. B now sued C and another, more than a year from the date of the order removing the attachment, to obtain a declaration of title to the house:—*Held*, that since there was nothing to show that the order releasing the attachment was an order against the plaintiff the suit was not barred by limitation.

Guruva v. Subbarayudu 366

22. —, s. 316—*Court-sale—Decree against Hindu father—Interest of undivided son—Certificate of sale—Grounds of second appeal:*

In execution of a decree for sale passed on a hypothecation bond, all the land comprised in the security was attached. The judgment-debtor was a member of an undivided family; his son put in no claim in execution, but on a claim put in by his nephew it was ordered that the right, title and interest of the judgment-debtor be sold. The decree-holder became the purchaser, and having obtained a sale certificate which recited that "all the interest of the judgment-debtor" was sold, he was put in possession of all the land, part of which he leased to the son. Subsequently the nephew obtained a decree for his share against the decree-holder and then purchased the rest of the land from him. In a suit by the son against the nephew to recover his share, the plaintiff having failed to prove that the judgment-debt had been incurred for purposes not binding on him:—*Held*, that the entire estate less the interest of the nephew was sold to the decree-holder and consequently the son's interest had passed to him. The question what is actually bargained and paid for at an execution sale is a mixed question of law and fact, and the High Court on second appeal is not bound by the finding of the Court of first appeal with regard to it.

Gnanammal v. Muthusami 47

23. —, s. 331—*Appeal—Jurisdiction—Civil Courts Act (Madras) —Act III of 1873, s. 13:*

The plaintiff being the holder of a decree of a Subordinate Court for more than Rs. 5,000 was obstructed in execution by the present defendants. He applied to the Court for the removal of the obstruction, the property, which was the subject of the application, being valued at less than Rs. 5,000 and the Subordinate Judge directed that the application be registered as a regular suit under Civil Procedure Code, s. 331, and ultimately passed a decree in favour of the plaintiff:—*Held*, that the appeal against this decree did not lie to the High Court.

Kalima v. Nainan Kutti 520

24. —, s. 342—*Period of imprisonment of judgment-debtor:*

The Court cannot fix any period for the imprisonment of a judgment-debtor under Civil Procedure Code, s. 342.

Subudhi v. Singi 141

25. —, s. 375—*Transfer of Property Act—Act IV of 1882, s. 83:*

A sum of money having been deposited in Court under Transfer of Property Act, s. 83, by a vendee of the mortgagor, the mortgagee refused to accept it in discharge of his mortgage except on the terms that the depositor should convey to him part of the mortgage premises, which he consented to do. This agreement was not communicated to the Court and the depositor refused to carry it out when the mortgagee had withdrawn the money as above:—*Held*, that the mortgagee was entitled to a decree for specific performance of the agreement to convey.

Tatayya v. Pichayya 316

26. —, ss. 437, 464—*Hindu law—Impartible zamindari—Right of zamindar to alienate—Regulation V of 1804 (Madras), ss. 2, 3—Suit by a ward of the Court of Wards—Non-joinder and misjoinder of parties:*

The holder of an impartible zamindari, governed by the law of primogeniture, having a son, executed a mining lease of part of the zamindari for a period of twenty years, by which no benefit was to accrue to the grantor unless mining operations were carried on with success, and the commencement of mining operations was left optional with the lessee. On the death of the grantor, his minor son and successor, by the Collector of the district as his next friend (authorized in that behalf by the Court of Wards), now sued the assignee of the lessee to have the lease set aside. The second plaintiff was the grantee from the Court of Wards (acting on behalf of the minor zamindar) of certain mining rights on the same land. The defendant had executed a declaration of trust in respect of his interest in favour of certain persons who were not joined:—*Held*, (1) *per Parker, J.*, that the first plaintiff could sue by the Collector of North Arcot as his next friend, since the Court of Wards had authorized the latter to conduct the suit; (2) *per Muttusami Ayyar and Wilkinson, JJ.* (affirming the judgment of Parker, J.) (1) that the interests of the first and second plaintiffs not being inconsistent with each other, the suit was not bad for misjoinder; (2) that the defendant's interests not having been shown to be hostile to those of the persons entitled under the declaration of trust, the suit was not bad for non-joinder; (3) that the lease was not one which a managing member of an ordinary joint family governed by Mitakshara law could providently enter into: (3) *per Muttusami Ayyar and Wilkinson, JJ.* (reversing the judgment of Parker, J.) that in the absence of evidence of any family custom rendering the zamindari inalienable by the zamindar for the time being for purposes other than those warranted by the Mitakshara law, the lease was not invalid as against the plaintiffs. *Sartaj Kuari v. Deoraj Kuari* (I.L.R., 10 All., 272) discussed and followed.

Beresford v. Ramasubba 197

27. —, ss. 525, 526, 646B—*Provincial Small Cause Courts Act—Act IX of 1887, sched. II, clause 24:*

A suit to recover a sum of money as payable to the plaintiff under an award which was contested was filed in a Subordinate Court on the small cause side. The Subordinate Judge returned the plaint, being of opinion that the suit was not cognizable by a Court of Small Causes. The plaint was then presented in the Court of the District Munsif as an ordinary suit, but the District Munsif returned it on the ground that the suit was cognizable by a Court of Small Causes. The plaintiff then applied to the District Judge to submit the record for the orders of the High Court:—*Held*, (1) that the District Judge was bound to submit the record under s. 646B of the Code of Civil Procedure on the requisition of the plaintiff, although the plaintiff might have appealed to the District Court against the order of the District Munsif; (2) that the suit was cognizable by a Court of Small Causes and accordingly that the order made by the Subordinate Judge returning the plaint was wrong.

Simson v. McMaster 344

28. —, s. 561—ACT VII OF 1888, s. 48—*Time allowed for memorandum of objections:*

An appeal cannot definitely be posted until the Court has ascertained that notice of the appeal has been served on the respondent and a date must then be fixed not less than one month from the date of service.

Sundaram v. Annangar 492

29. —, s. 595—*Final decree—Leave to appeal to Privy Council:*

The plaintiff in a suit to recover certain property set up an adoption. The Court of First Instance held that the adoption was not proved and dismissed the suit without trying the issues framed with reference to other allegations in the pleadings. On appeal by the plaintiff the High Court passed a decree setting aside the decree of the Court of First Instance, declaring the alleged adoption to be established and remanding the suit for the trial of the remain-

ing issues. The defendants sought to appeal to Her Majesty in Council against the decree of the High Court. The defendants' application was refused on the ground that that decree was not a final decree.

Tirumarayana v. Gopalasami 349

30. ———, ss. 623, 624, 626—Review—Provincial Small Cause Courts Act—IX of 1887, s. 17—Deposit of costs:

On 23rd February 1888 the Subordinate Judge of Tinnevely dismissed a small cause suit on the ground that the plaintiff had not secured the attendance of his witnesses. On 29th February the plaintiff presented a petition for review, on which notice was directed to issue, but he did not deposit in Court the amount of the costs payable under the decree. On 17th April the petition having come on for hearing, the Judge directed that the petitioner should "first" deposit the amount of the defendant's costs under s. 17 of the Provincial Small Cause Courts Act, which was accordingly done on the following day. On 21st April the petition, which proceeded on grounds other than those mentioned in s. 624 of the Code of Civil Procedure, came on for hearing before the Officiating Subordinate Judge, who had assumed charge of the Court between the last-mentioned dates: he entertained the petition, but dismissed it. The plaintiff preferred a revision petition against the order dismissing his petition:—*Held by the Full Bench*, that the Officiating Subordinate Judge had jurisdiction to make the order sought to be revised:—*Held by Parker and Wilkinson, JJ.*, that the provisions of s. 17 of the Provincial Small Cause Courts Act as to the deposit of costs on an application for review are not mandatory, but merely directory.

Ramasami v. Kurisu 178

31. ———, s. 642—Insolvent Act—11 & 12, Vic. Cap. 21, ss. 47, 51—Exemption from arrest on civil process *reduendo*:

The Commissioner in Insolvency committed an insolvent to jail by an order under s. 51 of the Insolvent Act:—*Held by the Full Bench*, that an order made under s. 51 of the Insolvent Act is a final order: and a Commissioner in Insolvency has no power under that section to commit an insolvent to jail, but must leave the excepted judgment-creditors (if any) to their ordinary remedies for the time mentioned in the order. *Nixon v. Chartered Mercantile Bank (I.L.R., 8 Mad., 97)* overruled. The insolvent having been discharged from jail under the rule laid down by the Full Bench as above, was immediately arrested on a warrant obtained by a judgment-creditor:—*Held, per Shephard, J.*, that the insolvent was not privileged from arrest as being on his way back from Court.

Samarapuri v. Parry and Company 150

CONTRACT ACT—ACT IX OF 1872, ss. 15, 16—Hindu law—Vaiyas—Requisites of adoption—Adoption during pollution of adoptive parent—Coercion—Undue influence:

The minor widow of a deceased Hindu of the Komati or Vaisya caste (who had authorized her to adopt a son) corporeally accepted a boy as in adoption from his natural father who (*semble*) belonged to a different gotram from her deceased husband. There were no formal declarations of giving and taking the child, and *datta homam* was not performed. At the time when the child was handed over to the widow her husband's corpse was still in the house, and the relatives of the child and other members of the caste obstructed the removal of the corpse until the child had been accepted as above and the widow had executed a deed of adoption:—*Held*, that there was no valid adoption by the widow. *Per cur.*—We cannot say that obstructing the removal of a corpse by the deceased's widow or her guardian, unless she made an adoption and signed a document is not an unlawful act or not an act such as is defined by s. 15 or 16 of the Indian Contract Act. *Dicta in Mahashaya Shosinath Ghose v. Srimati Krishna Soondari Dasi (L.R., 7 I.A., 250)* as to incidents of a formal adoption discussed. Observations on the necessity of *datta homam* in a ceremonial adoption among members of a twice-born class, and on an adoption taking place during the pollution of the adoptive parent.

Ranganayakamma v. Alwar Setti 214

2. ———, s. 23—Unlawful consideration—Marriage brokerage agreement—Hindu law:

Plaintiff agreed to give his daughter in marriage to defendant's nephew in consideration of a payment of Rs. 400. It was not alleged that the money was to be a dowry or settlement for the bride. Rs. 200 were paid and defendant executed a bond for the balance. The marriage took place in the *asura* form. The plaintiff now sued on the bond:—*Held*, the consideration for the bond was not unlawful.

Visvanathan v. Saminathan 83

3. ———, s. 27—Restraint of trade:

One having a license for the manufacture of salt entered into a contract with a firm of merchants, whereby it was provided that he should not manufacture salt in excess of the quantity which the firm at the commencement of each manufacturing season should require him to manufacture; and that all salt manufactured by him should be sold to the firm for a fixed price. The agreement was to be in force for a period of five years. In a suit by the merchants for an injunction restraining the licensee from selling his salt to others:—*Held*, that whether or not the first of these clauses was invalid under s. 27 of the Contract Act, it was separable from the second clause which was not bad as being in restraint of trade.

Mackenzie v. Striramiah 472

4. ———, s. 135—Negotiable Instruments Act—Act XXVI of 1881, ss. 37, 39, 66—Accommodation maker—Discharge of—Presentment of promissory note:

Suit by the endorsee against the maker of a promissory note, dated 9th August 1886. The plaintiff was aware that the note was made by the defendant for the accommodation of the acceptor, Watson and Co., with whom the plaintiff had large dealings. On the 4th August 1887, Watson and Co. executed in favour of the plaintiff and another creditor a mortgage of certain property to secure the amount then due by Watson and Co., including the amount due to the plaintiff on the promissory note: the mortgage contained a personal covenant by Watson and Co. to pay the sums due, together with interest, on the 4th August 1888; and the mortgagees practically took over the whole business of the mortgagor and it was intended that they should work it for his benefit up to that date. The promissory note fell due in June 1887, but was not presented to the defendant for payment:—*Held*, that plaintiff, by accepting the mortgage, promised to give time to Watson and Co., and thus rendered it impossible for him to sue Watson and Co., had the defendant as surety called on him to do so, and that the defendant was accordingly discharged. *Pogose v. Bank of Bengal, I.L.R., 3 Cal., 174*, distinguished. *Semle*.—The maker of a promissory note is not discharged by the holder's failure to present it at due date.

Ramakistnayya v. Kassim 172

COURT FEES ACT—ACT VII OF 1870, s. 7, CL. 5—Civil Courts Act—Act III of 1873, ss. 12, 14—Suit to enforce registration—Jurisdiction:

Suit in the Court of a District Munsif to enforce registration of two instruments of gift. The property purported to be conveyed was the same in each instrument and its value was found to be less than Rs. 2,500, but the earlier instrument comprised also an assignment of the right to manage a charity. The later instrument was found to have been executed in supercession of the former, and the District Munsif passed a decree directing its registration alone:—*Held*, that the District Munsif had jurisdiction to entertain the suit.

Ramakrishnamma v. Bhagamma 56

2. ———, sch. I, art. 1; sch. II, art. 17:

In a suit upon a hypothecation bond it was found by the Court of first appeal that the bond and the debt secured thereby were binding on the first defendant, but not on the second defendant. The plaintiff preferred

a second appeal against the second defendant as sole respondent:—*Held*, that the Court-fee payable on the second appeal should be calculated on the amount of the debt sought to be recovered.

Ramasami v. Subbusami

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COURT-SALE:

See EMBLEMENTS.

2.

See HINDU LAW, 6.

CRIMINAL BREACH OF CONTRACT ACT (ACT XIII OF 1859)—Labourer—Carrier by boat:

An advance was made under a contract by which the party who received the advance undertook to convey salt by boat, but did not bind himself to render personal labour. The party who received the advance broke the contract:—*Held*, the parties to the contract were not an employer of labour and a labourer respectively, and consequently the contract did not fall within the provisions of Act XIII of 1859.

Cahram v. Chengappa

351

CRIMINAL PROCEDURE CODE, s. 1:

See SCHEDULED DISTRICTS ACT.

2.

s. 96—Search warrant—When a search warrant may issue:

The accused was charged with the offence of criminal misappropriation of treasure belonging to a temple of which he was alleged to be the trustee. From the complaint, it appeared that some of the treasure belonging to the temple had been buried under a flagstaff in the temple, and the Magistrate was of opinion that the nature of the property so buried had an important and material bearing on the case for the prosecution:—*Held*, the Magistrate had jurisdiction to issue a warrant to search for and produce such property upon information which he considered credible, since there was a complaint before him duly affirmed as prescribed by the Criminal Procedure Code; and that it was not incumbent on him to wait until the evidence for the prosecution should have been recorded in the presence of the accused.

Queen-Empress v. Mahant of Tirupati

18

3.

s. 188—Offence committed in foreign territory—Trial without certificate of the Political Agent:

A District Magistrate instituted criminal proceedings in British India against a native Indian subject of the Queen, in respect of offences under ss. 419, 467 and 114 of the Indian Penal Code, said to have been committed by him in French territory, without a certificate under s. 188 of Criminal Procedure Code. The accused was committed to the Sessions Court:—*Held*, although the District Magistrate was the Political Agent who might have certified under Criminal Procedure Code, s. 188, the proceedings were void for want of the certificate, and the commitment should be quashed.

Queen-Empress v. Kathaperumal

423

4.

ss. 195, 476:

The High Court has no power on appeal to set aside a complaint duly made by a subordinate court under s. 476 of the Code of Criminal Procedure.

Queen-Empress v. Narakha

144

5.

s. 261—Police Act—(Act XXIV of 1859), s. 48—“Conspiracy clauses”—Jurisdiction of a Bench of Magistrates:

Offences under Police Act, s. 48, are within the cognizance of a Bench of Magistrates.

Queen-Empress v. Oolaganadan

112

6. *s. 307—Duty of Sessions Judges as to referring cases tried with a jury:*

The discretionary power to refer cases conferred on Sessions Judges by Criminal Procedure Code, s. 307, should always be exercised when the Judge thinks that the verdict is not supported by the evidence.

Queen-Empress v. Guruvadu

343

7. *ss. 476, 477, 480, 485—Jurisdiction of Judges and Magistrates in respect of offences committed before themselves—Penal Code, s. 175:*

A Court other than the High Court, &c., can try persons for offences committed before itself only in cases to which s. 477, 480 or 485 is applicable, and none of these sections is applicable when the accused is charged under s. 175 of the Penal Code.

Queen-Empress v. Senhayya

24

8. *s. 488—Liability of a Hindu not divided from his father to maintain his wife:*

A Hindu not divided from his father can be ordered to maintain his wife under s. 488 of the Code of Criminal Procedure.

Queen-Empress v. Ramasami

17

DECLARATORY SUIT—Civil Procedure Code, s. 13—Res judicata—Partition suit—Non-joinder:

A suit for partition of certain land was withdrawn as against one of the defendants who was entitled to part of the land. The plaintiff and the remaining defendants entered into a compromise in the terms of which the Court passed a decree for delivery of a share of the land to the plaintiff. The decree-holder having died without executing the decree, his heir now sued for partition of the land and delivery of the above share, joining as defendants the various persons entitled to shares:—*Held*, that the decree in the former suit could only operate as a declaratory decree and did not preclude the plaintiff from bringing the present suit.

Beemabai v. Yamunabai

313

2. *Registration Act—Act III of 1877, s. 48—Transfer of Property Act—Act IV of 1882, s. 54—Oral agreement for sale of land—Subsequent conveyance with notice—Delivery of possession—Priority—Specific Relief Act—Act I of 1877, ss. 27, 42—Specific performance—Consequential relief:*

Plaintiff being in possession of certain land as an incumbrancer under a registered instrument agreed orally with the mortgagor in 1885 to purchase it. The mortgagor subsequently sold the land to others who took the conveyance which was registered with notice of the plaintiff's mortgage and of the oral agreement with him. Plaintiff now sued for a declaration that the conveyance was not binding on him and for specific performance of the oral agreement:—*Held*, (1) that the suit was not bad for want of a prayer for delivery up, and cancellation of the conveyance; (2) that the plaintiff's possession under his incumbrance together with the agreement to sell was equivalent to delivery of possession within the meaning of Registration Act, s. 48; (3) that the plaintiff was entitled to have the oral contract specifically enforced notwithstanding the subsequent registered sale.

Kannan v. Krishnan

324

DEFAMATION—Expression of suspicion—Slander by a railway guard—Suit against Railway Company—De minimis non curat lex:

Suit for damages for defamation. A railway guard, having reason to suppose that a passenger travelling by a certain train from Madras to Chingleput had purchased his ticket at an intermediate station, called upon the plaintiff and others of the passengers to produce their tickets. As a reason for demanding the production of the plaintiff's ticket, he said to him in the presence of the other passengers “I suspect you are travelling with a wrong (or false) ticket,” which was the defamation complained of. The guard was held to have spoken the above words *bona fide*:—*Held*, the plaintiff was not entitled to a decree for damages.

South Indian Railway Company v. Ramakrishna

34

DISTRICT MUNICIPALITIES ACT (MADRAS), ACT IV OF 1884, s. 41 :

See PENAL CODE, s. 353.

2. **101—Municipal tax—Wrongful assessment of profession tax—Jurisdiction of Small Cause Court—Provincial Small Cause Courts Act—Act IX of 1887, sch. II, paragraph 1—Order of a Local Government :**

The Municipality at Tuticorin demanded Rs. 50 as profession tax from the South Indian Railway Company which had already paid profession tax to the Municipality at Negapatam. The Company complied with the demand under protest and sued the Municipality for a refund of the amount paid on the Small Cause Side of the District Munsifs' Court :—*Held*, (1) the Court had jurisdiction to hear and determine the suit; (2) the Municipality at Tuticorin had no right to levy the tax on the Railway Company and the decree directing the amount levied to be refunded was correct.

Tuticorin Municipality v. South Indian Railway 78

3. **Attachment of moveable property—Doors of a house : s. 103—At-**

The doors of a house are not attachable as moveable property under District Municipalities Act (Madras), s. 103.

Queen-Empress v. Shaik Ibrahim 518

EMBLEMENTS—Court-sale—Crop standing on land sold in execution of a decree obtained by a mortgagee in possession :

A mortgagee in possession sued on his mortgage and having obtained a decree brought the land to sale in execution; and the execution purchaser was placed in possession :—*Held*, the mortgagee was not entitled to recover from the execution purchaser the value of the then standing crop.

Ramalinga v. Samiappa 15

EVIDENCE—Trial for robbery and murder—Offences constituting parts of the same transaction—Evidence of robbery considered in trial for murder :

Persons convicted of robbery by a Sessions Judge and a Jury, and of murder by the Sessions Judge with Assessors appealed to the High Court against the conviction on the charge of murder :—*Held*, that in coming to a conclusion as to whether the evidence justified the conviction appealed on against, the verdict of the Jury should not be taken into consideration. But on its appearing that the two offences constituted parts of the same transaction :—*Held*, that recent and unexplained possession of the stolen property which would be presumptive evidence against the prisoners on the charge of robbery was similarly evidence against them on the charge of murder.

Queen-Empress v. Sami 426

EVIDENCE ACT—ACT I OF 1872, s. 92—Collateral evidence to show that an apparent sale-deed was a mortgage—Variance between pleading and proof :

In a suit by an attaching creditor to set aside an order (which allowed an objection made to his attachment by one claiming under a sale-deed from the judgment-debtor), and for the declaration of the judgment-debtor's title, the sole issue framed was whether the sale-deed was *bona fide* and supported by consideration :—*Held*, that the plaintiff was entitled to show by collateral evidence that the sale-deed was really a usufructuary mortgage and that the

Venkatratnam v. Reddiah 494

FOREST ACT—ACT V OF 1882 (MADRAS), s. 28—Canara Forest Rules, Nos. 7, 12, 23 :

The accused, not having a permit, cut certain classified trees on the *kumaki* adjoining his land and used the wood in his still as fuel; and upon these facts he was convicted of an offence against rules 7, 12 and 23 :—*Held*, that the conviction was illegal.

Queen-Empress v. Sheregar 21

2. **Jointly interested" : s. 33—**

The Government having possession of a forest under a mortgage is jointly interested therein with the mortgagor within the meaning of Madras Forest Act, s. 33.

Ashtamurthi v. Secretary of State for India 322

GENERAL CLAUSES ACT—ACT I OF 1868, s. 3, cl. 2 :

See : LIMITATION ACT, 1877, ss. 7, 9, 19.

HINDU LAW—Adoption among Brahmans—Ceremony of adoption after marriage of person to be adopted :

Suit for partition of family property. The plaintiff sued as the adopted son of defendant, who had, after performing the usual ceremony of adoption, long treated him as his adopted son. The defendant denied that the plaintiff was his adopted son on the ground (which was established by the evidence) that the plaintiff was married at the date of the ceremony of adoption. The parties were Brahmans and members of the same gotra by birth :—*Held*, (1) the adoption set up was invalid; (2) the defendant was not estopped by his conduct from denying the validity of the adoption.

Pichuwayyan v. Subbayyan 128

2. **Alienation by father when binding on son—Burden of proof :**

The father of an undivided Hindu family has no power to alienate the son's coparcenary share in land in the absence of any debt. One claiming merely as the father's vendee must therefore give evidence that the alienation was made for some purpose which would bind the son, or that it was made with his consent.

Chinnayya v. Perumal 51

3. **Civil Procedure Code, s. 11—Hindu Marriage Act (Act XV of 1856, s. 5)—Widow re-marriage—Exclusion from temple—Excommunication—Jurisdiction :**

The plaintiff, who was a *Smarta* Brahman, but had married a widow (whose first marriage had not been consummated), alleged that he had made a vow to present an offering in a certain temple, and that the defendants, who were the committee of the temple, had obstructed and prevented him from entering the inner shrine (where orthodox Brahmans usually make their offerings), asserting that he was disqualified to enter by reason of his having married a widow contrary to Hindu *śāstras*; and he sued for damages for the above obstruction and imputation, for a declaration that he was entitled to enter the shrine as a Brahman, and for an injunction restraining the defendants from interfering with his exercise of this right :—*Held*, (1) that the right claimed was of a civil nature and within the cognizance of the Civil Courts; (2) that the question to be determined was not a question of the plaintiff's legal status since a Brahman widow is at liberty to re-marry under Act XV of 1856, but it was a question of caste status in respect of a caste institution; (3) that in order to determine the above question, the Courts must inquire (a) what was the usage of the temple as regards admission into the inner shrine for the purposes of worship at the date of the suit, or the presumable intention of the religious foundation as regards such admission and (b) whether according to such usage or presumable intention of the foundation those who secede from the caste custom as to re-marriage of women are outside the class of beneficiaries as regards the right of admission into the inner shrine as above.

Venkatachalapati v. Subbarayadu 298

4. **Civil Procedure Code, s. 234—Execution of a decree against the son of a Hindu judgment-debtor—Determination of questions as to the binding nature of the decree debt :**

In execution of a money decree passed against a Hindu, since deceased, ancestral property in the possession of his son was attached. A petition by the son objecting that the property was not liable to be attached in his hands was dismissed :—*Held*, that the order dismissing the petition was wrong, for when a judgment-creditor seeks to attach ancestral property after it has vested in the son by survivorship under Hindu law upon the father's death,

- he cannot be considered as executing the decree against the property of the deceased judgment-debtor within the meaning of s. 234 of the Code of Civil Procedure.
- Venkatarama v. Senthivelu* 265
5. ——— *Contract Act—Act IX of 1872, s. 23—Unlawful consideration—Marriage brokerage agreement:*
- Plaintiff agreed to give his daughter in marriage to defendant's nephew in consideration of a payment of Rs. 400. It was not alleged that the money was to be a dowry or settlement for the bride. Rs. 200 were paid and defendant executed a bond for the balance. The marriage took place in the *asura* form. The plaintiff now sued on the bond:—*Held*, the consideration for the bond was not unlawful.
- Vivvanathan v. Saminathan* 83
6. ——— *Court-sale—Decree against Hindu father—Interest of undivided son—Certificate of sale—Civil Procedure Code, s. 316—Grounds of second appeal:*
- In execution of a decree for sale passed on a hypothecation bond, all the land comprised in the security was attached. The judgment-debtor was a member of an undivided family; his son put in no claim in execution, but on a claim put in by his nephew it was ordered that the right, title and interest of the judgment-debtor be sold. The decree-holder became the purchaser, and having obtained a sale certificate which recited that "all the interest of the judgment-debtor" was sold, he was put in possession of all the land, part of which he leased to the son. Subsequently the nephew obtained a decree for his share against the decree-holder and then purchased the rest of the land from him. In a suit by the son against the nephew to recover his share, the plaintiff having failed to prove that the judgment-debt had been incurred for purposes not binding on him:—*Held*, that the entire estate less the interest of the nephew was sold to the decree-holder and consequently the son's interest had passed to him. The question what is actually bargained and paid for at an execution sale is a mixed question of law and fact, and the High Court on second appeal is not bound by the finding of the Court of first appeal with regard to it.
- Gnanammal v. Muthusami* 47
7. ——— *Devadasi—Inheritance:*
- On the death of a prostitute dancing girl her adopted niece belonging to the same class, succeeds to her property, in whatever way it was acquired, in preference to a brother remaining in caste.
- Narasanna v. Gangu* 133
8. ——— *Impartibility of zamindari shown by evidence—Grant by sanad in 1802 of zamindari without change of rule of succession by primogeniture—Madras Regulation XXV of 1802:*
- The question whether an estate is impartible and descends by the law of primogeniture, or is subject to the ordinary Hindu law of inheritance, must be decided in each case according to the evidence given in it. The result of the evidence in this suit was to show that before, and in, the year 1802, the zamindar was in possession of the Devarakota zamindari, by right of primogeniture, as an impartible estate; and that he was so regarded by the Government. On the passing of Madras Regulation XXV of 1802, and the issue to him of a sanad-i-milkiyat-i-istimrari, in accordance with it, he acquired a permanent property in the zamindari lands at a fixed assessment, but they remained heritable as before; the estate remained entire; and there was no evidence of any intention on the part of the Government to alter the nature of the tenure. What was said in the judgment in the *Hansapur* case (12 M.I.A., 1) was applicable here. The estate continued to be impartible, and the rule of succession to it was not altered. It descended by the rule of primogeniture.
- Mallikarjuna v. Durga* 406

9. ——— *Impartible zamindari—Right of zamindar to alienate—Civil Procedure Code, ss. 437, 464—Regulation V of 1804 (Madras), ss. 2, 8—Suit by a ward of the Court of Wards—Non-joinder and misjoinder of parties:*
- The holder of an impartible zamindari, governed by the law of primogeniture, having a son, executed a mining lease of part of the zamindari for a period of twenty years, by which no benefit was to accrue to the grantor, unless mining operations were carried on with success, and the commencement of mining operations was left optional with the lessee. On the death of the grantor, his minor son and successor, by the Collector of the district as his next friend, (authorized in that behalf by the Court of Wards,) now sued the assignee of the lessee to have the lease set aside. The second plaintiff was the grantee from the Court of Wards (acting on behalf of the minor zamindar) of certain mining rights on the same land. The defendant had executed a declaration of trust in respect of his interest in favour of certain persons who were not joined:—*Held*, (1) *per Parker, J.*, that the first plaintiff could sue by the Collector of North Arcot as his next friend, since the Court of Wards had authorized the latter to conduct the suit; (2) *per Muttusami Ayyar and Wilkinson, J.J.* (affirming the judgment of *Parker, J.*) (1) that the interests of the first and second plaintiffs not being inconsistent with each other, the suit was not bad for misjoinder; (2) that the defendant's interests not having been shown to be hostile to those of the persons entitled under the declaration of trust, the suit was not bad for non-joinder; (3) that the lease was not one which a managing member of an ordinary joint family governed by Mitakshara law could providently enter into; (3) *per Muttusami Ayyar and Wilkinson, J.J.* (reversing the judgment of *Parker, J.*) that in the absence of evidence of any family custom rendering the zamindari inalienable by the zamindar for the time being for purposes other than those warranted by the Mitakshara law, the lease was not invalid as against the plaintiffs—*Sartaj Kuari v. Deoraj Kuari* (I.L.R., 10 All., 272) discussed and followed.
- Beresford v. Ramasubba* 197
10. ——— *Inheritance—Mother's brother—Father's sister:*
- According to the Hindu law current in the Madras Presidency, the father's sister is not entitled to inherit in preference to the mother's brother:—*Semble*, *per Wilkinson, J.*—The father's sister is a bandhu.
- Narasimma v. Mangammal* 10
11. ——— *Inheritance to stridhanam—Right of stepson to inherit:*
- A Hindu widow having stridhanam acquired from her husband, died leaving no issue. The defendant who was the son of her elder sister took possession. The stepson of the deceased now sued to recover the stridhanam property. It was found that the marriage of the deceased had been celebrated in the *Brahma* form:—*Held*, that the plaintiff was entitled to succeed.
- Brahmappa v. Papanna* 138
12. ——— *Limitation—Act XIV of 1859, s. 1, cl. 12—Act XV of 1877, sch. II, art. 141—Suit by reversioner on expiry of widow's and daughter's estate:*
- Plaintiff sued in 1887 to recover property as part of the estate of his maternal grandfather, who died about 1845, leaving (1) a widow, who inherited the property and died in 1846, (2) his daughter by her, who took the property on her mother's death and alienated it to the defendants about 1850 and died before suit, and (3) the plaintiff's mother, who was his daughter by another wife. The plaintiff's mother made no claim on the property and died in 1883:—*Held*, the suit was not barred by limitation.
- Sambasiva v. Rayava* 512
13. ——— *Revival of a barred debt by the widow of a deceased Hindu:*
- Although a managing member of a joint Hindu family cannot as such revive a barred debt as against his coparceners, it is competent to the widow of a deceased member of the family, who represents the inheritance for the time being and in whom it is a pious duty to pay her husband's debts, to bind the reversion by a mortgage executed to secure such debts though they were barred at the time of its execution. When therefore the managing

members of an undivided Hindu family, after the death of the widow, sold family property for the purpose of discharging such a mortgage:—*Held*, that the sale was binding on the coparcenary. 189

Kondappa v. Subba

14. ————Sale by a coparcener of his share in specific property—Rights of the vendor—Transfer of Property Act—Act IV of 1882, s. 44 : 275

A purchaser from a member of an undivided Hindu family of that member's share in a specific portion of the ancestral family property cannot sue for a partition of that portion alone and obtain an allotment to himself by metes and bounds of his vendor's share in that portion of the property.

Pandharum v. Marra Labai

25. ————Succession to a jeer of a mutt—Nomination requiring assumption of the character of a sannyasi—Time fixed by decree for assumption of that character—Enlargement on appeal of that time—Evidence of custom :

The plaintiff sued for a declaration of his right as jeer of a mutt and for possession of the property of the mutt. The plaintiff alleged that the immemorial custom with reference to the succession to the office of jeer was that the jeer for the time being nominated his successor, and that, failing such nomination, the disciples assembled at the place where he died, elected his successor, and that the person so nominated became jeer by virtue of such nomination alone. The plaintiff's case was that he was nominated by the late successor, and that the nomination was not concurred in by the disciples, and that although the nomination was not concurred in by the disciples, and that the late jeer had initiated him and directed him to become a sannyasi a day or two after his initiation, and that he was accordingly entitled to the rights and privileges of jeer. The plaintiff obtained a decree which was, however, made contingent upon his assuming the character of a sannyasi within the period of four months. The defendant preferred an appeal against this decree, and the plaintiff preferred an appeal praying for the enlargement of the period fixed, within which he was to become a sannyasi, pending the disposal of the appeal preferred by the defendant. On the plaintiff's appeal:—*Held*, the Court had power to extend the time as prayed. On the defendant's appeal:—*Held*, (1) on its appearing that the plaintiff did not repeat the *presna mantram* that his *upadesam* was insufficient; (2) that the plaintiff's right, if any, to the status of jeer ceased on his omission to become a sannyasi soon after the initiation alleged; (3) on the evidence that no similar case of succession had taken place in the history of the institution that the plaintiff had established merely an imperfect nomination which could not be upheld on the principles deducible from the known cases of succession.

Rangachariar v. Yegna Dikshatur 524

16. ————Vaisyas—Requisites of adoption—Adoption during pollution of adoptive parent—Contract Act—Act IX of 1872, ss. 15, 16—Coercion—Undue influence :

The minor widow of a deceased Hindu of the Komati or Vaisya caste (who had authorized her to adopt a son) corporeally accepted a boy as in adoption from his natural father who (*semble*) belonged to a different gotram from her deceased husband. There were no formal declarations of giving and taking the child, and *datta homam* was not performed. At the time when the child was handed over to the widow her husband's corpse was still in the house, and the relatives of the child and other members of the caste obstructed the removal of the corpse until the child had been accepted as above and the widow had executed a deed of adoption:—*Held*, that there was no valid adoption by the widow. *Per cur.*—We cannot say that obstructing the removal of a corpse by the deceased's widow or her guardian, unless she made an adoption and signed a document is not an unlawful act or not an act such as is defined by s. 15 or 16 of the Indian Contract Act. *Dicta in Mahashaya Shosinath Ghose v. Srimati Krishna Soondari Dasi* as to incidents of a formal adoption discussed. Observations on the necessity of *datta homam* adoption taking place during the pollution of the adoptive parent.

Ranganayakamma v. Alwar Setti 214

HINDU MARRIAGE ACT (ACT XV OF 1856, s. 5)—Civil Procedure Code, s. 11—*Hindu law*—Widow re-marriage—Exclusion from temple—Excommunication—Jurisdiction :

The plaintiff, who was a *Smarta* Brahman, but had married a widow (whose first marriage had not been consummated), alleged that he had made a vow to present an offering in a certain temple, and that the defendants, who were the committee of the temple, had obstructed and prevented him from entering the inner shrine (where orthodox Brahmans usually make their offerings), asserting that he was disqualified to enter by reason of his having married a widow contrary to Hindu *sastras*; and he sued for damages for the above obstruction and imputation, for a declaration that he was entitled to enter the shrine as a Brahman, and for an injunction restraining the defendants from interfering with his exercise of this right:—*Held*, (1) that the right claimed was of a civil nature and within the cognizance of the Civil Courts; (2) that the question to be determined was not a question of the plaintiff's legal status since a Brahman widow is at liberty to re-marry under Act XV of 1856, but it was a question of caste status in respect of a caste institution; (3) that in order to determine the above question, the Courts must inquire (a) what was the usage of the temple as regards admission into the inner shrine for the purposes of worship at the date of the suit, or the presumable intention of the religious foundation as regards such admission and (b) whether according to such usage or presumable intention of the foundation those who secede from the caste custom as to re-marriage of women are outside the class of beneficiaries as regards the right of admission into the inner shrine as above.

Venkatachalapati v. Subbarayadu 293

IMPARTIBILITY OF ZAMINDARI SHOWN BY EVIDENCE—Grant by sanad in 1802 of zamindari without change of rule of succession by primogeniture—Madras Regulation XXV of 1802 :

The question whether an estate is impartible and descends by the law of primogeniture, or is subject to the ordinary Hindu law of inheritance, must be decided in each case according to the evidence given in it. The result of the evidence in this suit was to show that before, and in, the year 1802, the zamindar was in possession of the Devarakota zamindari, by right of primogeniture, as an impartible estate; and that he was so regarded by the Government. On the passing of Madras Regulation XXV of 1802, and the issue to him of a sanad-i-milkhiyat-istimrari, in accordance with it, he acquired a permanent property in the zamindari lands at a fixed assessment, but they remained heritable as before; the estate remained entire; and there was no evidence of any intention on the part of the Government to alter the nature of the tenure. What was said in the judgment in the *Hansapur case* (12 M.L.A., 1) was applicable here. The estate continued to be impartible, and the rule of succession to it was not altered. It descended by the rule of primogeniture.

Mallikarjuna v. Durga 406

INSOLVENT ACT—11 & 12, Vic. Cap. 21, ss. 47, 51—Civil Procedure Code, s. 642—Exemption from arrest on civil process *reduendo* :

The Commissioner in Insolvency committed an insolvent to jail by an order under s. 51 of the Insolvent Act:—*Held by the Full Bench*, that an order made under s. 51 of the Insolvent Act is a final order: and a Commissioner in Insolvency has no power under that section to commit an insolvent to jail, but must leave the excepted judgment-creditors (if any) to their ordinary remedies for the time mentioned in the order. *Nixon v. Chartered Mercantile Bank* (I.L.R., 8 Mad., 97) overruled. The insolvent having been discharged from jail under the rule laid down by the Full Bench as above, was immediately arrested on a warrant obtained by a judgment creditor:—*Held, per Shepherd, J.*, that the insolvent was not privileged from arrest as being on his way back from Court.

Samarapuri v. Parry and Company 150

JUDGMENT OF FOREIGN COURT—Jurisdiction—Notice :

The defendants, who were British subjects, purchased goods from the plaintiff in French territory. The plaintiff sued the defendants in the French

Court and obtained judgment against them, but the defendants neither resided nor owned property in French territory, and did not appear at the trial and had no actual notice of the proceedings. In a suit brought in British India on the judgment of the French Court:—*Held*, that the want of notice to the defendants was fatal to the suit. *Quære*, whether the French Court would have had jurisdiction (apart from the question of notice) if it had been proved that it was intended that payment should be made in French territory?

Bangarusami v. Balasubramanian 496

JURISDICTION:

See JUDGMENT OF FOREIGN COURT.

2. ———— *Civil Procedure Code, s. 11—Hindu Marriage Act (Act XV of 1856, s. 5)—Hindu law—Widow re-marriage—Exclusion from temple—Excommunication:*

The plaintiff, who was a *Smarta* Brahman, but had married a widow (whose first marriage had not been consummated), alleged that he had made a vow to present an offering in a certain temple, and that the defendants, who were the committee of the temple, had obstructed and prevented him from entering the inner shrine (where orthodox Brahmans usually make their offerings), asserting that he was disqualified to enter by reason of his having married a widow contrary to *Hindu sastras*; and he sued for damages for the above obstruction and imputation, for a declaration that he was entitled to enter the shrine as a Brahman, and for an injunction restraining the defendants from interfering with his exercise of this right:—*Held*, (1) that the right claimed was of a civil nature and within the cognizance of the Civil Courts; (2) that the question to be determined was not a question of the plaintiff's legal status since a Brahman widow is at liberty to re-marry under Act XV of 1856, but it was a question of caste status in respect of a caste institution; (3) that in order to determine the above question, the Courts must inquire (a) what was the usage of the temple as regards admission into the inner shrine for the purposes of worship at the date of the suit, or the presumable intention of the religious foundation as regards such admission and (b) whether according to such usage or presumable intention of the foundation those who secede from the caste custom as to re-marriage of women are outside the class of beneficiaries as regards the right of admission into the inner shrine as above.

Venkatachalapati v. Subbarayadu 293

3. ———— *Objection as to, first taken in second appeal—Waiver of objection to jurisdiction—When objection cannot be waived:*

A suit of which the subject-matter was less than Rs. 2,500 was instituted in a Subordinate Court. The Subordinate Judge tried the suit and passed a decree, and an appeal against this decree was entertained and determined by the District Judge without objection taken that the Subordinate Court had no jurisdiction to hear and determine the suit. On second appeal objection was taken as above:—*Held*, that the objection must prevail and the plaint be returned for presentation in the proper Court.

Velayudam v. Arunachala 273

4. ———— *Objection as to, first taken on appeal—Suit for partition:*

Plaintiff sued in the District Court for partition of an one-seventh share purchased by him in an undivided aghraharam, of which the total value was about Rs. 16,400, and obtained a decree. The defendants on appeal objected that the suit should have been filed in the District Munsif's Court:—*Held*, *natha v. Subramanya* 1 L.R., 8 Mad., 235 distinguished. *Per cur.*—Though the objection was not taken in the Court below, yet it is apparent on the face of the plaint and has reference to the jurisdiction of the Court; we must therefore consider it.

Ramayya v. Subbarayudu 26

5. ———— *BY CONSENT—Waiver of want of jurisdiction—Civil Procedure Code, s. 25, order made under, without notice to the party not applying:*

A suit for land was filed in 1883 in the Subordinate Court of Cochin. In 1884 the Government, by a notification under Act III of 1874, transferred the district where the land was situated from the jurisdiction of that Court to that of the Subordinate Court of Calicut, whereupon the plaintiff applied to the District Court to transfer the case to the file of the first-mentioned Court under s. 25 of the Code of Civil Procedure. The District Judge granted the application without notice to the defendants. The defendants went to trial, and also preferred an appeal against the decree, which was passed in favour of the plaintiff, without objection to the jurisdiction of the Court. In execution of the above decree, (which was affirmed on appeal) the plaintiff was obstructed. He, therefore, filed the present suit against the obstructors under the provisions of s. 331 of the Code of Civil Procedure, and they pleaded that the decree sought to be executed had been passed without jurisdiction:—*Held*, (1) that the want of notice to the defendants of the application made under s. 25 of the Code of Civil Procedure was immaterial; (2) that the defect, if any, of the jurisdiction of the Court passing the decree had been waived by the defendants, and that the present defendants were precluded from availing themselves of it.

Sankumani v. Ikoran 211

- LAND ACQUISITION ACT—ACT X OF 1870—Land given as compensation—Regulation II of 1803 (Madras, s. 44—Darkhast rules:*

The owner of certain land taken up under the Land Acquisition Act, after the amount of compensation had been fixed, conveyed her interest to the present defendant, who applied for the land now in dispute in lieu of compensation, it being then Government waste, and this application was granted and the deed of exchange executed. The plaintiff and another had previously applied under the darkhast rules for the land now in dispute, but the Collector ordered the land to be placed in possession of the defendant. The Board of Revenue, however, directed that the land be made over to the prior darkhastdars on terms which were complied with and they were put into possession. The plaintiff having been subsequently dispossessed by the defendant, now sued for a declaration of title and for possession:—*Held*, that the plaintiff was entitled to the land as against the defendant.

Narayana v. Ramachandra 485

- LANDLORD AND TENANT—Estoppel—Collusion:*

The plaintiff in an ejectment suit had established in a former suit that land formerly the property of the second defendant's father had been sold under a decree and purchased *benami* for him (the plaintiff), and that a rent agreement in respect of the same lands entered into between the ostensible purchaser and the first defendant had also been entered into by the former on his behalf: and possession had been formally delivered to the plaintiff under process of Court. It now appeared that the second defendant, who contested the validity as against him of the decree under which the land was sold, having withdrawn a suit filed by him to declare the sale invalid as against him after his father's death, had colluded with the first defendant and collected rent from him:—*Held*, that the second defendant, having come in by collusion with the first defendant, was precluded from denying the plaintiff's title and was liable to the plaintiff for the rent collected by him from the first defendant.

Pasupati v. Narayana 335

2. ———— *Transfer of Property Act—Act IV of 1882, ss. 106, 108—Assignability of tenancy—Suit by zamindar to set aside a court-sale of his raiyat's interest—Burden of proof:*

A zamindari raiyat mortgaged the land comprised in his holding, and the mortgagee, having sued and obtained a decree on his mortgage, attached the mortgagor's interest in the land and purchased it at the court-sale held in execution of his decree. The zamindar, who had intervened unsuccessfully in execution, now sued to set aside the sale and to eject the decree-

holder and the judgment-debtor from the land. Neither party adduced evidence:—*Held*, that as the burden of proof lay on the plaintiff and had not been discharged, the suit must be dismissed.

Appa Rau v. Subbanna 60

LIMITATION—Adverse possession—Suit by a trustee of a devasom disaffirming the act of his predecessor :

The trustee of a Malabar devasom, who had succeeded to his office in June 1883, sued in 1887 to recover for the devasom possession of land which had been demised on kanom by his predecessor in February 1881, on the ground that the demise was invalid as against the devasom. The defendant had been in possession of the land for more than twelve years, falsely asserting the title of kanomdar with the permission of the plaintiff's predecessor in office:—*Held*, (1) the suit was not barred by limitation; (2) the plaintiff was entitled to maintain the suit for the purpose of recovering for the trusts of the devasom property improperly alienated by his predecessor. *Suppammal v. The Collector of Tanjore* (I.L.R., 12 Mad., 387) distinguished.

Vedapuratti v. Vallabha 402

2. ———— Regulation II of 1882 (Madras), s. 18—Act IX of 1871, sch. II, art. 142—Starting point of limitation—Acknowledgment—Adverse possession of partial interest in land :

Suit by the zamindar of Shivagunga to recover certain land as part of his zamindari from the defendants who claimed title under a deed of gift dated 1830 from the person then in possession of the zamindari. The istimrar zamindar died in 1829. After his death certain persons were in possession without title: but, in February 1863, his daughter, Katama Natchiar, obtained a decree in the Privy Council against the person then in possession of the zamindari in execution of which she was put into possession. In 1876 she brought a suit against the present defendants to recover the property now in question; but that suit was withdrawn on a petition presented by her vakil stating that the case had been compromised and praying that the suit be struck off the file, which was accordingly done. She died in 1877 and the plaintiff was her successor. It appeared that *poruppu* was always paid for the land now in question:—*Held*, (1) that the payment of *poruppu* did not prevent the possession of the defendants from being adverse to the plaintiff as possession of a limited interest in immovable property may be as much adverse for the purpose of barring a suit for the determination of that limited interest as is adverse possession of a complete interest in the property to bar a suit for the whole property; (2) that the date of the Privy Council decree could not be taken as the starting point of limitation; (3) that the transactions in reference to the suit of 1876 did not amount to an acknowledgment of the zamindari's title and did not give a new cause of action to her successors; (4) that the cause of action having arisen to the then rightful owner of the zamindari in 1830, the plaintiffs' suit was barred by limitation.

Sankaran v. Periasami 467

3. ———— Religious Endowments Act—Act XX of 1863, s. 7—Regulation VII of 1817 (Madras), s. 12—Suit by a dharmakarta disaffirming the acts of his predecessor :

The plaintiff, who had been appointed in 1886 by the Sub-Collector to be dharmakarta of a Hindu temple for which no committee had been appointed under Religious Endowments Act, s. 7, sued in 1886 to recover possession of land demised to the defendant on a perpetual lease in or about 1856 by a previous dharmakarta, who died in 1885:—*Held*, (1) that Regulation VII of 1817 having been repealed as regards Hindu temples by Act XX of 1863, the appointment by the Sub-Collector gave the plaintiff no right to sue: accordingly it was necessary to determine the question whether he had such right apart from that appointment; (2) that if the above question were answered in the affirmative, the plaintiff, since he did not derive title through his predecessor in office (the grantor of the lease), would be entitled to disaffirm his acts; (3) that the period of limitation ran not from the date of the lease, but from the date of the accession of the plaintiff to his office.

Mahomed v. Ganapati 277

LIMITATION ACT—ACT XIV OF 1859, s. 1, cl. 12—ACT XV OF 1877, sch. II, art. 141—Hindu law—Suit by reversioner on expiry of widow's and daughter's estate :

Plaintiff sued in 1887 to recover property as part of the estate of his maternal grandfather, who died about 1845, leaving (1) a widow, who inherited the property and died in 1846, (2) his daughter by her, who took the property on her mother's death and alienated it to the defendants about 1850 and died before suit, and (3) the plaintiff's mother, who was his daughter by another wife. The plaintiff's mother made no claim on the property and died in 1883:—*Held*, the suit was not barred by limitation.

Sambasiva v. Ragava 512

2. ———— ACT IX OF 1871, sch. II, art. 142—Starting point of limitation—Acknowledgment—Adverse possession of partial interest in land—Limitation—Regulation II of 1802 (Madras), s. 18 :

Suit by the zamindar of Shivagunga to recover certain land as part of his zamindari from the defendants who claimed title under deed of gift dated 1830 from the person then in possession of the zamindari. The istimrar zamindar died in 1829. After his death certain persons were in possession without title: but, in February 1863, his daughter, Katama Natchiar, obtained a decree in the Privy Council against the person then in possession of the zamindari in execution of which she was put into possession. In 1876 she brought a suit against the present defendants to recover the property now in question; but that suit was withdrawn on a petition presented by her vakil stating that the case had been compromised and praying that the suit be struck off the file, which was accordingly done. She died in 1877 and the plaintiff was her successor. It appeared that *poruppu* was always paid for the land now in question:—*Held*, (1) that the payment of *poruppu* did not prevent the possession of the defendants from being adverse to the plaintiff as possession of a limited interest in immovable property may be as much adverse for the purpose of barring a suit for the determination of that limited interest as is adverse possession of a complete interest in the property to bar a suit for the whole property; (2) that the date of the Privy Council decree could not be taken as the starting point of limitation; (3) that the transactions in reference to the suit of 1876 did not amount to an acknowledgment of the zamindari's title and did not give a new cause of action to her successors; (4) that the cause of action having arisen to the then rightful owner of the zamindari in 1830, the plaintiff's suit was barred by limitation.

Sankaran v. Periasami 467

3. ———— ACT XV OF 1877—Adverse possession :

In a suit in 1887 to redeem a kanom for Rs. 62 of 1835, it appeared that in 1862 the mortgagee had received a renewal of his kanom for a larger amount, and that the defendant had produced the document of renewal in 1864 to the knowledge of the plaintiff in a suit to which the plaintiff was party:—*Held*, that the suit was not barred by limitation—*Madhava v. Narayana* (I.L.R., 9 Mad., 244) distinguished.

Rairu Nayar v. Moidin 39

4. ———— ss. 5, 14—"Sufficient cause" to excuse delay—Error in law :

Land was sold in execution of a decree which was passed against the defendant for a sum exceeding Rs. 5,000. A suit to set aside the sale was instituted in a Subordinate Court and was dismissed. The plaintiff who desired to appeal against the decree dismissing his suit was advised that the appeal lay to the High Court in which a memorandum of appeal was accordingly filed. On its appearing that the value of the property sold was less than Rs. 5,000, the High Court returned the memorandum of appeal for presentation to the District Court. The District Judge rejected it on the ground that it was barred by limitation, holding that the delay caused by the error, which the appellant committed in taking proceedings in the wrong Court, could not be excused:—*Held*, that the District Judge should have decided whether the appellant, under the special circumstances of the case in appealing to the High Court, acted on an honest belief formed with due care and

attention. *Per cur.*—"We are not prepared to hold that a mistake in law is under no circumstances a sufficient cause within the meaning of s. 6 of the Limitation Act."

Krishna v. Chathappan 269

5. —————, ss. 7, 8, sch. II, art. 179—*Minority—Execution of decree—Civil Procedure Code*, ss. 231, 268 :

A member of an undivided Hindu family and his two minor brothers (who sued by him as their next friend) brought a suit for partition of family property against their father, and joined as defendants certain persons who were in possession of part of the property under alienations made by the father but alleged in the plaint to be invalid as against the family. In 1876 a decree was passed in favor of the plaintiffs in the above suit. No application for the execution of the decree was made by either the first or second plaintiff; but the third plaintiff, having attained his majority in June 1881, applied for execution in April 1884: his application was opposed by two of the defendants. The District Judge made an order granting his application in respect of the one quarter share to which he was declared to be entitled under the decree:—*Held*, that the order of the District Judge was wrong, as neither s. 7 nor s. 8 of the Limitation Act affected the case, and the application was accordingly barred by limitation.

Seshan v. Rajagopala 236

6. —————, ss. 7, 9, 19—*Minority of plaintiff—General Clauses Act—Act I of 1868*, s. 3, cl. 2 :

Suit to recover principal and interest due on a registered bond executed by defendants in favor of the plaintiff's father. The date of the bond was 20th June 1870; the principal sum was payable on 20th June 1872; the plaintiff's father died in 1875; the defendants made acknowledgments of their liability in June 1877; the plaintiff came of age in 1886, and this suit was brought on 11th August 1887:—*Held*, the suit was not barred by limitation.

Venkataramayyar v. Kothandaramayyar 136

7. —————, s. 14—*Exclusion of time of proceeding with suit bonâ fide—Cause of like nature* :

Of six persons in whom was vested the obligee's interest under a hypothecation bond, three brought a suit upon it in a District Court and the other three brought a similar suit in a District Munsif's Court to recover, with interest, their respective shares of the sum secured. The former suit was dismissed as not being maintainable and the latter was withdrawn. The present suit was brought by all six:—*Held*, that in computing the time within which the plaintiffs had to sue, the time occupied by them in prosecuting the former suits should be deducted. *Deo Prasad Sing v. Pertab Kairee* (I.L.R., 10 Cal., 86) followed.

Narasimma v. Muttayan 451

8. —————, s. 28—*Malabar law—Right of pre-emption under otti—Waiver* :

A jenmi having demised certain land in Malabar on otti to defendant No. 3 in 1869, sold the jenm title to the plaintiff and defendants Nos. 1 and 2 in 1886. In 1888 defendant No. 3 made a further advance to and obtained a renewed demise from defendants Nos. 1 and 2. The plaintiff now sued more than six years after the sale to recover his share (defendant No. 3 being in possession) on payment of one-third of the otti amount:—*Held*, that (whether or not the suit was maintainable as framed) the third defendant had a right of pre-emption as *otti-dar*, which had not been waived by him and was not barred by limitation, and which constituted a good defence to the suit.

Kanharankutti v. Uthotti 490

9. —————, sch. II, art. 11—*Civil Procedure Code*, s. 283—*Party to execution proceedings* :

A in execution of a decree against B attached a house. C intervened and the property was released from attachment. A then brought a suit against B and C to establish the title of B to the house and obtained a decree. B was *ex parte* throughout. In an appeal by C a decree was passed by consent of A and C reversing the decree appealed against. B now sued C and another, more than a year from the date of the order removing the attachment, to obtain a declaration of title to the house:—*Held*, that since there was nothing to show that the order releasing the attachment was an order against the plaintiff the suit was not barred by limitation.

Guruva v. Subbarayudu 366

10. —————, sch. II, arts. 29, 61, 62, 97, 120—*Civil Procedure Code*, s. 244—*Execution proceedings* :

In a suit of 1867 the present defendant obtained a decree for possession of a certain village and mesne profits for one year. Pending an appeal against that decree execution was stayed on the present plaintiff depositing a note for Rs. 15,000 as security. The decree was affirmed on appeal, and the present defendant had the note sold in execution and drew out of the proceeds a sum for mesne profits for subsequent years; but an appeal was preferred in the execution proceedings to the High Court which set aside the execution so far as concerned the mesne profits for the years subsequent to that to which the original decree related. The present plaintiff thereupon attached and sold the village to recover the balance: before that amount was paid to the present plaintiff the present defendant brought a suit against him in the District Court and there obtained a decree for mesne profits for the subsequent years and in the execution drew the amount of the decree out of Court. In second appeal however the High Court on 26th September 1881 reversed the decree of the District Court, whereupon the present plaintiff applied for restitution under Civil Procedure Code, s. 583, which application was ultimately disallowed. The present suit was brought to recover the amount to which that application related:—*Held*, (1) that the suit was not barred by the provisions of Civil Procedure Code, s. 244; (2) that Limitation Act, sch. II, art. 120, was applicable to the suit, which having been filed on 9th August 1887 was accordingly not barred by limitation.

Narayana v. Narayana 437

11. —————, sch. II, art. 91—*Civil Procedure Code*, s. 13—*Res judicata—Cause of action—Suit to cancel a document* :

On 23rd March 1878 plaintiff executed to defendant a document purporting to be a deed of gift. In 1886 plaintiff sued to cancel the document alleging that defendant on 11th May 1881 had agreed to execute a release but had not done so: that suit was dismissed for non-payment of duty due under the Court Fees Act. The plaintiff now sued in 1887 for a declaration that the document "was executed for nominal purposes and was not intended to take effect":—*Held*, (1) that since the cause of action in the suits of 1886 and 1887 were not the same, the claim in the latter suit was not *res judicata*; (2) that the suit was not barred by limitation.

Nagathal v. Ponnusami 44

12. —————, sch. II, art. 120—*Suit for perpetual injunction—Claim of possession* :

In a suit for a perpetual injunction to restrain the defendant from preventing the plaintiff from entering a certain house it was alleged that the defendant had been in exclusive possession for more than six years before suit:—*Held*, that Limitation Act, sch. II, art. 120, applied to the suit which was therefore barred by limitation. *Per cur.*—It was open to the plaintiff to sue for such possession other than exclusive possession (the right to which had already been negatived by suit) as he might be entitled to.

Kanakasabai v. Muttu 445

18. —————, sch. II, art. 179—*Civil Procedure Code*, ss. 231, 232—*Joint decree-holder—Application for execution of decree* :

A Hindu obtained in 1878 a decree for partition of certain property and applied in 1888 to have it executed. It appeared that the decree-holder's son, having obtained against him in 1881 a decree for a share of whatever he should acquire under the decree of 1878, had applied for execution of the last-mentioned decree; and reliance was now placed on that application to save the bar of limitation:—*Held*, that assuming the decree of 1881 had effected an assignment by operation of law of the decree of 1878, the father and son were not joint decree-holders within the meaning of Civil Procedure Code, s. 231, and the father's application for execution was barred by limitation.

Ramasami v. Anda Pillai 347

LOCAL BOARDS ACT—ACT V OF 1884 (MADRAS), ss. 128, 156—Suit for malicious prosecution against officers of panchayat union—Notice of suit :

A suit was brought against the chairman and accountant of a panchayat union for damages for malicious prosecution more than six months after the close of the criminal proceedings:—*Held*, (1) that the defendants were liable for torts committed by them, and that notwithstanding Local Boards Act, s. 128, the plaintiff was not confined to his remedy against the Taluk Board; (2) that Local Boards Act, s. 156, was not applicable unless it were proved that the Act complained of was done by servants of the Taluk Board within the scope of their authority as such, acting or purporting to act under the Act.

Annaji v. Subramanya 442

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT—ACT I OF 1887 (MADRAS), ss. 1, 2, 4, 6—Mode of assessing compensation for improvements :

The sum to be allowed for compensation for a tenant's improvements under Act I of 1887 (Madras) is not to be determined by capitalizing either the annual rent or the annual increment due to the improvement, but a reasonable sum should be awarded, assessed with reference to the amount by which the market value or the letting value or both has been increased thereby; and the Court should take into consideration the actual condition of the improvement at the time of the eviction, its probable duration, the labor and capital which the tenant has expended in effecting it and any reduction or remission of rent or other advantage which the landlord has given to the tenant in consideration of the improvement. In the absence of evidence as to the actual market value in the place where the land is situated, the reasonable mode of estimating the compensation consists in taking the cost of the improvement and interest thereon and in adjusting the compensation to be awarded with reference to the matters specified in section 6.

Valia Tamburatti v. Parvati 454

2. —————

s. 7—General Clauses Act, s. 6 :

A suit to recover property in Malabar demised on kanom was pending when the Malabar Compensation for Tenants' Improvements Act came into force:—*Held*, on the construction of ss. 1, 5, and 7, that the tenants' right to compensation should be dealt with in accordance with the provisions of that Act.

Malikan v. Shankunni 502

MALABAR LAW—Right of pre-emption under otti—waiver—Limitation Act—Act XV of 1877, s. 28 :

A jenmi having demised certain land in Malabar on otti to defendant No. 3 in 1869, sold the jenm title to the plaintiff and defendants Nos. 1 and 2 in 1886. In 1888 defendant No. 3 made a further advance to and obtained a renewed demise from defendants Nos. 1 and 2. The plaintiff now sued more than six years after the sale to recover his share (defendant No. 3 being in possession) on payment of one-third of the otti amount:—*Held*, that

(whether or not the suit was maintainable as framed) the third defendant had a right of pre-emption as *otti-dar*, which had not been waived by him and was not barred by limitation, and which constituted a good defence to the suit.

Kanharankutti v. Uthotti 490

MALICIOUS PROSECUTION—Matters in issue—Burden of proof :

In a suit for damages for malicious prosecution it was found that the charge brought by the defendant against the plaintiff was unfounded, and that it was brought without probable cause:—*Held*, that the absence of probable cause did not imply malice in law, and that on the failure of the plaintiff to prove that the defendant did not honestly believe in the charge brought by him, the suit should have been dismissed.

Hall v. Venkatakrishna 394

MINOR—Suit against guardian of a minor—Immaterial irregularity—Minor's interest bound :

In a suit by an adopted son, after the death of his adoptive father, to recover ancestral land sold in execution of a decree against his adoptive mother therein described as the guardian of the present plaintiff, who was then an infant, it appeared that the decree had been passed on a bond executed by the then defendant in respect of a debt due by her late husband:—*Held*, that the plaintiff should be regarded as a party to the suit in which the decree executed against the land had been passed, and that the present suit should be dismissed.

Natesayyan v. Narasimmayyar 480

MUHAMMADAN LAW—Gift by a father—Undivided share—Delivery of possession :

A Muhammadan made a gift in writing to his daughter on her marriage of an undivided moiety of his share in certain buildings, which were the property of the donor's wife. On the death of the donee, her husband married her sister, and the donor thereupon similarly made a gift to her of the remaining undivided moiety. The donees were minors at the dates of their respective gifts. The husband now sued to recover the share of his first wife, of which delivery had not been made:—*Held*, that the gift was not invalid, either for indefiniteness or for want of delivery of possession.

Hussain v. Shaik Mira 46

2. ————— **Wakf—Conditional and revocable dedication—Conditions of a valid dedication :**

A Muhammadan by an instrument revoking a previous trust deed conveyed her property to her husband on trust as follows:—(1) to maintain the settlor and her children out of the income; (2) to hand over the property to the children on their attaining majority; (3) in the event of the settlor's death without leaving children, with the income of the property to have *Kathom* recited in a mosque, give food to the Mollahs who come there for reciting the same and get the *moulu* performed. The settlor reserved to herself and her representatives an option of dealing with the property as a special fund for the maintenance of her children, if any. The settlor died leaving no children. In a suit by her half-sister against her husband and others to recover her share of the property:—*Held*, per Muttusami Ayyar and Parker, J.J., that the plaintiff was entitled to recover her proportionate share of the property, notwithstanding the provisions of the above instrument. Per Shephard, J.—There has been no complete dedication of the property, and, except so far as regards the income required for the three specific objects named by the donor, her property is undisposed of. Conditions of a valid *wakf* considered.

Pathukutti v. Avathalakutti 66

NEGOTIABLE INSTRUMENTS ACT—ACT XXVI OF 1881, ss. 37, 39, 66—Contract Act, s. 135—Accommodation maker—Discharge of—Presentment of promissory note :

Suit by the endorsee against the maker of a promissory note, dated 9th August 1886. The plaintiff was aware that the note was made by the defendant for the accommodation of the acceptor, Watson and Co., with

whom the plaintiff had large dealings. On the 4th August 1887, Watson and Co. executed in favor of the plaintiff and another creditor a mortgage of certain property to secure the amount then due by Watson and Co., including the amount due to the plaintiff on the promissory note: the mortgage contained a personal covenant by Watson and Co., to pay the sums due, together with interest, on the 4th August 1888; and the mortgagees practically took over the whole business of the mortgagor and it was intended that they should work it for his benefit up to that date. The promissory note fell due in June 1887, but was not presented to the defendant for payment:—*Held*, that plaintiff, by accepting the mortgage, promised to give time to Watson and Co., and thus rendered it impossible for him to sue Watson and Co., had the defendant as surety called on him to do so, and that the defendant was accordingly discharged. *Pogose v. Bank of Benagl*, I.L.R., 3 Cal., 174, distinguished. *Semle*.—The maker of a promissory note is not discharged by the holder's failure to present it at due date.

Ramakistnappa v. Kassim 172

NOMINATION—*Civil Procedure Code*, s. 244—*Appeal against order*—*Nomination by a pandaram under a decree*—*Revocation of such nomination by the pandaram's successor*:

The pandaram of a mutt being empowered under a decree to nominate a person to be the head of a subordinate mutt, subject to the approval of the Subordinate Court, made a nomination and died before the Subordinate Court had come to a determination as to the fitness of his nominee. His successor in office was brought on to the record and revoked his nomination and made a fresh nomination. The Subordinate Court treated the fresh nomination as a nullity and made an order confirming the first. The pandaram appealed against this order:—*Held*, (1) that an appeal lay against the order complained of; (2) that the person, whose nomination had been confirmed, was a necessary party to the appeal; (3) that the nomination first made was revocable for good cause and that the fitness of the person nominated by the appellant should be investigated by the Subordinate Judge.

Gnanasambanda v. Visvalinga 338

OPIUM ACT—ACT I OF 1878, s. 3—*License to possess opium*—*Transport of opium*:

One having a license for the possession of opium as a medical practitioner, limited to eight pollums of opium, sent his servant to buy from a licensed dealer at Sholavaram and bring to Madras four pollums of opium; he was convicted of the offence of transporting opium without a license:—*Held*, the conviction was right.

Queen-Empress v. Ramanujam 191

PARTNERSHIP—*Civil Procedure Code*, s. 266—*Unascertained interest in a partnership*:

The plaintiff having purchased at an execution sale the interest of the judgment-debtor in a partnership, of which the undivided father (deceased) of the judgment-debtor had been a member, now sued the other partners praying that an account be taken and that the share of the judgment-debtor be paid to him:—*Held*, that the execution sale was not bad in law and that the present suit was accordingly maintainable. *Dwarika Mohun Das v. Luckhimoni Dasi* (I.L.R., 14 Cal., 384) dissented from.

Payvathesam v. Bapanna 447

PENAL CODE, ss. 1, 2:

See SCHEDULED DISTRICT ACT.

2. ———, ss. 97, 148—*Self-defence*—*Rioting*—*Unlawful distraint*:

A landlord, who had not tendered to his tenant such a patta as the latter was bound to accept under the Madras Rent Recovery Act, distrained his cattle for arrears of rent, the assistance of the Police having been procured for the purpose. The tenant, with the assistance of eleven other persons,

forcibly obstructed the removal of the cattle which had already been actually seized and driven for some yards. They were charged with the offence of rioting and convicted:—*Held*, that the conviction was right.

Queen-Empress v. Ramayya 148

3. ———, s. 175—*Criminal Procedure Code*, ss. 476, 477, 480 and 485—*Jurisdiction of Judges and Magistrates in respect of offences committed before themselves*:

A Court other than the High Court, &c., can try persons for offences committed before itself only in cases to which s. 477, 480 or 485 is applicable, and none of these sections is applicable when the accused is charged under s. 175 of the Penal Code.

Queen-Empress v. Seshayya 24

4. ———, s. 363—*Public servant—District Municipalities Act (Madras Act IV of 1884)*, s. 41:

A Municipal Inspector is a public servant within the meaning of s. 41 of the Madras District Municipalities Act.

Queen-Empress v. Ramasami 131

5. ———, ss. 419, 420, 437 and 468—*Cheating—Forgery—Use of a false name with intent to defraud*:

The accused was alleged by the prosecution to have advertised that a work on English idioms by Robert S. Wilson, M.A., was ready, stating that the price was Rs. 2-4-0, and that intending purchasers might remit it by money order to Robert S. Wilson, Council House Street, Calcutta; to have then requested the Postal authorities at Calcutta by a letter signed Robert S. Wilson, to have the money orders re-directed to him as above at Rajam; to have similarly requested the Post Master at Rajam to pay the money orders to his clerk Seshagiri Rau; to have subsequently received the value of money orders made out in favor of Robert S. Wilson from the Post Master at Rajam, signing receipts as Seshagiri Rau: Robert S. Wilson and Seshagiri Rau were alleged to be fictitious persons, and it was also alleged that the accused had no book on English idioms ready to be despatched to purchasers:—*Held*, that the above allegations supported charges of cheating and forgery.

Queen-Empress v. Pera Raju 27

PENSIONS ACT—ACT XXIII OF 1871, s. 6—*Specific Relief Act—Act I of 1877*, s. 42—*Suit for declaration of title as holder of a stanom to which a malikana allowance is attached*:

Suit to declare plaintiff's title to the stanom of fifth Raja of Palghat; the first Raja (defendant No. 1) received a malikana allowance from Government payable to the various stanomdars, but had refused to pay to plaintiff the fifth Raja's share:—*Held*, the plaintiff being entitled to sue for further relief than the declaration of his title and having omitted to do so, the suit must be dismissed under Specific Relief Act, s. 42. *Per cur.*—Pensions Act, s. 6, was not applicable to this case.

Kombi v. Aundi 75

POLICE ACT—ACT XXIV OF 1859 (MADRAS), s. 48:

See CRIMINAL PROCEDURE CODE, s. 261.

POST OFFICE ACT, 1868, s. 5:

See CIVIL PROCEDURE CODE, s. 272.

PROVINCIAL SMALL CAUSE COURTS ACT—ACT IX OF 1887, s. 17—*Civil Procedure Code*, ss. 623, 624, 626—*Review—Deposit of costs*:

On 23rd February 1888 the Subordinate Judge of Tinnevely dismissed a small cause suit on the ground that the plaintiff had not secured the attendance of his witnesses. On 29th February the plaintiff presented a petition for review on which notice was directed to issue, but he did not deposit in Court the amount of the costs payable under the decree. On 17th April the petition having come on for hearing, the Judge directed that the petitioner

should "first" deposit the amount of the defendant's cost under s. 17 of the Provincial Small Cause Courts Act, which was accordingly done on the following day. On 21st April the petition, which proceeded on grounds other than those mentioned in s. 624 of the Code of Civil Procedure, came on for hearing before the Officiating Subordinate Judge, who had assumed charge of the Court between the last-mentioned dates: he entertained the petition, but dismissed it. The plaintiff preferred a revision petition against the order dismissing his petition:—*Held by the Full Bench* that the Officiating Subordinate Judge had jurisdiction to make the order sought to be revised. *Held by Parker and Wilkinson, JJ.*, that the provisions of s. 17 of the Provincial Small Cause Courts Act as to the deposit of costs on an application for review are not mandatory, but merely directory.

Ramasami v. Kurieu 178

2. —————, schd. II, cl. 24—
Civil Procedure Code, ss. 525, 526, 646B.]

A suit to recover a sum of money as payable to the plaintiff under an award which was contested was filed in a Subordinate Court on the small cause side. The Subordinate Judge returned the plaint, being of opinion that the suit was not cognizable by a Court of Small Causes. The plaint was then presented in the Court of the District Munsif as an ordinary suit, but the District Munsif returned it on the ground that the suit was cognizable by a Court of Small Causes. The plaintiff then applied to the District Judge to submit the record for the orders of the High Court:—*Held*, (1) that the District Judge was bound to submit the record under s. 646B of the Code of Civil Procedure on the requisition of the plaintiff, although the plaintiff might have appealed to the District Court against the order of the District Munsif; (2) that the suit was cognizable by a Court of Small Causes and accordingly that the order made by the Subordinate Judge returning the plaint was wrong.

Simson v. McMaster 344

3. —————, sch. II, paragraph 1—*Municipal tax—District Municipalities Act—Act IV of 1884 (Madras), ss. 49, 50, 53, 101—Wrongful assessment of profession tax—Jurisdiction of Small Cause Court—Order of a Local Government:*

The Municipality at Tuticorin demanded Rs. 50 as profession tax from the South Indian Railway Company which had already paid profession tax to the Municipality at Negapatam. The Company complied with the demand under protest and sued the Municipality for a refund of the amount paid on the Small Cause Side of the District Munsif's Court:—*Held*, (1) the Court had jurisdiction to hear and determine the suit; (2) the Municipality at Tuticorin had no right to levy the tax on the Railway Company and the decree directing the amount levied to be refunded was correct.

Tuticorin Municipality v. South Indian Railway 78

RECEIVER—Discretionary refusal to remove a Receiver and Manager of the estate of Hindu widows:

Rights and proceedings rendering a Court's order, refusing to remove an appointed Receiver and Manager of the estate, of which the widowed Ranis of the late Maharajah of Tanjore had become possessed by grant from the Government, entirely a matter for the discretion of the Court, which had exercised its discretion soundly.

Ex parte Jijai Amba 390

REGISTRATION ACT—ACT III OF 1877, s. 17 (b), (h):

Where a deed of partition between a mother and her son declared certain existing rights in her over moveable and immoveable property above the value of Rs. 100:—*Held*, that, although the deed showed that the execution of another deed with reference to those rights was in contemplation, yet the deed was not admissible in evidence of the mother's title to either the moveable or immoveable property.

Lakshamma v. Kameswara 281

2. —————, ss. 17 (d), 48—*Transfer of Property Act—Act IV of 1882, ss. 78, 101—Priority of mortgages—Gross negligence—Extinguishment of charges—Notice by registration:*

In a suit for declaration of priorities of mortgages and for foreclosure, it appeared that the mortgage premises were mortgaged to defendant No. 2 in 1879 and to the plaintiff in 1883 and again in 1884, and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff and defendant No. 2 had no actual notice at the date of their mortgage and conveyance, respectively, of the previous incumbrances. The plaintiff received the title-deeds to the estate from the mortgagor on the execution of the mortgage of 1883; defendant No. 2 alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that previous to the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody:—*Held*, (apart from the question whether the mortgage of 1879 had been extinguished by the conveyance of 1886), that the conduct of defendant No. 2 in permitting the title-deeds to remain in the possession of the mortgagor amounted to gross negligence within the meaning of Transfer of Property Act, s. 78, and that the registration of the mortgage to defendant No. 2 did not affect the plaintiff with constructive notice of its existence, and that accordingly the subsequent mortgages to the plaintiff were entitled to priority.

Madras Building Company v. Rowlandson 383

3. —————, ss. 17 (d), 49—*Covenant in unregistered lease—Specific performance:*

The plaintiff leased a house to the defendant for three years by an unregistered instrument which contained a covenant by the lessee that he would purchase the house at a certain price on an event which took place. The plaintiff now sued for specific performance of this covenant:—*Held*, that the unregistered instrument was not admissible in evidence and the suit should be dismissed.

Sambayya v. Gangayya 308

4. —————, s. 48—*Transfer of Property Act—Act IV of 1882, s. 54—Oral agreement for sale of land—Subsequent conveyance with notice—Delivery of possession—Priority—Specific Relief Act—Act I of 1877, ss. 27, 42—Specific performance—Declaratory suit—Consequential relief:*

Plaintiff being in possession of certain land as an incumbrancer under a registered instrument agreed orally with the mortgagor in 1885 to purchase it. The mortgagor subsequently sold the land to others who took the conveyance which was registered with notice of the plaintiff's mortgage and of the oral agreement with him. Plaintiff now sued for a declaration that the conveyance was not binding on him and for specific performance of the oral agreement:—*Held*, (1) that the suit was not bad for want of a prayer for delivery up, and cancellation of the conveyance; (2) that the plaintiff's possession under his incumbrance together with the agreement to sell was equivalent to delivery of possession within the meaning of Registration Act, s. 48; (3) that the plaintiff was entitled to have the oral contract specifically enforced notwithstanding the subsequent registered sale.

Kannan v. Krishnan 324

REGULATION II OF 1802 (MADRAS), s. 18:

See LIMITATION.

2. ————— **XXV OF 1802 (MADRAS), s. 12:**

See REVENUE RECOVERY ACT.

3. —————
See ZAMINDARI.

4. ————— **II OF 1803 (MADRAS), s. 44 :**

See LAND ACQUISITION ACT.

5. ————— **VII OF 1817 :**

See RELIGIOUS ENDOWMENTS ACT.

6. ————— **VI OF 1831, s. 3—Suit for a declaration as to land alleged to be nattamai maniyams—Jurisdiction of Revenue Courts—Res judicata—Civil Procedure Code, s. 13 :**

Suit to establish plaintiffs' title to certain land alleged by the defendants, who were the Secretary of State for India in Council and the nattamaigar of a certain village, to be maniyam land attached to the office of the second defendant, and previously held to be such by a Revenue Court:—*Held*, the Court was not precluded either by Regulation VI of 1831, s. 3, or by the decision of the Revenue Court from granting the declaration prayed for.

Barutha Koundan v. Muthu Koundan 41

RELIGIOUS ENDOWMENTS ACT—ACT XX OF 1863, s. 7—Regulation VII of 1817 (Madras), s. 12—Suit by a dharmakarta disavowing the acts of his predecessor—Limitation :

The plaintiff who had been appointed in 1886 by the Sub-Collector to be dharmakarta of a Hindu temple, for which no committee had been appointed under Religious Endowments Act, s. 7, sued in 1886 to recover possession of land demised to the defendant on a perpetual lease in or about 1856 by a previous dharmakarta, who died in 1885:—*Held*, (1) that Regulation VII of 1817 having been repealed as regards Hindu temples by Act XX of 1863, the appointment by the Sub-Collector gave the plaintiff no right to sue; accordingly it was necessary to determine the question whether he had such right apart from that appointment; (2) that if the above question were answered in the affirmative, the plaintiff, since he did not derive title through his predecessor in office (the grantor of the lease), would be entitled to disaffirm his acts; (3) that the period of limitation ran not from the date of the lease, but from the date of the accession of the plaintiff to his office.

Mohamed v. Ganapati 277

RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865—Civil Procedure Code, s. 13—Res judicata—Decision of Revenue Court as to landlord's title :

In a summary suit filed by a landlord against his tenant in the Court of the Deputy Collector under the Rent Recovery Act (Madras), s. 9, to enforce acceptance of a patta by the defendant, it appeared that, in a former suit between the same parties in the same Court, it had been decided that the defendant was the plaintiff's tenant and as such bound to accept a patta from him in respect of the land in question in the present suit:—*Held*, that the defendant was not entitled in the present suit to dispute the plaintiff's title, since the former decision constituted it *res judicata*.

Venkatachalapati v. Krishna 287

2. —————, ss. 2, 7 :

In a suit by a tenant against a zamindar to release an attachment made under Rent Recovery Act, s. 40, it appeared that, according to the kitsbandi obtaining in the zamindari, rent was payable in monthly instalments, commencing with November in each fasli:—*Held*, that the unit for the rule of limitation prescribed by Rent Recovery Act, s. 2, for proceedings by the landlord was the aggregate rent in arrear at the end of the fasli.

Appayasami v. Subba 463

3. —————, ss. 3, 7, 51, 87—Jurisdiction of Civil Courts—Suit to enforce acceptance of improper patta—Decree for rent—Limitation—Evidence of local usage—Judgments not inter partes :

A landlord sued his tenants in the Court of a District Munsif to enforce acceptance of pattas and the execution of muchalkas by them, and to recovery arrears of rent. The suits were filed more than thirty days after

tender of the pattas, which were found to contain certain improper stipulations:—*Held*, (1) the suit was not barred by the rule of limitation in Rent Recovery Act, s. 51; (2) the Civil Court had jurisdiction to entertain the suit and to modify the pattas where they were found to be improper and to enforce the execution of corresponding muchalkas; (3) the claim for rent should have been disallowed on the ground that the pattas as tendered were improper pattas—*Narasimma v. Suryanarayana* (I.L.R., 12 Mad., 481), distinguished. *Per cur.*—"The decisions [as to rates of rent] in previous suits are admissible as evidence of local usage, though the tenants in the cases before them were not parties to them."

Easwara Doss v. Pungavanachari 361

4. —————, ss. 3, 9—Regulation XXV of 1802 (Madras), s. 12—Revenue Recovery Act II of 1864 (Madras), ss. 32, 41 :

The purchaser at a revenue sale is *prima facie* entitled to claim the faisal rate of rent.

Palami v. Paramasiva 479

5. —————, ss. 4, 11—Acceptance of patta not in accordance with the Act :

A tenant having accepted a patta (which did not give the particulars described in s. 4 of the Rent Recovery Act) and having executed to the landlord a muchalka which was registered, is not entitled to obtain in a summary suit an order setting aside a distraint by the landlord for arrears of rent.

Appa Rau v. Viranna 271

6. —————, s. 9—Tender of patta by post :

A landlord sent a patta by post to his tenant, who declined to receive it:—*Held*, the tender of the patta by post was not sufficient to support a suit under s. 9 of the Rent Recovery Act.

Saminatha v. Viranna 42

7. —————, ss. 9, 10, 11—Improper stipulations in patta—Claim of tenants to hold over land after expiry of lease :

In summary suits brought by a landlord to enforce acceptance by his tenants of pattas tendered by him for the current *fasli*, it was pleaded that the pattas were improper in that they did not comprise certain land of which the tenants were in possession and in which they claimed permanent occupancy rights, and also in that they contained various terms which the plaintiff was not entitled to impose on the defendants, providing (*inter alia*) (1) that interest should be payable on the several instalments of rent as they became due, (2) that the defendant should not fell certain trees except for agricultural purposes, (3) that the defendants should not reap their crops without previously obtaining the plaintiff's permission, (4) that on a change made without the plaintiff's permission from dry to wet cultivation, the tenancy should be forfeited in case of default made by the defendants in paying the amount of Government assessment, and also an undetermined sum then to become payable by the defendants to the plaintiff in addition to the rent. The defendants failed to prove the permanent occupancy rights claimed over the land not comprised in the pattas, and it appeared that they had held leases from the plaintiff for the land in question for a period of three years and had held over after the expiry of the leases without the permission and contrary to the wishes of the landlord; and it further appeared that the provision as to trees did not extend to shrubs, &c., and had been an accepted term in the pattas issued for ten years. The Revenue Court modified the terms of the pattas and passed decrees that the pattas as modified be accepted, against which some only of the defendants appealed, and the District Judge on appeal introduced further modifications into the pattas:—*Held*, (1) that the District Judge had no jurisdiction under Civil Procedure Code, s. 544, to introduce further modifications into the pattas in favor of the defendants who had not appealed according to the opinion

formed by him in appeals preferred by the defendants in other suits; (2) that the defendants were not entitled to have the pattas modified by enlarging the extent of the land comprised in them, or by the cancellation of the provisions as to interest and as to felling trees; (3) that the defendants were entitled to have the pattas modified by the cancellation of the provision as to reaping crops and of the provision for forfeiture.

Appa Rau v. Ratnam 249

8. —————, s. 12—Surrender
by abandonment:

In a suit to recover possession of a certain land comprised in an unexpired lease granted to the plaintiff by the first defendant it was pleaded that the plaintiff had left the land waste, and had refused to pay rent or give a written relinquishment of the land, and that the first defendant had accordingly let it to the second defendant:—*Held*, that, although the defence did not disclose a surrender by the plaintiff, recorded as prescribed in the Rent Recovery Act, s. 12, the Court should determine the issue whether there had been a surrender by the plaintiff.

Narasimma v. Lakshmana 124

9. —————, s. 27—Order under
—Civil Procedure Code, s. 2—Decree:

An order made under Rent Recovery Act (Madras), s. 27, is not a decree within the meaning of Civil Procedure Code, s. 2.

Perumal v. Rajagopala 248

RES JUDICATA—Civil Procedure Code, s. 13—Rent Recovery Act (Madras)—Decision
of Revenue Court as to landlord's title:

In a summary suit filed by a landlord against his tenant in the Court of the Deputy Collector under the Rent Recovery Act (Madras), s. 9, to enforce acceptance of a patta by the defendant, it appeared that, in a former suit between the same parties in the same Court, it had been decided that the defendant was the plaintiff's tenant and as such bound to accept a patta from him in respect of the land in question in the present suit:—*Held*, that the defendant was not entitled in the present suit to dispute the plaintiff's title, since the former decision constituted it *res judicata*.

Venkatachalapati v. Krishna 287

2. —————:

See CIVIL PROCEDURE CODE, s. 13.

REVENUE RECOVERY ACT—ACT II OF 1864 (MADRAS), ss. 1, 39, 42—Rights
of jenmi in Malabar—Grant by Government of waste land on a cowle—Sale of
land for arrears of revenue:

The Collector of Malabar in 1869 let defendant No. 2 into possession of certain waste land under a cowle, and in 1872 granted to him a patta for it. The cowledar brought the land into cultivation, but subsequently left it uncultivated and failed to pay the assessed revenue; the land was accordingly attached in 1885 for arrears of revenue under the Revenue Recovery Act, 1864, and sold to defendant No. 3. The plaintiff, who was the jenmi of the land, had no notice of the grant of either the cowle or the patta: he asserted his right to jenmibhogam in a petition presented to the Collector at the time present suit was brought to set aside the sale:—*Held*, the interest of the jenmi did not pass by the sale.

Secretary of State v. Ashtamurthi 89

2. —————, s. 2—Remedies
of assignee from Government of land revenue—Land security for revenue:

The land revenue payable on certain land having been assigned to a temple by Government, which, however, continued to issue a patta for the land, the arrears accrued due.

Krishnasami v. Venkatarama 319

3. —————, ss. 42, 44—
Sale of part of a holding for arrears of revenue due on another part:

The plaintiff sued, as the purchaser under a court-sale, for possession of certain land, which the defendant's vendor had purchased at a sale held under the Revenue Recovery Act for arrears of revenue accrued due on other land belonging to the judgment-debtor:—*Held*, the suit should be dismissed.

Sama v. Strinivasa 477

SCHEDULED DISTRICTS ACT—ACT XIV OF 1874, ss. 1 to 7 and 11—Penal Code
—Act XLV of 1860, ss. 1, 2—Criminal Procedure Code, s. 1—Laws Local
Extent Act—Act XV of 1874, ss. 3, 4—Criminal Procedure in the Laccadive
Islands:

The Scheduled Districts Act having been extended to the Laccadive Islands, but no notifications having been made under that Act with regard to the criminal law to be administered there, the Penal Code and the Criminal Procedure Code are in force. Accordingly, when the Sub-Collector of Malabar, as such, tried and sentenced certain persons on one of the Laccadive Islands, not observing the procedure prescribed by the Criminal Procedure Code:—*Held*, that the proceedings were void and should be quashed.

Queen-Empress v. Cheria Koya 353

SPECIFIC RELIEF ACT—ACT I OF 1877, s. 9—Immoveable property—Right of
ferry:

A right of ferry is immoveable property or an interest therein within the meaning of Specific Relief Act, s. 9.

Krishna v. Ahilanda 54

2. —————, ss. 27, 42—Registration Act—Act III of
1877, s. 48—Transfer of Property Act—Act IV of 1882, s. 54—Oral agreement
for sale of land—Subsequent conveyance with notice—Delivery of possession—
Priority—Specific performance—Declaratory suit—Consequential relief:

Plaintiff being in possession of certain land as an incumbrancer under a registered instrument agreed orally with the mortgagor in 1885 to purchase it. The mortgagor subsequently sold the land to others who took the conveyance which was registered with notice of the plaintiff's mortgage and of the oral agreement with him. Plaintiff now sued for a declaration that the conveyance was not binding on him and for specific performance of the oral agreement:—*Held*, (1) that the suit was not bad for want of a prayer for delivery up, and cancellation of the conveyance; (2) that the plaintiff's possession under his incumbrance together with the agreement to sell was equivalent to delivery of possession within the meaning of Registration Act, s. 48; (3) that the plaintiff was entitled to have the oral contract specifically enforced notwithstanding the subsequent registered sale.

Kannan v. Krishnan 324

3. —————, s. 40—Civil Procedure Code, s. 50—In-
consistent causes of action—Cancellation of instruments—Interest necessary to
support the suit:

In a suit for cancellation of a sale-deed by the person whose name appeared on it as executant, it was alleged in the plaint that it was a forgery, and that if it was not a forgery, its execution had been obtained by fraud and that it was, moreover, void for want of consideration. The plaintiff's interest in the property to which the instrument related had been assigned by her to another by a conveyance which contained certain covenants by her with regard to the land:—*Held*, that the plaintiff was not entitled to maintain the suit. *Per cur.*—The gist of the plaintiff's charge against the defendant was that she had never executed a sale-deed in his favor, and that the document set up by him was a forgery. It was not competent to the plaintiff to combine with this charge as an alternative the wholly inconsistent charge that if she did execute the document no consideration was received by her or that fraud had been practised upon her.

Iyyappa v. Ramalakshamma 54

4. _____, s. 42—*Declaratory decrees—Suit by reversioner:*

The intervention of two life estates does not preclude the reversioner from obtaining a declaration of his interest as to land under Specific Relief Act, s. 42.

Kondasami v. Akkamal 195

5. _____, s. 43—*Suit for declaration of title as holder of a stanom to which a malikana allowance is attached—Pensions Act—Act XXIII of 1871, s. 6:*

Suit to declare plaintiff's title to the stanom of fifth Raja of Palghat; the first Raja (defendant No. 1) received a malikana allowance from Government payable to the various stanomdars, but had refused to pay to plaintiff the fifth Raja's share:—*Held*, the plaintiff being entitled to sue for further relief than the declaration of his title and having omitted to do so, the suit must be dismissed under Specific Relief Act, s. 42. *Per cur.*—Pensions Act, s. 6, was not applicable to this case.

Kombi v. Aundi 75

STAMP ACT, ACT I OF 1879, s. 3—Bond:

R. executed a document, by which he promised to pay on demand Rs. 10-12-0 with interest to S.R. The writer of the document and some others signed the document as witnesses:—*Held*, that the document was a bond and liable to stamp duty as such.

References under Stamp Act, s. 49 147

6. _____, s. 1, art. 5(a)—*Agreement or memorandum of agreement relating to the sale of shares—Agreement by correspondence:*

Correspondence having passed between the plaintiff and defendant relating to the sale of shares in a certain company by the plaintiff to the defendant, and the sale not having been carried out, the plaintiff in a suit for damages against the defendant sought to prove an agreement for sale from the letters, none of which were stamped:—*Held*, the letters, though unstamped, were admissible as evidence of an agreement, since they did not constitute an agreement or memorandum of agreement.

Rainier v. Gould 255

STATUTES 11 and 12, Vic. Cap. 21:

See INSOLVENT ACT.

TEMPLE MANAGEMENT—Dismissal of dharmakarta, grounds for—Dharmakarta guilty of misfeasance retained in office on terms:

A suit to remove a dharmakarta, though he is held to have been guilty of misconduct in the discharge of his duties as such may, in the absence of any proved and deliberate dishonesty on the defendants' part, be dismissed on conditions to be complied with by him.

Sivasankara v. Vadagiri 6

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 44—Hindu law—Sale by a coparcener of his share in specific property—Rights of the vendee:

A purchaser from a member of an undivided Hindu family of that member's share in a specific portion of the ancestral family property cannot sue metes and bounds of his vendor's share in that portion of the property.

Venkatarama v. Meera Labai 275

7. _____, s. 54—*Registration Act—Act III of 1877, s. 48—Oral agreement for sale of land—Subsequent conveyance with notice—Delivery of possession—Priority—Specific Relief Act—Act I of 1877, ss. 27, 42—Specific performance—Declaratory suit—Consequential relief:*

Plaintiff being in possession of certain land as an incumbrancer under a registered instrument, agreed orally with the mortgagor in 1885 to purchase

it. The mortgagor subsequently sold the land to others who took the conveyance which was registered with notice of the plaintiff's mortgage and of the oral agreement with him. Plaintiff now sued for a declaration that the conveyance was not binding on him and for specific performance of the oral agreement:—*Held*, (1) that the suit was not bad for want of a prayer for delivery up, and cancellation of the conveyance; (2) that the plaintiff's possession under his incumbrance together with the agreement to sell was equivalent to delivery of possession within the meaning of Registration Act, s. 48; (3) that the plaintiff was entitled to have the oral contract specifically enforced notwithstanding the subsequent registered sale.

Kannan v. Krishnan 324

8. _____, s. 55—*Vendor and purchaser—Implied covenant for title—Acts amounting to waiver of covenant—Possession taken under contract:*

On 16th August 1885 the defendant, having agreed to purchase a house belonging to the plaintiff, executed an agreement, in which it was stated "that that he had this day purchased the house belonging to Ghousiah Begum Sahiba (plaintiff) for Rs. 16,000, that he had paid Rs. 1,000 as an advance and taken possession, that he would pay the balance with interest at the rate of Rs. 1 per cent. *per mensem* within fifteen days, and obtain a sale-deed from the said Begum." The plaintiff at the time of the agreement had not obtained a conveyance of the house to her, and was not able to tender a conveyance to the defendant until January 1887, when she did so. Meanwhile the defendant took possession under the agreement, paying only a portion of the balance of the purchase money; he also executed certain repairs on the house and let it to a tenant and enjoyed the rent. It further appeared that shortly after the above agreement he sought to obtain a sale-deed from the plaintiff and attempted to raise a sum of money on a mortgage of the house. On 22nd December 1885 the defendant wrote to the plaintiff demanding a conveyance and giving notice that if the sale be not completed in the following month, the interest on the balance of the purchase money should cease; but no evidence was given as to any appropriation of the purchase money by the defendant. In 1887 the plaintiff filed the present suit to recover the unpaid purchase money with interest at 12 per cent.:—*Held*, that the acts of the defendant amounted to a waiver of the implied covenant for title, and that the plaintiff was entitled to recover the unpaid purchase money with interest at the agreed rate up to the date of payment, and that he was further entitled to a lien on the property for that amount.

Ghousiah Begum v. Rustumjiah 158

9. _____, ss. 65, 68—*Mortgagor and mortgagee—Construction of mortgage—Sale of premises at suit of a prior mortgagee—Right of a second mortgagee to sue the mortgagor personally:*

The defendants, having already mortgaged certain land to another, executed a hypothecation bond comprising the same land in favor of the plaintiff to secure a debt due by them to the plaintiff and covenanted therein to pay to him daily the proceeds of certain sales of firewood, of which the plaintiff was to credit part towards the secured debt. The defendants having failed to pay the amount due on the first mortgage, the first mortgagee obtained a decree and brought the land to sale. The plaintiff now brought a suit in the Small Cause Court to recover the amount due on footing of his hypothecation bond:—*Held*, that the hypothecation bond contained no personal covenant by the obligors, but that on the construction of ss. 65 and 68 of the Transfer of Property Act the obligors had committed default so as to entitle the obligee to sue them personally under the former section.

Singjee v. Tirumengadam 192

10. _____, s. 68—*Sale of mortgaged premises under Land Acquisition Act—Personal suit by mortgagee:*

The sale of mortgaged premises under the Land Acquisition Act is not a destruction of the security within the meaning of s. 68 of the Transfer of Property Act and does not enable the mortgagee to sue the mortgagor personally.

Arumugum v. Sivagnana 321

6. *mortgages—Gross negligence—Extinguishment of charges—Registration Act—Act III of 1877, ss. 17 (d), 48—Notice by registration:* ss. 78, 101—Priority of
- In a suit for declaration of priorities of mortgages and for foreclosure, it appeared that the mortgage premises were mortgaged to defendant No. 2 in 1879 and to the plaintiff in 1883 and again in 1884, and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff and defendant No. 2 had no actual notice at the date of their mortgage and conveyance, respectively, of the previous incumbrances. The plaintiff received the title-deeds to the estate from the mortgagor on the execution of the mortgage of 1883; defendant No. 2 alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that previous to the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody:—*Held*, (apart from the question whether the mortgage of 1879 had been extinguished by the conveyance of 1886), that the conduct of defendant No. 2 in permitting the title-deeds to remain in the possession of the mortgagor amounted to gross negligence within the meaning of Transfer of Property Act, s. 78, and that the registration of the mortgage to defendant No. 2 did not affect the plaintiff with constructive notice of its existence, and that accordingly the subsequent mortgages to the plaintiff were entitled to priority.
- Madras Building Company v. Rowlandson* 383

7. s. 375: s. 83—Civil Procedure Code,
- A sum of money having been deposited in Court under Transfer of Property Act, s. 83, by a vendee of the mortgagor, the mortgagee refused to accept it in discharge of his mortgage except on the terms that the depositor should convey to him part of the mortgage premises, which he consented to do. This agreement was not communicated to the Court and the depositor refused to carry it out when the mortgagee had withdrawn the money as above:—*Held*, that the mortgagee was entitled to a decree for specific performance of the agreement to convey.
- Tatayya v. Pichayya* 316

8. ss. 92, 93—Time fixed for redemption—Application to execute the decree:
- In a suit to redeem a kanom a redemption decree was passed which provided that the kanom amount and the value of improvements be paid in three months. The decree amount was not paid within that period, but the decree-holder applied to execute the decree at a later date:—*Held*, that the decree-holder was not then entitled to have the decree executed. *Povesh Nath Mojumdar v. Ramjodu Mojumdar* (I.L.R., 16 Cal., 246) dissented from.
- Elayadath v. Krishna* 267

9. ss. 106, 108—Landlord and tenant—Assignability of tenancy—Suit by zamindar to set aside a court-sale of his raiyat's interest—Burden of proof:
- A zamindari raiyat mortgaged the land comprised in his holding, and the mortgagee, having sued and obtained a decree on his mortgage, attached the mortgagor's interest in the land and purchased it at the court-sale held in execution of his decree. The zamindar, who had intervened unsuccessfully in execution, now sued to set aside the sale and to eject the decree-holder and the judgment-debtor from the land. Neither party adduced evidence:—*Held*, that as the burden of proof lay on the plaintiff, and had not been discharged, the suit must be dismissed.
- Appa Rau v. Subbanna* 60

10. s. 135 (d)—Adjudication on claim:
- In a suit upon a hypothecation bond brought by an assignee for value from the obligee, it appeared that the obligee had previously to the assignment obtained a decree by consent against the obligors for an instalment of the money due upon it, and had also made good his claim to the land comprised in it as against an attaching creditor of the obligors:—*Held*, that there had been no adjudication on the claim to exclude the rule in Transfer of Property Act, s. 135, and accordingly the plaintiff was entitled to recover only the sum paid by him for the assignment with interest from the date of payment to the date of the decree.

Ramachandra v. Venkatarama 516

11. s. 135—Assignment for value of a debt—Decree to which the assignee is entitled:

In a suit against a debtor an assignee for value of the debt is precluded by Transfer of Property Act, s. 135, from recovering more than the price paid by him for the assignment with interest thereon and the incidental expenses of the sale. *Jani Begam v. Jahangir Khan* (I.L.R., 9 All., 476), approved.

Nalakanta v. Krishnasami 225

- TRUSTEE—Limitation—Adverse possession—Suit by a trustee of a devasom disaffirming the act of his predecessor:

The trustee of a Malabar devasom, who had succeeded to his office in June 1883, sued in 1887 to recover for the devasom possession of land which had been demised on kanom by his predecessor in February 1881, on the ground that the demise was invalid as against the devasom. The defendant had been in possession of the land for more than twelve years, falsely asserting the title of kanomdar with the permission of the plaintiff's predecessor in office:—*Held*, (1) the suit was not barred by limitation; (2) the plaintiff was entitled to maintain the suit for the purpose of recovering for the trusts of the devasom property improperly alienated by his predecessor. *Suppammal v. The Collector of Tanjore* (I.L.R., 12 Mad., 1387) distinguished.

Vedapattai v. Vallabha 402

- VARIANCE BETWEEN PLEADING AND PROOF—Evidence Act—Act I of 1872, s. 92—Collateral evidence to show that an apparent sale-deed was a mortgage:

In a suit by an attaching creditor to set aside an order (which allowed an objection made to his attachment by one claiming under a sale-deed from the judgment-debtor), and for the declaration of the judgment-debtor's title, the sole issue framed was whether the sale-deed was *bond fide* and supported by consideration:—*Held*, that the plaintiff was entitled to show by collateral evidence that the sale-deed was really a usufructuary mortgage and that the mortgage had expired.

Venkatratnam v. Reddiah 494

VENDOR AND PURCHASER:

See TRANSFER OF PROPERTY ACT, s. 55.

- VILLAGE COURTS ACT (MADRAS)—ACT I OF 1889, s. 13—Civil Procedure Code, s. 15—Jurisdiction of Small Cause Courts to hear suits cognizable by Village Munsif:

The term "Court of lowest grade" in Civil Procedure Code, s. 15, refers only to Courts to which the Civil Procedure Code is applicable, and consequently Small Cause Courts have concurrent jurisdiction with Courts of Village Munsifs to hear suits which are cognizable by the latter.

Mirkhan v. Kadarsa 145

- WILL, CONSTRUCTION OF—Absolute gift—Repugnant gift over—Indefiniteness of gift—Reputed wife:

On the construction of a will which was as follows:—"I hereby declare all former wills cancelled. I desire that my wife should obtain possession of all my property and enjoy the benefit of all monies that may accrue until her

death, when I wish that whatever may remain shall be used for the education of the children of the Eurasian and Anglo-Indian community. I desire that this will be administered by the Official Trustee of Madras:—*Held*, (1) that the reputed wife should take under the will without strict proof of the marriage, no fraud being imputed to her in the matter of the marriage; (2) that the gift to the wife was absolute and the gift over bad for repugnancy.

Administrator-General of Madras v. White 379

ZAMINDARI—Impartibility of zamindari shown by evidence—Grant by sanad in 1802 of zamindari without change of rule of succession by primogeniture—Madras Regulation XXV of 1802:

The question whether an estate is impartible and descends by the law of primogeniture, or is subject to the ordinary Hindu law of inheritance, must be decided in each case according to the evidence given in it. The result of the evidence in this suit was to show that before, and in, the year 1802, the zamindar was in possession of the Devarakota zamindari, by right of primogeniture, as an impartible estate; and that he was so regarded by the Government. On the passing of Madras Regulation XXV of 1802, and the issue to him of a sanad-i-milkiyat-i-istimrari, in accordance with it, he acquired a permanent property in the zamindari lands at a fixed assessment, but they remained heritable as before; the estate remained entire; and there was no evidence of any intention on the part of the Government to alter the nature of the tenure. What was said in the judgment in the *Hansapur case* (12 M.L.A., 1) was applicable here. The estate continued to be impartible, and the rule of succession to it was not altered. It descended by the rule of primogeniture.

Mallikarjuna v. Durga 406

2. ———— **Impartible zamindari**—Right of zamindar to alienate—Regulation V of 1804 (Madras), ss. 2, 8—Suit by a ward of the Court of Wards—Non-joinder and misjoinder of parties—Civil Procedure Code, ss. 437, 464—Hindu Law:

The holder of an impartible zamindari, governed by the law of primogeniture, having a son, executed a mining lease of part of the zamindari for a period of twenty years, by which no benefit was to accrue to the grantor unless mining operations were carried on with success, and the commencement of mining operations was left optional with the lessee. On the death of the grantor, his minor son and successor, by the Collector of the district as his next friend (authorized in that behalf by the Court of Wards), now sued the assignee of the lessee to have the lease set aside. The second plaintiff was the grantee from the Court of Wards (acting on behalf of the minor zamindar) of certain mining rights on the same land. The defendant had executed a declaration of trust in respect of his interest in favour of certain persons who were not joined:—*Held*, (1) *per Parker, J.*, that the first plaintiff could sue by the Collector of North Arcot as his next friend, since the Court of Wards had authorized the latter to conduct the suit; (2) *per Muttusami Ayyar and Wilkinson, JJ.* (affirming the judgment of *Parker, J.*) (1) that the interests of the first and second plaintiffs not being inconsistent with each other, the suit was not bad for misjoinder; (2) that the defendant's interests not having been shown to be hostile to those of the persons entitled under the declaration of trust, the suit was not bad for non-joinder; (3) that the lease was not one which a managing member of an ordinary joint family governed by Mitakshara law could providently enter into; (3) *per Muttusami Ayyar and Wilkinson, JJ.* (reversing the judgment of *Parker, J.*) that in the absence of evidence of any family custom rendering the zamindari inalienable by the zamindar for the time being for purposes other than those warranted by the Mitakshara law, the lease was not invalid as against the plaintiffs. *Sartaj Kuari v. Deoraj Kuari* (I.L.R., 10 All., 272) discussed and followed.

Beresford v. Ramasubba 197

THE INDIAN LAW REPORTS, Madras Series.

APPELLATE CIVIL.

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

THIRUMALAI (PETITIONER), APPELLANT,

v.

RAMAYYAR AND ANOTHER (COUNTER-PETITIONERS, DEFENDANTS),
RESPONDENTS.*

Civil Procedure Code, ss. 253, 516, 583—Surety for the due performance of appellate decree—Mode of enforcing liability of such surety—Execution proceedings.

When security had been given on behalf of the respondent to an appeal under s. 516 of the Code of Civil Procedure for the due performance of the decree of the Appellate Court and the appeal had been successful:

Held, that under the provisions of ss. 253, 583, the decree of the Appellate Court could be enforced against the sureties in execution proceedings. *Venkapa Naik v. Baslingapa* (I.L.R., 12 Bom., 411), approved.

APPEAL against the order of S. Subbayyar, Subordinate Judge of Tinnevely, made on an application for the execution of the decree of the High Court in appeal No. 21 of 1886.

Defendant No. 2 in original suit No. 4 of 1884, on the file of the Subordinate Court, preferred the above appeal and obtained a decree reversing the decree of the Subordinate Court; he now sought to execute the decree of the High Court to the amount of Rs. 3,000 against two sureties who had furnished security on behalf of the plaintiff under section 546 of the Code of Civil Procedure for the fulfilment of the appellate decree.

* Appeal against Order No. 159 of 1886.

1889.
April 15, 18,
25.

THIRUMALAI v. RAMAYYAR. The Subordinate Judge dismissed the application and the petitioner preferred this appeal.

Bhashyam Ayyangar for appellant.

Rama Rau for respondents.

The further facts of this case and the arguments adduced on the appeal appear sufficiently for the purpose of this report from the judgment of Muttusami Ayyar, J.

MUTTUSAMI AYYAR, J.—This was an application for the execution of a decree, passed by the High Court in appeal, against two sureties who engaged under section 546, Code of Civil Procedure, to become liable for the performance of that decree before it had been passed. The Subordinate Judge dismissed the application on the ground that the decree could not be enforced against a surety. He observed that section 253 was applicable to decrees of the Court of first instance only, and that section 583 was not intended to extend its operation to decrees passed in appeal. It is contended before us that the construction suggested by the Subordinate Judge is not the true construction, and our attention is drawn to the decisions in *Bans Bahadur Singh v. Mughla Begam*(1), *Rashbehary Mookhopadhyaya v. Maharani Surnomoyee*(2), and *Venkapa Naik v. Baslingappa*(3). From the course of decisions on section 204 of Act VIII of 1859* it is clear that that section was considered to include decrees passed in appeal. This is conceded for the respondents in this case, but it is argued for them that the wording of section 204 has since been changed, that the change of expression has been intended to limit the special rule embodied in that section to decrees of the Court of first instance, and that the extension contemplated by section 583 does not include the provisions of section 253. The only case decided in this Court that has some bearing on the question is that of *Balaji v. Ramasami*(4). In that case, however, the surety contracted the obligation after the Appellate Court had passed its decree pending the disposal of

(1) I.L.R., 2 All., 601.

(2) I.L.R., 7 Cal., 403.

(3) I.L.R., 12 Bom., 411.

(4) I.L.R., 7 Mad., 284.

* Act VIII of 1859, section 204: Whenever a person has become liable as security for the performance of a decree or of any part thereof, the decree may be executed against such person to the extent to which he has rendered himself liable, in the same manner as a decree may be enforced against a defendant.

section 362: Application for execution of the decree of an Appellate Court shall be made to the Court which passed the first decree in the suit, and shall be executed by that Court, in the manner and according to the rules hereinbefore contained for the execution of original decrees.

an application for review. The Court, while declining to enforce the appeal decree against the surety, observed that "assuming that section 253 can be extended to appeals, it applied only to cases in which the security had been given before the passing of the decree in appeal." The point now raised for decision is whether section 253 can be extended to appeals. In the other High Courts there has been a difference of opinion. The High Court at Bombay and the majority of the Judges at Allahabad considered that the present Code did not alter the rule embodied in section 204, whilst the High Court at Calcutta, and some of the Judges at Allahabad considered that decrees of the Court of first instance alone could be enforced against sureties under the existing law. Comparing section 253 of the present Code of Civil Procedure with section 204 of Act VIII of 1859, it cannot be denied that there has been a change of expression in a material point. The words in the one were "whenever a person has become liable for the performance of a decree, &c.," whilst the words substituted for them in the other are "whenever a person has, before the passing of a decree in an original suit, become liable, &c." The case presupposed by the one set of words is the obligation of a surety contracted for the fulfilment of a decree whether in an original suit or in an appeal, whilst the case suggested by the other set of words is that of a surety who contracted the obligation before the passing of the decree in an original suit. I do not think that the words "the decree in an original suit" can be taken to mean the final decree in that suit, whether it is passed by the Court of first instance or by the Court of Appeal. The word "final" which is not found in section 253 will then have to be introduced into it, and we are not at liberty to alter the words. Again, section 583 shows that the Legislature first premised a distinction between decrees in suits and decrees in appeals, and then extended the operation of the rules applicable to the execution of decrees of Courts of first instance to the execution of decrees of the Appellate Courts.

The natural inference is that section 253, as suggested by its language, enacts a rule applicable to decrees of the Court of first instance. But section 583 appears to me to contain a statutory declaration that that rule shall also apply to decrees in appeal. The words "according to the rules hereinbefore prescribed for the execution of decrees in suits" must ordinarily include every

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rule relating to the mode of execution, and section 253 is inserted in the sub-division E of Chapter XIX which treats of the mode of executing decrees. It is then said that section 253 blends together the liability and the machinery, whilst the rules extended by section 583 are those which relate exclusively to the machinery; but I do not think there is sufficient foundation for this distinction. The sections which relate to the liability of the surety and which provide for its enforcement are not one and the same, whether in Act VIII of 1859 or in the present Code of Civil Procedure. In the former enactment sections 76 and 83 indicated how a surety became liable for the fulfilment of the original decree, and section 36 of Act XXIII of 1861 explained how his liability for the performance of the decree passed in appeal originated.* In the present Code, sections 479, 484 and 546 correspond to them. In the former it was section 204 that provided the machinery for its enforcement, whilst in the latter the machinery is contained in two sections, 253 and 583. The words in section 253 "whenever a person has, before the passing of a decree in an original suit, become liable for the performance of the same," only premise the case in reference to which the rule of procedure is prescribed; and they do not support the remark that the liability

* Act VIII of 1859, section 76: If the defendant fail to show such cause, the Court shall order him to give bail for his appearance at any time when called upon while the suit is pending, and until execution or satisfaction of any decree that may be passed against him in the suit; and the surety or sureties shall undertake, in default of such appearance, to pay any sum of money that may be adjudged against the defendant in the suit, with costs. Any order made by the Court, under the provisions of this section, shall be open to appeal by the defendant.

section 83: If the Court, after examining the applicant and making such further investigation as it may consider necessary, shall be satisfied that the defendant is about to dispose of or remove his property, with intent to obstruct or delay the execution of the decree, it shall be lawful for the Court to issue a warrant to the proper officer, commanding him to call upon the defendant, within a time to be fixed by the Court, either to furnish security in such sum as may be specified in the order to produce and place at the disposal of the Court when required the said property or the value of the same or such portion thereof as may be sufficient to fulfil the decree, or to appear and show cause why he should not furnish security. The Court may also in the warrant direct the attachment until further order of the whole or any portion of the property specified in the application.

Act XXIII of 1861, section 36: When an order is made for the execution of a decree against which an appeal has been preferred, it shall be lawful for the Court which pronounced the decree to require security to be given for the restitution of any property which may be taken in execution of the decree or of the value thereof, and for the due performance of the decree or order of the Appellate Court. The Appellate Court may in any such case direct the Court which pronounced the decree to take such security.

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and the machinery for its enforcement are blended together. Such being the case there is nothing unreasonable in holding that section 583 includes the rule embodied in section 253 among the rules applicable to execution of decrees in suits, and extends them all to execution of decrees passed in appeal. As to the question of necessity for changing the language of section 204 of Act VIII of 1859 it seems to me that the change was designed to bring the language of section 253 into complete accordance with the general scheme of the Code. Between section 204 and section 362 of Act VIII of 1859 there was this incongruity or want of precision. The case presupposed by the former was one in which a surety was liable for the performance of a decree, and the words "a decree" included appeal decrees. Again, the rules applicable to the execution of original decrees were declared by section 362 to apply to the execution of decrees of an Appellate Court. In the present Code all the rules applicable to the execution of original decrees were kept distinct, collected together in Chapter XIX and classified under appropriate heads. In carrying out this scientific arrangement, it was probably considered desirable to make section 253 in express terms what its place in the Code implies, viz., strictly a provision on the mode of executing original decrees and to indicate its applicability to the decrees of Appellate Courts by the general direction in section 583 that all the rules that apply to one shall likewise apply to the other. Again, the obligation which the surety undertakes is an obligation to fulfil the decree which may be passed against the defendant or appellant in the original suit or in appeal, and the obligation is contracted before the Court and is as much a matter of record as the decree undertaken to be fulfilled. There is no apparent reason for directing the successful party to obtain a fresh decree against the surety whilst the very obligation is to fulfil the decree against the defendant or the appellant. If this principle is to be recognized for the purpose of executing against the surety decrees of the Court of first instance, it is difficult to see why decrees of Appellate Courts should be excluded from its operation. I am therefore of opinion that the construction placed on sections 253 and 583 in *Venkapa Naik v. Baslingapa*(1) is the true construction, and I would set aside the order of the Subordinate Judge and

(1) I.L.R., 12 Bom., 411.

THIRUMALAI direct that the decree be executed against the sureties in accordance with law.
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The respondents will pay the appellant's costs throughout.

WILKINSON, J.—I also am of opinion that the decree can be executed against the surety, the provisions of section 253 being made applicable by section 583.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SIVASANKARA (DEFENDANT), APPELLANT,

v.

VADAGIRI (PLAINTIFF), RESPONDENT.*

1889.
August 14,
Sep. 29.

Temple management—Dismissal of dharmakarta, grounds for—Dharmakarta guilty of misfeasance retained in office on terms.

A suit to remove a dharmakarta, though he is held to have been guilty of misconduct in the discharge of his duties as such may, in the absence of any proved and deliberate dishonesty on the defendant's part, be dismissed on conditions to be complied with by him.

APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in original suit No. 22 of 1885.

Mr. Gover, Rama Rau, and Mahadeva Ayyar for appellant.

Ramasami Mudaliar, Sadagopa Charyar and Ranga Charyar for respondent.

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.

JUDGMENT.—The appellant and the respondent are the joint dharmakartas of Kandasami temple at Tiruporur, in the District of Chingleput. The respondent charged the appellant with various acts of misfeasance and sues for his dismissal from the office of dharmakarta. The District Judge has found against the appellant with regard to three of the charges made against him. He has found that the appellant has been guilty of malversation in respect of casuarina trees at Kalavakam and of improperly maintaining his mother and sister out of temple funds, and he has also found,

though this is not a charge specifically made in the plaint, that SIVASANKARA
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appellant has been persistently setting the respondent's authority at naught. Concerning the charge of consorting with dancing girls and using temple money for their use, while the District Judge believes that appellant has been guilty of immorality, he does not find that the immorality was accompanied by malversation of property. On the strength of the three charges above mentioned, the District Judge has decreed the appellant's removal from office. With regard to the last of the three charges we are disposed to agree with the District Judge in thinking that the appellant was endeavouring to ignore and disregard the respondent's position as a co-trustee. It is in evidence that, when the Government severed its direct connection with the management of the temple in 1842, the respondent's father and the appellant's predecessor in office were appointed as joint trustees, and that from that time they acted as such. In 1874 an agreement was made between the respondent and the appellant's predecessor, the purport of which was to abridge the functions of the respondent and restrict him to looking into the accounts of the temple once a month, and acting in all matters with the consent of his co-trustee. This agreement, we are of opinion, can only be regarded as made for mutual convenience as long as mutual confidence subsisted. Any other construction of it would involve the recognition of a right in a trustee to abdicate or delegate his duty.

We must, therefore, hold that the appellant is not justified by the arrangement with his predecessor in conducting himself as he has done with regard to the respondent. He has taken a wrong view of his position and his duties; but, unless it appears that in the conduct he has pursued he has been actuated by dishonest motives, we do not think he should be dismissed from the office of trustee. As regards the maintenance by the appellant of his mother and widowed sister out of temple funds, the evidence on both sides shows that they lived together in the mutt and under his protection. The admission in the written statement that he has no means lends weight to the evidence for the respondent that temple funds have been spent upon their support and the evidence of the two witnesses who say that the appellant's sister had property of her own is vague and inconsistent. We therefore agree with the District Judge in thinking that this charge is well founded. Whatever may be the moral obligation on the appel-

* Appeal No. 128 of 1887.

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VADAGIRI. lant's part to support his mother and sister, we must hold that an expenditure of temple funds for that purpose is not justified and constitutes a breach of trust. It is, however, of a comparatively venial character and would not by itself merit the extreme penalty of dismissal from office.

The more serious charge is that relating to the misappropriation of casuarina trees. The fact that two hundred trees in a garden at Kalavakam, belonging to the devastanam, were some two or three years ago cut down and sold by the defendant is spoken to by several witnesses. Two of the respondent's witnesses depose to the purchase of the wood by Ruthnavalu Mudali for Rs. 110. The first witness says that the money was paid to the appellant in the temple and taken charge of by the accountant. The appellant's witnesses, other than the appellant himself, admit the existence of the plantation, and the fact that some two or three years ago some trees, but not two hundred, were cut down. These trees, they say, were used for making pandals for the temple. The defendant, in his written statement, says:—"There never was a casuarina garden belonging to Tiruporur Kandasami," meaning apparently to deny in terms what is alleged in the eighth head of charge. This denial he repeats in his evidence adding "there is a tope in Kalavakam; it is my own property; the late dharmakarta purchased it from his own money." He says further that no account was kept with regard to the casuarina plantation and that such account was not handed to the amin, but when the Commissioner came on the second occasion, appellant says he showed him an account. From the list of accounts taken charge of by the amin as to which he speaks in a general way, it appears that there was a casuarina account, but no particulars are given and it is not shown to what garden it refers, by whom it was kept, or in whose custody. In a later report of another amin, the account is said to be "not found," but again no particulars are given, and the amin, who is examined, merely says he made a list and a report. The District Judge, without any examination of the evidence, has simply recorded a finding of guilty on the charge of misappropriating casuarina trees. Apparently he gave credit to the plaintiff's witnesses, and, if they are believed, it is clear that the appellant has not accounted for the proceeds of the trees. The District Judge says nothing concerning the appellant's assertion of a claim to the casuarina garden

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VADAGIRI. in his own right, although the circumstance of his making such a claim would, if the claim were made deliberately and with the knowledge that he was seeking to appropriate temple property, have constituted important evidence against the appellant. We observe that the appellant did not in his written statement lay any claim to the garden; his denial seems to have strict reference to the charge as laid in the plaint and, in a paragraph, it is admitted that the devastanam has some casuarina plantation. The same admission, moreover, is made throughout the evidence of the witnesses and even the appellant declares that the trees admitted to have been cut down were used for devastanam purposes. Having regard to all the circumstances, we are not prepared to take a more serious view of the appellant's conduct with regard to the casuarina than has been taken by the District Judge. We accept the finding that the appellant has not accounted for the proceeds of trees sold, but acquit the appellant on the graver charge of attempting to appropriate the garden to himself as his private property.

It is contended on behalf of the appellant that the misconduct proved against him is not sufficient to warrant his dismissal from office, and reliance is placed on the observations made in the case of *Chinna Jijan v. Durma Dossji*(1). Having regard to the considerations of expediency suggested in that case and to the absence of any proved and deliberate dishonesty on the appellant's part, we are of opinion that the interests of the temple do not absolutely demand the dismissal of the appellant. At the same time we do not altogether acquit him of misconduct. In the attitude he has assumed to the co-trustee, in using temple funds for the support of his mother and sister and not accounting for the money realized by sale of wood, he has acted wrongly and improperly. We shall not, therefore, dismiss the suit unconditionally. But we direct that, if within one month from the date of the decree the appellant do file in the District Court an undertaking signed by him to the effect that henceforth he will loyally co-operate with the respondent, allowing him to take an equal part in the management of the temple and its property, and to have access to the accounts, and liberty to examine the jewels and other things in the temple, and also that henceforth he will not

(1) 5 Mad. Jurist, 214.

SIVASANKARA
VADAGIRI. expend any part of the temple moneys on the maintenance of his mother and sister or for any other purposes than those of the temple, and further that, if within one month from the same date, the appellant do pay the sum of Rs. 110 into the District Court, this appeal be allowed and the decree of the District Court be reversed except as to costs, and the suit dismissed. On the appellant's making default in filing the abovementioned undertaking or paying the money into Court as required, the appeal will stand dismissed. In either event, the appellant must pay the costs of this appeal.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

NARASIMMA (DEFENDANT), APPELLANT,

v.

MANGAMMAL (PLAINTIFF), RESPONDENT.*

Hindu law—Inheritance—Mother's brother—Father's sister.

According to the Hindu law current in the Madras Presidency, the father's sister is not entitled to inherit in preference to the mother's brother.

Semle: per Wilkinson, J.—The father's sister is a bandhu.

APPEAL against the decree of G. D. Irvine, Acting District Judge of Coimbatore, in original suit No. 25 of 1887.

Suit to establish the plaintiff's right as heir to one Ellama Naik (deceased) and to recover from the defendant the amount collected by him under an heirship certificate. The plaintiff was paternal aunt and the defendant was maternal uncle of the deceased. The Acting District Judge held that the plaintiff was a nearer heir than the defendant, on the ground that she was a bandhu *ex parte paterna*, and accordingly passed a decree in favor of the plaintiff.

The defendant preferred this second appeal.

Bhashyam Ayyangar and Ramachandra Ayyar for appellant.

The plaintiff has obtained a decree on the ground that she is a bandhu *ex parte paterna*. If she could be entitled to inherit, it would be as a sapinda and not a bandhu; but, in the right view of the law, she is not an heir at all, and in any case she cannot come

in before the defendant or until the male heirs are exhausted. In the enumeration of bandhus in Mitakshara, chap. 11, s. 6 (see Mayne's Hindu Law, 4th edition, § 472), a son of either the plaintiff, the father's sister, or the defendant, the mother's brother would have been expressly included as "own cognate kindred." Neither paternal aunt nor maternal uncle comes within the terms of that enumeration, but the latter is really included and elsewhere he appears as a specified bandhu.

In *Lakshmanammal v. Tirurengada*(1) the contest was between a sister and sister's son; but the decision, which was in favor of the latter, did not involve a decision that a sister was in the line of heirs: the Court said if that matter had to be decided, a reference to the Full Bench would have been necessary. But in any view that decision is inapplicable here, for the sister being mentioned in certain texts, and some commentators including "sister" in "brother," and Manu, chap. IX, 211, 212, giving her certain special rights, there are indications that she has a right to inherit (though not so clear as those with regard to a widow or daughter), whereas there are none as to the father's sister.

In the scheme of the Mitakshara—*sagotras* come first, then *samonadakas* who are still of the same *gotra*, and then *bandhus* who are not of the same *gotra*. Among *sagotra sapindas* are inserted some female relations—wife (regarded in Bombay as a *sagotra*, because the wife of a *sapinda*), mother and great-grandmother. Then among the *bandhus* (who are enumerated in the Mitakshara by way of illustration merely) appear the offspring of a female *sapinda* with a male of a different *gotra*. The father's *gotra* is of course the *gotra* of the son, who is accordingly called *binna gotra sapinda*, because he is the offspring of persons of two *gotras*, and this would appear to be the true definition of a *bandhu* and explains his being postponed as such to *samonadakas* of fourteen degrees of remoteness.

(*Shephard, J.*—Your conclusion then is that the maternal uncle is a bandhu, because the mother's mother is a *sapinda* who marries into a different *gotra*?)

Yes; and it is also a fact to be noticed with reference to the enumeration in the Mitakshara that it gives only the extreme limits of the relationship—mentioning the sons, not the father.

(1) I.L.R., 5 Mad., 241.

* Appeal No. 169 of 1888.

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But the maternal uncle is specified as a bandhu in the Viramirodaya, translated in *Amrita Kumari Debi v. Lakhinarayan Chuckerbutty*(1).

As to the claims of the father's sister, see *Mari v. Chinmamal*(2), where, after discussing the Bombay rule that a mother is a gotraja sapinda because of her marriage into the gotra, the Full Bench decided practically that a stepmother is not a bandhu or an heir at all, because "mother" does not include "stepmother," and *Muttusami Ayyar, J.*, said he did not think that all female sapindas are to be recognized as heirs in this Presidency. The exclusion of females to its full extent is exemplified and explained in that case and also in *Krishnayya v. Pichamma*(3), *Gauri Sahai v. Rukko*(4). The Judge is wrong in attaching so great importance to the fact that the plaintiff is related through the father and the defendant through the mother; the maternal uncle comes under "own kindred" and so would the paternal aunt if she could come in at all.

Subramanya Ayyar and *Mahadeva Ayyar* for respondent.

Neither party comes under the expressions employed in the Mitakshara enumeration of bandhus, and there is no decided case precisely in point, but *Amrita Kumari Debi v. Lakhinarayan Chuckerbutty*(1) proceeds on the view that it would be absurd to hold that where sons are bandhus the parents would not be bandhus. It is admitted that a sister is a bandhu, and by parity of reasoning a paternal aunt would be one too; and as she is among paternal kindred, she would necessarily be a preferable heir to any maternal kindred. See also Stokes' Hindu Law Books, p. 447, as to Mitakshara, chap. II, s. 5, cl. 5.

WILKINSON, J.—The question for determination in this appeal is—who is entitled to succeed to the property of the deceased minor, his father's sister (plaintiff), or his mother's brother? The Lower Court has decided in favor of the paternal aunt, on the ground that she is a bandhu, and that the father's kindred have in Hindu Law a preference over the kindred of the mother.

On appeal it is argued (1) that the paternal aunt is not a bandhu; (2) that if it be held that the father's sister is a bandhu and in the line of heirs, she will come in only after all male heirs

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are exhausted; and (3) that the maternal uncle, being a specified bandhu, comes in before the paternal aunt.

The position of the maternal uncle as a bandhu was recognized by the Privy Council in the case of *Gridhari Lall Roy v. The Bengal Government*(1). Their Lordships relied on a passage written by the author of the Mitakshara, though not to be found in that portion of the Treatise translated by Colebrooke, and on a passage of the Viramirodaya, and were of opinion that the enumeration of bandhus in the text of Mitakshara, chap. II, s. 6, is illustrative and not exhaustive. The passage in the Viramirodaya, with reference to the said enumeration, is as follows:—

"The term cognate (bandhu) in the text of Yagnavalkya "must comprehend the maternal uncles and the rest, otherwise "the maternal uncles and the rest would be omitted, and their "sons would be entitled to inherit and not they themselves "though nearer in the degree of affinity, a doctrine highly objectionable."

The words "and the rest" must, I think, apply to "father's sister," "mother's sister," and the others whose sons are enumerated in the passage in the Mitakshara together with the maternal uncle. It follows, therefore, that the same passages, which are an authority for classing the maternal uncle among the bandhus, support the claim of the maternal aunt to be recognized as a cognate or bandhu. But then we must hold on the authority of *Lakshmanammal v. Tiruvenguda*(2) that, in virtue of the rule excluding the females in favor of preferential male heirs, the claim of the maternal uncle is superior as bandhu to that of the father's sister.

The decree of the Lower Court must be reversed and the suit dismissed with costs throughout.

SHEPARD, J.—The question in this appeal is—who is the nearer heir to one Ellamma Naik deceased: his father's sister, the plaintiff, or his mother's brother, the defendant? There is no doubt that the latter being maternal uncle of the deceased has a place among his heirs. The maternal uncle and his nephew stand in the relation of bandhus to each other, and, as such, either inherit to the other in the absence of preferable heirs, *Gridhari Lall Roy v. The Bengal Government*(1), *Amrita Kumari Debi v.*

(1) 2 B.L.R., F.B., 42.
(3) I.L.R., 11 Mad., 287.

(2) I.L.R., 8 Mad., 107.
(4) I.L.R., 3 All., 45.

(1) 12 M.I.A., 448.

(2) I.L.R., 5 Mad., 241.

NARASIMMA *Lakshinarayan Chuckerbutty*(1), *Krishnayya v. Pichamma*(2). The question here is whether the father's sister is a preferable heir?

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The District Judge has ruled that she is entitled to inherit as a bandhu, and that, as the father's kindred are to be preferred to the mother's, she ranks as an heir above the maternal uncle. There is no doubt that in this Presidency the father's sister cannot, any more than a man's own sister, claim a place as his heir among his samanagotra sapindas. Any distinction that may be made between a man's own sister and his father's sister, must be in favor of the former, for, whereas there is a text recognizing the former, no text expressly recognizing the father's sister has been cited. *Rayaningu v. Venkata Gopala Narasimha Rau*(3), *Lakshmanammal v. Tiruvengada*(4). It has been decided in this Court that while a sister had some place in the line of inheritance, she should be postponed to a sister's son (*Lakshmanammal v. Tiruvengada*(4)) and the principle on which this decision is rested is that in the Mitakshara, except where females are specially mentioned, the rule is that priority is given to male heirs. There is authority for the larger proposition that succession under the Mitakshara is not open to any females other than those specially mentioned (*Gauri Sahai v. Rukko*(5), *Mari v. Chinnammal*(6), *Mandlik*, p. 365). It was suggested that as a son of a father's sister is mentioned among the cognates related to the man himself (Mitakshara, chap. II, s. 6), his mother must equally be a bandhu of the same class. Not to mention the circumstance that the enumeration of bandhus, although not exhaustive, includes no females, this argument is obviously fallacious as there are numerous cases in which the offspring of a female parent has rights which that parent would not have. *Rayaningu v. Venkata Gopala Narasimha Rau*(3) and Mayne's Hindu Law, 4th edition, §. 492. Adopting the principle mentioned above (*Lakshmanammal v. Tiruvengada*(4)), I think that as it cannot be shown either by texts or decided authority that the father's sister has a place in the line of succession above that of a man's own bandhu, the right of the latter being an undoubted male heir must prevail.

For these reasons I think the plaintiff's claim has failed and would dismiss the suit with costs.

(1) 2 B.L.R., F.B., 28.
(4) I.L.R., 5 Mad., 241.

(2) I.L.R., 11 Mad., 287.
(5) I.L.R., 3 All., 45.

(3) 6 M.H.C.R., 278.
(6) I.L.R., 8 Mad., 107.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

RAMALINGA (DEFENDANT), PETITIONER,

v.

SAMIAPPA (PLAINTIFF), RESPONDENT.*

Court sale—Emblements—Crop standing on land sold in execution of a decree obtained by a mortgagee in possession.

A mortgagee in possession sued on his mortgage and having obtained a decree brought the land to sale in execution; and the execution purchaser was placed in possession:

Held, the mortgagee was not entitled to recover from the execution purchaser the value of the then standing crop.

PETITION under section 25 of the Provincial Small Cause Courts Act, 1887, praying the High Court to revise the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam.

Suit to recover the value of a crop raised by the plaintiff as mortgagee in possession on land which was purchased by the defendant at a Court sale held in execution of a decree obtained by the plaintiff on his mortgage. The Subordinate Judge passed a decree in favor of the plaintiff.

The defendant preferred this petition.

Subramanya Ayyar for petitioner.

Bashyam Ayyangar for respondent.

The further facts of this case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the judgment.

MUTTUSAMI AYYAR, J.—The petitioner was defendant in small cause suit No. 74 of 1888, on the file of the Subordinate Judge at Negapatam, and the counter-petitioner was plaintiff in that suit. The question is whether the decision passed therein is contrary to law. The plaintiff was originally a mortgagee in possession of 1 veli, 4 mahs of land. He obtained a decree for sale of the land in liquidation of the mortgage, and the land was accordingly put up to sale in execution. The defendant purchased it, paid the purchase money and obtained a warrant for delivery of posses-

* Civil Revision Petition No. 296 of 1888.

1889.
May 1.
August 7.

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sion. At that time a crop was standing on the land and, in execution of the warrant, the standing crop as well as the land was placed in his possession. The mortgagee claimed the value of the crop on the ground that he had raised it, and the purchaser contended that it had passed to him with the land. The Subordinate Judge was of opinion that the defendant bought only the land and acquired no right to the standing crop. In this view he decreed that defendant do pay plaintiff the value of the crop, together with interest, and it is argued before me that the decision is bad in law and that the standing crop passed with the land by virtue of its sale.

I am of opinion that the decree cannot be supported. It does not appear that the right to the standing crop was expressly reserved at the sale or by the sale notice. The interest that passed by the Court sale was not simply that of the judgment-debtor or mortgagor as it stood at the date of the decree, but also included the interest of the mortgagee, the sale being ordered in execution of the mortgage and not subject to it. The ordinary rule is that the right to the growing crop will pass by a sale of the land without express mention, and this the Subordinate Judge has overlooked. Nor has the doctrine of emblements any application in this case. A mortgagee is not one of the persons entitled to emblements, and cannot as such rely either on section 51 or section 108, clause i, of the Transfer of Property Act, which only declared the pre-existing law on the subject. (See also Woodfall's Landlord and Tenant, 11th edition, 705.) Nor is this case within the equity of the rule of law concerning emblements which are not allowed even to tenants who either know when their term is to cease or by their own negligence or misconduct allow their interest to determine between the time of sowing and of harvest. It was open to the mortgagee in this case to have asked the Court to postpone the sale, so as to enable him to take the standing crop. This view is in accordance with the decision in *Land Mortgage Bank of India v. Vishnu Govind Patankar*(1). I set aside the decree of the Subordinate Judge and direct that the counter-petitioner's suit be dismissed with costs throughout.

(1) I.L.R., 2 Bom., 670.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

RAMASAMI.*

1889.
August 21.

Criminal Procedure Code, s. 488—Liability of a Hindu not divided from his father to maintain his wife.

A Hindu not divided from his father can be ordered to maintain his wife under s. 488 of the Code of Criminal Procedure.

CASE (being maintenance case No. 1 of 1889, on the file of the Deputy Magistrate of Coimbatore) reported for the orders of the High Court under section 438 of the Code of Criminal Procedure, by J. H. A. Tremenhoe, Acting District Magistrate of Coimbatore.

Rajarathna Mudaliar for defendant.

The Court made the following

ORDER :—The Deputy Magistrate's opinion that a son not divided from his father cannot be ordered to maintain his wife cannot be supported. He must be taken to be able to utilize his joint interests as well for the maintenance of his wife as for his own when it is necessary to do so. The order of the Deputy Magistrate is set aside, and he is directed to restore the case to his file and dispose of it in accordance with the provisions of section 488, Criminal Procedure Code.

* Criminal Revision Case No. 226 of 1889.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

MAHANT OF TIRUPATI.*

*Criminal Procedure Code, s. 96—Search warrant—When a search
warrant may issue.*

The accused was charged with the offence of criminal misappropriation of treasure belonging to a temple of which he was alleged to be the trustee. From the complaint, it appeared that some of the treasure belonging to the temple had been buried under a flagstaff in the temple, and the Magistrate was of opinion that the nature of the property so buried had an important and material bearing on the case for the prosecution:

Held, the Magistrate had jurisdiction to issue a warrant to search for and produce such property upon information which he considered credible, since there was a complaint before him duly affirmed as prescribed by the Criminal Procedure Code: and that it was not incumbent on him to wait until the evidence for the prosecution should have been recorded in the presence of the accused.

PETITION under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order made by O. V. Bosanquet, Head Assistant Magistrate of North Arcot, on the 10th August 1889, on the application of the complainant, directing the issue of a summons to the accused for the production before the Court on the 19th August 1889 of the property buried underneath the dwajastambham pillar of the temple at Upper Tirupati.

Mr. Nelson, Mr. Norton, Ananda Charlu and Ramachandra Rau for petitioner.

S. Subramanya Ayyar and P. Subramanya Ayyar for counter-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.

JUDGMENT.—This is an application for the revision of an order made by the Head Assistant Magistrate of the district of

North Arcot on the 10th instant. The order was to the effect that a summons do issue to the mahant (petitioner before us) "to cause to be produced before this Court (the Court of the Head Assistant Magistrate) on Tirumalay on Monday, the 19th August, the property buried underneath the dwajastambham pillar."

The circumstances under which the order was made are shortly these. In the year 1872, a gold treasure, consisting of ancient gold coins of the estimated value of one lakh and seventy thousand rupees, was found buried in a place inside the temple on the hill at Tirupati called the Homa Kundam. This treasure was taken to the District Court at Chittoor and returned to the then trustee of the temple under the orders of that Court. It since remained in the possession of the petitioner's predecessor until his death in August 1880, and then passed into the possession of the petitioner, the present mahant or trustee. In 1887 the flagstaff (dwajastambham) in the temple was renewed, the old dwajastambham being taken down and new one being put up in its place. On the 20th July last, Srirangachari, one of the seven Acharya Purushas and holders of other mirassi rights in the temple, preferred a complaint to the District Magistrate of North Arcot accusing the petitioner, the present mahant or trustee, of criminal misappropriation in respect of a portion of the gold treasure. The statement taken from him on solemn affirmation tended to show that the petitioner made it to appear that the gold treasure which remained in his custody as trustee of the temple was deposited beneath the new flagstaff or dwajastambham, which was put up in 1887, whereas he deposited under it only a small portion of it and dishonestly misappropriated the remainder. Certain affidavits were filed before the District Magistrate and the complaint was transferred by him to the Head Assistant Magistrate on the 24th July last.

Before issuing process the Head Assistant Magistrate held an inquiry and made the order now sought to be revised in the course of that inquiry.

It appears from the order recorded by the Magistrate that he considered upon the affidavits and other information before him that a warrant should issue for the search and production of the property actually deposited under the flagstaff, that the petitioner's counsel then undertook that if a summons was issued under section 94 of the Criminal Procedure Code the mahant

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would have the necessary operations conducted in the presence of a responsible officer and would give notice of the day on which he intended to begin operations, and that on this understanding the Magistrate ordered that summons be issued instead of a search warrant. It is admitted that this was so, and stated that the undertaking was given without prejudice to the petitioner's right to apply to this Court for the revision of the Magistrate's order.

It is also conceded that, in dealing with this petition, we must take the real question to be, whether, upon the information before him, the Head Assistant Magistrate might lawfully issue a search warrant. It is urged, first, that no search warrant should be issued until the evidence for the prosecution was recorded in the presence of the petitioner and tested by cross-examination and a *prima facie* case was thereby established against him; secondly, that by excavating for the property deposited under the flagstaff, the flagstaff would be desecrated and that such desecration would be repugnant to the religious feelings of the general body of worshippers interested in the temple; and, thirdly, that there are physical difficulties in excavating for the property lying under the dwajastambham.

As to the first contention, we are of opinion that, under the provisions of section 96 of the Code of Criminal Procedure, it is lawful for a Magistrate to issue a warrant for the search and production of anything before him when he considers that such production is necessary for the purposes of any investigation or inquiry under the Code. Nor is it obligatory upon him to wait until a preliminary inquiry is held and all the witnesses for the prosecution are examined and cross-examined. Such a restriction would often tend to defeat the object with which search warrants are authorized to be issued. The Magistrate is entitled, in our judgment, to act upon information which he considers credible, provided that there is a complaint before him and the complainant is examined by him on solemn affirmation in the manner prescribed by the Code of Criminal Procedure. On referring to the complaint, to the complainant's examination and to the affidavits on the record, we see no reason to doubt that there was a reasonable foundation laid in this case for the issue of a search warrant. We do not desire to express any opinion at this stage of the case as to the weight which may be due to the statements contained in the several affidavits. But we may say that upon the affidavit of

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Kusal Doss and the letter produced by him and upon affidavits on the record relating to the contents of the mahazarnama prepared for the petitioner when the new dwajastambham was put up and to subsequent dealings in gold, to attempts to sell gold, and to sales of gold by the petitioner in Bombay, Bangalore and Madras, there was sufficient information before the Magistrate upon which he might issue a search warrant. It is then argued that even if the gold treasure were not found under the flagstaff, it would not follow that the petitioner is guilty of criminal misappropriation. But we consider it sufficient to observe that the nature of the property actually deposited under the flagstaff has an important and material bearing upon the accusation against the petitioner. The weight due to the statements of several persons who made affidavits is a matter which it is ordinarily for the Magistrate to determine, and unless the proceeding is either illegal or vitiated by material irregularity, we do not think we ought to interfere on revision and prevent the collection of material evidence as well in the interests of the temple as in the interests of justice.

[Their Lordships next proceeded to consider the other contentions in order, and having held them to be groundless, they dismissed the petition.]

APPELLATE CRIMINAL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

QUEEN-EMPRESS

v.

SHEREGAR.*

1889.
May 1.

Forest Act—Act V of 1882 (Madras), s. 26—Canara Forest Rules, Nos. 7, 12, 23.

The accused, not having a permit, cut certain classified trees on the *kumaki* adjoining his land and used the wood in his still as fuel; and upon these facts he was convicted of an offence against rules 7, 12 and 23.

Held, that the conviction was illegal.

CASE reported for the orders of the High Court under s. 438 of the Code of Criminal Procedure by S. H. Wynne, Acting District Magistrate of South Canara.

* Criminal Revision Case No. 73 of 1889.

The case was stated as follows:—

"The accused, two undivided brothers, set up a sandalwood still on their land and cut wood for fuel from the adjoining 'kumaki' for feeding it without permit. One has been convicted of 'cutting, removing and burning' firewood for purposes of trade, namely, for 'use of sandalwood stills without permit,' s. 26, Forest Act, and ss. 7, 12 and 23 of Forest Rules."*

"The rules referred to are published in *Fort St. George Gazette* of May 20, 1884, Part I, pp. 313-322. The case turns upon the interpretation of rule 7, paragraph 2, and the meaning of the words 'for his own use.' I am unable to see why cutting fuel for a sandalwood still placed by a man on his own land is not cutting it 'for his own use.' The magistrate has imported the words 'for purposes of trade' and (in his judgment) 'meant for sale and not for agricultural or domestic purposes' from the preceding paragraph of the rule which relates to unreserved land which is not *kumaki*. But even if it were mere unreserved land and not *kumaki* from which the fuel was taken, I do not think the conviction could stand. The words 'the produce of these lands shall not be sold or in any way used for purposes of trade' do not imply that the produce may not be used as fuel in the manufacture of an article to be afterwards sold. The land, however, was *kumaki* and not mere ordinary unreserved land."

The provisions of Rules Nos. 7, 9, 10, 12, 23 (Canara) are as follows:—

7. In all unreserved lands the villagers shall continue to enjoy, free of charge, such privileges as they have hitherto exercised in the way of grazing cattle or of cutting, converting, and removing trees (other than reserved and classified trees) and timber and other forest produce for fuel or for building or agricultural or domestic purposes, or of burning charcoal. The produce of these lands, however,

* See as to rules 7 and 12, *Queen-Empress v. Sivanna*, I.L.R., 11 Mad., 139. The publication in the Gazette of the rules in question is headed as follows:—

Under sections 26 and 33 (b) of the Madras Forest Act (V of 1882), His Excellency the Governor in Council is pleased to make the following rules for the regulation of the use of the pasturage and of the natural produce of lands at the disposal of Government and in lands known as "*kumaki*" in the district of South Canara and not included in a reserved forest, or within the limits of a municipality. Provided, however, that they shall apply to all sholas, plantations and reserves now existing within any such municipal limits, and to all lands at the disposal of Government, which may, from time to time, be notified as lands proposed to be constituted a reserved forest under section 4 of the said Act, and until the date fixed in the notification (to be issued under section 16 of the said Act) declaring the said lands to be a reserved forest. From that date, however, these rules shall cease to apply to, or be in force in respect of, the lands specified in such notification.

shall not be sold or bartered, or in any way used for purposes of trade, nor shall any of the aforesaid privileges be in any way alienated except with the land to which they are attached.

In "*kumaki*" lands, that is, within 100 yards of assessed land in wargs formed prior to fasli 1276, the holder of the *kumaki* shall also have the exclusive privilege of cutting, converting, and removing for his own use classified trees at will, and reserved trees on application, for which a permit shall be given free of charge, but if it is found that the concession as regards reserved trees is abused in any village, and not brought to notice by the villagers, the Collector may, in addition to prosecuting the offender, direct that the concession shall be withdrawn as regards that village.

9. The cutting of grass and the pasturing of cattle on reserved lands shall only be permitted with the consent of the Collector and on payment of the prescribed fees. It shall not be lawful for any person to cut grass or to pasture cattle upon any lands in contravention of this rule.

10. All the trees and other natural produce of reserved and unreserved lands shall vest in the Forest Department subject to the following exceptions, viz:—

- (a) The pasturage and grass on unreserved lands.
- (b) The toddy of palmyra, date, and other palm trees on unreserved lands.
- (c) The trees growing by the side of roads (and commonly known as avenue trees) and all topes or trees belonging to Local Fund Boards, communities or individuals.
- (d) All minerals.

12. Subject to the privileges, exceptions, and reservations specified in rules 7, 9 and 10, no person shall fell, girdle, mark, lop, top, uproot, or burn or strip off the bark or leaves from, or otherwise damage, any tree growing on any reserved or unreserved land, or remove the timber or collect the natural produce of such trees or land except as hereinafter provided.

23. Any breach or infringement of rules 8, 9, 12, 18, 19, 20, 21 or 22 will render the offender liable to imprisonment for a term which may extend to one month or to fine which may extend to Rs. 200, or to both.

The Acting Government Pleader (*Subramanya Ayyar*) for the Crown.

The Court delivered the following

JUDGMENT:—We concur with the District Magistrate that the conviction was illegal. The accused cut certain classified trees in *kumaki* land and used them as firewood for his still. It is argued that the words "for his own use" in clause 2 of rule 7 must be read in conjunction with the restrictive words in clause 1, and that therefore a raiyat may not use the wood cut in *kumaki* land in any way connected with his trade. We are unable to concede this. No doubt it would be illegal for a raiyat to sell wood cut in his *kumaki* land to another person as fuel for his still, but so long as he converts the wood to his own use, he is protected by rule 7. We set aside the conviction and sentence and direct the fine to be refunded.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

SESHAYYA.*

1889.
March 28.

Criminal Procedure Code, ss. 476, 477, 480 and 485—Jurisdiction of Judges and Magistrates in respect of offences committed before themselves—Penal Code, s. 175.

A Court other than the High Court, &c., can try persons for offences committed before itself only in cases to which s. 477, 480 or 485 is applicable, and none of these sections is applicable when the accused is charged under s. 175 of the Penal Code.

CASE reported for the orders of the High Court under section 438 of the Code of Criminal Procedure, by C. A. Bird, Sessions Judge of Godáviri.

The accused had been summoned as a witness to produce certain documents in calendar case No. 5 of 1888, on the file of the General Duty Deputy Magistrate, Godáviri, but failed to produce them, saying that they were not in his possession. The Magistrate having found that the statement was incorrect and that the accused could have produced the documents in question, charged him with having committed an offence under section 175 of the Indian Penal Code, and himself tried and convicted him.

The accused appealed to the Sessions Judge, who held that he had no jurisdiction to try the appeal, and accordingly reported the matter to the High Court.

Accused was not represented.

The Acting Government Pleader (*Subramanya Ayyar*) for the Crown.

The Court made the following

ORDER:—We are of opinion that the referring officer is right and that the Magistrate had no jurisdiction to try the accused for

* Criminal Revision Case No. 56 of 1889.

the offence charged, such offence having been committed before himself or in contempt of his authority. The procedure to be adopted is that laid down in section 476, Criminal Procedure Code. There are only three cases in which a Court, other than the High Court, &c., can try any person for certain offences when committed before itself. These are provided for in sections 477, 480 and 485. Section 477 obviously does not apply to this case. Section 480 only refers to certain offences committed in the view or presence of the Court and taken cognizance of the same day. This section also is inapplicable in this case. For the same reasons section 485 does not apply, and the Magistrate was, therefore, clearly precluded by the provisions of section 487 from trying the case himself. We set aside the conviction and sentence and direct the fine, if paid, to be refunded.

QUEEN-
EMPRESS
v.
SESHAYYA.

APPELLATE CIVIL.

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

RAMAYYA AND OTHERS (DEFENDANTS NOS. 7 TO 16), APPELLANTS,

1889.
March 29.

v.

SUBBARAYUDU AND OTHERS (PLAINTIFF AND DEFENDANTS
NOS. 1 TO 6), RESPONDENTS.*

Jurisdiction—Objection as to, first taken on appeal—Suit for partition.

Plaintiff sued in the District Court for partition of an one-seventh share purchased by him in an undivided aghaharam, of which the total value was about Rs. 10,400, and obtained a decree. The defendants on appeal objected that the suit should have been filed in the District Munsif's Court:

Held, that the suit should have been filed in the District Munsif's Court. *Vydinatha v. Subramanya* (I.L.R., 8 Mad., 235), distinguished.

Per cur: Though the objection was not taken in the Court below, yet it is apparent on the face of the plaint and has reference to the jurisdiction of the Court; we must therefore consider it.

APPEAL against the decree of W. G. Underwood, Acting District Judge of Kistna, in original suit No. 9 of 1887.

The plaint alleged that the Ketumukkuvari aghaharam was originally the property of the defendants, that one-seventh of the aghaharam was sold in execution of the decree in original suit

* Appeal No. 15 of 1888.

RAMAYYA
v.
SUBBA-
RAYUDU.

No. 109 of 1883 and the plaintiff became the purchaser and obtained a sale certificate on 28th June 1886. The plaint also stated as follows :—

“As the value of the whole property out of which the plaintiff claims his portion is above Rs. 2,500, this suit has been filed in this Court. Stamp duty for Rs. 1,494-4-0, the value of plaintiff's share of acres 123-28½ of land, has been paid.”

The prayer of the plaint was “that out of 862 acres of dry and wet land of Ketumukkuvari agraaharam . . . the plaintiff's one-seventh part be divided or given to him proportionately from the superior, middling and inferior land;” the plaint also prayed for mesne profits.

No plea to the jurisdiction of the Court was raised before the District Judge, who passed a decree for the plaintiff.

Defendants preferred this appeal against the decree of the District Judge on the ground *inter alia* that “the value of the share claimed being below Rs. 2,500, the suit should have been filed in the District Munsif's Court.”

Mr. Parthasaradhi Ayyangar for appellants.

Mr. Gantz for respondents.

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

JUDGMENT.—This was a suit brought by the first respondent to recover his share of an agraaharam, of which the value was mentioned in the plaint as Rs. 1,494-4-0. The plaint stated that the suit was filed in the District Court, as the value of the entire property, of which a share was claimed, exceeded Rs. 2,500. No objection was taken by the defendants in the Court below to its jurisdiction to entertain the suit. The Judge decreed the claim. It is argued in appeal for defendants Nos. 7 to 16 that the subject-matter of the suit was the specific share claimed in the plaint and that the suit was cognizable by the District Munsif, the value thereof being below Rs. 2,500. The jural relation between the parties to the suit was not that of coparceners as in the case of *Vydinatha v. Subramanya*(1), but that of joint owners of an agraaharam village.

(1) I.L.R., 8 Mad., 235.

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Having regard to the principle laid down in *Khansa Bibi v. Syed Abba*(1), we are of opinion that the subject-matter of the suit was the specific share claimed, and that the suit ought to have been brought in the Court of the District Munsif. Though the objection was not taken in the Court below, yet it is apparent on the face of the plaint and has reference to the jurisdiction of the Court. We must, therefore, consider it, though it is only raised in appeal.

We set aside the decree of the District Court and direct that the plaint be returned to the plaintiff for presentation to the Court of competent jurisdiction. As the objection was not taken at the earliest opportunity, we direct that each party do bear his costs both in this Court and in the Lower Court.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

PERA RAJU.*

Penal Code, ss. 419, 420, 467 and 468—Cheating—Forgery—Use of a false name with intent to defraud.

The accused was alleged by the prosecution to have advertised that a work on English idioms by Robert S. Wilson, M.A., was ready, stating that the price was Rs. 2-4-0, and that intending purchasers might remit it by money order to Robert S. Wilson, Council House Street, Calcutta: to have then requested the Postal authorities at Calcutta by a letter signed Robert S. Wilson, to have the money orders re-issued at Calcutta by a letter signed Robert S. Wilson, to have the money orders directed to him as above at Rajam: to have similarly requested the Post Master at Rajam to pay the money orders to his clerk Seshagiri Rau: to have subsequently received the value of money orders made out in favor of Robert S. Wilson from the Post Master at Rajam, signing receipts as Seshagiri Rau: Robert S. Wilson and Seshagiri Rau were alleged to be fictitious persons, and it was also alleged that the accused had no book on English idioms ready to be despatched to purchasers:

Held, that the above allegations supported charges of cheating and forgery.

APPEAL under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused by

(1) I.L.R., 11 Mad., 140.

* Criminal Appeal No. 114 of 1889.

1889.
June 6, 17.

QUEEN-
EMPRESS
v.
PERA RAJU.

J. Kelsall, Sessions Judge of Vizagapatam, in sessions case No. 28 of 1888.

The *Acting Government Pleader (Subramanya Ayyar)* for the Crown.

The accused was not represented.

The facts of this case appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.—This is an appeal from the judgment of acquittal recorded in sessions case No. 28 of 1888 on the file of the Court of Session at Vizagapatam. In that case the accused, one Pera Raju, was committed for trial by the Deputy Magistrate of Vizianagram on charges of forgery under sections 467 and 468, and of cheating under sections 419 and 420, Indian Penal Code. The Judge acquitted him without recording any evidence on the ground that the facts which the evidence before the Magistrate went to prove could not support a conviction for either of those offences. It is contended for the Crown in appeal that upon the facts stated by the Judge the acquittal was bad in law, and that the charges ought to have been amended, if necessary, under section 226, Code of Criminal Procedure. We are of opinion that this contention ought to prevail. The facts stated by the Judge as likely to be established by the evidence recorded by the committing Magistrate are shortly these:—

In June 1887, the accused by advertisements and hand bills, notified throughout India, that a work on English idioms, designed specially for matriculates, by one Robert S. Wilson, M.A., was ready, that the price was Rs. 2-4-0, and that intending purchasers might remit it by money orders to Robert S. Wilson, M.A., Council House Street, Calcutta. About a month or two later the accused signing a letter as Robert S. Wilson, wrote to the Postal authorities at Calcutta, asking that all money orders received for Robert S. Wilson might be redirected to him at Rajam in the district of Vizagapatam. Signing himself again as Robert S. Wilson, he wrote to the Post Master at Rajam to say that his clerk Seshagiri Rau would call in a day or two for these money orders, and that their value might be paid to the clerk, who would bring a note from him. The accused since called in person at the post office at Rajam and representing that he was the clerk Seshagiri Rau induced the Post Master to pay him the value of 25 money orders. On this occasion he produced a writing authorizing pay-

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ment to Seshagiri Rau and signed by himself as Robert S. Wilson, and he also signed receipts acknowledging payment of value of the money order as Seshagiri Rau. There was no person known to the Post Master either as Robert S. Wilson or as his clerk Seshagiri Rau, and the case for the prosecution was that both were fictitious persons. It is also urged for the Crown that no book on English idioms was ready as notified by the accused in his advertisements and hand bills.

The charge of cheating as framed by the Magistrate stated that the accused falsely personated Seshagiri Rau, clerk of S. Robert Wilson, and thereby deceived the Post Master and fraudulently induced him to deliver to the accused 25 money orders which the Post Master would not have paid if he had not been so deceived. The charge of forgery stated (a) that the accused wrote a false letter to the Post Master of Rajam in the fictitious name of Robert S. Wilson, requesting that the money orders might be retained and their value paid to his clerk Seshagiri Rau; (b) that the accused signed 25 money orders in the feigned name of Seshagiri Rau; (c) that the accused wrote a false letter to the Post Master at Rajam in the name of Robert S. Wilson, requesting that the money orders subsequently received might be retained until further orders; and (d) that the accused signed the writing authorizing payment to Seshagiri Rau in the name of Robert S. Wilson.

Adverting to these facts the Judge observed that assuming the case for the prosecution was proved in every detail, the offence of cheating the Post Master was not committed; that the money orders were admittedly for the accused by whatever name he chose to call himself; that the Post Master could not have refused to pay them; that there was no known Robert S. Wilson, except the accused, and that the senders of the money orders intended the money to be paid to him. With reference to the charge of forgery, the Judge remarked it is not forgery to call yourself Robert Wilson, to have money orders in that name sent to you, and in that name to give directions about cashing them.

We consider that the Judge is clearly in error in holding that if the facts stated above were proved at the trial, they would amount neither to the offence of cheating nor to that of forgery as defined by the Penal Code. The accused knew that Robert S. Wilson was a fictitious person, that he had no clerk by the name

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of Seshagiri Rau, and that he was also a fictitious person, and with this knowledge he intentionally produced generally a false belief by his advertisements and hand bills that Robert S. Wilson was a person actually in existence, that he was a Master of Arts, that he wrote a book on English idioms, that it was ready to be despatched, and that the price might be sent to him and not to the accused Pera Raju. By causing such false belief he induced those who remitted the price by money orders to do so in the expectation that it would reach the hands of Robert S. Wilson through the Post office, and that in return the said Robert S. Wilson would send each of them a copy of the publication on English idioms, a publication which as alleged for the Crown the accused knew had no existence. It is clear, therefore, assuming for the purposes of this appeal the facts were as stated for the prosecution, they would sustain a charge of cheating those who remitted the money orders. Though the charge framed by the Magistrate did not refer to the deception practised on those who sent the money orders, yet it was open to the Judge to have amended it if the evidence before the Magistrate had tended to establish it.

As to the charge of cheating the Post Master, the Judge is mistaken in considering that the Post Master was bound to pay the value of the money orders to the accused Pera Raju. On the facts stated, the accused must be taken to have caused a false belief that Robert S. Wilson was a real person, that he had a clerk by the name of Seshagiri Rau, and that the accused was that individual. It appears further that but for such false belief the Post Master would not have paid the accused the value of the money orders. As those who remitted the money orders intended them for Robert S. Wilson, a person whom they believed to be a real and not an imaginary person, the Post Master was not bound to pay their value to the accused for the obvious reason that there was no such person as was designated by the remitters, and that it was not competent to him to pay it to any other unless it appeared (which is not the case) that the remitters gave credit to the accused Pera Raju as one known to them and not to Robert S. Wilson supposed to be alive. The deception practised on the Post Master seems to be a dishonest continuance to consummate the fraud practised on the public. The fallacy in the Judge's reasoning lies in overlooking the rule that in determining whether a person was actually deceived or not regard should be had to the

facts as they were made to appear to him and erroneously accepted by him and not simply to the actual facts known to the accused, but not known either to the persons who remitted the money orders or to the Post Master.

As to the charge of forgery it is wholly immaterial whether the name forged is that of a fictitious person who never existed or of a real person. It is as much a forgery in the one case as in the other provided the fictitious name is assumed for the purpose of fraud in the particular case under trial. Section 464, explanation 2 of the Indian Penal Code, provides that the making of a false document in the name of a fictitious person intending it to be believed that the document was made by a real person may amount to forgery (see also the illustration to the explanation). There is, however, no doubt that an intention to defraud is an essential ingredient; but it is sufficient to show that there was an intention to defraud generally. Whether there was an intention to defraud or not is a question of fact to be determined with reference to the special circumstances of each case. It is true that in *The Queen v. Martin*(1) it was held that though a document was signed in a fictitious name, yet such signing did not amount to forgery, as it appeared that credit was wholly given to the accused in that case as a known individual without any regard to the assumed name or to any assumed relation to a third person. But the facts as stated by the Judge tend to show that there is a wholly different case. There is apparently no pretence for saying that Pera Raju, the accused, was known to and accepted by either those who sent the money orders or the Post Master as the author or publisher of the work on English idioms, and that the money orders were intended for him.

We are therefore of opinion that the acquittal of the accused must be set aside, and a retrial ordered with reference to the foregoing observations.

(1) 5 Q.B.D., 34.

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EMPRESS
v.
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APPELLATE CIVIL.

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

1889.
July 9.

THIRTHASAMI (DEFENDANT NO. 5), APPELLANT,

v.

GOPALA AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 AND 3),
RESPONDENTS.*

Civil Procedure Code, s. 32—Joinder of new defendant.

Suit upon a bond of which the obligor was therein described as the manager of a certain mutt. The defendants, who were the sons of the obligor (since deceased) pleaded that the debt was contracted by their father for the benefit of the mutt and as manager of the mutt. The Judge ordered that the representative of the mutt be joined as defendant in the suit under s. 32, and subsequently a decree was passed against him:

Held, that the order under s. 32 was right, although the plaintiff had prayed for no relief against the mutt.

SECOND APPEAL against the decree of J. W. Best, District Judge of South Canara, in appeal suit No. 176 of 1886, affirming the decree of A. Venkataramana Pai, District Munsif of Mangalore, in original suit No. 296 of 1884.

Narayana Rau for appellant.

Ramachandra Rau Saheb, Ramasami Mudaliar and Subba Rau 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.

JUDGMENT.—This was a suit upon a bond—exhibit A—executed by one Appayachari, since deceased, who was *parpathegar* or manager of the Pejevar Mutt in South Canara. The plaintiff, as originally framed, prayed for a decree against property left by Appayachari. But defendants Nos. 2 and 3, his sons, contended that the debt was contracted by their father for the benefit of the mutt and in his capacity as manager or agent. The District

Munsif decreed the claim against Appayachari's property in the hands of defendants Nos. 2 and 3, but, on appeal, the District Judge directed that the fourth defendant, the representative of the mutt, be made a party, and that the suit be retried. At the retrial, the District Munsif exonerated defendants Nos. 1 to 3 from all liability and passed a decree in plaintiff's favor against the fifth defendant as the representative for the time being of the Pejevar Mutt. It is urged in appeal that the Judge was in error in directing that the fourth defendant be made a party and that the plaintiff prayed for no relief against the Pejevar Mutt. But it appears to us that the procedure followed by the Judge was warranted by section 32 of the Code of Civil Procedure. Though the plaintiff did not pray for a decree against the mutt, yet the question whether the debt was one binding on Appayachari's assets in the hands of his sons was distinctly raised by them in their written statement. Under the provisions of section 32 the Judge was entitled to make the representative of the mutt a party in order that he might be able effectually and completely to adjudicate on that question which arose on the pleadings so as to avoid a multiplicity of suits. The decision *Eshan Chunder Singh v. Shama Churn Bhutto*(1) proceeded on the ground that the High Court relied on a state of facts different from and opposed to what was alleged in the plaintiff and to what was attempted to be proved. But the case before us is not similar to it, and the decision under appeal rests on a state of facts which formed the subject of an issue and which was pleaded by the second and third defendants. In dealing with the question of variance between what is alleged and proved, regard should always be had not only to the averments in the plaintiff, but also to the questions arising for decision on the pleadings, and on which the parties proceed to trial. Though the plaintiff was not formally amended at the settlement of issues with reference to the question raised by the second and third defendants, yet it was a mere omission which occasioned no failure of justice. Further, it does not appear that the plaintiff insisted in the Courts below on his right to proceed against Appayachari's property, on the ground that document A did not show on its face that he borrowed only as agent of the mutt.

(1) 11 M.I.A., 7.

* Second Appeal No. 652 of 1888.

THIRTHASAMI
GOPALA.

Another objection urged upon us is that the debt sued for did not appear in the accounts of the mutt, and that the Judge was not entitled to pass a decree against the mutt. The absence of an entry in the accounts was only a fact in evidence, and the Judge has considered it together with the other evidence in the case in coming to a finding on the question whether the debt was contracted by Appayachari on his own account or on account of the mutt. Nor do we consider that the Judge was in error in holding that upon the facts found, the recital in document A in regard to Rs. 200 raised a presumption that "the sundry expenses" mentioned therein were those of the mutt. If the documents were executed, as is found by the Judge, on account of the mutt and by its agent, the recital was clearly *prima facie* evidence against the principal in the circumstances of this case.

On these grounds we are of opinion that the decision of the Judge is right, and that the second appeal must be dismissed with costs. There will be two sets of costs, one in favor of the first respondent and the other in favor of the second and third respondents.

APPELLATE CIVIL.

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

SOUTH INDIAN RAILWAY COMPANY
(DEFENDANTS), APPELLANTS,

v.

RAMAKRISHNA (PLAINTIFF), RESPONDENT.*

Defamation—Expression of suspicion—Slander by a railway guard—Suit against Railway Company—De minimis non curat lex.

Suit for damages for defamation. A railway guard, having reason to suppose that a passenger travelling by a certain train from Madras to Chingleput had purchased his ticket at an intermediate station, called upon the plaintiff and others of the passengers to produce their tickets. As a reason for demanding the production of the plaintiff's ticket, he said to him in the presence of the other passengers "I suspect you are travelling with a wrong (or false) ticket," which was the defamation complained of. The guard was held to have spoken the above words *in malice*. Held, the plaintiff was not entitled to a decree for damages.

* Second Appeal No. 1742 of 1888.

SECOND APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in appeal suit No. 295 of 1888, modifying the decree of C. Sury Ayyar, District Munsif of Chingleput, in original suit No. 217 of 1887.

Action for Rs. 250, damages for insulting and defamatory words spoken by a railway guard, in the employ of the defendant Company, of the plaintiff in the presence of various other persons whereby the plaintiff was injured in reputation, &c. No special damage was alleged.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

The District Munsif passed a decree in favor of the plaintiff for Rs. 100. On appeal the District Judge modified the decree of the District Munsif reducing the damages awarded to plaintiff to Rs. 10.

The defendant preferred this second appeal.

Mr. Johnstone for appellant.

The words complained of are not actionable *per se*: they only express suspicions, which appear to have had a certain justification; or at the worst they were mere vulgar abuse. *Purvathi v. Mannar*(1), *Dawan Singh v. Mahip Singh*(2), *Tozer v. Mashford*(3).

It would be absurd to hold the Company liable for vulgar abuse by its servants which it did not authorize. In fact the guard was acting on his own authority—*Bank of New South Wales v. Owston*(4), Odger on Libel, 2nd edition, pp. 411, 416.

Ramachandra Rau Saheb for respondent.

The words are actionable *per se* even judged by the English rule, because they imputed conduct punishable both under the Railway Act, Act IV of 1879, section 32, but also under the Penal Code; but in India the test is hurt to the plaintiff's feelings.

As to the liability of the defendant's Company, see *Tozer v. Mashford*(3), *Hamon v. Falle*(5). Calling for tickets was within the scope of the guard's authority: the test of the liability of the employer is—was the servant acting independently on his own behalf, or consulting the interest of the employer at the time? When the discretion vested in him by the employer is abused, the employer is liable. There is no question of express authority:

(1) I.L.R., 8 Mad., 175.
(3) 6 Exch., 539.

(2) I.L.R., 10 All., 425.
(4) 4 App. Cas., 270.

(5) 4 App. Cas., 247.

1889.
March 25.
May 1.

SOUTH INDIAN
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if there were express authority the defendant would have been directly liable and not merely liable as an employer. *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Company*(1), *Moore v. Metropolitan Railway Company*(2), *Limpus v. London General Omnibus Company*(3), *Goff v. Great Northern Railway Company*(4). In *Seymour v. Greenwood*(5) as here, the wrong was done by the servant who, in exercising the authority derived from the employer, exceeded its bounds. See Underhill on Torts, p. 51. Thus a Statute was necessary to protect the proprietors of newspapers from even criminal liability. *Dewan Singh v. Mahip Singh*(6) is in my favor and I only seek to establish civil liability. I rely also on *Parrathi v. Mannar*(7).

Mr. Johnstone in reply cited *Allen v. The London and South-Western Railway Company*(8).

COLLINS, C.J.—This is an action brought by the plaintiff against the South Indian Railway Company for defamatory words alleged to have been used by a servant of the Railway Company. The plaintiff complains that he has suffered both in mind and body by reason of the words spoken by the servant of the Company, and that although the plaintiff sent a letter through his vakil to the Railway Company, demanding Rs. 250 as compensation for loss of his reputation and for pain of mind and body, no answer was received from the Railway Company. Hence this action.

The District Munsif came to the conclusion that defamatory words had been uttered by the servant of the Company and awarded the plaintiff Rs. 100. On appeal to the District Judge he reduced the damages to Rs. 10. The Railway Company appeal. The material facts of this case are as follows:—The plaintiff was travelling by the railway from Madras to Chingleput. According to the plaintiff's evidence, a friend of his, Subramania Sastri, and a Christian College student, Raghava Rao, were in the third-class carriage with him. The District Judge finds as a fact that a ticket for Chingleput was purchased at Vandalore by some one then a passenger in the train and who had already come by it, and it is also found as a fact that the ticket so purchased was delivered up at Singaperumalkoil by some one in the same compart-

(1) L.R., 7 C.P., 415-419.

(4) 3 E. & E., 672.

(7) I.L.R., 8 Mad., 175.

(2) 8 Q.B., 36.

(5) 6 H. & N., 359.

(8) L.R., 6 Q.B., 65.

(3) 1 H. & C., 526.

(6) I.L.R., 10 All., 425.

ment as the plaintiff, and it appears clear that this arrangement was made with intent to defraud the Railway Company. At Singaperumalkoil the guard of the train came to the carriage wherein the plaintiff was travelling and asked plaintiff to produce his ticket, stating that he, the guard, suspected the plaintiff of travelling with a wrong (or false) ticket; the exact words are not proved. The plaintiff produced a ticket, which was in order. These are the defamatory words complained of, and it may be taken as law in this country that if defamatory expressions are used under such circumstances as to induce in the plaintiff reasonable apprehension that his reputation has been injured and to inflict on him pain consequent on such belief, the plaintiff is entitled to recover damages without actual proof of loss sustained. The District Judge is of opinion that the guard said the words complained of without malice, but with what he calls simple carelessness.

The Counsel for the appellant contends, 1st, that the words are not actionable; 2ndly, that the guard was justified in uttering the same under the circumstances of the case; and, 3rdly, that in any event the Railway Company are not liable.

It appears to me that this action cannot be maintained. The words used by the guard of the train were not in my opinion under the circumstances of the case defamatory in the sense that an action would lie either against the guard or the Railway Company. It is clear that these were spoken *bona fide*. The guard was justified in requesting each passenger to produce his ticket, and he gave as a reason that he suspected passengers were travelling with wrong tickets. The words he is said to have used to the plaintiff, "I suspect you are travelling with a wrong ticket" given as a reason for demanding the production of the ticket would not induce the plaintiff reasonably to apprehend that his reputation had been injured and could not and did not inflict upon him any damage. If, as it is suggested, the guard's manner was insolent, a complaint should have been made to the Railway Company.

Upon the evidence there is no reason to believe that the plaintiff was in league with others to defraud the Railway Company, or that he knew any of the passengers were travelling with wrong tickets. I allow the appeal and set aside the decrees of both the Lower Courts and dismiss the suit, and I direct that each party pay their own costs throughout.

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WILKINSON, J.—The facts of the case are as follows:—The plaintiff was a passenger from Madras on the South Indian Railway on the 12th March 1887. At Vandalore a ticket for Chingleput was purchased by a person who had travelled in the train from Madras to that station. As the train was starting the guard observed the said ticket being handed to some one in the same compartment as that in which plaintiff was travelling. At the next station the guard, whose suspicions had been aroused, went to the door of the carriage and demanded to see the tickets. Tickets were shown and the ticket taken at Vandalore was, the Judge finds, shown by some one in the compartment in which plaintiff was seated. An altercation ensued between plaintiff and the guard who told plaintiff he suspected him of travelling with a wrong ticket. The Lower Courts have held the Railway Company liable for the words used by the guard, being of opinion that such words were defamatory. In my judgment the words used do not amount to defamation, and, even if they did, the Railway Company could not be held responsible. It appears from the evidence of the plaintiff himself that the guard at first "politely" asked plaintiff where he was going, and that when plaintiff objected to give the information sought, the guard said that he suspected that there was something wrong with his ticket, or words to that effect. What the exact words used were, has not been found, and plaintiff himself is not prepared to swear what words the guard did use. There appears to have been an altercation, because the plaintiff refused to give the information he was bound to give, and, in the heat of the moment, the guard having grounds for suspecting that a ticket had been surreptitiously obtained at Vandalore did state that he suspected plaintiff was in possession of that ticket. It seems to me very doubtful whether under any circumstances the expression of a mere suspicion is actionable, and under the circumstances of the present case, I am of opinion that no action would lie against the guard, much less can an action against the Railway Company be maintained. Undoubtedly the Railway Company is responsible for the manner in which their servants do any act which is within the scope of their authority and is answerable for any tortious act of their servants, provided such act is not done from any caprice of the servant, but in the course of the employment. But it would be straining this principle of law to an unprecedented extent to hold that, because the guard of a train in the execution of his duty expressed a

suspicion not altogether unfounded that a passenger was travelling with a wrong ticket, the Company was liable in damages to that passenger for slander. *De minimis non curat lex*, or, as the authors of the Penal Code have expressed it, "nothing is an offence by reason that it causes or that it is intended to cause or that it is known to be likely to cause any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm." The harm, if any, caused to plaintiff's reputation by the imputation that he was travelling with wrong ticket was so slight that he might well have contented himself with reporting the guard for incivility.

I would reverse the decrees of the Courts below and dismiss the plaintiff's suit. Each party must bear his own costs throughout.

APPELLATE CIVIL.

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

RAIRU NAYAR (PLAINTIFF), APPELLANT,

MOIDIN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Adverse possession.

In a suit in 1887 to redeem a kanom for Rs. 62 of 1835, it appeared that in 1862 the mortgagee had received a renewal of his kanom for a larger amount, and that the defendant had produced the document of renewal in 1864 to the knowledge of the plaintiff in a suit to which the plaintiff was party:

Held, that the suit was not barred by limitation. *Madhava v. Narayana* (I.L.R., 9 Mad., 244) distinguished.

SECOND APPEAL against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 263 of 1888, confirming the decree of S. Rangunatha Ayyar, District Munsif of Tellicherry, in original suit No. 482 of 1887.

Suit to redeem a kanom of Rs. 62 granted by a former karnavan of the plaintiff's tarwad to the father of defendant No. 1 in 1835. Defendant No. 1 set up a kanom interest for Rs. 192 over the property alleging that he had made a further advance of

* Second Appeal No. 1818 of 1888.

SOUTH INDIAN
RAILWAY CO.
v.
RAMA-
KRISHNA.

1889.
Aug. 20, 26.

RAJIV NAYAR Rs. 100 in 1862 in which year the subsisting kanom interest in his favor was Rs. 92, and had received a further kanom deed, filed in the suit as exhibit A, for the whole amount. This document had been produced by the present defendant at the instance of the present plaintiff, and put in evidence by the latter in a suit instituted by him in 1864.

The plaintiff now said it was a forgery, or even if genuine, invalid as against his tarwad.

Both the District Munsif and on appeal the District Judge held that the above allegations of the defendant were established. The suit was dismissed by the District Munsif after a trial of the whole case: the District Judge on appeal affirmed the decree of the District Munsif holding "on the principle which appears to have been followed in *Madhava v. Narayana*(1) that the first defendant's possession of the land became hostile as soon as the plaintiff was aware of the claim now put forward"—which was in 1864 at the latest—and consequently that the suit was barred by limitation.

The plaintiff preferred this second appeal.

Sankara Menon for appellant.

Sankaran Nayar for respondent No. 1.

JUDGMENT.—The Acting District Judge has dismissed the appeal on the ground that first defendant's possession became hostile from the date of plaintiff's knowledge of exhibit A, and has relied upon *Madhava v. Narayana*(1) in support of this finding. We are not able to agree that the case applies, for in that case the alienation, which the plaintiff sought to set aside, was the original alienation, whereas in this case the plaintiff merely ignores a renewal on an increased fee, which he says is not binding on the tarwad.

In a similar case unreported (S. A. 676 of 1886) it was held by Collins, C.J., and Brandt, J., that the decision in *Madhava v. Narayana*(1) did not apply.

We must therefore reverse the decree of the Lower Appellate Court and remand the appeal for determination on the other points which arise.

The costs will abide and follow the result.

(1) I.L.R., 9 Mad., 244.

APPELLATE CIVIL.

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

RAVUTHA KOUNDAN (DEFENDANT No. 2), APPELLANT,

1888.
Sept. 4.

v.

MUTHU KOUNDAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Regulation VI of 1831, s. 3—Suit for a declaration as to land alleged to be nattamai maniyams—Jurisdiction of Revenue Courts—Res judicata—Civil Procedure Code, s. 13.

Suit to establish plaintiffs' title to certain land alleged by the defendants, who were the Secretary of State for India in Council and the nattamaigar of a certain village, to be maniyam land attached to the office of the second defendant, and previously held to be such by a Revenue Court:

Held, the Court was not precluded either by Regulation VI of 1831, s. 3, or by the decision of the Revenue Court from granting the declaration prayed for.

SECOND APPEAL against the decree of T. Weir, District Judge of Madura, in appeal suit No. 57 of 1886, reversing the decree of P. S. Gurumurthi Ayyar, District Munsif of Tirumangalam, in original suit No. 40 of 1885.

The plaintiff alleged that certain land therein referred to was the ancestral property of the plaintiffs' family, and that the Deputy Collector in suit No. 3 of 1883 under Regulation VI of 1831 decided that they were maniyam lands attached to the office of nattamaigar which was the office of defendant No. 2, and prayed for a declaration of the plaintiffs' title.

The District Munsif dismissed the suit. On appeal the District Judge reversed the decree of the District Munsif and granted the declaration prayed for.

Defendant No. 2 preferred this appeal against the decree of the District Judge.

Rama Rau for appellant.

Mahadeva Ayyar and Rangacharyar for respondents.

JUDGMENT.—Regulation VI of 1831, section 3, bars the right of the ordinary Courts to investigate claims to the possession of,

* Second Appeal No. 547 of 1887.

RAVUTHA
KOUNDAN
v.
MUTHU
KOUNDAN.

or succession to, certain hereditary offices and their emoluments, but otherwise does not interfere with the ordinary jurisdiction of the regular Courts. This is not such a suit, and we see no reason to hold that by that Regulation the ordinary Courts are debarred from entertaining a suit to declare what are the emoluments of the office.

Nor will the plea that this point has already been decided by a Revenue Court of concurrent jurisdiction avail, for the Revenue Courts have not authority under Regulation VI of 1831 to determine such a suit as the present.

[Their Lordships next proceeded to dispose of various other questions raised on this second appeal and passed a decree dismissing the second appeal with costs.]

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

SAMINATHA (PLAINTIFF), APPELLANT,

v.

VIRANNA (DEFENDANT), RESPONDENT.*

1889,
August
2, 13, 20.

Rent Recovery Act—Act VIII of 1865 (Madras), s. 9—Tender of patta by post.

A landlord sent a patta by post to his tenant, who declined to receive it:

Held, the tender of the patta by post was not sufficient to support a suit under s. 9 of the Rent Recovery Act.

SECOND APPEAL against the decree of T. Weir, District Judge of Madura, in appeal suit No. 532 of 1887, affirming the decree of M. Tillainayakam Pillai, Deputy Collector of Madura, in summary suit No. 31 of 1887.

Suit by a landlord under the Madras Rent Recovery Act, s. 9, to compel the acceptance of a patta by the defendant. The lower courts decreed in favor of the defendant, and the plaintiff preferred this second appeal.

Subramanya Ayyar for appellant.

Bhaskyam Ayyangar for respondent.

* Second Appeal No. 884 of 1888.

The facts of this case appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.—This is a suit under s. 9, Act VIII of 1865, by a landlord to enforce the acceptance of a patta. The patta enclosed in a registered cover bearing the tenant's address and a superscription that the letter contained a patta for the tenants' acceptance was offered by the postman to the tenant, who declined to receive it. Both the lower courts have held that the landlord has not complied with the requirements of Act VIII of 1865 and have dismissed his suit. It is argued in second appeal that the landlord has done all that is required of him in that he has made a demand which has been refused. We are of opinion that the lower courts are right and that tender of a patta by post is not sufficient. What a landlord suing under s. 9, Act VIII of 1865, is bound to prove is (1) tender of such a patta as he is entitled to impose, accompanied by (2) a demand to accept, and (3) refusal. Tender of a patta can only be properly effected when it is presented to a person formally by the landlord or some one acting for him, and in such a manner that the tenant is at once able to ascertain whether or not it is of such a nature as the landlord is entitled to impose; the tenant must be put in a position to say whether or not he will accept the patta tendered. What the tenant in this case refused to accept was, not a patta, but a cover said to contain a patta. He was not legally bound to accept the cover tendered to him by the postman, and as we cannot impute to him knowledge of the contents of the cover, we are unable to hold that he refused to accept such a patta as the landlord was entitled to impose. Such a demand as was made in this case, if a demand at all, was a mere indefinite demand, which as was held in *Sagud Chanda Miah Sahib v. Lakshmana Aiyangar* (1) is not sufficient to maintain a suit.

This second appeal therefore fails and is dismissed with costs.

(1) 1.L.R., 1 Mad., 15.

SAMINATHA
v.
VIRANNA.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

NAGATHAL (PLAINTIFF), APPELLANT,

v.

PONNUSAMI (DEFENDANT), RESPONDENT.*

*Civil Procedure Code, s. 13—Res judicata—Cause of action—Limitation Act—
Act XV of 1877, sch. II, art. 91—Suit to cancel a document.*

On 23rd March 1878 plaintiff executed to defendant a document purporting to be a deed of gift. In 1886 plaintiff sued to cancel the document alleging that defendant on 11th May 1881 had agreed to execute a release but had not done so: that suit was dismissed for non-payment of duty due under the Court Fees Act.

The plaintiff now sued in 1887 for a declaration that the document "was executed for nominal purposes and was not intended to take effect."

Held, (1) that since the cause of action in the suits of 1886 and 1887 were not the same, the claim in the latter suit was not *res judicata*;

(2) that the suit was not barred by limitation.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 204 of 1888, affirming the decree of S. Subbayar, District Munsif of Negapatam, in original suit No. 62 of 1887.

The plaintiff was a Hindu widow, and the defendant, her daughter's husband. On 23rd March 1878, the plaintiff executed in the defendant's favor a deed of gift, which confirmed an oral gift of certain property she had made to him at the marriage of her daughter in 1866, and recited that he has been in possession of the property from the date of gift.

In original suit No. 12 of 1886, the plaintiff had sued the defendant for the cancellation of the deed of gift. She then alleged that the possession of the property never passed to the defendant, and that, on 11th May 1881, he had agreed to execute a release, but that he failed to do so. The cause of action was stated to have arisen on 12th May 1881. The plaint had been stamped with a court fee stamp of Rs. 10; and the Court directed the plaintiff to pay the Court fee on the value of the

property, which was Rs. 1,500. She failed to pay this amount and the suit was dismissed under clause II, section 10, of the Court Fees Act.

NAGATHAL
v.
PONNUSAMI.

This suit was brought by the plaintiff against the defendant to obtain a declaration that the deed of gift was "nominally executed and was not intended to take effect." She alleged in the plaint that the deed of gift was cancelled, the defendant having returned the same to her; that since the beginning of December 1885, he had been setting up his right to the property on the strength of the deed being registered and denying her title to the same, &c.

Defendant contended that the claim was barred; that the deed of gift was not cancelled, and that this second suit was brought in the present form in order to evade the Court fee.

The District Munsif dismissed the suit holding that the claim was barred under sections 13 and 43 of the Code of Civil Procedure, and the Subordinate Judge affirmed his decree. The plaintiff preferred this second appeal.

Subramanya Ayyar for appellant.

Sadagopa Charyar for respondent.

The Court delivered the following

JUDGMENT:—Though the relief sought in both suits is substantially the same, the cause of action put forward is different. In the former suit the cause of action was alleged to be the refusal in 1881 of defendant to execute a document; in the latter, the claims to the property advanced by the defendant in 1885. The relief sought is not the cancellation of the document (as to which article 91 of the Limitation Act would apply,) but a declaration that the document was only nominally executed. The plaintiff was in possession of the document and the property, and could only want a declaration. There is no *res judicata*, and it is admitted, on appeal, that section 43 of the Code of Civil Procedure does not apply, nor will the dismissal of the former suit for non-payment of Court fees bar this suit.

We must reverse the decrees of the Courts below, and remand the suit to the Court of first instance for disposal on the merits.

The costs will abide and follow the result.

* Second Appeal No. 1728 of 1888.

APPELLATE CIVIL.

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

HUSSAIN (DEFENDANT NO. 1), APPELLANT.

v.

SHAIK MIRA (PLAINTIFF), RESPONDENT.*

Muhammadian law—Gift by a father—Undivided share—Delivery of possession.

A Muhammadan made a gift in writing to his daughter on her marriage of an undivided moiety of his share in certain buildings, which were the property of the donor's wife. On the death of the donee, her husband married her sister, and the donor thereupon similarly made a gift to her of the remaining undivided moiety. The donees were minors at the dates of their respective gifts. The husband now sued to recover the share of his first wife, of which delivery had not been made.

Held, that the gift was not invalid, either for indefiniteness or for want of delivery of possession.

SECOND APPEAL against the decree of T. Ganapati Ayyar, Subordinate Judge of Kambaconam, in appeal suit No. 759 of 1887, affirming the decree of S. Subbayyar, District Munsif of Nega-patam, in original suit No. 179 of 1886.

Mr. Wedderburn for appellant.

Pattabhiramayyar for respondent.

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.

JUDGMENT.—The only question argued in second appeal is the validity of the gift of items 2 and 3. The plaintiff's first wife was the eldest daughter of defendant No. 1. On her marriage, on 30th May 1883, exhibit A was executed whereby defendant No. 1 gave to his daughter a moiety of the property described in schedules 2 and 3 of the plaint. She died on the 14th June, and on the 15th the plaintiff married her sister, and to her defendant No. 1 gave as dowry the other half of her mother's tiled house and building. The plaintiff now sues for the share of his first wife in the house and lands. These houses were the properties of the wife of defend-

* Second Appeal No. 1655 of 1888.

ant No. 1, and he, therefore, was, at the time of the gift, a co-sharer with his daughters, being entitled only to a one-quarter share. It is argued that the gift by defendant No. 1 to his eldest daughter was invalid (1) because an undivided share cannot be given, and (2) because the donor retained possession and user of the gift. With reference to the latter objection it is sufficient to say that where there is on the part of the father of a minor a *bond fide* intention to make a gift to the minor, the Muhammadan law is satisfied without actual change of possession, and it will be presumed that the subsequent holding of the father is on behalf of the minor. According to the Shurhi Viqaya "a gift made by a father to his child is perfected by the mere declaration of it.(1)" Nor do we think that the former objection should be allowed to prevail. The doctrine of Muhammadan law that a gift of an undivided share in property is invalid because of *musha* or confusion only applies to such objects of gift as are capable of partition. The shares of the father and his minor daughters in the house were defined, but the house was not capable of being divided into three shares consisting of $\frac{1}{4}$, $\frac{2}{4}$ and $\frac{1}{4}$ respectively. The father gave to his minor daughters on their marriages a moiety of the share to which he was entitled, and the gift was not in our judgment void for indefiniteness. This second appeal fails and is dismissed with costs.

HUSSAIN
v.
SHAIK MIRA.

APPELLATE CIVIL.

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

GNANAMMAL AND OTHERS (DEFENDANTS), APPELLANTS,

v.

MUTHUSAMI (PLAINTIFF), RESPONDENT.*

1889.
February 6.

Court sale—Decree against Hindu father—Interest of undivided son—Certificate of sale—Civil Procedure Code, s. 316—Grounds of second appeal.

In execution of a decree for sale passed on a hypothecation bond, all the land comprised in the security was attached. The judgment-debtor was a member of an undivided family; his son put in no claim in execution, but on a claim put in by his nephew it was ordered that the right, title and interest of the judgment-debtor

(1) Macnaghten, p. 213 (Ed. iv).

* Second Appeal No. 70 of 1888.

GNANAMMAL
v.
MUTHUSAMI.

be sold. The decree-holder became the purchaser, and having obtained a sale certificate which recited that "all the interest of the judgment-debtor" was sold, he was put in possession of all the land, part of which he leased to the son. Subsequently the nephew obtained a decree for his share against the decree-holder and then purchased the rest of the land from him. In a suit by the son against the nephew to recover his share, the plaintiff having failed to prove that the judgment debt had been incurred for purposes not binding on him:

Held, that the entire estate less the interest of the nephew was sold to the decree-holder and consequently the son's interest had passed to him.

The question what is actually bargained and paid for at an execution sale is a mixed question of law and fact, and the High Court on second appeal is not bound by the finding of the Court of first appeal with regard to it.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 827 of 1886, reversing the decree of W. Gopalachariar, District Munsif of Trivadi, in original suit No. 31 of 1886.

One Muthu Ayyan, having obtained a decree on a hypothecation bond against the father of the present plaintiff, attached the land comprised in the hypothecation. The present first defendant, an undivided member of the judgment-debtor's family, intervened in execution asserting a claim to a moiety of the land, but at the sale held in execution Muthu Ayyan became the purchaser and was put in possession of the whole property. The present first defendant then obtained a decree against Muthu Ayyan for his share and subsequently purchased from him the remainder of the property.

This suit was brought to recover the plaintiff's share in the land purchased by Muthu Ayyan on the ground that the debt secured by the hypothecation bond was not incurred for his benefit, that he was not a party to the suit, and that the interest of his father alone was sold. The defendant No. 1 pleaded that the sale was binding on the plaintiff, that the plaintiff had signed the delivery account prepared with reference to the land delivered to Muthu Ayyan, and had subsequently taken a lease of part of it from him.

The District Munsif held that the last-mentioned allegation was established, and that taken with the fact "that the plaintiff never came forward with a claim petition," it imposed on the plaintiff the burden of proving that the judgment-debt was not incurred for purposes binding on him, and holding that the plaintiff had failed to prove this, he dismissed the suit. On appeal the Subordinate Judge concurred in the finding that the

plaintiff had not proved the judgment-debt to have been incurred for purposes not binding on him, but reversed the decree on the ground that his interest had not been purchased, observing—

"The first question is whether plaintiff's share also passed to the purchaser. That plaintiff's father mortgaged the entire land is not disputed. There is also no dispute that the land mortgaged was charged with the payment of the decree debt. It is allowed that the land attached in execution was the full extent of land covered by the decree. When the first defendant put in his claim for the release of his half share, the Subordinate Judge of Tanjore, instead of allowing his claim and ordering the sale of the other moiety, made an order that the judgment-debtor's right, title and interest should be sold as stated in the plaint. Defendants do not contend that the order did not run to that effect. What is stated in the plaint must therefore be taken as correct. The Subordinate Court of Tanjore believing that besides the first defendant there might be some other claimants to property attached seems to have passed the order in question in view to protect the interest of all. That the order directed the sale of plaintiff's father's interest alone is not open to question. The sale certificate recites that *all the interest of the judgment-debtor* was sold. Reading it with the light thrown by the order, there can be no doubt that the sale did not extend beyond the interest of plaintiff's father."

The defendants preferred this second appeal.

Rama Rau for appellants.

Pattabhiramayyar for respondent.

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

JUDGMENT.—On the 3rd November 1870 the plaintiff's father hypothecated certain property to one Muthu Ayyan, who, in original suit No. 99 of 1876, obtained a decree rendering the property liable. On his proceeding to realise the decree by attachment, defendant No. 1, an undivided nephew of the judgment-debtor, applied for and obtained the release of his share in the attached property. Muthu Ayyan purchased the property in Court sale, and the plaintiff was for some time a tenant under Muthu Ayyan. Subsequently Muthu Ayyan conveyed his right to defendant No. 1, and the plaintiff now seeks to recover his share of the

GNANAMMAL
v.
MUTHUSAMI.

GNANAMMAL
v.
MUTHUSAMI. lands on the ground that he is not concluded by the decree against his father nor by the sale.

The Munsif dismissed the suit, holding that the plaintiff was estopped by his own conduct in taking a lease from Muthu Ayyan from asserting his title, and that he had failed to prove that the debt was contracted for illegal or immoral purposes.

On appeal the Subordinate Judge sent down an issue to determine whether Muthu Ayyan bargained and paid for the whole land.

The Munsif returned a finding in the affirmative, but the Subordinate Judge, on the ground that only the right, title and interest of the judgment-debtor had been ordered to be sold, held that the father's interest alone had passed, and that the plaintiff's share did not pass to Muthu Ayyan. He therefore reversed the Munsif's decree and decreed for the plaintiff.

In original suit No. 90 of 1885, the present first defendant sued Muthu Ayyan for possession of a house and ground purchased from him. The present plaintiff intervened (as second defendant) as the party in possession and claimed a half share as his ancestral property. The Court of first instance and the Lower Appellate Court both found that all that passed to the purchaser (Muthu Ayyan) in the Court sale in execution of the decree in original suit No. 90 of 1876 was the right, title and interest of his judgment-debtor (the present plaintiff's father). On second appeal this Court, remarking that the case had not been decided in accordance with the principles laid down by the Privy Council in *Nanomi Babuasin v. Modhun Mohun*(1) and *Simbhunath Panday v. Golab Singh*(2), remanded the case for a finding on two points—(1) whether Muthu Ayyan bargained and, in point of fact, paid for the whole or for the father's interest only as contradistinguished from that of the son, and (2) if for the whole whether the debt was immoral or vicious. The Subordinate Judge (Kumbakonam) found that the purchaser bargained and paid for the whole property and that the debt was neither immoral nor vicious. This Court accepted the finding, set aside the decrees of the Courts below, and gave the present first defendant a decree.

There are thus two diametrically opposite findings by two Subordinate Judges on one and the same question, and it is argued in

(1) L.R., 13 I.A., 1; s.c. I.L.R., 13 Cal., 21. (2) L.R., 14 I.A., 82.

second appeal that the finding of the Subordinate Judge in the present case being on a question of fact, it cannot be questioned in second appeal. In our judgment the question as to what the purchaser actually bargained and paid for is not a mere question of fact but a mixed question of law and fact, and we think that, looking at all the circumstances, the Subordinate Judge erred in holding that plaintiff's share did not pass.

There can be no doubt that by the bond on which the suit was brought the property was charged. The decree directed the entire mortgaged property to be sold, and the whole property was attached. Then the first defendant, the undivided nephew of the judgment-debtor, advanced his claim, and his interest was released from attachment. The plaintiff put in no claim. The property was sold and the sale confirmed as to the property itself, Muthu Ayyan being declared the purchaser of the immovable property specified. We have no doubt that the interest brought to sale was the entire estate less the interest of the first defendant.

We therefore reverse the decree of the Subordinate Judge and restore that of the Munsif. The plaintiff will pay appellant's costs both in this and the Lower Appellate Court.

APPELLATE CIVIL.

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

CHINNAYYA (PLAINTIFF), APPELLANT,

v.

PERUMAL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Alienation by father when binding on son—Burden of proof.

The father of an undivided Hindu family has no power to alienate the son's co-parcenary share in land in the absence of any debt. One claiming merely as the father's vendee must therefore give evidence that the alienation was made for some purpose which would bind the son, or that it was made with his consent.

SECOND APPEAL against the decree of C. Venkobacharyar, Subordinate Judge of Madura (West), in appeal suit No. 264 of

* Second Appeal No. 1373 of 1885.

CHINNAYYA
v.
PERUMAL.

1887, reversing the decree of P. S. Gurumurthi Ayyar, District Munsif of Madura, in original suit No. 451 of 1886.

The plaintiff in execution of a personal decree obtained by him in original suit No. 42 of 1884 against defendant No. 1 attached the judgment-debtor's interest in a certain house. Defendant No. 1 intervened in execution claiming title under a sale-deed executed to him in 1883 by defendant No. 2, who was the father of defendants Nos. 3, 4 and 5. The attachment was released by an order made under section 278 of the Code of Civil Procedure and the plaintiff brought this suit to set aside the above order and to obtain a declaration that his judgment-debtor's interest therein was liable to be sold in execution of his decree.

The District Munsif passed a decree in favor of the plaintiff, but on appeal this decree was reversed by the Subordinate Judge who said:—"Half of this house is ancestral property and the other half had been purchased by Minatchi Naidu in Court sale under exhibit II. On the date of attachment, the sons of Minatchi Naidu had no interest in the house as he had disposed of the property long before the attachment. Although in the sale-deed I, Minatchi Naidu is not described as the manager, yet the evidence on record shows that he was, and is still, the family manager. The father has a disposing power, and, by reason of it, he represents his sons also in transactions and suits provided that the power is properly exercised. The District Munsif finds that the transaction in question is *bonâ fide*. The vendee has had possession following his purchase, and till the present moment Minatchi Naidu's sons have not raised objections to first defendant's purchase. According to the principles enunciated in the case of *Kunhali Beari v. Keshava Shanbaga*(1) it is quite clear that the sons cannot set aside the alienation unless they show that the transaction was immoral or illegal. Plaintiff, who is the son's creditor, cannot be in a better position than the son himself. The Lower Court's view is not, therefore, tenable."

The plaintiff preferred this second appeal.

Bhashyam Ayyangar for appellant.

The only question is whether the sale by defendant No. 2 to defendant No. 1 passed the whole property. It was not an

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PERUMAL.

alienation in satisfaction of a debt, so *Kunhali Beari v. Keshava Shanbaga*(1) and other authorities as to Court sales are inapplicable, for the obligation on a Hindu to pay his father's debt is independent of the existence of family property; nor was this shown to have been an alienation made for any family purpose. The plaintiff therefore is entitled to attach and sell the share of defendant No. 3 in execution of his decree. The case is governed by *Subramanya v. Sadasiva*(2).

Subramanya Ayyar and *Desikacharyar* for respondents.

The law as to the father's power of alienation and as to the burden of proof when that power is called in question is correctly stated by West, J., in *Jagabhai Lalubhai v. Vijbhukandas Jagjivandas*(3) which case was followed in *Kunhali Beari v. Keshava Shanbaga*(1) see also *Nanomi Babuasin v. Modhun Mohun*(4). Moreover the presumption is that alienation made by the father as managing member of a Hindu family are made for family purposes. *Gan Savant Bal Sarant v. Narayan Dhond Sarant*(5).

Bhashyam Ayyangar in reply. The presumption does not go so far as is contended for. If the purchaser says "I do not know what caused the father to sell, all I know is that I bought or paid for the land," the sons could intervene. *Arunachala v. Munisami*(6).

JUDGMENT.—The Subordinate Judge has misunderstood the decision in *Kunhali Beari v. Keshava Shanbaga*(1). Although the son or the son's creditor cannot set up his vested interest in ancestral property for the purpose of denying the father's power to alienate it for a debt, the father has no power to alienate the son's co-parcenary share in the absence of any debt.

It was for the purchaser therefore to give evidence that the alienation was for some purpose which would bind the son, or that it was made with his consent.

We must reverse the decree of the Lower Appellate Court and remand the appeal for rehearing.

The costs will follow and abide the result.

(1) I.L.R., 11 Mad., 64.

(3) I.L.R., 11 Bom., 37.

(5) I.L.R., 7 Bom., 467.

(2) I.L.R., 8 Mad., 75.

(4) I.L.R., 13 I.A.; 1 s.c., I.L.R., 13 Cal., 21.

(6) I.L.R., 7 Mad., 39.

APPELLATE CIVIL.

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

1889.
May 2.
August 9.

KRISHNA AND OTHERS (DEFENDANTS NOS. 1—4), PETITIONERS,

v.

AKILANDA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Specific Relief Act — Act I of 1877, s. 9.—Immovable property—Right of ferry.

A right of ferry is immovable property or an interest therein within the meaning of Specific Relief Act, s. 9.

PETITION under section 622 of the Code of Civil Procedure praying the High Court to revise the decree of T. Dorasami Pillai, District Munsif of Salem, in original suit No. 2 of 1887.

Suit to recover the use of a certain ferry. The plaint alleged that the right of ferrying boats from the Pallipalayam inam agraaharam on the bank of the Cauvery to the opposite bank belonged to the agraaharamdars from time immemorial, that the plaintiffs leased the said right from the agraaharamdars and enjoyed it up to 12th September 1886, and that while the plaintiffs were plying boats on that date, the defendants unlawfully interfered with them, prevented their boats from plying, and that since then the defendants continued to ply their own boats.

The District Munsif passed a decree in favor of the plaintiff; and the defendants preferred this petition.

Rama Rau and Sadagopacharyar for petitioners.

Subramanya Ayyar and Bhashyam Ayyangar for respondents.

The further facts of the case appear sufficiently from the judgment of the Court.

JUDGMENT.—There is a ferry established from time immemorial across the river Cauvery within the limits of the Pallipalayam agraaharam in the Sankagiri division of the Salem district. It is conceded by both parties that the agraaharamdars have by custom the exclusive right of managing the ferry, of maintaining and providing necessary ferry boats, and of taking the nett collections of tolls to their own use. Under a registered

* Civil Revision Petition No. 280 of 1888.

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lease (exhibit A) granted by the agraaharamdars on 6th October 1875 for a term of 10 years, the counter-petitioners had enjoyed that right for 10 years. In September 1886 the petitioners dispossessed them and set up a subsequent lease from the agraaharamdars in their own favor for the next 10 years. On the other hand, the counter-petitioners asserted that there had been an extension of the prior lease for 10 years and instituted the present suit under section 9 of the Specific Relief Act to recover the use of the ferry. The District Munsif finding upon the evidence in the case that petitioners dispossessed the counter-petitioners of their ferry otherwise than in due course of law, decreed the claim and directed that the use of the ferry be restored to them. The petitioners contend that the right of ferry is neither immovable property nor an interest therein within the meaning of section 9 of the Specific Relief Act, and that the decree passed by the District Munsif was one which he had no jurisdiction to pass. We are unable to accede to this contention. According to the General Clauses Act, the term 'immovable property' includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. It includes as well *incorporeal* rights in immovable property as *tangible* immovable property.

In *Maharaja Futtehsangji Jaisantsangji v. Desai Kullianraji Hakoombtraji*(1) the Privy Council say: "Immovable property comprehends certainly all that would be real property according to English law and possibly more. In some foreign systems of law in which the technical division of property is into 'movables and immovables, as e.g. the Civil Code of France, 'many things which the law of England would class as incorporeal hereditaments fall within the latter category.' In *Bhundal Panda v. Pandol Pos Patil*(2) the exclusive right of fishing in a creek within certain limits between high and low water mark was held to be immovable property within the meaning of section 9 of Act I of 1877. The Registration Act III of 1877 includes ferries in the definition of immovable property and places them in the same category with fisheries and ways and other benefits to arise out of land. The Code of Criminal Procedure, section 145, shows that, whenever the intention was to designate im-

(1) 13 B.L.R., 265.

(2) I.L.R., 12 Bom., 221.

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movable property which is capable of physical possession, the Legislature indicated that intention by the word "tangible." In Act I of 1877 there is neither a special definition of immovable property nor other indication of an intention to restrict the summary remedy to tangible immovable property. We are of opinion that the District Munsif had jurisdiction to entertain the suit and to deal with it under section 9 of the Specific Relief Act and dismiss this petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

RAMAKRISHNAMMA (DEFENDANT), APPELLANT,

v.

BHAGAMMA (PLAINTIFF), RESPONDENT.*

Court Fees Act—Act VII of 1870, s. 7, cl. 5—Civil Courts Act—Act III of 1873, ss. 12, 14. Suit to enforce registration—Jurisdiction.

Suit in the Court of a District Munsif to enforce registration of two instruments of gift. The property purported to be conveyed was the same in each instrument and its value was found to be less than Rs. 2,500, but the earlier instrument comprised also an assignment of the right to manage a charity. The later instrument was found to have been executed in supersession of the former, and the District Munsif passed a decree directing its registration alone.

Held, that the District Munsif had jurisdiction to entertain the suit.

SECOND APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Cocanada, in appeal suit No. 20 of 1888, affirming the decree of Y. Janakiramayya, District Munsif of Cocanada, in original suit No. 81 of 1887.

The plaintiff was the widow of Srinivasa Rau, who, on the day of his death, executed two documents, filed as exhibits B and A, respectively, by which he conveyed certain land by way of gift to the plaintiff. The property expressed to be conveyed was the same in exhibits A and B, but exhibit B (unlike exhibit A) purported further to assign to the plaintiff the right to manage a

certain charity. The plaintiff in this suit sought to enforce the registration of these documents.

The defendant denied the genuineness of the documents and pleaded that, as each document purported to deal with property of the value of Rs. 2,000, the District Munsif had not jurisdiction to try the suit.

The District Munsif overruled the plea to his jurisdiction and he held that both documents were genuine, but that as exhibit A superseded exhibit B, exhibit A alone should be registered, and passed a decree accordingly. The Subordinate Judge, on appeal, affirmed this decree.

The defendant preferred this second appeal.

Subba Rau for appellant.

Bashyam Ayyangar 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 Muttusami Ayyar, J.

MUTTUSAMI AYYAR, J.—The appellant is the son of one Srinivasa Rau and the respondent is his widow. On the 5th January 1887, Srinivasa Rau executed two documents, exhibits A and B, in favor of the respondent, and died on the same day. Shortly after his death, the respondent presented exhibit A to the Registrar at Cocanada for registration, which however was refused by that officer. Thereupon she brought the present suit to enforce its registration and that of exhibit B in the Court of the District Munsif of Cocanada. The appellant denied the genuineness of those documents and the jurisdiction of the District Munsif. Both the Courts below found that exhibits A and B were genuine and held that the suit was cognizable by the District Munsif. They were also of opinion that both were not intended to have independent operation and that exhibit A superseded B. On this ground they passed a decree declaring that exhibits A and B are genuine, but directing the registration of A alone; hence this second appeal.

It is urged on behalf of the appellant that the inquiry, as regards the execution of exhibit A was imperfect, and that there is no evidence to show that the interpolations in exhibit B were made *bonâ fide*. Exhibit A, which is found to be genuine, is, though signed and attested, but a copy of exhibit B as corrected and interlined, and there is ample evidence to the effect that

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Srinivasa Rau executed exhibit A, in which the corrections and alterations to be found in exhibit B are adopted. The next objection is that the Court of first instance declined to summon certain witnesses and issue warrants for others as requested by the appellant in C. W. P. No 1713. It appears that nine witnesses were examined for him, and that the District Munsif refused his application for additional witnesses by reason of laches on his part. It appears likewise that the Lower Appellate Court refused to admit certain documents tendered in evidence on appeal on the ground that they might have been produced in the Court of first instance if the appellant had exercised due diligence. It is not shown that the grounds on which the additional evidence was refused are not tenable. Nor is there any affidavit to the effect that the evidence was not offered in time from circumstances over which the appellant had had no control. On the merits, this second appeal must fail.

The substantial question for determination is whether the District Munsif had jurisdiction to entertain the suit with reference to its value. On this point the contest in the first Court was whether the value of the property affected by the documents should be taken to be Rs. 2,000, as mentioned in exhibit A, or computed with reference to section 7, clause 5 of the Court Fees Act of 1870. The District Munsif observed (1) that the property comprised in the documents was *not* the subject-matter of the suit, and that its value did not depend on the value of the property; (2) that, if it did, by analogy to suits for the specific performance of a contract of sale, Rs. 2,000 should be treated as the proper value; and (3) that, even if it were computed in the mode urged for the appellant, it would not be more than Rs. 2,012½. On appeal, the Subordinate Judge remarked that, if the two exhibits, A and B, were independent of each other and were both intended to have legal operation, each of them must be taken to be an instrument of Rs. 2,000, but that as exhibit A superseded B, the District Munsif had jurisdiction. It is argued before us that there is no evidence that Rs. 2,000 was interlined in exhibit B as the proper value, that each document being for Rs. 2,000, the proper value of the suit is Rs. 4,000, and that in computing the value of the inam land the market value should have been taken, instead of 15 times the annual produce as prescribed by section 7, clause 5 of the Court Fees Act. As to the first

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contention, the insertion of Rs. 2,000 in exhibit A, which is found to be genuine, is evidence that the value was interlined in exhibit B by Srinivasa Rau's direction, when he decided to execute a fresh document on a stamped paper in accordance with exhibit B as altered. As to the mode of valuing the suit, regard should be had to the provisions of the Civil Courts Act—Act III of 1873. It is provided by section 12 that the jurisdiction of District Munsifs shall extend to all suits of which the value of the subject-matter does not exceed Rs. 2,500, and by section 14, that, when the subject-matter is land or house or garden, the value shall, for the purposes of the jurisdiction conferred by the Act, be fixed in manner provided by the Court Fees Act, section 7, clause 5. What is the subject-matter of this suit? Is it the transaction evidenced by the document, or the interest in property created by it, or its usefulness as evidence of the transaction? In ordinary parlance registration is but a form of authentication, and its value is nothing more than that of pre-appointed evidence, but its juridical value is higher. As regards instruments of which registration is compulsory, it is of the essence of the transaction, since though it may be valid in other respects, it cannot acquire without registration legal efficacy or the power of affecting the property comprised therein. It is important here to bear in mind the distinction between a registered document and the act of registration, the former is only evidence, and, if it is lost, the transaction may be proved otherwise, but without the latter there can be no legal transaction at all. The object of the suit is to secure legal efficacy to the transaction evidenced by the documents and not simply a mode of proving them, and the value of the transaction must therefore be taken to be the value of the suit. As exhibit A is a deed of gift, it can bear no analogy to a contract of sale of which specific performance is claimed, there being no consideration in the one case whilst there is consideration in the other. The value of the present suit is in my judgment that of the interest created by the document sought to be registered. Both Courts concur in finding that it is below Rs. 2,500. It is then urged that the plaint prayed that both documents be registered, and that as each relates to property of Rs. 2,000 value, the value of the suit is Rs. 4,000. Both Courts find that the appellant's father superseded exhibit B by exhibit A, and the circumstances to which they refer warrant the

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finding. Though the postscript found in B relating to the right of managing Nallaacheruvu choultry and its endowment is not to be found in exhibit A, yet it may be that Srinivasa Rau changed his mind about it when he executed exhibit A in supersession of B. I must hold that, when two documents are executed by one and the same person and they create the same interest in the same property standing to each other in the relation of an operative and a superseded document, the value of the suit for the purposes of jurisdiction is the value of the interest intended to be created by the operative instrument. The only contention which remains to be noticed is that, in determining the value of the subject-matter when it is land, house or garden, the market value should be considered instead of the value prescribed by section 7, clause 5 of the Court Fees Act. I do not think that the value of a suit to have a document registered and thereby give it legal efficacy can be higher for purposes of jurisdiction than that of a suit to recover the property itself.

I am of opinion that this second appeal cannot be supported, and I would dismiss it with costs.

SHEPHERD, J.—I concur.

APPELLATE CIVIL.

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

APPA RAU (PLAINTIFF), APPELLANT,

v.

SUBBANNA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, ss. 106, 108—Landlord and tenant—Assignability of tenancy—Suit by zamindar to set aside a court-sale of his raiyat's interest—Burden of proof.

A zamindari raiyat mortgaged the land comprised in his holding, and the mortgagee, having sued and obtained a decree on his mortgage, attached the mortgagor's interest in the land and purchased it at the court-sale held in execution of his decree. The zamindar, who had intervened unsuccessfully in execution, now sued to set aside the sale and to eject the decree-holder and the judgment-debtor from the land. Neither party adduced evidence:

* Second Appeal No. 1086 of 1888.

Held, that as the burden of proof lay on the plaintiff, and had not been discharged, the suit must be dismissed.

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SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 80 of 1886, affirming the decree of E. Subharayudu, District Munsif of Bezvada, in original suit No. 173 of 1885.

Suit by a zamindar to set aside the sale of the interest of defendant No. 2 in certain land held by him of the plaintiff, in execution of a decree obtained by defendant No. 1 against defendant No. 2, and to restrain the defendants from obstructing the plaintiff from taking possession of the land.

No evidence was adduced. The District Munsif and, on appeal, the District Judge held that the burden of proof lay on the plaintiff and decreed for the defendants.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar for appellant.

Narayana Rau 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 following judgment:—

MUTTUSAMI AYYAR, J.—The appellant is the owner of a portion of the Nuzvid estate in the district of Kistna. Respondent No. 2, a raiyat in the zamindari, mortgaged the land under his cultivation to respondent No. 1, who obtained a decree upon the mortgage and purchased the mortgagor's interest in the land at the court-sale held in execution. When the land was attached prior to the sale, the appellant objected that the tenant had no saleable interest, but his objection was disallowed on the ground that what was intended to be sold was such interest, if any, as the tenant had. The appellant then brought this suit to eject the respondents, alleging that respondent No. 2 had no saleable interest, but they contended that they had a permanent occupancy right. Neither party went into evidence. On appeal the Judge held that the appellant having failed to show how the tenancy was determined, the sale of such interest as the tenant actually had did not entitle him to eject the respondents. It is argued in second appeal that it lies on the tenant to prove that he had a saleable interest either from contract or usage as mentioned in s. 38 of Act VIII of 1865, and that in the absence of proof of such interest, the court-sale gave the appellant a right to re-enter.

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I am unable to accede to this contention. In the absence of a covenant not to assign, a tenancy is presumably a saleable interest, and it lies on the plaintiff in ejectment to show what was the nature of the tenancy, how it ceased by virtue of the court-sale, and how his right to present possession accrued. It is no doubt for the tenant to prove a permanent occupancy right when the plaintiff makes out a *prima facie* case for his eviction, but it does not follow from his failure to prove such right that such other interest as he really had was not saleable. As to s. 38 of Act VIII of 1865, on which reliance is placed for the appellant, it only specifies the sources from which a saleable interest is derived, but it was not intended to deal with presumptions on which the onus of proof rests in suits for ejectment. According to ss. 106 and 108 of the Transfer of Property Act, which only declare the law as previously administered in this presidency, the presumption as to the duration of an agricultural tenancy is that it is a tenancy from year to year, and that it is an assignable interest in the absence of an agreement or local usage to the contrary.

In *Venkataramanier v. Ananda Chetty*(1), decided by this Court in 1869, it was held that the tenancy of an ordinary pattadar (raiyyat) in a mittha was assignable. This Court then observed: "We apprehend the established general rule of law in this presidency to be that such a tenancy, when properly created, entitles the tenant to the right of occupancy for the purpose of cultivation until default in the payment of the stipulated rent at the time it becomes due, and that it may be determined upon such default under s. 41 of Madras Act VIII of 1865, or at any time by the landlord's acceptance of a surrender by the tenant which is required to be in writing by section 12 of the same Act." This shows that even in cases in which a permanent right of occupancy may not be shown to exist, there may be a right to continue in possession so long as rent is punctually paid.

In *Chockalinga Pillai v. Vythealinga Pundara Sunnady*(2), the landlord sued to eject the tenant under a muchalka. The Court then held that neither the Rent Recovery Act nor the Regulations operated to extend a tenancy beyond the period of its duration secured by the express or implied terms of the contract creating

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it. Holloway, J., observed there was nothing in any existing written law to render a tenancy once created only modifiable by a revision of rent, but not terminable at the will of the lessor exercised in accordance with his obligations. It was also observed that the decision in *Venkataramanier v. Ananda Chetty*(1) went too far in laying down the rule as to a pattadar's right of occupation in the broad terms that it did. This decision is an authority for the position that when there is a contract, express or implied, the duration of the tenancy and the right to evict the tenant are governed by it and that to that extent the rule laid down in *Venkataramanier v. Ananda Chetty*(1) is inapplicable. Again, in *Krishnasami v. Varadaraja*(2), which was a Full Bench decision, this Court observed that the case of *Chockalinga Pillai v. Vythealinga Pundara Sunnady*(3) did not derogate from any customary right. The Court discusses the nature of custom on the subject and observes that "where there is so much evidence to show that by the custom of the country and of the district in which the lands are situated permanent cultivators are entitled to permanent occupancy, we do not see how this privilege can be refused to the defendants whose ancestors have cultivated the lands they now cultivate for at least 70 years. This case shows that the general custom of the country and of the district in which the land in suit is situated may materially add to the value of the tenants' length of enjoyment or of other circumstances as *prima facie* evidence of a right of permanent occupancy. In *Venkan v. Kesavalu*(4), in which the plaintiffs failed to prove the letting alleged, and the defendants who admitted that the land belonged to the plaintiffs failed also to establish the occupancy right set up by them, this Court held that the plaintiffs were not entitled to a decree in ejectment. This negatives the view that there is a presumption in favor of a tenancy at will. According to the course of decisions, therefore, in this presidency, the landlord may determine the tenancy if there is a contract, express or implied, by exercising his will in accordance with his obligations; that there is no presumption in favor of a tenancy at will; that an occupancy right may exist by custom; that a pattadar or raiyyat in a mittha is entitled to continue in possession so long as he regularly pays rent and has a saleable interest, and that by reason of special

(1) 5 M.H.C.R., 120.

(2) 6 M.H.C.R., 164.

(1) 5 M.H.C.R., 120.

(3) 6 M.H.C.R., 164.

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

(4) S.A. 1078 of 1887 unreported.

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circumstances in evidence the onus of proof may be shifted, even in regard to a permanent occupancy right, from the tenant to the landlord.

The appellant's pleader draws our attention to the case of *Kripamoyi Dabia v. Durga Govind Sirkar*(1), and to the decisions cited in it. In that case the land formed part of a *patni* belonging to the plaintiffs and the Court held that the onus lay upon the tenant to show that his holding under the plaintiffs was of a transferable character. The holding was on a *patni* tenure, and it may well be that, as a customary incident of that tenure, the landlord may be entitled to *khas* possession unless the tenant made out the special right set up by him. But in *Doya Chand Shaha v. Anund Chunder Sen Mozumdar*(2), another Divisional Bench of the Calcutta High Court held that there was no presumption that any tenure on which land was held was not transferable. In the Privy Council case of *Perhlad Sein v. Doorgapershad Tewarree*(3), which was relied on in *Kripamoyi Dabia v. Durga Govind Sirkar*(1), the defendant set up an intermediate tenure, a *mokurrari* tenure, which derogated from the *prima facie* right of the zamindar (plaintiff) to the gross collections from the mauzas within his zamindari. Adverting to this *prima facie* right of the zamindar, their Lordships of the Privy Council held that the onus lay on the defendant of proving the intermediate tenure. In *Sumbhoolall Girdhurlall v. Collector of Surat*(4), the question was whether the right to levy a *huk* called "*tara garas*" was alienable. The Privy Council observe, apart from any evidence in that case, that the onus lay upon the Government to prove that there was something in the nature of the payment which made it incapable of alienation.

It seems to me that the foregoing cases show that unless the landlord has a *prima facie* right to evict the tenant, he must start his case and show how such right accrued. It may be that the tenant is bound to prove a permanent occupancy right by custom or contract and fails to do so. I do not see, however, how this failure gives the landlord a right to evict the tenant from the land, and shows that the tenant has no other interest in the land which, though not a permanent occupancy right, may be alienable. Such a right of eviction could only arise either because there is

presumption that every zamindari raiyat is a tenant at will, unless and until he shows the contrary, or because the liability to eviction must, unless the special case set up by the tenant is proved, be taken to be admitted upon the pleadings or by the mode in which the parties conducted their case. It would be monstrous to hold that every tenant in a zamindari is presumably a tenant at will. Such a presumption is at variance with section 106 of the Transfer of Property Act and with the course of decisions in this presidency. Nor is there a presumption that a tenancy is not a saleable interest. Such presumption is contrary to section 108 and to the previous course of decisions. In the case before us there was no admission that defendant No. 2 was a tenant at will or that he had no saleable interest. I am therefore of opinion that the plaintiff is not entitled to a decree until he starts his case and shows by evidence how the tenancy of defendant No. 2 ceased by the court-sale. The decision of the Judge is right, and I would dismiss this second appeal with costs.

WILKINSON, J.—I think the Lower Courts were right in holding that the burden of proof lay upon the plaintiff. He seeks to set aside a sale of his tenants' right and to obtain possession of the land. It is evident that if neither side gave any evidence, plaintiff could not recover, for, admittedly defendant No. 2 was at the time of the sale a tenant of the plaintiff, and it has not been shown that the tenancy has terminated or that by law or custom a tenant is prohibited from assigning his tenant right. In execution of the decree obtained by defendant No. 1, the second defendant's rights in the land were sold and purchased by defendant No. 1. He then stepped into the shoes of defendant No. 2 as a tenant of plaintiff, and, before ejecting him, plaintiff must show that he has put an end to the tenancy. This he has failed to do, and the Lower Courts have rightly dismissed his suit. This second appeal fails and is dismissed with costs.

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(1) I.L.R., 15 Cal., 89.

(3) 12 M.I.A., 322.

(2) I.L.R., 14 Cal., 382.

(4) 8 M.I.A., 30.

APPELLATE CIVIL.

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

PATHUKUTTI (PLAINTIFF), APPELLANT,

v.

AVATHALAKUTTI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Muhammadian law—Wakf—Conditional and revocable dedication—Conditions of a valid dedication.

A Muhammadan by an instrument revoking a previous trust deed conveyed her property to her husband on trust as follows:—(1) to maintain the settlor and her children out of the income; (2) to hand over the property to the children on their attaining majority; (3) in the event of the settlor's death without leaving children, with the income of the property to have *Kathom* recited in a mosque, give food to the Mollahs who come there for reciting the same and get the *moilu* performed. The settlor reserved to herself and her representatives an option of dealing with the property as a special fund for the maintenance of her children, if any.

The settlor died leaving no children. In a suit by her half-sister against her husband and others to recover her share of the property:

Held, per Muttusami Ayyar and Parker, JJ., that the plaintiff was entitled to recover her proportionate share of the property, notwithstanding the provisions of the above instrument.

per Shephard, J. There has been no complete dedication of the property, and, except so far as regards the income required for the three specific objects named by the donor, her property is undisposed of.

Conditions of a valid *wakf* considered.

SECOND APPEAL against the decree of the District Judge of South Malabar in appeal suit No. 381 of 1887 confirming the decree of the Subordinate Judge of South Malabar in original suit No. 79 of 1885.

The parties to this suit were Moplahs. The plaintiff sued defendants Nos. 2 and 3 (her brothers), defendant No. 4 (her half-sister), and defendant No. 1 (the husband of her late half-sister, Kuttiyachamma) to recover from them her share of the property of the late Kuttiyachamma and of her late half-brother, Kammali Kutti.

It was pleaded that the plaintiff's claim on the estate of Kammali Kutti was barred by limitation, and this plea prevailed in both the Subordinate Court and the District Court. With

reference to the plaintiff's claim on the estate of Kuttiyachamma the defence was that she had by an instrument which was filed as exhibit I, conveyed her property including certain property which she held under the will of Kammali Kutti to defendant No. 1 on certain charitable trusts which were described in the will of Kammali Kutti, and that the plaintiff accordingly had no right to share in it. Both the Subordinate Judge and the District Judge held that exhibit I, of which the material portions appear *in extenso* in the judgment of Muthusami Ayyar, J., was a valid *wakf* deed, and prevailed against the claim of the plaintiff, and they accordingly passed decrees for the defendants.

The plaintiff preferred this appeal.

Ramasami Mudaliar and Sankara Menon for appellant.

Narayana Rau for respondents.

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

PARKER, J.—I am of opinion that the District Judge clearly intended to express his agreement with the Subordinate Judge that the plaintiff's allegation that she had shared in the income of her late brother's property was untrue, and hence that the suit with respect to that was barred. As to item No. 1 (the house), the District Judge found that the alleged gift to Biyachu Kutti and her daughters was not proved.

The remaining point is whether exhibit I is a wakfnama and valid against the plaintiff, and the sole difficulty in construing it has arisen from paragraph 5.

It must be remembered that exhibit I refers to two distinct properties—(1) those of the executant (Kuttiyachamma) herself, (2) those which she held under the will of her late brother, Kammali Kutti. Kammali Kutti would appear to have dedicated all his property to charitable purposes for which his sister was the trustee, and she provides (paragraph 6) that the holder of her property in the future shall continue to conduct the charities founded by her brother.

With respect to her own property, Kuttiyachamma revokes a former deed and provides (paragraph 2) that her husband shall take possession of it. He is to pay the Government kist, &c., with the surplus income and maintain her and any children that may be born to her. If any children attained majority the husband was then to make over the property to them.

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* Second Appeal No. 1082 of 1887.

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Paragraph 3 provides that if the lady have no offspring or they die after birth, her husband is, after the lady's death, to spend the whole income in prayers and charities which may be beneficial to her, and after his death the senior male and senior female of the tarwad are jointly to conduct these charities.

Paragraph 4 provides that if the children survive their parents the above-mentioned members of the tarwad (the senior male and senior female) shall be guardians of the children and shall render account to them and make over the property to them on attaining majority. Then follows a declaration that if the husband predecease the lady, she will, whether with or without children, conduct *these charities* until her death. I apprehend that the charities here referred to must be Kammali Kutti's charities, since the lady apparently intended (paragraph 2) that she was to have the income of her own property during her life and that, after her death, it should go to her children (if any).

This construction is borne out by paragraph 5 by which I understand the lady to mean that no charities are to be conducted out of her own property till her death, and that if she has children who survive, the property is to go to them absolutely, unburdened by any dedication for charitable purposes, though of course they would have to perform Kammali Kutti's charities.

Taking this view of the document, I think that exhibit I was only a conditional dedication of the lady's property for religious and charitable purposes,—conditional upon the event which has happened, viz., the death of the lady herself and the failure of any issue which attained majority.

Is such a conditional deed a *wakfnama*? It appears to me that it is not.

In *Jugatmoni Chowdrani v. Romjani Bibee*(1) the essentials of a *wakf* grant were discussed, and they are defined to be four in number—(1) the ultimate application must be to objects not liable to become extinct; (2) the appropriation must be *at once* complete; (3) there must be no stipulation for sale and expenditure of the price on the appropriator's necessities; (4) perpetuity is a necessary condition.

Conditions number 1 and 2 do not apply in the present case. Had one of the lady's children lived to attain majority, he would

have taken an absolute interest, and the religious and charitable appropriation would have altogether failed. This condition being interposed, the appropriation as *wakf* was not at once complete.

In *Fatmabibi v. The Advocate-General of Bombay*(1) it was held that a *wakf* must be unconditional and not subject to an option; this is not the case here (paragraph 5 of exhibit I), and exhibit I itself revokes a former deed. (See Baillie's *Moochumudan Law*, p. 556). In the Bombay case the *corpus* of the property could never absolutely revert, and the interposed private interests, which might or might not endure, were held not to avoid the ultimate charitable trust. In this case the trust, as far as the children were concerned, was certainly revocable.

The decision in *Amrutlal Kalidas v. Shaik Hussein*(2) differs from the present case: in that case the *corpus* of the property was irrevocably dedicated to charitable and religious purposes, though as to the income there was a perpetuity created in favor of the descendants of the founder as long as any should exist.

For these reasons, it appears to me that exhibit I is invalid as a *wakf* deed and that the provisions of paragraph 3 as to the appropriation of the income of Kuttiyachamma's own property for religious and charitable purposes wholly fail.

I would ask the District Judge to return a finding on the issue, "To what proportionate share in the properties described in exhibit I is the plaintiff entitled?"

SHEPARD, J.—The plaintiff seeks to recover her share of the property left by her half-brother Kammali who died in 1868 and her half share of the estate of her sister who died in 1882. The first part of the plaintiff's claim the Subordinate Judge held to be barred by limitation, finding that it was not proved as alleged by the plaintiff that she had enjoyed any part of the income of the property since 1868 and that there was no admission to take the case out of the statute. The District Judge concurred in this finding, and, though he did not say so in express words, clearly meant to agree with the Subordinate Judge in holding that the suit was barred; and in their holding I think the Courts below were right, inasmuch as the plaintiff was entitled to her share immediately on the death of her brother Kammali, and more than twelve years intervened between the date of his death and the

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(1) I.L.R., 6 Bom., 42.

(2) I.L.R., 11 Bom., 492.

(1) I.L.R., 10 Cal., 533.

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filing of the suit (article 123 of the second schedule to the Limitation Act). The District Judge also found, agreeing with the Subordinate Judge, that the alleged gift by Maria Kutti to Biyachu and her daughter was not proved. So far therefore the appeal must be dismissed. To the rest of the claim, that is, to the claim in respect of Kuttiyacha's estate the Courts agreed in thinking that the instrument executed by her in 1881 afforded a complete answer.

In both Courts this instrument (exhibit I) was construed as an instrument constituting the property dealt with *wakf* with a condition attached that, if children were born to Kuttiyacha, they were to take the property. In this instrument, executed by Kuttiyacha when pregnant, she directs her husband to take possession of the property specified, and with the surplus income to support her children and conduct the charities according to the will of Kammali. He is to hand over the property to the children on their attaining majority.

Then follows the clause which is supposed to make the instrument an instrument of *wakf*. In this clause the trustee is directed in the event which has happened, viz., of Kuttiyachamma leaving no children, with the income of the properties to have kathom recited in Jumath mosque at Ponnani, give food to the Mollahs who come there for reciting the same, and get the *moilu* performed. It was not present to her mind that then those objects would exhaust the income of the properties, for she proceeds to direct the trustee to conduct "other charities beneficial to me for ever."

If the further direction had been so framed that any effect could be given to it, it might be said that there was a complete dedication of the property, no part of the income being left undisposed of. But the direction is expressed in such general terms as to give the trustee no sort of guidance. In order that a gift for a charitable purpose or indeed for any purpose should be operative and take effect, the object which the giver proposes must be defined with certainty. The requisite certainty is here wholly wanting and therefore no effect can, in my opinion, be given to the final direction of Kuttiyachamma. It follows that there has been no complete dedication of the property, and that, except so far as regards the income required for the three specific objects named by the donor, her property is undisposed of.

Taking this view of the instrument, I think that no question of *wakf* arises and that the plaintiff as one of the Kuttiyachamma's heirs is entitled to the share of her property burdened with the charges she has imposed upon it.

I would reverse the decree of the Lower Court except so far as relates to the estate of Kammali and grant the plaintiff a decree for the recovery of her share of the estate of Kuttiyacha, the decree being made, however, without prejudice to the rights of the trustee in respect of the three specific duties imposed upon by clause 3 of exhibit I.

This second appeal was referred under the provisions of section 575 of the Civil Procedure Code to Muttusami Ayyar, J., who delivered the following judgment:—

MUTTUSAMI AYYAR, J.—This second appeal has been referred to me under section 575 of the Civil Procedure Code owing to a difference of opinion between the learned Judges who heard it.

The appellant, a Mopla lady in South Malabar, sued for her share under Mahomedan law in the property of her deceased half-brother Kammali Kutti and half-sister Kuttiyachamma. The claim was considered by the Courts below to be barred by limitation so far as it related to the property of Kammali Kutti. Their decision rested on the ground that the half-brother died more than twelve years before suit and that the appellant's averment that she participated in the enjoyment of his property within twelve years was not true. Upon the facts found, the decision is correct, and on this point, there is no difference of opinion between the Judges who first heard this appeal. They also agreed that upon the finding that there was no movable property of which partition could be decreed, the claim regarding a share therein was properly dismissed. They concurred further in holding that the appeal must fail in regard to item No. 1 of the immovable property. It is only necessary for me for the purposes of this reference to mention the nature of the contest with reference to items 2 to 6 which belonged to the appellant's deceased half-sister Kuttiyachamma. The appellant's case was that the settlement made by that lady under exhibit I was inoperative and that the property forming the subject of the settlement was liable to be divided. Both the Courts below considered the settlement to be valid. In this Court Mr. Justice Parker held that exhibit I was a *wakfnama* and no effect could be given to it as the dedication to charitable and

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religious use it provided for was not unconditional and complete. Mr. Justice Shephard was of opinion that the instrument was not a *wakfnama*, and that even if it were the gift, was complete in the sense that the giver reserved no power of revocation. The question I have to consider is whether the instrument is a *wakfnama*, and whether effect can be given to it in part or in whole. The material portions of the document are paragraphs 2 to 5, and they run in these terms:—

“2. You shall from this day onwards keep in possession the properties specified in the schedule along with the above-mentioned documents, defray the customary expenses and pay the Government revenue, and with the surplus income you shall until death maintain me who am pregnant and the children I may bring forth, and conduct the charities according to the testamentary instrument of the deceased Kammali Kutti. Besides, when the children I may bring forth attain majority, you shall make over the properties to them along with the documents.

“3. If either I have no offspring, or if they die after birth, with the income from the properties, you shall, after my death, have *kathom* recited in the Jumath mosque at Ponnani, give food to the Mollahs who come and live there for reciting the same and get the *moilu* performed, and you shall, with due regard to time and propriety, conduct other charities beneficial to me for ever without any default. But you, till your death, and after your lifetime, the senior male member and the senior female member of my tarwad for the time being jointly, shall be responsible for the management of the charities. The Mahadur Tangal for the time being of Ponnani shall have the superintendence of the charities conducted by my tarwad and the power to conduct them without default.

“4. If children be born and they survive us, the aforesaid members of my tarwad, who have been appointed to conduct the charities, shall have the liberty and power to be the guardian of the children and to render account and make over the (properties) in case (they) have to be transferred on their attaining majority. If you die after children are born and I be alive, or if there be no children and I survive, I shall, in the capacity of the guardian of the children (in the former case), be prepared to conduct these charities, and I shall in accordance with the provisions of the above paragraphs conduct the charities until my death.

“5. Nothing in this shall be considered to affect my arrangement that the charities cannot be conducted until my death, and that the properties cannot, [?] at any time during the lifetime of the children, be taken up as special property for their maintenance.”

There appears to me to be sufficient ground for holding that the document in question is a *wakfnama*. The event that has arisen was anticipated by the settlor, and by paragraph 3, she dedicated the property permanently and exclusively to religious and charitable use if the contingency anticipated should arise. It may be that the creation of *wakf* subject to a contingency is either valid or invalid, in part or in whole, but this cannot affect the construction which ought to be placed on the instrument. The criterion is whether from the contents of the document it could reasonably be inferred that a *wakf* or an endowment for religious and charitable use was intended. It should also be borne in mind that the creation of a perpetuity except for and in connection with the ultimate destination of property to such use would be open to objection. The instrument being a *wakfnama*, the further question arises whether it is valid, and I am of opinion that it is not. The dedication should not depend on a contingency and the appropriation must at once be complete and not suspended on anything. Baillie, at page 556, gives an illustration, observing if one were to say “my mansion is a charity appropriated to the poor if my son arrives,” and the son should arrive, the mansion does not still become *wakf*. He adds, if one should say this, “my land is charity if such a one pleases,” and if the person referred to should indicate his pleasure, still the *wakf* would be void. I take the reason to be that at the time of settlement there was no absolute or complete appropriation in the sense that no proprietary interest was reserved and that the property was effectually constituted to be charity property. I do not desire to be understood as saying that the interposition of an intermediate estate limited in duration would invalidate the creation of a *wakf*, provided that there was an out and out appropriation at the time of the settlement. In that case, the appropriation to religious use would only be deferred so long as the interposed estate continued and there would be no reason for saying that the religious appropriation might fail altogether. In the present case there is also another objection as observed by Mr. Justice Parker. In paragraph 5, the settlor

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reserved an option to her during her life and an option to her representatives even after her death, to the extent of dealing with the endowment as a special fund for the maintenance of her children, if any. Seeing that she revoked a former settlement, I cannot say that she did not desire to have an option to do the same in regard to the settlement before me. As to the decided cases to which my attention was called, the ground on which the decision rested in *Delroos Banoo Begum v. Nawab Syud Ashgur Ally Khan*(1) was that the settlor did not understand in making the settlement that she was creating a tenure in the nature of a *wakf*. The decision in *Mahomed Hamidulla Khan v. Lotful Hug*(2) is an authority in support of the view which I take, and the facts of that case were similar to this, inasmuch as a contingency was indicated by the creation of an intermediate estate which might prevent the ultimate dedication to religious use from ever taking any effect at all. Nor does the case in *Luchmiput Singh v. Amir Alum*(3) support this appeal. The case in *Jewun Doss Sahoo v. Shah Kubeeroodeen*(4) did not decide the question which is here raised for decision. As for the case in *Fatma Bibi v. The Advocate-General of Bombay*(5) Mr. Justice West observes that the direct ownership of the property was completely parted with, whilst in the case before us the settlor reserved an option. The *ratio decidendi* in *Mahomed Hamidulla Khan v. Lotful Hug*(2) is that the principle underlying a *wakf* is charity and the ultimate application of property, the subject of *wakf* must be certain and to objects which never become extinct and those objects must be all of religious and charitable character. This is in accordance with Hedaya as read by Hanifa, "that to constitute a *wakf*, there must be a dedication solely to the worship of God or to religious or charitable purposes." It seems to me that unless the ultimate application of the property to religious or charitable use can be predicated with certainty from the deed of the settlement, it cannot be said that one essential ingredient, viz., application to charity is not wanting and that a valid *wakf* is created. For these reasons, I come to the same conclusion to which Mr. Justice Parker has come. The result is that the order proposed by him

(1) 15 B.L.R., 167.

(3) I.L.R., 9 Cal., 176.

(5) I.L.R., 6 Bom., 42.

(2) I.L.R., 6 Cal., 744.

(4) 2 M.I.A., 390.

will be the order of the majority of the Judges who took part in this appeal.

[In compliance with the above order the District Judge returned a finding which was accepted by the High Court, and the decree appealed against was accordingly modified by awarding to the plaintiff $\frac{2}{4}$ of items Nos. 2—5 described in exhibit I.]

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APPELLATE CIVIL.

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

KOMBI (PLAINTIFF), APPELLANT,

v.

AUNDI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Specific Relief Act—Act I of 1877, s. 42—Suit for declaration of title as holder of a stanom to which a malikana allowance is attached—Pensions Act—Act XXIII of 1871, s. 6.

Suit to declare plaintiff's title to the stanom of fifth Raja of Palghat; the first Raja (defendant No. 1) received a malikana allowance from Government payable to the various stanomdars, but had refused to pay to plaintiff the fifth Raja's share:

Held, the plaintiff being entitled to sue for further relief than the declaration of his title and having omitted to do so, the suit must be dismissed under Specific Relief Act, s. 42.

Per cur: Pensions Act, s. 6, was not applicable to this case.

SECOND APPEAL against the decree of L. Moore, Acting District Judge of South Malabar, in appeal suit No. 25 of 1888, reversing the decree of S. Subbramanya Ayyar, District Munsif of Temelprom, in original suit No. 8 of 1887.

Suit for a declaration that the plaintiff was entitled to the stanom of the fifth Raja of Palghat. Defendant No. 1 was the first Raja, and as such he received from Government a *malikana* to distribute among the other Rajas, being the stanomdars of the kovilagom. The plaint stated that defendant No. 1 refused to pay the fifth Raja's share to the plaintiff, who accordingly brought this suit to establish his title.

* Second Appeal No. 744 of 1888.

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The District Munsif passed a decree for the plaintiff, but it was reversed on appeal by the District Judge, who held that the suit was not cognizable by the District Munsif.

The plaintiff preferred this second appeal against the decree of the District Judge.

Sankaran Nayar for appellant.

Rama Rau and *Ramachandra Ayyar* for respondents.

The further facts of this case and the arguments adduced on second appeal appear sufficiently for the purpose of this report from the following judgments:—

WILKINSON, J.—The plaintiff, one Kombi Achan, instituted this suit to obtain a declaration that he was the fifth Raja of Palghat. The Munsif decreed for the plaintiff, but on appeal the District Judge dismissed the suit on the grounds—(1) that the suit was not cognizable by the Munsif, the certificate required by section 6, Act XXIII of 1871 not having been obtained, and (2) that the plaintiff was entitled to further relief and could not therefore maintain a suit under section 42 of the Specific Relief Act. I am of opinion that the Judge was in error on the former point. The suit was not a suit relating to any pension or grant of money or land-revenue conferred by the British or any former Government, but merely a suit for a declaration as to the plaintiff's status. No doubt malikana is paid by Government on behalf of the stanom of the fifth Raja, but this suit did not seek a declaration that the plaintiff is entitled to anything so payable. Act XXIII of 1871, being in derogation of the rights of the subject to resort to the ordinary Civil Courts, must be construed strictly. But the suit is barred by the provisions of section 42, Specific Relief Act. The malikana payable to the fifth Raja is in the hands of the first Raja. There being a dispute between the male members of the family as to who is, in virtue of seniority, entitled to succeed to the vacant post, the first Raja refused to pay any malikana until the claimants have made good their title. The plaintiff was entitled to seek further relief than a mere declaration of his status. Being entitled to an executory decree he cannot seek a mere declaratory decree. The decree of the Lower Appellate Court must therefore be affirmed and the appeal dismissed with costs.

MUTTUSAMI AYYAR, J.—This was a suit to have it declared that the appellant (plaintiff) was entitled to the stanom of the

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fifth Raja of Palghat. The plaint stated that his status as such was denied by the defendant No. 4 and that defendant No. 1, who drew from the Government the malikana allowance payable to the several stanoms and edoms in the kovilagam, refused to pay the appellant the share due to the fifth Raja. The District Judge considered that the suit was not cognizable by the District Munsif under the provisions of section 4 of Act XXIII of 1871 and of section 42 of Act I of 1877. Hence this second appeal.

I am also of opinion that the Pensions Act has no application in this case. The suit was not brought against the Government, nor was any relief claimed within the scope of the Act. As soon as the pension was paid by the Government to the first defendant, it ceased to be a pension payable by the former and became money had and received by the latter for the use of persons entitled to the several stanoms and edoms for whose benefit the payment was made. The decision in *Babaji Hari v. Rajaram Ballal*(1) is not in point. It proceeded on the ground that Act XXIII of 1871 was intended not only to guard the executive Government against responsibility to the Civil Courts in respect of pensions, but also to keep the distribution of what is regarded as a bounty of Government in the hands of its executive officers. This view is consistent with the decision of this Court in regard to suits for partition of inams mentioned in Regulation IV of 1831 (Madras) and may be accepted as sound.

But this was not a suit brought to obtain a declaration that the fifth Raja was entitled to a share of the malikana which the Government paid the first defendant professedly on his own account. On the other hand it was admitted that the malikana was paid by the Government to the first defendant to be distributed among the fifth Raja and others, the only matter in controversy being whether the appellant was the fifth Raja. This differs therefore from the Bombay case in that the money received by the first defendant was paid by the Government and received by him avowedly for distribution among the fifth Raja and others of his family, and it is not necessary to determine for the purposes of this suit that the fifth Raja is entitled to a share in the malikana.

Though the Pensions Act does not bar this suit, yet the

(1) I.L.R., 1 Bom., 75.

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decision appealed against must be supported under section 42 of the Specific Relief Act. It provides that no declaration shall be made when the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The arrears of malikana payable to the fifth Raja and already paid to the first defendant, being monies had and received by the one for the use of the others, their recovery was the further relief which the appellant was at liberty to claim and which he omitted to claim or abandon. The object of the proviso to section 42 is to avoid multiplicity of suits and to prevent a person getting a declaration of right in one suit and immediately after, the remedy already available in another. On this ground the appeal must fail and be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

1889.
August 7.
Sept. 3.

MUNICIPAL COUNCIL OF TUTICORIN (DEFENDANTS),
PETITIONERS,

v.

SOUTH INDIAN RAILWAY COMPANY (PLAINTIFFS),
RESPONDENTS.*

*Municipal tax—District Municipalities Act—Act IV of 1884 (Madras), ss. 49, 50, 53,
101—Wrongful assessment of profession tax—Jurisdiction of Small Cause Court—
Provincial Small Cause Courts Act—Act IX of 1887, sch. II, paragraph 1—Order
of a Local Government.*

The Municipality at Tuticorin demanded Rs. 50 as profession tax from the South Indian Railway Company which had already paid profession tax to the Municipality at Negapatam. The Company complied with the demand under protest and sued the Municipality for a refund of the amount paid on the Small Cause Side of the District Munsif's Court :

Held, (1) the Court had jurisdiction to hear and determine the suit;

(2) the Municipality at Tuticorin had no right to levy the tax on the Railway Company and the decree directing the amount levied to be refunded was correct.

* Civil Revision Petition No. 173 of 1888.

PETITION under Act IX of 1887, s. 25, praying the High Court to revise the decree of S. Krishnasami Ayyar, District Munsif of Tuticorin, in small cause suit No. 1041 of 1887.

Subramanya Ayyar for petitioners.

Burton for respondents.

The facts of this case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the following

JUDGMENT:—The petitioners in this case are the Municipal Council at Tuticorin and the counter-petitioners are the South Indian Railway Company. The question for decision is whether the Railway Company who exercise their profession or carry on their business as such Company as well within the limits of the Municipality at Tuticorin as within the limits of the Municipality at Negapatam are liable under Act IV of 1884 (Madras), to pay the profession tax to both Municipalities. The facts upon which the question arises are shortly these. In 1884, when Act IV of 1884 was passed, Negapatam was the head-quarters in India of the South Indian Railway Company. The Company's profession tax was paid for that and the subsequent year to the Negapatam Municipality. In April 1885, the Company's head-quarters were transferred from Negapatam to Trichinopoly, but the Negapatam Municipality continued to demand and the Railway Company continued to pay them the profession tax due for 1886-87 and for the first half of 1887-88. On 6th August 1887, the Municipality at Tuticorin gave notice to the Railway Company that Rs. 50 was payable to that body as the Company's profession tax for the first half of the year 1887-88. This demand was made after the Company had paid Rs. 50 as their profession tax to the Municipality of Negapatam for the same half-year. On the 31st August 1887, the Railway Company paid Rs. 50 to the Municipality at Tuticorin under protest and preferred an appeal against the assessment on the ground that the profession tax had been previously paid to the Negapatam Municipality. Their appeal was rejected and they then sued for a refund on the Small Cause Side of the District Munsif's Court at Tuticorin. The Tuticorin Municipality resisted the claim on three grounds, viz. (1) that the suit was barred by Act IV of 1884 (Madras), (2) that the District Munsif had no jurisdiction to entertain it on the Small Cause Side, and (3) that the tax, of which a refund was

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claimed, had been lawfully levied. The District Munsif disallowed their objections and decreed the claim with costs and the contention before me is that the decision is contrary to law as regards each of those objections.

As to the first objection, viz., that the suit cannot be maintained in a Civil Court, I am unable to support it. It is taken with reference to section 101 which provides that the adjudication of an appeal by the Municipal Council shall be final. Section 97 allows an appeal from the decision of the Chairman to the Municipal Council in regard to (i) any classification or revision under section 54, (ii) any valuation or assessment under section 65 and any revision thereof under section 71, and (iii) any tax on any vehicle or animal demanded on behalf of the Municipal Council. Act IV of 1884 came into force on the 2nd July 1884, and according to the previous decisions of this Court in *Kamayya v. Leman*(1) and in *Leman v. Damodaraya*(2) a distinction was made between a suit contesting the incidence of a tax lawfully imposed and a suit to recover back money wrongfully levied on the ground that the so-called tax had no legal existence. Section 85 of Act III of 1871 to which those decisions referred provided that "no person shall contest any assessment in any other manner than by an appeal as hereinbefore provided." Section 85 of the Act III of 1871 and section 101 of the present Act appear to me to be substantially the same, and the jurisdiction which the Civil Courts had under section 85 of the former Act was not taken away by section 101 of the Act now in force. Again, section 87 of Act III of 1871 provided a rule of decision impliedly for the guidance of Civil Courts and enacted that no tax shall be impeached by reason of any mistake in the name of any person liable to pay the tax, or in the description of any property liable to the tax, or in the amount of assessment, provided that the directions of the Act be in substance and effect complied with. Section 262 of the present Act re-enacts in substance section 87 and provides further by clause 2 that "No action shall be maintained in any Court to recover money paid in respect of any tax, &c.," levied under this Act, "provided that the provisions of this Act relating to the assessment and levy of such tax and to the collection of payments have been in substance and effect complied with." There can therefore be no doubt

(1) I.L.R., 2 Mad., 37.

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

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that a suit will lie when the provisions of the Act have not been complied with in substance and effect in regard to the assessment and levy of such tax, and the tax cannot be considered to have legal sanction.

The second objection argued before me is that a Court of Small Causes has no jurisdiction to entertain this suit. It is conceded that under section 15 of Act IX of 1887 it would have jurisdiction if the suit were not specially exempted by the second schedule attached to that Act, but it is argued that it is so exempted and reliance is placed on paragraph 1 of the schedule which is in these terms:—"A suit concerning an Act or order purporting to be done or made by the Governor-General in Council or a Local Government, or by the Governor-General or a Governor or by a Member of the Council of the Governor-General or of the Governor of Madras or Bombay, in his official capacity, or concerning an act purporting to be done by any person by order of the Governor-General in Council or a Local Government."

It is urged that the sanction and approval of the Governor in Council are necessary under sections 49 and 50 of Act IV of 1884 and that the levy of the tax with such sanction is an act done by the order of the Local Government within the meaning of the above cited paragraph. The act contemplated by paragraph 1 is an act done or ordered to be done by the Local Government in its executive or administrative capacity and the sanction or approval contemplated by sections 49 or 50 of Act IV of 1884 is not in my judgment within the purview of paragraph 1 of the second schedule.

The third objection is that the tax of which the refund was claimed was lawfully levied under section 53. After directing the Municipal Council to notify that a profession tax shall be levied, it provides that every person, who, within the Municipality, exercises any one or more of the arts, professions, or trades or callings specified in schedule A, shall, subject to the provisions of section 59, pay in respect thereof the sum specified in the said schedule, as payable by the persons of the class in which such person is placed. Section 60 provides that no person shall be liable to the payment of the tax under section 53, who shall prove that he has paid the tax for the same half-year in any other Municipality. It is not disputed in this

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case that the South Indian Railway Company had paid their profession tax to the Municipality at Negapatam when the Municipality at Tuticorin called upon them to pay their profession tax. The intention which the two sections suggest when they are read together, is that the person liable to pay a profession tax has to pay it but once, and that when he lawfully pays it in any one Municipality he is not liable to pay another profession tax for the same period in any other Municipality. Any other construction would lead to this result, —that the South Indian Railway Company would have to pay as many profession taxes as there are Municipal towns through which their Railway passes, though they exercise but one profession. The tax seems to be regarded as being in the nature of a license or registration fee, and when it is paid and the exercise of the profession is once licensed, no second license or registration fee is intended by the Legislature to be required for the same half-year. In this connection I may refer to the proviso of section 58 of the old Act. It was in these terms: "No person, who shall prove that he has paid the tax prescribed in this section in any one Municipality, shall be required to pay the same for the same half-year in any other Municipality, unless it shall appear that he has exercised in both Municipalities within the same half-year the art, profession, trade or calling in respect of which he has been taxed." The omission in the present Act of the last clause is significant, and appears to confirm the view which I take.

The decision of the District Munsif is right, and I dismiss this petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

VISVANATHAN (DEFENDANT), PETITIONER,

v.

SAMINATHAN (PLAINTIFF), RESPONDENT.*

1889.
July 26.
August 12.

*Contract Act—Act IX of 1872, s. 23—Unlawful consideration—Marriage
brokage agreement—Hindu law.*

Plaintiff agreed to give his daughter in marriage to defendant's nephew in consideration of a payment of Rs. 400. It was not alleged that the money was to be a dowry or settlement for the bride. Rs. 200 were paid and defendant executed a bond for the balance. The marriage took place in the *asura* form. The plaintiff now sued on the bond:

Held, the consideration for the bond was not unlawful.

PETITION under section 25 of the Provincial Small Cause Courts Act, 1887, praying the High Court to revise the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in small cause suit No. 725 of 1888.

Suit on a bond. The bond was admitted, but the defendant pleaded that the consideration was unlawful, and also that the consideration had failed. The Subordinate Judge held that neither of these pleas was established, and passed a decree for the plaintiff.

The defendant preferred this petition.

Desikacharyar for petitioner.

Sivasami Ayyar for respondent.

The facts of the case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the following judgments:—

WILKINSON, J.—This is a petition under section 25, Act IX of 1887, to set aside the decree of the Subordinate Judge of Kumbakonam in small cause suit No. 725 of 1888 as contrary to law.

The parties to the suit are Brahmans. The plaintiff's daughter was given in marriage to the defendant's brother's son. As a consideration for the marriage, the defendant paid the

* Civil Revision Petition No. 325 of 1888.

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plaintiff Rs. 200 and executed a bond for Rs. 200. The plaintiff now sues to recover the money due under the bond. The defendant pleaded that the bond was executed for cash to be actually advanced and denied consideration. He further pleaded that the consideration, if such as was alleged by the plaintiff, was illegal. The Subordinate Judge found that the bond was executed under the circumstances alleged by the plaintiff, and that the consideration was not illegal.

Before us, it is argued that the contract was not enforceable, being (1) against public policy and (2) contrary to Hindu law.

No doubt it has been long held in England that all contracts or agreements for promoting marriages for reward (usually termed marriage brokerage contracts) are utterly void. The principle on which the decisions have proceeded is that every contract relating to marriage ought to be free and open, whereas marriage brokerage contracts necessarily tend to a deceit on one party to the marriage, or on the parents and friends, and to the promotion of marriage by hirelings, instead of by the mediation of friends and relatives. Now I very much doubt whether these principles can be made applicable to this case. In this country marriages take place while the contracting parties are infants, incapable of making any choice of their own, and the consideration may often be received by the father for the use and benefit of the child. That, as remarked by the Subordinate Judge, marriages in the *asura* form are widely prevalent in Southern India was observed by Strange so long ago as 1830 and is not denied at the bar. The paucity of decisions is in favor of the contention that the moral consciousness of the people is not opposed to the practice. In consideration of the father of a girl giving his consent to the betrothal of his daughter, a sum of money is paid by the relatives of the would-be bridegroom to the father. Is this immoral or opposed to public policy? Under all circumstances I see no reason for so holding. Where the wife is immature, as is the case in nearly every marriage in this country, it is the custom that she should reside with her parents, and they maintain her as a matter of affection, but not of obligation. If the father is poor and the relatives of the husband well to do, what immorality can there be in the latter giving to the former a sum of money for the maintenance of the girl-bride? It is true that in the passage quoted by

the Subordinate Judge,* *Manu* prohibits a father from receiving a gratuity for giving his daughter in marriage, but the prohibition appears to be based on the necessity which then existed of commanding fathers not to sell their offspring. In the present case there is no question of sale, and there is nothing to show that the plaintiff "through avarice" accepted the money in order to spend it on himself only. In the present state of society, I am not prepared to hold that the receipt by a Hindu father of money in consideration of his giving his daughter in marriage is in every case without distinction immoral or contrary to public policy. Each case must be decided on its own merits. I may remark that the facts in *Dulari v. Vallabdas Pragji*(1) are not on all fours with this case, and that the dictum of Garth, C.J., in *Ram Chand Sen v. Audaito Sen*(2), was unnecessary for the decision of the case and opposed to the opinion of Beverley, J., who sat with him.

As to Hindu law, we have been referred to no authority by which the *asura* form of marriage is condemned. In his Commentary on Hindu law, Siromani † points out that the *asura* form is the same as the *arsha* (which he classes as one of the approved forms), the only difference being that the form is called *asura*, if any other property than cattle is taken by the father of the bride. In the absence of any authority that the *asura* form of marriage is contrary to custom and so is not binding, I would hold that the marriage of the plaintiff's daughter was not contrary to Hindu law. The relationship of husband and wife is created, not by the form of marriage, but by the recitation of mantras prescribed by the holy scriptures. There is, says Siromani, no difference of opinion among Hindu jurists as to the necessity of mantras and ceremonies in order to create the relation of husband and wife.

This petition, therefore, fails and is dismissed with costs.

PARKER, J.—The facts found are that the plaintiff agreed to give his daughter in marriage to the defendant's nephew in consideration of a payment of Rs. 400. Rs. 200 was paid in cash and a bond for the balance given by the defendant. The marriage took place. The plaintiff now sued on the bond for the balance due to him. It is not alleged that the money was pro-

* See Mayne's Hindu Law, 4th ed., § 78.
(1) I.L.R., 13 Bom., 126.

† See p. 80.
(2) I.L.R., 10 Cal., 1054.

VISVANATHAN v. SAMINATHAN. mised as a dowry or settlement for the bride. The marriage was in the *asura* form.

The defendant pleaded that the consideration was illegal, but the Subordinate Judge decreed the claim. He held that, though the practice was prohibited by Manu, and though it was sinful for rich parents to receive a price for a daughter, it was otherwise with poor parents who had not means otherwise to meet the necessary expenses which they had to incur.

The *asura* form of marriage was in its origin simply a marriage by purchase. The *arsha* form, which is one of the approved forms, is a survival from the *asura*, and in it the price paid for the girl dwindled down to a gift of nominal value or to a present received by the parents for the benefit of the bride. The present marriage is not alleged to be in the *arsha* form. The *asura* form is absolutely forbidden by Manu and Narada, though, as a matter of fact, it is admittedly prevalent in Southern India.

I do not doubt as to the existence of the custom, and it is significant that there should be so few cases in which the legality of the consideration has been called in question in the Courts.

In *Juggessur Chuckerbutty v. Panchcouree Chuckerbutty*(1) a small cause suit was brought by the plaintiff to recover a sum of money paid to the defendant in consideration of a promise made by the latter to give the former his sister in marriage, which contract had been broken and the girl married to another. The Subordinate Judge, in referring the case, held that, according to English law, the contract would be invalid and contrary to public policy, and was further of opinion that in India the practice of demanding from the suitor a "pun," the amount of which goes entirely to the parent's benefit, none of it being in the nature of a settlement upon the wife, must undoubtedly tend to induce the exercise of parental influence from corrupt motives and encourage the buying and selling of women. The High Court of Calcutta did not discuss the question, but merely observed that, under the circumstances stated, an action to recover back the money paid to the defendant will lie.

In *Ranee Lallun Monee Dossee v. Nobin Mohun Singh*(2) a Hindu contracting a second marriage agreed to confer on the party whose sister was to be his second wife, a taluk which was to

(1) 14 W.R., 154.

(2) 25 W.R., 32.

be carved out of his estate, and, until it was carved out, to make a yearly payment of a fixed sum. The High Court observed that the document on which the plaintiff's case was based having been executed more than fifty years ago, it was a great deal too late to inquire whether there was consideration for the deed, and even if there was any, whether the agreement was not contrary to public policy. The Judges intimated an opinion that the special agreement made was not without consideration or contrary to public policy, but, observing that the moneys stipulated for under the agreement having been paid for the last fifty years, the defendants were not at liberty at that late period to attack the origin of the contract and ask the Court to allow them to repudiate it.

The case of *Ram Chand Sen v. Audaito Sen*(1) is similar to *Juggessur Chuckerbutty v. Panchcouree Chuckerbutty*(2), and the Judges followed that decision. It was, however, intimated by Garth, C.J., that had the action been by the father to recover money promised as "pun" by the bridegroom he would have been disposed to hold that such a contract (even in this country) would be incapable of being enforced by the rules of equity and good conscience. Beverley, J., however, held that there was nothing immoral in such contracts since they were recognized by the customs of the country and not prohibited by law.

These decisions were considered by Jardine, J., in *Dulari v. Vallabdas Praggi*(3) in which the plaintiff prayed for leave to sue as a pauper to recover Rs. 2,500, which the defendant had agreed to pay her for giving him a girl in marriage, whom however he had subsequently seduced without marriage. The learned Judge held that the plaintiff was not a pauper and under section 407, clause (c), that her allegation did not show a right to sue, since such contracts were immoral and against public policy even in the present state of matrimonial relations in India, and should not be enforced in the Courts of Law. A similar decision by Scott, J., in 1884 was referred to and followed.

None of these decisions are exactly on all fours with the present. *Juggessur Chuckerbutty v. Panchcouree Chuckerbutty*(2) and *Ram Chand Sen v. Audaito Sen*(1) were actions brought by the bridegroom to recover money paid, the consideration for which

(1) I.L.R., 10 Cal., 1054.

(2) 14 W.R., 154.
(3) I.L.R., 13 Bom., 126.

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had failed, and the remarks of Garth, C.J., which would bear upon the present case were extra-judicial; the decision in *Ranee Lallun Monee Dossee v. Nobin Mohun Singh*(1) proceeded upon the ground that lapse of time had made the origin of the contract immaterial; in the case before Jardine, J., though the plaintiff did stand in *loco parentis*, the decision proceeded upon the double ground that plaintiff was not a pauper, while the case before Scott, J., was really a suit by a matrimonial agent.

The *asura* form of marriage, though disapproved by Hindu writers, is still recognized as a valid form, and the practice of parents taking money from the bridegroom or his family in consideration of the marriage is not prohibited by law. The question is, ought the Courts to treat it as immoral or opposed to public policy (section 23, Indian Contract Act). Having regard to the customs of the country, it appears to me impossible to lay down a hard and fast general rule. No doubt there may be cases in which such contracts might be held immoral and opposed to public policy, *e.g.*, for the payment of money as a consideration for the marriage of very young children to old and debauched men. But in many cases the payment may really tend to facilitate the marriage in a legitimate way. Each case must, I think, be judged on its own merits and according to its special circumstances, and it is for the defendant to allege and prove those special circumstances which will invalidate the contract. There is no such allegation or proof in the present case.

On these grounds, I concur in dismissing the petition with costs.

(1) 25 W.R., 32.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shepard.

SECRETARY OF STATE (DEFENDANT No. 1), APPELLANT,

v.

ASHTAMURTHI (PLAINTIFF), RESPONDENT.*

1888.
Number 26.
1889.
September 19.

Revenue Recovery Act—Act II of 1864 (Madras), ss. 1, 39, 42—Rights of jenmi in Malabar—Grant by Government of waste land on a cowle—Sale of land for arrears of revenue.

The Collector of Malabar in 1869 let defendant No. 2 into possession of certain waste land under a cowle, and in 1872 granted to him a patta for it. The cowledar brought the land into cultivation, but subsequently left it uncultivated and failed to pay the assessed revenue; the land was accordingly attached in 1885 for arrears of revenue under the Revenue Recovery Act, 1864, and sold to defendant No. 3. The plaintiff, who was the jenmi of the land, had no notice of the grant of either the cowle or the patta: he asserted his right to jenmibhogam in a petition presented to the Collector at the time of the sale, but the sale proceeded without reference to his claim. The present suit was brought to set aside the sale:

Held, the interest of the jenmi did not pass by the sale.

SECOND APPEAL against the decree of F. Wilkinson, District Judge of South Malabar, in appeal suit No. 803 of 1886, reversing the decree of V. Raman Menon, District Munsif of Ernad, in original suit No. 498 of 1885.

Suit to set aside the sale for arrears of revenue of certain land. The plaintiff as uralen of a certain devaswam was the jenmi; defendant No. 2 was the defaulter who had held under a cowle and a patta granted to him by the Collector without the knowledge of the jenmi; defendant No. 3 was the purchaser at the revenue sale: defendants Nos. 2 and 3 were *ex parte* throughout this suit.

The cowle (exhibit XIII, dated 28th June 1870) stated that permission was thereby granted to defendant No. 2 to improve the undermentioned immemorial waste land and to cultivate paddy thereon; and after providing that the revenue therein assessed should be remitted for two years on certain conditions, proceeded as follows:—"You are further informed that, as this "cowle refers to cultivation of the plot and Government revenue

* Second Appeal No. 78 of 1888.

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"only and as the right, if any, possessed by any body and the dues thereunder are not comprised therein, they will be governed by usage of the country."

Defendant No. 2 brought the land into cultivation and in due course received a patta for it from the Collector, which like the cowle was granted subject to the right of the jenmi, if any. But a short time previous to the year 1885 he ceased to cultivate it and failed to pay the revenue to which it was assessed. In January 1885 the land was attached under the Revenue Recovery Act, 1864, for the arrears accrued due, being described in the notice of attachment addressed to defendant No. 2, as "the under-mentioned landed property belonging to you." On 1st June 1885 the plaintiff presented a petition to the Collector (exhibit A), asserting his jenm title to the land, and praying "that as the said lands lie waste without cultivation even now, either the assessment of revenue as per the cowle may be cancelled and removed from the account and the attachment set aside, or it may be ordered that the petitioner is entitled to realize the jenmibhogam in the lands and the sale held after alteration of the auction notification." The order on that petition was that the attachment would be set aside on payment of the arrears of revenue. This payment was not made and the land, as such, was sold, defendant No. 3 being, as stated, the purchaser.

Upon the above facts, the District Munsif dismissed the suit. On appeal the District Judge reversed the decree of the District Munsif and set aside the sale as prayed. He said:—It is laid down in "The standing information regarding the official administration of the Madras Presidency," compiled under the orders of Government, that "A cowle is an agreement to hand over land without payment for a certain period, the assessment being payable after that time. It is usually granted to induce cultivators to break up unpromising waste land. Each party is subject to the terms of the contract contained in the cowle. If the Government have good grounds under the contract for dispossessing the cowledar, they can do so." By grant of cowle the Government do not undertake to confer any title to the land beyond that of occupancy. The cowle confers no title against the jenmi who is at liberty to eject the cowledar on payment of the value of improvements effected by him. If, therefore, the cowledar fail to pay the revenue due according to the terms of the cowle,

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the mode of recovering the arrears due will, I am of opinion, be in accordance with the terms of the cowle and not under the provisions of Act II of 1864. The proprietary right of the landlords of Malabar to their estates has been recognized by Government ever since 1800. To quote the words of the judgment of the High Court in *Zamorin of Calicut v. Sitarama*(1). "According to section 2 of Act II of 1864 it is the proprietary right that is liable to be sold. According to section 1, it is the person in whom such right rests, that is the landholder. According to section 3 it is the proprietor that is liable for the payment of the revenue. According to section 39 it is his right and property that passes by the revenue sale." But this has reference only to land which is within the knowledge of the jenmi assessed land. Where a jenmi allows a patta for assessed land to stand in the name of a third person and through such person's neglect to pay the revenue punctually, the land is sold, the jenmi cannot maintain a suit to set aside the sale, because he has permitted such person to appear as ostensible owner. But the case is very different where Government, without issuing any notice to the jenmi, permits a third person to occupy the waste lands of a jenmi."

The more important of the exhibits filed in the case were the following:—

EXHIBIT XIV.

Extract (p. 127) from a printed volume entitled Reports of a Joint Commission from Bengal and Bombay, appointed to inspect into the state and condition of the Province of Malabar, in the years 1792 and 1793. (Reprinted by H. Smith, at the Fort St. George Gazette Press, 1862.)

Section 196. * * * * It must be noticed that, as the Namboory Brahmins and Nayrs (the primary landholders of Malabar) had been usually in the habit of leasing out the greatest part of their estates (called jenms, jemies or jelms) to cultivating farmers, called kanumkars or kanoomar (the termination "mar" being the Malabar plural), who were thus in the ostensible and immediate occupancy of the greatest part of the soil at the period of Hyder's conquest; and as the terror of his and his son Tippoo's subsequent administration prevented the major part of these Brahmin landholders, as well as many of the Nayrs, from ever trusting their persons at the Mahomedan cutcherries of their new sovereigns; when, therefore, the system of establishing a general money rental payable to these latter was to be carried into execution the local delegates of the Mysore Government had in general

(1) I.L.R., 7 Mad., 405.

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no other choice than to settle the assessment on each portion of territory with these kanoomar or kanumkar.

EXHIBIT XV.

Extract from Proceedings of the Board of Revenue, dated 12th February 1827.

Paragraph 1. Read again letter from the Principal Collector of Malabar, reporting on the settlement of the Land Revenue of his district for fasli 1235.

From the Principal Collector, dated 16th September 1826.

Paragraph 13. The measures adopted by Mr. Sheffield for reclaiming waste appear judicious, and the number of proposals which he reports in the postscript of his letter to have already received for cultivating waste seem to justify the expectation he entertains of a successful result. But before passing any definite orders on this subject the Board wish the Principal Collector to explain, with reference to the different periods for which waste has been given exempt from assessment, the precise terms on which the cowles are regulated; a copy of the cowlenamah should also be forwarded.

EXHIBIT XVI.

Extract from Collector's Jamabandi Report to the Board of Revenue for fasli 1236, dated 20th September 1827.

Waste Lands. Para. 18. With reference to para. 13 of your Board's Proceedings on the Settlement of this district for 1235, I do myself the honor of herewith transmitting a translation of a cowlenamah granted by me

No. 8. exempting waste land from assessment, and in order that your Board may be enabled to judge of the expediency of my arrangements I likewise forward a detailed statement of waste lands which I have succeeded during fasli 1236 in persuading the ryots to

No. 9. cultivate by exempting them from assessment for certain periods of from 1 to 12 years, with reference to the expenses incurable for constructing sluices, raising embankments, and other works required for repelling encroachments of the sea and salt water rivers, the whole cost of which is to be defrayed by the occupant; the period for which waste land is given exempt from assessment is also regulated with reference to the number of years required for bringing each spot of land into such an improved state of cultivation as to enable the occupant to make good the full assessment from his returns; in some cases half the assessment is exempted for one or more years according to circumstances. A full explanation of the grounds on which each spot of land has been temporarily exempted from the payment of rent to Government is given in statement No. 9. I venture to hope that the measures therein detailed will be approved of.

Gentlemen, &c.,

(Signed) W. SHEFFIELD,
Principal Collector.

EXHIBIT XVII.

Enclosure No. 8 to Collector's Jamabandi Report to the Board of Revenue for fasli 1236, dated 20th September 1827.

Translation of a cowlenamah such as is usually granted to those who undertake to bring waste land into cultivation.

From

WILLIAM SHEFFIELD, Esq.,

Principal Collector of Malabar,

To

MANANTALA ANANTHA KOORPOO,

Inhabitant of Payatoor Deshum, Erramala Umshom, Eddasherry Hobly in the Kertenad Talook.

Whereas you have proposed to cultivate the rice land known by the name of Kay kandom, situated at Hayara kaden, which hitherto has never been brought on the assessment, measuring from north to south 55 kolls, and from east to west 120 kolls, capable of receiving 300 dangalies of seed and which has been lying waste for upwards of 40 years, and is overgrown with jungle trees, and moreover inundated with salt water, by felling and removing the trees and underwood and constructing dams to repel the encroachment in future of salt water; and whereas the Sirkar officers who were deputed by me to inspect the said land have confirmed the account you gave of its devastated state, you are hereby permitted to undertake the cultivation of the aforementioned land and in consideration of the outlay which will be required to enable you to clear the ground of the jungle trees and underwood, also to construct the necessary works to prevent the encroachment of salt water, and to prepare and render the soil productive, the above land is hereby given to you exempt from the payment of any rent to Government for a period of seven years, namely, from fasli 1237 to 1244, both inclusive. From the year 1244 you will pay to Government such revenue as may be fixed according to an actual inspection of the land, which inspection will be made prior to the expiration of the above period of exemption. You will be held accountable for the Jemakars or proprietor's share of the produce of the said land. You are however hereby given to understand that in the event of your abandoning the land in question at any period prior to the expiration of the above term of exemption, you will hereby render yourself liable for the due payment of the full assessment according to the present established rate for the whole period during which it shall have been possessed and cultivated by you.

(True Translation.)

(Signed) W. SHEFFIELD,
Principal Collector.

EXHIBIT XVIII.

Extract from Proceedings of the Board of Revenue, dated 19th May 1828.

Read again the Report of the Principal Collector of Malabar on the settlement of the Land Revenue of that Province in fasli 1236.

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Paragraph 15. In their proceedings on the settlement of fasli 1235 the Board requested the Principal Collector to submit a copy of his cowlcnamah for the cultivation of waste and with reference to the different periods for which waste had been given exempt from assessment to explain precisely the

Para. 18. terms on which the cowles are regulated. The Principal Collector has now submitted a translation of a cowle such as is usually granted to persons undertaking to bring waste into cultivation, and a detailed statement of waste lands for which cowles were granted in fasli 1236 explaining particularly the grounds on which exemption from assessment was allowed in each case. The Principal Collector observes, that the periods for which exemption is allowed are from 1 to 12 years, with reference to the expenses which must be incurred for constructing sluices, raising embankments, and other works required for repelling encroachments of the sea and salt water rivers, the whole cost of which is to be defrayed by the occupant. He explains that "the period for which waste land is given exempt from assessment is also regulated with reference to the number of years required for bringing each spot of land into such an improved state of cultivation as to enable the occupant to make good the full assessment from his returns." The Board approve generally of the grounds upon which the cowles issued last year were allowed and of the principles upon which they were regulated. It seems only requisite to add to the statement of lands given on cowle, columns showing the produce expected from the land and its value, and where the land is not already assessed the amount of tax it will eventually be liable to.

16. The Board conclude that the form of cowle which the Principal Collector has forwarded is intended for unclaimed lands considered as belonging to the Sircar; and that the expression "you will be held accountable for the Jenmakar's or Proprietor's share of the Produce" is only meant to intimate to the occupant, that when his assessment comes to be fixed he will be regarded as a mere tenant, not as a proprietor and will have to pay the whole of the landlord's rent to the Sircar. If it means, however, that a claimant to the land may one day appear, or that the occupant will in that case, have to account to him for a certain portion of the produce termed the "Jenmakar's share" some explanation of this provision is necessary. The Principal Collector should state whether, according to the ancient custom of the country, a proprietor who may have deserted his land or the heirs of such proprietor is entitled at any future period, however distant, to resume his rights, or whether there is in Malabar as in most other Provinces a certain period, after which the land if unclaimed is considered to have lapsed to the State. He should also explain on what conditions a proprietor, who may claim his land within the limited period, is allowed to resume possession, and what indemnity is secured to the person who may have occupied and improved the lands on cowle. It is probable that the rights of proprietors in Malabar were analogous to those in Canara, and they might be still further illustrated by a reference to the state of rights in Cochin and Travancore. According to Sir Thomas Munro,* a proprietor

* See minute, 31st December 1824, paras. 6 and 7, vol. III, Revenue and Judicial Selections. in Malabar or Canara who may have failed to cultivate his land is not entitled to demand a proprietor's share from the person who may have been allowed by the Government to occupy it.

17. With respect to the right of a proprietor to reclaim possession of his land, it is also stated by Sir Thomas Munro that the rules, Malabar and Canara, respecting

private landed property differ very little from those of the Deccan regarding

meeras according to which "the Meerasadar gets back his land when his absence has not been long, and when it has been given in temporary lease to another person, but not after a long absence and its having been granted in meeras to another and that though he is supposed to have a right even for a century,

usage does not allow so long a period. He adds that "the

Para. 8. Sircar from ancient times has everywhere, even in Arcot as well as in other provinces, granted waste in Enam free of every rent or claim, public or private, and appears in all such grants to have considered waste as being exclusively its own property." It is desirable to come to a clear understanding on these points; and the cowles which may be issued in Malabar in the meantime may be so worked as not to commit the Government on any doubtful question. To mention a jenmakar's share when it is uncertain whether or not there be a jenmakar claiming the land for which the cowle is granted, and if there be, whether or not he be entitled to a share, is very likely to give rise to claims which would otherwise not have been thought of and by lessening the security of the occupant is adverse to improvement.

(Signed) _____,
Secretary.

EXHIBIT XIX.

Extract from Collector's Jamabandi Report to the Board of Revenue for fasli 1237, dated 14th April 1829.

Paragraph 36. With reference to the orders conveyed in paragraph 16 of your Board's Proceedings directing me to inform you "whether according to the ancient custom of the country a proprietor, who may have deserted his land or the heir of such proprietor, is entitled at any future period, however distant to resume his rights, or whether there is in Malabar as in most other provinces a certain period after which the land is unclaimed, is considered to have lapsed to the State, and to explain likewise on what conditions a proprietor who may claim his land within the limited period is allowed to resume possession and what indemnity is secured to the person who may have occupied and improved the lands on cowle," I do myself the honour to state that Major Walker, in his account of landed tenures and of the state of property in Malabar observes that "should a jenmakar disappear or should there be a paramba without any known owner and a Kudian, believing that it was without a master, settle on it, and make considerable improvements; on the return of the jenmakar or any one producing sufficient proofs that he was the owner of the paramba, the Kudian must in that case, without dispute, accede to the demand provided the jenmakar pays koowye canom or the value of the improvements" and that "the jenmakar possesses the entire right of the soil and no earthly authority can with justice deprive him of it" and it is universally admitted throughout the province to be the peculiar right of the jenmakar or proprietor, established by usage from time immemorial, to resume his land at any period whatever, however

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long it may have been deserted by himself or his ancestor and so far from its having a tendency to check the spirit of industry which now pervades the population, scarcely a single individual who obtains a cowle for waste land omits at the same time obtaining from the jenmakar, if any be forthcoming, a koowye canom lease for the same, which is in fact advantageous to both; for by obtaining such a document the ryot secures to himself the unmolested possession of the land for a long period and the granting of it ensures to the jenmakar his share of the produce after the land shall have become productive: and also the option, with less probability of any one presuming to question his title to the land, of redeeming it at the expiration of the lease by reimbursing the occupant for his improvements, which however is very rarely done; for the lease, which generally runs from 10 to 12 years, is usually extended for a further period on varom pattom tenure, and very often where the improvements introduced are considerable, the occupant obtains a kanom or mortgage bond from the jenmakar for the amount value of those improvements, which is in all cases adjusted by the deshom people.

Paragraph 37. The occupant, when the jenmakar chooses to resume possession of a garden land which may have been enclosed and planted by the former, must be fully indemnified by the latter's paying him the value of fences, wells and in fact for all improvements which he may have made at the established rates the sum so paid, after the occupant shall have possessed it for some years, is apparently inadequate, though it is not so in reality, for during that period the occupant or koowye canamkar will have enjoyed the land rent free and the produce is not only that of the trees which alone are assessed though not until after they arrive at maturity, but consists also of rice or grain, raised in the intervals of the trees and also plantains and vegetables of various descriptions.

Paragraph 38. Moreover in elucidation of this subject and in order to show that the jenm of freehold right was at once acknowledged and respected during the period that Malabar continued under the dominion of Hyder and Tippoo, I beg to add that there are a few Mahomedan priests enjoying enams in this district, to whom the Sirkar revenue on particular tracts of land has been remitted under grants from both those sovereigns, and which have been continued to them by our Government, but those grants convey nothing beyond an entire exemption of the revenue, the lands themselves remaining the rightful property of the jenmakars who cannot be deprived of the shistom or proprietor's share of the pattom (net rent). The revenue on certain pagoda lands has been remitted in a similar manner.

Gentlemen, &c.,
(Signed) W. SHEFFIELD,
Principal Collector.

EXHIBIT XX.

Extract from Collector's Jamabundi Report for fasli 1250, dated 10th November 1841, to the Board of Revenue.

23. The nature and condition of cowles seem to be generally understood and appreciated by the inhabitants of this district, and to this may be ascribed the

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increased applications for them, and the very few instances of unassessed lands being cultivated without cowles. The statement in the margin shows that during

the last eight years no less than 2,250½ cawnies of immemorial waste have been reclaimed; and since the commencement of the present fasli numerous further applications have been received, which are in course of inquiry.

24. Referring to para. 38 of the Board's Proceedings, I would beg to observe that, however questionable it may at first sight appear for the Government to issue cowles for the cultivation of lands which are not their property, the practice of issuing such documents seems to be attended with advantage to both Government and proprietor. It affords the Government servants a knowledge of what new lands are under cultivation, and when and what they are to demand for them, whilst the exemption of revenue allowed in consideration of the expense and labour attending the rendering of the lands productive, has the tendency of encouraging agricultural pursuits. But in point of fact, the cowle is no more than a writing expressive of the condition under which the land is to be cultivated, its principal object being to guarantee to the cultivator the temporary immunity allowed him, and to assure him of the amount he will have to pay to Government for revenue at the expiration of the cowle. Where the cowle is not in the name of the proprietor himself, a clause is invariably introduced holding the cultivator or occupant accountable to the proprietor for his share of the produce. Generally speaking the cultivator at the time of obtaining a cowle from the Sirkar makes his own arrangements with the proprietor by obtaining a verum pattom or kuykanom lease, which secures both parties in their respective rights.

I have, &c.,

(Signed) H. V. CONOLLY,
Collector.

EXHIBIT XXII.

Extract from report written by the Collector of Malabar to the Board of Revenue.

CALICUT, 9th January 1846.

To

T. PYCROFT, Esq.,
Secretary to the Board of Revenue,
Fort Saint George.

The Government have nowhere so thoroughly relinquished their claims as sovereigns as to leave it in the power of any proprietor to leave his ground waste to the detriment of the public interest. In Lower Malabar even where proprietary right has been more thoroughly and invariably admitted than in any other part of India this has not been done. If a landholder will not cultivate his waste the Government consider themselves at liberty to get some one who will, reserving always to the said landlord the share of the produce which his right as proprietor entitles him to according to the usage of the country.

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7. In peculiar illustration of this point I would beg to observe it would be quite contrary to the practice of the country for the landlord to prevent any native from cutting down jungle in his land for the purpose of Ponam (hill paddy) cultivation. The cultivator cuts it no doubt with the landlord's permission and pays him the immemorially fixed proportion of the produce he may obtain as a rent, but what I mean to say is that no landlord would be held justified in preventing his forest being so cut merely to please a fancy—the Government who would lose by his doing so would interfere.

I have, &c.,

(Signed) H. V. CONOLLY,
Collector.

EXHIBIT XXIV.

Hookumnamah containing rules for granting remissions when waste lands are reclaimed either for the purpose of rice or garden cultivation.

Application for reclaiming wastes.

9. Parties desirous of reclaiming tracts of waste lands—whether assessed to the revenue or not—are to present darkasts (as hitherto done) either at the Huzzoor, subordinate or Talook Cutcheries. They would save themselves much trouble and annoyance if, previous to making such applications, they were to obtain the consent of the parties who may hold proprietary or mortgage right to the land, to their reclaiming it. Proprietors are of course to have the choice of reclaiming such lands themselves, but should they refuse to do so on insufficient grounds, the Government will take the offer of any other party who comes forward. A clause will always be inserted in cowles given to such parties to the effect that they have to account to the proprietor for his share of the produce, and are to pay the Sirkar merely the usual revenue. The party claiming proprietary or mortgage right to the land will however have himself to recover his share by a suit in the civil Court, if it cannot be effected by a mutual amicable settlement between the parties.

(Signed) H. V. CONOLLY,
Collector.

EXHIBIT XXV.

From M.R.Ry. Conolly Avergal, Collector of the Province of Malabar, to the Tahsildar of the Calicut Taluk.

Circular Order No. 3.

In the list of waste lands, now being prepared with a view to grant cowle thereon, in order to reclaim them it is now the practice to enter the name of the jenmi of each item of such lands.

As the cowle is granted for the sole purpose of legally doing a favor to the individuals assiduous in reclaiming the waste lands and in paying Government revenue, the Government gains nothing in recording name of the jenmi also besides the particulars necessary to serve the above purpose.

It is therefore not necessary, in future, to enter, in the list, who the jenmi of the land is when on measurement of the land such list will be prepared to grant cowle.

But in all cases where there is reason to believe that the Government is the jenmi, it is to be distinctly shown in the said list that the land is jenm property of the Government. The list must also contain the stipulations made with a view to ensure payment of the Jenmabhogam to the Government.

Dated 31st Karkidagom 1025.
13th August 1850.
Calicut.

The order was sent to Betutnad, Kutnad and Chavakad Taluk authorities, to the Head Assistant Collector in charge of Palghat, Temelprom, and Nedunganad, to the Sub-Collector in charge of Kottayam, Kothathnad, Chirakel, Kawai, and Wynad, to the Assistant Collector of Ernad and Walluvanad, and to Mr. Platel, the Assistant in charge of Kurumbranad and Shernad.

(True extract).

Seal.

(Signed) E. G. WRICKETTS,
Deputy Collector.

EXHIBIT XXVI.

Extract from printed volume entitled "Correspondence on Moplah Outrages in Malabar for the years 1853-59." Published by Authority. Vol. II, Madras, 1863.

No. 18-A.

Extract from the Proceedings of the Sudder Udalut under date the 13th February 1854.

Paragraph 9. Adverting to the remark in the Extract from the Minutes of Consultation under date the 23rd August last, that "it may possibly be desirable to interfere by legislative enactment, so as to fix some terms to the landlords indefinite paramount rights over the tracts of waste land and forest, to which he now lays claim," the Collector observes that "the injury which these paramount rights have certainly a tendency to produce is in a measure neutralized by the universally acknowledged practice of the country. All land in Malabar, as I remarked in a memorandum drawn up for Government in 1840, is strictly private property and the rights of the jenmakar or proprietor are held to be inalienable, whether it be cultivated or whether it be left waste. So far is this carried that it is laid down by the standard authority on all matters relating to the land tenures of Malabar (Major Walker), that should a person bring into cultivation a piece of

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waste ground which appeared to have no claimant, the owner on making his appearance after any lapse of time, would have a right to resume his property, paying for the improvements that had been made. Extensive and bounded indeed, as these rights at first appear, they have their limits. A man is not allowed to keep his land waste, unless he agree to pay the Government the tax they would derive from its cultivation. Should he decline to do this, the land is delivered over to any person who will undertake to till it; a specification being made, that out of the profits deducible from its cultivation a certain portion (about 15 per cent.) shall be given to the proprietor as the landlord's share."

"The only practical difficulty which has presented itself in this matter is that alluded to in my letter to Mr. Strange of the 10th September 1852, in which I have shown that Hindoo landlords have at times attempted to hinder the location of Moplah cultivators on waste by preventing them from acquiring in fee simple so much ground as would suffice for a mosque and burial ground.

"But such cases are not frequent, and I would fain hope that the personal representations of the European local authorities will be found sufficient to induce the landlords to listen to reason without the necessity of any extraordinary interference on the part of Government."

Paragraph 10. The Court of Sudder Udalt fully concur with the late Special Commissioner, and the officers whose views have been stated in the foregoing paragraphs as to the inexpediency of any departure by the Courts from the ancient usages which regulate the relations of landlord and tenant and the liabilities of families governed under the law of Maroonakatyam in Malabar, and they resolve to enjoin upon the several judicial authorities in that province that they be careful to give effect to all such usages in their decisions.

* * * *

The Secretary of State, defendant No. 1, preferred this second appeal against the decree of the District Judge.

The Advocate-General (Hon. Mr. *Spring Branson*) and the Acting Government Pleader (*Subramanya Ayyar*) for the appellant.

The plaintiff does not dispute the right of Government to grant a cowle: and, clearly, on the grant of the cowle the cultivator becomes liable in respect of both the claims of Government and of the jenmi. As to this right see *Logan's Treaties and Engagements*, pp. 21, 82, 86. If the jenmi does not choose to cultivate his waste and a cowle is granted for it, the land, having once been assessed, becomes a security for the payment of the revenue which may accordingly be collected, if necessary, by the sale of the land. This position has been maintained by the Government in Malabar for a long time, see p. 240 of the work already referred to, and *Logan's District Manual*, vol. II, app. XV; and it is both reason-

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able in itself, and in accordance with the recognized claims of Government on mirasi and other lands. A landholder for revenue purposes is taken to mean the person registered as such. See as to Madras Regulation II of 1802, *Secretary of State v. Vira Rayan*(1), and as to the Revenue Recovery Act, 1864, *Zamorin of Calicut v. Sitarama*(2), and *Secretary of State v. Narayanan*(3). Compare also as to the origin and precedence of the right of Government to land revenue, *Bhaskarappa v. The Collector of North Canara*(4), *Vyakunta Bapuji v. Government of Bombay*(5), *Thakooranee Dossee v. Bisheshur Mookerjee*(6), *Secretary of State for India v. Bombay Landing and Shipping Company*(7), *Abdul Gani v. Krishnaji Bhikaji*(8), *Gundo Shiddheshwar v. Mardan Saheb*(9), *Ghelabhai Bhikaridas v. Pranjivan Ichharam*(10), and see also Fifth Report, vol. II, p. 440.

Moreover here the jenmi appears to have had notice of the issue of the cowle, or at any rate of the occupancy of defendant No. 2 whom he allowed to appear as ostensible owner, as to which see *Zamorin of Calicut v. Sitarama*(2). The lower courts did not consider either of these points, nor did they frame an issue upon the question whether the plaintiff's claim was or was not barred under the Limitation Act.

Bhashyam Ayyangar, Sankara Menon and Govinda Menon for respondent.

The argument of the learned Advocate-General leads to the extreme conclusions that Government without consulting or warning the landowner can (1) give his land to another for cultivation and (2) then extinguish that right if that other fails to comply with the revenue demands. But in the right view of the law, Government cannot so dispose of the jenmi's property; or if it can, the sale must be subject to his right to jenmibhogam.

There is no question in this case as to the Government's right to levy revenue; but the respondent says that he as jenmi should have the option of paying it and that his land should not be taken away without his being consulted. Compare *Rajagopala*

(1) I.L.R., 9 Mad., 175.

(3) I.L.R., 8 Mad., 130.

(5) 12 Bom. H.C., App. 40, 41.

(7) 5 Bom. H.C.R., 48.

(9) 10 Bom. H.C.R., 422.

(2) I.L.R., 7 Mad., 405.

(4) I.L.R., 3 Bom., 547.

(6) B.L.R., Sup., Vol. 295.

(8) 10 Bom. H.C. R., 416.

(10) 11 Bom. H.C.R., 218.

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Ayyangar v. Collector of Chingleput(1), a case where land was abandoned. Moreover under Madras Regulation XXVI of 1802 notice should be given to the jenmi before another is registered as owner.

The rights of the jenmi are not those of an incumbrancer only, they are certainly not less than those of a mirasidar; and a purchaser under a revenue sale is liable for the dues payable to a mirasidar, *Sakkaji Rau v. Latchmana Gaundan*(2), nor is a mirasidar's right affected when land is sold for the Government's share of the melvaram, see *Ragava v. Parthasaradhi*(3). Thus a sale under the circumstances of the present case would be legal only if made subject to the right to jenmibhogam; that right stands on a higher footing than a mere incumbrance which in the sense in which the word is used in the Revenue Recovery Act means some burden resulting from the act of the defaulter or of the owner, see *Yellaya v. Viraya*(4).

In the right view of the law all that the Government can do by a cowle is to fix the revenue and by the grant of a patta no fresh estate is created.

The Acting Government Pleader (*Subramanya Ayyar*) in reply.

As to want of notice to the jenmi, the land-owner, under the regulations, should have his name registered, if he omits to avail himself of this means of securing himself, he does so at his own risk. Moreover the Revenue Recovery Act II of 1864 does not require any registration any more than it requires any contract to pay. See *Ghelabhai Bhikaridas v. Pranjivan Ichharam*(5). However it is not contended for the appellant that the cowle creates any estate, but that the land is a security for the revenue which accrues due subject to the remission which the cowle grants; the claim of Government to that revenue could be enforced even against a trespasser, such as the respondent claims defendant No. 2 to have been. But if defendant No. 2 was a trespasser the respondent's claim to jenmibhogam falls to the ground. Here, as in the case of a zamindari, there are various admitted interests in the land, the question is as to their priority. The jenmi's position is that of a raiyat with a preferential right to the waste land. The claim of Government comes first, see *Zamorin*

(1) 7 M.H.C.R., 98.

(3) S.A. 43 of 1885 (not reported).

(2) I.L.R., 2 Mad., 149.

(4) I.L.R., 10 Mad., 62.

(5) 11 Bom. H.C.R., 218.

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of Calicut v. Sitarama(1), *Bhaskarappa v. The Collector of North Canara*(2), and with the liability of land to be assessed to revenue, the Courts have nothing to do, *Vyakunta Bapuji v. Government of Bombay*(3); that claim being satisfied, Government is not concerned about the rest.

The Court made the following

ORDER.—The plaintiff, the uralen of the devaswam, which is the jenmi of the land in suit, sues to set aside the sale of certain land belonging in jenm right to the devaswam which has been sold for arrears of revenue under Madras Act II of 1864.

It appears that in 1869 the first defendant, Collector of Malabar, granted a cowle to second defendant for the land in suit, and it is stated that the land was cultivated until two years before suit and a patta was granted to second defendant by the revenue authorities. As second defendant did not pay the assessment, the land was attached and sold, third defendant being the purchaser. A petition by the plaintiff to release the attachment was dismissed as he did not pay the arrears of revenue due. The plaintiff now sues to have the sale of his jenm right set aside on the ground that the cowle was granted and the tax imposed without his consent as jenmi. The first defendant—the Secretary of State for India in Council represented by the Collector of Malabar—maintained that the land was liable to be sold for the arrears of public revenue due upon it. Defendants Nos. 2 and 3 allowed the suit to proceed *ex parte*.

The District Munsif dismissed the plaintiff's suit, holding that no authority was shown for the proposition that the Collector was bound to give notice to the jenmi when a revenue patta was granted to a tenant in possession, and that the land was doubtless liable to be sold as security for the public revenue. On appeal, the District Judge reversed this decision, holding that, though a jenmi could not maintain a suit to set aside a revenue sale when he had permitted a pattadar to appear as ostensible owner, it was otherwise when the Government, without notice to the jenmi, had granted the jenmi's waste lands on cowle. The Judge held that the Collector's remedy against second defendant could only be under the terms of the cowle, that the cowle did not render the

(1) I.L.R., 7 Mad., 405.

(2) I.L.R., 3 Bom., 547.

(3) 12 Bom. H.C.R., App. 1.

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land liable to be sold, and that the Collector was not authorized to grant cowles for the reclamation of private property without notice to the jenmi.

Against this decree the Secretary of State appeals.

It appears to us that the District Judge has overlooked the fact that the cowle set forth in his judgment was one for two years only and that the District Munsif found that a patta had been since issued. The cowle reserves the right of the jenmi, and there is nothing before us to show whether the subsequent patta also reserved those rights, or whether the Government then purported to set up an adverse title in themselves.

If the land was legally at the disposal of Government to allot to the second defendant for cultivation, there could be no doubt that it is liable to be sold for arrears of revenue free of all incumbrances; but if it was not, *i.e.*, if it was private property not at the disposal of Government and which the jenmi could deal with at his pleasure without reference to Government, it may be doubted whether a sale for arrears of revenue could carry with it the jenmi's right. It is contended that the "incumbrances on the land" alluded to in Act II of 1864, section 42, refer only to incumbrances created by the parties, and does not mean that all rights are destroyed.

It is contended for the appellant that the Government right to assessment is based upon a right to receive a share of the produce of all land which is brought under cultivation, but this right is not necessarily inconsistent with the rights of private individuals to decide whether their own lands shall or shall not be cultivated.

The second defendant is *ex parte* in the suit, and it is clear that he at all events can have no defence to the Government claim to sell whatever interest he may have in the land for an arrear of public revenue due by him. He however has set up no jenmi title, and it is obvious from the cowle that he came into possession with the rights of the jenmi reserved, so that if he still holds under the same tenure he may not be able to deny the jenmi's title. If, however, in granting the patta to him the Government have set up an adverse title for themselves, it may be that the plaintiff has lost his title by adverse possession, or he may also have lost his right to object by having allowed second defendant to appear as ostensible owner.

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We will ask the District Judge to return findings upon the following issues:—

- I. When was the land granted on patta to the second defendant, and was such grant made adversely to the plaintiff's title?
- II. Has the plaintiff allowed second defendant to appear as ostensible owner and for how long?
- III. Had the Collector legal power to grant the plaintiff's lands for cultivation without his consent, and if not, can he legally bring the plaintiff's title to sale under Act II of 1864?

Further evidence may be taken.

The District Judge having returned findings on the issues remitted to him to the effect summarized at the beginning of the judgment of Parker, J., the second appeal came on for rehearing.

The Advocate-General (Hon. Mr. Spring Branson) for appellant.

The finding that the patta was not granted adversely to the plaintiff's title is erroneous. The jenmi must have known of the cultivation and he received no jenmibhogam: moreover if he had chosen, he might have come in, see the Proclamation of 1799, Logan's Treaties and Engagements and exhibits XX, XXIV, XXVI.

There is no difference between this case and that of a trespasser. But whatever may be the title of the holder, the revenue must be paid.

(PARKER, J.—The question is, is he the landholder within the meaning of the Revenue Recovery Act, see section 39? The tenant was let in subject to the jenmi's right; how can you sell independently of that right?)

The owner must see that he is recognized as such and can if he chooses be registered under Madras Regulation XXVI of 1802; it is not for Government to seek him out. A man may be liable for the whole revenue though he may have parted with half of the land. Government can only look to the cultivator—the man in possession: but this does not prejudice the jenmi who may come in, demand his jenmibhogam or eject. As to the jenmi being thus put to the assertion of his right, see exhibit XXV. There might be disputes between the owner and the cultivator for instance as to title or the crop raised might have

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no marketable value, but the claim of the crown cannot be affected thereby, see Rent Recovery Act, 1864, sections 35 and 58, and the circumstance that this case arose in Malabar does not make any difference. *Secretary of State v. Vira Rayan*(1).

Sankara Menon for respondent.

There is no doubt that Government if it choose can levy assessment on waste land after giving notice to the jenmi. But notice ought to have been given, for undeniably the proprietary right is in the jenmi. Further it is an important fact in this case that at the time when the sale for revenue actually took place, the land on which the revenue was assessed was lying waste.

As to the jenmi's proprietary right and the obligation to give notice to him, compare *Secretary of State v. Vira Rayan*(1) and see the Joint Commission Report.

The customary right of Government contended for in this appeal to sell land without notice to the jenmi has been exercised as appears from the evidence of the Collector only rarely. Moreover the custom set up is unreasonable, see exhibit XXVI, with which compare Munro's Minutes, 16th July 1822.

With regard to the contention that the plaintiff's claim is barred, it was advanced for the first time in second appeal and could not in any case be supported, as there was not adverse possession by either the tenant or the Government for twelve years if at all.

The Acting Government Pleader (*Subramanya Ayyar*) in reply.

The admission of the proprietary right of the jenmi has always been subject to certain qualifications—see the Proclamation of 1799 (Logan's Treaties and Engagements, p. 215). All private property is subject to the right of Government to collect revenue, *Bhaskarappa v. The Collector of North Canara*(2). This right of Government is not the creation of legislative enactments, but has merely been regulated by them. The question now raised is as to a supposed restriction on the mode of exercising it. This is really a question of usage rather than of abstract justice, and the right has been exercised as appears from the evidence in the mode now claimed to be lawful in the issue of 16,000 cowles, to the

(1) I.L.R., 9 Mad., 180, 186.

(2) I.L.R., 3 Bom., 523.

advantage, it should be observed, of the jenmis who have thereby had tenants found for their waste.

The fact that a new man is brought on to the land is a notice of the claim of revenue which cannot be ignored by the jenmi. But there is no authority for the argument that the jenmi is entitled to notice from Government in any other sense. He is sufficiently protected by the law: under the Regulation of 1802 and Act II of 1864, he can insist on being registered as proprietor, and he has the right to eject. See *Tiruchurna Perumal Nadan v. Sanguvien*(1).

As to the laches of the plaintiff and the lapse of time, either the possession of defendant No. 2 was without the consent of the jenmi in which case it was adverse to his title, or else it was by his consent and an estoppel arises. See *Zamorin of Calicut v. Sitarama*(2).

PARKER, J.—The District Judge has found (1) that the patta was not granted adversely to the plaintiff's title; (2) that the plaintiff has not allowed the second defendant to appear as ostensible owner; and (3) that the Collector had no legal power to grant the plaintiff's lands for cultivation without previous notice to him, and that in the absence of such notice no public revenue on account of which the plaintiff's title can be brought to sale under Act II of 1864 can be held to be due upon the land. To these findings the first defendant has put in a memorandum of objections.

There can be no doubt that the patta was granted on the same terms as the cowle, *i.e.*, without prejudice to the jenmi's right. The further plea was put forward that second defendant had acquired an adverse title as against plaintiff, and hence that Government was justified in selling his land for arrears. Defendants Nos. 2 and 3 are however *ex parte* in the suit, and the first defendant never raised this plea in his written statement, nor has any issue been taken upon it. We do not think we ought to allow it to be taken on second appeal, and it would certainly be anomalous that first defendant having let in a cultivator with reservation of the jenmi's rights should afterwards be allowed to plead that that cultivator had through that same act of the first defendant adversely acquired rights against the jenmi, by which

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(1) I.L.R., 3 Mad., 118.

(2) I.L.R., 7 Mad., 405.

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the jenmi's title had been lost. We must accept the findings, therefore on the first and second issues referred.

The third issue raises for decision a question of the utmost importance. It is admitted that the land in Malabar is private property, but it is argued on behalf of Government that co-existent with the proprietorship of the jenmi is the right of Government to allot to any person, not the proprietor of the soil, the right to cultivate any waste land in the jenmi's estate which is capable of cultivation, but which the jenmi has not cultivated. This right, it is asserted, is founded upon the right of the State to derive a revenue from all land cultivated or capable of cultivation, and it is contended that a private proprietor has no right to keep any portion of his estate waste if in the opinion of the officers of Government it should be cultivated so as to yield revenue to the State, and that if he neglects to cultivate such waste the Collector may without reference to him assign such land for cultivation to any other person, subject however to the jenmi's right to eject such person and pay the revenue himself.

Such claim is no doubt altogether inconsistent with rights of property as understood by English Law, but it has been held that property in the soil must not be understood to convey the same rights in India as in England. "It may be subject to 'restrictions and qualifications varying according to the peculiar laws of each country; and those acts which under one system 'would be necessarily regarded as contradictions of any ownership over the object on which they were exercised, except that from which they spring, might under another system be quite compatible with an ownership subsisting unimpaired side by side with the limited right to which they would be attributed. The exaction of a share of the crops is itself an instance of this divided dominion.'" See *Bhaskarappa v. The Collector of North Canara*(1). The right here claimed however is something much larger than a right to a share in the crops. It is not alleged that the right now claimed rests either upon legislative enactment or upon judicial decision, but it is said to be founded upon customary law which has not hitherto received the sanction of judicial recognition. It is necessary therefore that a custom of an anomalous character and apparently so subversive of the ordinary rights

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of private property should be strictly proved before it can be recognized as having the legal requisites of a valid custom.

The evidence shows that the jenmis or the proprietors of the soil in Malabar have long been in the habit of leasing out the greater portion of their estates to kanomdars who are thus in the immediate occupancy of the greater part of the soil. This was the state of things at the time of Hyder's conquest (exhibit XIV), and the British Government is stated to have continued the practice of the Mysore Government in settling the assessment with these kanomdars. At the annexation of Malabar in 1799 the Government disclaimed any desire to act as the proprietor of the soil, and directed that rent should be collected from the immediate cultivators, *Trimbak Rani v. Nana Bhavani*(1) and *Secretary of State v. Vira Rayan*(2), thus limiting its claim to revenue. Further, in their despatch of 17th December 1813 relating to the settlement of Malabar the Directors observed that in Malabar they had no property in the land to confer, with the exception of some forfeited estates. This may be regarded as an absolute disclaimer by the Government of the day of any proprietary right in the jenmis' estates, and is hardly consistent with the right of letting in a tenant which is certainly an exercise of proprietary right.

The first trace of the assertion of the right now claimed is to be found in 1827 when the then Collector, Mr. Sheffield, made proposals to the Board of Revenue for reclaiming waste lands (exhibits XV—XVIII), and on 12th February 1827 he was ordered to submit to the Board the precise terms of the cowle, which he proposed to grant. On 20th September 1827, Mr. Sheffield accordingly submitted a specimen cowle (exhibit XVII) which contained a stipulation that the cowledar should be responsible for the jenmakars' or proprietors' share of the produce of the said land. In acknowledging receipt of this specimen document on May 19th, 1828, the Board says (exhibit XVIII, paragraph 16) "The Board conclude that the form of cowle which the Principal Collector has forwarded is intended for *unclaimed lands considered as belonging to the Circar*; and that the expression 'you will be held accountable for the jenmakars' or proprietors' share of the produce' is only meant to intimate to the occupant that when

(1) I.L.R., 3 Bom., 715.

(1) 12 Bom. H.C.B., 144.

(2) I.L.R., 9 Mad., 175.

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"his assessment comes to be fixed he will be regarded as a mere tenant, not as proprietor, and will have to pay the whole of his landlord's rent to the Circar."

The Board then goes on to ask within what period in Malabar unclaimed lands are considered to have lapsed to the State, and object to the mention of the jenmakars' share when it is uncertain whether or not there be a jenmakar on the ground that the Government ought not to be committed on any doubtful question. The tenor of this document certainly goes to show that in 1828, the Board of Revenue did not consider the Government had power to grant cowles for other than unclaimed lands which were at the disposal of Government, and this is consistent with the despatch of the Marquis Wellesley of 19th July 1804, and that of the Court of Directors of December 1813, and see *Trimbak Ranu v. Nana Bhavani*(1).

On April 14th, 1829, the Collector replied to these enquiries (exhibit XIX) to the effect that according to Malabar custom a jenmakar's right to resume on payment of the value of improvements never became barred by lapse of time. This concludes the correspondence 1827—1829, and there is certainly nothing in it to show that up to 1829, the Government had asserted the right now claimed.

The next document in point of date is a report of the Collector, dated 10th November 1841 (exhibit XX). In it Mr. Conolly writes on the subject of cowles: "However questionable it may at first sight appear for the Government to issue cowles for the cultivation of lands which are not their property, the practice of issuing such documents seems to be attended with advantage to both Government and proprietor;" and further on, "generally speaking the cultivator at the time of obtaining a cowle from the Circar makes his own arrangement with the proprietor by obtaining a verumpattom or kuyikanom lease, which secures both parties in their respective rights." Here clearly Mr. Conolly justified the practice on the ground of convenience, but not of legal right.

The same officer writing to the Board five years later (exhibit XXII, January 9th, 1846) for the first time broaches the theory which the Government now puts forward. He then says, "The

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"Government have nowhere so thoroughly relinquished their claim as sovereign as to leave it in the power of any proprietor to leave his ground waste to the detriment of the public interest If a land-holder will not cultivate his waste the Government consider themselves at liberty to get some one who will, reserving always to the said landlord the share of the produce which his right as proprietor entitles him to according to the usage of the country." Here we have the first trace of the present claim together with the underlying fallacy that the jenmi's rights are to a share in the produce only and ignoring his right as proprietor to the soil itself.

The Board then appears to have called for a copy of rules issued by the Collector to his subordinates for the reclamation of waste lands, and six months later (10th July 1846, exhibit XXII) Mr. Conolly sends them expressing his own anxiety that applications for such cowles should be encouraged, not only because it is always desirable to bring waste lands under cultivation, but also for political reasons, because it was desirable that the restless and vigorous Moplahs of the interior should be encouraged to expend their energy in honest work, failing which they will betake themselves to smuggling and other malpractices.

In the hookumnamah sent for the information of the Board (exhibit XXIV) the applicants are enjoined to obtain, if possible, the consent of the jenmis, who it is said have the prior right to reclaim for themselves if they wish to do so; but it is stated that if they refuse on insufficient ground, the Government will take the offer of any other party. The rights of the jenmi are reserved, but he is relegated to a Civil Court to enforce them.

These extracts make it clear that between 1841 and 1846 Mr. Conolly's views of the relative rights of the Government on the one hand and the jenmi on the other had altered considerably, but four years later—in 1850—we find him making a still further advance in the attitude which he had assumed with reference to the jenmis. He then (exhibit XXV, August 13th, 1850) instructs the Tahsildars that "Government gains nothing in recording the name of the jenmi" in the cowle and that in future it is not necessary to enter it.

Exhibit XXVI is an extract from the Proceedings of the Sudder Adawlut, dated 13th February 1854, from which it appears that the Government had in 1853 under consideration the question

(1) 12 Bom. H.C.R., 144.

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of legislating to limit the rights of jenmis over waste lands, but the only opinion expressed by the Sudder Court (and that not a judicial one) is that it is inexpedient to depart from ancient usages which regulate the relations of landlord and tenant. The views of the local officers are referred to without any expression of opinion as to whether they are correct, or the contrary.

It will be observed that Mr. Conolly nowhere gives reasons for the opinion advanced in January 1846 that it is not within the power of a private proprietor to leave his land waste to the detriment of the public revenue, and no documents have been filed to show that either the Board of Revenue or Government formally accepted this view. We were however referred in argument to a proclamation issued on 26th November 1799 to the inhabitants of Koletanaad (North Malabar) contained in Logan's Collection of Treaties and Engagements, page 215, on which the Advocate-General strongly relied, as showing that the present right had been claimed as early as 1799 and before the formal annexation of Malabar. If this were so, the fact would no doubt be strong evidence; but on reading the proclamation carefully it seems to me quite clear that it does not refer to waste lands at all, but to lands which had been assessed to revenue but the owners of which had disappeared. Malabar was at that time in a transition state under an interim Government, and the British Government which was in possession, but had not formally annexed the country, was anxious to put matters in order, in view to ascertain the revenue really derivable from its new possession. The history of the steps then taken is very fully set forth in the judgment of Westropp, C.J., in *Vyakunta Bapuji v. Government of Bombay*(1), but the fact that this proclamation refers to lands on which revenue (nigudee) had been fixed, is clear from the offer to remit it for one or two years wheresoever there may have been considerable impediments in cultivating the lands, and where such impediments are proved to the satisfaction of Mr. Hodgson. It will not, I think, be denied that the 'Kunnus' of Malabar from which crops of dry grain or rain-fed paddy are taken are assessed to public revenue when cultivated.

The Advocate-General referred in his argument to certain other State papers collected in the same work (Logan's Treaties

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and Engagements), but they do not appear to me to support his contention, but rather show that the original intention of Government was to hold the jenmis only—not the actual cultivators—liable for the revenue. Thus at page 21, paragraph 5, it appears that in 1792 the Nair jenmis were in future to be held liable for the jumma instead of rendering military service as in the days of Tippoo. Paper No. 68 of 28th October 1793 (p. 82) alludes to the flight and return of the jenmis and clearly (paragraphs 4 and 5) indicates an intention of settling with them and not with the kanomkars for the revenue. Document 73 (1794) at page 86 and document 242 at page 240 (1803) point to the same conclusion, and go to show that it was the jenmi whom it was then intended to designate as the proprietor of the land within the meaning of Madras Regulation XXVII of 1802, section 2. See *Vyakunta Bapuji v. Government of Bombay*(1).

The only document to which we have been referred as containing a formal claim with regard to waste lands is paper No. 81 (Logan's Treaties and Engagements, p. 97) which is an agreement executed by the Achen of Palghat in 1792-93. In it after fixing the revenue payable to the Company's Government it is stated that the "Terse," i.e., waste lands, cannot now be cultivated, but "should it hereafter be found capable of cultivation, the Company's share of nigudee from the ground in question shall be "allowed and added to the present revenues." This does not amount to more than the assertion of a right to assess the proprietors to revenue for all cultivable land, but is no assertion of a right to let in and assess any other person than the proprietor.

I have now reviewed all the documentary evidence on the record as to the origin and existence of the alleged custom, and I find nothing whatever to show that the right now contended for has ever been formally claimed in any general notice or proclamation, and the whole evidence tends strongly to show that the claim in its present form was first advanced by Mr. Conolly in 1846 and apparently originated in his zeal for the public revenue and for the reformation of the Moplahs of Malabar.

The evidence of Mr. Winterbotham, the present Collector of Malabar, shows that the practice originated by Mr. Conolly has been continued. That officer has filed a list showing the approxi-

(1) 12 Bom. H.C.R., App. 75.

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mate number of cowles granted in Malabar from *fasli* 1238 to *fasli* 1297 (1828–1889). This, it may be assumed, includes cowles granted for the reclamation of Government waste lands as well as for lands belonging to private proprietors. There is no evidence that any cowles were issued for the reclamation of lands of private owners before Mr. Sheffield's tenure of office in 1827 and the instructions of the Board of Revenue in 1828 (exhibit XVIII) would certainly tend to check the practice. Accordingly we find that the issue dropped from 36 in *fasli* 1238 and 99 in *fasli* 1239 to 8 in *fasli* 1241, and there was no great increase again till Mr. Conolly was Collector when the number rose to 421 in *fasli* 1256 (1846), which year was synchronous with Mr. Conolly's change of views. After that the number of cowles granted rose annually till it reached its highest point in *fasli* 1268 when 1524 were issued. Since then the issue has declined and very rapidly from *fasli* 1278 to *fasli* 1297 (1868 to 1887). The Malabar Special Commission Report of 1882 (exhibit XVIII) explains the cause of this to be the insecurity of the cowledar let in by Government and his liability to be ejected by the jenmi.

Mr. Winterbotham is an officer who has considerable experience in Malabar, and he appears to have entirely adopted the later views of Mr. Conolly. He admitted that a considerable number of cowles had been granted on his own recommendation, and stated that since 1850 the Government officials had carefully refrained from making inquiries as to who was the jenmi before the issue of cowles. He admitted however that, as a general rule, the cowledars had attorned to the jenmi who generally, if kists fell into arrears, paid the revenue himself and thus prevented a sale. In some few cases the issue of the cowle was objected to by the jenmis who involuntarily submitted to be assessed to revenue themselves rather than let in the cowledars. The Collector further stated that sales for arrears of revenue and relinquishment of land were almost unknown in Malabar.

It appears to me that Mr. Winterbotham's evidence proves, not that the right claimed by Government has been acquiesced in, but that jenmis have, as a rule, taken steps to assert and preserve their rights of property when brought into peril by the action of the Collectors.

The Government bases its claim neither upon legislation nor upon judicial decision, but upon customary law. Among the

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requisites of a valid custom are (1) that it must be ancient; (2) that it must have been continued and acquiesced in; and (3) that it must be reasonable, and it appears to me that none of the conditions have been satisfied. The custom is not ancient, for the evidence shows that it was first put forward by Mr. Conolly in 1846 and has never been formally asserted by the Government; it has not been acquiesced in, for a claim counteracted is not a claim acknowledged; nor do I think it is reasonable, for instead of assessing the *de jure* proprietor to revenue in his own name the Government plants a trespasser upon his land, does not make that trespasser attorn to the owner, but forces the proprietor to take active steps to assert his legal rights if they are not to become barred by a hostile possession. And I am confirmed in my opinion that this right does not exist by customary law by the fact that in the only other part of India where it is shown that Government has a right similar to that claimed in Malabar that right does not exist by customary law, but by the sanction of a legislative enactment. (Bengal Regulation VII of 1822.) See *Sakkaji Rau v. Latchmana Gaundan*(1).

When examined on interrogatories in May 1886, the Collector, Mr. Winterbotham, rightly stated the law that the landholder contemplated in section 1 of the Revenue Recovery Act is the person in whose name the land should stand in the revenue register maintained under Madras Regulation XXVI of 1802, but in his later deposition he stated that he considered the term "landholder" to apply to all the pattadars in Malabar. In this he appears to me to beg the whole question. Regulation XXVI of 1802 provides that Collectors shall keep registers of landed property paying revenue to Government, and shall also enter all transfers of landed property from one proprietor to another. The regulation does not appear to contemplate the contingency of the person paying the revenue not being the proprietor. In other districts the pattadar is, as a rule, the proprietor, and I think I have shown that in Malabar also the original intention was to assess the land to revenue in the name of the jenmi. It is admitted that the jenmi is really proprietor and that he can oust any person holding a patta from Government and retain the land himself—subject only to his liability to pay the revenue. He therefore is and has

(1) I.L.R., 2 Mad., 149.

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a legal right to be the landholder within the meaning of section 1 of the Revenue Recovery Act. It therefore appears to me that where land is private property as in Malabar, the right of Government is limited to that of charging the proprietor with revenue. If the proprietor does not pay the revenue assessed on his land, his proprietary rights can be determined under the provisions of Act II of 1864, but the Government is bound to proceed to determine his interest in a manner which the law recognizes *Rajagopala Ayyangar v. Collector of Chingleput*(1). The right of Government to grant pattas for unclaimed lands at its own disposal stands entirely on a different footing, and neither the arguments of Mr. Conolly, in 1840, nor those of his successor, 40 years later, really amount to more than a justification of an irregularity on the ground of the great difficulty in Malabar of keeping a register of landed proprietors as required by Regulation XXVI of 1802. It may be that that difficulty requires legislation for its removal, but with the remedy the Courts have nothing to do.

Holding therefore that the plaintiff is the landholder within the meaning of the Revenue Recovery Act, it follows that the sale without notice to him was illegal and will not pass his rights. I would dismiss this second appeal with costs.

SHEPARD, J.—This is an appeal on behalf of Government against the decree of the District Judge, setting aside a sale of the plaintiff's lands effected by the Collector under the provisions of Act II of 1864. The plaint stated that the land being the jenm of the plaintiff's devasom was granted on cowle to the second defendant by the Collector in fasli 1279 and that it was sold for arrears of revenue on the 18th June 1885 and purchased by the third defendant. The plaint refers to a petition presented by the plaintiff to the Collector subsequently to the attachment, but before the sale took place, praying that the attachment may be set aside "or that it may be ordered that the petitioner is entitled to "realize the jenmibhogam in the lands and the sale held after "alteration in the auction notification." The order on that petition was that the attachment would be set aside on payment of the arrears of revenue. The Collector representing Government, who was the only defendant that appeared, pleaded that the land was properly sold and that the sale was not liable to be set

(1) 7 M.H.C.R., 98.

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aside. The facts stated in the plaint are admitted. It is found that the second defendant came into possession under a cowle given by the Collector, and that subsequently, in 1872, he had a patta given to him. It is not alleged on behalf of Government that the plaintiff in any way consented to the granting of the cowle or the patta or that he was ever aware of the issue of such documents. On the contrary, the third issue assumes that the Collector did not give any notice to the plaintiff before issuing the patta. The main question argued both in this Court and in the Courts below was whether in the absence of such notice the Collector could, on default being made by the pattadar in payment of revenue, lawfully bring the jenm title to sale. Some argument was addressed to us to the effect that the suit was barred by limitation, inasmuch as the second defendant's possession is shown to have commenced more than twelve years before the suit was brought. As between Government and the plaintiff it seems clear that the action of the Collector was not intended to be hostile to the jenm title. It has been found that the patta was not granted adversely to the plaintiff's title. Whether notwithstanding this the second defendant's possession would have been adverse and the plaintiff therefore deprived of his right by a continuance of that possession for twelve years, is a question which does not arise upon the facts as they are found. The land is found to have been waste at the time of the sale and for some time before, and it is not proved that the second defendant's possession lasted for twelve years. Moreover the plea of limitation was not raised in the Courts below.

Another question, which was raised on the original argument of the appeal, is disposed of by the finding on the second of the three issues referred by us. No valid objection can be urged against that finding, and it is clear that the plaintiff in no manner put forward the defendant as the proprietor of the land so as to preclude himself from setting up his own jenm title.

Coming to the main question which is, as far as I can learn, discussed now for the first time in a Court of Justice, we have to consider what authority there is for the proposition asserted on behalf of Government that the jenm title of land can be sold under the Act in satisfaction of arrears of revenue due by a pattadar, who has occupied the land without the jenmi's consent.

There is no doubt that the practice of granting cowles to persons who undertake to cultivate waste lands has largely pre-

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vailed in Malabar. The practice is consistent with the anomalous system, which has also long prevailed there of settling the revenue with the tenant and not with the jenmi. (See paragraph 196 of the report of the Joint Commission, 1793, and the articles settled with the jenmakars for the year 969, page 81 of Logan's Treaties and Engagements). The grantee of the cowle comes under an engagement with Government to pay revenue on the expiration of a fixed period during which the land is declared free of assessment. The relation in which the cowledar stands to the jenmi is tolerably well ascertained. It is expressly provided in the cowle that the jenmi's rights are unaffected by it, and it appears from the evidence that generally persons taking cowles at the same time make their terms with the jenmi (see exhibits XIX, XX, extract from jamabandi report of 1841) and in the rules for granting remission on waste lands published in 1846, the advisability of adopting this course is pointed out to applicants for remission (see exhibit XXIV). Should the cowledar omit to make arrangements with the jenmi, it is quite clear that subject only to his right to compensation for improvements, he may be at once evicted (see Major Walker's report adopted by the Sudder Adawlat in proceedings of 13th February 1854). Should he however be left in possession for more than twelve years without any recognition of the jenmi's right, he would like any other trespasser acquire a valid title by limitation. By the mere fact of a cowle being given and taken, no benefit accrues to the grantee in his relations to the jenmi, and conversely the jenmi is in no way prejudiced. The question at issue is in what manner the granting of the cowle affects the relations between the jenmi and the Government.

It is argued that the Government are within their right in planting a cultivator in a jenmi's land without consulting him, and further that they are entitled to treat that cultivator as the landholder, ignoring the person who is admittedly the real owner. It is said that the power is necessarily involved in the right which Government possesses to charge revenue upon all cultivable lands, and it is urged that the jenmi is not injured, because he is at liberty at any time to eject the cultivator and take upon himself the burden of paying the revenue. It appears to me that, in order to disprove the existence and even the utility of the power which is claimed, it is almost sufficient to state the position in

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which the cultivator is placed with regard to the jenmi who has been ignored. If it is true that the cultivator may be ejected by the jenmi the day after the Collector has let him into possession, it is difficult to understand in what sense the Collector had a legal right to admit him upon the land. In so far as the object which the Collector has in view is a fiscal one the obvious way of attaining it is by a direct application to the jenmi and an intimation that he will be charged revenue for his waste land; in so far as the object is to promote the cultivation of waste lands, that object is not very effectively furthered by a system under which the cultivator is left wholly at the mercy of the jenmi. *A priori* it is most improbable that, in a country where the right of private property in land was highly developed and where it is not even certain that any land revenue was exacted by the ruling authorities before the Mussulman invasion, a power so seriously trenching on proprietary right should have come into existence. Nor am I able to find in the exhibits and other papers to which we have been referred any foundation for the notion that Government has the asserted right. In all the papers from the proclamation of 1799 (Logan, page 215) down to the most recent, it is stated, or at least implied, that the jenmi is to be consulted before a cultivator is put upon his land. In the proclamation the rights of Government are put on the highest ground and a security of tenure is assured to the cultivator which, in fact, he has not obtained. Yet even then the authorities evidently did not intend that the option of cultivating their lands should be taken away from the jenmis altogether. In 1829, the Collector in answer to questions put by the Board of Revenue, citing Major Walker as his authority, asserts to the full extent the right of the jenmi to dispossess a cultivator who has been placed on the land in his absence. The only liability which the latter can incur for such unauthorized cultivation of the land is the liability to pay compensation for improvements (exhibits XVIII and XIX). The Collector, Mr. Conolly, in 1846 speaking of the right of Government to insist on cultivation of land in the interest of the revenue distinctly saves the rights of the jenmi, saying that if he will not cultivate, Government is at liberty to get some one who will, reserving always to the landlord the share of the produce to which he is entitled (exhibit XXII), and again in the same year similar language is used by the same Collector—"Proprietors" are of course to have the choice of reclaiming such lands them-

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"selves, but should they refuse to do so on insufficient grounds the Government will take the offer of any other party who comes forward." (See also Mr. Conolly's letter of 8th October 1853 quoted in Minutes of Consultation of 15th November 1853.) Our attention was specially called to the order of 1850 also proceeding from Mr. Conolly (exhibit XXV) which the Collector examined as a witness quotes as the authority for prohibiting Revenue Officer from making inquiries as to who is the jenmi when a cowle is to be granted. The Collector appears to have misunderstood the order, for all that it says is that it is unnecessary to record the names of jenmis in the lists of waste lands since the Government gains nothing by such record. Anyhow, this order must not be read by itself, but in connection with the language used by Mr. Conolly on other occasions, and so read it affords no ground for belief that in his opinion the jenmi and his rights might be ignored in the transaction altogether. No doubt he assumed that applicants for cowles would look after their own interests and secure themselves by making a bargain with the jenmi as he had recommended them to do in the hookumnamah published four years before (exhibit XXIV). Some stress was laid upon the large number of cowles said to have been granted since 1826. In view of the circumstance above referred to that in the majority of cases the cowledar at the same time enters into an engagement with the jenmi, the prevalence of the system of granting cowles seems to me of no weight. Assuming that the Government have the right claimed by Mr. Conolly in some of the above-cited papers of introducing a cultivator on to the land of a jenmi who unreasonably refuses to cultivate it, I can find no authority for the further claim which is now made of cultivating lands for a jenmi without giving him the option of doing it himself. This claim appears to me to be an unwarrantable extension of the practice which is itself an anomaly of settling with the tenant and not with the jenmi.

The rights of the jenmi are certainly not less extensive than those of the mirasidar with which they have often been compared (see Mirasi papers, page 434, and appendix 1). Yet the mirasidar is generally entitled to a prior right to undertake the cultivation and consequent assessment, *Fakir Muhammad v. Tirumala Chariar*(1)

(1) I.L.R., 1 Mad., 205.

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Mirasi papers, page 219, and he does not lose any prescriptive rights he may have by the fact that patta is given to another, *Subbaraya v. The Sub-Collector of Chingleput*(1). If we are to adopt the view contended for on behalf of Government the jenmi is placed in a less favorable position, for the cultivation of his waste lands may be taken out of his hands without any choice being allowed to him in the matter, and he may run the risk of having his jenm right sold without any warning or even notice that the land has been assessed.

It was argued that it was the business of landholders to see that their lands were registered in their own names and that they can protect themselves by requiring the Collector so to register them, *Ponnusamy Tevar v. Collector of Madura*(2) and that on the other hand it was not the business of the Collector to ascertain who was the real owner and to settle with him. Reference was in this connection made to section 35 of the Revenue Recovery Act, as showing that the legislature contemplated cases in which other persons than the registered holder might have interest in the land. Notwithstanding the opinion expressed by Turner, C.J., in *Subbaraya v. The Sub-Collector of Chingleput*(1), I think it must be allowed that a suit would lie to compel the Collector to settle the assessment with the real owner and not with a third person, *Mahomed Israile v. Wise*(3). And in my opinion the possession of such a remedy by the jenmi is only consistent with his contention in this appeal. So far from that circumstance militating against the jenmi's contention, it appears to me that if he had no remedy in the case supposed, there would have been more reason for saying that the Collector in making a settlement might act without regard to claims of legal ownership. The Advocate-General referred to the Madras Regulations XXV and XXVI of 1802 as showing that it is the business of landholders to enter their names in the registry. The provisions for the registration of landholders were enacted for fiscal purposes. The Regulation XXV of 1802 requires that any alienation of part an entire zamindari shall be registered, or the entire zamindari will still remain answerable for the whole revenue. In other words a zamindar who has come under an engagement to pay a certain revenue on account of a certain estate which stands as security therefor

(1) I.L.R., 6 Mad., 303. (2) 3 Mad. H.C.R., 35. (3) 13 B.L.R., 118.

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cannot lessen his obligation or diminish the security except with the consent of the Collector. But a provision of this sort is very different from one entailing on the landholder who omits to register the consequence that the Collector may treat another person as the landholder. There is no provision to that effect in the Regulations or in the Act of 1864. In this connection the case of *Bute v. Grindall*(1) which is mentioned in a note to *Bhas-karappa v. The Collector of North Canara*(2) was cited. That was a case concerning a poor rate, and the question was whether the plaintiff who was the ranger and keeper of a Royal Park was liable to be rated. It was said that it was enough to find that he was occupier, and *quo nomine* occupier whether for gift or wages could make no difference. "It is immaterial" said Buller, J., "what interest the occupier has in land; whether he holds as "tenant at will or by any other tenure, it is not necessary to "inquire into the occupier's title." These observations relating to a rate which is not a tax on the land but a personal charge paid by the occupier in respect of it, *Rowls v. Gells*(3) have no bearing on the present case in which it is sought to realize by sale of the land arrears of revenue incurred by the occupier.

It was admitted that the right claimed on behalf of Government had not been recognized by the legislature and that no sanction for it was to be found in the Regulations of 1802 or in the Act of 1864. Unless Innes, J., was wrong in his opinion that the Act of 1864 provides a complete scheme for the realization of land revenue, that admission is fatal to the appellant's case; and at any rate, in view of the large measure of attention and discussion which the institutions of Malabar have attracted from 1799 downward, the admission is of great importance. In my judgment the right of Government to deal with a stranger for the purpose of assessing the revenue as if he were the proprietor is not only not recognized by the legislature, but is inconsistent with the provisions enacted by it. In the Act II of 1864 as in the Regulation XXVIII of 1802 it is the landholder against whom measures are to be taken for realization of the revenue. It is the landholder between whom and the Collector the engagement with regard to revenue shall be made. He being the person who may be a defaulter is the person whose property, movable or immov-

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able, may be sold under the provisions of section 6, he is the person to whom notice has to be given under sections 8 and 25 before the Collector proceeds to sell the property. It is quite true, as was insisted in the argument, that the land is security for the revenue, but a security pre-supposes an obligation, and unless therefore an obligation has been imposed on the landholder, it is difficult to see how his interest in the land can be affected. "The "right of the Government is only a right to a charge on the land "and a right to forfeit by due course of law the title of the person "holding the land who does not pay the charge." *Subbaraya v. The Sub-Collector of Chingleput*(1). The case for Government requires that the pattadar who, as already observed, is as against the jenmi a mere trespasser, should be identified with the jenmi so that his engagement should be treated as an engagement entered into by the jenmi. It is intelligible that such an identity should be taken to exist in the case where the landholder allows a third person to represent himself as owner of the land (see *Zamorin of Calicut v. Sitarama*(2); as to this case compare *Minute on Malabar Tenures* by Turner, C.J., chap. V, section 82). But I fail to see on what principle it can be held that a jenmi on whose land a stranger has intruded behind his back can be taken to have assumed any responsibility for the revenue and therewith to have pledged his land as security for the due payment of it. If the contention on behalf of the Government is to be accepted and the jenmi is supposed to have assumed any responsibility, it must follow that the Collector is equally at liberty to realize the arrears of revenue by the sale of other immovable property or movable property belonging to him. I must not omit to notice the provision of section 42 of the Act on which some stress was laid, to the effect that land brought to sale for arrears of revenue shall be sold free of all incumbrances. In my judgment it would be a strain on the language of the section to hold that the phrase "incumbrances," which ordinarily denotes a burden imposed on land by the owner, is intended to denote the interest of the owner himself.

I am of opinion that the appellant has failed to show that there was a valid sale of the respondent's property under the provision of the Act and that therefore the appeal must be dismissed with costs.

(1) 1 T.R., 338.

(2) I.L.R., 3 Bom., 580.

(3) 2 Cowp., 461.

(1) I.L.R., 6 Mad., 303, 310.

(2) I.L.R., 7 Mad., 405.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

NARASIMMA (DEFENDANT NO. 1), APPELLANT,

v.

LAKSHMANA (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, s. 12.—Surrender by abandonment.

In a suit to recover possession of certain land comprised in an unexpired lease granted to the plaintiff by the first defendant it was pleaded that the plaintiff had left the land waste, and had refused to pay rent or give a written relinquishment of the land, and that the first defendant had accordingly let it to the second defendant:

Held that, although the defence did not disclose a surrender by the plaintiff, recorded as prescribed in the Rent Recovery Act, s. 12, the Court should determine the issue whether there had been a surrender by the plaintiff.

SECOND APPEAL against the decree of Venkatarangayyar, Subordinate Judge of Ellore, in appeal suit No. 709 of 1887, confirming the decree of M. B. Sundara Rau, District Munsif of Masulipatam, in original suit No. 465 of 1886.

Suit by a tenant, alleging an unexpired lease for five years against his lessor and a subsequent lessee for recovery of possession of the land and for damages. The lessor in his defence pleaded a surrender, which was not in writing.

The District Munsif framed an issue (the second issue) on the question of surrender; but, holding that the surrender set up by the lessor was invalid by reason of the provisions of Rent Recovery Act (Madras), section 12, he passed a decree for the plaintiff without taking evidence. His decree was affirmed on appeal by the Subordinate Judge.

Rent Recovery Act (Madras), section 12, provides as follows:—

“The landholders specified in section 3 are not empowered to eject tenants from their lands except by a decree of a Civil Court or under the provisions of sections 10 or 41 of this Act. Tenants ejected without such due authority may bring a summary suit before the Collector to obtain reinstatement with damages:

Provided always that tenants shall be allowed to relinquish their lands at the end of the revenue year by a writing to be signed by them in the presence of witnesses, or at any other time if the landholder is willing to accept the relinquishment.”

The first defendant preferred this second appeal.

Mr. DeRozario for appellant.

Krishnasami Chetti for respondent.

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

SHEPHARD, J.—The plaintiff sued to recover land of which, as he alleged, he had been in possession up to the end of fasli 1294 as tenant of the first defendant. The defendant in his written statement admitted the plaintiff's possession up to the end of fasli 1291, but averred that as “he (the plaintiff) neither executed a khat, nor cultivated the lands, nor paid the rent for that fasli, his (the defendant's) manager ordered the collection of the rent in the jamabandi and acceptance of relinquishment from fasli 1292; that when called upon to do so, plaintiff neither paid the rent nor presented a relinquishment in writing, but said that he abandoned the lands in the beginning of that very fasli, and that the land was therefore left waste, and subsequently in fasli 1295 was rented out to the second defendant.”

Upon these averments which formed the subject of the second issue, the District Munsif ruled, as a matter of law, that they afforded no defence and accordingly gave judgment for the plaintiff without taking any evidence. The question argued on appeal, both in the Subordinate Court and in this Court, was whether such surrender, not being in writing, signed and attested in manner provided by section 12 of the Rent Recovery Act, could be held to be a valid surrender of the land. This question, which is one on which as far as I can see there is no authority, has been answered in the negative, as well by the District Munsif as by the Subordinate Judge. I think that the interpretation which has been put on the proviso of section 12 is an erroneous one. It is said that the proviso like the substantive part of the section is devised for the protection of the tenant, and that the security of the tenant requires that no surrender, not recorded in writing, should be treated as binding upon him. There is no doubt that the protection of the tenant against hasty eviction is the main object of the section, and the proviso may have been framed with the

* Second Appeal No. 1359 of 1888.

NARASIMMA
v.
LAKSHMANA. same view, for the written and attested record of the tenant's relinquishment would afford him protection against subsequent demands for rent. It is plainly to the interest of both parties that a surrender, when made and accepted, should be recorded in some such way as that provided. But, in my opinion, the section does not render wholly void and inoperative a surrender which, although not so recorded, has in fact taken place. If that was the intention it certainly has not been expressed in plain terms. Indeed, the substantive part of the section does not refer to cases in which a surrender has taken place, because a tenant who has surrendered the land cannot be ejected. If it is said that an intention to avoid oral surrenders, though not clearly expressed, must be inferred from the language of the section, it becomes important to consider the inconvenient consequence which would follow from the construction which the Courts below have put on this section. In this particular case, the tenant appears to have been invited to give a written relinquishment of the land but in vain, and about four years afterwards another tenant having meanwhile been placed in possession, he brings this suit. According to the construction contended for by the plaintiff, he might have waited even longer before instituting his suit. His surrender being invalid, he might have brought his suit at any time within the period allowed by the law of limitation. Again, if the construction is the correct one, what protection is there for the landlord whose tenant abandons the land with the declared intention of surrendering it, and refuses, as in fact the plaintiff did, to put his declaration in writing?

Having regard to the language of the section and to the above considerations, I am of opinion that a surrender by a tenant is not invalid, because it is not recorded in manner provided in section 12 of the Rent Act. No evidence having been taken, I think the case must be referred to the lower Appellate Court for a finding on the second issue, both parties being at liberty to adduce evidence thereon.

MUTTUSAMI AYYAR, J.—I am also of opinion that an oral relinquishment, followed by abandonment of the land for several years, is not inoperative under the proviso of section 12, Act VIII of 1865. That section first negatives any power in the landholder to eject his tenant except under the provisions of the Act. The power contemplated is obviously not a right arising from

a distinct contract between the parties. The proviso further declares a power in the tenant to relinquish the land in writing at the end of the revenue year, or at any other time if the landholder is willing to accept the relinquishment. The apparent intention is to give the tenant a facility which the landlord does not possess in terminating the tenancy of his own will. The words "at any other time if the landlord is willing to accept the relinquishment" are again intended to afford an additional facility subject to the landlord's consent. A writing is prescribed as evidence when the tenant chooses to relinquish the land as a matter of right and thereby to protect himself against continued liability for payment of rent, and the proviso was not intended to apply to cases where the tenancy is determined by mutual contract such as surrender or abandonment for several years under circumstances from which a surrender might reasonably be referred. In the case before us the respondent contended that the tenancy commenced with a lease for five years, commencing with fasli 1286 and ending with fasli 1290, that the tenant neither cultivated the land nor paid rent for 1291, that when questioned about it at the annual settlement, he orally relinquished the land from 1292, that the land lay unoccupied for 1293 and 1294, that the landlord therefore rented it out to the second defendant in 1295, and that he was entitled to do so. If this contention were well founded, it would amount to a plea of surrender or an abandonment for some years arising from a mutual contract expressed or implied. In such a case a writing does not seem to be necessary and the proviso is not applicable. Though the second issue raised the question of surrender, the Courts below recorded no distinct finding, but rested their decision on the fact that there was no written evidence of relinquishment. The case in *Dinabhandu v. Lokanadhasami*(1) only decided that the act of allowing the land to lie waste was not conclusive evidence of an intention to abandon.

I therefore concur in the order proposed by my learned colleague.

[In compliance with the above order, the Subordinate Judge returned a finding, which was in favor of the plaintiff. This finding was accepted by their Lordships on the rehearing of the second appeal which they accordingly dismissed with costs.]

(1) I.L.R., 6 Mad, 322.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

PICHUVAYYAN (DEFENDANT), APPELLANT,

v.

SUBBAYYAN (PLAINTIFF), RESPONDENT.*

1889.
October
14, 24.

Hindu law—Adoption among Brahmans—Ceremony of adoption after marriage of person to be adopted.

Suit for partition of family property. The plaintiff sued as the adopted son of defendant, who had, after performing the usual ceremony of adoption, long treated him as his adopted son. The defendant denied that the plaintiff was his adopted son on the ground (which was established by the evidence) that the plaintiff was married at the date of the ceremony of adoption. The parties were Brahmans and members of the same gotra by birth:

Held (1) the adoption set up was invalid;

(2) the defendant was not estopped by his conduct from denying the validity of the adoption.

SECOND APPEAL against the decree of W. M. Thorburn, Acting District Judge of Trichinopoly, in appeal suit No 240 of 1887, reversing the decree of P. Dorasami Ayyar, Principal District Munsif of Trichinopoly, in original suit No. 11 of 1887.

Suit by the plaintiff as adopted son of defendant for partition of the family property.

The District Munsif dismissed the suit, holding, on the evidence as to the ceremony of adoption, that the adoption set up was not established.

The District Judge found that the ceremony of adoption had been sufficient, regard being had to the fact that the parties were Brahmans, and by birth members of the same gotra; and ruled on the authority of *Dharmadagu v. Ramkrishna Chinnaji*(1), *Sadashiv Moreshtar Ghate v. Hari Moreshtar Ghate*(2), and *Lakshmappa v. Ramava*(3) that the alleged adoption was not invalid by reason of the previous marriage of the plaintiff. He accordingly passed a decree for the plaintiff.

Both Courts found that the defendant had recognised the plaintiff as his adopted son.

* Second Appeal No. 130 of 1889.
(2) 11 Bom. H.C.R., 190.

(1) I.L.R., 10 Bom., 80.
(3) 12 Bom. H.C.R., 364.

The defendant preferred this appeal.

Sadagopa Chary for appellant.

Krishnasami Ayyar for respondent.

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

JUDGMENT:—The principal question argued in this appeal is whether the plaintiff was validly adopted by his uncle, the defendant. The parties are Brahmans, and, when the adoption took place, the plaintiff was married. The District Judge, on the authority of rulings in the High Court of Bombay, has held that, notwithstanding his marriage, the plaintiff was lawfully adopted by the defendant. We are of opinion that this judgment cannot be supported. Apart from the Bombay cases, which proceed upon texts which have no authority in this Presidency, no text or other authority can be cited to justify an adoption taking place after marriage, notwithstanding that the person taken in adoption may belong to the same *gotra* as the adopter. On the other hand such authority as there is on the subject is against the respondent's contention. In the *Dattaka Chandrika*, the author, treating of the rites which must be performed in the adopter's family, refers to the rite of marriage as that by which the filial relation can be completed in the case of Sudras. An adoption, therefore, in order to be valid, even among Sudras, must take place before the marriage of the adopted son (*Dattaka Chandrika*, s. II—§ 29–31, p. 643, Stokes' Hindu Law Books). The same writer fixed *upanayanam* as the rite which completes the filial relationship in the case of Brahmans, and though this rule, with regard to *upanayanam* has been relaxed in the case of *sagotras*, there is no warrant for the contention that the relaxation should be extended to marriage.

The rule that no one is eligible for adoption after marriage was recognised by the Sadr Adawlut in 1823—*Chetty Culum Prusunna Vencatachella Reddyar v. Chetty Culum Moodoo Vencatachella Reddyar*(1) and *Ranee Sevagamy Nachiar v. Moolo Vizia Raghoonadha Satooputty*(2)—and in 1830 Sir T. Strange sums up his view of the law by saying “upon these principles it would seem as if there could be no adoption of one who is married, marriage not being capable, like tonsure and investiture, of

(1) Madras Sudder Decisions, 406.

(2) *Ib.*, p. 101.
19

PICHUVAYYAN annulment"—Strange's Hindu Law, Vol. I, p. 79, and see West and
 SUBBAYYAN. Bühler, 1063, &c. In the case of *Vythilinga v. Vijayathammal*(1) the parties were Sudras. The Court referred, with approval, to the decision of the Sadr Court in 1823, and held the adoption made at a time when he was a married man and father of three children invalid. The respondent's vakil relied on the Full Bench decision in *Viraragava v. Ramalinga*(2), in which it was held that among Brahmans, in Southern India, the adoption after upanayanam of a boy of the same *gotra* with the adoptive father was permissible. For this exception, from what is admitted to be the general rule, in favor of the adoption of a *sagotra*, authority was found as well in the books as in the evidence of usage adduced in the case. There is no colour for the argument that this decision abrogated the rule according to which the previous marriage of the child is an obstacle to his adoption. There is, as we have shown, distinct authority for the rule, and the recognition of it is in no way inconsistent with the decision regarding the ceremony of upanayanam. It must be borne in mind that a valid adoption presupposes a gift by the father or mother, and they have no power under Hindu law to give their daughter-in-law or son's wife in adoption. For these reasons we must hold that the adoption of the plaintiff was invalid and of no effect. Failing the validity of the adoption, it was urged on the respondent's behalf that he was nevertheless entitled to a decree, inasmuch as the appellant was estopped from denying the adoption. This point was not raised in the issues settled between the parties, and though it did form one of the grounds of appeal to the District Court, no facts such as are required to support it are found or even alleged. The mere fact that the appellant recognized the respondent as his adopted son is clearly insufficient to raise a case of estoppel, for such recognition may be, and probably was, due to a mistake on the part of the appellant, a mistake in law, which also was probably shared by the respondent. In order to avail himself of the doctrine of estoppel, the respondent would have had to prove that the appellant by a representation which he knew to be unfounded intentionally misled the respondent into a position prejudicial to the interests which he would otherwise have possessed. There is no trace of any evidence to show that there

(1) I.L.R., 6 Mad., 43.

(2) I.L.R., 9 Mad., 148.

was any intentional deceit on the appellant's part or that the PICHUVAYYAN respondent has by his adoption been deprived of any rights in SUBBAYYAN. his natural family—*Vishnu v. Krishnan*(1).

We must reverse the decree of the District Judge and restore that of the District Munsif.

The appellant is entitled to his costs in this and in the Lower Appellate Courts.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

1889,
 August 21.

RAMASAMI.*

Penal Code, s. 353—Public servant—District Municipalities Act (Madras Act IV of 1884), s. 41.

A Municipal Inspector is a public servant within the meaning of s. 41 of the Madras District Municipalities Act.

CASE reported for the orders of the High Court under section 438 of the Code of Criminal Procedure by G. W. Fawcett, Acting District Magistrate of Trichinopoly.

Kallaya Pillai, the occupier of a certain house in Trichinopoly, was called on by the Municipal Council to remove an obstruction in the public street. He neglected to do so, and was served with a notice under section 264 of the District Municipalities Act (Madras Act IV of 1884) to the effect that if he did not remove the obstruction as required, the municipal council would have it removed and would recover from him the cost of its removal. The notice having been disregarded, the council removed the obstruction and demanded the cost (Rs. 7-0-7) from him. This demand also was unheeded, and the chairman accordingly issued a warrant of distress on him. When the Municipal Inspector came to levy the distress, Ramasami Pillai, the father of Kallaya Pillai, who had

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

* Criminal Revision Case No. 286 of 1889.

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meanwhile come to live in the house, assaulted him, pushing him out of the house. Ramasami Pillai was thereupon charged under section 353 of the Penal Code with the offence of using criminal force to deter a public servant from the discharge of his duty as such. The Town Sub-Magistrate, without taking evidence as to the alleged assault, held that the levy of distress was irregular, in that the warrant should have been issued on the father as owner of the house and not on the son, and that the Inspector was consequently a trespasser and might be lawfully resisted. He accordingly discharged the accused.

The report of the case by the Acting District Magistrate, after stating the above facts, continued as follows:—

“It is not necessary, at present, to discuss the procedure of the municipal council previous to the issue of the demand, though I may remark that it was apparently correct. It is sufficient, first, that the distress warrant entrusted to the Inspector for execution was, according to the prosecution evidence, a direction given by a public servant, the chairman of the council acting apparently ‘in good faith under colour of his office,’ and, secondly, that the Inspector was also a public servant apparently ‘acting in good faith under colour of his office’—*vide* Indian Penal Code, section 99, cl. 1 and 2—and the accused person had no right of private defence against the Inspector’s seizure, even if it was not—and even this was not shown—justifiable by law.

“I called on the Sub-Magistrate to explain on this point, and he replies (1) that the Inspector was not a public servant, and (2) that though he was acting under the direction of a public servant, his act, *i.e.*, the distress, was directed against a person other than that named in the public servant’s (the chairman’s) direction. This position is untenable, even leaving out of consideration the second part of it, for the Inspector is distinctly a public servant under section 41 of Act IV of 1884.”

The Acting Government Pleader (*Subramanya Ayyar*) for the Crown.

Tyagarajayyar for the accused.

JUDGMENT:—The Inspector is clearly a public servant within the meaning of section 41, Madras Act IV of 1884, and if, as stated by the Magistrate, he was assaulted in the execution of a distress upon property in which the father may, perhaps, have a

joint interest, the offender will be liable to punishment under section 353 of the Penal Code.

The order of discharge is set aside and the case must be re-tried.

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APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

NARASANNA (PLAINTIFF), APPELLANT,

1889.
Aug. 16, 20.

GANGU AND ANOTHER (DEFENDANTS NOS. 1 AND 6), RESPONDENTS.*

Hindu law—Deva dasi—Inheritance.

On the death of a prostitute dancing girl her adopted niece, belonging to the same class, succeeds to her property, in whatever way it was acquired, in preference to a brother remaining in caste.

SECOND APPEAL against the decree of L. Moore, Acting District Judge of Cuddapah, in appeal suit No. 73 of 1886, confirming the decree of S. Dorasami Ayyangar, District Munsif of Cuddapah, in original suit No. 484 of 1885.

Suit to recover certain land, alleged by plaintiff to have been the property of his father, which, on his death, passed into the possession of the plaintiff’s sisters. Defendant No. 1 was the widow of Konappa, the plaintiff’s brother, and defendant No. 6 was her daughter, who claimed title as the adopted daughter and heiress of a dancing girl Pedda Lakshmi, the plaintiff’s sister. The plaintiff was divided from the rest of the family and had received, from his father, his share of the family property.

The District Munsif dismissed the suit, and, on appeal, his decree was affirmed by the District Judge.

The plaintiff preferred this appeal.

Rama Rau for appellant.

Sadagopacharyar for respondents.

The further facts of the case and arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment.

JUDGMENT:—The Acting District Judge has found that the sisters, Pedda Narasi and Lakshmi, each took one-fourth share in

* Second Appeal No. 652 of 1887.

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the plaint property, and, on the ground that the sisters' property must revert to the surviving male member of the family, holds that plaintiff is entitled to recover it. The respondents contend that the case is governed by the peculiar law applicable to dancing women and that plaintiff is no heir.

The two sisters were admittedly dancing women, though their brothers, plaintiff and Konappa, remained in caste. At the division the two sisters were given shares. There is now no dispute that defendant No. 1 is entitled to the share of her late husband Konappa, but the question is as to the devolution of the property of the two sisters. Pedda Narasi died first and her degraded sister Lakshmi was, therefore, her heir. The question then is who succeeds to the property left by Lakshmi.

The contention is practically between her brother the plaintiff and defendant No. 6, her niece, who, though not formally adopted by Pedda Narasi, was introduced by her into the temple and has become a *deva dasi*. The decision of this Court in *Sirasangu v. Minal*(1) would, no doubt, govern the case were it clear that the property had been acquired by the gain of prostitution, but it is urged that the property was in its origin family property, which should, therefore, revert to the surviving male member of the family.

It is impossible for us to say whether this contention is even well founded on fact. Unless part of the property divided in 1863 had been acquired by the sisters in the exercise of their profession, it is not explained how they came to be allotted a share at all. They were certainly not entitled to it under the ordinary rules of Hindu law. However that may be, it appears to us that it is immaterial how the property was originally acquired. It was at the death of Lakshmi, the property of a dancing girl, and the question is who is the nearest heir to the dancing girl. The general rule is that the legal relation between a prostitute dancing girl and her undegraded relations remaining in caste becomes severed, and in this view the defendant No. 6 is the only legal heir to Lakshmi.

Taking this view, we must hold that the plaintiff's claim fails with regard to the whole property. The second appeal is, therefore, dismissed with costs.

(1) I.L.R., 12 Mad., 277.

APPELLATE CIVIL.

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

VENKATARAMAYYAR (PLAINTIFF), APPELLANT,

KOTHANDARAMAYYAR AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

*Limitation Act—Act XV of 1877, ss. 7, 9, 19—Minority of plaintiff—General
Clauses Act—Act I of 1868, s. 3, cl. 2.*

Suit to recover principal and interest due on a registered bond executed by defendants in favor of the plaintiff's father. The date of the bond was 20th June 1870; the principal sum was payable on 20th June 1872; the plaintiff's father died in 1875; the defendants made acknowledgments of their liability in June 1877; the plaintiff came of age in 1885, and this suit was brought on 11th August 1887: Held, the suit was not barred by limitation.

APPEAL against the decree of Shephard, J., sitting on the Original Side of the High Court in civil suit No. 173 of 1887, dismissing the suit.

Suit to recover principal and interest due on a registered bond executed by defendants in favor of the plaintiff's father.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the Appellate Court.

The defendants set up the plea of limitation, and the learned Judge held that it afforded a defence to the suit. He delivered judgment as follows:—

SHEPHARD, J., (after reciting the allegations in the plaint proceeded:—) “On these facts, as stated in the plaint, it was contended on the defendants' behalf that the suit was on the face of it barred by limitation, more than six years having elapsed since the date of the alleged acknowledgments. For the plaintiff it was urged that inasmuch as he was a minor when the acknowledgments were made he was entitled to the benefit of section 7 of the Limitation Act. The section is so worded as to give colour to this argument; for it provides not, that if a person entitled to sue is a

* Appeal No. 41 of 1888.

1889.
July 17.
Oct. 25.

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minor when his right to sue accrues he shall be allowed a fresh period wherein to sue, but that he shall be allowed such fresh period if he was a minor at the time from which the period of limitation is to be reckoned, and it was argued that the date from which the period had to be reckoned was the date of the acknowledgment. The point thus raised could not have arisen on the Acts of Limitation prior to that of 1877, for the corresponding section of the Acts of 1859 and 1871 are differently worded. No authorities were cited, and as far as I can ascertain there are none exactly in point. But the vakil for the defendants called attention to section 9 as showing that no allowance was to be made for a disability arising after the accrual of the right of action.

"I am of opinion that the plaintiff is not saved by the provision of section 7. The plaintiff is suing as representative of his father against whom time was running at the date of his death in 1875. The effect of the acknowledgments no doubt was to give the plaintiff a fresh period which apart from any question of disability expired in 1882 or 1883. His contention must be that during that interval and until 1885, when he is said to have come of age, time did not run against him. Time was running against him before the acknowledgments were made, but afterwards ceased to run. This contention, as it appears to me, involves a complete disregard of the provision of section 9, which says that when once time has begun to run, subsequent disability shall stop it. An acknowledgment does not give a new cause of action, and the fact that it has been made does not make it the less true that time had previously begun to run. Section 9, therefore, becomes applicable, and reading it with section 7, I must hold that the plaintiff, though he was a minor at the time from which the fresh period should be completed, cannot claim the protection of that section. It may be well to mention with reference to the change of language used in section 7, that it may be accounted for without supposing that any change of the law was intended. The object, I think, must have been to fix a definite *terminus a quo* and to avoid the difficulties surrounding the question when the cause of action arises, for the date of the accrual of a cause of action does not always give the starting point for the purpose of limitation. However this may be, I do not think it can have been intended to alter the previous rule according to which section 7 conferring a personal privilege on the minor avails only when the right to sue accrued, and time

would otherwise have begun to run, during the minority of the person claiming the privilege. I must dismiss the suit with costs."

The plaintiff preferred this appeal.

Rama Rau for appellant.

Sundaram Sastri and *Seshagiri Ayyar* for respondents.

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

JUDGMENT:—The plaintiff sues on a registered bond, repayable within two years, executed to his late father on 20th June 1870. Plaintiff's father died in 1875, leaving plaintiff, a minor. Plaintiff is said to have attained his majority in 1885. It is further alleged that defendants made acknowledgments of their liability in 1876 and 1877, so as to give a new period of limitation under section 19 of the Limitation Act. Time had begun to run against plaintiff's father and therefore against plaintiff before the dates of these acknowledgments, and the question is whether plaintiff is entitled to the benefit of section 7, these acknowledgments in his favor having been given and the new period of limitation having arisen during his minority, when time was already running against him.

The learned Judge who tried the suit on the Original Side held that plaintiff was not saved by the provisions of section 7, notwithstanding the alteration made in that section by the Limitation Act of 1877. He considered that the object of the alteration was only to fix a definite *terminus a quo* since the date of the accrual of a cause of action does not always give the starting point for the purpose of limitation. He held, therefore, that section 9 was applicable, and that the suit was barred.

If this be so, the only effect of the acknowledgment would be to give to the minor plaintiff, against whom time was already running, an extension of six years (calculated under article 116 according to the nature of the original liability) within which to bring his suit, such extension being computed from the date of the acknowledgment. In this opinion we are not able to concur. We observe that section 19 speaks of a new period of limitation, not an extension of the old period.

Under section 3, clause 2 of the General Clauses Act, the word "from" is sufficient to exclude the first in a series of days or any other period of time. As, therefore, under section 19 of the Limitation Act the date of acknowledgment will have to be

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included in computing the new period of limitation, it is evident that the former period, already running, was not extended, but terminated, and that an entirely new period runs from the date of acknowledgment.

The plaintiff was a minor at the date from which that new period is to be reckoned, and he therefore falls under the strict wording of section 7. We do not think that section 9 will take away this privilege since it is not subsequent disability which stops the time already running but the operation of law consequent upon the giving of the acknowledgment.

Taking this view, we must reverse the decree and remand the suit to be heard on the merits. The appellant is entitled to the costs of this appeal, and the costs on the Original Side will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

BRAHMAPPÄ (DEFENDANT), APPELLANT,

v.

PAPANNA (PLAINTIFF), RESPONDENT.*

Hindu law—Inheritance to stridhanam—Right of stepson to inherit.

A Hindu widow having stridhanam acquired from her husband, died leaving no issue. The defendant who was the son of her elder sister took possession. The stepson of the deceased now sued to recover the stridhanam property. It was found that the marriage of the deceased had been celebrated in the *brahma* form.

Held, that the plaintiff was entitled to succeed.

SECOND APPEAL against the decree of D. Venkatarangayyar, Subordinate Judge of Tadpatri, in appeal suit No. 83 of 1888, reversing the decree of V. Subramanya Ayyar, District Munsif of Penukonda, in original suit No. 327 of 1887.

Suit for possession of certain jewels, the property of a Hindu widow, being stridhanam acquired by her from her late husband. The plaintiff was the stepson of the deceased: the defendant who was the son of her elder sister, had possession of the jewels, and his

defence was that they were only three in number, that the deceased had made a gift of two of them to him in writing, and had given him the third to defray her funeral expenses. BRAHMAPPÄ
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The District Munsif held that the stepson was not entitled to inherit to the deceased and dismissed the suit. The Subordinate Judge on appeal reversed this decree.

The defendant preferred this second appeal.

Balaji Rau for appellant.

Bhashyam Ayyangar for respondent.

PARKER, J.—The plaintiff failed to prove the special arrangement set up that he was to inherit the jewels on the death of his stepmother, and it is found that the property was Sunandamma's *stridhanam*. This inference is drawn from the description of the property in the family list. The only question, therefore, is whether plaintiff, the stepson, is a nearer heir than defendant, who is the son of Sunandamma's elder sister.

According to the *Smriti Chandrika*, chap. IX, section 3, cl. 38,(1) the stepson would be entitled to take where the deceased left no issue, husband, or the like.

According to the *Mitakshara*, chap. II, section XI, cl. 11,(2) the property of a woman dying without issue would go to her husband, and on failure of him to his *sapindas*, if the marriage had been in the form *brahma*, *daiva*, *arsha*, or *prajapatya*. If the marriage had been in one of the other forms, viz., *asura*, *gandharva*, *rakshasa*, or *paisacha*, the property would, in default of issue to the woman, go to her parents. Mr. Mayne's observation that stepchildren are not entitled to inherit by *Mitakshara* law except in a single case is based upon chapter II, section XI, clause 22 of the *Mitakshara*(3)—but the Calcutta High Court in discussing the *Mitakshara* law, held that when the marriage has been in any of the four modes first mentioned, the husband's kinsmen had the priority, and held that the husband's brother's son was entitled to preference as against the sister's son *Bachha Jha v. Jugmon Jha*(4). *A fortiori* the son of a rival wife is a nearer *sapinda* than a husband's brother's son.

(1) Krishnasami Ayyar's Translation, p. 147.

(2) Stokes' Hindu Law Books, p. 461.

(3) *Ib.*, p. 463.

(4) I.L.R., 12 Cal. 348.

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In *Teenconree Chatterjee v. Dinonath Banerjee*(1) it was held by the High Court of Bengal in 1865 that a son adopted by one wife might succeed to a co-wife's *stridhanam*, but it is not clear from the report whether the parties were governed by the Mitakshara law.

Although the plaint mentioned property is found to be *stridhanam*, its nature and origin are not ascertained. This may also affect its course of descent. See Mayne's Hindu Law, 4th ed., § 619 *et seq.*

I would ask for a finding upon the issue—"Is plaintiff entitled to succeed to the property of Sunandamma," with reference to these observations and allow further evidence to be taken.

WILKINSON, J.—I concur in the necessity for a finding. The order of succession to the property of a woman, who leaves neither children nor grandchildren appears, according to all the authorities, to vary according to the form in which the deceased female was married. If she have been married in one of the five approved forms, her property goes to her husband and his kinsmen. In other cases, it reverts to her father or other kinsmen from whom she had received it. I think it very doubtful whether stepsons precede sister's sons in any case. Clause 38, chapter IX, section 3, of the Smriti Chandrika, which appears to be the only direct authority on the point, is inserted between the exposition of the texts of Brihaspati and Manu, and would appear to form a portion of the exposition of the former. The author of the *Daya Vibhaga* in his exposition of the text of Brihaspati lays it down that "in case of marriages by the *brahma* and similar rites, in default of the husband, and in the case of marriages in the *asura* and similar forms of marriages in default of the father and mother, and mother's sister's son, &c., take." This is the view followed by Siromani in his Commentary on Hindu Law. He says (p. 302) stepsons succeed sister's son, &c., except in the case of property given by a father to a daughter who is married to a husband of a superior class, &c.

In *Teenconree Chatterjee v. Dinonath Banerjee*(1) the question whether the adopted son of a woman can inherit her rival wife's *stridhanam* was only incidentally referred to, and the learned Judges quoted no authority in support of their *dictum*.

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If the learned Judges who decided *Bachha Jha v. Jugmon Jha*(1) under the Mithila law intended it to be understood that in all cases under the Mitakshara the husband's kinsmen are preferred to the father's kinsmen, I am unable to agree with them.

[In compliance with the above order the Subordinate Judge submitted a finding which was to the effect that "the plaintiff is entitled to succeed to the property of Sunandamma as her marriage was in one of the approved forms namely *brahma*, and as the plaint property was given to her by her husband as *stridhanam*." He also found that "they belong to the Vysia sect of the Jains."

The second appeal having come on for rehearing, their Lordships accepted the finding and dismissed the second appeal with costs.]

APPELLATE CIVIL.

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

SUBUDHI (DECREE-HOLDER).

1889.
September 6.

SINGI (JUDGMENT-DEBTOR).*

Civil Procedure Code, s. 312—Period of imprisonment of judgment-debtor.

The Court cannot fix any period for the imprisonment of a judgment-debtor under Civil Procedure Code, s. 312.

CASE referred for the decision of the High Court under section 617 of the Code of Civil Procedure, by V. Lakshminarasimham Pantulu, District Munsif of Berhampore, as follows:—

"In the execution of small cause suit No. 808 of 1888 (execution petition No. 1142 of 1888 on the file of my Court), the judgment-debtor, Samapalata Singi, was arrested for decree debt at the instance of the decree-holder Andavarapu Domburu Subudhi and committed to the civil jail to be imprisoned for a period of six weeks, from 27th November 1888, the term having been fixed by the Court at its discretion as in some other cases. But before

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the expiration of the term, the decree-holder applied to the Court to prolong the period of imprisonment for two months more, stating that the debtor could be imprisoned for a period of six months, as the amount of debt exceeded Rs. 50.

"Although the matter is a simple one, I am compelled to make the reference as it is a point which I have constantly to deal with and as the question seems to have been never decided before."

Counsel were not instructed.

JUDGMENT:—The Court has no authority to fix any term of imprisonment. On arrest, the judgment-debtor, if he fails to pay the amount decreed and costs, is committed to jail. He can only be released therefrom under the provisions of section 341. If none of these conditions are fulfilled before the expiry of six months in the one case, or six weeks in the other, the judgment-debtor remains in jail the full time.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

OOLAGANADAN.*

1889.
September
12, 16.

Criminal Procedure Code, s. 261—Police Act (Act XXIV of 1859), s. 48—"Conservancy clauses"—Jurisdiction of a Bench of Magistrates.

Offences under Police Act, s. 48, are within the cognizance of a Bench of Magistrates.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by E. Gibson, District Magistrate of Tanjore.

The Acting Government Pleader (*Subramanya Ayyar*) for the Crown.

The facts of the case and the arguments adduced on it appear sufficiently for the purpose of this report from the judgment.

JUDGMENT:—The accused has been convicted by the Bench of

Magistrates at Negapatam for exposing goods for sale on the road so as to obstruct passengers, and fined two annas. The District Magistrate refers the case on the ground that, according to the construction placed by the High Court in Criminal Revision Cases Nos. 69 of 1886 and 488 to 492 of 1888, upon the phrase "conservancy clauses" in clause b, section 261 of the Criminal Procedure Code, an offence punishable under section 48 of the Police Act XXIV of 1859 is not within the cognizance of a Bench of Magistrates. The decisions referred to were passed by single Judges in the admission Court and not by a Bench.

Under section 261, clause b, of the Criminal Procedure Code, Benches of Magistrates are empowered to try certain offences against Municipal Acts and the conservancy clauses of Police Acts. On referring to the General Police Act XXIV of 1859 we observe that section 48 is the only section which can possibly be referred to, since all other offences punishable under the Act (sections 18, 20, 44, 45, 46, 47) are offences by or against Police officers in the execution of their duty. The side note to section 48 describes the subject of the section as "certain duties of Police officers within the limits of towns, obstructions and nuisances in roads;" and as the eight clauses of the section are governed by the preamble, we are of opinion that all the clauses relate to offences which are obstructions and nuisances in roads.

Clause 4, section 48, is moreover identical with section 366 of the Madras Municipal Act I of 1884, which falls under Part VI. General Conservancy, and also with section 203 of the District Municipalities Act, and the Government Pleader has pointed out that other clauses in section 48 of the Police Act have been reproduced in the conservancy sections of the Acts relating to the Madras and District Municipalities.

Taking this view we are of opinion that section 48 of the Police Act which relates to obstructions and nuisances in roads (within the limits of towns) is a general conservancy clause, and that offences committed thereunder are within the cognizance of a Bench of Magistrates. The conviction was therefore right.

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NADAN.

* Criminal Revision Case No. 343 of 1889.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

NARAKKA AND OTHERS (PETITIONERS).*

Criminal Procedure Code, ss. 195, 476.

The High Court has no power on appeal to set aside a complaint duly made by a Subordinate Court under s. 476 of the Code of Criminal Procedure.

PETITION praying the High Court to revoke the order for prosecution of the petitioners passed by the Sessions Court of Kurnool.

The Sessions Judge of Kurnool being of opinion that there was ground for inquiring into the offence of giving false evidence committed before him in Sessions case No. 18 of 1889 by the present petitioners sent the case under Criminal Procedure Code, section 476, to the District Magistrate of Kurnool for inquiry.

The present petitioners prayed for the revocation of the above proceedings of the Sessions Judge.

Parthasaradhi Ayyangar for petitioners.

JUDGMENT.—The Court has no power, on appeal, to set aside a complaint duly made by a Subordinate Court under section 476, Code of Criminal Procedure, see *Queen-Empress v. Rachappa*(1). Without expressing any opinion as to the desirability of the prosecution of the second prosecution witness and of the defence witnesses we can only say that no sufficient grounds have been shown for interfering on revision with the exercise of the Judge's discretion. We think it is to be regretted that the Judge should have ordered the criminal prosecution of a child of such a tender age (8 years) as Lakshmakka, but the Magistrate will no doubt be careful to consider whether her statements, if false, were also wilfully false, before he commits her for trial, and whether she knew and realized the nature of the evidence she was giving.

The petition is dismissed.

* Criminal Miscellaneous Petition No. 86 of 1889.
(1) I.L.R., 13 Bom., 109.

APPELLATE CIVIL.

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

MIRKHAN (PLAINTIFF),

v.

KADARSA (DEFENDANT).*

Civil Procedure Code, s. 15—Act I of 1889, s. 13—Jurisdiction of Small Cause Courts to hear suits cognizable by Village Munsif.

The term "Court of lowest grade" in Civil Procedure Code, s. 15, refers only to Courts to which the Civil Procedure Code is applicable, and consequently Small Cause Courts have concurrent jurisdiction with Courts of Village Munsifs to hear suits which are cognizable by the latter.

CASE referred under section 617 of the Code of Civil Procedure for the decision of the High Court by V. Malhari Rau, District Munsif of Coimbatore, as follows:—

"This is a suit for the recovery of Rs. 18 for arrears of rent from 13th January 1887 to 11th January 1889 under a contract of rent, dated in January 1883, under which defendant promised to pay a monthly rent of As. 12 for a house in his occupation.

"The suit is one which is cognizable by a Village Court under Madras Act I of 1889, s. 13 of which enacts:—'The following are the suits which shall be cognizable by Village Courts, namely, claims for money due on contract, or for personal property, or for the value of such property, when the debt or demand does not exceed in amount or value the sum of Rs. 20, whether on balance of account or otherwise.'

"The expression in the present Act I of 1889, Madras, s. 13, is:—'The following are the suits which shall be cognizable.' This is a change from the old regulation, which simply empowered Village Munsifs to try such suits as might be preferred to them. It is therefore no longer optional with parties who have to institute the suits coming under the description given in that section in the Village Courts and not in a Small Cause Court.

"It may be that section 15 of the Civil Procedure Code does

* Referred Case No. 10 of 1889.

1889.
November 8.

MIRKHAN
KADARSA.

not apply to a Village Court. But that circumstance does not affect a Court to which the section applies, and which has therefore to be guided by its provisions. And the section does not necessarily become applicable to the Village Courts, because parties have to resort to them.

"The Small Cause Courts Act, IX of 1887, ss. 16 and 32, do not affect the question, as the jurisdiction of Village Munsifs in Madras is expressly saved under section 3."

Counsel were not instructed.

JUDGMENT :—There is no doubt that the Village Munsif's Court has jurisdiction to hear the suit under section 13, Madras Act I of 1889, but the question is whether the District Munsif is precluded from hearing it by the provisions of section 15 of the Civil Procedure Code.

Under the old law the Small Cause Court had concurrent jurisdiction (*Parasoorama Pillay v. Ramaswamy*(1)), and we have to consider whether the new Act has in any way changed this state of affairs.

The Civil Procedure Code has no application to the Courts of Village Munsifs at all, see section 6, and there is nothing in Madras Act I of 1889 to extend its provisions to Village Munsifs' Courts. Sections 2-4 make it clear that the Courts as now re-constituted are the same Courts that formerly existed under Madras Regulation IV of 1816, and section 4 makes it clear that no Civil Court should either acquire or lose jurisdiction unless any village or area was withdrawn from the operation of the Act.

We are therefore of opinion that the concurrent jurisdiction remains unchanged, and that the term "Court of the lowest grade" in section 15, Civil Procedure Code, refers only to Courts to which the Code of Civil Procedure is applicable.

(1) 5 M.H.C.R., 45.

APPELLATE CIVIL—FULL BENCH.

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

REFERENCE UNDER STAMP ACT, s. 49.*

1889.
Sept. 16.

Stamp Act, s. 3—Bond.

R. executed a document, by which he promised to pay on demand Rs. 10-12-0 with interest to S.R. The writer of the document and some others signed the document as witnesses :

Held, that the document was a bond and liable to stamp duty as such.

CASE referred to the High Court under Stamp Act, 1879, s. 49, by the District Munsif of Kavali, through C. Ramachandra Ayyar, Acting District Judge of Nellore.

The question referred for determination by the High Court was whether or not the following instrument, which bore a one-anna stamp only, should have been stamped as a bond :—

"Bond executed by Ithadi Ramudu in favor of Swarna Ramanna on the 2nd Sudha, Palguna of the year Parthiva.

"The debt due up to date under the prior bond according to the settlement effected with you this day is Rs. 10-12-0, in words rupees ten and annas twelve. Interest on this is at 12 annas per Rs. 100 per month. I bind myself to pay you the principal and interest at this rate whenever you may make a demand for it. This is the bond passed with my free will and consent in the hand of Nandayanam Venkatasami.

"× Mark of RAMUDU.

"Witnesses,

"(Signed) BANDI RAMASAMI.

"(Signed by mark) SWARNA CHINNA VENKATACHALLAM.

"(Signed by mark) SUBHAYA, son of
SWARNA KOTAPPA."

The District Munsif was of opinion that the instrument was a bond, and in his statement of the case he referred to *Reference*

* Referred Case No. 7 of 1889.

REFERENCE
UNDER STAMP
ACT, s. 49.

under Stamp Act, s. 49(1), *Pattal Ambadi Marar v. Krishnan*(2), Negotiable Instruments Act, s. 46, and Proceedings of the Board of Revenue, No. 1434, dated 24th April 1884.

Counsel were not instructed.

JUDGMENT.—We reply to the reference that the document is a bond, See *Reference under Stamp Act*, s. 49(1), and section 3 of the Stamp Act.

APPELLATE CRIMINAL.

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

1889.
Oct. 2, 25.

QUEEN-EMPRESS

v.

RAMAYYA AND OTHERS (PETITIONERS).*

Penal Code, ss. 97, 146.—Self-defence.—Rioting.—Unlawful distraint.

A landlord who had not tendered to his tenant such a patta as the latter was bound to accept under the Madras Rent Recovery Act, distrained his cattle for arrears of rent, the assistance of the Police having been procured for the purpose. The tenant, with the assistance of eleven other persons, forcibly obstructed the removal of the cattle which had already been actually seized and driven for some yards. They were charged with the offence of rioting and convicted :

Held, that the conviction was right.

PETITION under Criminal Procedure Code, ss. 435, 439, praying the High Court to revise the proceedings of the Additional Deputy Magistrate of Kistna in criminal appeal No. 72 of 1888, presented against the convictions of petitioners under Penal Code, s. 146, by the Second-class Magistrate of Bandar town in calendar case No. 579 of 1888.

The accused preferred this revision petition.

Pattabhiramayyar for petitioners.

The facts of the case appear sufficiently for the purpose of this report from the following

JUDGMENT:—The facts found are that the complainant, the landlord, had distrained the moveable property of first accused (his

tenant) under the Rent Recovery Act, for arrears of rent, whereupon the first accused, with the assistance of eleven others, forcibly removed the distrained property. It is also found that the patta tendered by the landlord contained provisions which were illegal and was not such a patta as the first accused would have been bound to accept.

The accused relied upon the Proceedings of the High Court of 19th November 1875(1) as justifying their action. It was there held that a landholder in distraining moveable property under the Rent Recovery Act acted upon his own responsibility, and if he attempted to seize the goods of his tenant when no rent was in arrear, mere obstruction to the seizure was not an offence. The Magistrate had there treated the case as one of obstruction to legal process.

In this case, however, there is evidence that the cattle had been actually seized, the attachment lists prepared, and the cattle driven some 20 yards before the first accused and his men came up and forcibly obstructed the removal of the cattle off the ground. Moreover the distraint itself was carried out under section 19 of the Rent Recovery Act, the assistance of the Police having been procured for the purpose.

It appears to us that under such circumstances the use of force to rescue the cattle was clearly unlawful, and that the cattle having been attached there was no right of private defence of property. If the attachment had been made unlawfully, the first accused should have had recourse to the properly constituted authorities.

We must dismiss this petition for revision.

(1) 8 M.H.C.R., App. XII.

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v.
RAMAYYA

(1) I.L.R., 10 Mad., 158.

(2) I.L.R., 11 Mad., 290.

* Criminal Revision Case No. 299 of 1889.

APPELLATE CIVIL—FULL BENCH.

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

SAMARAPURI (INSOLVENT DEBTOR), APPELLANT,

PARRY AND COMPANY (CREDITORS No. 1), RESPONDENTS.*

*Insolvent Act—11 & 12, Vic. Cap. 21, ss. 47, 51—Civil Procedure Code, s. 642—
Exemption from arrest on civil process redeundo.*

The Commissioner in Insolvency committed an insolvent to jail by an order under s. 51 of the Insolvent Act:

Held by the Full Bench, that an order made under s. 51 of the Insolvent Act is a final order: and a Commissioner in Insolvency has no power under that section to commit an insolvent to jail, but must leave the excepted judgment-creditors (if any) to their ordinary remedies for the time mentioned in the order. *Nixon v. Chartered Mercantile Bank* (I.L.R., 8 Mad., 97) overruled.

The insolvent having been discharged from jail under the rule laid down by the Full Bench as above, was immediately arrested on a warrant obtained by a judgment-creditor:

Held per Shephard, J., that the insolvent was not privileged from arrest as being on his way back from Court.

APPEAL by the insolvent against an order made on 15th July 1889 by Wilkinson, J., sitting as Commissioner of the Insolvent Court, on insolvent petition No. 70 of 1888.

On 11th March 1889 Kernan, J., the then Commissioner, made an order in this insolvency as follows:—

“It is ordered that the further hearing of this matter be adjourned to the fifteenth day of July next, and that the said insolvent, Mundy Samarapoory Chetty, be remanded to custody until the said fifteenth day of July next at the suit of the said creditors, Messrs. Parry and Company, creditors No. 1, and B. C. Narayanappa Chetty, creditor No. 17, and it is further ordered that the said Messrs. Parry and Company and B. C. Narayanappa Chetty do pay batta at the rate of 3 annas a day for the said period to the said insolvent.”

On the 15th July Wilkinson, J., made the order appealed against, which was as follows:—

* Appeal No. 11 of 1889.

“It is ordered that under 11 and 12, Vic. Cap. 21, s. 51, the said insolvent, Mundy Samarapoory Chetty, be not entitled to his discharge until he shall have been in custody at the suit of the said Messrs. Parry and Company for a period of one year from the date hereof, and that they, the said Messrs. Parry and Company, do pay batta at the rate of 3 annas per day for the said period of one year, and it is further ordered that the further hearing of this matter be adjourned for one year from the date hereof.”

The judgment of Wilkinson, J., was as follows:—

“I do not consider that I am precluded by the order of Mr. Justice Kernan, passed on the 11th March last, from passing orders under section 51 of the Act as to the insolvent's detention in jail. Whether or not Mr. Justice Kernan intended his order to be one passed under section 51 or not seems doubtful; but, even if it were, I think the terms of section 51 are wide enough to permit the Court to extend the term of detention, so that on the whole the insolvent be not imprisoned for more than two years. Mr. Justice Kernan was of opinion that the insolvent had carried on trade recklessly. In that opinion I fully concur. The petitioner's present liabilities amount to Rupees 1,28,751. He has represented his assets as Rupees 23,864, but the Official Assignee has only been able to recover Rupees 110, and no explanation has been offered as to the balance which is not forthcoming.”

The further facts of this case appear sufficiently for the purpose of this report from the order of reference to the Full Bench.

Sections 47, 51 and 52 of the Insolvent Act are as follows:—

Section 47.—And be it enacted, that upon application to the Court for that purpose it shall be lawful for the Court to declare that the insolvent is entitled to his personal discharge under this Act, and to order the same accordingly, which order of discharge shall have the effect of protecting his person from arrest in respect of all demands inserted in his schedule or established in the same Court; and if such insolvent be in custody, it shall be lawful for the Court to order his immediate discharge from custody accordingly, or to dismiss or give leave to amend the petition aforesaid, or to order the insolvent to amend his schedule, or to adjourn the hearing until a future day, or to make a reference to the examiner or other officer of the said Court to make inquiry into any matter of account, or into the truth of the schedule or schedules, and to report thereon to the Court; and it shall also be lawful for the Court to remand the insolvent to prison, if a prisoner, until a further hearing, or until a further time to be named in such order, or to commit the insolvent to custody for any debt or demand, if he shall not be in custody at the time of the hearing, and to cancel or renew any such order as is hereinbefore mentioned which may have been given for the purpose of affording interim protection to the

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insolvent from arrest, and to order and direct that the Assignee shall make some reasonable allowance for maintenance of the insolvent until final order, the amount of which shall be fixed by the Court, and shall not exceed 5 Company's rupees per week; and the Court by which any order of discharge shall be made upon any such hearing as is hereinbefore mentioned shall by such order direct that the Assignee shall give such notice of such order as to the Court shall seem fit and convenient.

Section 51.—And be it enacted, that in case it shall appear to any such Court that such insolvent shall have contracted any of his debts fraudulently, or by means of breach of trust, or by means of false pretences, or without having any reasonable or probable expectation at the time when contracted of paying the same, or shall have fraudulently or by means of false pretences obtained the forbearance of any of his debts by any of his creditors, or shall have put any of his creditors to any unnecessary expense, by any vexatious or frivolous defence or delay, to any suit for recovering any debt or any sum of money due from such insolvent, or shall be indebted in costs incurred in any action or suit vexatiously brought or defended, or shall be indebted for damages recovered in any action for criminal conversation with the wife, or for seducing the daughter or servant of the plaintiff in such action, or for breach of promise of marriage made to the plaintiff in such action, or for damages recovered in any action for a malicious prosecution, or for a libel or for slander, or assault or battery, or malicious arrest, or in any other action for a malicious injury done to the plaintiff therein, or in any action of tort or trespass to the person or property of the plaintiff therein, wherein it shall appear to the satisfaction of such Court that the injury complained of was malicious, or if it shall appear that the insolvent's whole debts so greatly exceed his means of providing for the payment thereof during the time when the same were in the course of being contracted, reference being had to his actual and expected property, as to show gross misconduct in contracting the same, then and in every such case it shall and may be lawful for such Court to adjudge that such insolvent shall be so discharged and so entitled as aforesaid forthwith, excepting as to any debts, sum or sums of money, or damages to be specially mentioned in the order, and as to such debt or debts, sum or sums of money, or damages, to adjudge that such insolvent shall be so discharged and so entitled as aforesaid as soon as he shall have been in custody at the suit of the person or persons who shall be creditor or creditors for the same respectively, for such period or periods, not exceeding two years on the whole, as such Court shall direct.

Section 52.—And be it enacted, that in all cases where it shall have been ordered that any such insolvent shall be discharged from imprisonment as aforesaid at some future period, such insolvent shall be subject and liable to be detained in prison, and to be arrested and charged in custody, at the suit of any one or more of his creditors with respect to whom it shall have been so ordered, at any time before such period shall have arrived, in the same manner as he would have been subject and liable thereto if this Act had not passed. Provided nevertheless, that when such period shall have arrived, such insolvent shall be entitled to the benefit and protection of this Act, notwithstanding that he may have been out of actual custody during all or any part of the time mentioned in such order, by reason of such insolvent not having been arrested or detained during such time, or any part thereof.

Mr. Johnstone and Mr. Norton for appellant.
Mr. Grant for respondent.

The following were among the authorities cited in the argument :—

Nixon v. Chartered Mercantile Bank(1), *Bavachi Packi v. Pierce Leslie and Company*(2), *Martin v. Lawrence*(3), *Cowie in re*(4), *Ratansi Kalianji in re*(5), *Mancharji Hirji Readymoney in re*(6).

This appeal having come on for hearing before Collins, C.J., and Parker, J., their Lordships made the following

Order of Reference to the Full Bench:—The appellant was a petitioner for relief under the provisions of the Insolvent Debtors' Act, and, on March 11th, 1889, he was remanded to custody until July 15th at the suit of Messrs. Parry and Company and of creditor No. 17, as a criminal charge was pending against him, and the learned Commissioner (Kernan, J.), was of opinion that he had carried on trade recklessly.

On July 15th the insolvent was brought before the present Commissioner (Wilkinson, J.), who, holding that he had been guilty of gross misconduct, directed, under section 51, that he should not be entitled to his discharge until he should have been in custody at the suit of Messrs. Parry and Company for one year from that date. The order directed that Messrs. Parry and Company should pay batta at 3 annas per diem, but did not contain any direction committing the insolvent to custody. Nor did the order contain any direction that the insolvent should be discharged with respect to the debts in his schedule other than that of Messrs. Parry and Company.

Messrs. Parry and Company were decree-debtors, but on July 15th the warrant which they had taken out against the insolvent had expired and was no longer capable of execution.

The insolvent was, however, sent to jail under the warrant of the Chief Clerk, and we must therefore take it that the absence of a direction for committal is a mere mistake in drawing out the order. The warrant purports to be issued under section 51.

The question before us is whether the order of the learned Commissioner committing the insolvent to jail under section 51 is legal, or whether under that section the judgment-debtors (Messrs. Parry and Company) should have been left to their

(1) I.L.R., 8 Mad., 97.
(3) I.L.R., 4 Cal., 656.
(5) I.L.R., 2 Bom., 148.

(2) I.L.R., 2 Mad., 219.
(4) I.L.R., 6 Cal., 70.
(6) 6 Bom. H.C., 55.

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ordinary remedy as decree-holders for the period of one year—after which the insolvent would be entitled to his personal discharge with respect to their claim. In support of the appeal, we are referred to in re *Mancharji Hirji Readymoney*(1).

Against this the decision of Turner, C.J., and Muttusami Ayyar, J., in *Nixon v. Chartered Mercantile Bank*(2), is quoted. In that case a precisely similar committal to jail was upheld on the ground that the combined effect of sections 47 and 51 justified the procedure. On referring to the judgment of the learned Commissioner in that case, we find that he discharged the insolvent under section 47 with respect to the general creditors, but with regard to the debt due to the bank he directed that he should be discharged when he should have been in custody at the suit of the bank for six months, and the order went on to direct that the insolvent be committed to custody for six months in respect of the debt to the bank, and that the Official Assignee do pay the insolvent while in custody Rupees 5 per week.

The former part of this order would appear to have been passed under section 51, and the latter under section 47 and not under section 52.

In the present case the order drawn out by the Chief Clerk on July 15th concludes with a direction “that the further hearing of this matter be adjourned for one year from the date hereof.” This can only have been passed under section 47, so that if the decision in *Nixon v. Chartered Mercantile Bank*(2) is right, the present order can also be justified by a reference of the committal to the Commissioner’s powers under section 47.

The decision of the Bombay High Court in re *Mancharji Hirji Readymoney*(1) appears to us in conflict with the Madras decision, and as we entertain doubts whether the latter is correct, we refer for the decision of a Full Bench the following questions:—

- (1) Has a Commissioner in Insolvency power to commit an insolvent to jail under section 51, or is the effect of that section to leave the judgment-creditors to their ordinary remedies for the term mentioned in the order?
- (2) If not, can any order be passed under section 51 pending a final order under section 47?

(1) 5 Bom. H.C.R., 55.

(2) I.L.R., 8 Mad., 97.

On the above reference, the Full Bench delivered the following

JUDGMENT:—“Section 47 empowers the Court to give the insolvent his personal discharge, and pending such discharge to adjourn the hearing for further inquiry and to commit the insolvent to custody at the expense of the Official Assignee *until final orders*.

Section 51 empowers the Court in certain cases to grant the insolvent his personal discharge immediately, except as to any debts, sums of money, or damages to be specially mentioned in the order, and as to such debts, &c., as soon as he shall have been in custody at the suit of such creditor or creditors for such period not exceeding two years as the Court shall direct.

Section 52 provides that where such insolvent is ordered to be discharged from imprisonment at a future period, he shall be liable to be arrested and charged in custody at the suit of such creditor abovementioned at any time before such period shall have arrived, in the same manner as he would have been liable if the Act had not been passed, and goes on to provide that if such insolvent be not arrested at the suit of any such creditor within the period mentioned in the order, he shall, at the expiry of such period, be entitled to the benefit and protection of the Act. Section 53 provides that the maintenance is to be at the expense of the creditor.

Section 51 does not empower the Court to commit to custody, and section 47 only empowers the Court to commit to custody at the expense of the Official Assignee pending a final order. Had the Legislature intended to empower the Court to commit to jail under section 51, it is reasonable to suppose that it would have given similar powers as in section 50,—but on the contrary it simply enabled any one or more specified judgment-creditors to enforce their remedies (which may have been previously stayed under section 49) in the same manner as if the Act had not been passed,—that is to say, that for a specified time the Court refuses to give protection to the insolvent at the suit of any special creditors.

It appears to us that the decision of the Bombay High Court in re *Mancharji Hirji Readymoney*(1) is right; that an order

(1) 5 Bom. H.C.R., 55.

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under section 51 is a final order, and that a Commissioner has no power to commit an insolvent to jail under that section, but must leave the creditor or creditors mentioned in the order to their ordinary remedies for the term mentioned in the order without protection to the insolvent.

Holding that an order under section 51 is a final order, we do not consider that the Commissioner in Insolvency is entitled to fall back upon his powers under section 47 to justify a committal to jail when passing an order under section 51. The former section appears to us to authorize a committal only pending inquiry and final order in the Insolvent Court. In this respect we differ from the ruling of Turner, C.J., and Muttusami Ayyar, J., reported in *Nixon v. Chartered Mercantile Bank*(1).

Our answer to the first question is that a Commissioner in Insolvency has no power under section 51 to commit an insolvent to jail, but must leave the excepted judgment-creditors to their ordinary remedies for the time mentioned in the order; and to the second question that an order under section 51 is a final order."

This appeal coming on for final hearing before Collins, C.J., and Parker, J., the Court, in pursuance of the opinion of the Full Bench, delivered the following

JUDGMENT :—"On the answer of the Full Bench to the questions referred, we must hold that the appellant cannot be detained under section 51, not having been arrested at the suit of Messrs. Parry and Company, and we must therefore order him to be discharged.

It appears to us that the order of the Chief Clerk has been wrongly drawn. If, as appears probable from the judgment, the learned Commissioner intended to discharge the insolvent with respect to all creditors, except Messrs. Parry and Company, and with respect to his debt to them as soon as he shall have been in custody for the time mentioned in the order, the order should be amended accordingly and we will ask the learned Commissioner to revise it.

The appellant is entitled to his costs in this appeal."

In pursuance of the above order the insolvent was discharged from jail. But as soon as he had left the jail he was arrested on a warrant obtained by Messrs. Parry & Company. This

(1) I.L.R., 8 Mad., 97.

application was then made before Shephard, J., for the discharge of the insolvent on the ground that his arrest was illegal.

Mr. Johnstone and Mr. Norton for the insolvent.

The insolvent was entitled to privilege *redeundo* from jail. When he was arrested, as it now appears by the decision of the Full Bench illegally, he was attending the proceedings in the Insolvent Court. But for that illegal arrest he would have returned home, and while returning he would have been exempt from arrest under civil process. See Civil Procedure Code, section 642; *Chaurin v. Alexandre*(1).

(Shephard, J.—Can you say your client was, when he was arrested, returning from a tribunal where a matter to which he was a party was pending?)

The order of the Commissioner in Insolvency must be treated as a nullity and the insolvent must be regarded as having been *redeundo* since the time when he was illegally prevented from returning home in pursuance of that order.

Rex v. Blake(2) was the case of one arrested under an illegal or irregular writ. See also in illustration of the privilege of one returning from the Insolvent Court. *List's case*(3), *Ex parte King*(4), Reference was also made to the unreported cases of *Gribble v. Arbuthnot*(5), *Oakes v. Clegg*(6).

Mr. W. Grant for Messrs. Parry & Company.

The insolvent was not within the privilege under either section 642 or the rules laid down in the English cases.

The privilege is the privilege of the Court (*Magnay v. Burt*(7)), and the Court cannot be said to have been touched by his arrest unless an extravagant fiction is invoked :—See *per Campbell, C.J.*, in *Hare v. Hyde*(8), *Goodwin v. Lordon*(9), *Gilpin v. Cohen*(10).

Mr. Norton in reply.

SHEPHARD, J.—I have no doubt about this matter. The debtor was sent to jail under an order made by the learned Commissioner in Insolvency on the 15th July. The order purported to be made under section 51 of the Insolvent Debtors' Act. That order has since been held to be illegal, and the debtor was therefore entitled

(1) 31 L.J.Q.B.N.S., 79. (2) 4 B. & A., 355. (3) 2 V. & B., 373.
(4) 7 Ves., 312. (5) Civil Suit 30 of 1885. (6) Civil Suit 268 of 1888.
(7) 5 Q.B., 393. (8) 16 Q.B., 394. (9) 1 A. & E., 378.
(10) L.R., 4 Ex., 131.

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to be released. He was accordingly released from the jail, but, immediately after he was released, was arrested on a warrant obtained by the judgment-creditor. It is argued that that arrest was illegal, because the debtor ought to be treated as if he stood in the position he was in on the 15th July, and was therefore privileged from arrest. The argument amounts to this, that because the imprisonment followed on the order of the 15th July was illegal, therefore the debtor must be treated in the meanwhile as either in attendance upon the Court or returning from it. This involves a fiction of a rather extreme character. No authority is cited for such an extension of the doctrine of privilege, and it appears to me to be inconsistent with the principle on which the doctrine is rested, namely, that it is the privilege of the Court and not of the party (*See Magnay v. Burt*(1)). Looking to the language of section 642 of the Code of Civil Procedure, I can find no sanction for extending it to the present case. No doubt that section covers the case of parties attending the Insolvency Court, but I think it is impossible to hold that a debtor, who is arrested in the circumstances above stated, is either attending or returning from the Insolvency Court.

The motion for release must be dismissed with costs.

Ramanujacharyar, attorney for appellant.

Wilson and King, attorneys for respondent.

APPELLATE CIVIL.

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

GHOUSIAH BEGUM (PLAINTIFF), APPELLANT,

v.

RUSTUMJAH (DEFENDANT), RESPONDENT.*

Transfer of Property Act (Act IV of 1882), s. 55—Vendor and purchaser—Implied covenant for title—Acts amounting to waiver of covenant—Possession taken under contract.

On 16th August 1885 the defendant, having agreed to purchase a house belonging to the plaintiff, executed an agreement, in which it was stated "that that he had this day purchased the house belonging to Ghousiah Begum Sahiba (plaintiff) for Rs. 16,000, that he had paid Rs. 1,000 as an advance and taken possession, that

he would pay the balance with interest at the rate of Re. 1 per cent. *per mensem* within fifteen days, and obtain a sale-deed from the said Begum."

The plaintiff at the time of the agreement had not obtained a conveyance of the house to her, and was not able to tender a conveyance to the defendant until January 1887, when she did so. Meanwhile the defendant took possession under the agreement, paying only a portion of the balance of the purchase money; he also executed certain repairs on the house and let it to a tenant and enjoyed the rent. It further appeared that shortly after the above agreement he sought to obtain a sale-deed from the plaintiff and attempted to raise a sum of money on a mortgage of the house. On 22nd December 1885 the defendant wrote to the plaintiff demanding a conveyance and giving notice that if the sale be not completed in the following month, the interest on the balance of the purchase money should cease; but no evidence was given as to any appropriation of the purchase money by the defendant. In 1887 the plaintiff filed the present suit to recover the unpaid purchase money with interest at 12 per cent.

Held, that the acts of the defendant amounted to a waiver of the implied covenant for title, and that the plaintiff was entitled to recover the unpaid purchase money with interest at the agreed rate up to the date of payment, and that he was further entitled to a lien on the property for that amount.

APPEAL against the decree of Shephard, J., in civil suit No. 292 of 1887 on the file of the High Court.

Suit by the vendor to recover with interest at the rate of 12 per cent. per annum the unpaid purchase money of a house, &c., and for a declaration of a lien on the property for that amount.

The facts of the case are stated fully in the judgments of the Court.

SHEPHARD, J., held on the evidence that the implied covenant for title by the vendor had not been expressly excluded; and he ruled that the acts of the defendant did not amount to a waiver of the covenant, but only to a waiver of any objection to the purchase which the defendant might otherwise have had on the ground of the plaintiff's delay in completing, and accordingly held that the plaintiff was entitled to a decree only on her showing that she could give the purchaser a title free from reasonable doubt. (Specific Relief Act, s. 25.) He also ruled that the plaintiff would not in any event be entitled to receive interest on the unpaid purchase money at the contract rate, but only to recover damages which he assessed, citing *Deen Doyal Lall v. Het Narain Singh*(1) and *Nanchand Hansraj v. Bapusaheb Rustambhai*(2) at 6 per cent. interest on the principal sum.

The plaintiff preferred this appeal.

(1) I.L.R., 2 Cal., 41.

(2) I.L.R., 3 Bom., 131.

(1) 5 Q. B., 393.

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The Advocate-General (Hon. Mr. *Spring Branson*) and Mr. K. *Brown* for appellant.

Mr. *Wedderburn* and Mr. R. F. *Grant* for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the following judgments:—

WILKINSON, J.—This is a suit to recover the balance of purchase money of a house conveyed by plaintiff to defendant on the 16th August 1885. On that day defendant executed the agreement (exhibit A), in which it was set forth that defendant “has this day purchased the house belonging to Ghousiah Begum Sahiba (plaintiff) for Rs. 16,000, that he had paid Rs. 1,000 as an advance and taken possession, that he will pay the balance with interest at 12 per cent. within fifteen days and obtain a sale from the plaintiff.” The defendant did not pay the balance due before the 1st September, but paid Rs. 2,000 on the 4th September and Rs. 1,000 on the 4th November. These facts are not disputed.

The plaintiff asserts that defendant had been informed, and was on the date of his purchase fully aware, that disputes and differences existed between the plaintiff's vendors, which had already delayed and would probably still further delay the execution by them of an assignment in plaintiff's favor.

The defendant on the other hand maintains that he was informed at the time of sale that the plaintiff had a good title and would prove the same and execute a conveyance to defendant before the 1st September and that, learning after the payment in November that plaintiff had not a good title, he on the 22nd December gave notice to plaintiff that he was prepared to pay the balance upon being furnished with a good title, and that if the sale were not completed before the 15th January 1886, he must decline to pay any further interest.

The learned Judge who tried the case found that defendant had not waived his right to demand a good title, and that his right was not prejudiced by his taking possession, and held that plaintiff was only entitled to a decree on her showing that she had a title free from reasonable doubt, and that plaintiff was entitled, provided her title was made out, to damages measured not according to the terms of exhibit A, but at the usual rate, 6 per cent.

In appeal three points have been argued. First, it is contended that defendant with full knowledge of all the facts con-

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sented to accept such title as the plaintiff could give him; second, that if there had been an agreement for good title, defendant's possession and dealing with the property amounted to waiver of his right to demand proof of plaintiff's title; and thirdly, that plaintiff was entitled to interest at 12 per cent. on the unpaid balance.

The provisions of the law in this country as to the covenant for title are laid down in section 55 of the Transfer of Property Act. “In the absence of a contract to the contrary, the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same.” The learned counsel for the respondent argues that it is incumbent on the purchaser to make out an express contract entered into between himself and the buyer that the title of the purchaser is accepted, and that as exhibit A is silent on the question, the plaintiff is under the terms of section 25 of the Specific Relief Act not entitled to specific performance. The right to a good title is not a right growing out of the agreement between the parties, but is given by the law. But a vendor may stipulate that the purchaser shall accept the title as it is. Moreover, the purchaser may be precluded from taking objection to the vendor's title by the fact that he had clear notice of the state of the title before he entered into the contract for sale (*Mancharji Pestanji v. Narayan Lakshumanji*(1)), and this is more especially the case where vendor and vendee deal with each other as in this case without legal advice, and the purchaser relies on the implied covenant for title. (See also *Dart's Vendors and Purchasers*, 6th edition, p. 495). The learned Judge remarks that he should have taken this view if the evidence showed that after a full explanation of the facts the defendant had consented to accept such title as the plaintiff could give him. Now, it is the plaintiff's contention that the defendant was put in full possession of all the facts relating to plaintiff's title which has never been in doubt, and that he was satisfied with the title made out. The learned Judge thought it probable that defendant did not trouble himself about the title, but on the ground that that there was no distinct declaration in exhibit A that defendant accepted plaintiff's title, coupled with his demand in December 1885 for proof

(1) 1 Bom. H.C.R., 77.

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of title and the omission to reply to that demand, the Judge refused to believe that defendant had expressly waived his right to require a good title.

The contract for sale was negotiated on behalf of plaintiff by Raja Eswara Doss (first witness) and his darogah (second witness). They have gone into the box and given a full and apparently trustworthy account of the negotiations prior to the execution of exhibit A. The learned Judge thinks it would be rash to accept the evidence of these witnesses as absolutely accurate, but he appears to have overlooked the fact that their evidence is uncontradicted, and that the defendant has not tendered himself for examination. Raja Eswara Doss and his darogah were the persons who on the plaintiff's side were in a position to give evidence as to what had taken place, and the only evidence on the defendant's side is that of a servant of defendant, and it does not negative that of the Raja. Another fact which was overlooked is that certain translations in the vernacular were at the request of the defendant furnished to him, so that the learned Judge's objection that the mere showing to defendant exhibits B, C, D and K in English, which he remarks defendant did not understand (there is no evidence of this) falls to the ground.

Turning to the evidence—Eswara Doss deposes that he informed defendant why no conveyance had been executed in favor of plaintiff and that he showed him his mortgage (exhibit D) and informed him that that was the only incumbrance on the property. Defendant's letter of the 22nd December (exhibit H) confirms this portion of Eswara Doss' evidence, for the said mortgage is therein distinctly referred to. Eswara Doss goes on to say, "defendant asked me for all previous deeds and I told him we had bought at Sheriff's sale (exhibits B and C) and sold to plaintiff (K). He asked me to draft sale and mortgage deeds and I did so (called for and not produced). Defendant said that the vouchers on which plaintiff had bought (exhibits B and C) were enough for him and authorized me to advance money for him. I told him the dispute with Vallaba Doss would be settled in a year or two and that it was this dispute which stood in the way of the execution of a conveyance to plaintiff." I can see no reason why the evidence of this witness should be distrusted. It has not been contradicted and though in one sense an interested witness in that he had a mortgage on the property to the amount of Rs. 12,000, there is no

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reason to entirely reject his testimony on that account. It certainly shows that the defendant not only, as the learned Judge finds, waived all objection on the score of the plaintiff having no conveyance in her favor, but impliedly, if not expressly, waived his right to question her title. And his subsequent conduct confirms this view, for not only did he enter into possession of the house, but he also made subsequent payments, leased the property to a tenant, and made an attempt to mortgage it. He had at first consented to mortgage it to Eswara Doss, but he never executed the deed which was sent to him and subsequently applied to Agar Chand (his fourth witness) to advance him the Rs. 12,000 to pay plaintiff. When this application was made Agar Chand cannot definitely state but Eswara Doss deposes that it was after he took out summons against defendant to compel him to register exhibit A. That document was registered on the 15th December 1885. If, as Eswara Doss states, defendant fell out with him at that time, the defendant's application to Agar Chand and to Messrs. Champion and Short, who on his behalf sent plaintiff the letter of 22nd December, is accounted for. I am unable to accept Agar Chand's statement that he asked Raja Eswara Doss for the title-deeds of the property and was informed they were in Court. Raja Eswara Doss denies this, and it seems to me improbable that Agar Chand would, after he had been informed by Raja Eswara Doss that defendant intended to mortgage the property to him (Raja Eswara Doss), have insisted on seeing the title-deeds. It is far more likely that he would have accepted the Raja's statement and have taken, as in fact he did take, no further steps about the proposed mortgage. No doubt a person selling property to another without conditions is impliedly bound himself to have, and to give to his purchaser a title free from reasonable doubt. But he may relieve himself of the implied obligation by special contract, and if the purchaser chooses to buy subject to such terms, he will be bound by them. It is the duty of the vendor to inform the buyer of all the facts within his knowledge material to title; and if by reason of misstatement or suppression of facts within his knowledge, which the purchaser is entitled to know and the vendor is bound to communicate, the purchaser is misled, he would not be bound (*Motiahoo v. Vinayak Veerchand*(1)). But in the present case

(1) I.L.R. 12 Bom., 1.

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defendant was placed in possession of all material facts to enable him to decide as to the validity of plaintiff's title and with those facts before him he executed exhibit A. In *Haydon v. Bell*(1) it was held that where possession was taken, part of the purchase money paid and a mortgage of the lessee's interest made, the purchaser was not, after thus dealing with the property, entitled to call for the production of the lessor's title. And in the *Port of London Assurance Company's case*(2), Lord Justice Turner remarked that where a purchaser has taken possession of and enjoyed the subject-matter of a contract, it is the duty of the Court to make every reasonable presumption in favor of the validity of the contract. In the present case, the defendant was informed that the property had been purchased in 1876 in execution of a decree by Raja Eswara Doss and Gunsham Doss, who were partners, that after the death of Gunsham Doss disputes arose between the sons of Gunsham Doss and Raja Eswara Doss, that the property was sold by auction, on the motion of Eswara Doss and Vallaba Doss, the only adult son of Gunsham Doss, that the plaintiff had purchased at that auction and been placed in possession, executing a deed of mortgage for a portion of the purchase money in favor of Eswara Doss, and that a conveyance would be executed in her favor as soon as the disputes between her vendors were settled. The defendant thereupon executed exhibit A, took possession and paid Rs. 1,000. Notwithstanding the non-execution on the 1st September 1885 of the sale-deed by plaintiff which respondent contends was an essential part of the contract, defendant remained in possession, leased the house, executed repairs, paid further portions of the sale amount, and attempted to raise money on it by way of mortgage in order to pay off the whole sum due. There does not appear to have been any cloud upon the plaintiff's title at the time of purchase or subsequently, and I think it must be held that defendant both expressly, before the execution of exhibit A and impliedly, by his subsequent conduct, waived his right to any further proof of plaintiff's title. In exhibit H, the only question raised as to plaintiff's title was that defendant had been informed that there were disputes relating to the house between Eswara Doss and Vallaba Doss. Of these disputes which concerned not the house, but the partnership, defendant was fully

(1) 1 Beav., 337.

(2) 5 De G. M. & G., 465.

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informed prior to the 16th August and with full notice of them, he took possession and made payments. The learned Judge lays stress on the fact that the claim set up by exhibit H was not at once repudiated and that no reference was made to this letter in the letter written to defendant by Messrs. Branson and Branson, the plaintiff's solicitors, on 26th January 1887 (exhibit F). But a conveyance had then been executed in plaintiff's favor by Raja Eswara Doss and the sons of Gunsham Doss (exhibit E), and the only objection which defendant had raised to the purchase was thereby removed. There was therefore no necessity to refer to exhibit H.

As to the interest, it was laid down by Sir John Leach in *Esdale v. Stephenson*(1) that where there is an express stipulation as to the payment of interest by the purchaser it applies to every delay however occasioned, unless such delay is owing to the gross misconduct or wilful delay of the vendor. And as remarked by Lord St. Leonards "if the money was not actually and *bonâ fide* appropriated for the purchase, or the purchaser derived the least advantage from it or in any way made use of it, the Court would compel him to pay interest." (*Sugden's Vendors and Purchasers*, 14th ed., p. 628).

The cases quoted by the learned Judge do not apply as the agreed rate of interest was neither excessive nor extraordinary but reasonable and usual. The purchaser has been in possession of the rents and profits of the property. He has never tendered the balance of the purchase money, nor has he adduced any evidence to show that he had the money by him in readiness for payment. I think he is bound to pay interest at 12 per cent.

For these reasons, I would set aside the decree of the learned Judge and give plaintiff a decree as sued for with costs throughout.

MUTTUSAMI AIYAR, J.—I have had the advantage of reading the judgment of my learned colleague and I concur in the conclusion at which he has arrived. But for a difference of opinion as to one of the grounds of decision and the importance of the case both as regards the amount sued for and the questions raised for decision, I should not have written a separate judgment.

The suit brought by the appellant was substantially one for the specific execution of a contract of sale. That contract is evi-

(1) 1 S. & S., 122.

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denced by document A which bears date the 16th August 1885. Though the suit was instituted only in November 1887, the learned Judge below found and the finding is warranted by evidence in the case that time was not of the essence of the contract, and it is not questioned on appeal by the respondent. The only questions arising for our decision are—first, whether the decree was properly made conditional on the appellant showing a good title, and, secondly, whether the rate of interest awarded to her from the 1st September 1885 is less than what she is entitled to under the circumstances of the case.

As regards the first question, the appellant's contention is that the respondent expressly agreed prior to the date of A, though not in writing, to accept such title as she had and that by his subsequent conduct the respondent waived his right, if any, to call for proof of the appellant's title.

Document A is silent on the subject and under section 55 of Act IV of 1882, which was in force when it was executed, it must be read, in the absence of a contract to the contrary as if it contained a covenant for title. Though it describes the house bought as "belonging to" the appellant, yet I do not consider that the description can be accepted as equivalent to a statement that the respondent has waived his right to investigate the appellant's title. They are mere words of description and ought not to be so construed, especially as section 55 requires an express contract to exclude its operation. I take it, therefore, that there was an implied covenant for title.

As to the question whether the respondent had previously agreed to accept the appellant's title, such as it was, the decision must rest on the weight due to the oral evidence in this case. On the one hand Raja Esvara Doss and his darogah say that there was such an agreement, whilst on the other, the respondent's servant contradicts them. Although the evidence for the appellant is apparently somewhat stronger than the evidence for the respondent by reason of the comparative social position of the witnesses, yet the learned Judge below who had them before him considered that it was unsafe to act upon it. It cannot be denied that the Raja has some personal interest in the result of this suit, that he negotiated the sale in question and pays the expenses of this litigation. If there was a conversation regarding title as alleged, and if it was understood by the respondent to form part

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of his agreement, I do not see my way to account satisfactorily for the omission of Raja Esvara Doss to insert a provision to that effect in document A, having due regard to his shrewdness and intelligence in matters of business and also to the fact that document A was drawn up under his dictation or direction at the instance of the respondent. It seems to me more probable that beyond showing documents B, C, D and K,* the Raja did not press the matter farther and make a definite contract as to the title. It must be remembered that an agreement to take such title as the vendor has is in restraint of the purchaser's legal right, and that when it is set up as being antecedent to a written contract in a suit to enforce specific performance, it must at all events be established with the greatest clearness and precision. I am not prepared to disturb the finding of the learned Judge below on this point.

But as regards implied waiver by subsequent conduct, I concur in the opinion of my learned colleague. The question of waiver is in the main one of evidence, and in determining it, we have to consider each of the acts of the party concerned in the light thrown by his knowledge at the time of material facts in relation to the title, and then to see whether an intention *not* to rely on the implied covenant as a subsisting covenant can clearly and unequivocally be inferred from them. It is in evidence in this case that Raja Esvara Doss not only showed documents B, C, D and K to the respondent prior to the date of A, but also furnished translations in the vernacular. In coming to a finding on this matter, the learned Judge below overlooked the last-mentioned fact, and I am also of opinion that we must take it upon the evidence that the respondent had the means of knowing, and knew, their contents. On referring then to these documents as evidence of the respondent's knowledge, I find that they only trace the appellant's title up to the Sheriff's sale in 1876 but do not carry it beyond. It is therefore reasonable to presume that it was known to the respondent that no document was shown regarding the state of the title prior to the Sheriff's sale.

It is also admitted that on the date of A, the respondent knew that there was litigation between Raja Esvara Doss and Vallaba Doss, that the appellant herself had no conveyance, and that there might be delay in her executing one in his favor. It is, however, shown that the appellant obtained a conveyance before January

* See as to these exhibits *ante*, p. 162.

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1886, and that when she tendered one to the respondent, the dispute with Vallaba Doss had been compromised and that it had never cast any cloud on the title to the house in dispute. Hence it is the state of title prior to the Sheriff's sale that is of moment in this case, and keeping this fact in view, I pass on to consider the respondent's subsequent acts and to estimate their value as evidence of waiver.

I may first refer to the two part payments made by him, viz., of Rs. 2,000 on the 4th September and of Rs. 1,000 on the 4th November 1885. Exhibit A shows that the balance of purchase money was intended to be paid on or before the 1st September and a conveyance was to be taken. Though the appellant was not in a position to execute a conveyance, yet the respondent proceeded to make the part payments without any inquiry or further proof as to the state of the title prior to the Sheriff's sale in 1876. At law, the purchaser could not have the right to the estate nor the vendor to the money until the conveyance was executed, and according to exhibit A, both are concurrent acts. The part payments appear to indicate an intention to dispense with the benefit of this provision of law, and of the contract, and even if they stood alone, they would be some evidence to show that he did not attach importance to proof of title prior to 1876.

Another fact which has an important bearing on the question of waiver is the respondent's endeavour about one month after the date of A to obtain at once a sale-deed and to execute a mortgage in favor of Raja Eswara Doss for the unpaid balance of the purchase money. On this point there is the evidence of Raja Eswara Doss that he prepared drafts and sent them to the respondent and that he sent again at his request fresh drafts in the name of his son. There is also the evidence of Gulam Khadir in regard to it. The evidence of Agar Chand shows that the Raja told him that the respondent had agreed to mortgage the house to him. It is also in evidence that notice was given to the respondent to produce the drafts but that the respondent did not produce them. I see no sufficient reason to doubt that the respondent agreed to mortgage the house to Eswara Doss and take a sale-deed, that drafts were sent to him at his request and that they are withheld lest they may weaken his case. This conduct on his part appears to me to be inconsistent with a belief that the appellant must prove her title or that the dispute with Vallaba Doss had reference to title.

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The next fact in evidence is the respondent's endeavour to borrow Rs. 12,000 from Agar Chand in view to pay off the balance of the purchase money. This is spoken to by Agar Chand, who is the respondent's witness. This attempt again indicates that the respondent was endeavouring to deal with the property as his own and to pay off the purchase money though the appellant was not in a position to give him a conveyance. I am unable to reconcile these attempts to exercise acts of ownership with the continuance of an intention to treat the implied covenant as a subsisting covenant.

Though Agar Chand states in his evidence that the Raja told him that the title-deeds of the house were in Court, yet Raja Eswara Doss contradicts him, and there is thus oath against oath. But the evidence also shows that Raja Eswara Doss was unwilling that Agar Chand should take a mortgage and desired that he himself should take the mortgage; and it may well be that if Raja Eswara Doss did really say that the title-deeds were in Court, he did so in order to prevent Agar Chand from advancing money on the house. As already observed, it was in the respondent's knowledge that the Raja had documents B, C, D and K with him, and looking at his subsequent conduct in connection with this fact, the evidence conveys the impression that it was the obstruction caused to Agar Chand advancing the money so as to enable the appellant to complete his contract that really originated the misunderstanding which has finally resulted in this litigation.

The effect of the evidence then is that until the date of the last part payment, the respondent's conduct is inconsistent with a belief on his part that the appellant had first to prove her title before he completed his contract.

It is again in evidence that Raja Eswara Doss bought the house at the auction sale in 1876 without investigating the title of Prince Azimja's daughter, that the appellant accepted the title of the purchasers at the Sheriff's sale, that the dispute of Vallaba Doss raised no doubt as to title and that the daughter of Prince Azimja had been in possession for several years before the Sheriff's sale. It may well be that the respondent thought that it was not necessary for him to ask for more and endeavoured to complete the contract as shown above until December 1887.

The first document which shows a desire on the respondent's part to ask for proof of title is exhibit H, dated the 22nd

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December 1887. Though the first paragraph speaks of an agreement by Raja Eswara Doss to get the appellant to hand over the title-deed, showing a good title in the said Begum (appellant), yet the second paragraph refers to the dispute with Vallaba Doss as the cause of her not being able to give a good title and execute a conveyance. It is remarkable that there was no allusion to the state of the title prior to 1876 whilst there was an allusion to a dispute which as is shown by exhibit E and the evidence of Vallaba Doss had nothing to do with the title to the house. This indicates that even when the relation between the respondent and Raja Eswara Doss was strained, the former continued to treat with the latter irrespective of the state of the appellant's title prior to the Sheriff's sale.

The next occasion to which I have to refer is the tender for the appellant of a conveyance in January 1886 after the dispute with Vallaba Doss was settled and the appellant was thereby enabled to obtain a conveyance. It was not until then that the respondent indicated any intention to insist on proof of title beyond the point to which exhibits B, C, D and K traced it. It is further in evidence that the respondent has been in possession of the house since August 1885 though the appellant declined to prove title in 1886. It is no doubt true that the respondent entered into possession under the terms of document A and his continuance in possession until the appellant repudiated her obligation to prove title beyond 1876 might in the absence of a waiver be referred to a supposition on his part that the appellant would execute her implied covenant. But the retention of such possession after the appellant repudiated her obligation to show title beyond a certain stage and the appropriation by him of rents to his own use without either rescinding the contract or depositing the remainder of the purchase money or setting it apart with notice of the same to the appellant imply a desire on his part to take undue advantage of his position as the party originally let into possession.

Taking the evidence as a whole, the conclusion to which I am led is that prior to the execution of A, the respondent had knowledge that the title-deeds which the Raja had with him showed title only up to the Sheriff's sale in 1876, that there was no definite agreement as to title when A was executed, that his subsequent conduct until December 1885, was inconsistent with a belief on

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his part that the appellant had first to prove her title before he completed his part of the contract, that it was the obstruction to his raising money from Agar Chand and Eswara Doss' desire to lend money himself that created a disagreement and induced him to change his front, that the first attempt on his part was to take advantage of the delay in the execution of a conveyance in consequence of the dispute with Vallaba Doss though he knew of it at the date of A, though it tended to cast no doubt on title and though time was not of the essence of the contract, that when this dispute terminated and a conveyance was tendered and not until then, his conduct assumed the phase of insisting on a complete proof of title, and that he has continued to retain possession and receive rents until now without depositing or setting apart the balance of the purchase money.

In this view of the facts, I have no doubt that neither party had section 55 of Act IV of 1882 before their minds when A was executed, that the respondent had then knowledge of material facts bearing on the title and that he since waived his right to the benefit of the implied covenant by his acts and that his subsequent assertion that he always relied on title being shown further back than the Sheriff's sale in 1876 is an after thought. Upon facts similar to these it was held that objections to the title were considered waived in *Margravine of Anspach v. Noel*(1). As my learned colleague has referred also to other authorities on the question of waiver, I do not desire to repeat them here.

As to the question of interest also I agree with him. As there was a waiver the appellant is *prima facie* entitled to interest at 12 per cent., which is the rate mentioned in A, and there is no evidence to show what the rent actually received by the respondent was and that the interest claimed is excessive. It is also in evidence that the respondent intended to pay Agar Chand 12 per cent. if he lent him Rs. 12,000.

As regards the contention that there was no contract to pay interest subsequent to the 1st September 1885, the act of taking possession implies an agreement to continue to pay interest until the purchase money is paid. In *Fludyer v. Cocker*(2) Sir William Grant remarked with reference to a similar objection that "the act of taking possession is an implied agreement to pay interest,

(1) 1 Maddock, 310.

(2) 12 Ves., 25.

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for so absurd an agreement as that the purchaser is to receive the rents and profits to which he has no legal title and the vendor is not to have interest as he has no legal title to the money can never be implied." The purchaser, it was observed in that case, might have said he would have nothing to do with the estate until he got a conveyance. But that was not the course which he took. "He enters into possession, an act that generally amounts to a waiver even of objections to title. He proceeds upon the supposition that the contract will be executed and thereby agrees that he will treat it as if it was executed." It is true that this general rule is subject to the exception that when the delay in the completion of the contract is imputable to the vendor and the stipulated interest exceeds the rent, the vendor ought not to be enabled to gain by his own wrong and he can only be entitled to the interim rent. Though in this case the appellant did not tender a conveyance before January 1886 owing to the dispute with Vallaba Doss and the respondent might not until then be liable to pay the vendor more than the rent actually received by him, yet there is no evidence to show that the rate of interest which is the rate current in the market exceeded the rent and was excessive.

For these reasons I concur in the decree proposed by my learned colleague.

Branson & Branson, attorneys for appellant.

Champion & Short, attorneys for respondent.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

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*Contract Act, s. 135—Negotiable Instruments Act—Act XXVI of 1881, ss. 37, 39, 66
—Accommodation maker—Discharge of—Presentment of promissory note.*

Suit by the endorsee against the maker of a promissory note, dated 9th August 1886. The plaintiff was aware that the note was made by the defendant for the accommodation of the acceptor, Watson and Co., with whom the plaintiff had large dealings. On the 4th August 1887, Watson and Co. executed in favor of the

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plaintiff and another creditor a mortgage of certain property to secure the amount then due by Watson and Co., including the amount due to the plaintiff on the promissory note: the mortgage contained a personal covenant by Watson and Co. to pay the sums due, together with interest, on the 4th August 1888; and the mortgagees practically took over the whole business of the mortgagor and it was intended that they should work it for his benefit up to that date. The promissory note fell due in June 1887, but was not presented to the defendant for payment:

Held, that plaintiff, by accepting the mortgage, promised to give time to Watson and Co., and thus rendered it impossible for him to sue Watson and Co. had the defendant as surety called on him to do so, and that the defendant was accordingly discharged. *Pogosa v. Bank of Bengal*, I.L.R., 3 Cal., 174, distinguished.

Semle: The maker of a promissory note is not discharged by the holder's failure to present it at due date.

Suit by the endorsee of a promissory note against the maker. The defendant pleaded that he made the note, as the plaintiff well knew, for the accommodation of Watson and Co., that he was discharged from all liability upon the note by reason of an arrangement entered into between the plaintiff and Watson and Co., and that the note had not been presented to him for payment.

The facts of the case appear, sufficiently for the purpose of this report, from the judgment of the Court.

Mr. Johnstone for the plaintiff.

The issue is on the defendant, who admits the plaint note. He must therefore begin.

Mr. Norton for the defendant.

The plaintiff cannot succeed, though the defendant admits that he was the maker of the note, for the plaintiff knew that it was made for the accommodation of Watson and Co., and became the endorsee from Watson and Co. with notice of this fact. The admitted consideration from the plaintiff to Watson and Co. cannot alter the circumstances. Defendant must be regarded in equity as the drawer, Watson and Co. as the acceptor, and plaintiff as the holder of an accepted bill of exchange. Defendant is, accordingly, in the position of a surety, the principal debtor being Watson and Co. Therefore sections 39 and 82 (b) of the Negotiable Instruments Act apply. For two months after due date the plaintiff obtained from Watson and Co. a mortgage, securing all the debts due by the latter, amongst others the amount of the plaint note. Watson and Co.'s time for repayment was thereby enlarged, and the defendant is therefore discharged under sections 134 and 135 of the Contract Act. See also section 139. Watson and Co. became insolvent, and the defendant was deprived of

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any legal remedy he formerly had against Watson and Co. See Byles on Bills (14th edition), pp. 321, 322; *Seetaram Sahoo v. DaCosta*(1); *Smith v. Winter*(2); *Cowper v. Smith*(3); *Nichols v. Norris*(4); *Bailey v. Edwards*(5); *Davies v. Stainbank*(6); *ex parte Glendinning*(7).

Admittedly there was no presentment of the note in this case. And this is fatal to the plaintiff's case, inasmuch as the plaint note was payable at a specified period after date. Sections 66 and 76 (c), Negotiable Instruments Act.

Mr. Johnstone in reply cited *Pogose v. Bank of Bengal*(8).
cur. ad. vult.

SHEPARD, J.—The plaintiff sues as the endorsee of a promissory note for Rs. 5,000, made by the defendant on the 9th August 1886 and payable ten months after date. The note was made in favor of Richard Watson and Co., and was admittedly endorsed to the plaintiff for value. There is no evidence that the note, which fell due in June 1887, was presented to the defendant for payment, and it is contended on defendant's behalf that he is, therefore, discharged from liability, inasmuch as section 66 of the Negotiable Instruments Act is imperative in requiring presentment. According to English law there is no doubt that presentment for payment is not generally necessary in order to charge the maker of a note (Byles on Bills, 14th edition, p. 290), and this general rule, with specified exceptions, is recognized in the Bills of Exchange Act, 1882, s. 87. It is contended that the Act of 1881, which regulates the law of negotiable instruments in this country, has introduced a new rule with regard to promissory notes payable at a specified period after date, and that on failure to present such a note at maturity the maker is discharged. That Act is in the main at least a reproduction of the English rules on the subject, and apart from section 66 the provisions with regard to default of presentment appear to be the same as those laid down by the English cases. Comparing the language of section 66 with that of other sections in the same chapter, I do not think the defendant's contention can be maintained. Section 61 deals with a bill of exchange payable after sight, and after requiring

(1) 12 W.R., 294.

(3) 4 M. & W., 519.

(5) 4 B. & S., 761.

(7) Buck's Ca. in Bankruptcy, 517.

(2) 4 M. & W., 454.

(4) 3 B. & Ad., 41.

(6) 6 DeG. M. & G., 679.

(8) J.L.R., 3 Cal., 174.

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presentment for acceptance, enacts that in default of such presentment no party thereto is liable thereon to the party making such default. Section 62 makes, *mutatis mutandis*, a similar provision for promissory notes payable at a certain period after sight. Sections 68 and 69 make provision for negotiable instruments payable at a certain place, requiring presentment at that place in order to charge any party thereto in the one case and the maker or drawer thereof in the other. Section 64 declares of all negotiable instruments indifferently that they must be presented for payment to the maker, acceptor, or drawer thereof by the holder as hereinafter provided, and then enacts that "in default of such presentment, the other parties thereto are not liable thereon to such holder." Seeing that in all these sections the penalty that is to be entailed by default in presentment is expressly declared, I think the inference may be fairly drawn that express language would have been used if the same penalty was intended to ensue on default of the presentment which section 66 enjoins. In my opinion there was no intention to alter the pre-existing law, and the language of the Act does not justify the contention that the maker of such a note as the present is discharged by the holder's failure to present it at due date.

The defence raised by the written statement was in substance that the defendant to the plaintiff's knowledge received no consideration for the note, and that the plaintiff, after the note fell due, by taking a mortgage from the principal debtor and giving him time, has discharged the defendant. It is for the defendant to show that he is not, as he *prima facie* appears to be, the principal debtor. I think he has sufficiently proved this, and it is also I think clear that the plaintiff knew perfectly well that the defendant gave the note for the accommodation of Watson and Co. Watson and Co., whose real name is Muttusami, and the defendant on the one hand and plaintiff on the other are the witnesses who speak to the circumstances under which the note was made. Both the plaintiff and defendant had in 1876 large dealings with Watson and Co. The plaintiff appears to have been a sort of banker to Watson and Co., while, the defendant carrying on business in Bangalore, had constant supplies of fish and ice from Watson and Co., and they had constant monetary transaction. Both were interested in keeping his business afloat. That business was wholly or to a large extent carried on under a

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contract with the Ice Company and funds were needed for payment of arrears due to the company and for a deposit to be made by Watson and Co. with the company.

The three parties were present when the note was drawn up and then and there endorsed to the plaintiff. The plaintiff knew that Watson and Co. was in want of funds. He knew that the deposit had to be made with the Ice Company and Watson and Co. had even applied to him for money. The defendant and his witness, Muttusami, say that he was fully aware that Watson and Co. was also indebted to the defendant, and knew that the note was not made for the defendant's benefit. I think their evidence must be accepted, and must therefore find that the plaintiff knew the note was an accommodation note. Evidence was gone into by the plaintiff to show that after the note was made the defendant made payments towards it on the footing of one liable as principal debtor, and the plaintiff in his plaint gives credit for Rs. 1,500 said to have been so paid. His case is that there was an agreement between him and defendant that the note should be paid off by monthly instalments of Rs. 500, and that accordingly three instalments were paid in two payments of Rs. 500 and Rs. 1,000 each. There is only the plaintiff to speak to this arrangement; the defendant denies it, and it is not explained why the defendant should have engaged to make payments in anticipation of the time when the note fell due. The defendant's case is that these two sums have nothing to do with the promissory note. (His Lordship, after a discussion of the evidence of this part of the case, proceeded as follows.)

I am unable, for these reasons, to believe the plaintiff's story with regard to the payment of Rs. 500 and Rs. 1,000 for which he gives credit.

In the view I take of the case, it is not necessary to say much about the promise alleged in the first paragraph of the written statement to have been made by the plaintiff about the return of promissory notes. There is evidence of such a promise, and I think it is very probable that the defendant did ask to have his notes back. On the other hand there is the fact that the defendant did not pursue the matter nor obtain from the plaintiff a written undertaking such as Muttusami's brother got. If there was such a promise, there was no consideration for it, and the fact of its being made would only be important to show that plaintiff looked to

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Watson and Co. as the principal debtor. In the result I find, having regard to the evidence of what took place at the time of the making of the note, that the note was, as the plaintiff knew, made for Watson and Co.'s accommodation; and further looking to the subsequent dealings of the parties, that there is nothing to show that the defendant was treated as principal debtor on the note.

The remaining question is whether there has been a contract between the plaintiff and the principal debtor which should have the effect of discharging the surety under the provisions of section 135 of the Contract Act. That section has to be read with the provisions of the Negotiable Instruments Act; and as here there was—within the meaning of the Negotiable Instruments Act, s. 37—a “contract to the contrary” making defendant a surety instead of principal debtor, the defendant is entitled to be discharged if he can bring the case within the terms of section 135 of the Contract Act. (See Negotiable Instruments Act, s. 39). It is an admitted fact that on the 4th August 1887 a mortgage was executed by Watson and Co. in favor of plaintiff and another creditor, in which mortgage the amount then due on the note was included in the sum secured. It is admitted that defendant was no party to the transaction, and was not cognizant of it till after it had taken place. There is no evidence that he assented to the transaction either at the time or subsequently, for I do not believe the plaintiff's evidence as to any statement made by the defendant of his willingness to pay the money if plaintiff did not succeed in realizing it under his mortgage. There is evidence that the defendant was annoyed when he heard of the mortgage, and I think it is not improbable that, as defendant's witnesses say, he asked to have any promissory notes of his in the plaintiff's hands returned to him. The defendant could not help acquiescing in the mortgage, but there is nothing to show that he consented to any arrangement whereby time should be given to Watson and Co. In fact it was not suggested that he did so. Under the mortgage the plaintiff and his co-mortgagee practically took over the whole business of Watson and Co., and it was intended that they should work it for Watson and Co.'s benefit till the 4th August 1888, crediting the balance of profits after payment of various charges, first to the interest and then to payment of the principal sum of Rs. 21,035-9-9 expressed to be due to the mort-

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gagees. There was a covenant by the mortgagors to pay that sum with interest at 12 per cent. on the 4th August 1888, and on the other hand a power of sale reserved to the mortgagees on default being made.

The plaintiff and his mortgagee took possession under the mortgage and carried on the business till January 1888 when the Ice Company cancelled the contract with Watson and Co. and Watson and Co. filed a petition in the Insolvency Court. I think there can be no doubt that plaintiff did, by accepting the mortgage, promise to give time to Watson and Co. and thus render it impossible for him to sue Watson and Co. had the defendant as surety called upon him so to do. *Bailey v. Edwards*(1).

Mr. Johnstone referred to *Poyase v. Bank of Bengal*(2) and argued that here also there was nothing to show that the eventual remedy of the surety was prejudiced; but in that case the question turned upon section 139 of the Contract Act and it did not appear that time had been given in such a way as to make section 135 applicable.

Upon the question whether the defendant is discharged by the contract between plaintiff and Watson and Co., I must find in the defendant's favor. The result is that I dismiss the suit with costs.

Grant & Laing, attorneys for plaintiff.

Tyagarajayyar, attorney for defendant.

APPELLATE CIVIL—FULL BENCH.

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

RAMASAMI (PLAINTIFF), PETITIONER,

v.

KURISU (DEFENDANT), RESPONDENT.*

Civil Procedure Code, ss. 623, 624, 626—Review—Provincial Small Cause Courts Act
—IX of 1887, s. 17—Deposit of costs.

On 23rd February 1888 the Subordinate Judge of Tinnevely dismissed a small cause suit on the ground that the plaintiff had not secured the attendance of his

(1) 4 B. & S., 761.

(2) I.L.R., 3 Cal., 174.

* Civil Revision Petition No. 201 of 1888.

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witnesses. On 29th February the plaintiff presented a petition for review on which notice was directed to issue, but he did not deposit in Court the amount of the costs payable under the decree. On 17th April the petition having come on for hearing, the Judge directed that the petitioner should "first" deposit the amount of the defendant's costs under s. 17 of the Provincial Small Cause Courts Act, which was accordingly done on the following day. On 21st April the petition, which proceeded on grounds other than those mentioned in s. 624 of the Code of Civil Procedure, came on for hearing before the Officiating Subordinate Judge, who had assumed charge of the Court between the last-mentioned dates: he entertained the petition, but dismissed it. The plaintiff preferred a revision petition against the order dismissing his petition:

Held by the Full Bench that the Officiating Subordinate Judge had jurisdiction to make the order sought to be revised.

Held by Parker and Wilkinson, JJ., that the provisions of s. 17 of the Provincial Small Cause Courts Act as to the deposit of costs on an application for review are not mandatory, but merely directory.

PETITION under section 25 of the Provincial Small Cause Courts Act praying the High Court to revise the order of S. Subbier, Acting Subordinate Judge of Tinnevely, dated 21st April 1888, dismissing a petition for review of the judgment of Kanagasabai Mudaliar, Subordinate Judge of Tinnevely, in small cause suit No. 927 of 1887.

The judgment of which review was sought proceeded on the ground that the plaintiff had omitted to secure the attendance of his witnesses and had not paid batta for summoning them in due time; and the petition of review set forth reasons why these omissions by the plaintiff should have been excused. The petition was admitted, but when it came on for hearing it appeared that the amount of the costs payable to the defendant under the decree had not been deposited in accordance with the provisions of Provincial Small Cause Courts Act, s. 17, and the hearing was thereupon adjourned for the payment to be made. At the adjourned hearing the Officiating Subordinate Judge, who had in the interval assumed charge of the Court, made the following order:—

"I do not think that sufficient grounds for a review of judgment have been put forth in this application. The plaintiff was represented by counsel and batta for witnesses was not paid in sufficient time. The allegation that plaintiff's son died does not appear to have been put forward at or before the time of the dismissal of the suit. The defendant appeared and denied the claim and opposes this petition. The permanent Subordinate

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Judge ordered notice to issue to the opposite party, but from this I have no reason to suppose that he was satisfied with the sufficiency of the grounds put forward. The petitioner, moreover, did not deposit the amount of the decree with this petition as required by section 17 of the Small Cause Act.

"I accordingly reject this petition with costs."

The plaintiff preferred this petition.

The further facts of this case appear sufficiently for the purposes of this report from the following judgments.

Rama Rau for petitioner.

Bhashyam Ayyangar for respondent.

PARKER, J.—This is a petition under section 25 of the Small Cause Court Act IX of 1887. This suit was dismissed on February 23rd, 1888, by the Subordinate Judge of Tinnevely on the ground that the plaintiff had not secured the attendance of his witnesses, and had not paid the batta for summoning them in due time. On February 29th a petition for review was presented by the plaintiff under section 623 of the Civil Procedure Code, on which the Subordinate Judge ordered notice to issue on March 6th, fixing the date of hearing for March 26th. The plaintiff, moreover, failed to deposit the costs payable under the decree as required by section 17 of the Small Cause Court Act. The case does not appear to have been taken on March 26th; but on April 17th the Subordinate Judge passed an order that the petitioner should "first" deposit the amount of the defendant's costs. This was paid on April 18th, and on April 21st the petition came on for disposal. Between April 17th and April 21st there had been a change of Subordinate Judges, Mr. Kanagasabai Mudaliar having gone on leave and Mr. Subbier having been appointed to act for him. On April 21st the petition for review was dismissed by the latter on the grounds (1) that witness' batta was not paid in sufficient time, (2) that the order for notice was not sufficient ground for holding the permanent Subordinate Judge was satisfied with the excuse, and (3) that the costs had not been deposited with the petition as required by section 17, Act IX of 1887.

This order we are now asked to revise, and the defendant's pleader raised the preliminary objection that, under section 624 of the Civil Procedure Code, it was *ultra vires* for the Subordinate Judge (Mr. Subbier) to have disposed of the review petition at all

Pancham v. Jhinguri(1). As against this contention, we were referred to the cases of *Karoo Singh v. Deo Narain Singh*(2) and *Fazel Biswas v. Jamadar Sheik*(3). The decisions of the Allahabad and Calcutta High Courts are directly in conflict.

The question is as to the construction to be put upon the word "made" in section 624 of the Civil Procedure Code. That section is a new one, but the effect of it is to give legislative sanction to the principles laid down by the Privy Council in *Maharajah Moheshur Singh v. The Bengal Government*(4) with reference to granting reviews of judgment. The reason for the rule is obvious; for, if another Judge were to admit a review of the judgment of his predecessor upon any other grounds than that of the discovery of new evidence or to correct a clerical error, he would practically be hearing an appeal from his predecessor's judgment, which is the function of a superior Court.

In this case I am unable to hold that the application has not been "made" to the Judge who delivered the judgment. The mere filing of the application in Court might be insufficient, but here the Subordinate Judge has exercised his judicial mind upon the application and has seen *prima facie* ground for believing that his judgment required reconsideration. To hold otherwise would lead to this anomaly:—that, after registering the application and before finally disposing of it, the Judge who passed the decree might die or be removed, and the party lose his remedy both by way of review and by appeal (which might be barred). A provision of law should not be construed so as to cause injury to a suitor, nor can it be supposed that the Legislature having given a right to apply for a review when the same Judge is in office, and having allowed the Court to acquire jurisdiction, has left it in certain contingencies without the power to deal with the application or to exercise the jurisdiction acquired. The successor of the Subordinate Judge, to whom the application was made, must therefore exercise the jurisdiction as a case of necessity, since his predecessor can no longer do so. On these grounds, I concur in the view taken by the High Court of Calcutta.

Holding then that the Subordinate Judge (Mr. Subbier) had jurisdiction to make the order, it appears to me that the grounds

(1) I.L.R., 4 All., 278.

(3) I.L.R., 13 Cal., 231.

(2) I.L.R., 10 Cal., 80.

(4) 7 M.I.A., 283.

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of his order cannot be supported. The witnesses were all resident in Tinnevely near the Court-house, and some of them, if not all, might have been served between February 17th and February 23rd—at all events the plaintiff was entitled to the issue of summons. The fact of the permanent Subordinate Judge having issued the order was evidence that he considered some *prima facie* ground had been shown. With regard to the third point, viz., the deposit of costs with the application, I am disposed to hold that section 17 of the Small Cause Court Act is merely directory and not mandatory. The Court did require the costs to be deposited before the review was heard, and this, I think, is the intention of the section.

I would therefore set aside the order and remand the petition for rehearing. The costs to follow the result.

WILKINSON, J.—Small Cause Suit No. 927 of 1887 was dismissed by the Subordinate Judge of Tinnevely, Mr. Kanagasabai Mudaliar, on 23rd February on the ground that plaintiff had failed to secure the attendance of his witnesses. On the 29th February plaintiff applied for a review. On the 6th March the Subordinate Judge ordered notice to go to the defendant to show cause why the review should not be allowed. On the 17th April he ordered plaintiff to pay into Court the costs decreed. The costs were deposited on the 18th April. Mr. Kanagasabai Mudaliar availed himself of leave on the 19th April, and on the 21st his *locum tenens*, Mr. S. Subbier, rejected the application to review.

We are asked to set aside his order on the ground that it is contrary to law.

The first question we have to decide is whether the Acting Subordinate Judge had power to pass any orders in review. On the one hand, it is contended on the authority of *Pancham v. Jhinguri*(1) that the words "shall be made" in section 624 of the Civil Procedure Code mean "shall be heard and determined," and that as the review was not sought on the ground of (1) new matter, or (2) clerical error, the Acting Subordinate Judge was not entitled to pass any orders in review of his predecessor's judgment. On the other side, it is argued on the authority of *Karoo Singh v. Deo Narain Singh*(2) followed in *Fazel Biswas v. Jamadar Sheikh*(3) that the Judge whose judgment it was sought

(1) I.L.R., 4 All., 278. (2) I.L.R., 19 Cal., 80. (3) I.L.R., 13 Cal., 231.

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to review having admitted the application, it was competent to his successor to dispose of it, and we are referred to the remarks of the Privy Council in *Maharajah Moheshur Singh v. The Bengal Government*(1). There their Lordships say that the primary intention of granting a review was a reconsideration of the same subject by the same Judge. They went on to remark, "we do not say that there might not be cases in which a review might take place before another and a different Judge, because death or some other unavoidable cause might prevent the Judge who made the decision from reviewing it, but we do say that such exceptions are allowable only *ex necessitate*." These remarks were made in 1859 with reference to the law as laid down in the regulations. Having them in view, the Legislature has provided (section 623 of the Civil Procedure Code) that any person considering himself aggrieved by a decree or order may apply for a review of judgment to the Court which passed the decree or made the order, and has prohibited the entertainment of any such application by any Judge other than the Judge who pronounced the judgment, except in two cases, viz., (1) the discovery of new matter, or (2) clerical error. As was held in this Court in *Sarangapani v. Narayanasami*(2) where there has been a change of the presiding Judge, no application can be made to the new Judge except on the grounds stated in section 624. To hold that the issue of notice by the Judge who passed the decree entitles another Judge to pass final orders either granting or rejecting the application for review would render the provisions of section 624 completely nugatory. As I understand the code, the only cases in which a Judge other than the Judge who passed the decree can review the judgment of his predecessor are those provided in section 624, and the Legislature deliberately declined to lay down any other exceptions to the general rule. Where the correctness of the decision either in law or on facts is impeached by the person applying for review, the only Judge who can hear and determine the application is the Judge whose decision is impeached.

Being of opinion that the Acting Subordinate Judge had no jurisdiction to pass the order he did, I would set aside his order.

In consequence of the difference of opinion between their

(1) 7 M.L.A., 283.

(2) I.L.R., 8 Mad., 567.

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Lordships, the case was referred to a Full Bench, and their Lordships made the following :—

Order of Reference to the Full Bench:—The facts are sufficiently set forth in the foregoing judgments. The plaintiff applied for review of judgment on grounds other than those mentioned in section 624 of the Civil Procedure Code. The Subordinate Judge who had passed the decree received the petition and ordered notice to be given to the opposite party, but left the Court before passing any final order granting or refusing the review.

The question for the Full Bench is—whether, having regard to the provisions of section 624 of the Civil Procedure Code, the application may be heard and disposed of by his successor?

The decisions of the Allahabad and Calcutta High Courts are in conflict—*Pancham v. Jhinguri*(1), *Karoo Singh v. Deo Narain Singh*(2), and *Fazel Biswas v. Jamadar Sheikh*(3). We therefore refer the question to the Full Bench.

Rama Rau for appellant cited *Maharajah Moheshur Singh v. The Bengal Government*(4), *Sarangapani v. Narayanasami*(5), *Cheru Kurup v. Cheru Kanda Kurup*(6), *Fazel Biswas v. Jamadar Sheikh*(3). *Deseka Chari* for respondent.

All the difficulties which arise here are anticipated and resolved in *Pancham v. Jhinguri*(1).

A review of judgment is, except where the application is made under section 624, a matter of discretion merely. The object of Chapter XLVII of the Civil Procedure Code is to enable the suitor to obtain the result of a maturer consideration by the same mind—see the recent changes in the law, sections 624, 626. And in this case no hardship would be involved for the plaintiff, for the permanent Subordinate Judge was only absent on leave for two months, and the plaintiff, if he had waited, might have had recourse to the provisions of section 627.

(WILKINSON, J.—Does that section apply to Small Cause Courts?)

Its application to such Courts is not excluded in terms, so it would apply the marginal note notwithstanding.

(1) I.L.R., 4 All., 278.
(3) I.L.R., 13 Cal., 231.
(5) I.L.R., 8 Mad., 567.

(2) I.L.R., 10 Cal., 80.
(4) 7 M.I.A., 283.
(6) I.L.R., 12 Mad., 509.

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(MUTTUSAMI AYYAR, J.—The first clause appears to presuppose that there are more than one Judge in the Court, and the position of the section in the chapter and the terms of section 628 point the same way. The Allahabad decision admits the hardship arising under section 624, but the Judges say they are bound by the Privy Council ruling—)

or rather by the words of the section.

(MUTTUSAMI AYYAR, J.—On the words of the section all the High Courts agree in construing “made” as referring not to the actual reception of the application for review, but to the judicial consideration of it.)

The Allahabad Court seems to go further than the Calcutta Court in applying it to the “hearing and determination” of the application. It must be observed that the Legislature in the Amendment Act did not carry out exactly the principle of the Privy Council decision, but made two exceptions only.

Rama Rau in reply.

As to section 627, it does not apply to Courts of Small Causes—see as to the weight to be attached to the marginal notes, *Maxwell* on the Interpretation of Statutes, p. 525, and *Venour v. Sellon*(1). (He was stopped on that point.)

The Full Bench delivered the following

JUDGMENT:—This is a case referred for the opinion of the Full Bench, and the facts giving rise to the reference are these.

The Subordinate Judge of Tinnevely dismissed a suit on February 23rd, 1888, on the ground that plaintiff had not secured the attendance of his witnesses, and had not paid the batta for summoning them in due time. On February 29th a petition for review was presented by plaintiff under section 623 of the Civil Procedure Code, on which the Subordinate Judge ordered notice to issue on March 6th, fixing the date of hearing for March 26th. The plaintiff moreover failed to deposit the costs payable under the decree, as required by section 17 of the Small Cause Court Act. The case does not appear to have been taken up on March 26th; but on April 17th the Subordinate Judge passed an order that petitioner should “first” deposit the amount of defendant’s costs. This was paid on April 18th, and on April 21st the petition came on for disposal. Between April 17th and April 21st there had

(1) L.R., 2 Ch. D., 525.

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been a change of Subordinate Judges, Mr. Kanagasabai Mudaliar having gone on leave and Mr. Subbier having been appointed to act for him. On April 21st the petition for review was dismissed by the latter on the grounds (1) that witness' batta was not paid in sufficient time, (2) that the order of notice was not sufficient ground for holding the permanent Subordinate Judge was satisfied with the excuse, and (3) that the costs had not been deposited with the petition as required by section 17, Act IX of 1887.

The question for the Full Bench is whether having regard to the provisions of section 624 of the Civil Procedure Code, the Acting Subordinate Judge was competent to hear and finally determine the application made to his predecessor.

The party aggrieved by a decree is entitled under section 623 to ask for a review of judgment on all the grounds mentioned therein when the Judge who passed the decree hears and finally determines his application. It is also clear from section 624 that, when the Judge who delivered the original judgment ceases to be attached to the same Court before the application for review is made, it can only be made on the specific grounds mentioned in that section. There are, however, two intermediate stages at which the Judge who delivered the original judgment may cease to be attached to the same Court, viz., (I) after the application is made and before he orders notice to issue under section 626, and (II) after he orders notice to issue and before he hears the opposite party in support of the original decree and finally determines the application. As regards the former, there is a consensus of opinion among the High Courts at Madras, Calcutta and Allahabad—that the term "made" in section 624 must be taken to signify that the application is brought under the judicial cognizance of the Judge who delivered the judgment to be reviewed and is considered, if not finally determined by him under section 626, see *Cheru Kurup v. Cheru Kanda Kurup*(1), *Karoo Singh v. Deo Narain Singh*(2), and *Pancham v. Jkinguri*(3). As regards the latter, the substantial question is, whether the term "made" signifies a final determination of the application by the same Judge that delivered the judgment of which it is desired to obtain a review.

Section 624 limits the scope of section 623 and restricts the

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remedy provided by it, and unless the intention is clear it ought to be construed so as to advance the remedy. In their ordinary sense, the words "no application shall be made" cannot be taken to mean, "no application shall be finally determined." Again in form section 624 contains a direction to the party seeking to obtain a review of judgment, and in substance it must be taken to limit the power of the Court to entertain and deal with the application only to the extent to which the remedy is taken away from the party concerned. To hold otherwise would lead to this anomaly, viz., that after ordering notice and before finally disposing of the application, the Judge who passed the decree might die or be removed from the Court and the party lose his remedy both by way of review and by appeal (which might become barred). It would also contravene the ordinary rule of construction that a provision of law should be so interpreted, if possible, as to avoid injustice to a suitor or as not to leave a Court that is once seized of jurisdiction to entertain an application without power to determine it. It is no doubt true that section 624 is intended to give legislative sanction to the principles laid down by the Privy Council in *Maharajah Maheshur Singh v. The Bengal Government*(1) in which it was observed that a review was perfectly distinct from an appeal, that the primary intention of granting a review was a reconsideration of the same subject by the same Judge as contradistinguished from an appeal which is a rehearing before another tribunal, and that review should take place before the same Judge that delivered the judgment except in cases of necessity such as the death or removal of the Judge. Whilst taking these observations as a guide to the construction to be put upon section 624, regard should also be had to the mode in which legal effect was intended to be given to them by that section. According to the prior law as interpreted by the Privy Council, a review might take place in case of necessity before another Judge upon all the grounds mentioned in section 623 without reference to the question whether the Judge who delivered the original judgment ceased to belong to the Court before or after the application for review had been made. But section 624 contemplates the state of things when the application for review is made and permits or forbids a review according as the Judge who passed the original decree is

(1) I.L.R., 12 Mad., 509. (2) I.L.R., 10 Cal., 80. (3) I.L.R., 4 All., 278.

(1) 7 M.I.A., 283.

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or is not then attached to the same Court. Though the intention is clear not to provide even for a case of necessity before the Court acquires jurisdiction to deal with the application, yet it may well be that the exercise of jurisdiction which once vests in a Court, notwithstanding a subsequent change of Judges is regarded as a case of necessity. That this is the correct view is placed beyond doubt by clause (c) added to section 626 by the Amendment Act VII of 1888, s. 59. We concur in the view taken in *Karoo Singh v. Deo Narain Singh*(1) and *Fazel Biswas v. Jamadar Sheik*(2) and we are not prepared to follow the decision in *Pancham v. Jhinguri*(3).

We accordingly answer the question referred to us in the affirmative.

This petition coming on for final hearing before Parker and Wilkinson, JJ., the Court delivered the following

JUDGMENT :—The Full Bench having held that the Subordinate Judge had jurisdiction to make the order, we are of opinion that the grounds of his order cannot be supported.

The witnesses were all resident in Tinnevely near the Court house, and some of them, if not all, might have been seen at all events between February 17th and February 23rd—at all events the plaintiff was entitled to the issue of the summons. The fact is that the permanent Subordinate Judge had issued the order and evidence that he considered some *prima facie* ground had been shown, and we think that section 17 of the Small Cause Act is merely directory. The costs were deposited before the review was heard.

We therefore set aside the order and remand the petition for rehearing. The costs will follow the result.

(1) I.L.R., 10 Cal., 80. (2) I.L.R., 13 Cal., 231. (3) I.L.R., 4 All., 210.
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APPELLATE CIVIL.

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

KONDAPPA (PLAINTIFF), APPELLANT,

v.

SUBBA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu law—Revival of a barred debt by the widow of a deceased Hindu.

Although a managing member of a joint Hindu family cannot as such revive a barred debt as against his coparceners, it is competent to the widow of a deceased member of the family, who represents the inheritance for the time being and in whom it is a pious duty to pay her husband's debts, to bind the reversion by a mortgage executed to secure such debts though they were barred at the time of its execution.

When therefore the managing members of an undivided Hindu family, after the death of the widow, sold family property for the purpose of discharging such a mortgage :

Held, that the sale was binding on the coparcenary.

SECOND APPEAL against the decree of R. Sewell, Acting District Judge of Bellary, in appeal suit No. 134 of 1888, confirming the decree of V. Subramanyam, District Munsif of Penukonda, in original suit No. 403 of 1887.

Suit to establish the plaintiff's right to, and to recover possession of, certain land.

The plaintiff and his undivided brothers (deceased) were members of a joint Hindu family. Their grandfather and one Gurumurthi Bhotlu were undivided brothers. Gurumurthi Bhotlu died leaving only a widow Papamma, and the plaintiffs were the reversionary heirs to his estate. In 1877 Papamma executed an usufructuary mortgage of part of his lands to secure a debt (which was then barred by limitation) incurred by him to the defendants; and in 1880 Papamma having died, and the plaintiff's family having succeeded to the estate of Gurumurthi Bhotlu, the elder brother of the plaintiff executed a sale-deed for the purpose of discharging the mortgage. The plaintiff now charged that the sale-deed was void as against him.

* Second Appeal No. 229 of 1889.

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October 16.

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v.
SUBBA.

The District Munsif dismissed the suit, and his decree was upheld on appeal by the District Judge.

The plaintiff preferred this appeal.

Rama Rau for appellant.

Rangacharyar for respondents.

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

JUDGMENT:—The Judge is wrong in holding that the manager of a joint Hindu family can *quâ* manager revive a barred debt as against his coparceners, and his decision is at variance with the Full Bench ruling in *Chinnaya v. Gurunatham*(1). But the decision of the Judge is right, inasmuch as the barred debt was revived, not by the appellant's brother, but by the widow of *Gurumurti Bhotlu*. That a widow is at liberty to pay her husband's debts, although barred by limitation, is recognised by the Bombay High Court in a series of cases *Bhala Nahana v. Parbhu Hari*(2), *Chimnaji Govind Godbole v. Dinkar Dhonde Godbole*(3), *Bhau Babaji v. Gopala Mahipati*(4). The discharge of her husband's debt, whether barred or not, was clearly a pious duty, and she was also the representative of the inheritance for the time being. A mortgage by her would, therefore, clearly bind the reversion by Hindu law, provided it was executed *bond fide*. In the present case the appellant's brothers *bond fide* sold a portion of the property to discharge such a mortgage and to save the rest of the property from litigation, and we concur in holding that the sale was binding on the appellant.

The appeal is dismissed with costs.

(1) I.L.R., 5 Mad., 169.

(3) I.L.R., 11 Bom., 320.

(2) I.L.R., 2 Bom., 67.

(4) I.L.R., 11 Bom., 325.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

RAMANUJAM.*

Opium Act—Act I of 1878, s. 3—License to possess opium—Transport of opium.

One having a license for the possession of opium as a medical practitioner, limited to eight pollums of opium, sent his servant to buy from a licensed dealer at Sholavaram and bring to Madras four pollums of opium; he was convicted of the offence of transporting opium without a license:

Held, the conviction was right.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the finding and sentence of the Presidency Magistrate, Madras, in calendar case No. 17595 of 1889.

Jagarau Pillai and *Nadamuni Chetti* for the accused.

Mr. Grant (the Crown Prosecutor) for the Crown.

The facts of this case appear sufficiently for the purposes of this report from the judgment of the Court.

JUDGMENT.—The facts proved and admitted by the accused are that in June last the accused, who carries on business as a chemist and druggist in Madras under the name of *Le Febour and Co.*, sent his servant, the first prosecution witness, to Sholavaram in the Ponneri Taluk of the Chingleput District, to buy four pollums of opium from one *Sathur Khan*, a licensed vendor of opium. The first witness accordingly went to Sholavaram, purchased the opium, and brought it to accused at Madras. Accused has a license from the Collector, under Rule VI of the rules framed by the local Government under the Act, for the possession of opium as a medical practitioner. The quantity of opium which he may have in his possession under such a license at one time is limited by Rule VI to one seer, equal to eight pollums. The license is not before us; but, assuming it to be in the form given in the

1889.
December 13.

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rules, it does not authorize accused to transport opium, unless such authorization can be implied from the license to possess. Section 3 of the Opium Act I of 1878 absolutely prohibits the transport of opium, which is defined to mean the moving it from one place to another, except in the manner prescribed by the Act, and the only provisions under the Act allowing transport are contained in Rules VIII to XIII, which only apply to licensed importers, farmers, and licensed vendors, under none of which classes does accused come.

By sending his servant to bring opium from Sholavaram to Madras accused was clearly transporting opium within the meaning of the Act. Except under the provisions of Rules VIII to XIII such transport is illegal, and the license he holds does not authorize it expressly or impliedly.

Whether if accused had carried the opium himself the license to possess the opium would necessarily imply a right to transport it with him and so over-ride the prohibition of transport is a question which does not arise in this case and which we need not therefore determine.

The conviction was right and the petition is dismissed.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SINGJEE (PLAINTIFF), APPELLANT,

v.

TIRUVENGADAM AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (Act IV of 1882), ss. 65, 68—Mortgagor and mortgagee—Construction of mortgage—Sale of premises at suit of a prior mortgagee—Right of a second mortgagee to sue the mortgagor personally.

The defendants, having already mortgaged certain land to another, executed a hypothecation bond comprising the same land in favor of the plaintiff to secure a debt due by them to the plaintiff and covenanted therein to pay to him daily the proceeds of certain sales of firewood, of which the plaintiff was to credit part towards the secured debt. The defendants having failed to pay the amount due on the first mortgage, the first mortgagee obtained a decree and brought the land to sale. The plaintiff now brought a suit in the Small Cause Court to recover the amount due on footing of his hypothecation bond :

* Letters Patent Appeal No. 13 of 1888.

Held, that the hypothecation bond contained no personal covenant by the obligors, but that on the construction of ss. 65 and 68 of the Transfer of Property Act the obligors had committed default so as to entitle the obligee to sue them personally under the former section.

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APPEAL under Letters Patent of the High Court, section 15, against the order of Wilkinson, J., made on civil revision petition No. 227 of 1888, setting aside the decree of the Chief Judge of the Court of Small Causes at Madras in suit No. 21478 of 1886.

Suit by the obligee of a hypothecation bond, dated 16th March 1883, against the obligors to recover principal and interest of a debt which was secured thereby. The operative part of the hypothecation bond was as follows :—

“The amount in cash that we have this day received on account of our exigency, having hypothecated the properties mentioned below, is Rs. 1,200; in words, Rs. one thousand and two hundred. Since we have received these Rs. 1,200 we will pay away to you from this date the rupees arising from sale every day in the firewood depôt mentioned below; of this, if any money is required for railway fare expense, &c., and for getting fuel, you should give (us) out of the money that we give each day, and out of the money that we give you arising from the sale each day, you will deduct 2 per cent. for commission and Rs. 100 per mensem towards payment of the principal amount, and pay us the remaining amount. We will settle account in this manner every month. If we do not give the sale-proceeds according to the terms mentioned above, and if we fail to give according to the kist (fixed time), you or those who receive your order should collect, on the properties secured in Madras itself, commission at Rs. 20 per mensem and the balance of total arrears of the principal (money).”

The land comprised in this instrument was subject to a prior instrument of mortgage executed in favor of K. Guruvappa Chetti and dated 8th December 1882: and it appeared that before the present suit it had been sold at the suit of the first mortgagee. The Chief Judge accordingly held under section 68 of the Transfer of Property Act that the plaintiff was entitled to recover the amount sued for from the defendants personally and passed a decree as prayed.

The defendants presented civil revision petition No. 227 of 27

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1888 praying the High Court to revise this decree. This petition came on for hearing before *Wilkinson, J.*, who delivered judgment as follows:—

"It is contended that the Small Cause Court had no jurisdiction, as there was no personal obligation to pay the mortgage amount. The bond sued on certainly gives no personal remedy against the defendants, but provides that in case of default of payment in a certain way, the mortgagee shall collect the money on the properties secured. But the learned Judge of the Small Cause Court held that, under section 68 of the Transfer of Property Act, plaintiff was entitled to sue, because the property hypothecated had been sold at the suit of the first mortgagee. I do not comprehend how section 68 applies to the case. The mortgagee has not been deprived of his security by or in consequence of the wrongful act or default of the mortgagor. It is, it is true, argued here that as the mortgagor made default in discharging the first mortgage, clause (b) applies. I do not think the word default is used there in the sense contended for, but looking at section 65 (c), I should hold that a mortgagor made default where he failed to pay public charges accruing due in respect of the property. We do not know what the terms of the first mortgage were, nor whether there was any so-called default on the part of the mortgagor as is alleged. The decree of the Small Cause Court was therefore *ultra vires* and must be set aside with costs."

The plaintiff preferred this appeal against the order of *Wilkinson, J.*

Mr. Gantz for appellant.

Rama Rau for respondents.

JUDGMENT.—Two questions are raised in this petition:—first, it is said that there is in the hypothecation bond sued on a covenant to pay, on which the plaintiff is entitled to sue the defendants personally. By the bond it is stipulated that the debtor should pay to the obligee every day the proceeds of sales of firewood and that the latter should retain in his hands, out of the amount so paid, 2 per cent. commission and Rs. 100 towards the debt, repaying the balance to the obligor. In default of such payment there is a stipulation that the obligee may collect the money due from the hypothecated property. In our opinion there is clearly no covenant to pay out of the general assets of the obligor, and

therefore the plaintiff cannot recover from the defendants on that footing. On this point the learned Judge is right.

Then it is said that there has been default on the mortgagor's part within the meaning of clause (b), section 68 of the Transfer of Property Act. The alleged default is the non-payment of the amount due on the first mortgage which led to the sale of the mortgaged property. And in this connection our attention is drawn to clause (c), section 65:—"and where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will, at the proper time, discharge the principal money due on such prior incumbrance." In the absence of an express contract to the contrary, this clause would certainly be an authority for implying a contract on the part of the mortgagor in favor of the second mortgagee to pay the first mortgage debt on its becoming due, and a breach of a covenant, whether express or implied, would equally be a default within the meaning of clause (b) of section 68. The conclusion arrived at by the Small Cause Court is therefore right. We must set aside the order of the learned Judge and restore the decree of the Small Cause Court.

The revision petition is dismissed with costs including the costs of this appeal.

APPELLATE CIVIL.

Before *Mr. Justice Muttusami Ayyar* and *Mr. Justice Handley*.

KANDASAMI (DEFENDANT No. 3), APPELLANT,

v.

AKKAMMAL AND OTHERS (DEFENDANT No. 2 AND PLAINTIFFS Nos. 1 AND 2), RESPONDENTS.*

Specific Relief Act—Act I of 1877, s. 42—Declaratory decree—Suit by reversioner.

The intervention of two life estates does not preclude the reversioner from obtaining a declaration of his interest as to land under Specific Relief Act, s. 42.

SECOND APPEAL against the decree of *G. D. Irvine*, Acting District Judge of Coimbatore, in appeal suit No. 48 of 1888, confirming

* Second Appeal No. 88 of 1889.

SINGJEE
v.
TIRUVEN-
GADAM.

1889.
Sept. 30.

KANDASAMI
v.
AKKAMMAL. the decree of T. Dorasami Pillai, District Munsif of Erode, in original suit No. 444 of 1884.

The plaintiffs sued as the brothers of one Gopal Chetty, deceased, (the husband of defendant No. 2, and the father of the deceased husband of defendant No. 1,) for a declaration that certain alienations of the property of their late husband, made by defendants Nos. 1 and 2, respectively, in favor of defendant No. 3, were invalid as against the plaintiffs' reversionary interest.

Defendants Nos. 1 and 2 were *ex parte* throughout. The District Munsif passed a decree as prayed, which was affirmed on appeal by the District Judge.

Defendant No. 3 preferred this second appeal.

Mr. Subramanyam and Mr. DeRozario for appellant.

Rama Rau for respondents.

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

JUDGMENT.—It is urged that the District Judge was in error in holding that the suit was maintainable under section 42 of the Specific Relief Act. The last male owner was one Sanjivi Chetty, the first defendant is his widow, and the second his mother. As the half-brothers of Sanjivi Chetty's father and the next male reversioners, the plaintiffs brought this suit to set aside a mortgage executed by the first defendant in favor of the third defendant. Under section 42 of the Specific Relief Act, illustration (c), it is clear that, where there is an alienation by a Hindu widow to the prejudice of the male reversioner, he is entitled to maintain a suit for a declaration that the alienation is not binding upon the reversion. It was also held by the Judicial Committee in *Rani Anand Kunwar v. The Court of Wards*(1) that as between the presumptive reversionary heir and a more remote reversioner the latter was not entitled to maintain a suit for a declaratory decree, unless he showed collusion between the former and the widow. The question for decision in this appeal is whether the relation between the second defendant and the plaintiff is that of the nearer and the more remote reversioners within the meaning of the Privy Council decision. The second defendant has only a widow's estate, which under the Mitakshara law is a qualified heritage and

(1) I.L.R., 6 Cal., 764.

an estate interposed between the last male owner and the next full owner. We are of opinion that the Judge was right in holding that the intervention of two life estates does not alter the nature of the reversionary interest, which section 42 was intended to protect. His view is in accordance with the observations made by this Court in *Narayana v. Chengalamma*(1) and by the Privy Council in *Anant Bahadur Sing v. Thakurain Raghunath Koar*(2). Another objection urged upon us is that the alienation made by the first in favor of the third defendant is binding on the reversion. Both the Courts below find that the appellant, who dealt with a Hindu widow and was therefore bound to show affirmatively the legal necessity which made the alienation by her binding on the reversioners, has failed to establish such necessity. The question whether there was such legal necessity is one of fact, and we are concluded by the concurrent findings of both the Courts below.

This second appeal fails and we dismiss it with costs.

APPELLATE CIVIL.

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

BERESFORD (DEFENDANT), APPELLANT,

v.

RAMASUBBA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Impartible zamindari—Right of zamindar to alienate—Civil Procedure Code, ss. 437, 464—Regulation V of 1804 (Madras), ss. 2, 8—Suit by a ward of the Court of Wards—Non-joinder and misjoinder of parties.

The holder of an impartible zamindari, governed by the law of primogeniture, having a son, executed a mining lease of part of the zamindari for a period of twenty years, by which no benefit was to accrue to the grantor unless mining operations were carried on with success, and the commencement of mining operations was left optional with the lessee. On the death of the grantor, his operations was left optional with the lessee. On the death of the grantor, his minor son and successor, by the Collector of the district as his next friend, (authorized in that behalf by the Court of Wards,) now sued the assignee of the lease to have the lease set aside. The second plaintiff was the grantee from the Court of Wards (acting on behalf of the minor zamindar) of certain mining

(1) I.L.R., 10 Mad., 1.

(2) L.R., 9 I.A., 53.

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rights on the same land. The defendant had executed a declaration of trust in respect of his interest in favor of certain persons who were not joined :

Held—

(1) per *Parker, J.*, that the first plaintiff could sue by the Collector of North Arcot as his next friend, since the Court of Wards had authorized the latter to conduct the suit :

(2) per *Muttusami Ayyar and Wilkinson, JJ.* (affirming the judgment of *Parker, J.*) (1) that the interests of the first and second plaintiffs not being inconsistent with each other, the suit was not bad for misjoinder ; (2) that the defendant's interests not having been shown to be hostile to those of the persons entitled under the declaration of trust, the suit was not bad for non-joinder ; (3) that the lease was not one which a managing member of an ordinary joint family governed by Mitakshara law could providently enter into :

(3) per *Muttusami Ayyar and Wilkinson, JJ.* (reversing the judgment of *Parker, J.*) that in the absence of evidence of any family custom rendering the zamindari inalienable by the zamindar for the time being for purposes other than those warranted by the Mitakshara law, the lease was not invalid as against the plaintiffs. *Sartaj Kuari v. Deoraj Kuari* (I.L.R., 10 All., 272) discussed and followed.

APPEAL against the decree of *Parker, J.*, (sitting on the Original Side of the High Court) in civil suit No. 2 of 1889.

This was a suit by the minor zamindar of Kangundi by his next friend the Collector of North Arcot, appointed as such by the Court of Wards under Madras Regulation V of 1804, to set aside an instrument, dated 18th April 1876, and executed by the late zamindar of Kangundi, the father of the plaintiff, to one Saravana Muttu Pillai, deceased, whereby the exclusive right of mining in part of the zamindari was conveyed to the latter, on the ground that the instrument was not binding on the son and successor of the grantor. The second plaintiff was joined on the ground that the Court of Wards having repudiated on behalf of the first plaintiff, the instrument above referred to, had purported to grant to him an exclusive license to search for gold and other metals in the Kangundi zamindari. The defendant was the assignee of the rights of Saravana Muttu Pillai under the instrument of 18th April 1876, of which he (the defendant) had since executed a declaration of trust, exhibit I, in favor of certain other persons who were not joined as parties to the suit.

It was admitted that the Kangundi zamindari was impartible and was governed by the law of primogeniture. And it appeared that the grantor of the lease sought to be set aside died on 17th February 1883 leaving two sons, of whom the first plaintiff, who was born about 1869, was the eldest. The instrument of the 18th April 1876 was filed as exhibit A.

Mr. *Shaw* for defendant objected at the hearing that, under the terms of section 464 of the Code of Civil Procedure, the first plaintiff could not sue by the Collector of North Arcot as his next friend.

With regard to this objection the learned Judge said in delivering judgment:—"I overruled that objection as it appeared to me that the effect of that section is merely to prevent any person other than some agent acting under the authority of the Court of Wards from being admitted as next friend to a minor whose estate has been taken under the management of the Court. In the plaint as first presented the manager appointed under section 8, Regulation V of 1804, was entered as the next friend of the minor first plaintiff. That manager was subsequently dismissed, and the Court authorized the Collector of North Arcot to conduct the suit. There is nothing in the Regulation to restrict the duty to the managers appointed under section 8; the Collector is *ex-officio* agent of the Court, and the direction would be perfectly legal under section 2. The objection is merely formal, and in a similar case the Privy Council refused to hear such an objection. *Baboo Hurdey Narain Sahu v. Pundit Baboo Rooder Perkash Misser*(1)."

The Advocate-General (Hon. Mr. *Spring Branson*) and Mr. *Michell* for the plaintiffs argued that the lease of 18th April 1876 was improvident and was invalid as against the first plaintiff, who was already born at the date of its execution.

Mr. *Shaw* objected further to the frame of the suit on the grounds that the second plaintiff had no right to sue jointly with the first plaintiff, that the beneficiaries under the declaration of trust executed by the defendant should have been joined, and argued that the lease sought to be set aside was not invalid as against the first defendant.

Upon the question of the validity of the lease *Parker, J.*, delivered judgment as follows:—

"The real question in the suit is whether the lease granted by the late zamindar is binding on the estate in the hands of his successor, and I am of opinion that it is not. Though the estate is an impartible zamindari, there are still rights of survivorship, *Gavuridevanamma Garu v. Ramandora Garu*(2), and *Naraganti*

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

(2) 6 M.H.C.B., 93.

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RAMASUBBA. *Achamma Garu v. Venkatachalapati Nayanicar*(1). The learned Advocate-General does not contend that the lease is invalid merely because it is a long lease running beyond the life-time of the grantor, for the validity of such leases if made for proper purposes beneficial to the family is well recognized. See *Mana Vikraman v. Sundaran Pattar*(2). But he contends that the lease was prejudicial to the interests of the family and altogether beyond the scope of the authority of the zamindar for the time being. Mr. Shaw, on the other hand, contends that the test is not whether the lease has turned out beneficially, but whether, having regard to the circumstances of the country at the time at which it was granted, it might be viewed as not at that time detrimental.

"It is further urged that the royalties agreed to be paid by Mr. Lonsdale (the second plaintiff) are similar to the terms to which defendant has agreed, and that nothing is to be gained by substituting one lessee for another.

"Not only was exhibit A granted without consideration for a term of twenty years, but there are no provisions in the document requiring the lessee to work either within a given time or at all, nor are there any provisions for the cancellation of the lease in case the concession is not worked. This is what has actually occurred. It is stated in the plaint, and the allegation is not traversed that nothing whatever has been done by the lessee; nor is he bound to do anything; and the consequence is that the successors of the grantor might be obliged to wait till 1896 before they could derive any profits from gold mining on the estate if from want of capital or want of will, the defendant neglected to utilize his concession. And this without any consideration whatever. A mere one-sided agreement it is impossible to imagine, and even judged by the test proposed by the learned counsel for the defendant the lease could not be upheld.

"There will be a decree for plaintiffs with costs declaring the lease void and for its cancellation."

The defendant preferred this appeal against the decree of Parker, J.

Mr. K. Brown for appellant.

The Advocate-General (Hon. Mr. Spring Branson) and Mr. Kernan for respondents.

(1) I.L.R., 4 Mad., 280.

(2) I.L.R., 4 Mad., 148.

The arguments adduced on this appeal appear sufficiently for the purposes of this report from the following judgments.

MUTTUSAMI AYYAR, J.—The first respondent is the minor zamindar of Kangundi in the district of North Arcot and the appellant is the assignee of a mining lease which was granted by the late zamindar on 18th April 1876 to one Saravana Muthu Pillai and by him transferred on 16th October 1876 to Major-General Beresford and Mr. Alexander Mackenzie. Mr. Mackenzie transferred his interest on 21st July 1877 to General Beresford, who, on 8th December 1881, executed a declaration of trust in favor of certain persons in trust for whom he agreed to hold certain shares in the lease. The late zamindar died on 17th February 1883 and the zamindari, which is an impartible estate, devolved by custom on his eldest son, the first respondent, by right of primogeniture. As he was a minor, the Court of Wards took the estate under its management on 11th April 1883; thereupon, the appellant inquired on 7th April 1886 if the Court would renew the lease for a further period of ten or twenty years. The Court of Wards repudiated the lease on 7th May 1886, but offered to consider any proposals which might be made on terms similar to those made in connection with mining leases granted by the Government. No such proposals being made, they granted a lease to the second respondent for two years to search for gold and other metals in a portion of the zamindari on 25th February 1887. The minor zamindar and the lessee of 1887 brought this suit to have it declared that the lease granted in 1876 by the late zamindar was null and void as against them. The plaint stated that the zamindari was the lessor's ancestral property, that he had two undivided sons living at the date of the lease aged seven and five years respectively, and that the lease granted by him in 1876 was invalid under the Mitakshara law as against his sons. The learned Judge in the Court below decreed the claim and considered the lease to be improvident and in excess of the late zamindar's authority as the zamindar for the time being of an impartible ancestral estate belonging to a joint Hindu family governed by the Mitakshara law. The first question argued in support of this appeal is whether the parties named in exhibit I as beneficiaries ought to have been made defendants. The learned Judge below held that there was no privity of contract between them and the minor zamindar, and that they were not necessary

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parties to the suit. In this conclusion I concur. Exhibit I only declares a trust and constitutes the relation of *cestuique trust* and trustee between the beneficiaries mentioned in it and Major-General Beresford. It is provided by section 437 of the Code of Civil Procedure that in all suits concerning property vested in a trustee, the trustee shall represent the persons beneficially interested in such property, and it shall not ordinarily be necessary to make such persons parties to the suit. But the Court may, if it think fit, order them or any of them to be made such parties. The last clause is taken from 15 & 16 Vic., cap. 86, section 42, rule 9, and beneficiaries are made parties in England when the trustee is either wholly uninterested or has an interest adverse to their interest—*Clegg v. Rowland*(1), *Payne v. Parker*(2). In the case before us, the appellant filed no written statement, nor are we referred to any averment or evidence to the effect that the appellant's interest was hostile to that of the beneficiaries. I do not consider that this contention as to non-joinder can be supported.

The next question is whether the second plaintiff was properly allowed to intervene as a co-plaintiff. It is not denied that he has an interest in the subject-matter of the suit to the extent mentioned by the learned Judge, and such interest could not take effect if the lease sought to be set aside were valid. It is not necessary that the interests of co-plaintiffs should be co-extensive, but it is sufficient if they are not inconsistent with each other. On this point also the decision appealed against is right.

Passing on to the merits, the substantial question for decision is whether the mining lease evidenced by exhibit A is binding on the minor zamindar. It was executed by his late father and purports to grant mining rights over a portion of the Kangundi zamindar for a period of twenty years. But it is so framed that no benefit could accrue from it to the lessor unless and until the lessee commenced mining operations, and there is no provision whereby the former can insist upon the latter commencing those operations at any time within that period. It was practically left to the arbitrary discretion of the lessee either to commence work or not, and the result is that nothing has been done by the lessee, though the lease was granted in 1876. The learned Judge is, therefore, well founded in holding that the transaction is not

one which the manager of a joint Hindu family acting with ordinary care and prudence in the exercise of his qualified power of dealing with family property should conclude.

It is urged for the appellant that there was no improvidence in securing the benefit of English capital and appliances without which no mining operations could ordinarily be carried on in India. But it must be observed that the learned Judge did not take exception to granting a mining lease for that purpose, but objected to the particular transaction evidenced by document A, which was not calculated to secure the benefit suggested for the appellant within a reasonable time and has in the result failed to do so for upwards of ten years. I cannot say that the learned Judge was not warranted in finding that the transaction was not for the benefit of the joint family. His opinion is in accordance with the course of decisions in this presidency as to the disposing power of the owner for the time being of an impartible estate.

The law hitherto administered in this presidency was explained by this Court as follows in *Naraganti Achammagaru v. Venkatachalapati Nayanicar*(1):—"Where property is held in co-parcenary by a joint Hindu family, there are ordinarily three rights vested in co-parceners—the right of joint enjoyment, the right to call for partition, and the right of survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment and the right of partition, as the right of an undivided co-parcener, are, from the nature of the property, incapable of existence. But there being nothing in the nature of the property inconsistent with the right of survivorship, it may be presumed that that right remains. The right to call for partition altogether disappears—the right of joint enjoyment is superseded by a right of successive enjoyment. . . . Where from the nature of the property possession is left with one co-parcener, the others are not divested of co-ownership. Their necessary exclusion from possession imposes on the co-owner in possession two obligations to his co-parceners in virtue of their co-ownership—the obligation to provide them with maintenance and the obligation to preserve the *corpus* of the estate." The Court then referred to the decision of the Privy Council in *Katama Natchiar v. The Rajah of Shiva-gunga*(2), where their Lordships declared that, in the absence of

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(1) L.R., 3 Eq., 368.

(2) L.R., 1 Ch. App., 327.

(1) I.L.R., 4 Mad., 266.

(2) 9 M.I.A., 543.

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Again, in *Gavuri Devamma Garu v. Raman Dora Garu*(1) decided in 1867, this Court observed:—"Such usage (viz., of impartibility) does not interfere with the general rules of succession further than to vest the possession and enjoyment of the *corpus* of the whole of the estate in a single member subject to the legal incidents attached to it as the heritage of an undivided family." It was also considered then that the decision was in accordance with the observations of the Privy Council on the subject. Thus, the principle which has hitherto guided the Courts in this presidency as supported by the observations of the Judicial Committee has been this—that when an estate is shown to be impartible by custom, the general law is superseded only to the extent of excluding the right of partition and of joint enjoyment, and the Mitakshara law governs the disposing power of the co-parcener in sole possession over the *corpus* of the estate. But this view of the law was overruled by the Privy Council in the case of *Sartaj Kuari v. Deoraj Kuari*(2). There, the High Court at Allahabad held that unless alienability was shown to be sanctioned by custom, the general Mitakshara law restricted the power of alienation possessed by the co-parcener in sole possession of an impartible raj. Their Lordships of the Privy Council held that the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, that the inalienability of the estate depends upon custom which must be proved or it may be in some cases, upon the nature of the tenure. The grounds of their decision are (i) that the son's right by birth under the Mitakshara is so connected with the right to demand partition of the estate that it does not exist independently of the latter right; (ii) that when there

(1) 6 M.H.C.R., 93.

(2) I.L.R., 10 All., 272.

is no right to demand partition and when the estate descends by custom to the eldest son by primogeniture, as if the property were held in severalty, that mode of succession cannot be reconciled with joint ownership which under the general law is the cause of the restraint on alienation; and (iii) that inalienability is not to be inferred as a matter of law from impartibility, but that it may be specially proved by custom. The Judicial Committee considered also the observations of the same tribunal in the *Shivagunga case*(1) and in the *Naraganti Paleiyam case*(2) on which the course of decisions in this presidency was founded, and in other cases, and further adverted to the right of the junior members of the family to be maintained out of the estate and their right of succession. Their Lordships observed that though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it, which under the Mitakshara law is created by birth, does not exist, and that in all the previous cases the question was as to the right of succession to the property on the death of the raja or zamindar, and that it was held that for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family. Referring to the remark of the Judicial Committee in the *Shivagunga case*, that though the zamindari was impartible, it was part of the common family property, they observed that it must be understood with reference to the question which was then before their Lordships. The decision of the Privy Council in the Allahabad case followed the decision of the same tribunal in *Raja Udaya Aditya Deb v. Jadab Lal Aditya Deb*(3) which was decided in 1881. We are concluded by the authority of the Privy Council, and the lease in dispute cannot be set aside on the ground that under the general Mitakshara law it is not binding on the first respondent. The Privy Council decision, however, does not operate to render alienable an impartible estate inalienable by custom or by the nature of its tenure, but it is an authority only to the extent that inalienability is not to be inferred as a matter of general Mitakshara law from impartibility. I am of opinion that before disposing of this appeal we must ask the Court below to try the question:—

Whether by family custom the Kangundi zamindari is inalien-

(1) 9 M.I.A., 543.

(2) I.L.R., 4 Mad., 266.

(3) I.L.R., 8 Cal., 199.

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able by the zamindar for the time being for purposes other than those warranted by the Mitakshara law.

Both parties are at liberty to adduce fresh evidence, and the finding will be returned within three months from date of the receipt of this order, and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

WILKINSON, J.—The facts of this case are sufficiently set forth in the judgment of the learned Judge. Two objections have been taken to his decision: First, it is argued that all the persons mentioned in the fifth issue should have been made defendants and that the suit is bad for non-joinder of parties; secondly, it is contended that plaintiff not having proved that by law or family custom the late zamindar had not power to alienate, he could not impeach the alienation.

With reference to the first objection, the case is governed by the provisions of section 437 of the Civil Procedure Code. On the 8th December 1881 the defendant executed a declaration of trust on behalf of certain persons, who were declared to be partners and co-owners with him in the rights, benefits, and privileges of the lease. The deed set forth that the defendants held such lease with all rights, benefits, and privileges granted thereby on behalf of himself and as trustee for the several persons who were partners with him, and he covenanted at any future time at the request and costs of the said persons to convey and assign their respective shares to them. The contention in the present case being between the persons beneficially interested and a third person, the trustee sufficiently represented all the persons interested. It appears from the English cases that all the beneficiaries are necessary parties only where the trustee is wholly uninterested or has an interest adverse to the beneficiaries (*Clegg v. Rowland*(1), *Payne v. Parker*(2)). It has been held that where a trustee seeks to redeem, or in cases for partition or for sale and partition the trustee sufficiently represents the beneficiaries for the purpose of the suit. In the present case the defendant is not a bare trustee, but a co-owner and partner, and holds the lease as such and as trustee for his partners.

In support of his second contention, the learned counsel for the appellant relies upon two Privy Council cases reported at *Sartaj Kuari v. Deoraj Kuari*(3), and *Raja Udaya Aditya Deb v.*

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Jadab Lal Aditya Deb(1). In both these cases the suit was instituted to set aside a permanent alienation made by the holder for the time being of an impartible zamindari, and it was held that unless it is shown that there is some custom which would prevent the operation of the general law empowering alienation, proof of custom that the estate descended to the eldest son is not sufficient to invalidate the alienation.

In the Allahabad case the question was as to the validity of the gift of certain villages forming part of the hereditary and impartible estate in favor of a younger wife, and it was disputed by the raja's eldest son. The raja in his defence alleged a right to make any transfer and set up transfers of every description from of old. The High Court decided against the alienation, finding against the fact and custom of alienations set up by defendant. Their Lordships of the Privy Council reversed that decision on the ground that inalienability depends upon custom which must be proved, or it may be in some cases upon the nature of the tenure. They pointed out that if there were no family custom of impartibility, the raja's power over the estate would be governed by the law of the Mitakshara, which renders the father subject to the control of his sons in regard to the immoveable estate, and that the gift would have been void. They went on to say that the property in the paternal or ancestral estate acquired by birth under the Mitakshara is so connected with the right to partition that it does not exist where there is no right to partition. They quoted with approval two Calcutta cases, *Thakoor Kapilnauth Sahai Deo v. The Government*(2) and *Raja Udaya Aditya Deb v. Jadab Lal Aditya Deb*(1), in which it was held that it was necessary for the plaintiff, who alleged that the descent of the estate was governed by Mitakshara law, and that by the usage and custom of the family the estate was impartible and descendible according to the law of primogeniture on the male heirs of the original grantee, to show that there was some custom which would prevent the operation of the general law empowering alienation. The decision was given in 1888. The other Privy Council decision was in 1881. It was there held that the owner of an estate which descends as an impartible inheritance is not by reason of its impartibility restricted to making grants or gifts enuring only for his own life,

(1) L.R., 3 Eq., 368. (2) L.R., 1 Ch. App., 327. (3) I.L.R., 10 All., 272.

(1) I.L.R., 8 Cal., 199.

(2) 13 B.L.R., 445.

BRETFORD and that the question of inalienability was one depending upon family custom, which would require to be proved.

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These decisions are in direct conflict with the principle upon which the whole series of decisions in this presidency as to the right of a zamindar to alienate depends. It has been invariably held that acts and alienations by the holder of an impartible zamindari made to endure beyond his life-time will, if otherwise than *bona fide*, and if prejudicial to the family, be set aside. The grounds on which the decisions have proceeded are that the zamindar, though absolute owner, has only a life interest; that he is the manager of the family for the time being; that his co-parceners have rights of survivorship to the possession of the whole estate; and that the law of the Mitakshara by which each son has by birth a property in the ancestral estate, though it cannot apply so as to enable them to insist on partition, at least applies so far as to enable them to claim maintenance. But we are bound by the decisions of the Privy Council, and must hold that the alienation complained of in this suit must be upheld, unless the plaintiff can make out that there exists some family custom in restraint of alienation.

I agree to the issue proposed by my learned colleague.

[Upon the issue remanded for trial, Parker, J., returned a finding that no family custom to the effect described was proved to exist.

This appeal having thereupon come on for re-hearing their Lordships allowed the appeal and dismissed the suit with costs throughout.]

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

OHANDU AND ANOTHER (DEFENDANTS NOS. 2 AND 3),
APPELLANTS,

v.

SUBBA AND ANOTHER (PLAINTIFF AND DEFENDANT NO. 1),
RESPONDENTS.*

Aliyasantana Law—Qualification of ejaman—Leprosy.

The last female member of an Aliyasantana family made an adoption without the consent of her son, who was suffering from ulcerous leprosy, which was not congenital:

Held, the son was entitled to have the adoption set aside.

SECOND APPEAL against the decree of the District Judge of South Canara in appeal suit No. 114 of 1887, affirming the decree of the District Munsif of Karkal in original suit No. 3 of 1886.

The parties to this suit were governed by the Aliyasantana law. Defendant No. 1 was the mother of the plaintiff and had adopted defendant No. 2 and executed a karar in her favour without the consent of the plaintiff, who was a leper. Defendant No. 3 was the natural mother and guardian *ad litem* of defendant No. 2. The plaintiff now sued to set aside the adoption and the karar.

The District Munsif passed a decree in favour of the plaintiff, and his decree was affirmed on appeal by the District Judge.

Defendants Nos. 2 and 3 preferred this second appeal.

This second appeal having come on for hearing before Kernan and Shephard, JJ., their Lordships made an order directing the trial of (1) an issue as to the truth of a genealogical tree of the family, filed with reference to an allegation in the plaint that there were four male and three female members of the plaintiff's family besides himself and defendant No. 1, and (2) an issue as to the form of leprosy with which the plaintiff was afflicted.

Upon the above issues, the District Judge returned findings as follows:—(1) that the plaintiff had failed to prove the allegation above referred to, and (2) that the leprosy was not congenital, and

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that while the two types of leprosy are often mixed and both result in ulcers, in the present case the ulcerous (non-tubercular) type seemed predominant.

This second appeal then came on for re-hearing before Muttusami Ayyar and Shephard, JJ.

Narayana Rau for appellants.

Ramachandra Rau Sahab and *Subba Rau* for respondents.

JUDGMENT.—The finding on the two issues, remanded for trial which we accept, makes it necessary to decide the question whether the plaintiff's leprosy deprives him of his right to question the adoption made by his mother, the defendant. That the plaintiff as son of the defendant would, but for his disease, have, under the Aliyasantana system, the right claimed by him there can be no doubt. It was held by the late Sudder Court in *Cotay Hegaday v. Manjoo Kumpty*(1) that the last female member of an Aliyasantana family having a son cannot, without his consent, make a valid adoption. In the present case it is found as a fact that there is no custom in South Canara excluding lepers either from management or from inheritance. But it is argued that, apart from custom, a leper is disqualified under the Aliyasantana system in the same way as he is under Hindu law. The appellants' vakil, being unable to refer to any distinct authority in support of the position, argues that in the nature of things a leper is not a fit person to act as ejaman, and cites a Malabar case in which a blind man was considered unfit to hold the office of karnavan—*Kanaran v. Kunyan*(2). We do not think it was intended to lay down as a matter of general law that blindness is always a disqualification for karnavanship. But apart from that, we are unable to see why a physical infirmity which unfits a man to be karnavan should further deprive him of other rights attached to the status which he enjoys in the family. The question is one of Aliyasantana usage, and in the absence of any authority warranting the adoption by the first defendant during the plaintiff's life time, we are not at liberty to sever from his status one of its legal incidents, viz., the right to bar an adoption by his mother. The Hindu law cannot be extended to the Aliyasantana usage by analogy, especially as it rests on special conventional grounds so far as it relates to disqualified heirs. It must also be observed that

(1) Sudder Decisions, 1869, p. 138.

(2) I.L.R., 12 Mad., 307.

the leprosy in the case before us was not congenital, and even if the Hindu law could be extended to the case, it is not applicable on the facts found.

We do not consider that the appeal can be supported, and must, therefore, dismiss it with costs.

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APPELLATE CIVIL.

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

SANKUMANI (PLAINTIFF), APPELLANT,

v.

IKORAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Jurisdiction by consent—Waiver of want of jurisdiction—Civil Procedure Code, s. 25, order made under, without notice to the party not applying.

A suit for land was filed in 1883 in the Subordinate Court of Cochin. In 1884 the Government, by a notification under Act III of 1874, transferred the district where the land was situated from the jurisdiction of that Court to that of the Subordinate Court of Calicut, whereupon the plaintiff applied to the District Court to transfer the case to the file of the first-mentioned Court under s. 25 of the Code of Civil Procedure. The District Judge granted the application without notice to the defendants. The defendants went to trial, and also preferred an appeal against the decree, which was passed in favour of the plaintiff, without objection to the jurisdiction of the Court.

In execution of the above decree, (which was affirmed on appeal) the plaintiff was obstructed. He, therefore, filed the present suit against the obstructors under the provisions of s. 331 of the Code of Civil Procedure, and they pleaded that the decree sought to be executed had been passed without jurisdiction:

Held, (1) that the want of notice to the defendants of the application made under s. 25 of the Code of Civil Procedure was immaterial;

(2) that the defect, if any, of the jurisdiction of the Court passing the decree had been waived by the defendants, and that the present defendants were precluded from availing themselves of it.

APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 259 of 1888, reversing the decree of E. K. Krishnan, Subordinate Judge of Calicut, in original suit No. 24 of 1887.

The plaintiff obtained a decree for possession of certain land

* Second Appeal No. 468 of 1889.

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in original suit No. 25 of 1883 on the file of the Subordinate Court of Cochin. The decree was dated 12th March 1884.

The execution of this decree was resisted as regards part of the land by the present defendants, against whom he accordingly filed this suit under the provisions of section 331 of the Code of Civil Procedure.

The defendants pleaded, *inter alia*, that the Subordinate Court of Cochin had no jurisdiction to pass the decree sought to be executed by reason of a notification of Government, Judicial Department, No. 40, published in *Fort St. George Gazette* of 2nd February 1884, whereby the Governor in Council notified under Act III of 1873, ss. 4 and 10, that the Court of the Subordinate Judge at Cochin had, from 11th January 1884, ceased to exercise jurisdiction, and that the Subordinate Judge at Calicut had, from the same date, been invested with jurisdiction over the seven Manaprom amshoms in which the land in question in original suit No. 25 of 1883 and in the present suit was situated.

On the other hand it was argued that exhibit T, which was an order made by the District Judge of South Malabar on miscellaneous petition No. 93 of 1884, gave jurisdiction to the Subordinate Court at Cochin. That petition was presented by the plaintiff, and prayed that the District Judge should issue an order to the Subordinate Judge at Cochin to hear and determine original suit No. 25 of 1883 himself and not transfer it to the Subordinate Court at Calicut. The order of the District Judge on this petition, which was made without notice to the defendants, was as follows:—"Under section 25 of the Code of Civil Procedure, original suit No. 25 of 1883 is transferred for disposal to Subordinate Court, Cochin." It appeared that the suit was defended in the Subordinate Court at Cochin and an appeal preferred against the decree of that Court without objection taken as to jurisdiction.

The present suit was dismissed by the District Munsif on the ground that the decree sought to be executed had been passed without jurisdiction, and his decree was affirmed on appeal by the District Judge.

The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Sankaran Nayar for respondents.

JUDGMENT.—We are unable to concur with the opinion of the Courts below that the decree of the Cochin Subordinate Court in

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original suit No. 25 of 1883 is bad in law. The notice prescribed by section 25 of the Civil Procedure Code is intended for the benefit of the party in the suit other than the party applying for transfer, and defendants in the above suit would have been entitled to object to the transfer on the ground that notice had not been given. But admittedly they by their conduct in going to trial submitted to the jurisdiction, and not only suffered the Cochin Court to pass a decree against them, but also appealed from that decree without taking any objection to the jurisdiction of the Court. The only question, therefore, is whether they were at liberty to waive their objection to the validity of the order by which the Cochin Subordinate Court acquired jurisdiction. In *Ledgard v. Bull*(1) and *Minakshi v. Subramanya*(2), the Privy Council have pointed out that in cases in which a Court has no inherent jurisdiction, waiver will not confer jurisdiction; but in cases in which a Court has jurisdiction, but there has been some irregularity in the initial proceedings upon which it exercised jurisdiction, the defect is one which can be cured by waiver, though it may be made a valid ground of objection to the exercise of jurisdiction. It must not be overlooked that under section 25 the District Court can of its own motion transfer, and the provision, therefore, as to notice is one in the nature of procedure and practice as observed in *Park Gate Iron Company v. Coates*(3) with reference to 13 and 14 Viet. Cap. 61, sect. 14, and in *Graham v. Ingleby*(4) with reference to 4 Ann. Cap. 16, sect. 11. It is, therefore, clear that as the objection was not taken by the parties in the suit, but on the contrary waived, any defect in the order conferring jurisdiction on the Cochin Court must be held to have been cured. We have also to observe that both the Lower Courts have omitted to consider that the notification of Government transferring jurisdiction over the Manaprom amshoms was dated 2nd February 1884, whereas the suit was filed in 1883. At the time, therefore, of the notification the Cochin Court had jurisdiction to decide original suit No. 25 of 1883, and such jurisdiction was apparently not taken away as regards pending suits by the notification of Government. The order of Government transferring jurisdiction is not before us, and in its absence we do not desire to

(1) L.R., 13 I.A., 134.
(3) L.R., 6 C.P., 634.

(2) I.L.R., 11 Mad., 26.
(4) 1 Ex., 651.

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express any opinion as to whether the jurisdiction in pending suits was validly taken away. Nor do we think that the present defendants, who were no parties to the decree in original suit No. 25 of 1883, and as between whom and the plaintiff the execution creditor in the Cochin Subordinate Court, the Calicut Subordinate Court has jurisdiction, are entitled to rely on the provisions of section 25 of which the defendants in original suit No. 25 of 1883 did not avail themselves and thereby call in question the jurisdiction of the Cochin Subordinate Court.

We set aside the decree of the Lower Appellate Court and remand the appeal to be heard and determined on its merits. Costs to follow result.

APPELLATE CIVIL.

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

1889.
November 27.
December 12.

RANGANAYAKAMMA AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

ALWAR SETTI (PLAINTIFF), RESPONDENT.*

Hindu Law—Vaisyas—Requisites of adoption—Adoption during pollution of adoptive parent—Contract Act—Act IX of 1872, ss. 15, 16—Coercion—Undue influence.

The minor widow of a deceased Hindu of the Komati or Vaisya caste (who had authorized her to adopt a son) corporeally accepted a boy as in adoption from his natural father who (*semble*) belonged to a different gotram from her deceased husband. There were no formal declarations of giving and taking the child, and *datta homam* was not performed. At the time when the child was handed over to the widow her husband's corpse was still in the house, and the relatives of the child and other members of the caste obstructed the removal of the corpse until the child had been accepted as above and the widow had executed a deed of adoption:

Held, that there was no valid adoption by the widow.

Per cur: We cannot say that obstructing the removal of a corpse by the deceased's widow or her guardian, unless she made an adoption and signed a document is not an unlawful act or not an act such as is defined by section 15 or 16 of the Indian Contract Act.

Dicta in Mahashaya Shosinath Ghose v. Srimati Krishna Soondari Dasi (1) as to incidents of a formal adoption discussed.

* Appeal No. 143 of 1888.

(1) L.R., 7 I.A., 250.

Observations on the necessity of *datta homam* in a ceremonial adoption among members of a twice-born class, and on an adoption taking place during the pollution of the adoptive parent.

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APPEAL against the decree of L. A. Campbell, District Judge of Nellore, in original suit No. 17 of 1887.

Suit by the minor plaintiff by his natural father and next friend to establish his adoption by defendant No. 1, the widow of Akula Chenchayya, a Vaisya, and for possession of the moveable and immoveable property of Akula Chenchayya. Defendant No. 1, who was a minor, defended the suit by her guardian *ad litem*, her father, who was also joined as defendant No. 2.

The facts of this case appear sufficiently for the purposes of this report from the judgment of the High Court. Exhibit A, which is there referred to, was translated as follows:—

“Yesterday at about 8 o'clock in the night my husband Chenchayya Setti died of the disease under which he was labouring.

“Before his death, *i.e.*, about 7 o'clock in the night, my husband directed me to adopt a boy in order to perpetuate his family. This he said in the presence of our priest by name Chakravarthala Govinda Charulu Ayavarlur Garu, Tusali Appala Charlu, Kami Setti China Subbiah, Duggi Setti Bali Setti and others, also in the presence of our relatives and females.

“According to the orders of my husband I, having this day consented to adopt a boy in the presence of the mediators, who are the attestors, adopted one Alwaru, son of Mogili Garatiah, and settled that the funerals of my husband should be performed in the name of my adopted son.

“If my father, &c., raise any objections as to the said arrangement, these shall not be valid. I caused this to be written by Addanki Subbaramiah of my own free will.”

The District Judge, on a question raised as to the ceremonial validity of the adoption, delivered judgment as follows:—

“There were no religious ceremonies. The immediate presence of the corpse forbade them. But there seems to have been a giving and taking, though the defence argue otherwise. Admittedly the father of plaintiff and two sons were fetched to the house, and there is the evidence of several witnesses for plaintiff to the effect that the boy selected, *i.e.*, plaintiff, offered fruits to first defendant. The fifth, sixth, eighth, ninth, and tenth witnesses all say that plaintiff was taken by his father up to first

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defendant, and the first four of these agree in saying that the child was seated on his father's thigh at the time. It is in such little points that the truth becomes apparent, and there can be no doubt but that this action of the father of the boy did occur. If so, it seems to me that there was a giving. An acceptance there certainly was, for not only was the document then signed, but, as already noticed, the boy was admittedly kept on in the house for some days.

"The parties are Komatis and are, therefore, members of the third superior regenerate class, the Vaisyas. It has been ruled by the Madras High Court in *Chandramala v. Muktamala*(1) that a giving and receiving in adoption is sufficient in the case of the next highest class, the Kshatriyas. It follows, therefore, that this is sufficient in the class to which the parties belong. The adoption now in question is, therefore, not invalidated on the absence of religious ceremony. There was some sort of ceremony, for the boy's head was admittedly shaved. If a religious ceremony is not necessary, the fact of the person adopting being under pollution is necessarily not fatal to an adoption. Pollution merely bars the performance of a religious ceremony. This is shown in the case of *Thangathanni v. Ramu*(2). The circumstances there were the same as here, and the fact that those parties were Sudras does not affect the principle involved. I take it from that decision that the mere fact of death causes pollution. But the sixth witness for plaintiff, a Brahmin, stated that 'pollution begins, it is said, after the dead body is burnt.' . . . I hold, therefore, that adoption was made, and that it is valid, unless it can be shown for the defence that undue influence or coercion was used to bring it about."

The District Judge came to the conclusion that no undue influence and coercion had been exercised on defendant No. 1 and passed a decree for the plaintiff.

The defendants preferred this appeal.

Rama Rau for appellants.

Parthasaradhi Ayyangar for respondent.

JUDGMENT.—The real parties to this appeal are minors, and the question for decision is whether the first appellant adopted the plaintiff, and whether the adoption, if true, is valid.

The minor appellant's husband was one Chenchayya, a Komati

or Vaisya by caste, and on 16th March 1887 he died after a protracted illness extending over several months. He left considerable property, which is estimated in the plaint at Rs. 40,000, and but for the adoption, the first appellant, his childless widow, would be his heir-at-law. The plaintiff's case was that about two hours before his death, Chenchayya learned that he was in a critical condition, that after directing his wife to pay certain legacies, he asked her to adopt some boy and thereby perpetuate his family, and that upon his death and prior to the removal of his corpse for cremation the widow adopted the plaintiff with the consent of her guardian and father, the second appellant, and executed a deed of adoption (exhibit A) in the name of the plaintiff's natural father. The appellants contended that Chenchayya became unconscious on the morning of the 16th March and died in the evening; that he was not in a condition either to give legacies or authorize an adoption; that the plaintiff was neither given by his father nor taken by the first appellant in adoption that no *datta homam* was performed; that the appellant was under pollution when the adoption is said to have been made, and that the plaintiff's brother-in-law with the aid of a police constable and others obstructed the removal of Chenchayya's dead body, and by continuing to do so coerced her to sign exhibit A when she was in grief and unfit to act with free will and consent. The Judge upheld the adoption and decreed the claim, and to this decision the appellants object and reiterate the objections urged in the written statement.

We agree with the Judge that Chenchayya did authorize his widow to adopt. Five witnesses for the plaintiff deposed to that effect, and they are in no way connected with the plaintiff. The authority to adopt is mentioned in exhibit A, and it is very likely that a person in Chenchayya's position should have desired to provide against the extinction of his family. Though this evidence is contradicted by some of the appellants' witnesses, and though they state that Chenchayya was unconscious throughout the 16th March, they are all related to the minor appellant with one exception. Again the appellants' pleader lays stress on the absence of an authority in writing, on Chenchayya's omission to adopt whilst alive notwithstanding his protracted illness, on the plaintiff's omission to call Chenchayya's guru or priest, Govinda-charlu, who is said by the plaintiff's witnesses to have been

(1) I.L.R., 6 Mad., 20.

(2) I.L.R., 5 Mad., 358.

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consulted about the adoption, and on Chenchayya's conduct in accepting at once the statement of the plaintiff's sixth witness that he would die soon, without communicating with the physicians who had been treating him. These defects in the evidence in support of the authority to adopt detract doubtless from its weight, but it must also be observed that persons often postpone the making of a will or arranging for an adoption until they are on their death-bed. On the one side there is positive evidence, apparently disinterested and accepted as *bona fide* by the Judge who had the witnesses before him, and not inconsistent with the probabilities of the case; whilst on the other there is only the evidence of relatives, and the observations to which the plaintiff's evidence is open are in themselves not conclusive. We are of opinion that on appeal we must accept the finding that Chenchayya directed his widow to adopt.

We also concur in the opinion of the Judge that before Chenchayya's corpse was removed, the plaintiff was taken to his house and given by the boy's father and taken by the minor appellant in adoption. We shall presently consider how far the latter acted under pressure, and whether the pressure amounts to coercion; but, for the present, we confine ourselves to the consideration of the question whether there was such an overt act as might be accepted in law to amount to a gift and acceptance. The evidence for the plaintiff shows that he was taken to Chenchayya's house, that he was there seated on his father's lap, that a cocoanut and fruits were then placed in his hands, and that he gave them to the minor appellant, his adoptive mother. The plaintiff's third witness, who officiated at Chenchayya's funeral ceremonies, stated that the acceptance of fruits from the boy selected for adoption by the desire of his natural father, and in his presence, was a token of his acceptance in adoption. The appellants' pleader draws our attention to the decision of the Privy Council in *Mahashoya Shosinath Ghose v. Srimati Krishna Soondari Dasi*(1) and argues that though the boy might be taken to be corporeally delivered, the act was not accompanied with the declarations, viz., "I give this child as your son, and I take him as my son." We do not apprehend their Lordships of the Privy Council to do more than indicate the ordinary incidents of a formal adoption, and rule that there must be a

(1) L.R., 7 I.A., 250.

corporeal delivery of the boy by a person competent to give to a person competent to take under circumstances which denote an intention on the part of the one to give and an intention on the part of the other to accept the boy in adoption.

Upon the evidence, the Judge, we consider, properly held that there was a gift and acceptance as described above. Though there is a conflict of testimony on this point also, we are inclined to accept the finding of the Judge. It is clear that the plaintiff was shaved immediately after he had been received in adoption, and according to his third witness, the funeral ceremonies of Chenchayya were performed until the eighth day of his death in the name of the plaintiff. The adoption is further referred to as having taken place in exhibit A. The substantial questions then for determination in this case are whether the plea of coercion is well founded and whether the adoption is invalid either because no *datta homam* was performed or because it was made whilst the adoptive parent was under pollution. As to the contention in regard to pollution, the Judge is clearly in error in saying that it arises on the cremation of the corpse. Pollution consequent on birth or death arises according to the usage of the caste to which the parties belong at the moment of birth or death. It is, however, unnecessary to dwell further on this point as *datta homam* was admittedly not performed, though Chenchayya was a Vaisya by caste and belonged to the third of the regenerate classes. Though *datta homam* was declared not to be indispensable even among Brahmins in the case of *Singamma v. Ramanuja Charlu*(1), yet it was held in *Govindayyar v. Dorasami*(2) by the Full Bench that it might be necessary to a ceremonial adoption, that adoption among the three higher classes was ceremonial, and that unless the adoption was from the same *gotram*, an inquiry as to Hindu usage in this presidency would be material. This view is confirmed by the observations of the Privy Council in *Mahashoya Shosinath Ghose v. Srimati Krishna Soondari Dasi*(3). Their Lordships say in that case that "All that has been decided is that amongst Sudras no ceremonies are necessary in addition to the giving and taking of the child in adoption. The mode of giving and taking a child in adoption continues to stand on Hindu law and usage, and it is perfectly clear

(1) 4 M.H.R., 105.

(2) I L.R., 11 Mad., 5.

(3) L.R., 7 I.A., 250.

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It is then said that these remarks are in the nature of an *obiter dictum*, and that the parties in that case were Sudras. But, even if they were so, they would be entitled to great weight as pointing to a distinction in the law of adoption as administered to the different classes. They are, however, made to indicate the ground of the decision that corporeal delivery of the child is essential even among Sudras, and unless it is shown that the usage in this presidency is otherwise, they must be accepted as binding upon us.

As regards the plea of coercion, the case for the plaintiff is that the minor appellant insisted upon carrying out the wishes of her husband at once; that her father consented to her doing so; that two boys, the plaintiff and his younger brother, were shown to her; that she selected the plaintiff; that those assembled for the funeral said that there was no objection to the selection, the plaintiff not being the first born, though he was the eldest of the sons alive, and that thereupon he was given and taken in adoption in the mode already described. The appellants' case, on the other hand, is that the removal of the corpse was obstructed; that the appellants were told that the corpse should not be removed until the plaintiff was adopted; that his brother-in-law took an active part in forcing the adoption on the appellants; that at his instance a police constable interfered and insisted on the adoption; that an application made at the neighbouring police station for aid was refused, and that overcome by grief, the minor appellant and her father were coerced into making the adoption, and that exhibit A was executed by the minor and attested by her father otherwise than with free will and consent. The Judge observes that no

actual force or restraint was used; that some caste influence was very probably brought to bear on them; that the spiritual needs of the deceased as conceived by his castemen called for their interference, and that his expressed wish for a son almost rendered such interference a duty on their part. No doubt the caste wished the adoption, wished it to take place at once, and if the deceased had authorized it, there was no occasion for the delay. He held that the caste influence was not exerted in an irregular manner, and that the adoption must be upheld. In coming to this finding the Judge has overlooked several facts in evidence which raise a strong presumption in support of the appellants' contention. The first appellant was only about 13 years old when Chenchayya died, and, though under Hindu law a minor might make a valid adoption for the spiritual benefit of her husband, yet there must be cogent evidence to show that she did so under the intelligent and disinterested guidance of her legal guardian seeking *bonâ fide* to provide for a spiritual necessity with due regard to her interest so far as it is compatible with such necessity. The Judge finds that Chenchayya's castemen exerted a pressure on the widow and her guardian, but he omits to consider that the occasion was one when no such pressure should be and is ordinarily exerted. The adoption was authorized but on the previous evening, and within two hours later, Chenchayya died, and his death, which doomed the minor, according to the usage of her caste, to a life-long widowhood, must have caused to her and her father intense grief. The occasion was, therefore, one in which no guardian would be in a frame of mind to deliberate and decide whether an adoption should be made, and if so, who ought to be selected for the adoption. Adoption is usually regarded in this country as a solemn and irrevocable act, and it is generally made after protracted discussion and careful consideration among members of the family interested in the infant widow. The procedure which was followed in the case before us is as summary as it is unusual.

If immediate adoption had been deemed necessary by Chenchayya for his spiritual benefit, it was in his power to have made it before he died, or to have named a boy and enjoined his widow to adopt on the expiry of the period of pollution. This he had not done on the plaintiff's own showing. It is then by no means easy to understand why Chenchayya's castemen should care more for his spiritual benefit than himself, unless they feared that the

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Again, it is an undisputed fact that the minor appellant was under pollution when the adoption was made. On this point the Judge is clearly in error, for according to the usage of the caste, as is indeed conceded by the respondent's pleader, pollution commences, as already stated, at the moment of death and not after cremation as is remarked by the Judge. The plaintiff's third witness, who officiated at Chenchayya's funeral, deposes that adoption is an auspicious act, that no auspicious or religious ceremony is performed before the expiration of the period of pollution, and that although he is 41 years of age, and although he is a *purohit* by profession, as far as he was aware no adoption ever took place anywhere else whilst the corpse was still lying in the house. Several other witnesses for the plaintiff say that when they have to perform their father's annual obsequies, which, according to custom, must be performed on the lunar day corresponding to the date of death, such ceremonies are postponed, if they are under pollution, until it is over and they become pure again. It is also generally believed that religious ceremonies, if performed during the period of pollution, are devoid of merit and lose their efficacy. Hence it is that when an immediate adoption is desired, it is made either immediately prior to death or on the expiration of the period of pollution. Having regard to these incidents of caste custom, we do not see our way to believe that those who insisted on immediate adoption and prior to the removal of the corpse did so *bonâ fide* to provide for urgent spiritual necessity.

Apparently, several of the plaintiff's witnesses suggest in view of this peculiarity in the case that the minor appellant desired to carry out the wishes of her husband at once and that her father consented to her doing so. The Judge evidently does not credit them, inasmuch as he accepts the evidence for the appellant so far as it shows that pressure was put upon them. In support of this view, there is the evidence of the appellants and their witnesses Nos. 2, 5, 8, 9, and 10. As most of these witnesses are relatives of the minor appellant, the Judge considers perhaps that the pressure was neither irregular nor severe and that it did not go beyond firm persuasion. But we find from the evidence of the

Inspector of Police, viz., the fourth witness for the appellants, that the girl's uncle, her second witness, went to the police station-house at Nellore Town whilst Chenchayya's corpse was lying in his house and complained that its removal was being prevented and the adoption of a boy was being fabricated, but that he was told that the matter was not one for police interference. This corroborates the evidence of the minor appellant's father and uncle that the plaintiff's brother-in-law and others urged upon them the plaintiff's adoption; that they refused to adopt and persisted in doing so until 10 o'clock in the morning; that the former refused to allow the corpse to be removed; that these were backed by the Head Constable of Nabob's Petta; that by the desire of the minor appellant's father, her uncle complained at the police station at Nellore; that the complaint was ineffectual, and that they were overcome by the pressure. Their evidence is corroborated in another important particular. The plaintiff's second witness is the head constable who so interfered. There is strong reason to think that he was there and assisted in bringing about the execution of the document through pressure. Though he states that he went to Chenchayya's house because he wanted to see him on hearing of his death, yet it is to be observed that he must have been then aware that the presence of a Mahomedan like him would be unwelcome on the occasion, that there was no satisfactory reason for his going into the entrance where the corpse lay unless it was to speak to the minor and assist the plaintiff's brother-in-law as suggested by the appellant and several of her witnesses or for his taking part as an attesting witness in the execution of exhibit A. Seeing that the plaintiff was a pauper, whilst Chenchayya was comparatively well to do in life, and his widow had several relations, the selection of the plaintiff for adoption, whose father only recently settled at Nabob's Petta and was in no way related to Chenchayya's family, was antecedently improbable. The evidence of the appellants' seventh witness, who wrote exhibit A, shows that it was dictated by the plaintiff's brother-in-law, the police constable, and others, that though he waited there till 10 A.M., the parties did not affix their signatures, and that he then left. He is corroborated by the fact that his attestation does not appear in the document. As to the suggestion that no physical force or restraint was used, we cannot say that obstructing the removal of a corpse by the deceased's widow or

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It is true that one witness for the plaintiff stated in his examination-in-chief that the plaintiff was of the same *gotram* with Chenchayya, but he denied all personal knowledge in cross-examination. The appellants' witnesses Nos. 2 and 8 denied that the plaintiff was of Chenchayya's *gotram*, and the plaintiff's father did not go into the witness box to contradict them. Furthermore, it is an undisputed fact that the plaintiff was expelled from Chenchayya's house within eight days after his death, and before the funeral ceremonies were completed. This revulsion of feeling is also unaccountable on the view suggested for the plaintiff that the adoption was sought for by the minor appellant with the sanction of her father. There appears to have been some misapprehension on the part of the Judge in regard to the right of interference on the part of Chenchayya's castemen. It is usually regarded as indelicate and harsh even to suggest an adoption to an infant widow and her father when the corpse is lying, and when in the midst of their affliction they can think of nothing else than their misfortune, and as altogether inconsistent with what is due from persons calling to condole and express their sympathy. The exerting of any pressure by strangers on such occasion is as unwarranted in law as by the usage of the caste.

We are of opinion upon the whole evidence that but for the obstruction caused to the removal of Chenchayya's corpse by his brother-in-law and others, and for the appellant and her guardian being overawed by a head constable assisting them, and by the police refusing to interfere on their complaint, neither the plaintiff would have been taken in adoption nor exhibit A executed as evidence of it.

We set aside the decree of the Judge and dismiss the suit with costs throughout.

APPELLATE CIVIL—FULL BENCH.

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

NILAKANTA (PLAINTIFF), APPELLANT,

KRISHNASAMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 135—Assignment for value of a debt—Decree to which the assignee is entitled.

In a suit against a debtor an assignee for value of the debt is precluded by Transfer of Property Act, s. 135, from recovering more than the price paid by him for the assignment with interest thereon and the incidental expenses of the sale. *Jani Begam v. Jahangir Khan* (I.L.R., 9 All., 476) approved.

SECOND APPEAL against the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in appeal suit No. 761 of 1887, affirming the decree of T. A. Krishnasami Ayyar, District Munsif of Mannargudi, in original suit No. 444 of 1886.

The two defendants and Subbanna and Ramanna were the sons of one Subramanya Ayyar, deceased. One Lakshminarayani Ammal (since deceased) was Subramanya's adoptive mother. During the minority of the defendants, a family arrangement was made by which Lakshminarayani was to receive for her maintenance 100 kalams of paddy and Rs. 150 a year from the four brothers above referred to. The plaintiff stated that the defendants had allowed the sum due by them to Lakshminarayani to fall into arrears for eight years, and that she, in consideration of his having paid her Rs. 800, assigned to him in 1884, her right to receive from defendants Rs. 875 due to her for her maintenance. He brought this suit to recover that amount.

The District Munsif found that the plaintiff had paid to Lakshminarayani Rs. 100 only and he passed a decree in favor of the plaintiff for Rs. 130, being Rs. 100 with interest thereon and the cost of the stamp affixed to the instrument of assignment and the cost of registering it. On appeal, the Subordinate Judge

1889.
Jan. 11.
March 25.
1890.
Jan. 10.
Feb. 24.

* Second Appeal No. 805 of 1888.

NILAKANTA affirmed the decree of the District Munsif, and the plaintiff preferred this second appeal against his decree.

This second appeal having come on for hearing before Kernan and Parker, JJ., their Lordships made the following

Order of Reference to Full Bench.—"We think that the question in this case ought to be submitted to a Full Bench.

"The facts material are—

"Lakshminarayani was entitled to recover from the two defendants, her grandsons, and their property for maintenance Rs. 875 from January 1876 to December 1883. She made over her right to recover that sum to the plaintiff, a stranger, not one of the debtors, and not interested in the property on which it may have been charged.

"It has been found that the only consideration paid by the plaintiff for the transfer to him was Rs. 100. The plaintiff alleged that Rs. 700 were due to or advanced by him to Lakshminarayani before the transfer, but this allegation is found to be untrue.

"Decrees have been passed by both the Lower Courts in favor of plaintiff, but limiting the amount to the sum of Rs. 100 and Rs. 22-8-0, interest on it to the date of the plaint and further interest and registration fees. Each party is decreed to bear his own costs.

"It is not alleged by the defendants that any sum was tendered to the plaintiff in discharge of his claim either in Court or out of Court.

"Referring to the Transfer of Property Act, 1882, especially section 135, the question for the Full Bench is whether the plaintiff is entitled to be paid the full sum of Rs. 875 due, or only the sum decreed, Rs. 130-3-0. In this Court there are two decisions to be considered, *Rathnasami v. Subramanya*(1), *Singaracharu v. Sivabai*(2), in the Calcutta Court, the cases of *Grish Chandra v. Kashisauri Debi*(3), *Khoshdeb Biswas v. Satar Mondol*(4), in the Allahabad Court, the case of *Jani Begam v. Jahangir Khan*(5)."

Rama Rau for appellant.

Bhashyam Ayyangar for respondents.

(1) I.L.R., 11 Mad., 56.

(2) *Ib.*, p. 498.

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

(4) I.L.R., 15 Cal., 436.

(5) I.L.R., 9 All., 476.

The arguments adduced on this second appeal appear sufficiently for the purposes of this report from the following judgments—

COLLINS, C.J.—The point the High Court has to decide in this reference is—

Has an assignee of an actionable claim suing to recover such claim the right to recover the whole amount of such claim, or is he precluded by section 135 of the Transfer of Property Act from recovering more from the debtor than the amount actually paid by him (the assignee) for it, together with interest and the incidental expenses of the sale?

The words of the section are as follows:—

"Where an actionable claim is sold, he, against whom it is made, is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

"Nothing in the former part of this section applies—

"(a) where the sale is made to the co-heir to, or co-proprietor of, the claim sold;

"(b) where it is made to a creditor in payment of what is due to him;

"(c) where it is made to the possessor of a property subject to the actionable claim;

"(d) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment."

The reference was made on account of the High Courts of Allahabad and Calcutta differing in opinion upon the construction of the section.

In *Grish Chandra v. Kashisauri Debi*(1), Mitter and Grant, JJ., decided that as section 135 does not say that a transferee is not entitled to recover from the debtor the full amount of the debt due from the latter, and as it was not alleged that the debtor had paid or tendered the amount mentioned in the section, the transferee was entitled to the whole amount of the claim, and that as the Lower Courts had decreed the plaintiff's claim sub-section (d) applied.

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

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In *Khoshdeb Biswas v. Satar Mondol*(1), Petheram, C.J., and Tottenham, J., agreed with the decision in *Grish Chandra v. Kan-shisauri Debi*(2), but expressed an opinion that if the defendant paid into Court immediately the suit was commenced the money paid by the plaintiff together with interest and expenses, that would be a payment within the meaning of the Act and would discharge the defendant from further liability. In *Jani Begam v. Jahangir Khan*(3), Straight and Tyrrel, JJ., held that the purchaser of an actionable claim was only entitled to recover the actual sum he paid for it together with the interest and incidental expenses. The Transfer of Property Act was evidently the work of more than one hand, and some of the sections in it are very difficult to construe and somewhat obscure to ordinary minds; but it appears to me that if the obvious intention of the legislature is taken into consideration, the meaning of the section appears fairly clear. I take it that the Legislature intended to prevent speculative trafficking in actionable claims, and provided that if an actionable claim was sold the buyer should only get from the debtor the sum he had paid for it. I think, therefore, that a defendant-debtor has a right to put the purchaser of the actionable claim sued on to the proof of his claim, and also to contend that at all events he cannot recover more than the sum he purchased it for, together with interest and expenses. The debtor is to be wholly discharged by paying to the buyer the price given for such claim and incidental expenses of the sale with interest. If the legislature meant that the debtor should only be wholly discharged if he paid the sum before action brought or paid it into Court immediately the action was brought, I suppose it would have said so. How is the debtor to ascertain what price the purchaser did pay and what are the expenses of such sale until the plaintiff has proved the facts of his case and given the debtor an opportunity of ascertaining what the facts are? Petheram, C.J., in *Khoshdeb Biswas v. Satar Mondol*(1) is of opinion that if the debtor immediately on the suit being brought paid the purchaser the amount he paid for it together with expenses and interest, that would be a good payment and the debtor in that case would be wholly discharged. I think this is too limited a view to take of the section. The debtor, in my opinion, is wholly discharged by payment of the sum actually paid

(1) I.L.R., 15 Cal., 436. (2) I.L.R., 13 Cal., 145. (3) I.L.R., 9 A.L., 476.

together with interest and expenses even if he has contested the claim, and the Court deciding the validity of the claim can give a decree for the amount only which has been actually paid together with interest and expenses, in other words, the debtor's liability is limited to the sum the purchaser gave for the actionable claim together with expenses and interest. If the debtor is wholly discharged in law by payment of a certain sum, it seems to follow that the creditor is only entitled to recover that sum. With regard to clause (d) in the section, I am of opinion that it applies only to a state of facts existing at the time of the purchase of the actionable claim.

With very great respect to the learned Judges of the Calcutta High Court, I am constrained to differ from them and to adopt the conclusion arrived at by the Judges of the Allahabad High Court. The plaintiff in this case is, therefore, only entitled to recover the smaller amount.

PARKER, J.—The question referred to the Full Bench is whether the plaintiff, as assignee of an actionable claim, is precluded by section 135 of the Transfer of Property Act from recovering from the debtor more than the price paid by him with interest thereon.

The object of the section which was enacted in 1882 was apparently to prevent trafficking and speculation in litigation, it having been held that the English laws of champerty and maintenance were not in force in India. See the Privy Council decisions in *Chedambara Chetty v. Renja Krishna Muthu Vira Puchanja Naiker*(1) and *Ram Coomar Coondoo v. Chunder Canto Mookerjee*(2). It was held that in India the *bona fide* acquisition of an interest in the subject of litigation was not illegal, but that unfair and extortionate transactions got up for mere purposes of spoil or litigation, or for disturbing the peace of families, should be held invalid. A fair agreement to supply funds to carry on a suit was held not *per se* opposed to public policy.

Section 135 of the Transfer of Property Act appears to have been framed to give effect to these principles. In the first (or principal) clause it is enacted that when an actionable claim is sold the debtor shall be wholly discharged by paying to the assignee the price paid by him and incidental expenses of the sale with

(1) 13 B.L.R., 509.

(2) L.R., 4 I.A., 23.

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In the view taken by the latter Court it was held that the assignee could in no case recover more than the sale price with interest thereon and incidental expenses of sale except where the original creditor had, before making the transfer, obtained a judgment upon the actionable claim or had prosecuted the claim up to the stage at which the Court was ready to pronounce judgment. In this view it is the state of things existing at the time of transfer and not at the time of payment that is to be regarded. My difficulty in accepting it has been that it seems to me incongruous and inaccurate to speak of a claim already decreed as an actionable claim, and I was, therefore, disposed to think that the legislature intended the debtor to be wholly discharged by payment of the sale price provided that payment was made either before decree or before the claim was ripe for judgment. The difficulties of taking this view are no doubt that in ordinary language a creditor cannot be said to be entitled under any circumstances to recover a larger sum than that which if paid will wholly discharge the debtor, and it is hard to see why a debtor should be worse off because he puts an assignee to the proof of his claim.

Section 135, however, relates to the *sale* of actionable claims and clauses (a), (b) and (c) relate to the state of things at the date of the transaction. The preceding section (134) relating to a warranty by the transferor is *expressly* limited to the state of things at the date of the transaction, and this being so the inference is strong that the legislature intended clause (d) of section 135 to have a similar application. The section is very obscurely worded and appears to have been imported from the Code of Lower Canada:—See Stokes' Anglo-Indian Codes, Volume I, page 814. Upon the whole, therefore, notwithstanding

(1) I.L.R., 13 Cal., 146. (2) I.L.R., 10 Mad., 289. (3) I.L.R., 9 All., 476.

ing the awkwardness of the language in the first sentence in clause (d), I am not prepared to dissent from the opinion of my learned colleagues that the plaintiff is not entitled to recover more than he actually paid, viz., Rs. 100 and interest upon that sum.

SHEPARD, J.—The question referred to the Full Bench stated in the abstract is this—Is the assignee of a debt suing to recover it precluded by section 135 of the Transfer of Property Act from recovering from the debtor more than the price paid by him for it with interest thereon and the incidental expenses of the sale? The High Court at Allahabad has answered this question in favor of the debtor, *Jani Begam v. Jahangir Khan*(1). The High Court of Bengal has answered it in the assignee's favor, *Grish Chandra v. Kashisauri Debi*(2) and *Khoshdeb Biswas v. Satar Mondol*(3). Apart from the Act there is no doubt that the debtor is in no way concerned with the price paid by the assignee to the original creditor; his liability is not affected by the transfer of the benefit of the obligation. The Act introduces a rule which, inasmuch as it prejudices the assignee and advantages the debtor, must presumably be founded on the notion that assignments of debts for less than their full nominal value should be discouraged, probably with the view of preventing trafficking in litigation. By means of section 135 there can be no doubt that a debtor can by a payment before suit of the sum paid by the assignee with interest thereon and the expenses of the sale obtain a complete discharge of his liability and thus transfer from the assignee to himself the benefit of the good bargain which the assignee has made. It has to be seen whether the language used in the section is applicable to the case where a suit is brought and the claim is contested. Whether the section should be read in this way or whether it should receive the narrower construction put upon it by the High Court of Bengal, it is equally clear that the language used is somewhat obscure. In the judgment of Mitter, J., in *Grish Chandra v. Kashisauri Debi*(2), it is suggested that if the defendant's contention were sound, the section should have declared that a transferee should not be entitled to recover from the debtor the full amount of the debt due from the latter. It may, with equal force, be suggested that if the section was only to operate in case of payment made before the suit or before

(1) I.L.R., 9 All., 476. (2) I.L.R., 13 Cal., 145. (3) I.L.R., 15 Cal., 436.

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contest, words to that effect would have been introduced. We have to give some reasonable meaning to the section having regard to the language used and the apparent intention of the legislature. And if the language of the section will bear either of two interpretations, that ought to be preferred which appears most reasonable.

When a man is said to be discharged from liability by payment of a certain sum, it is ordinarily meant that the liability is limited to that sum and that no greater sum can be recovered by suit. The sum by payment of which a debtor is discharged is ordinarily the sum for which his creditor can obtain judgment. If similar language is found in a contract between parties, I apprehend there is no doubt that it will be taken to limit the obligation of the debtor, and in consequence the creditor's right of action, to the amount stated. In my judgment, therefore, the section is susceptible of the interpretation for which the defendants' *vakil* contends. According to the construction put upon the section by the High Court of Bengal the amount which, if paid before suit, or if paid into Court immediately after suit brought, would satisfy the plaintiff's claim is not necessarily the amount for which decree must be given. The advantage which the section gives to the debtor and the disadvantage which it brings to the assignee of the debt cease the moment the debtor contests the assignee's claim. With all deference to the learned Chief Justice and the Judges of the High Court of Bengal, I cannot think that this is a reasonable interpretation of the section; for how can it possibly be said that the claim of the assignee is less meritorious because the debtor finds it expedient to satisfy it without dispute? The fact that the debtor admits the claim would rather go to show that the transaction between the assignor and the assignee was not of a speculative character. Moreover, if the section is to be restricted to cases of payment before suit or into Court, there are few cases in which it could operate at all; for the debtor would not ordinarily know what price the assignee had paid or what interest was chargeable or what expenses he had incurred, and he would have no means of ascertaining except those means which would be available to him in the course of a suit. Mitter, J., also refers to clause (d) of the section and observes that if the debtor had offered to pay the amount mentioned in the section after the decree of the Lower Court, he would not

have been discharged. This observation, which anyhow would not have been pertinent in the present case where no decree for the full amount claimed has ever been given, assumes that the clause refers to a judgment obtained by the assignee after the assignment. In my opinion the words used in clause (d), as also those used in the preceding clauses indicate a state of things existing at the date of the assignment. If that is the meaning of the clause, the use of the past tense is explained and the whole clause is intelligible. The word "judgment" may be intended to include judgments of foreign Courts, while the word "decree" is avoided, because a debt which has become the subject of a decree is no longer an actionable claim. In either of the two cases supposed, the uncertainty of the claim has been removed to a certain degree, the speculative character of the transaction has disappeared, and therefore there is no reason why the assignee should not realize the whole amount of his claim. It may be said that instances will be rare in which the clause thus construed can become applicable, but that is what might naturally be expected of cases saved by a proviso and excepted from a general rule. On the other hand, if the clause was intended to refer to the suit brought by the assignee himself, the language used is not what might have been expected and the cases covered by the proviso would be those most frequent in occurrence. It would, I apprehend, be a strange and unusual mode of drafting to except from the general rule by one of several provisos the class of cases in which otherwise the rule could most frequently become applicable. Moreover the operation of the section will become very uncertain. Let me put the case of the heir of an alleged debtor sued by the assignee of the creditor: the defendant being in ignorance as to the circumstances of the claim, puts the plaintiff to proof of the debt and says that if it be proved he is ready to pay into Court the amount claimable under section 135. On the issue as to the fact of the debt evidence might first be given so as to put it beyond all doubt; and after that witnesses as to the assignment might be called, from whom alone the defendant could learn the particulars needed for fixing the amount to be paid into Court. It would only be at the end of the case and when the claim "had been made clear by evidence and was ready for judgment" that the defendant would have learnt what sum he should pay into Court. And then the former part of the section not applying, a decree must be passed against

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him for the full amount and costs. Such a case is not an unlikely one, and it shows that an assignee without any unfair astuteness might prevent the defendant from taking advantage of the section. Surely too if the clause was to be read in the way supposed, there would have been some reference to the matter of costs, for if payment is made in the course of the suit, it cannot be intended that the defendant is to be thereby wholly discharged from liability unless he also pays the costs. Having regard as well to the language used as to the consequences which would follow from any other interpretation, I think the clause must be read as referring to a suit brought before the date of the assignment.

In my opinion the section will bear the larger construction put upon it, and that construction is more reasonable and corresponds more fully with the apparent intention of the legislature than the narrower interpretation which has been adopted in Calcutta. I must say, therefore, that the question stated above should be answered in the affirmative, and the plaintiff should have a decree for the lesser sum mentioned in the order of reference.

HANDLEY, J.—The intention of the legislature in enacting section 135 of the Transfer of Property Act, viz., to discourage speculative purchases of actionable claims, is sufficiently obvious from the exceptions, which are all cases where that mischief would not exist, and this object is distinctly recognized by the learned Judges who decided the case of *Rathnasami v. Subramanya*(1). At page 63 of the judgment in that case occurs this passage:—“The intention indicated by section 135 is to prevent traffic in actionable claims by making the difference between the amount of the claim and the actual price paid irrecoverable by action, and thereby removing the motive for unconscionable dealing in such cases.”

Whether legislation with that object was desirable, or whether if so the provisions of this section are the best that could be devised to carry out that object, may be open to question. It is not easy to see why the debtor should be benefited because his creditor has made a disadvantageous bargain with a third party. But with that the Courts have nothing to do. They have only

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to carry out the intention of the legislature so far as it is sufficiently expressed in the words of the enactment. And though the wording of this section is unusual I confess that but for the decisions in *Grish Chandra v. Kashisauri Debi*(1) and *Khoshdeb Biswas v. Satar Mondol*(2), I should have entertained no doubt whatever that the words meant that the buyer cannot recover nor can the debtor be compelled to pay more than the price for which the claim was sold with interest and incidental expenses. To say that a person is wholly discharged by doing a certain thing seems to me to be the same thing as to say that that he is under no obligation to do and therefore cannot be compelled to do more than that thing. And the words of the section presuppose a claim made whether by suit or otherwise:—“He against whom it (the claim) is made is wholly discharged.” The construction put upon the section by the High Court of Calcutta would render it almost wholly inoperative, for in the majority of cases the debtor cannot know the exact sum which he should pay or tender under the section, and unless he does pay or tender the exact sum according to that construction, the section affords him no protection. And if the words are to be thus strictly construed I cannot see how tender is let in, for the discharge is only to be by payment. And why should payment into Court immediately on the suit being brought be a good payment under the section, as suggested in the judgment in *Khoshdeb Biswas v. Satar Mondol*(2) any more than a payment at any other stage of the suit, before (in the words of clause (d) of the section) “the claim has been made clear by evidence and is ready for judgment.” As to the construction to be put upon that clause, in my opinion it must refer to the state of things existing at the time of the transfer and not at the time of payment. All the other clauses (a), (b) and (c) refer to circumstances attending the sale and there are reasons for excepting a transfer made under the circumstances mentioned in clause (d) which accord with the object and intention of the section. When a judgment has been delivered affirming the claim or the claim has been made clear by evidence, there is no longer an element of speculation in the sale of the claim. Seller and buyer alike know what is the value of the thing to be sold and the mischief aimed at by the section is non-existent. On the other hand there seems

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

(2) I.L.R., 15 Cal., 436.

(1) I.L.R., 11 Mad., 56.

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[The second appeal having come on for final hearing before a bench of two Judges, the Court delivered judgment as follows:—

JUDGMENT.—On the decision of the Full Bench, the second appeal fails and must be dismissed with costs.]

APPELLATE CIVIL.

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

SESHAN AND ANOTHER (PETITIONERS), APPELLANTS IN A.A.O.
No. 100 OF 1886,

v.

RAJAGOPALA (COUNTER-PETITIONER), RESPONDENT.*

RAJAGOPALA (PETITIONER), APPELLANT IN A.A.O.
No. 103 OF 1886,

v.

RAMANADA AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code, ss. 231, 258—Limitation Act—Act XV of 1877, ss. 7, 8, sched. II, art. 179—Minority—Execution of decrees.

A member of an undivided Hindu family and his two minor brothers (who sued by him as their next friend) brought a suit for partition of family property against their father, and joined as defendants certain persons who were in possession

of part of the property under alienations made by the father but alleged in the plaint to be invalid as against the family. In 1875 a decree was passed in favor of the plaintiffs in the above suit. No application for the execution of the decree was made by either the first or second plaintiff; but the third plaintiff, having attained his majority in June 1881, applied for execution in April 1884: his application was opposed by two of the defendants. The District Judge made an order granting his application in respect of the one quarter share to which he was declared to be entitled under the decree:

Held, that the order of the District Judge was wrong, as neither s. 7 nor s. 8 of the Limitation Act affected the case, and the application was accordingly barred by limitation.

APPEALS against the orders of J. W. Reid, District Judge of Coimbatore, made on execution petition No. 13 of 1884 and civil miscellaneous petition No. 216 of 1885.

Execution petition No. 13 of 1884, presented in April 1884, was a petition by one of three plaintiffs who had in 1875 obtained a decree for the partition of family property, for the execution of the decree. The applicant was a minor at the date of the decree, but had attained his majority in June 1881. The plea of limitation was raised in civil miscellaneous petition No. 216 of 1885, which was a counter-petition preferred by certain of the judgment-debtors, but the District Judge who referred in his judgment to *Mon Mohun Buksee v. Gunga Soondery Dabee* (1), *Jagjivan Amirchand v. Hasan Abraham* (2), *Surju Prasad Singh v. Khwahish Ali* (3) overruled this plea and granted the application for execution in respect of the applicant's one quarter share in the property, the subject of the suit.

The persons against whom execution was permitted to issue preferred appeal No. 100; and the decree-holder preferred appeal No. 103.

Bhashyam Ayyangar and Ramachandra Ayyar for appellants in appeal No. 100 of 1886.

Subramanya Ayyar for respondent.

Subramanya Ayyar and Sundara Ayyar for appellant in appeal No. 103 of 1886.

Balaji Rau, Bhashyam Ayyangar, Anandacharlu, Sankaran Nayar, Mahadeva Ayyar and Ramachandra Ayyar for respondents.

The further facts of this case appear sufficiently for the purposes of this report from the judgment.

(1) I.L.R., 9 All., 476. * Appeal against Orders Nos. 100 and 103 of 1886.

(1) I.L.R., 9 Cal., 181. (2) I.L.R., 7 Bom., 179. (3) I.L.R., 4 All., 512.

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JUDGMENT :—These are appeals from orders passed in execution of the decree in original suit No. 16 of 1873 on the file of the District Court of Coimbatore. The suit was one brought for partition by the appellants, Rajagopala Misrayar and his two brothers, against their father and 81 others, who were in possession of portions of the family property under alienations made in their favor by the father. Of the three plaintiffs, the first plaintiff alone was of age when the suit was brought, and he instituted it in his own name and as the next friend of his two minor brothers, the second and third plaintiffs, who were described to be under his protection. The decree which was passed against the 45th and 46th defendants, who are the appellants in civil miscellaneous appeal No. 100, had reference to three items of immovable property Nos. 79, 80 and 81, and it declared that the plaintiffs were entitled to one half of the jenm right in item No. 80 and to redeem the mortgage of items Nos. 79, 80 and 81 on payment to the 45th defendant of Rs. 11,840, the amount for which the plaintiffs and the first defendant, their father, were jointly liable under exhibit 44, that the plaintiffs' share of the mortgaged property declared to be redeemable by them and of the mortgage debt was three-fourths. The decree was passed on the 30th August 1875, and no application for its execution was filed either by the first plaintiff or the second plaintiff within the period prescribed by Act XV of 1877.

The third plaintiff, however, who was a minor when the suit was brought, attained his majority on the 4th June 1881 and applied for execution of the decree on the 7th April 1884. The 45th and 46th defendants opposed the application on the grounds, first, that the decree sought to be executed was merely declaratory; secondly, that the third plaintiff was bound to deposit the entire mortgage debt, amounting to Rs. 17,973-12-9, in Court; and, thirdly, that the application was barred by limitation. The Judge granted the application to the extent of the third plaintiff's quarter share and left the amount payable in redemption of the mortgage to be determined by the District Court in South Malabar, to which the plaintiff prayed that the decree might be transferred for execution. From this order the third plaintiff appeals on the ground that he is entitled to execute the whole decree, and defendants Nos. 45 and 46 appeal for the reason that the execution is wholly barred by limitation. The third plaintiff's appeal

No. 103 relates also to portions of the order in which the other respondents are concerned. His pleader, however, does not support the appeal, so far as it relates to those portions, and states that he has had no instructions from his client. We, therefore, dismiss appeal No. 103 so far as it concerns respondents other than respondents Nos. 20 and 21 or defendants Nos. 45 and 46 with costs (separate sets) of such of them as have appeared by pleader in this Court.

As to the contest between the third plaintiff and the 45th and 46th defendants, we attach no weight either to the contention that the decree is, so far as it affects the latter, merely declaratory, or to the fact that the third plaintiff did not offer in his application for execution to pay the mortgage debt. Reading the decree together with the judgment, we see no reason to doubt that, though the former is not drawn up with precision, it was intended to be mandatory. The prayer in the plaint and the very nature of the suit support the construction suggested by the Judge. Though the application did not in terms offer to deposit the mortgage debt, yet there is no sufficient warrant for the suggestion that the third plaintiff sought to recover possession before paying the mortgage debt. The application prayed for transmission of the decree for execution to the District Court in South Malabar, and in his order the Judge left the amount to be paid to be determined by that Court. The substantial question, therefore, for determination is whether the application for execution is barred by limitation. Though the suit in which the decree was made was one for partition, and though in such suit the share of each of the co-parceners might be ascertained and awarded, yet, having regard to the actual direction embodied in the decree, we agree with the pleader for defendants Nos. 45 and 46 that it is not "a decree passed severally in favor of more persons than one, distinguishing portions of the subject matter as payable or deliverable to each," and that article 179 would apply if the appellant's application is not protected by section 7 of the Limitation Act. It was suggested that section 8 of the Limitation Act was applicable to the case before us, but we are not prepared to adopt this suggestion. Section 8 does not appear to include execution-creditors, and the classes of persons contemplated by it are joint-creditors or joint-claimants, one of whom is under some disability, whilst there are others who can give a valid discharge

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in regard to his interest without his concurrence. But the question whether one of several decree-holders can enter satisfaction on behalf of all is one of procedure, and a rule of decision must be looked for in the Code of Civil Procedure. Having regard to sections 258 and 231, we are of opinion that it is not the act of the joint decree-holder, but the act of the Court executing the decree that is intended to operate as a valid discharge. Though a joint decree-holder may accept payment out of Court and grant a receipt in acknowledgment of such payment, yet in the absence of a certificate of satisfaction, the creditor's acknowledgment does not of itself operate as a discharge. Again, section 231 suggests that the liability of the adult joint decree-holder to the minor decree-holder in respect of his interests in the decree is not considered to be of itself an adequate protection, but that the duty of protecting the minor's interest is cast upon the Court. We consider that section 8 applies only to those cases in which the act of the adult joint owner is *per se* a valid discharge.

It is next contended that section 7 does not apply to the case before us, and we are of opinion that this contention is well founded. It applies to cases in which there is either one decree-holder and he is a minor, or in which all the joint decree-holders are minors or labor under some other disability. It does not seem to be intended to apply to cases in which the minor's interest can be protected by joint decree-holders, who are also interested in the subject matter of the decree. Section 7 is in these terms:—"If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed." The language of this section is substantially the same as that of the proviso in the statute of James I and of 3 and 4 Will. IV, cap. 42, s. 4. Referring to the former statute Lord Kenyon observed as follows in *Perry v. Jackson*(1):—"the proviso was introduced into the statute in order to protect the interests of those persons only which there was no one of competent age, of competent understanding, or competent in point of residence in

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"this country, to protect . . . Now the words of this clause, grammatically speaking, do not apply to the present case; they only extend to cases where the person individually a single plaintiff, or persons in the plural, when there are several plaintiffs, are not in a situation to protect their interests. Neither does this case come within the policy of the law which provides that, if parties neglect their interests, they shall lose the benefit of suing to enforce their demands." We are, therefore, of opinion that the construction that ought to be placed on section 7 is the same as that placed on the corresponding provision of the English statute. It was held under it that the disability of one of two co-heirs cannot operate to save the statute in favor of the other who was capable of instituting a suit. Having regard to the language of section 231 of the Code of Civil Procedure, we must hold, if any other construction were adopted, that the third plaintiff could not only execute the decree in regard to his own share, but also in regard to the shares of those who are precluded by the Limitation Act from applying for execution. There can be no doubt that the first and second plaintiffs are barred by article 179 of the Limitation Act, and, if so, what the Act would forbid them from doing directly could not be done for them by the third plaintiff, which would be the case if any other construction were to prevail. The conclusion we come to is that the application of the third plaintiff is barred by limitation as against defendants Nos. 45 and 46.

We set aside the order of the District Judge so far as it relates to them and dismiss the application with costs both in this Court and in the Court below.

(1) 4 T. R., 519.

APPELLATE CIVIL.

Before Mr. Justice Shephard.

NARASIMHULU AND OTHERS (PETITIONERS),

v.

ADIAPPA (COUNTER-PETITIONER).*

*Civil Procedure Code, s. 272—Post Office Act—Act XIV of 1866, s. 5—
Attachment of letters in Post Office.*

An attachment was placed under Civil Procedure Code, s. 272, on letters in the post office addressed to certain judgment-debtors. The day before the attachment the senders of the letters had applied to have the letters returned to them :

Held, that the postmaster held the letters in trust for, or on behalf of, the judgment-debtors, and they were accordingly liable to attachment on the application of the decree-holder.

CASE referred for the orders of the High Court under section 617 of the Code of Civil Procedure by E. J. S. White, District Munsif of Kurnool.

The case was stated as follows :—

“Bupalem Subbayya and Kristam Ramayya, tradesmen of Prodatur in the Cuddapah District, came to Kurnool and purchased quantities of indigo, which they forwarded to the petitioners, who are also tradesmen of Prodatur.

“On the 27th March 1889 the petitioners registered and posted two covers at Prodatur. One was addressed to Bupalem Subbayya and contained halves of certain currency notes to the value of Rs. 800. The other cover was addressed to Kristam Ramayya and contained the remaining halves of the same notes. Both were directed to Kurnool. The money was admittedly remitted in payment of the indigo already purchased, or to be thereafter purchased, by Subbayya and Ramayya on account of the petitioners. The covers were received at the Kurnool Post office on the 29th March 1889. Previous to the arrival of the covers at Kurnool, the addressees had left the town, having, it is alleged, absconded without paying for the indigo taken by them. They were arrested on charges of cheating preferred against them, and

brought back to Kurnool, on the date the letters were received at the Kurnool Post office, the addressees were in confinement in the Kurnool jail, pending trial.

“On the 5th April 1889 the counter-petitioner filed original suit No. 130 of 1889 against Bupalem Subbayya and original suit No. 131 of 1889 against Kristam Ramayya; and on his application the covers addressed to the defendants, which had in the meantime been received at the Kurnool Post office, were attached before judgment. The attachment was made in the usual manner by notices issued to the postmaster of Kurnool in the form (No. 142 of the 4th Schedule, Civil Procedure Code) prescribed for orders of attachment under sections 272 and 486 of the Civil Procedure Code. The order of attachment of this Court was issued in both cases on the 5th April 1889 and received by the postmaster of Kurnool on the following day. On the 4th April the petitioners presented to the postmaster of Kurnool an application to the address of the Postmaster-General for return of the covers to them.

“These petitions are now filed for release of the attachment. It is pleaded that the covers, not having been delivered to the addressees, were not liable to be attached; that the petitioners had the right of recalling them; that the post office was merely the agent of the senders for delivery of the letters to the addressees; and that the petitioners having countermanded the request for delivery, before delivery was made, are entitled to have the covers returned to them.

“For the counter-petitioner it is pleaded that the money contained in the covers was remitted to the addressees in payment of indigo supplied by them to the petitioners; that the payment became complete as soon as the covers were posted; that the post office was the agent, not of the senders for delivery, but of the addressees for receipt of the money contained in the covers; and that the petitioners had no right to recall the covers and have not recalled them.

“Decrees have been obtained by the counter-petitioner in both suits against the addressees; and it is now necessary, in execution of those decrees, to decide the question of the legality of the attachment made before judgment.

“The case is one without, as far as I am aware, any exact precedent; and both parties request that it may be submitted for

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* Referred Cases Nos. 20 and 21 of 1889.

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the decision of the High Court. The decree-holder specially requests the reference, as the Postmaster-General, it is understood, declines to be bound by the prohibitory order issued; and there is no very obvious method by which the attachment can be enforced against that official.

"In these circumstances, I would beg respectfully to submit, for the decision of the High Court, the question whether the prohibitory orders issued to the postmaster of Kurnool for detention of the covers in question are valid and binding on the petitioners and the Postmaster-General.

"As section 617 requires that the Court making a reference should state his opinion on the question referred, I would venture to express my opinion that the attachment is valid. The question appears to me to be whether a cover made over to the post office for delivery to the addressee has passed out of the power or possession (which may be constructive) of the sender. This question can, I think, be decided by reference to section 4 of the Contract Act. We there find in illustration of cases in which an acceptance is 'out of the power' of the acceptor, the case of an acceptance contained in a letter sent by post. The acceptance is out of the power of the acceptor as soon as the letter is posted. The view, then, of the legislature must be that a letter is out of the power of the sender as soon as it is posted. That the legislature considers the title of the sender of a letter to such letter to have ceased as soon as the letter is posted, appears from section 27 of the Indian Post Office Act XIV of 1866. It is there enacted that 'No person having delivered into any post office any letter or other article shall be entitled to recall the same.' Provision is made for the return of any such letter under the authority of the Governor-General in Council; but this of course is a matter of grace. The sender cannot claim the return of the letter as of right, the title to such letter having ceased to be in the sender, and, as I view it, vested in the addressee. It appears to me that the post office in such a case is the agent, not of the sender, but of the addressee. The addressee can demand as of right the delivery of the cover to him; whereas the sender by express enactment ceases to have such right as soon as he delivers the cover to the post office. The post office receives delivery of the letter for the addressee. The delivery is complete, for the sender has also by express enactment ceased to have power over it. Delivery to

an agent authorized to receive such delivery is delivery to the principal. The Government is authorized to take delivery of letters—section 5 of the Post Office Act, 1866. Delivery to a carrier passes the property in the goods delivered—sections 91 and 92 of the Contract Act. The post office has the exclusive privilege of carrying letters—section 5 of the Post Office Act. This raises the question of stoppage in transit; but it appears to me that the right to stoppage of letters in transit by the post office is excluded by section 27 of the Post Office Act already quoted. There is no right, though the stoppage may be permitted at the discretion of the Government. The addressee on the other hand is entitled to delivery—section 45 of the Post Office Act.

"The Court attaching the letter stands, it seems to me, in the place of the addressee, and, as in the case of any other attachment of property, acquires a superior right to possession of the property attached. The Court clearly can attach a cover, specially a cover known to contain bank notes or promissory notes—section 266 of the Civil Procedure Code. A cover containing such notes, delivered to the post office, is 'property in the custody of a public officer' within the meaning of section 272 of the Civil Procedure Code.

"It is not necessary that the property should belong to the judgment-debtor. It is sufficient if he has a disposing power over it—section 266. It is not denied that the addressee has a disposing power over a letter sent to him through the post office. It cannot be disposed of by the post office except by his authority. He can direct the post office to deliver it to any person mentioned by him, to re-direct it, or keep it till called for. He can sell it and direct delivery to the purchaser. He can refuse to receive it, and direct that it be returned to the sender.

"Property is liable to attachment 'whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf'—section 266. In the present case the covers containing the notes are expressly held in the name of the judgment-debtor in each case, and it can scarcely be denied that they are held in trust for him on his behalf.

"Admittedly the money contained in the covers was money due to the addressees for the indigo forwarded by them to petitioners. If the petitioners were seeking to recover the money from the addressees, they would, it is clear, have no right to do

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NARASIMHULU SO. The case does not, it appears to me, differ in any material respect from the ordinary one of money due by A to B and delivered to C for payment. If such money is attached, when C is on the point of paying it to B by D, B's judgment-creditor, can A have any right to object?

"The objection, which the Postmaster-General is understood to take to the attachment, appears to be even less tenable than the objection raised by the petitioners. Let us suppose that the addressees, decrees against whom have been put in execution in this Court, authorized the post office to deliver to the Court, in satisfaction of those decrees, the covers held by the post office containing money due to the said addressees; and that to obviate all objections they authorized the Court by a power of attorney to receive delivery. The post office would, I presume, in that case have no objection to making the delivery in accordance with the instructions of the addressees. The attachment made by the Court vests for the time being all the rights of the judgment-debtors in the Court; and has all the effect of a direct conveyance. For the post office to argue in this case that the Court cannot claim delivery of the covers without an express authority from the addressees is tantamount to an assertion that the Court cannot make an attachment without the judgment-debtors' authority and consent. It is asking the Court to produce its power of attorney."

Ramasami Mudaliar for petitioners.

Rama Rau for counter-petitioner.

JUDGMENT.—The question forming the subject of this reference arises in consequence of a claim to have released from attachment certain letters containing currency notes on the ground that the right and title of the judgment-debtors had ceased before the attachment took place. The letters, which are addressed to the judgment-debtors, were attached in the hands of the postmaster in the manner indicated by section 272 of the Civil Procedure Code. A day before the attachment took place, the claimants, being the persons who had sent the letters, had applied to the Postmaster-General, through the postmaster, to have the letters returned. The question is whether, in the circumstances stated by the District Munsif, the letters, with their contents, were, on the 6th April, liable to attachment as being the property of the judgment-debtors, and whether they were held by the postmaster in trust for them or on their behalf. I am of opinion that both

questions must be answered in the affirmative. The notes were sent by the claimants to the judgment-debtors on account of purchases of indigo made, or to be made by the latter on behalf of the former. In the hands of the judgment-debtor the notes would clearly have been part of their general property and subject to attachment by their creditors. The question is whether the ownership in the notes was vested in the judgment-debtors or liable to be divested at the date of the attachment. According to English law, it seems clear that the post office holds every letter that is once posted as agent of the addressee, and that therefore where delivery of a thing is requisite to pass the property, it is generally sufficient to deliver it for transmission by the post office. *Ex parte Cote*(1). I find nothing in the Act XIV of 1866 to indicate a different state of law in this country, and, on the contrary, the illustrations to sections 4 and 5 of the Contract Act are in accordance with English law. I think that the provision in the Act, reserving to the Postmaster-General the liberty of returning the letter to the sender, which is in effect a proviso to the declaration that the sender shall not be entitled to have his letter returned cannot possibly be construed in the manner suggested by the vakil for the claimants. Construed as giving an absolute right to the sender, the proviso would be inconsistent with the former part of the section. When once the letter has been posted, the property in it becomes vested in the addressee, and the sender has no power of reclaiming it without the addressee's consent. The doctrine of stoppage *in transitu* can have no application, because the parties do not stand in the relation of vendor and purchaser. In my judgment the question referred by the District Munsif must be answered in favor of the judgment-creditors.

(1) L.R., 9 Ch., 27.

APPELLATE CIVIL.

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

1889.
November 1.

PERUMAL AND ANOTHER (PETITIONERS), APPELLANTS,

v.

RAJAGOPALA (COUNTER-PETITIONER), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, s. 27—order under—Civil Procedure Code, s. 2—Decree.

An order made under Rent Recovery Act (Madras), s. 27, is not a decree within the meaning of Civil Procedure Code, s. 2.

APPEAL under Letters Patent against the order of Wilkinson, J., made on civil revision petition No. 228 of 1889, which was presented under section 622 of the Civil Procedure Code, and prayed the High Court to revise the order of C. Srinivasa Sastri, District Munsif of Trivellore, made on miscellaneous petition No. 13 of 1887.

A landlord having distrained certain crops, &c., as for arrears of rent, the tenants forcibly recovered possession of the property distrained. The landlord accordingly presented miscellaneous petition No. 13 of 1887 in the Court of the District Munsif praying that the distress be restored to him. The District Munsif made an order to the effect sought under Act VIII of 1865, s. 27.

The tenants preferred the above petition.

Sadagopachariar for petitioners.

Srirangachariar for respondent.

The petition having come on for hearing before Wilkinson, J., it was objected for the respondent that the petitioners' remedy was by way of appeal to the District Court. His Lordship delivered judgment as follows:—

WILKINSON, J.—“I am of opinion that the preliminary objection must prevail. It is argued that the order of the Munsif being the formal expression of an adjudication upon a right claimed, is a decree, and that from such decree an appeal lies to the District Court. On the other hand it is contended that the only appeals provided for by section 69 of Act VIII of 1865 are from judgments of a Collector, and that, therefore, no appeal lies from an order passed under section 27 of that Act. It was unnecessary to

* Letters Patent Appeal No. 8 of 1889

make any special provision in Act VIII of 1865 for an appeal from an order of a Civil Court, because provision for all such cases is made in the Code of Civil Procedure. The order passed under section 27 is, in my opinion, a decree capable of execution, and being a decree of a Civil Court, the appeal is regulated by the provisions of the code.

“This petition must, therefore, be dismissed with costs.”

The petitioners preferred this appeal against the above order of Wilkinson, J.

The appeal having come on for hearing before Muttusami Ayyar and Parker, JJ., their Lordships, after hearing the pleaders for the parties, delivered judgment as follows:—

JUDGMENT.—We are unable to agree with the learned Judge that an order made under section 27, Act VIII of 1865, is a decree within the meaning of the Civil Procedure Code.

Having regard to the language of section 27, we think it can only be taken to be an order in a summary proceeding, and as such cannot be said to have decided a “suit or appeal” under section 2 of the Code of Civil Procedure. The decision in *Vudamalai Thiruvana Tevar v. Caruppen Servai*(1) would show that the proceeding contemplated by the section is summary. We must, therefore, allow the appeal with costs, and we shall proceed to hear the civil revision petition under section 622.

[Their Lordships, holding that the petitioners had established no grounds on which the Court should interfere in revision, dismissed their petition with costs.]

APPELLATE CIVIL.

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

RANGAYYA APPA RAU (PLAINTIFF), APPELLANT,

v.

KADIYALA RATNĀM AND OTHERS (DEFENDANTS), RESPONDENTS.*

Rent Recovery Act, Madras—Act VIII of 1865, ss. 9, 10, 11—Improper stipulations in patta—Claim of tenants to hold over land after expiry of lease.

* In summary suits brought by a landlord to enforce acceptance by his tenants of pattas tendered by him for the current *fasli*, it was pleaded that the pattas were

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improper in that they did not comprise certain land of which the tenants were in possession and in which they claimed permanent occupancy rights, and also in that they contained various terms which the plaintiff was not entitled to impose on the defendants, providing (*inter alia*) (1) that interest should be payable on the several instalments of rent as they became due, (2) that the defendant should not fell certain trees except for agricultural purposes, (3) that the defendants should not reap their crops without previously obtaining the plaintiff's permission, (4) that on a change made without the plaintiff's permission from dry to wet cultivation, the tenancy should be forfeited in case of default made by the defendants in paying the amount of Government assessment, and also an undetermined sum then to become payable by the defendants to the plaintiff in addition to the rent.

The defendants failed to prove the permanent occupancy rights claimed over the land not comprised in the pattas and it appeared that they had held leases from the plaintiff for the land in question for a period of three years and had held over after the expiry of the leases without the permission and contrary to the wishes of the landlord; and it further appeared that the provision as to trees did not extend to shrubs, &c., and had been an accepted term in the pattas issued for ten years. The Revenue Court modified the terms of the pattas and passed decrees that the pattas as modified be accepted, against which some only of the defendants appealed, and the District Judge on appeal introduced further modifications into the pattas:

Held (1) that the District Judge had no jurisdiction under Civil Procedure Code, s. 544, to introduce further modifications into the pattas in favor of the defendants who had not appealed according to the opinion formed by him in appeals preferred by the defendants in other suits;

(2) that the defendants were not entitled to have the pattas modified by enlarging the extent of the land comprised in them, or by the cancellation of the provisions as to interest and as to felling trees:

(3) that the defendants were entitled to have the pattas modified by the cancellation of the provision as to reaping crops and of the provision for forfeiture.

SECOND APPEALS against the decrees of G. T. Mackenzie, District Judge of Kistna, in appeal suits Nos. 187, 188, 189, &c., of 1887, modifying the decision of P. Ramachandra Rau, Head Assistant Collector of Kistna, in summary suits Nos. 190, 191, 192, &c., of 1886.

Suits by a landlord under section 9 of the Rent Recovery Act, Madras, to enforce the acceptance of pattas by his tenants. The form of the pattas tendered by the plaintiff, so far as it is material for the purposes of this report, is as follows:—

“You shall pay the kist of every year in that very year, in the order of kistbandi instalments mentioned above, in our taluk of Nuzvid without raising any objections, and obtain receipts

“On failure to pay according to the kist instalments, you shall pay together with interest at rupee 1 per cent. per mensem from the date of the expiration of the kist instalment.

“You yourself shall bear the profit or loss accruing from excess

of rain or want of it; and whether you cultivate or not, you shall pay the kist without relinquishing the lands within the term.

“You shall enjoy (the produce) after obtaining Dumbalas from our Circar for permission for harvesting the produce after the season.

“At the expiration of the term, you shall not cultivate without again obtaining fresh pattas from us.

“If you irrigate the Vetha crops (*i.e.*, crops sown by the hand) by the Krishna water, you shall pay separately the tirva that may be fixed by the Queen's Circar.

“If, without obtaining our permission, you newly raise wet cultivation on dry lands, you shall not only pay the tirva that may be fixed therefor by the Queen's Circar in addition to your paying to our Circar the excess kist that may be determined by us for such wet cultivation, but also you shall thenceforth relinquish the right of cultivating those lands.

“As the fruit trees, the tax on the palmyras, the Tumma trees (Baubul trees) that are on the said lands are not included in the said kist, you shall, when required for cultivation purposes, obtain permission and cut the required Tumma trees only.”

The Head Assistant Collector and (on appeals preferred by some of the defendants) the District Judge made certain modifications in the form of the patta.

The plaintiff preferred these second appeals.

Subramanya Ayyar and *Bhashyam Ayyangar* for appellant.

Mr. de Rosario and *Ananda Charlu* for respondents.

The further facts of the case appear sufficiently for the purposes of this report from the following

JUDGMENT:—The appellant in these cases is the zamindar of Nuzvid and the respondents are his raiyats in the village of Mastabada. One of the principal questions raised in them was whether the pattas tendered by the former to the latter for fasli 1295 were proper. Both the Head Assistant Collector and the Judge considered that they required to be amended, and the zamindar appeals from their decision.

The first objection taken with reference to second appeals Nos. 1292 and 1299 is that the Judge was not entitled to alter the decision of the Court of First Instance to the appellant's prejudice. In those cases the raiyats did not appeal to the District Court, but the Judge modified the decrees of the Head Assistant Collector

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according to the opinion formed by him in appeals preferred by other raiyats in other suits. It is contended that he was not at liberty to do so, and as section 544 of the Code of Civil Procedure is not applicable, we are of opinion that the contention must prevail. The decision of the District Court so far as it modifies that of the Head Assistant Collector in the respondent's favour in second appeals Nos. 1292 and 1299 must be set aside.

The second objection which is taken for the appellant is that both the Lower Courts were in error in holding that the relinquished land should be included in the pattas. The zamindar's contention was that the land was granted to the raiyats on a lease for three years ending with 1294, that they cultivated it without his permission in 1295, that he leased it out to others in May, and that he was, therefore, not bound to include it in the pattas tendered to respondents in June 1295. In answer to this contention the raiyats urged that the relinquished land was granted to them in 1292 not on a lease for three years but in perpetuity and on the same tenure on which they hold ordinary jarayati land. The land in dispute is about 2,000 acres in extent, and it was relinquished by the raiyats together with 200 acres more in 1289 when the estate was under the management of the Court of Wards. It was rented out as pasture land in 1289, 1290 and 1291, and at the end of the last-mentioned fasli the zamindari was made over to the appellant. Early in 1292 he granted the relinquished land to the respondents on a joint lease for three years subject to an annual rent of Rs. 24-8-0 per katti, but the respondents since divided it among them and in consequence of this division the joint holding was converted into separate holdings. So far there is no dispute, the contest being as to whether the ordinary raiyatwari tenure was also substituted for the tenancy for three years when separate holdings were substituted for the joint holding. The Head Assistant Collector observed that neither party proved his case, but that as the zamindar did not tender pattas prior to June 1295 and not until long after the raiyats had cultivated the land, it was fair to direct that it should be included in the pattas. The Judge recorded no distinct finding as to whether the lease, as ultimately modified in 1292, was permanent or limited to three years, but upheld the decision of the Head Assistant Collector on the ground that it was equitable. It is argued before us, and rightly we think, that the question which

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the Judge had to decide was one of legal right. If, as alleged by the zamindar, the land was let but for three years, and the raiyats held it over after the expiration of the lease without his permission and contrary to his wishes such holding over would be wrongful and it would be no valid defence in a suit to eject them. It is not alleged that the zamindar granted permission to raiyats to cultivate the relinquished land in 1295 on the same terms on which they cultivated it during the previous year. A wrongful holding over could not be treated as a continuation of the prior tenancy unless the zamindar accepted rent or by some overt act condoned the wrong. Again the appellant was entitled under the existing law to tender pattas before the end of the fasli year, and if a tenant who must be taken to know the law chose to hold over, the inference is that he is in possession by his own wrong and at his own risk. We must therefore ask the Judge to return a distinct finding as to whether the relinquished land was granted in 1292 ultimately on a lease for three years only or on a permanent tenure.

Adverting to the finding of the Head Assistant Collector that neither party proved his contention as to the tenure on which the relinquished land was let in 1292, it is argued for the appellant that the *onus* of proof being on the respondents, the decision must be in his favour in the event of that finding being adopted. To this suggestion we are unable to accede. The *onus* of establishing a perpetual tenure, if any, is certainly on the respondents, but it is open to them to fall back upon the presumption of tenancy from year to year, which might arise from their occupation from 1292 to 1294, and to claim that the relinquished land should be included in the pattas at least for 1295, if neither a lease for the fixed term of three years nor a perpetual tenure were established. Before we dispose of these second appeals, however, we must request the Judge to return findings on the question mentioned above.

The last objection has reference to two stipulations which the Judge directed to be omitted from the pattas in all the cases on the ground that they were unreasonable. The first stipulation is this:—“In case, without obtaining our permission, you should newly cultivate dry land as wet land, you should not only pay the assessment fixed by the Government of Her Majesty and the extra assessment fixed by us for your having cultivated it as wet

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land to our Circar, but should also forfeit the right of cultivating the land from that time." This provision, so far as it relates to forfeiture of the right to cultivate, is manifestly penal, and, so far as it relates to extra assessment payable to the zamindar, is arbitrary and likely to prove oppressive. We consider that it was properly disallowed by the Judge. We also concur in his opinion that the second stipulation is unreasonable. It requires the raiyat not to reap his crop without the previous permission of the zamindar. The appellant has a lien on the crop for his rent and is entitled to distrain it for arrears of rent if any. The provision is open to abuse, while it is not necessary for the protection of his interest.

The respondents object that the stipulation for payment of interest from the dates on which the several instalments of rent were payable according to the kistbundi was improperly inserted in the pattas which were tendered at the close of the year. It must here be observed that the pattas, though tendered in June 1295, were tendered as evidence of the contents of a pre-existing obligation consequent on the position of the respondent as occupancy raiyats. The tender is not the *cause* of the obligation, though it is a condition precedent to its enforcement. We see no sufficient ground for upholding this objection.

The respondents also object that the stipulation that raiyats ought not to fell fruit trees and certain other trees except for agricultural purposes is an unwarranted interference with their right to the trees which stand on their land. We observe that there was a similar stipulation in some of the previous pattas. There is, however, no distinct finding as to whether its insertion in the pattas is in accordance with the established usage of the village. On this point also we shall ask the Judge to return a distinct finding.

[The District Judge returned a finding to the effect that the defendants entered upon the relinquished lands in fasli 1292 not as tenants from year to year, but on leases for a term of three years, and that, having held over without the zamindar's consent, they could not claim future pattas at the rent which they had paid in those three years. With regard to the trees, the District Judge found that the stipulation had been comprised in the pattas for ten years, but that this period was not sufficient to constitute a usage.]

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These second appeals having come on for final hearing their Lordships accepted the finding with regard to the relinquished lands, and, with regard to the stipulation not to cut trees delivered judgment as follows:—

We are not able to support the finding of the District Judge, and it appears to us that he has put the burden on the wrong side. *Prima facie* a tenant would not be at liberty to cut down fruit trees on his holding, and by so doing would considerably impair the value of the property. The fact that for ten years this condition in the pattas had been accepted would be evidence of a recognized custom consistent with the usual rights of a landlord and it is shown that the prohibition does not extend to shrubs and small trees which are generally at the disposal of a tenant for the purposes of his holding. With this modification the finding of the Lower Appellate Court is accepted. We direct that each party do bear his own costs throughout.

APPELLATE CIVIL.

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

RAINIER (PLAINTIFF),

v.

GOULD (DEFENDANT).*

1889.
Nov. 11, 14.

Stamp Act—Act I of 1879, sched. I, art. 5(a)—Agreement or memorandum of agreement relating to the sale of shares—Agreement by correspondence.

Correspondence having passed between the plaintiff and defendant relating to the sale of shares in a certain company by the plaintiff to the defendant, and the sale not having been carried out, the plaintiff in a suit for damages against the defendant sought to prove an agreement for sale from the letters, none of which were stamped:

Held, the letters, though unstamped, were admissible as evidence of an agreement, since they did not constitute an agreement or a memorandum of agreement.

CASE stated under section 69 of the Presidency Small Cause Court Act by J. W. Handley, Chief Judge of the Madras Court of Small Causes, in suit No. 20399 of 1888.

The case was stated as follows:—

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"This was a suit for damages for breach of a contract on the part of defendant to purchase from plaintiff fifty shares in the South Indian Ice Company (Limited). Defendant, amongst other pleas, denied the contract.

"At the first hearing before the Acting Chief Judge, Mr. Scharlieb, certain letters (exhibits A to E) were proposed to be put in evidence on behalf of plaintiff in proof of the contract. For defendant these letters were objected to as inadmissible in evidence on the ground that, if they were put forward as constituting a contract for the sale of the shares, they or one of them required a one-anna stamp under article 5(a), schedule I of the Stamp Act (I of 1879), which stamp must have been affixed at the time of execution; and that the stamp duty required being one anna, the documents could not be received in evidence on payment of the stamp and penalty under the provisions of section 34 of the Stamp Act, instruments chargeable with such duty being expressly by the words of the section excluded from the benefit of those provisions.

"One of the letters (exhibit C), when produced by plaintiff, bore a one-anna adhesive stamp, which, however, it was admitted was affixed to it after it came into plaintiff's hands. It was contended at one time on behalf of plaintiff on the authority of a Bombay case (*Bhauram Madan Gopal v. Ramnarayan Gopal*)⁽¹⁾ that this was a sufficient stamping to render the document admissible in evidence, but this contention was not much insisted upon, and I do not consider it necessary to refer that point to the High Court.

"Mr. Scharlieb after hearing the evidence of plaintiff held that the letter (exhibit D) required a one-anna stamp, and, not being so stamped, was inadmissible in evidence, and that the contract could not be proved without that letter, and accordingly he dismissed the suit.

"Upon an application to the Full Court for a new trial, it was held that none of the letters in question required a stamp under article 5(a) of schedule I of the Stamp Act, and that they were, therefore, admissible in evidence in proof of the contract, but that even if this opinion were not well founded and one or more of the letters were inadmissible on this ground, plaintiff would still be entitled to prove the contract by the written admissions of the

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defendant. A new trial was accordingly ordered, leave being given to plaintiff to amend the plaint.

"Upon the new trial before me I found that the contract, as alleged in the amended plaint, was proved by the letters A to E, or, if they were not admissible in evidence by the written admissions of defendant, that plaintiff was ready and willing to complete the contract, and that there was no unreasonable delay on his part in obtaining the share certificates, and that defendant was not justified in rescinding the contract, and that plaintiff had proved his damages as charged in the plaint. I gave judgment, therefore, for plaintiff for the amount claimed and costs, but (at the request of defendant's attorney), contingent upon a case to be stated for the opinion of the High Court upon two questions of law raised in the case, viz.,

- (1) Do the letters (exhibit A to E) or any of them require a stamp under article 5(a), schedule I of the Stamp Act?
- (2) If all or any of the letters in question are or is inadmissible in evidence on account of not bearing a stamp, is it open to plaintiff to prove the contract by the written admissions of defendant?

"As to (1)—it has been a surprise to me to find that there are no decisions of the Indian Courts upon the effect of the present Stamp Law upon a series of letters put forward in proof of a contract; at least none have been quoted in the argument, and I can find none. The present Stamp Act omits the provision, which found a place in the preceding Act (XVIII of 1869, sched. II, art. 2), and in previous Stamp Acts, that, when several letters constitute an agreement, it is sufficient if any one of them is properly stamped. I believe that, notwithstanding this omission, it has still been the practice in the Courts of this Presidency at any rate when a series of letters is tendered in evidence in proof of a contract to require that the stamp duty and penalty be paid on one of them. It seems to me doubtful whether this practice is correct,—whether a series of letters of this kind can be said to be an 'agreement or memorandum of an agreement' within the meaning of the Stamp Act. The question has to be faced and decided in a case like the present where the stamp (if any) required being a one-anna stamp, the document cannot be admitted on payment of penalty. The difficulty to my mind is that if such a series of letters is an 'agreement or memorandum

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of an agreement' within the meaning of the Stamp Act, then the requirements of that Act as to the time of stamping instruments cannot be complied with. Section 16 requires that all instruments executed in British India shall be stamped before or at the time of execution. Now take the simple case of two letters—a proposal and an acceptance. At the time of execution by the proposer it is impossible that the instrument should be stamped because there is then no agreement between the parties and consequently there can be no written agreement or memorandum of an agreement to stamp. So in the case of a series of letters introducing variations in the terms of the original offer or acceptance, it is not until the last letter of the series that there is an agreement between the parties, and then it is impossible to stamp the instrument at the time of its execution by one of the parties. In the present case, for instance, Mr. Scharlieb held, and I think quite rightly, that there was no contract till the letter D was written by the plaintiff. How then could this series of letters or any of them have been stamped as an agreement or memorandum of an agreement at the time of its execution by defendant. Another difficulty is that, even in the case of a letter finally accepting an offer, it cannot be said that there is a complete agreement between the parties at the time of its execution, because the previous offer may be retracted at any time before the acceptance is put in course of transmission to the proposer. These and other difficulties and the fact of the omission of the above mentioned provision from the present Stamp Act suggest to me that by an 'agreement or memorandum of an agreement' is meant one document embodying the agreement of the parties, and that it was not the intention of the legislature to require that one or more of a series of letters, which may be evidence of a contract, should be liable to stamp duty.

"As to question (2) the Evidence Act, sections 22 and 85(b), seems to embody the doctrine of the English cases of *Slatterie v. Pooley*(1) and many others that the admissions of a party to the suit are always evidence against him, even though they relate to the contents of a document which is not produced or is not admissible in evidence, with this variation that the admission must be a written one."

Exhibit A—E were as follows:—

EXHIBIT A.

18, MOUNT ROAD,
MADRAS, 28th May 1888.

DEAR SIR,

I am informed you wish to part with your shares in the South Indian Ice Company at 20 per cent. discount or more. Please inform me if this is correct, as I should feel inclined to buy.

Yours faithfully,
HORACE J. GOULD.

EXHIBIT B.

29th May 1888.

DEAR SIR,

In reply to your note, I have fifty shares of the Ice Company, which, in spite of the very favorable prospects of that company, I, for other reasons altogether apart, wish to sell, and in order to sell quickly, will sell at a loss.

On the above shares, I have paid Rs. 37-8-0 each, or altogether Rs., 1875- Rs. 12-8-0 more per share is payable next month.

I am prepared to let you have the above shares at the price you mention, viz., 20 per cent. off what I have paid or for Rs. 1,500 cash. Kindly let me know whether this is settled.

Yours faithfully,
H. RAINIER.

EXHIBIT C.

18, MOUNT ROAD,
MADRAS, 30th May 1888.

DEAR SIR,

In reply to your note, I write to say I am prepared to take your shares at Rs. 2,000, being 20 per cent. off Rs. 2,500, the original price of shares.

Yours faithfully,
HORACE J. GOULD.

EXHIBIT D.

MADRAS CLUB,
31st May 1888.

DEAR SIR,

I accept your offer of Rs. 2,000 for my 50 shares South Indian Ice Company, Limited, fully paid.

I have as previously stated paid only Rs. 37-8-0 per share at present for the above shares, leaving Rs. 12-8-0 per share payable, or altogether Rs. 625; if then you hand me your cheque for Rs. 1,375 in exchange for my transfer deed I presume it will be all right.

Perhaps my bankers had better arrange it with yours.

You are probably aware that scrip of shares is not yet issued pending final call payable next month (June).

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Kindly say to whom my bankers (National Bank, India,) shall send the bill and transfer for payment.

I am yours truly,
H. RAINIER.

EXHIBIT F.

ANDERSON'S ROAD,
NUNGAMBAKAM, 2nd June 1888.

DEAR SIR,

My Bankers are the Bank of Madras, and I have written them to take over from you the fifty shares in the South Indian Ice Company. I shall be glad if your Bankers will arrange matters with mine.

Yours faithfully,
HORACE J. GOULD.

The *Advocate-General* (Hon. Mr. Spring Branson) for defendant.

Exhibit D, a letter from plaintiff to defendant, dated 1st May 1888, shows that the contract was completed, and also states that the scrip had not been issued. It completes the proposal and acceptance. See section 7, Contract Act and *Hebb's case*(1). It should accordingly have been stamped under schedule 1, clause 5(a). As to the argument of the learned Chief Judge, I say, the admissions referred to really form the contract, and the want of a stamp prevents them from being proved. See *Arunachellum Chetty v. Olagappah Chetty*(2), *Arumuga Kolathairian v. Kolandai Semandan*(3), and *Sennandan v. Kollakiran*(4), where the learned Judges distinguished *Golap Chand Maricree v. Thakurani Mohokoom Kooaree*(5) (where a decree was passed on the original consideration for which an unstamped promissory note had been given) and followed *Marine Investment Company v. Heaviside*(6) which also governs this case, see per Lord Cairns at p. 684 of the report, compare also *Muthalagan Ambalam v. Ramanadhan Chetti*(7), where as here the terms were reduced to the form of a document, and *Valiappa v. Mahommed Khasim*(8), and see *Varada v. Krishnasami*(9) (upon the corresponding provisions of the Registration Act, 1864), and *Pothi Reddi v. Velayuda Sivan*(10), *Damodar Jagannath v. Atmaram Babaji*(11),

- (1) L.R., 4 Eq., 9.
- (3) 4 Ind. Jurist, 499.
- (5) I.L.R., 3 Cal., 314.
- (7) 4 Ind. Jurist, 668.
- (9) I.L.R., 6 Mad., 117.
- (11) I.L.R., 12 Bom., 443.

- (2) 4 M.H.C.R., 312.
- (4) I.L.R., 2 Mad., 208.
- (6) L.R., 5 P.C., 624.
- (8) I.L.R., 5 Mad., 166.
- (10) I.L.R., 10 Mad., 91.

Jethibai v. Ramchandra Narottam(1), *Benarsi Das v. Bhikhari Das*(2).

Evidence Act, ss. 22, 65, must be subject to the rule in the *Marine Investment Company v. Heaviside* (*supra*), and if you cannot prove the contract at all directly, you cannot prove it indirectly by proof of admissions.

Mr. W. Grant for plaintiff.

In Act X of 1862, sched. A, art. 1, there was a note that if two or more letters were offered in evidence, it was sufficient if one be stamped. In subsequent Acts this note has been omitted, probably because it was impossible to say which letter should be stamped or when. A contract evidenced by letters is not "a written contract." A contract to be inferred from correspondence is not reduced to a document. Is the person who makes the offer to put the stamp to protect himself lest the acceptance should be without one? Letter C should be stamped, if any, but the plaintiff could not stamp it; in fact none of the letters here was written as the contract between the parties, though they evidence it. A man's admissions are evidence against him although contained in a writing not necessarily admissible for all purposes, *Iggulden v. May*(3), *Farr v. Price*(4), *Earle v. Picken*(5), *The King v. The Inhabitants of Wrangle*(6), *Newhall v. Holt*(7), *Slatterie v. Pooley*(8), and section 65(b) was never intended to vary the English law that a party's admissions were evidence against him. *Duchess of Kingston's case*(9), *Barker v. Birt*(10). See *Teignmouth and General Mutual Shipping Association in re*(11), for what amounts to sufficient admission of liability in books of policy of insurance.

Moreover an equitable construction should be put on fiscal legislation, see per Lord Cairns in *Partington v. The Attorney-General*(12), and see per Esher M. R. in *Commissioners of Inland Revenue v. Angus and Company*(13). The tax is imposed on the instrument, not on the transaction, therefore if there is a transfer apart from instrument, the section does not apply.

- (1) I.L.R., 13 Bom., 484.
- (3) 7 T.R., 241.
- (5) 5 Carrington & Payne, 542.
- (7) 6 M. & W., 662.
- (9) 2 S.L. Cases, 785.
- (11) L.R., 14 Eq., 148.
- (13) 23 Q.B.D., 579.

- (2) I.L.R., 3 All., 717.
- (4) 1 East, 55 (1800).
- (6) 2 A. & E., 514.
- (8) 6 M. & W., 664.
- (10) 10 M. & W., 61.
- (12) 4 Eng. & Irish App. Cases, 122.

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I rely also on *Muttukaruppa Kaundan v. Rama Pillai*(1), *Rajah Lakshmi Chelliah Garu v. Krishna Bhupati Deru*(2). *Sennandan v. Kollakiran*(3), does not apply for I am not proposing to give secondary evidence of any document, but original evidence, admissions—*Valiappa v. Mahommed Khasim*(4) only held a plaintiff must succeed if at all on the case he sets up and see *Kopasan v. Shamu*(5). *Pothi Reddi v. Velayuda Sivan*(6), does not apply as the contract has not been reduced to the form of a document; see illustrations to section 91, Evidence Act.

How if contract is made by telegrams? What can be stamped? *Arunachellum Chetti v. Olagappah Chetti*(7) was also referred to.

Taylor on Evidence, page 361 letters are evidence of agreement, not the agreement itself. Section 22, Evidence Act, only provides for oral admissions, but there are other kinds: section 17.

The *Advocate-General* in reply referred to *Smith's Case* (8).

JUDGMENT:—This is a case stated for the opinion of the High Court by the Chief Judge of the Madras Court of Small Causes under section 69 of the Presidency Small Cause Act.

The suit was one for damages for breach of contract on the part of defendant to purchase from plaintiff fifty shares in the South Indian Ice Company (Limited), certain letters (A to E) were proposed to be put in evidence to prove the contract, but objection was raised on the ground that if they were put forward as constituting a contract for the sale of the shares, they or one of them required a one-anna stamp under article 5(a), schedule I of the Stamp Act I of 1879.

The questions referred to the High Court by the learned Chief Judge are—

- (1) Do the letters (A to E) or either of them require a stamp under article 5(a), schedule I of the Stamp Act?
- (2) If the letters in question or any of them are or is inadmissible in evidence on account of not bearing a stamp, is it open to plaintiff to prove the contract by the written admissions of the defendant?

(1) 3 M.H.C.R., 168.

(3) I.L.R., 2 Mad., 208.

(5) I.L.R., 7 Mad., 440.

(2) 7. M.H.C.R., 6, 21.

(4) I.L.R., 5 Mad., 166.

(6) I.L.R., 10 Mad., 94.

Under article 5(a) of schedule I, the "description of instrument" rendered liable to a stamp duty of one anna is an agreement or memorandum of an agreement relating to the sale of shares in any company. From the language of the schedule it might be inferred that what the legislature intended to make liable to duty was some instrument, which should form the record of the agreement, and from which the terms of the agreement could be collected. Where, however, the terms of an agreement have to be collected from a correspondence it is obvious that it would often be difficult if not impossible to select any one letter in the correspondence which could be regarded as containing a memorandum of the entire agreement.

It is clear that this difficulty has not escaped the notice of the legislature. Referring back to Act X of 1862, which was enacted for the purpose of consolidating and amending the law relating to stamp duties, we find a note to schedule A in which it is enacted that if two or more letters are offered in evidence to prove an agreement between the parties who shall have written such letters, it will be sufficient if any one of such letters be stamped as an agreement. The duty chargeable on an agreement under the Act of 1862 was one rupee.

The General Stamp Act XVIII of 1869 which repealed the Act of 1862, repealed this provision in the form of a proviso to article 11, schedule II, at the same time reducing the duty upon a memorandum of an agreement to eight annas. The proviso is, however, entirely omitted in the corresponding article 5(a), schedule I of the present Stamp Law, which still further reduces the charge upon an agreement to one anna, and we cannot doubt that the omission of the legislature to re-enact the clause must have been intentional. The point for determination is whether the intention was to exclude such letters from the category of agreements liable to stamp duty or to omit what was regarded as a superfluous provision.

It appears to us that there are several reasons in support of the first-mentioned intention. Not only has the tendency of legislation been to lighten the burden of taxation with reference to agreements, but the Stamp Act being a fiscal enactment, the intention to tax a particular instrument must appear in terms clear and positive, and in case of doubt, the construction must be in favor of the subject.

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As the Act stands at present, all the letters would require to be stamped unless the terms of the agreement can be collected from any one of them, which is frequently impossible. It appears to us most improbable that the legislature could have intended to hamper commercial transactions in such a manner and the fact that the terms of an agreement if embodied in a single document was in future intended to be only liable to the reduced duty of one anna certainly favors this view.

When we consider, therefore, the omission of the proviso from the present Stamp Act, together with the recognized principles of construing fiscal enactments, we are led to the conclusion that the legislature intended to make a distinction between a document which is intended by the parties concerned to be a formal expression of the terms of an agreement, and letters offered in evidence from which an agreement and its tenor have to be inferred by a process of construction; and that to provide for the difficulty which might be felt by the parties writing the letters as to which of them should be stamped, the legislature deliberately omitted to render any of such letters merely evidencing an agreement liable to future duty while at the same time imposing a reduced duty upon a formal instrument.

Our answer to the first question is that none of the letters A to E is liable to stamp duty. The contingency on which the second question was referred to us does not, therefore, arise, and it is not necessary for us to answer it. The costs of the reference must follow the event.

Attorneys for plaintiff *Wilson & King*.

Attorney for defendant *Grant*.

APPELLATE CIVIL.

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

VENKATARAMA (PETITIONER), APPELLANT,

1890.
Jan. 6

v.

SENTHIVELU AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code, s. 234—Hindu Law—Execution of a decree against the son of a Hindu judgment-debtor—Determination of questions as to the binding nature of the decree debt.

In execution of a money decree passed against a Hindu, since deceased, ancestral property in the possession of his son was attached. A petition by the son objecting that the property was not liable to be attached in his hands was dismissed:

Held, that the order dismissing the petition was wrong, for when a judgment-creditor seeks to attach ancestral property after it has vested in the son by survivorship under Hindu law upon the father's death, he cannot be considered as executing the decree against the property of the deceased judgment-debtor within the meaning of s. 234 of the Code of Civil Procedure.

SECOND APPEALS against the orders of H. T. Ross, Acting District Judge of Madura, in civil miscellaneous appeals Nos. 17 and 19 of 1888, reversing in part the order of A. Sami Ayyar, District Munsif of Paramagudi, on civil miscellaneous petition No. 935 of 1887.

An application was made for the execution of a money decree passed in original suit No. 332 of 1877 and notice was issued under Civil Procedure Code, s. 248, to the son of the deceased judgment-debtor to show cause against the execution. No cause having been shown, execution was ordered and attachment was placed on certain property in the possession of the son, who thereupon presented the above petition objecting to the execution on the ground that the property proceeded against was not liable to satisfy the decree.

The petitioner was found to have been a minor at the date of the application for execution; and his petition was accordingly heard. The District Munsif held that the petitioner's objection was valid in respect of one moiety of the property which he accord-

* Appeals against Appellate Orders Nos. 13 and 14 of 1889.

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Attorneys for plaintiff *Wilson & King*.

Attorney for defendant *Grant*.

APPELLATE CIVIL.

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Held, that the order dismissing the petition was wrong, for when a judgment-creditor seeks to attach ancestral property after it has vested in the son by survivorship under Hindu law upon the father's death, he cannot be considered as executing the decree against the property of the deceased judgment-debtor within the meaning of s. 234 of the Code of Civil Procedure.

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The petitioner was found to have been a minor at the date of the application for execution; and his petition was accordingly heard. The District Munsif held that the petitioner's objection was valid in respect of one moiety of the property which he accord-

* Appeals against Appellate Orders Nos. 13 and 14 of 1889.

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ingly released from attachment, but he maintained the attachment on the other moiety.

Both parties appealed to the District Court against the above order. The District Judge came to the conclusion that the property in question was ancestral property, and said:—

“ If I understand the latest decisions on the question of the son's liability for his father's debts aright, the law, as at present settled, may be taken to be that it makes no difference that the decree against the father was a money decree to which the son was not a party, or that the estate which the decree-creditor seeks to make liable is ancestral estate; but that such estate in the son's hands is answerable for the father's decree-debt unless the son can show that the debt was contracted for immoral or illegal purposes not imposing on him the pious duty of discharging it. There is no attempt in the present case to show anything of the kind, and I must hold that the two-thirds of three-eighths of Kilakanjirankulam now in petitioner's hands under exhibit A and attached by the counter-petitioner is liable for counter-petitioner's decree of 1st December 1877 against petitioner's father.”

The District Judge accordingly set aside the orders of the District Munsif so far as it annulled the attachment.

The petitioner preferred these appeals.

Sivasami Ayyar, Krishnasami Ayyar and Sundaram Ayyar for appellant.

Ramachandra Ayyar for respondents.

JUDGMENT.—We do not consider that the Judge was right in upholding the attachment. His opinion is not in accordance with the course of decisions of the High Court (see *Zemindar of Sivagiri v. Alwar Ayyangar*(1), *Hanumantha v. Hanumayya*(2), *Muttayan v. Zamindar of Sivagiri*(3), *Arunachala v. Zamindar of Sivagiri*(4), *Muttia v. Virammal*(5), *Ariabudra v. Dorasami*(6). The principle recognized by them is that the Courts are not at liberty to extend the scope of the decree under s. 234 of the Code of Civil Procedure, though the judgment-creditor may enforce the pious obligation of the son under Hindu law by a regular suit. When, therefore, there is a money decree against the father, and when the judg-

(1) I.L.R., 3 Mad., 42.

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

(5) I.L.R., 10 Mad., 288.

(2) I.L.R., 6 Mad., 232.

(4) I.L.R., 7 Mad., 328.

(6) I.L.R., 11 Mad., 413.

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ment-creditor seeks to attach ancestral property after it has vested in the son by survivorship under Hindu law upon the father's death, he cannot be considered as executing the decree against the property of the deceased judgment-debtor within the meaning of s. 234. How far the son's pious obligation would make him liable for the decree debt is a matter to be investigated in a fresh suit. The respondents' pleader concedes that the course of decisions is against him, but contends that the attachment made by Venkatanarayana Pillai in May 1884 was in force when the attachment now in dispute was made. Having regard to the facts set out by the Judge, we are unable to accept this view. If the former attachment were in force, there was no necessity for the respondents' making the present attachment.

We set aside the orders of the Courts below and the attachment of two-thirds of three-eighths of Kilakanjirankulam. The respondents will pay the appellant's costs throughout.

APPELLATE CIVIL.

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

ELAYADATH (COUNTER-PETITIONER No. 1), APPELLANT,

v.

KRISHNA (PETITIONER), RESPONDENT.*

*Transfer of Property Act—Act IV of 1882, ss. 92, 93—Time fixed for redemption—
Application to execute the decree.*

In a suit to redeem a kanom a redemption decree was passed which provided that the kanom amount and the value of improvements be paid in three months. The decree amount was not paid within that period, but the decree-holder applied to execute the decree at a later date:

Held, that the decree-holder was not then entitled to have the decree executed. *Poreesh Nath Mojudar v. Ramjodu Mojudar* (I.L.R., 16 Cal., 246) dissented from.

SECOND APPEAL against the order of L. Moore, Acting District Judge of South Malabar, in civil miscellaneous appeal No. 317 of 1888 reversing the order of V. Raman Menon, District Munsif of Angadipuram, in civil miscellaneous petition No. 419 of 1887,

* Appeal against Appellate Order No. 5 of 1889.

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The decree sought to be executed, which was dated 28th June 1887, was a decree for the redemption of a kanom: it provided as follows:—

“The Court doth order and decree that the defendants do surrender to the plaintiff the plaint kutiyirup (dwelling) as per boundaries and measurements noted in the Commissioner's plan and specified in the schedule below on the plaintiffs paying into Court within three months the kanom amount Rs. 2-13-9 and Rs. 107-0-1, the value of kuyikurs and chamayoms, in order that the same may be paid to the first defendant, and that the first defendant do pay to the plaintiff the porapad at 3 annas 6 pies per annum as stipulated in the kychit A from 1062 till execution of the decree or for three years from this day (whichever event first occurs) and that the first defendant do pay plaintiff's costs.”

The decree amount was not paid within three months, but the District Munsif held that “the direction in the decree to deposit kanom and value of improvements within three months does not absolutely debar petitioner of his right to redeem under Transfer of Property Act, s. 92,” and he made an order granting the petition.

The Acting District Judge on appeal reversed the above order, observing that the District Munsif was bound to give effect to the directions contained in the decree.

The decree-holder preferred this appeal.

Subba Rau for appellant.

Sankaran Nayar for respondent.

JUDGMENT.—We are of opinion that the District Judge is right.

The application by the mortgagor for permission to pay after the expiration of the period fixed in the decree does not fall under the proviso of section 93 of the Transfer of Property Act. It is conceded that there was no application by the mortgagee for foreclosing the right of redemption. If the appellant's contention were to prevail, the Act of Limitations would be rendered ineffectual in regard to execution of decrees for redemption. Sections 92 and 93 of the Transfer of Property Act ought to be read together, and the proviso of the latter section has no application when the mortgagee does not apply for a foreclosure, or where the

original decree does not contain the last clause mentioned in section 92. ELAYADATH
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We are not prepared to follow the decision in *Poresh Nath Mojumdar v. Ramjodu Mojumdar*(1).

The appeal is dismissed with costs.

APPELLATE CIVIL.

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

KRISHNA (PLAINTIFF), APPELLANT,

v.

CHATHAPPAN (DEFENDANT No. 2), RESPONDENT.*

*Limitation Act—Act XV of 1877, ss. 5, 14—“Sufficient cause” to excuse delay—
Error in law.*

Land was sold in execution of a decree which was passed against the defendant for a sum exceeding Rs. 5,000. A suit to set aside the sale was instituted in a Subordinate Court and was dismissed. The plaintiff who desired to appeal against the decree dismissing his suit was advised that the appeal lay to the High Court in which a memorandum of appeal was accordingly filed. On its appearing that the value of the property sold was less than Rs. 5,000, the High Court returned the memorandum of appeal for presentation to the District Court. The District Judge rejected it on the ground that it was barred by limitation, holding that the delay caused by the error which the appellant committed in taking proceedings in the wrong Court could not be excused:

Held, that the District Judge should have decided whether the appellant under the special circumstances of the case in appealing to the High Court acted on an honest belief formed with due care and attention.

Per cur: “We are not prepared to hold that a mistake in law is under no circumstances a sufficient cause within the meaning of s. 5 of the Limitation Act.”

APPEAL against the order of J. H. A. Tremeneheere, Acting District Judge of North Malabar, in miscellaneous petition No. 666 of 1888.

The order appealed against dismissed a petition which prayed that an appeal against a decree of the Subordinate Judge of North Malabar be ordered to be placed on the file, though presented after the period allowed by the law of limitation.

KRISHNA
v.
CHATHAPPAN. The further facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

Bhashyam Ayyangar and Sankara Menon for appellant.

Sankaran Nayar for respondent.

JUDGMENT.—In execution of the decree in original suit No. 2 of 1883 on the file of the Subordinate Court of North Malabar certain immoveable properties were sold. The appellant instituted original suit No. 5 of 1886 to set aside the sale and took the amount of the decree in the first-mentioned suit, which exceeded Rs. 5,000, as the value of the second suit.

The Subordinate Court dismissed his suit and he preferred an appeal to the High Court. This Court held that the property sold being less than Rs. 5,000 in value, it was the value of the property in litigation that was the value of the suit, and returned the petition of appeal for presentation to the District Court. The decree was issued on the 16th October 1886, and the affidavit filed by the petitioner states that the memorandum of appeal was returned to the appellant on the 30th October. It was presented to the District Judge on the 8th November, but it was rejected as being out of time. The Judge relied on the decision of *Jag Lal v. Har Narain Singh*(1). It is stated in the affidavit that before presenting his appeal to the High Court, the appellant obtained professional advice, and his counsel thought that the appeal lay to the High Court. It is urged before us that there was sufficient cause for the delay under section 5 of the Limitation Act. We are not prepared to hold that a mistake of law is under no circumstances a sufficient cause within the meaning of that section. In an unreported case to which we have been referred the appellant valued his partition suit at the amount claimed for his share instead of taking the value of the entire property to be the value of the subject matter of the suit, and a Divisional Bench of this Court admitted the appeal, though it was out of time. In *Huro Chunder Roy v. Sarnamoyi*(2) the same view was taken. In that case the plaintiff valued his suit at Rs. 18,000, which was reduced by the Court of First Instance to less than Rs. 5,000. A decree was passed against the defendant, who was under the impression that the appeal would lie to the High Court and placed himself in communication with his Calcutta agent. On his mistake being

(1) I.L.R., 10 All., 524.

(2) I.L.R., 13 Cal., 206.

pointed out, he filed his appeal in the District Court. It was held by a Divisional Bench of the High Court at Calcutta that the Court might admit the appeal in the exercise of its discretion under section 5. The true rule is whether under the special circumstances of each case the appellant acted under an honest, though mistaken, belief formed with due care and attention. Section 14 of the Limitation Act indicates that the Legislature intended to show indulgence to a party acting *bonâ fide* under a mistake. We think that section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to the appellant.

We do not consider that the Judge is concluded by the decision in *Jag Lal v. Har Narain Singh*(1), and we are of opinion that he must exercise his discretion under section 5 with reference to the special circumstances of each case. We set aside the order of the Judge and direct him to restore the petition of appeal to his file and deal with it in accordance with law.

The costs of the appeal will be provided for by the Judge in his revised order.

APPELLATE CIVIL.

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

APPA RAU (DEFENDANT No. 1), APPELLANT,

v.

VIRANNA (PLAINTIFF), RESPONDENT.*

*Rent Recovery Act (Madras)—Act VIII of 1865, ss. 4, 11—Acceptance of patia not
in accordance with the Act.*

A tenant having accepted a patia (which did not give the particulars described in s. 4 of the Rent Recovery Act) and having executed to the landlord a muchalka which was registered, is not entitled to obtain in a summary suit an order setting aside a distraint by the landlord for arrears of rent.

(1) I.L.R., 10 All., 524.

* Second Appeal No. 1623 of 1888.

KRISHNA
v.
CHATHAPP.

1889.
August 2.

APPA RAU
v.
VIRANNA.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 582 of 1887, reversing the decree of L. M. Wynch, Acting Head Assistant Collector of Kistna, in summary suit No. 156 of 1887.

Suit to set aside a distraint by the first defendant for rent due to him by the plaintiff. The Head Assistant Collector dismissed the suit. His decree was reversed on appeal by the District Judge against whose decree the first defendant preferred this appeal.

The further facts of the case appear sufficiently for the purposes of this report from the judgment of the High Court.

Mr. Subramanyam and Subramanya Ayyar for appellant.

Rama Rau for respondent.

JUDGMENT.—The District Judge has lost sight of the fact that in this case the patta has been accepted and a registered muchalka given in exchange. The case is, therefore, distinguishable from *Ramanjulu v. Ramachandra*(1), in which the landlord relied upon his having tendered a proper patta to justify his distraint. Had the defendant in this case merely tendered the patta and received no muchalka, it may be admitted that the Court would not hold the patta a proper one, inasmuch as the rates of rent are not given as required by section 4 of the Rent Recovery Act.

An express contract having been made between the parties, it should be enforced (section 11).

Had the patta not been accepted, this stipulation would have made the patta void for uncertainty, *Ramasami v. Rajagopala*(2), but in that case no muchalka had been given. The rate charged by the landlord was the highest wet rate in the village, which was not in itself an illegal or unreasonable charge. Under the circumstances we must reverse the decree of the Lower Appellate Court and restore that of the Head Assistant Collector. The appellant is entitled to his costs in this and in the Lower Appellate Court.

(1) I.L.R., 7 Mad., 150.

(2) I.L.R., 11 Mad., 200.

APPELLATE CIVIL.

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

VELAYUDAM (DEFENDANT No. 25), APPELLANT,

v.

ARUNACHALA (PLAINTIFF), RESPONDENT.*

Jurisdiction—Objection as to, first taken in second appeal—Waiver of objection to jurisdiction—When objection cannot be waived.

A suit of which the subject matter was less than Rs. 2,500 was instituted in a Subordinate Court. The Subordinate Judge tried the suit and passed a decree, and an appeal against this decree was entertained and determined by the District Judge without objection taken that the Subordinate Court had no jurisdiction to hear and determine the suit. On second appeal objection was taken as above:

Held, that the objection must prevail and the plaint be returned for presentation in the proper Court.

SECOND APPEAL against the decree of H. T. Ross, Acting District Judge of Madura, in appeal suit No. 515 of 1887, affirming the decree of S. Gopalachariar, Subordinate Judge of Madura (East), in original suit No. 10 of 1887.

Suit to recover possession of land with mesne profits. To the plaint was affixed the following note:—

“The value of the property for purpose of jurisdiction is given at Rs. 4,500, and the value of plaintiff's claim inclusive of mesne profits at Rs. 2,160. The suit has been instituted in this Court in pursuance to the ruling of the High Court in *Vydinatha v. Subramanya*(1).”

The plaintiff obtained a decree, which was affirmed on appeal. Defendant No. 25 preferred this second appeal.

Mr. Parthasaradhi Ayyangar for appellant.

Mr. Johnstone for respondent.

The facts of the case appear sufficiently for the purposes of this report from the following judgment.

JUDGMENT.—The first objection taken in second appeal is that the Court of First Instance had no jurisdiction to hear and decide the suit, the value of the claim being below Rs. 2,500. This point was not raised in either of the Courts below, but we

* Second Appeal No. 240 of 1889.

(1) I.L.R., 8 Mad., 236.

VELAYUDAM
ARUNACHALA.

are of opinion that an objection to the jurisdiction of the Court of First Instance may be taken for the first time in second appeal, inasmuch as an act done without jurisdiction is of no legal effect and must be set aside when the illegality is made apparent. But it is argued that, inasmuch as the appellant did not demur to the jurisdiction of the Lower Appellate Court, he must be held to have waived the right to raise the question of jurisdiction. Admittedly the Subordinate Judge had no jurisdiction to try the suit which should have been filed in the Court of the District Munsif; but it is contended that the Judge was competent to hear and decide the appeal, and reference is made to the Privy Council case of *Ledgard v. Bull*(1). In that case it was distinctly held by the Privy Council that even an order transferring a case from one Court to another could not be validly made unless the suit was instituted in a Court of competent jurisdiction. An appeal could not be heard on the merits, unless the decree from which the appeal was preferred was passed by a Judge having jurisdiction over the matter in dispute. No doubt the District Judge was the appellate authority, whether the suit was heard and determined either by the Subordinate Judge or District Munsif, but it must be remembered that the Appellate Court is only a Court of error and the trial by the Appellate Court cannot be accepted in place of a trial by the Court of First Instance. In the case of *Ledgard v. Bull*(1) the Court to which by an irregular process the suit was transferred was competent to try the suit, and we cannot say that it is on all fours with the present, nor are we prepared to hold that this is a case to which the principle laid down by the Privy Council in that case can be extended. We must, therefore, set aside the decrees of both the lower Courts, dismiss the suit, and direct that the plaint be returned to be presented in the proper Court.

As the second appeal was necessary, the respondent must pay the appellant's costs in this Court, but we direct that each party bear his own costs in the Courts below.

(1) I.L.R., 9 All., 191.

APPELLATE CIVIL.

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

VENKATARAMA (DEFENDANT NO. 3), APPELLANT,

v.

MEERA LABAI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu law—Sale by a coparcener of his share in specific property—Rights of the vendee—Transfer of Property Act—Act IV of 1882, s. 44.

A purchaser from a member of an undivided Hindu family of that member's share in a specific portion of the ancestral family property cannot sue for a partition of that portion alone and obtain an allotment to himself by metes and bounds of his vendor's share in that portion of the property.

SECOND APPEAL against the decree of C. Venkoba Rau, Subordinate Judge of Madura (West), in appeal suit No. 197 of 1888, affirming the decree of M. A. Tirumalachariar, District Munsif of Dindigul, in original suit No. 634 of 1886.

Suit for the partition and delivery to the plaintiffs of the first defendant's half share in certain land. Defendants Nos. 1 and 3 were brothers and the other defendants were their sons, and they formed together an undivided Hindu family: the land which was the subject matter of the suit was part of their ancestral family property.

The first defendant, on 30th September 1885, sold to the plaintiffs his half share in the specific land, of which the plaintiff now claimed partition and delivery as above.

The District Munsif passed a decree as prayed, and the Subordinate Judge, on appeal, affirmed this decree.

The defendants preferred this second appeal.

Desikachariar and Krishnasami Ayyar for appellant.

Subramanya Ayyar for respondent.

JUDGMENT.—The question raised in this second appeal is whether a purchaser from one member of a Hindu undivided family of that member's share in a specific portion of the family property can sue for a partition of that portion alone and obtain

* Second Appeal No. 531 of 1889.

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v.
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an allotment to himself by metes and bounds of his vendor's share in that portion of the property. The point appears not to have been expressly decided by this Court, for the *dictum* in *Chinna Sanyasi v. Suriya*(1) refers only to the case of a suit by a coparcener; and *Appusami v. Dorasami*(2) as correctly remarked by the Subordinate Judge, differs from this in that the plaintiff was the vendee of the share of the coparcener in the whole family property and therefore could have sued for a share of the whole. In the present case the plaintiffs are only purchasers of the share of their vendor in a portion of the family property, and therefore cannot demand a share in the whole, and the question is, are they precluded from suing for the share sold to them in the particular portion of the family property by the general principle, which has no doubt been firmly established by the decisions, that a suit for a partial partition of undivided family property will not lie, and we are of opinion that they are. The purchaser of a coparcener's share can take no higher right than his vendor possesses, and that is not a right to a certain share in each particular item of the family property, but a joint right with the other coparceners to the ownership and enjoyment of each individual item, with an incidental right to obtain a partition of the whole family property and have his share therein made over to him after due provision for the family debts and liabilities. The judgment in *Pandurang Anandray v. Bhaskar Shadashiv*(3) points out the course to be taken by a purchaser of a share in part of the family property. He must file a partition suit against the other members of the family for the ascertainment of the share of his vendor and for the allotment to himself of his vendor's share in the particular portion in which he is interested; and we think that the rights of such a purchaser are not extended by section 44 of the Transfer of Property Act. That section only gives him "the transferor's right to joint possession or other common or part enjoyment of the property and to enforce a partition of the same," and the transferor's right is not a right to enforce partition of a particular portion of the property; and even if section 44 would otherwise enlarge the right of the purchaser, such an effect is precluded by section 2, clause (d) which declares that nothing in the chapter

(1) I.L.R., 5 Mad., 196.

(2) Second Appeal No. 626 of 1881 (not reported).

(3) 11 Bom. H.C.R., 72.

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which contains that section shall affect any rule of Hindu law. There is no doubt that the rule may work hardship in some cases by throwing upon the purchaser of a coparcener's share in some small portion of a large family estate the burden of a partition suit to ascertain his vendor's share in the whole estate, but those who deal with persons having the very limited power of alienation possessed by the members of an undivided Hindu family must take the consequences. The concession of any such power of alienation was to some extent a departure from the principles upon which the Hindu law of the undivided family rests, and there is no reason for extending that concession further than it has been already extended.

We must hold that the suit in its present form will not lie. The decrees of both the lower Courts will be reversed and the suit dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

MAHOMED (DEFENDANT), APPELLANT.

1889.
October 15.

GANAPATI (PLAINTIFF), RESPONDENT.*

Religious Endowments Act—Act XX of 1863, s. 7—Regulation VII of 1817 (Madras), s. 12—Suit by a dharmakarta disaffirming the acts of his predecessor—Limitation.

The plaintiff, who had been appointed in 1886 by the Sub-Collector to be dharmakarta of a Hindu temple, for which no committee had been appointed under Religious Endowments Act, s. 7, sued in 1886 to recover possession of land demised to the defendant on a perpetual lease in or about 1856 by a previous dharmakarta, who died in 1885:

Held, (1) that Regulation VII of 1817 having been repealed as regards Hindu temples by Act XX of 1863, the appointment by the Sub-Collector gave the plaintiff no right to sue: accordingly it was necessary to determine the question whether he had such right apart from that appointment;

(2) that if the above question were answered in the affirmative, the plaintiff, since he did not derive title through his predecessor in office (the grantor of the lease), would be entitled to disaffirm his acts;

(3) that the period of limitation ran not from the date of the lease, but from the date of the accession of the plaintiff to his office.

* Second Appeal No. 126 of 1889.

MAHOMED
v.
GANAPATI.

SECOND APPEAL against the decree of H. T. Ross, Acting District Judge of Madura, in appeal suit No. 141 of 1888, affirming the decree of M. A. Tirumalachariar, District Munsif of Dindigul, in original suit No. 643 of 1886.

Suit by the plaintiff as dharmakarta of a Hindu temple to recover certain land as part of the property of the temple. The defendant claimed to hold the land under a perpetual lease granted to him thirty years before suit by Raman Pujari, a former dharmakarta of the temple, who died in 1885.

The District Munsif passed a decree in favour of the plaintiff, which was affirmed on appeal by the District Judge, who observed with reference to the plaintiff's right to maintain the suit:—

“He was appointed by order of the Sub-Collector, communicated with exhibit C on the 5th August 1886; and the argument used in appeal is that the Sub-Collector's appointment had no effect, because section 12, Regulation VII of 1817, under which it was made, was repealed by section 1, Act XX of 1863..

“It appears to me that, notwithstanding the repeal of that section, the Collector (and equally the Sub-Collector) had the power to appoint as local agent of the Board of Revenue, until such power legally ceased and determined in the manner provided in section 12, Act XX of 1863, and there has been no such cessation or determination in this case, because, admittedly, no committee has been appointed under section 7 of the same Act to take the place of the Board of Revenue and the local agents in respect of the plaintiff temple. Reading sections 3, 7 and 12 of the Act together, the appointment of plaintiff was legal and his right to maintain the suit cannot be questioned.”

The defendant preferred this second appeal.

Rama Rau and Mahadeva Ayyar for appellant.

Krishnasami Ayyar and Subramanya Ayyar for respondent.

SHEPARD, J.—The defendant holds under a lease made thirty years ago by Raman Pujari, dharmakarta of the temple to which the lands belong. The plaintiff claims to recover the land as successor in office to Raman Pujari, who died in 1885. The first question is whether the plaintiff is entitled to the office of dharmakarta. I cannot agree with the Courts below in thinking that the Collector had in 1886 any statutory power to appoint dharmakartas. The Regulation VII of 1817 was, so far as concerned Hindu temples, unreservedly repealed by the Act of 1863, and it

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cannot be contended that, owing to the neglect of Government to carry out the duties imposed upon them by section 7 of that Act, the Board of Revenue can be deemed to be still invested with the powers and duties which attached to the Board under the Regulation. Whether or not the plaintiff is trustee of the temple independently of the appointment by the Sub-Collector is a question on which there is no decision. We must ask the District Judge to return a finding on that question. If the plaintiff, being dharmakarta, is entitled to sue to recover temple property, the further question arises whether the lease under which the plaintiff holds was of a character prejudicial to the interests of the temple, so that the plaintiff, as trustee, is entitled to have it set aside. It is found that the lease was a perpetual one, but that circumstance is not conclusive to show that it was a transaction of an improvident nature calculated to prejudice the interests of the temple. We must, therefore, direct the District Judge to return a finding on that question.

It was contended on behalf of the appellant that, granted that the lease was one which the late dharmakarta ought not to have granted, the present dharmakarta was not entitled to maintain this suit, and, further that, if the suit was maintainable, it was barred by limitation. In support of the former contention, we were referred to the case of *Maniklal Atmaram v. Manchershhi Dinsha Coachman*(1), where the opinion was expressed that it was not competent for a trustee to sue to undo the act of his predecessor, though that act might have been done in breach of trust. “A trustee, it is said, as between himself and one to whom he has conveyed trust property, is, I apprehend, as much concluded by his own completed act as any other vendor. So again I apprehend the completed act of a former trustee, though in itself a breach of trust, is as conclusive against a successor in the trusteeship where it is the successor who in a suit against one claiming under, and by virtue of such act is seeking to disaffirm and annul it.” In the case in which this language was used, the plaintiff was the son and heir of one to whom, on the revocation of the probate previously granted to the testator's widow, letters of administration with the will annexed were granted without prejudice to any act done in the due course of

(1) I.L.R., 1 Bom., 279.

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administration by the widow. The plaintiff sued to set aside an alienation made by the widow in the defendant's favor of a house which under the will had been made the subject of a charitable trust. It was held that the plaintiff, not claiming any beneficial interest, but merely claiming to act as trustee under a will and seeking to undo an act of one who had also been a trustee under the same will, could not maintain the suit. From the language used it would seem that the plaintiff was treated as if he had derived title from the widow, as would be the case generally where one trustee under a will has succeeded another. And it is also to be observed that the learned Judge expressly refrained from deciding the question whether such a suit could be brought on behalf of the person for whose benefit the trust was created. In the present case, though the plaintiff may in point of time have succeeded the dharmakarta who made the alienation, he does not derive his title from that dharmakarta, and is, therefore, not bound by his acts. Subject to the law of limitation, the successive holders of an office, enjoying for life the property attached to it, are at liberty to question the dispositions made by their predecessors (*Papaya v. Ramana*(1), *Jamal Saheb v. Murgaya Swami*(2), *Modho Kooery v. Tekait Ram Chunder Singh*(3)), and it is equally clear that time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of the predecessor's death, when only the successor became entitled to possession. Accordingly, Raman Pujari having died so recently as 1885, the plaintiff's suit cannot be barred by limitation.

It was finally contended on behalf of the appellant that he was entitled to notice before his lease could lawfully be determined by the plaintiff, and that it was not shown that any such notice had been given. No doubt, it has been held that, in a suit by a landlord to eject his tenant, not being a mere tenant-at-will, it is a part of the necessary proof of the plaintiff's title that he should prove notice to quit, and that it is competent to the defendant to take the objection of want of notice even on second appeal *Abdulla Rawutan v. Subbarayyar*(4). I do not think that ruling is applicable to the present case, for here the plaintiff has never admitted

(1) I.L.R., 7 Mad., 85.

(3) I.L.R., 9 Cal., 411.

(2) I.L.R., 10 Bom., 35.

(4) I.L.R., 2 Mad., 346.

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the tenancy of the defendant, but is seeking to eject him as one holding under an invalid alienation. In the plaint, which was presented in November 1886, it is stated that the plaintiff came into office in July 1886, and in the following month called upon the defendant to relinquish the property. No issue was taken upon this allegation; and, in view of the allegations made on both sides in the pleadings, I think that it could not properly have been made the subject of an issue.

I think the District Judge should be asked to return findings on the two issues indicated above within six weeks from the date of the receipt of this order, when seven days, after the posting of the finding in this Court, will be allowed for filing objections.

Both parties to be at liberty to adduce fresh evidence.

MUTTUSAMI AYYAR, J.—I concur.

APPELLATE CIVIL.

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

LAKSHMAMMA (PLAINTIFF), APPELLANT,

KAMESWARA AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
RESPONDENTS.*

Registration Act—Act III of 1877, s. 17 (b), (d).

Where a deed of partition between a mother and her son declared certain existing rights in her over moveable and immoveable property above the value Rs. 100:

Held, that, although the deed showed that the execution of another deed with reference to those rights was in contemplation, yet the deed was not admissible in evidence of the mother's title to either the moveable or immoveable property.

APPEAL against the decree of Venkata Rangayyar, Subordinate Judge of Ellore, in original suit No. 31 of 1886.

Suit by the plaintiff, who was the widow of one Venkata-krishnayya, to restrain the defendants from interfering with her enjoyment of certain jewels, to recover from the defendants cer-

LAKSHMAMMA
v.
KAMESWARA. tain moveable and immoveable property, (the immoveable property being of the value of Rs. 1,200), and to compel defendant No. 1 who claimed to be the adoptive son of the late Venkatakrishnayya to execute to her deeds of transfer in respect of the above-mentioned moveable and immoveable property as per exhibit A.

Exhibit A was translated as follows :—

“To Velagapudy Venkata Lakshmamma Pinnigar (the plaintiff), who is equal to Ganga and Bhagirade.

“The manavi (representation) of Sevakudu Velagapudy Kameswara Rao.

“As my father Velagapudy Venkatakrishnayya died, what we intend in regard to division of moveable and immoveable property which was acquired by him and which we hold up to the present day is as follows:—I have given you without any share to me the inam lands which were previously purchased in Vijaiswaram, the silver and gold jewels of which you hold possession, cloths, cot and beds and all the silver things in your possession, as also the jewels which my father had, as also brass utensils which are engraved in your name. I have arranged that I shall hold without giving you any share the silver and gold articles, cloths, cot and bed which myself, my wife and my children hold and which are in my possession, as also the seri lands which stand in my name and in that of Suraparazu Gurumurthy, as also the debts due to us from the people up to this day, i.e., entire outstanding balance of debts due under bonds executed in my name after deducting payment as to the remaining silver, gold (articles), ready money and utensils which are forthcoming at present and which are in the house, the two houses and sites at Pentapadu, bandy and cattle I have agreed to divide them in equal shares. The pension rupees which are due to my father from the Siroar and the security money are to be divided equally when they come to us.

“I have agreed to give my father's mother Venkamma Garu Rs. 500 from our joint money on account of her maintenance and utensils for her use.

“We should both take the boxes in our respective possession. The remaining wooden and stone articles, which are in our house, should be divided equally. I won't make any kind of objection to the gift and sale of the moveable and immoveable property which may be made by you at any time as you please.

“It is arranged that after we divide the property above referred to and take possession of our respective shares, a document shall be drawn up and registered.

(Signed) V. KAMESWARA RAU ”

(defendant No. 1).

The Subordinate Judge held, on the authority of *Ramasami v. Ramasami*(1), that this document came within the purview of Registration Act, s. 17, cl. (b), and not within the exception in cl. (h), and accordingly ruled that it was not admissible in the evidence. He passed a decree in favor of the plaintiff for the delivery to her of certain moveable property, but otherwise dismissed the suit.

The plaintiff preferred this appeal.

Subba Rau for appellant.

As to the admissibility of exhibit A see the Full Bench decision in *Jivan Ali Beg v. Basa Mal*(2).

The Registration Act, like all disqualifying Acts, has to be construed strictly, and this document strictly creates no right in land, but merely gives a right to have a conveyance. See *Venkatagiri Zamindar v. Raghava*(3), *The Collector of Tanjore v. Ramasamier*(4) and *Annappa v. Ganpati*(5). *Ramasami v. Ramasami*(1) does not govern this case, for it proceeds on the acknowledgment of the receipt of the price in the instrument, merely following *Futteh Chund Sahoo v. Leelumber Singh Doss*(6).

The document is admissible to prove the agreement for the execution of a further document, to prove the compromise between plaintiff and defendant No. 1 and to confirm the evidence of the father's intention to divide. *Venkatarama Naik v. Chinmuthambu Reddy*(7).

Moreover, the document is divisible in the sense that it can be used as to moveable property, &c., though it cannot be used as creating an interest in land. *Krishto Lall Ghose v. Bonomalee Roy*(8), *Sham Narayan Lall v. Khimajit Matoc*(9), *Lochmipat Sing Dugar v. Mirza Khairat Ali*(10), *Vellaya Padyachy v. Moorthy Padyachy*(11).

(1) I.L.R., 6 Mad., 115.

(3) I.L.R., 9 Mad., 142.

(5) I.L.R., 5 Bom., 181.

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

(9) 4 Beng. L.R.F.B., 1.

(2) I.L.R., 9 All., 108.

(4) I.L.R., 3 Mad., 342.

(6) 14 M.I.A., 129.

(8) I.L.R., 5 Cal., 611.

(10) 4 Beng. L.R.F.B., 18.

(11) 4 M.H.C.R., 174.

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KAMESWARA. The Advocate-General (Hon. Mr. Spring Branson) for respondents.

The case is precluded by the authority of *Ramasami v. Ramasami*(1); where a document, which is compulsorily registrable, is unregistered, its terms cannot be consulted—see also *Nangali v. Raman*(2): that authority is not affected by *Venkatagiri Zamindar v. Raghava*(3), which only decided that the fact of a tenancy can be put in evidence, though the lease may be inadmissible. Compare also *G. Lee Morris v. Sapamtheetha Pillay*(4) and *Somu Gurukkal v. Rangammal*(5) followed in *Sambhubhai Karandas v. Shivaldas Sadashivdas Desai*(6) and see *Balaram Nemchand v. Appavalad Dulu*(7).

The Collector of Tanjore v. *Ramasamier*(8) and *Annappa v. Ganpati*(9) do not apply here: the first case was a decision on the terms of Stamp Act, s. 26, and in the latter case the document in question was not intended to affect land.

As to the admissibility of the document for the purposes suggested, *Sham Narayan Lall v. Khimajit Matoe*(10) is no authority for the appellant, for the suit being for the registration of the instrument, the instrument there had necessarily to be read; nor does *Venkatarama Naik v. Chinnathambu Reddi*(11), of which the head note is incorrect, help the appellant, for the document in that case was not of the nature described in Registration Act, s. 17.

In the present case the document does not recite the father's will or the like, but sets out the terms of a partition then and there effected; nor is it an agreement of which specific performance is sought. Compare also *Mattongency Dossee v. Rammarain Sadkhan*(12), where Garth, C.J., discussed *Lachmipat Sing Dugar v. Mirza Khairat Ali*(13) and *Krishto Lall Ghose v. Bonomallce Roy*(14), which also, like the Madras case last cited, bears on the argument as to the divisibility of the document. As to this point see also *Lachman Singh v. Kesri*(15). *Vellaiya Padyachy v.*

(1) I.L.R., 5 Mad., 115.

(3) I.L.R., 9 Mad., 142.

(5) 7 M.H.C.R., 13.

(7) 9 Bom. H.C.R., 121.

(9) I.L.R., 5 Bom., 181.

(11) 7 M.H.C.R., 1.

(13) 4 Beng. L.R.F.B., 18.

(2) I.L.R., 7 Mad., 226.

(4) 6 M.H.C.R., 45.

(6) I.L.R., 4 Bom., 89.

(8) I.L.R., 3 Mad., 342.

(10) 4 Beng. L.R.F.B., 1.

(12) I.L.R., 4 Cal., 83.

(14) I.L.R., 5 Cal., 611.

(15) I.L.R., 4 All., 3.

Moorthy Padyachy(1) cited against me was overruled in *Achoo Bayamah v. Dhany Ram*(2). The document if registered would be a good conveyance if anything, as it is not registered it does not avail the appellant.

Subba Rau in reply.

JUDGMENT:—The plaintiff is the widow of one Venkatakrishnayya, who died on 21st February 1886. She sued to enforce an arrangement for partition, said to have been made with defendant No. 1 six days after her husband's death, and to compel defendant No. 1 to execute and register a formal deed in conformity with the terms of that arrangement. In the suit the plaintiff denied the adoption of defendant No. 1 by her late husband; but this point was decided against her and is not pressed in appeal. The question before us, therefore, is what effect, if any, can be given to the agreement (exhibit A) executed by defendant No. 1 on 27th February 1886. The Subordinate Judge held the document purported to create and declare rights in immoveable property to the value of more than Rs. 100, and that registration was, therefore, compulsory. In appeal it was argued that the document was merely an agreement to carry out the wishes of the deceased Venkatakrishnayya expressed shortly before his death, and did not in itself operate to create a title in immoveable property, but was merely an agreement to execute another document, which should create such title.

This contention we do not consider to be tenable. The language of the document expressly declares existent rights in the plaintiff in immoveable property, and, though the last clause of exhibit A contemplates the execution of another deed, it is clear that that future deed was only necessary because there was a certain amount of property as to which immediate division was not possible.

Nor do we think that the plaintiff's claim can be supported upon the alleged oral disposition of his property by her late husband. The evidence as to such disposition rests upon the testimony of the same witnesses who have been discredited with regard to the status of defendant No. 1 in the deceased's family; and, moreover, exhibit A, which undoubtedly was executed immediately after Venkatakrishnayya's death is absolutely silent

(1) 1 M.H.C.R., 174.

(2) 4 M.H.C.R., 378.

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nayya was a Sub-Magistrate and a man of business; and had he
intended to make any such disposition of his property before his
death, it is not likely he would have left only oral declarations
of his intentions when there was ample time during his last
illness to express his wishes in writing. We are, therefore, of
opinion that the plaintiff's claim must fail so far as she relies
upon her husband's directions as the origin of her title.

The next contention is that even if the agreement (exhibit A)
is, through want of registration, inadmissible in evidence to prove
the plaintiff's right to the immoveable property comprised therein,
it may still be looked at as evidencing her title to the rest of the
property. The learned Advocate-General, on the other hand,
contends that the transaction is one and indivisible, and that the
document cannot be looked at for any purpose whatever. This
objection appears to us to be well founded. The document A, if
carried out, is a deed of partition, and it is clear that as between
mother and son there can be no such thing as partition apart from
this document. The transaction evidenced by the agreement is,
therefore, one and indivisible, and the partition of the moveable
property cannot be separated from the partition of the rest. The
document is not merely evidence of the transaction, but is the
transaction itself—*Somu Gurukkal v. Rangammal*(1) and *G. Lee
Morris v. Sapamtheetha Pillay*(2).

The case referred to by the plaintiff's pleader—*Krishto Lall
Ghose v. Bonomalee Roy*(3)—is in reality against him, while that
in *Vellaya Padyachy v. Moorthy Padyachy*(4) has been overruled by
the Full Bench in *Achoo Bayamah v. Dhany Ram*(5). The same
rule has been followed in *Mattongency Dossee v. Ramnarain
Sadkhan*(6) and *Lachman Singh v. Kesri*(7). The case of *Venkata-
giri Zamindar v. Raghava*(8) was referred to, but it is not in
conflict with these decisions. There it was merely decided that if
a contract of lease is for want of registration inadmissible in
evidence, the plaintiff can give other evidence of tenancy in a suit
to eject.

(1) 7 M.H.C.R., 13.
(3) I.L.R., 5 Cal., 611.
(5) 4 M.H.C.R., 373.
(7) I.L.R., 4 All., 3.

(2) 6 M.H.C.R., 46.
(4) 4 M.H.C.R., 174.
(6) I.L.R., 4 Cal., 80.
(8) I.L.R., 9 Mad., 142.

On these grounds we must hold that exhibit A is altogether inadmissible in evidence. The appeal, therefore, fails, and we must dismiss it with costs.

APPELLATE CIVIL.

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

VENKATACHALAPATI (DEFENDANT), APPELLANT,

v.

KRISHNA (PLAINTIFF'S REPRESENTATIVE), RESPONDENT.*

*Civil Procedure Code, s. 13—Res judicata—Rent Recovery Act (Madras)—Decision of
Revenue Court as to landlord's title.*

In a summary suit filed by a landlord against his tenant in the Court of the
Deputy Collector under the Rent Recovery Act (Madras), s. 9, to enforce acceptance
of a patta by the defendant, it appeared that, in a former suit between the same
parties in the same Court, it had been decided that the defendant was the plaintiff's
tenant and as such bound to accept a patta from him in respect of the land in
question in the present suit:

Held, that the defendant was not entitled in the present suit to dispute the
plaintiff's title, since the former decision constituted it *res judicata*.

SECOND APPEAL against the decree of J. A. Davies, Acting
District Judge of Tanjore, in appeal suit No. 114 of 1886, con-
firming the decision of N. Krishnasami Ayyar, Acting Deputy
Collector of Tanjore Division, in summary suit No. 224 of 1884.

Suit brought by a landlord against his tenant under Rent
Recovery Act, s. 9, to enforce acceptance by the defendant of a
patta tendered to him by the plaintiff, and the execution of a
muchalka by him to the plaintiff.

The defendant disputed the title of the plaintiff. But it
appeared that, in a former suit between the same parties in the
same Court, it had been decided that the defendant was the
plaintiff's tenant and as such bound to accept a patta from him in
respect of the lands in question in the present suit.

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The Deputy Collector decided in favor of the plaintiff, and this decision was upheld on appeal by the District Judge on the ground that the pleas now raised by the defendant had been decided against him in the former suit.

The defendant preferred this second appeal against the decree of the District Judge.

Bhashyam Ayyangar for appellant.

The District Judge was wrong in passing a decree for the plaintiff whose title was disputed by the defendant and had not been established by him; *Rama v. Tirtasami*(1) the decision of a Revenue Court in a summary suit has a binding force only for the current *fasli*, it cannot constitute any matter *res judicata*, for it operates merely with regard to the one patta to which alone it purports to relate.

(COLLINS, C.J.—When it has once been decided that the plaintiff is your landlord, can you deny his title next year?)

Yes, if the decision is a decision in a summary suit. Similarly, a Small Cause Court has, year after year, to try suits for rent in respect of the same premises. Nor does it make any difference that the second suit is a summary suit like the first—*Debi Prasad v. Jafar Ali*(2), *Chunder Coomar Mundul v. Nunner Khanum*(3), and *Boistub Churn Sein v. Trahee Ram Sein*(4). There is no hardship on the landlord who might obtain a final and conclusive decision in a Civil Court.

Pattabhirama Ayyar for respondent.

The argument as to the tenants' liberty to deny his landlord's title seems to be inconsistent with the terms of sections 9 and 10 of the Rent Recovery Act. Under these sections, the Collector must in the first place consider whether the tenant is obliged to accept a patta, &c., i.e., whether the plaintiff is entitled to impose a patta, i.e., whether he has title to the land. The question is not whether the summary decision would support the plea of *res judicata* in a civil suit. In the cases cited the second Courts were all cases of different jurisdiction, not as here where the Court is identical. In *Rama v. Tirtasami*(1) the first suit was a suit in Revenue Court to enforce a patta, the second was a suit in a Civil Court by the tenant for a declaration. In *Debi Prasad v. Jafar Ali*(2) the

(1) I.L.R., 7 Mad., 61.

(3) 11 Beng. L.R., 434.

(2) I.L.R., 3 All., 40.

(4) 15 W.R., 32.

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first suit was instituted in a Revenue Court, the second suit in a Civil Court for a declaration of proprietary right. In *Chunder Coomar Mundul v. Nunner Khanum*(1) the first suit was instituted in a Revenue Court, the second was a suit to obtain possession of the land. *Boistub Churn Sein v. Trahee Ram Sein*(2) was a case of a revenue suit followed by a civil suit. See also Evidence Act, ss. 109, 116, and Civil Procedure Code, s. 13. According to *Birchunder Manickya v. Hurrish Chunder Dass*(3) even an *ex-parte* decree passed in a Revenue Court supports plea of *res judicata*; and here there has not only been a series of petitions for very many years, but also a number of contested suits; the result has always been in favor of the landlord, whether in suits to enforce acceptance of pattas or in suits to set aside attachments.

The plea of *res judicata* must prevail even independently of section 13 of the Civil Procedure Code resting on the maxim *nemo debet bis vexari eadem causa*, see *Krishna Behari Roy v. Brojeswari Chowdrance*(4).

Bhashyam Ayyangar in reply.

The multiplicity of decisions does not affect the plea of *res judicata*. As to the case of *Birchunder Manickya v. Hurrish Chunder Dass*(3) the decision was not in Revenue Court, it only decides that the fact of a decree having been passed *ex parte* does not affect the plea of *res judicata* founded on it. Compare Bengal Act X of 1859 giving jurisdiction to revenue officers varied by Act VIII of 1869 which gives that jurisdiction of Civil Courts in these cases.

In *Manappa Mudali v. S. T. McCarthy*(5) the Full Bench held a Small Cause Court's incidental finding on title is good for the suit in question only; nor would it be valid to support the plea of *res judicata* even if confirmed in appeal by District Court sitting in appeal from the small cause side of a District Munsif's Court. Compare also *Anusuyabai v. Sakharam Pandurang*(6). The respondent's contention leads logically to the conclusion that the matter would be *res judicata* in a Civil Court; but this would clearly not be the case. See *Khugowlee Sing v. Hossein Bux Khan*(7).

(1) 11 Beng. L.R., 434.

(3) I.L.R., 3 Cal., 383.

(5) I.L.R., 3 Mad., 192.

(2) 15 W.R., 32.

(4) L.R., 2 I.A., 283.

(6) I.L.R., 7 Bom., 464.

(7) 7 Beng. L.R., 673.

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JUDGMENT.—The appellant in this second appeal was the defendant in a suit instituted before the Deputy Collector of Tanjore by the respondent, the inamdar of the village. The suit was brought under Act VIII of 1865 to compel appellant to accept a patta. He pleaded non-liability denying the plaintiff's title as landlord. In a former suit between the same parties in the same Court, it had been decided that the defendant-appellant was the tenant of the plaintiff-respondent and as such bound to accept the patta tendered and to grant his muchalka. This decree was confirmed on appeal by the District Court and there was no second appeal. Both the lower Courts have held that the matter in issue between the parties having been heard and determined in the former suit, the appellant is estopped from raising the same defence in the present suit.

In second appeal it is argued that the decision of a Revenue Court cannot operate as *res judicata* in any subsequent suit between the parties, inasmuch as (1) the said decision is only binding for the *fusli* for which the suit is brought and (2) a Revenue Court can only decide a question of title incidentally and such a decision cannot operate as *res judicata*. The following cases were relied on in support of the appellant's argument: *Rama v. Tirtasami*(1), *Chunder Coomar Mundul v. Nunner Khanum*(2), *Debi Prasad v. Jafar Ali*(3), and *Boistub Churn Sein v. Trahee Ram Sein* (4), but none of these cases are in point. In these cases it was held that the decision of a Revenue Court is no bar to a suit brought in the regular Courts. We have not been referred to any case in which it has been held that the doctrine of *res judicata* is not applicable to the Revenue Court and we do not think that the appellant's contention is sustainable.

In adjudicating on a suit to enforce the acceptance of a patta the first question which the Revenue Court has to decide is whether the party sued is bound to accept a patta and give a muchalka, in other words, whether the relation of landlord and tenant subsists (section 10, Act VIII of 1865).

It is conceded that each year's rent is in itself a separate and entire cause of an action. It would therefore, at first sight, seem as if judgment obtained in a suit to enforce the acceptance of a

(1) I.L.R., 7 Mad., 61.
(3) I.L.R., 3 All., 40.

(2) 11 Beng. L.R., 434.
(4) 15 W.R., 32.

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patta for one year would only extend to the subject-matter of the suit, leaving the landlord at liberty to bring a fresh suit in the following year and the tenant at liberty to raise any defence he thought proper. But seeing that in the former suit the whole question as to the relation in which the parties stood was substantially and necessarily tried and determined, and that the materials upon which the Judge would have to arrive at a decision are the same in the subsequent as in the prior suit, we are clearly of opinion that even if the former judgment does not bind as an estoppel, it affords such cogent evidence of the relation in which the parties stand that the Deputy Collector would have been perfectly justified in acting upon it, and deciding the question as to status in the affirmative. This was also the opinion of the Calcutta High Court—*Nobo Doorga Doss v. Foyzbux Choudhry*(1).

We are, however, of opinion that in law the former decision does act as an estoppel. The Revenue Court is empowered by law to determine the question of title and such determination of a matter directly and substantially in issue is a bar to the trial of the same matter in a subsequent suit between the same parties in the same Court, litigating under the same title. The adjudication as to the liability of the defendant to accept a patta having been decided by a competent Court is conclusive and binding on the parties in any subsequent litigation in the same Court—*Krishna Behari Roy v. Brojeswari Choudranee*(2).

Reliance is placed on the decision of this Court in *Manappa Mudalli v. McCarthy*(3), and it is argued that as the decision of a Small Cause Court in a case in which a question of title has been raised and decided incidentally is no bar to a suit upon the title, so the decision of the Revenue Court as to the status of the parties is no bar to the litigation of the same question in a subsequent suit. The argument might be sustainable if the subsequent suit was one brought in the Court of a District Munsif, but for many reasons we do not think it of any weight in this case. In the first place an incidental finding even of a District Court on a question of title in a case not admitting of further appeal could not operate as *res judicata* as to that point in a future suit. As remarked by Savigny (Syst. sec. 293) "everything that should have the authority of *res judicata* is and ought to be subject to appeal." Now

(1) I.L.R., 1 Cal., 202. (2) L.R., 2 I.A., 283. (3) I.L.R., 3 Mad., 192.

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an appeal is allowed from the decision of a Revenue Court on the question of title, and in the present case the District Court in appeal confirmed the finding of the Deputy Collector.

Again the maxim *nemo debet bis vexari eadem causa* applies as much to the plea of the defendant in a case as to the case set up by the plaintiff. It would be intolerable if the defendant, who has been declared by a competent Court to be the tenant of the plaintiff and as such bound to accept a patta and grant a muchalka, were to be permitted to put his landlord, year by year, to the proof of his title. It was suggested by Mr. Bhashyam Ayyangar that the landlord's remedy is by suit in the regular Courts, but we see no reason why the plaintiff-respondent, who has obtained the final decision of a competent Court on the question, should be forced to bring a fresh suit to establish his title.

For these reasons we think the Lower Appellate Court was right in holding that the defendant-appellant was not at liberty to raise in this suit those questions which were decided against him in the former suit.

We are also of opinion that the District Judge was justified in finding that the contentions of the defendant were not *bond fide*. The Deputy Collector pointed out that the opposition to plaintiff-respondent had been got up by one Shesha Ayyangar, his avowed enemy, and by Kristna Homada, the headman of the caste to which the defendant belongs, that the defendant pleaded complete ignorance of the contents of his written statement and admitted that he gave no instructions to his vakil.

We dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

VENKATACHALAPATI (PLAINTIFF), APPELLANT,

v.

SUBBARAYADU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 11—Hindu Marriage Act (Act XV of 1856, s. 5)—Hindu Law—Widow re-marriage—Exclusion from temple—Excommunication—Jurisdiction.

The plaintiff, who was a *Smarta* Brahman, but had married a widow (whose first marriage had not been consummated), alleged that he had made a vow to present an offering in a certain temple, and that the defendants, who were the committee of the temple, had obstructed and prevented him from entering the inner shrine (where orthodox Brahmans usually make their offerings), asserting that he was disqualified to enter by reason of his having married a widow contrary to Hindu *sastras*; and he sued for damages for the above obstruction and imputation, for a declaration that he was entitled to enter the shrine as a Brahman, and for an injunction restraining the defendants from interfering with his exercise of this right:

Held, (1) that the right claimed was of a civil nature and within the cognizance of the Civil Courts;

(2) that the question to be determined was not a question of the plaintiff's legal status since a Brahman widow is at liberty to re-marry under Act XV of 1856, but it was a question of caste status in respect of a caste institution;

(3) that in order to determine the above question, the Courts must inquire (a) what was the usage of the temple as regards admission into the inner shrine for the purposes of worship at the date of the suit, or the presumable-intention of the religious foundation as regards such admission and (b) whether according to such usage or presumable intention of the foundation those who secede from the caste custom as to re-marriage of women are outside the class of beneficiaries as regards the right of admission into the inner shrine as above.

SECOND APPEAL against the decree of Venkata Rangayyar, Subordinate Judge of Ellore, in appeal suit No. 321 of 1887, reversing the decree of O. S. R. Kristnamma, District Munsif of Ellore, in original suit No. 94 of 1886.

The defendants, who were the committee of a temple, had prevented the plaintiff from entering the inner shrine, alleging that he was disqualified to enter by reason of his marriage with a widow. The plaintiff sued for damages, and for a declaration of

* Second Appeal No. 1473 of 1888.

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October 2.
1890.
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his right to enter, and for an injunction to restrain the defendants from obstructing him in the exercise of this right.

The District Munsif passed a decree "that the plaintiff do 'have such right as all the Brahmans have for going into the 'temple for worship.'" On appeal the Subordinate Judge reversed the decree and dismissed the suit.

The plaintiff preferred this second appeal against the decree of the Subordinate Judge.

Pattabhirama Ayyar for appellant.

Mr. Michell for respondents.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purposes of this report from the judgment of Muttusami Ayyar, J.

MUTTUSAMI AYYAR, J.—The appellant, Venkatachalapati Rau, is a *Smarta* Brahman of Tanuku, in the Godavari District, and the respondents are the *archaka* and members of the committee of management attached to Sri Markandesvara Swami's temple in the town of Rajahmundry. In June 1883, Venkatachalapati married a Brahman lady who was of his caste, but who had lost her husband before she attained her maturity and her marriage was consummated. The plaint stated that, during her subsequent illness, he made a vow to present an offering to the deity worshipped in the temple in question in case she recovered. For the purpose of performing the alleged vow, he attempted, in January 1886, to enter the inner precincts or the *sanctum sanctorum* of the temple where orthodox Brahmans usually make their offerings to the idol. But the respondents prevented him from doing so, the first asserting that he was disqualified from entering the inner shrine by reason of his having married a widow contrary to Hindu *sastras*. The appellant's case was that the imputation was defamatory, and the obstruction caused to his entering the inner shrine was wrongful. He asked, first, for a declaration that he was entitled to enter the inner shrine of the temple as a member of the Brahman community, secondly, for an injunction commanding the respondents not to interfere in future with the exercise by him of such right, and, thirdly, for an award of Rs. 100 as compensation for the injury already done to him.

The District Munsif of Ellore, by whom this suit was tried, observed that there was no evidence in support of the alleged vow and that the appellant entered the temple in pursuance of a plan

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concerted with his friends in anticipation of opposition from the respondents in order to obtain a judicial declaration that widow marriage was in conformity with the Hindu *sastras*. He considered further that the appellant proved no actual loss, that the injury for which he claimed compensation was only sentimental, and that the respondents' statement that the appellant had become an out-caste by reason of his marriage with a widow was not malicious. On this view of the facts, the District Munsif disallowed the claim to an injunction and to damages, and the appellant preferred no appeal to the District Court from that portion of his decree. As regards the appellant's prayer for a declaration of his right to enter the inner shrine of the temple for the purposes of religious worship, the respondents contended that the appellant's marriage with a widow was opposed to Hindu law and custom, that he lost his *status* as a Brahman by contracting such marriage, and that in refusing him permission to enter the inner shrine, they acted *bonâ fide*, and were guilty of no actionable wrong. They raised also three preliminary objections to the suit, viz., (1) that the appellant had no right to maintain the suit, (2) that the Civil Courts had no jurisdiction to entertain it, and (3) that the suit was bad for non-joinder as a defendant of Sankarachariar, the head priest or the ecclesiastical superior of *Smarta* Brahmans in that part of the country. The plea of non-joinder was disallowed by the District Munsif, and it was not pressed by the respondents on appeal. The other two objections rested on one and the same ground, viz., that this suit relates to a religious matter, that Hindu marriage is a religious ceremony, that ecclesiastical superiors are alone competent judges of its efficacy, and that the ritual and usage of the temple in dispute are founded on the *agamam* or the code of temple ritual. The District Munsif considered that the right asserted in the plaint was one of a civil nature which vested in the appellant as a citizen and as a member of the Brahman community, that its connection with religious or caste observances was not of itself sufficient to preclude the appellant from complaining of what he considered to be an infringement of such right or the Civil Courts from adjudicating upon it and protecting its exercise if it really existed in law. Turning to the main question whether marriage with a widow was forbidden by Hindu law, he discussed it with reference first to *sruti*, next to *smriti*, and then to *puranas*, and after referring to the general

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custom on the subject and its supposed origin, and to the canon of interpretation applicable when rules deducible from the several sources of Hindu law conflict with each other, concluded that widow marriage was not forbidden by the Hindu *sastras*, and that such marriage did not impair or taint the appellant's status as a member of the Brahman community. Accordingly, he passed a decree that "plaintiff do have such right as all the Brahmans have of going into the temple mentioned in the plaint." On appeal the Subordinate Judge set aside that decree and directed that the suit be dismissed with costs. He did not discuss separately the first and second issues and the fourth issue on the merits and record a distinct finding on each, but he observed (1) that it was an undisputed fact that the custom or the rule of caste obtaining among Brahmans and other regenerate classes prohibited widow marriage and condemned to exclusion from caste those who violated the rule of custom or caste, (2) that the custom was a matter of general notoriety and it was incumbent on the Civil Courts to take judicial cognizance of it, and that it was not necessary for him to go behind it and to follow the District Munsif in his disquisition of the several sources of Hindu law. He next referred to the *arimukham* or letter of excommunication which emanated from Sankarachariar and which is referred to in the case of *The Queen v. Sankara*(1) and held that it amounted to an authoritative and binding declaration to the effect that those Brahmans who marry widows become out-castes, and that, by implication, it prohibited also the appellant's marriage with a widow. After remarking to what extent a Hindu temple was a public place, and that it was a caste institution, he held that the respondents were justified in obstructing the appellant's entrance into the temple and that the appellant's grievance was not an actionable wrong. Hence this second appeal.

As regards the two preliminary objections, the decision of District Munsif is correct. The right which the appellant claimed in the plaint and which he asked the Court to protect was a right of access to the inner shrine or *sanctum sanctorum* of a Hindu temple for the purposes of religious worship, and the ground of claim was that prior to his marriage with a Hindu widow, he had that right, and that he did not since forfeit it by

(1) I.L.R., 6 Mad., 381.

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reason of such marriage: The question whether with reference to its pre-requisites, the right continued to exist after his marriage was one which related to the merits, and whatever might be the decision in regard to it, the right was, in its nature, one which the appellant was at liberty to assert as a citizen and a Brahman and which the Courts were bound to adjudicate upon. It may be that an inquiry as to religious or caste usage, or as to the religious foundation for the excommunication pronounced by the chief priest of *Smarta* Brahmans, is indispensable to coming to a correct decision, but when the right claimed is asserted to be of a civil nature and one which is within the cognizance of Civil Courts, they are bound to hold such inquiry as is ancillary to the exercise of the jurisdiction vested in them by law.

Before entering on the merits, however, it is desirable to note to what extent a Hindu temple is a public institution and what restrictions usually obtain as regards the right of access to different portions of the temple in dispute. The District Munsif observes "The temple is of course intended for all castes, but "there are restrictions of entry. Pariahs cannot go into the court "of the temple even. Sudras and Baniyas can go into the hall of "the temple. Brahmans can go into the holy of the holies." On this point, the Subordinate Judge remarks that a Hindu temple is not a public place in the sense in which a public road is a public place. It is open only to the persons belonging to the religious community for whose use and benefit it was dedicated. "Venkatachalapati (appellant) was only entitled to use the "temple in question so long as he remained a member of the "community to which the temple belongs." Here it must also be observed that the grievance of which the appellant complains is not his total exclusion from the temple, but the denial of his right of entry into the inner shrine which orthodox Brahmans are permitted to enter when they make their offerings. The matter in controversy is the effect which marriage with a Hindu widow has upon the appellant's right of access into the inner shrine of the temple. The respondents' case was that the appellant ceased to be on the same footing with other Brahmans and became an out-caste by reason of his marriage, whilst the appellant's contention was that the marriage was an act permitted by the Hindu *sastras*, and that it in no way impaired his caste status as a Brahman. The question for determination was what was the

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nature and extent of caste *status* necessary according to the usage and recognized trusts of the temple to the exercise of the right.

The first contention on second appeal is that, assuming that the appellant became an out-caste by reason of his marriage, the right now claimed by him was saved either by Act XXI of 1850 or by Act XV of 1856. Section 1 of the first enactment provides that "So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from, the communion of any religion, or being deprived of caste shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal Charter within those territories." Section 5 of Act XV of 1856 enacts that except as in the three preceding sections is provided "A widow shall not by reason of her re-marriage forfeit any property or right to which she would otherwise be entitled and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage." It is on these provisions of law the contention is rested, but they do not appear to support it. They were clearly not intended to repeal the usage of Hindu temples or of religious or quasi-religious institutions controlling and regulating their management and prescribing rules as to the place where offerings are to be made and persons from whom they are to be accepted. In *Greedharee Doss v. Nundakissore Doss Mohunt*(1) and in *Genda Puri v. Chhatar Puri*(2), Her Majesty's Privy Council observed with reference to the right of succession to management that the law to be applied to *mutts* which are quasi-religious institutions is what is indicated by their usage. A rule of determination is looked for in the case of such institutions in their usage, because it is an index to the intention of those who founded and endowed them and who have since kept them up. A compliance with such intention is the accepted basis on which those who claim the benefit of worshipping in those institutions can sustain their right to such benefit and unless the appellant retains his *status* as a Brahman or a member of that section of the

(1) 11 M.I.A., 405.

(2) L.R. 13 I.A., 105.

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community for whose benefit Hindu temples exist, it is difficult to see how he can be regarded as coming within the object with which they are founded and maintained.

The right asserted is from its very nature not an exclusive personal right, or a right of domestic or family worship, or a right of property which may be conceived to exist independently of caste or religion, but it is a joint right to be exercised in a religious institution conformably to caste usage to the extent recognized by it so as not to contravene the equal rights of other members of the caste who are similarly interested in the institution. Any other view as to the basis of the appellant's right would be inconsistent with the doctrine of neutrality which forms part of the British judicial system as administered in India, and lead to the introduction into Hindu temples of Mahomedans, out-castes, and others, who are outside their scope and for whose benefit they were neither founded nor are kept up. The ground of claim disclosed by the plaint itself was that the appellant's *status* as a Brahman received no taint from his marriage and the contention now urged apparently implies a change of front. The reasonable construction of the enactments cited as saving the appellant's right is that a right consisting in the participation, along with other members of a caste, in the benefits of a religious institution appropriated to the members of the caste is not within their purview.

The next contention which we have to consider is that relied on for the respondents as to the effect of the *srinukham* or edict of excommunication pronounced by Sankarachariar on those who were connected with two other widow marriages which took place at Rajahmundry on the 11th and 15th December 1881. The circumstances under which it was issued and the nature and extent of the ecclesiastical jurisdiction in the exercise of which it was issued are discussed in case of the *The Queen v. Sankara*(1).

Admitting the fact that the appellant and his wife are not named in that "*srinukham*" and that their marriage was subsequent to its promulgation, the Subordinate Judge considered that they were also excommunicated if not expressly, by implication, and that such implied excommunication was binding upon them. The appellant's counsel argues, and I think very properly, that

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this opinion of the Lower Appellate Court cannot be supported. In the first place there can be no valid excommunication by implication, for the presumption of law is against the forfeiture of one's *status*, civil or social, until it is affirmatively established. Again, there was no evidence in this case to show that at the time of his marriage the appellant was a disciple of Sankarachariar and amenable to his jurisdiction as spiritual superior. Neither was the appellant heard as to whether he should be put out of his caste, and his marriage was in fact contracted after the publication of the "*srinukham*." The Subordinate Judge apparently assumes that every *Smarta* Brahman, whether he will or no, must be a disciple of Sankarachariar and that if he does any act prohibited by the chief priest he forfeits his caste as a Brahman. Learned and pious Brahmans have often dissented from the views of Sankarachariar and of each other in regard to interpretation of *smritis* and vedic texts, and yet they have not forfeited their caste *status*. There is no legal warrant in Hindu *sastras* for the supremacy imputed to Sankarachariar and in *The Queen v. Sankara*(1) it is pointed out that it is not in his power to forbid any act which is permitted by the *sastras*. A *Smarta* Brahman is bound by his creed to acknowledge no other binding authority than that of the "*achara*" and law as laid down by *sruti*, *smriti*, and other recognized sources of law. Though the opinion of Sankarachariar may be evidence of *bona fides* on the part of those who act upon it and entitled to weight as the opinion of a learned religious ascetic and an ecclesiastical chief, yet it has no inherent authority and cannot of itself operate to cause a forfeiture of caste or to bar an inquiry into the real state of Hindu *sastras* bearing on the point. The conclusion to which I come on this part of the case is that the *srinukham* referred to by the Subordinate Judge cannot be accepted as conclusive.

The substantial question then for decision is what was the recognized general usage of the caste to which appellant belongs at the date of the suit, whether it was against his marriage with a widow, and, if so, whether a departure from it affected his caste *status* so as to deprive him of the right claimed in the plaint. The Subordinate Judge observes that the general usage of Brahmans forbids such marriage and condemns those who infringe

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it to exclusion from caste, and that the custom is a general custom and one of general notoriety of which Civil Courts may take judicial cognizance. As to the custom of the caste being against the marriage, the District Munsif himself appears to entertain no doubt. In one part of his judgment he observes: "I have reserved "to the last the discussion of the question of custom. Since the "commencement of the *kaliyug*, about 5,000 years ago, it is said "that no widow marriages have taken place. That a different "course prevailed before *kaliyug* has already been shown. Why "widow marriage in *kaliyug* has been discontinued in the face of "the sanction by Parasara is to be decided now." He then refers to paragraphs 86 and 87 of Mayne's learned treatise on Hindu law where it is said that—"It is probable that the change "of usage on this point (re-marriage of women) arose in former "times from the influence of Brahminical opinion, marriage coming "to be looked upon as a sort of sacrament the effect of which was "indelible." The District Munsif also refers to the opinion of some writers who trace the custom to the effect of the celebrated war of the Mahabharat upon the proportion between the number of widows in this country and the number of males of a marriageable age. He then concludes the discussion with this observation:—"I have taken time and given my best thought and consideration "to the subject, and I am of opinion that the custom ought to give "way to law." Here it will be observed that he treats law and custom as antagonistic to each other. The preamble of Act XV of 1856 refers to the custom as an established custom and the Hindu law then administered by the Civil Courts as invalidating such marriage. Moreover, in *The Queen v. Sankara*(1) the general custom is referred to. Further, the two leading commentaries, the Mitakshara and the Dayabhaga, and the other commentaries, do not contemplate the case of a widow marrying and getting a son whilst enumerating the heirs of a deceased person. This indicates that the custom is at least as old as the period of the digests during which the Hindu law as deduced from diverse sources was consolidated by a process of interpretation into a homogeneous system. I am, therefore, of opinion that the finding of the Courts below that the general custom of the Brahman community as it stood prior to Act XV of 1856 is against the

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marriage, is open to no legal objection and must be accepted in second appeal.

This being so, the further question arises, whether the Subordinate Judge is right in declining to go behind the custom and to examine whether it is deducible from the original sources of Hindu law. The District Munsif examines into these sources, states what inference may, in his opinion, be drawn from them, how orthodox Brahmans interpret them so as to support the general usage; and discarding their interpretation as unreasonable and incongruous concludes that his interpretation is the only reasonable construction which ought to be adopted. He then observes: "The oppositionists point to the custom of 50 centuries. But we are considering a question of Hindu law purely on the stand-point of the law itself. It is incumbent therefore to see what it says on the point of the custom." He then refers to the conventional rule as to the relative weight of the several sources of Hindu law, viz., *vedas* precede the *smritis*: *smritis* the *puranas* and then custom, &c., and cites a passage from the Mahabharat which is to the following effect:—"As to those who wish to know what *dharma*s are, for them the *veda* is the highest authority, the *smriti* the second, and custom the third."

This conventional rule of interpretation is acknowledged by all. But under the teaching of Sankara, another conventional rule came to be adopted together with it by commentators of authority who consolidated the diverse law-sources into a consistent system of law. They considered that all the recognized law-sources were inspired writings, and that if properly understood, they were capable of being reconciled, and attached great weight in connection with their interpretation to usage approved by learned and pious men. Thus a latitude of interpretation was introduced by them and their exposition of law which was at times wide both of the conventional rule first mentioned and of the rules of doctrinal interpretation, was in many cases readily adopted by the people as authoritative, and as a guide to their caste practice in consequence of the great respect which they had for their authority as men of learning and piety. After the practice of the people continued for some time, it reacted on the mode in which commentators reconciled the original law-sources with each other, and gave to what was originally a mere juristic thought the force of a rule of law. Whilst this accounts for the belief of the general commu-

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nity that what they practice is consistent with the original law-sources as authoritatively interpreted and adopted for many generations, it suggests also the stand-point from which a reformer who desires to revive some practice of ancient times as being salutary may act. He may treat the authoritative commentaries as misinterpreting the original law-sources, and ignore the juristic thought which they contain as a legitimate factor in the development of Hindu law. The District Munsif apparently confounds the functions of the judiciary with those of the reformer. In administering Hindu law the former has only to see what is the Hindu law as received and practised by the Hindu community in general with the conviction that it is law, and to declare and enforce it when it is ascertained. It is not for him to go beyond, to resolve the Hindu law as received by the people into its historical factors, to see how far its historical development has diverged from the logical or philosophical development in the light of modern civilization, and to reconstruct a system of Hindu law which the people ought to have received and followed as consistent with their *sastras*.

This mode of reasoning is altogether inadmissible as a ground of judicial decision. It has for its object not to declare the Hindu law as it was received by the Hindu community and as proved by their usage prior to Act XV of 1856, but to criticize and reconstruct it upon speculations as to how Hindu law ought to have developed itself according to the relative weight of the original law-sources for the purpose of evolving an antagonism between law and usage. If the Civil Courts are at liberty to travel back beyond the law and usage of *kali* age, and examine into the ancient Hindu law and usage, it may be admitted, that texts may be cited from *vedas* and *smritis* which bear a construction in favor of re-marriage of women, and that the interpretation adopted by the general Hindu community under the teaching of commentators of authority to reconcile them with the usage which came to prevail in the *kali* age is strained. It may be further admitted that traces do exist in ancient treatises of twice-married women and of their children forming a section of the Brahmanical community and of a gradual historical development under which restrictions on the re-marriage of women gained ground step by step among Brahmans, until marriage came to be recognized as a sacrament of which the effect was indelible when it was once

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contracted, and as complete when "*saptapadi*" was performed. With reference to speculations like these, their Lordships of the Privy Council observed in *Collector of Madura v. Mootoo Ramalinga Sathupathy*(1) as follows:—"Positive authority affords a foundation for the doctrine (then in controversy) safer than any "built upon speculations touching the natural development of "Hindu law or upon analogies real or supposed between adoption "according to the *dattaka* form and the obsolete practice with "which that form of adoption co-existed of raising up issue by "carnal intercourse with the widow. It may be admitted that "the arguments founded upon the supposed analogy are in some "measure confirmed by passages in several of the ancient treatises "referred to and in particular by the *Dattaka Mimansa* of Vidya "Narainsamy, the author of the *Madhaviya*, but as a ground for "judicial decision these speculations are inadmissible, though as "explanatory arguments to account for actual practice they may "be deserving of attention." If such speculations are inadmissible even for the purpose of declaring a rule by analogy as was done in that case, it must be much more so when the object is to declare the Hindu law, received as founded upon their *sastras* by the Hindu community at large to be the outcome of an illogical development, and to substitute in its place the District Munsif's conception of what ought to have been its proper development. When the Civil Courts find what the Hindu law is as evidenced by the usage of the community based on the conviction that it is law, they light upon positive authority, to use the language of the Privy Council, serving as the basis of a judicial decision and it is immaterial to them how that usage historically originated and how the conviction of the orthodox Hindu community that what they practice is founded upon their *sastras* was generated. A disquisition into the several law-sources, such as *sruti*, *smriti*, and *mahapuranas*, and custom, is of a judicial value only for the purposes of elucidation and of tracing the consciousness of generations that have passed away that what is practised was law. If such disquisition leads them to a period when the law and usage were otherwise, such discovery should tend only to enable them to trace the origin and development of the law and usage as they since came to prevail. It is not permitted to the judiciary to push

the disquisition beyond those legitimate limits, to treat the several law-sources as independent factors which he is at liberty to manipulate at his pleasure and by a process of reasoning to disintegrate the law as received and practised by the people, and to build up a fresh system of Hindu law, which though obsolete is, in his opinion, more in accordance either with the *vedas* or *smritis* than the usage adopted by the people as founded upon them. It must always be remembered that the Hindu law, which the Courts are bound to administer, is the law as received by the Hindu community and not as it stood either in the *vedic* or *smriti* period of their history, and that no other conception of Hindu law to be administered by the Courts is either judicial or rational. If it were otherwise, the Courts might have to force upon the Hindu community of this century the several portions of obsolete Hindu law which existed at some former time and have since fallen into disuse. What are the Courts to say if they are asked to revive the obsolete law of *niyoga* as the result of a disquisition into original law-sources? There is another defect which underlies the decision of the District Munsif. The question which he had to determine is no longer one of the appellant's legal *status*, for, a Brahman widow is now at liberty to re-marry under Act XV of 1856, but it is one of caste *status* in respect of a caste institution, which, it is asserted, recognizes, and is influenced by, the general religious usage of Brahmans and of the other regenerate classes.

The discussion in regard to the Hindu law administered prior to 1856 as founded upon such usage with respect to the re-marriage of woman, is material as indicating the general consciousness that the usage is in conformity to the Hindu *sastras*. If those who once conformed to such usage depart from it, the legal relation between them and those who still conform to the usage is that of the orthodox party and the secessionists in regard to a matter of doctrine or caste practice. There is no State church in India. Nor is there any recognized Ecclesiastical Court and the Hindu religion is not the State religion. The only jural basis on which their respective relations to religious or caste institutions can rest is that of viewing them as endowed institutions or voluntary associations founded or formed for caste or religious purposes as evidenced by their immemorial usage, endowment deeds, if any, and the presumable intention of those who founded them. It is

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(1) 2 M.L.A., p. 441.

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in such intention or the original trusts of the institution that a rule of decision must be found in the case of a dispute between the orthodox party and the dissenters. The same principle was laid down in *Attorney-General v. Welsh*(1) where an endowment was made for a society of Presbyterians in communion with the Church of Scotland and the ministers and majority of the congregation seceded to the Free Kirk. It was held that the minority who still clung to the Church of Scotland was entitled to keep the endowments and to appoint another minister. Hindu temples being religious institutions founded, endowed, and maintained, for the benefit of those sections of the Hindu community who conform to certain recognized usages as those of the castes for whose benefit the temples are by immemorial usage dedicated as places of worship, persons who conform to those usages stand to the managers for the time being in the relation of *cestuis que trustent* by reason of an implied contract; and if a few secede and transgress such usages, the managers would be acting within their rights if they could say:—"We have according to the usage of the institution to admit into the inner shrine for the purposes of worship only those Brahmans who conform to the general usages of their caste: you have transgressed the caste usage in respect of marriage and we cannot admit you to that part of the temple to which those who conform to the usage are alone admitted according to the original trusts of the institution." I do not desire to be understood as detracting from the merits of those that secede from the orthodox usage. The secession may possibly mark an era of progress and reform, and it may in time produce important results, raise the condition of Hindu women and prove beneficial to the Hindu community. But these are considerations with which Courts of Justice have nothing to do if they are foreign to the original trusts of the temple in question. The only questions which we have to consider are what was the usage of the temple in dispute as regards admission into the inner shrine for the purposes of worship at the date of the suit, or the presumable intention of the religious foundation as regards such admission, and whether according to such usage or presumable intention of the foundation those who secede from the caste custom as to re-

(1) 4 Haro, 572.

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marriage of women are outside the class of beneficiaries as regards the specific right in contest, viz., of admission into the inner shrine of the temple for purposes of worship.

Before answering these questions further inquiry appears to be necessary. No specific issue was recorded with reference to the usage of the temple or its original trusts. Nor is any evidence referred to as to the continuance of the general caste custom subsequently to 1856. The Subordinate Judge apparently presumes from the custom as it obtained prior to Act XV of 1856 that it has since continued, and that those who transgress it are condemned to exclusion from caste and therefore from the temple. He states in his judgment that this is an admitted fact. But it is denied before us that such admission was ever made and we find no note of it on the record. Though there may be a presumption that the general usage which existed prior to 1856 since continued unless the contrary is shown, yet the contention for the appellant that he must be given an opportunity of showing a change of custom before a finding is judicially recorded is well founded. The Subordinate Judge further prefers finally to rest his decision on the question of jurisdiction. We must therefore direct that the following specific issues be tried and findings returned thereon:—

- (i) "Whether the general custom of Brahmans worshipping or entitled to worship, in the temple mentioned in the plaint, continued to prohibit, at the date of the suit, marriage with a widow?"
- (ii) "If so, whether according to the usage of the temple mentioned in the plaint or according to the original and recognized intention of the foundation, regard being had to its nature and character as a religious and caste institution and to the customary mode of treating those who transgress general caste customs, and thereby lose or impair their caste *status*, those Brahmans who marry widows are excluded from the inner shrine of the temple by the original and recognized trusts of the institution."

The finding is to be returned within two months from the date of the receipt of this order, and seven days after the posting of the finding in this Court will be allowed for filing objections. Both parties to be at liberty to adduce fresh evidence.

Shephard, J.—I concur.

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[The Subordinate Judge having recorded on the above issues findings in favor of the respondents, this second appeal came on for rehearing, and their Lordships delivered judgment as follows :—

JUDGMENT.—The finding is that, upon the evidence recorded, the plaintiff is, under the circumstances, excluded by the usage of the temple and the intention of the founder from the inner shrine of the temple.

The objections have not been pressed.

We accept the findings and dismiss the appeal with costs.]

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SAMBAYYA (DEFENDANT), APPELLANT.

v.

GANGAYYA (PLAINTIFF), RESPONDENT.*

Registration Act—Act III of 1877, ss. 17 (d), 49—Covenant in unregistered lease—specific performance.

The plaintiff leased a house to the defendant for three years by an unregistered instrument which contained a covenant by the lessee that he would purchase the house at a certain price on an event which took place. The plaintiff now sued for specific performance of this covenant :

Held, that the unregistered instrument was not admissible in evidence and the suit should be dismissed.

SECOND APPEAL against the decree of W. H. Welsh, Acting District Judge of Cuddapah, in appeal suit No. 81 of 1888, affirming the decree of Mahomed Abdul Allam Saheb Bahadur, District Munsif of Madanapalli, in original suit No. 374 of 1887.

Suit for specific performance of a covenant for the purchase of a house, contained in an unregistered lease. The facts of the case are stated sufficiently for the purposes of this report in the judgments of the High Court.

The District Munsif passed a decree as prayed, and this decree was affirmed in appeal by the District Judge.

The defendant preferred this second appeal.

Sadagopa Chariyar for appellant.

Subbayya Chetti for respondent.

* Second Appeal No. 185 of 1889.

MUTTUSAMI AYYAR, J.—The appellant rented a house from the respondent for three years and executed a kararnama in his favor on the 5th September 1884 undertaking to keep the premises in repair during the period and to restore possession on the expiration of the lease. The document provided further that, if the appellant either failed to execute the necessary repairs or to restore possession, he should pay the respondent Rs. 60, and take a sale-deed from him regarding the house. It has been found by the Courts below that the appellant lived in the house but for six months, and then left the village where it is situated, refused to make over possession to the respondent on the ground that he (appellant) was entitled to remain in possession for three years, and continued to occupy the house whenever he came to the village.

It has also been found that the appellant failed to repair the house and that it became dilapidated and ceased to be habitable. Upon these facts, the District Munsif directed the respondent to pay the appellant Rs. 60, and the appellant to execute and register a sale-deed in respect of the house. On appeal, the District Judge agreed with the District Munsif, and held that the omission to register the kararnama or lease for three years did not preclude the appellant from enforcing specific performance of the covenant for the purchase of the house. The contention in second appeal is that the kararnama acquired no legal force for want of registration, that the lease for three years which it purported to create was not a valid transaction, that the covenant for purchase was likewise invalid, and that the document was not admissible in evidence to prove either the lease for three years or the stipulation for the purchase.

The transaction evidenced by document A, or the principal contract which forms the foundation for the respondent's claim, is the lease for three years, and the covenant which the respondent sued to enforce was part of, and depended on, the principal contract. Document A was compulsorily registrable under section 17, clause (d) of Act III of 1877, and under section 49, it was ineffectual for the purpose of creating a lease of the house for three years and inadmissible as evidence of any transaction affecting the house. As the principal contract failed, the covenant depending upon it likewise failed (*Venkatrayudu v.*

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Papi(1)). The decision in *Muttukaruppa Kaundan v. Rama Pillai*(2), on which the Judge relies proceeded on the ground that when a document is merely evidence and not of the essence of a transaction, the statement of a party to a suit is admissible original evidence as against him to prove the contents of a document which is not admissible in evidence under the Stamp Act. But in the case now before us registration is of the essence of the transaction, and the question is whether the covenant for purchase ought not to stand or fall with the principal contract. The question to what extent a document, which is a subject of compulsory registration but not registered is admissible in evidence for the purpose of proving a money claim, was considered by this Court in *Stri Seshathri Ayyengar v. Sankara Ayeen*(3) and *Guduri Jagannadham v. Rapaka Ramanna*(4). The course of decisions on this point has been influenced by the language of the Registration Act in force at the time when the document sued on was executed. The first case is that of *Achoo Bayamah v. Dhany Ram*(5) decided in 1869 with reference to Act XX of 1866. The words of section 49 of that enactment were as follows:—"No instrument required by section 17 to be registered shall be received in evidence in any civil proceeding in any Court or shall affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act." The question decided in that case was whether an unregistered instrument of mortgage might be admitted in evidence for the purpose of proving the covenant to repay the debt and enforcing the personal obligation only. Three of the learned Judges of this Court held that it was not admissible and relied on the general words: "No document shall be received in any Court." But the learned Chief Justice, Sir Colley Scotland, dissented and observed that, "An instrument which has the twofold operation of a simple contract or bond to pay a debt a collateral security for the debt is admissible in evidence, though unregistered, for the purpose of proving the simple contract debt."

When Act VIII of 1871 was passed the language of section 49 was modified and rendered less stringent, the words being, "No document required to be registered shall, unless registered,

(1) I.L.R., 8 Mad., 182.

(2) 3 M.H.C.R., 158.

(3) 7 M.H.C.R., 296.

(4) 7 M.H.C.R., 348.

(5) 4 M.H.C.R., 378.

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"be received in evidence of any transaction affecting any immoveable property comprised therein." The cases decided under this Act are *Stri Seshathri Ayyengar v. Sankara Ayeen*(1), *Guduri Jagannadham v. Rapaka Ramanna*(2), and it was held in both that the unregistered document, though a subject of compulsory registration, was admissible in evidence for the purpose of enforcing the personal liability of the person executing the document. In the second case this Court observed that the new law (Act VIII of 1871) explicitly adopted the doctrine which the late Chief Justice believed to be derivable from the old. The language of the present registration section 49 is same as that of Act VIII of 1871; and the test therefore is whether the transaction evidenced by the particular instrument is single and indivisible, or whether it really evidences two transactions which can be severed from each other, the one as creating an independent personal obligation and the other as merely strengthening it by adding a right to proceed against immoveable property. But it should be remembered that it is not enough that there is an obligation to pay a sum of money, but that it is also necessary that the obligation should have an independent existence, and be in no way contingent or conditional on the breach of some obligation relating to immoveable property created by the same instrument, for the contingency or the condition and the obligation would then be parts of one indivisible transaction. This principle was recognized in *Venkatragudu v. Papi*(3) decided in 1884, in which there was a covenant in a deed of sale for a term of years to the effect that if the grantor failed to observe the stipulations relating to the land mentioned in the unregistered instrument, he was to pay the principal debt after deducting the profits and interest received from the date of the document. The present case is on all fours with the above and it is further a suit by the vendor to enforce the specific performance of a covenant relating to immoveable property. I would reverse the decrees of the Courts below and direct that the suit be dismissed.

BEST, J.—The question for decision in this appeal is whether the Lower Appellate Court is right in giving the plaintiff a decree on the so-called admission of the defendant, notwithstanding that the *karar* on which the suit is based is inadmissible in evidence by reason of its not being registered.

(1) 7 M.H.C.R., 296. (2) 7 M.H.C.R., 348. (3) I.L.R., 8 Mad., 182.

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In the case of *Muttukaruppa Kaundan v. Rama Pillai*(1), to which the Judge refers in support of his finding that the admission is sufficient, it appears that the then defendant had "himself admitted before the Court the contents of the counterpart, which had been admittedly executed by him, and such admission was held to be *primary* evidence of the terms of the tenancy" upon which the plaintiff was entitled to rely without producing the written instrument or accounting for its absence. In the present case, though the defendant appears to have admitted the existence of a *karar* such as is mentioned in the plaint, he does not appear to have stated what were the contents of such *karar*, or to have expressly admitted that it contained a stipulation such as is now sought to be enforced; and the mere fact that an allegation in a plaint is not traversed does not relieve a plaintiff from the burden of proving his case—*Mulji Bechar v. Anupram Bechar*(2).

If authority were required for the proposition that when a document is inadmissible in evidence no *secondary* evidence of its contents can be admitted, it is found in the very case relied on by the Judge, namely, that in *Muttukaruppa Kaundan v. Rama Pillai*(1), wherein it was held that the plaintiff's admission of the want of stamp precluded secondary evidence of the contents of the counterpart. Further, as observed by West, J., in *Burjorji Cursetji Panthaki v. Muncherji Kuverji*(3) (at page 153 of the report), "if, the document being pronounced absolutely invalid for "some purpose on considerations of public policy, it were sought "to defeat the law through the effect usually given to an admission "in pleading such an attempt could not be allowed to succeed." Compare also *Varada v. Krishnasami*(4) and *Venkatrayudu v. Papi*(5).

The covenant now sought to be enforced being a contract depending on the lease, and the latter being invalid for want of registration, the former must also fail.

This appeal must therefore be allowed, and the decrees of both the Lower Courts being set aside, plaintiff's suit must be dismissed and the respondent (plaintiff) directed to pay the appellant's (defendant's) costs of this appeal. Each party is directed to bear his own costs in the Lower Courts as the ground on which the suit is now found to fail was not taken in the original Court.

(1) 3 M.H.C.R., 158. (2) 7 Bom. H.C.R., 136. (3) I.L.R., 5 Bom., 143.
(4) I.L.R., 6 Mad., 117. (5) I.L.R., 8 Mad., 182.

APPELLATE CIVIL.

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

BEEMABAI (PLAINTIFF). APPELLANT.

1890.
March 13.

YAMUNABAI AND ANOTHER (DEFENDANTS NOS. 1 AND 2).
RESPONDENTS.*

*Civil Procedure Code, s. 13—Res judicata—Partition suit—Non-joinder—
Declaratory decree.*

A suit for partition of certain land was withdrawn as against one of the defendants who was entitled to part of the land. The plaintiff and the remaining defendants entered into a compromise in the terms of which the Court passed a decree for delivery of a share of the land to the plaintiff. The decree-holder having died without executing the decree, his heir now sued for partition of the land and delivery of the above share, joining as defendants the various persons entitled to shares:

Held, that the decree in the former suit could only operate as a declaratory decree and did not preclude the plaintiff from bringing the present suit.

SECOND APPEAL against the decree of G. W. Fawcett, Acting District Judge of Tanjore, in appeal suit No. 614 of 1888, reversing the decree of T. A. Krishnasami Ayyar, District Munsif of Mannargudi, in original suit No. 344 of 1887.

Suit for partition and delivery to the plaintiff of $\frac{1}{2}$ veli of land part of $2\frac{1}{2}$ velis in the possession of defendants Nos. 1 and 2. The plaintiff sued as widow and heir of one Tiruvadamarudur Krishnasami Royar, deceased, who in 1878 had brought a suit (original suit No. 41 of 1878) against the present first defendant, who was his daughter-in-law, her father (Ramachandra Royar) and Srinivasa Royar, the present second defendant, for partition of the land now in question, and for delivery to him of 1 veli. It was admitted in the plaint in both the suit of 1878 and the present suit that Srinivasa Royar was entitled to three-fifths of the land: but the plaint in the suit of 1878 having been returned for amendment, the suit was withdrawn as against him, and the prayer for the division of the land and the delivery of the plaintiffs'

* Second Appeal No. 672 of 1889.

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share was withdrawn. Subsequently, however, the then plaintiff and the remaining defendants entered into a *razinamah* and a decree was passed as follows :—

“Plaint presented by the plaintiff valuing the suit at Rs. 2,111-4-0 was filed on the 26th February 1878. It is set forth in the plaint that about 18 years ago plaintiff purchased in the name of the said Vasudeva Royar, who was the husband of the first defendant and undivided son of plaintiff, and who was then a minor, the plaint mentioned veli of nanjai land situated in the village of Samudaya karai, in Mannargudi taluk, and they were enjoying the same; that the said Vasudeva Royar died eight years ago; that from the year 1871 the defendants have wrongfully taken possession of and been enjoying the same and that 2½ velis of land made up of the abovesaid land and the 1½ velis of Srinivasa Royar not included in the plaint being common, a decree may be passed directing delivery of possession to plaintiff from the defendants of 1 veli of nanjai land generally, valued at Rs. 2,111-4-0 and appertaining to the 2½ pangu, being the balance after deducting the ¾ pangu of the said Srinivasa Royar out of the said land including his land, and awarding subsequent profits and costs.

“In accordance with the *razinamah* presented by the plaintiff's vakil Singaniengar and the plaintiff, and the defendants' vakil Sreenivassa Iyengar and Kayarohaniyar and the second defendant who appeared before Venkatarayar Avergal, District Munsif of Mannargudi, in South Tanjore district, the Court doth decree that, towards the land, profits, and amount of costs, &c., claimed in the said suit, the first defendant do surrender to the plaintiff, within two weeks from this date, a moiety of the suit 1 veli of land along with all the samudayams including the excess and deficit appertaining thereto, and the produce, and with regard to good and bad soil; that each party do bear his or her own costs incurred in this suit; and that the first defendant do pay to the plaintiff the expenses of executing this decree.”

The decree-holder applied for execution of his decree by delivery to him of the ½ veli therein referred to, but his application was rejected on the ground that the decree to which Srinivasa Royar was not a party was not an executory decree. The decree-holder died in 1884 and the plaintiff now sued as above to recover the ½ veli.

The District Munsif passed a decree as prayed, but his decree was reversed on appeal by the District Judge, who held that the matter in dispute was *res judicata* by reason of the decree in original suit No. 41 of 1878.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Krishnasami Ayyar* for appellant.

Pattabhirama Ayyar for respondents.

JUDGMENT.—The suit has been dismissed on the ground that the matter is *res judicata* as against the first defendant. It is contended here that the judgment is wrong inasmuch as the plaintiff's husband did not and could not in the former suit ask for partition. He sought to recover the whole veli from the daughter-in-law, and as the plaint originally stood joined the present second defendant; when the plaint was amended and the defendant's name struck out, it is clear that the suit was no longer maintainable as a partition suit. This being so, the decree ought not to have been drawn up in the form in which it was drawn, for it could only operate as a declaratory decree. We think we may construe it in that way in order that justice may be done between the parties. But as this second suit has had to be brought on account of the laches of the plaintiff's husband, we do not think the first defendant ought to suffer for it. While reversing the decree of the District Judge and restoring that of the District Munsif, we must direct that the plaintiff do bear the costs of the first defendant in this and in the Lower Appellate Court.

The second defendant must pay the plaintiff's costs in this and in the Lower Appellate Court.

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YAMUNABAI.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

1890.
February 13.

TATAYYA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

PICHAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 375—Transfer of Property Act—Act IV of 1882, s. 83.

A sum of money having been deposited in Court under Transfer of Property Act, s. 83, by a vendee of the mortgagor, the mortgagee refused to accept it in discharge of his mortgage except on the terms that the depositor should convey to him part of the mortgage premises, which he consented to do. This agreement was not communicated to the Court and the depositor refused to carry it out when the mortgagee had withdrawn the money as above:

Held, that the mortgagee was entitled to a decree for specific performance of the agreement to convey.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 362 of 1888, reversing the decree of M. Ramayya, District Munsif of Bapatla, in original suit No. 6 of 1888.

Suit for possession of certain land (acres 3.67), and for the execution of a conveyance thereof by the defendants to the plaintiffs.

Akkayya (deceased), the father of the plaintiffs, obtained a mortgage with possession of certain land to secure an advance of Rs. 4,000 on 16th February 1878. On 10th and 11th April 1882 the mortgagor sold 40 acres, part of the mortgaged land, to a third party for Rs. 3,000 under two sale deeds, which provided that the vendee should pay the purchase money to the mortgagee towards the mortgage debt on 30th June 1886, and that the mortgagor should pay the balance then due, if any, and deliver possession to the vendee. On 30th June 1886 the vendee, who had in the interval sold his interest in the land to the defendants tendered the sum of Rs. 3,000 to the mortgagee and, on his refusal to accept it, paid Rs. 3,400 into the District Court under Transfer of Property Act, s. 83, and notices were issued to the mortgagor and mortgagee. The latter raised certain objections to the applica-

tion under section 83; but a compromise was arrived at to the effect that these objections should be withdrawn and that the defendants should pay Rs. 400 to the mortgagor and should convey the land in question in the present suit to the mortgagee in consideration of which he should surrender his mortgage lien.

Petitions were accordingly, on 25th February 1887, presented to the District Court praying that the money deposited be paid out of Court to the mortgagee. But the petitions were rejected as the money had been attached on the previous day in execution of a decree against the depositor who, however, raised a similar sum elsewhere and paid it to the mortgagee. The present suit was brought by the sons of the mortgagee (since deceased) to enforce the terms of the compromise.

The District Munsif passed a decree as prayed. But his decree was reversed on appeal by the District Judge, who (after stating the facts summarized above) said:—

“The question then arises whether this is a contract which the Courts will enforce. No mention of this contract was made in the petitions (exhibits III and IV) presented to the District Court under section 83 of the Transfer of Property Act. The petition of Vomulapalli Akkayya under that section must be verified as a plaint and the decision of the District Court under that section resembles the decision of a suit. Does not the spirit and intention of section 375 of the Code of Civil Procedure apply here?”

“In argument on this point at the hearing of the appeal the plaintiffs cited the following decisions:—*Ruttonsey Lalji v. Pooribai*(1), *Karuppan v. Ramasami*(2), and *Appasami v. Manikam*(3).

“The point decided in these cases was that, if the parties to a suit come to an agreement and afterwards disagree, the Court may, nevertheless, pass a decision under section 375 in accordance with the agreement. This does not affect the point now in question. Section 375 directs that the decision given in accordance with an agreement shall be final, so that, if there is any portion of the agreement kept back from the knowledge of the Court and not included in the decision, that portion of the agreement cannot afterwards be enforced. I consider that

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* Second Appeal No. 327 of 1889.

(1) I.L.R., 7 Bom., 304.

(2) I.L.R., 8 Mad., 482.

(3) I.L.R., 9 Mad., 103.

TATAYYA "the same rule applies to proceedings under section 83 of the
 PICHAYYA. "Transfer of Property Act Vemulapalli Akkayya
 "accepted this tender. I consider that his heirs cannot now
 "contend that there was a further tender of four acres which was
 "kept from the knowledge of the Court. Upon this ground I
 "reverse the decision of the District Munsif and dismiss the
 "plaintiffs' suit with costs throughout."

The plaintiffs preferred this second appeal.

Bhashyam Ayyangar for appellants.

Sundaram Sastryar for respondents.

JUDGMENT.—The Judge finds there was an agreement to sell three acres of land and that there was consideration to support it. This being so the appellants were clearly entitled to a decree for its specific performance. We do not consider that the omission to refer to the agreement is fatal to the claim. There is nothing on the record to show that the District Court in which the money was deposited ordered it to be paid to the appellants' father. On the other hand the money in deposit was attached and Rs. 3,400 were borrowed elsewhere and paid to Akkayya. On referring to section 83 of Act IV of 1882, we find that it simply provides a mode whereby a mortgage may be satisfied through the Court, and we do not think that the petition filed under that section and the order made upon it can be treated as proceedings in a regular suit. In the case before us the appellants' father did not draw the money in deposit, and his petition proved infructuous. The direction that the petition be verified in the manner prescribed by law for verification of plaints does not warrant the inference that the order made upon it has the force of a decree in a regular suit.

We are also unable to concur in the opinion of the Judge that section 375, Civil Procedure Code, can be extended by analogy to proceedings held under section 83 of Act IV of 1882, and that if extended it would invalidate the agreement on which this suit was brought. We set aside the decree of the Lower Appellate Court and restore that of the District Munsif. The respondents will pay the appellants' costs both in this Court and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

KRISHNASAMI (PLAINTIFF No. 2), APPELLANT,

v.

VENKATARAMA AND OTHERS (DEFENDANTS Nos. 2 to 5
 AND PLAINTIFF No. 1), RESPONDENTS.*

*Revenue Recovery Act (Madras)—Act II of 1864, s. 2—Remedies of assignee from
 Government of land revenue—Land security for revenue.*

The land revenue payable on certain land having been assigned to a temple by Government, which, however, continued to issue a patta for the land, the panchayat of the temple are entitled to bring the land to sale to discharge arrears accrued due.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 109 of 1888, modifying the decree of S. Subba Ayyar, District Munsif of Negapatam, in original suit No. 410 of 1886.

Defendant No. 1 was the owner of certain land. The Government revenue on it was assigned over by the Government to a temple at Teruvalur in lieu of the mohinee or annual money allowance which the Government had been paying to that institution. Defendant No. 1 mortgaged his land; the mortgagee obtained a decree for his debt and brought the mortgaged property for sale in execution, and defendants Nos. 3 to 5 and the mortgagee became the purchasers in August 1885. Defendant No. 2 bought from the mortgagee the portion of the land purchased by him.

Defendant No. 1 did not pay the revenue due on the land for fasli 1293 (1883). The plaintiffs (the panchayat of the temple) brought this suit to recover the amount due from defendant No. 1 and by the sale of the land on which it was due. Subsequently defendants Nos. 2 to 5, being in possession of the property, were joined as defendants on the plaintiffs' application.

The District Munsif passed a decree as prayed. The Subordinate Judge on appeal modified the decree by exonerating the land.

1890.
 Feb. 18, 21.

KRISHNASAMI Plaintiff No. 2 preferred this second appeal, defendants Nos. 2 to 5 and plaintiff No. 1, who was a minor, being joined as respondents.

Krishnasami Ayyar for appellant.

Subramanya Ayyar for respondents Nos. 1 to 4.

PARKER, J.—The plaintiffs are assignees of the kist due on the patta of defendant No. 1, and are not farmers of land revenue under Government. They are not, therefore, landlords within the meaning of the Rent Recovery Act. The patta is still granted by the Government to defendant No. 1. Defendants Nos. 2 to 5 are purchasers in execution of decrees against defendant No. 1. As the whole land in a patta is liable for the revenue due on the holding, the shares purchased by them are undoubtedly liable for the kists due on the whole patta.

It has never been asserted that the plaintiffs as assignees of the Government revenue have all the powers which Government possesses under Act II of 1864. They have, however, as assignees a right of suit for the kists due to them, and under section 2 of Act II of 1864, the land itself is security for the revenue due thereon.

The decree of the District Munsif appears to me to be correct. I would reverse the decree of the Subordinate Judge and restore that of the District Munsif with costs in this and in the Lower Appellate Court.

SHEPARD, J.—I have felt some doubt on the question whether the kists payable to the appellant in virtue of the arrangement with Government could be considered as secured by a charge on the lands in the appellant's favor. It is argued that on any assignment of revenue made by Government to a private person the amounts payable cease to be public revenue within the meaning of the Act of 1864, and, therefore, are no longer secured by a charge on the land. In the present case, however, the patta is still granted by Government, and it does not appear that Government has parted with the right to the revenue. The fact that the Collector has temporarily appropriated a part of the public revenue to the liquidation of a public charge cannot, I think, deprive it of the character of public revenue. The District Munsif was, therefore, right in the conclusion he arrived at on the fourth issue.

I agree with Parker, J., as to the decree which should be drawn up.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

ARUMUGAM (DEFENDANT NO. 1), APPELLANT.

1890.
Feb. 27.

SIVAGNANA AND OTHERS (PLAINTIFF AND DEFENDANTS
Nos. 2 AND 3), RESPONDENTS.*

*Transfer of Property Act (Act IV of 1882), s. 68—Sale of mortgaged premises
under Land Acquisition Act—Personal suit by mortgagee.*

The sale of mortgaged premises under the Land Acquisition Act is not a destruction of the security within the meaning of s. 68 of the Transfer of Property Act and does not enable the mortgagee to sue the mortgagor personally.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 646 of 1888, reversing the decree of T. V. Anantan Nayar, Principal District Munsif of Calicut, in original suit No. 837 of 1887.

Suit by a mortgagee to recover from the mortgagor personally Rs. 1,332-2-6, principal and interest of the mortgage debt. The debt had not become payable by the mortgagor under the terms of the mortgage instrument at the date of the suit, but it appeared that part of the mortgage premises had been purchased by Government under the Land Acquisition Act.

The District Munsif dismissed the suit, but his decree was reversed in appeal by the Subordinate Judge.

The defendant preferred this second appeal.

Sankaran Nayar for appellant.

Mahadeva Ayyar for respondent No. 1.

JUDGMENT.—As to land No. 1, of which the plaintiff was entitled to possession under the mortgage, it is not shown that the plaintiff has been deprived of possession of it, and, therefore, whether the suit is regarded as a suit for damages or a suit under section 68 of the Transfer of Property Act; it is premature with regard to the other item, the only question which can possibly arise is whether the plaintiff is entitled to relief under the last paragraph of section 68:—clause (b) cannot apply, because no

* Second Appeal No. 693 of 1889.

ARUMUGAM
v.
SIVAGNANA. default is charged, and clause (c) cannot apply, because plaintiff was not entitled to possession.

We are of opinion that the sale of the land under the Land Acquisition Act has not operated to effect any destruction of the property within the meaning of that paragraph. The only effect of the sale is to change the nature of the security. The land was converted into money to which the plaintiff might have made good his claim under the Act. Whether or not he has made good this claim, he can have no personal remedy against the mortgagor.

The appeal must be allowed and the suit dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

ASHTAMURTHI (PLAINTIFF), APPELLANT,

v.

SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT.*

Forest Act—Act V of 1882 (Madras), s. 33—"Jointly interested."

The Government having possession of a forest under a mortgage is jointly interested therein with the mortgagor within the meaning of Madras Forest Act, s. 33.

SECOND APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 905 of 1888, affirming the decree of A. Annasami Ayyar, District Munsif of Ernad, in original suit No. 243 of 1888.

Plaintiff, the urulan and representative of the Trikalayar devasom, sued the defendant, to obtain a declaration that the two notifications issued by the Government of Madras under section 33 (a) of the Madras Forest Act V of 1882, published in the *Fort St. George Gazette* on the 17th and 24th January 1888, relating to the management of 49 items of forest lands situated in Ernad and Calicut Taluks and mentioned in the schedule attached to the plaintiff are invalid and not binding upon his devasom.

The forest land to which the above notifications related were admittedly the property of the plaintiff's devasom; but it appeared that under exhibit A, executed on the 10th December 1840, the plaintiff's predecessor mortgaged the land to Government under the following among other conditions:—It was agreed that the mortgagee was to be put in possession, that the mortgagor was not to demand surrender on payment of the mortgage money as long as the mortgagee wished to continue in possession, and that the demise was to be renewed every 30 years when a renewal fee at the rate of 20 per cent. of the mortgage money was to be paid.

The plaintiff's case was that the Government and the appellant were not jointly interested in the forest land in question, and that consequently the provisions of section 33 of the Madras Forest Act (V of 1882) were not applicable to them.

That section provides as follows:—

"If the Government and any person or persons are jointly interested in any forest or waste land, or in the whole or any part of the produce thereof, the Government may either

- (a) undertake the management of such forest, waste land or produce, accounting to such person for his interest in the same; or
- (b) issue such regulations for the management of the forest, waste land or produce by the persons so jointly interested, as it deems necessary for the management thereof and the interests of all parties therein.

"When the Government undertakes, under clause (a) of this section, the management of any forest, waste land or produce, it may by notification in the *Fort St. George Gazette* and in the official gazette of the district declare that any of the provisions contained in chapters II and III of this Act shall apply to such forest, waste land or produce, and thereupon such provisions shall apply accordingly."

The District Munsif dismissed the suit and his decree was affirmed on appeal by the District Judge.

The plaintiff preferred this appeal.

Bhashyam Ayyangar and *Govinda Menon* for appellant.

The Government Pleader (*Mr. Powell*) for respondent.

JUDGMENT.—We see no reason to differ from the construction put by both the Lower Courts on the term "jointly interested" occurring in section 33 of Madras Act V of 1882. The words

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FOR INDIA.

ASHTAMURTHI used may not be (as a term of art) altogether appropriate, but the section appears to us clearly to refer to cases in which Government have a partial or limited interest in a forest along with a private individual, and this is precisely the state of affairs which on the terms of the lease put before us exists in this case.

We think then that the Government were jointly interested along with plaintiff in the forest within the meaning of section 33 of the Act.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

1889.
Oct. 25.
1890.
Feb. 14.
KANNAN AND ANOTHER (DEFENDANTS NOS. 8 AND 9), APPELLANTS,
v.
KRISHNAN AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 7),
RESPONDENTS.*

Registration Act—Act III of 1877, s. 48—Transfer of Property Act—Act IV of 1882, s. 54—Oral agreement for sale of land—Subsequent conveyance with notice—Delivery of possession—Priority—Specific Relief Act—Act I of 1877, ss. 27, 42—Specific performance—Declaratory suit—Consequential relief.

Plaintiff being in possession of certain land as an incumbrancer under a registered instrument agreed orally with the mortgagor in 1885 to purchase it. The mortgagor subsequently sold the land to others who took the conveyance which was registered with notice of the plaintiff's mortgage and of the oral agreement with him. Plaintiff now sued for a declaration that the conveyance was not binding on him and for specific performance of the oral agreement:

Held, (1) that the suit was not bad for want of a prayer for delivery up, and cancellation of the conveyance;

(2) that the plaintiff's possession under his incumbrance together with the agreement to sell was equivalent to delivery of possession within the meaning of Registration Act, s. 48;

(3) that the plaintiff was entitled to have the oral contract specifically enforced notwithstanding the subsequent registered sale.

SECOND APPEAL against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 351 of 1887, confirming the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in original suit No. 44 of 1886.

* Second Appeal No. 1447 of 1888.

Suit for a declaration that a registered sale-deed, dated 19th September 1885, and executed by defendants Nos. 1 to 7 to defendants Nos. 8 and 9 was not binding on the plaintiff, and for specific performance of an oral agreement entered into on 27th January 1885 for the sale by defendants Nos. 1 to 7 to the plaintiff of the land purported to be conveyed by the instrument of 19th September 1885. The plaintiff was in possession of the land in question as an incumbrancer (whether ottidar or kanomdar) under a registered instrument, dated 12th October 1867. Defendants Nos. 8 and 9 had notice at the date of the sale to them, of both the instrument of October 1867 and the oral agreement for sale of 27th January 1885.

The instrument of 12th October 1867 was as follows:—

“Kanom deed executed, on the 27th Kanni 1042, or 12th October 1867 to Ammalil Kytheri Krishnan, of Vattoli desom, Kannanam amshom, Kottayam taluq, residing in Kanakath house by Matayatti Pakra of Kottayam Nagaram. The loan obtained by me from you to-day to liquidate my tarwad debts, &c., is Rs. 2,312-8-0. For these Rs. 2,312-8-0, properties Nos. 1 to 9 mentioned below, which are my jenm, are granted to you on kanom. Holding the above-mentioned lands and paying the revenue, you will take the remaining income on account of interest on the said kanom amount. For the security of the kanom the jenm deeds of properties Nos. 1 to 5 are herewith given. As I have filed the jenm deeds of property No. 7 in suit No. 341 of 1866 on the file of the District Munsif's Court of Chavasheri, that and the document in respect of No. 8 are not herewith given. The marupats obtained on giving these lands to tenants on simple kozhu right are also herewith given. Enak to tenants is also given so that the tenants who hold the property may attorn with you, that this year's rent may be paid to you, and that in future you may do as you please. This and all other documents should be returned on paying of the kanom amount.”

The further facts of the case appear sufficiently for the purpose of this report from the judgment of Muttusami Ayyar, J.

The Subordinate Judge passed a decree as follows:—

“It is declared that the jenm deed executed by defendants Nos. 1 to 7 to the defendants Nos. 8 and 9 on 19th September 1885, in respect of the plaint lands, is not binding on plaintiff or on the plaint lands, and it is further ordered and decreed, that on

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plaintiff paying the balance purchase money, viz., Rs. 2,394 into Court for payment to defendants Nos. 1 to 7 within six months from this date, the defendants Nos. 1 to 7 do execute to him (plaintiff) a deed conveying to him the plaint lands in jenm, and that the defendants do pay plaintiff's costs."

The District Judge on appeal confirmed this decree.

Defendants Nos. 8 and 9 preferred this second appeal.

Mr. Wedderburn, Mr. Ramasami Raju and Sankaran Nayar for appellants.

On the pleadings the Lower Courts have granted relief to which the respondents were not entitled. Defendants Nos. 1 to 7 were not entitled to the decree which has been passed. Moreover the registered sale-deed of September 1885 remains unaffected by the decree though it is impeached as fraudulent in the pleadings. In the view taken by the Courts it could have been cancelled, accordingly the plaint praying for a declaratory decree and not for this consequential relief was bad under Specific Relief Act, s. 42, and the suit should have been dismissed. This is not a suit by an ottidar to enforce his right of pre-emption for he does not allege any tender by him to the purchasers of the sum paid by them *Vasudevan v. Keshavan*(1). But in fact the document does not purport to be an otti—it is a mere kanom without a provision for payment of rent. See Wigram's Malabar Law, pp. 100–132, and the Lower Courts were not entitled to employ the alleged enaks or notices by the mortgagor to third parties to show that the document was what it does not purport to be. See Evidence Act, ss. 94, 95 and 98.

As to the transaction of January 1885, the plaint refers to it as an agreement to sell while the Lower Courts seem to regard it as a sale. If it was a sale, it is invalid under Transfer of Property Act, s. 54; if it was an agreement for sale, then the instrument of September 1885 has priority under Registration Act, s. 48, in spite of the finding as to notice, for the words "accompanied or followed by delivery of possession" cannot mean merely accompanied by possession and so apply to the case of a sale to one already in possession.

(HANDLEY, J.—Cannot the Court, in spite of Registration Act, s. 48, set aside the subsequent conveyance?)

(1) I.L.R., 7 Mad., 309.

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The object of the Registration Acts must not be defeated. See *Nallappa v. Ibram*(1), *Madar v. Subbarayalu*(2), *Muthanna v. Alibeg*(3), *Kirty Chunder Haldar v. Raj Chunder Haldar*(4), and see per Hutchins, J., in *Kadar v. Ismail*(5). The case of *Narasimulu v. Somanna*(6) proceeded on the finding as to fraud not notice: the Act says I may buy with notice.

[It was also argued that the agreement of January 1885 was not valid by Malabar Law.]

Bashyam Ayyangar for respondent No. 1, the plaintiff in the suit.

Specific Relief Act, s. 42, does not apply, for in fact consequential relief is asked for in the prayer for the execution of a conveyance to the plaintiff; the delivery up and cancellation of the prior instrument would not have been appropriate relief.

As regards the transaction of January 1885 it is proved that it was an agreement to execute a conveyance, so no question arises under either Registration Act, s. 48, or Transfer of Property Act, s. 54. The rulings cited amount only to this, that the mere fact of notice does not take away the priority given by registration; but here the sale to defendants Nos. 8 and 9 was fraudulent within the meaning of the Transfer of Property Act, s. 53. Specific Relief Act, s. 27, is not applicable where the plaintiff is wanting in *bona fides*, or contracts with notice of prior rights. As to Registration Act, s. 48, see *Bhandu Rajaram v. Damaji Jivaji*(7).

(HANDLEY, J.—The words in section 48 are agreement or declaration.

MUTTUSAMI AYYAR, J.—Probably that section has to be read with Specific Relief Act, s. 27, and the question arises how far they affect each other.

Mr. Wedderburn.—Section 4 of the Specific Relief Act saves the Registration Act).

In the Act of 1866 it was expressly provided that no effect was to be given to an oral agreement such as that now in question, but the Act of 1871 introduced the phrase as to delivery of possession in section 48. If that section has to be applied here I say that

(1) I.L.R., 5 Mad., 73.

(2) I.L.R., 6 Mad., 83.

(3) I.L.R., 6 Mad., 174.

(4) 22 W.R., 273.

(5) I.L.R., 9 Mad., 119.

(6) I.L.R., 8 Mad., 167.

(7) 6 Bom. H.C.R., 59.

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there was delivery of possession in the same sense as when by a conveyance to a lessee his tenancy is terminated and his possession becomes that of a vendee.

(HANDLEY, J.—The policy of the Act has to be considered.)

Yes: but the finding as to notice alters the matter with reference to "delivery." Compare the cases of gifts held to be valid from the date of such delivery as the subject-matter admits of.

As to the document of October 1867 it is clearly an otti and not a kanom. See Ramachendrier's Malabar Law, p. 97. Moreover there is the fact that no rent was reserved.

(MUTTUSAMI AYYAR, J.—This matter is of the less importance as it was the plaintiff's own case that the right of pre-emption had at the date of the suit merged in the agreement).

Govinda Menon for respondents Nos. 2—8, defendants Nos. 1 to 7 in the suit.

Mr. Wedderburn in reply.

MUTTUSAMI AYYAR, J.—This was a suit for the specific performance of a contract of sale, and the land agreed to be sold had been in the plaintiff's possession under exhibit B from October 1867. The contract was oral and it was made on the 27th January 1885, and the price agreed on was Rs. 5,000 inclusive of the amount due under exhibit B, and a sum of Rs. 293-8-0 was paid as an advance at the date of the contract. Defendants Nos. 1 to 7 are the jenmis or owners of the land in dispute, and defendants Nos. 8 and 9 purchased it for Rs. 5,000 under a registered sale-deed on the 19th September 1885 (exhibit I). Exhibit B, which evidences the prior mortgage in favor of the plaintiff, is also a registered document, and it is found by the Courts below that defendants Nos. 8 and 9 had, at the date of their purchase, notice of document B and of the oral contract of sale. The Lower Courts were also of opinion that document B evidenced an otti, and not a mere kanom as suggested by defendants Nos. 8 and 9, and decreed the claim declaring the sale in favor of defendants Nos. 8 and 9 void as against the plaintiff and directing defendants Nos. 1 to 7 to execute a conveyance in his favor on receipt of the balance of the purchase money. Defendants Nos. 8 and 9 have preferred this second appeal.

It is first urged on their behalf that exhibit B evidences, on its true construction, only a kanom; but it would not be necessary to consider that question if the prior oral contract should prevail

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against the subsequent sale as held by the Courts below. The main question for decision therefore is whether the oral contract ought to be specifically enforced, notwithstanding the subsequent registered sale in favor of the appellants.

The appellants' Counsel relies on section 54 of the Transfer of Property Act and section 50 of the Registration Act and argues that there was no registered instrument and therefore no valid sale, whilst the oral contract for sale created no interest in the property agreed to be sold under section 54 of the first-mentioned enactment; and that even if this contention should fail, the registered sale should prevail against the prior oral agreement since the land in dispute was not delivered at the time of the agreement.

It is true that the oral contract did not in itself operate to create an interest in immoveable property, but it was accompanied by an agreement to execute and register a sale-deed within five days. Such a contract, even when in writing, need not be registered under section 17, clause (h) of the Registration Act, for the intention of the parties was to obtain another document which, when executed and registered, would create such interest. Section 54 of Act IV of 1882 does not apply, because there was no sale creating a present interest and there was only a contract for a future sale as expressly noticed at the end of that very section. Nor does section 48 of the Registration Act apply, for it presupposes a competition between a registered instrument and an unregistered instrument which purports to create a present interest. Until a vested interest is created as prescribed by Act IV of 1882, s. 54, and in accordance with the provisions of the Registration Act, the obligee under the contract of sale has only a right to demand that a sale shall take place in accordance with its terms subject to certain contingencies, the remedy for its breach being a suit for specific performance. The Specific Relief Act is a special enactment prescribing rules as to the party against whom the remedy is available and the conditions subject to which it may be enforced against third parties who may claim an interest in the same property. It is provided by section 27 clause (b) that specific performance may be granted against a third party claiming under a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. The words used are transferee for value and they signify a person to whom the property is trans-

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ferred for value which can alone be under a registered instrument when the value exceeds Rs. 100. The intention is to adopt the equitable doctrine of notice in suits for specific performance, to protect *bona fide* purchasers for value, and to treat at the same time purchasers with notice as persons purchasing subject to the vendor's pre-existing contractual obligation, or with notice of a trust in favor of the party entitled to specific performance. Neither the Transfer of Property Act, nor the Registration Act overrides this provision of the Specific Relief Act. Section 2 of Act IV of 1882 repeals Act I of 1877 only to the extent mentioned in the schedule attached to it, and the extent mentioned in the schedule consists in the omission of the words "in writing" in sections 35 and 36, which omission has the effect of including oral contracts among those entitled to the specific relief provided by those sections. Section 48 in protecting oral agreements accompanied with or followed by delivery of possession against the rule of priority contemplates oral alienations referred to in paragraph 3 of section 54 of Act IV of 1882, and has the effect of treating delivery of possession as equivalent to registration. But there is no trace in either enactment of an intention to override section 27 of Act I of 1877, and contracts of sale are expressly excluded from both as creating no present interest in immoveable property. The contention for the appellants that notice is not sufficient to defeat the claim of priority under the Registration Act except as provided by section 48 is no doubt supported by a series of decisions. But on referring to them it will be seen that they rest on the ground that the Legislature intended to encourage registration, and departed from the ordinary rule of equity that a party taking with notice is affected with knowledge of the title of which he has notice and that it cannot be defeated by his act. But a contract for sale creates no present interest in immoveable property, and is not therefore intended to defeat the policy of the Registration Act, a future registered document being contemplated. Those decisions have no reference to section 27 of Act I of 1877 which adopts the principle on which the Court of Equity refuses specific performance only against *bona fide* purchasers for value. The decided cases bearing on the point are *Chunder Nath Roy v. Bhoyrub Chunder Surma Roy*(1), *Nemai Charan Dhabal v.*

(1) I.L.R., 10 Cal., 250.

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Kokil Bag(1), *Waman Ramchandra v. Dhondiba Krishnaji*(2), and *Kadar v. Ismail*(3), a decision of three Judges of this Court, in which specific performance of an unregistered agreement was decreed against a purchaser under a registered sale with notice of the prior instrument. As pointed out in that case by Mr. Justice Parker the competition is not between the unregistered instrument which created no present interest and a registered instrument which created a present interest, but it is between the decree which may be passed on the former and the latter instrument. The same principle, it seems to me, governs this case. The conclusion to which I come is neither Act IV of 1882, nor the Registration Act, nor the decisions as to the effect of notice with reference to section 50 of the last-mentioned enactment override the doctrine of equity embodied in section 27 of the Specific Relief Act. Even on the view that under section 4 of Act I of 1877, section 27 of that Act is displaced by section 48 of the Registration Act, the plaintiff was already in possession under his *kanom*, and such possession together with the agreement to sell is equivalent to a delivery of possession under the oral agreement.

Another contention is that the plaint contains no prayer for a direction that the registered sale-deed in favor of defendants Nos. 8 and 9 be cancelled and delivered up, and though it prays for a declaration that the sale is void as against the plaintiff, it is open to the objection that a declaration is asked for without asking for consequential relief. This was a suit for specific performance and the appropriate relief is the execution of a sale-deed by defendants Nos. 1 to 7 pursuant to the contract sought to be specifically enforced. The cancellation and delivery up of the sale-deed in favor of the appellants is a species of auxillary equitable relief which the plaintiff is not bound to claim under section 42. The proviso of that section is applicable only to such relief as is appropriate to and consequent on the right asserted, *viz.*, the execution and registration of a sale-deed and the transfer of possession when the plaintiff is not in possession. The next contention is that the decree appealed against contains no provision for a refund of the purchase-money which the appellants have paid. There was no claim advanced to a refund of the

(1) I.L.R., 6 Cal., 534. (2) I.L.R., 4 Bom., 126. (3) I.L.R., 9 Mad., 119.

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purchase-money in the written statement, nor is the plaintiff liable for such refund. If they have really paid the purchase-money to defendants Nos. 1 to 7, their remedy lies in a fresh suit against them when the sale in their favor is declared to be inoperative.

I am of opinion that this second appeal fails and it must be dismissed with costs.

HANDLEY, J.—The first objection taken to the decree upon second appeal is that the suit is wrongly framed and that no relief such as has been given is allowable under section 42 of the Specific Relief Act, because it is in effect a suit for a declaratory decree, and consequential relief, *viz.*, the execution of a deed of sale by defendants Nos. 8 and 9 to plaintiff could have been sought and granted. I think there is nothing in this objection. Consequential relief is sought for and given by the decree, *viz.*, the execution of a jenm deed by defendants Nos. 1 to 7 to plaintiff, and the suit being one for specific performance of an agreement by defendants Nos. 1 to 7 to sell to plaintiff, the relief sought for, *viz.*, a declaration that the subsequent sale to defendants Nos. 8 and 9 is void as against plaintiff, and a decree compelling defendants Nos. 1 to 7 to carry out their contract with plaintiff by conveying the jenm to him, was the relief appropriate to the cause of action.

It is objected that the decree as it stands leaves the registered sale-deed by defendants Nos. 1 to 7 to defendants Nos. 8 and 9 in their hands and the money they paid to defendants Nos. 1 to 7 still in the hands of those persons who will thus be paid twice over for the same thing. Strictly speaking the Court should have ordered under section 39 of the Specific Relief Act that the sale-deed to defendants Nos. 8 and 9 should be delivered up to be cancelled, and that a copy of the decree should be sent to the Registration Office. The plaintiff however does not object to the decree on this ground and defendants Nos. 8 and 9 have no right to do so. As to the purchase-money alleged to have been paid by defendants Nos. 8 and 9, they can sue for its recovery if they have in fact paid it. They did not object to the decree on this ground in their appeal to the Lower Appellate Court and there is no reason to think any injustice will be done to them by the decree as it stands.

The next ground of second appeal relied on is that the Lower Courts are in error in holding that plaintiff's mortgage was an

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otti and not a kanom. The deed of mortgage, exhibit B, speaks of the transaction simply as a kanom, and the District Judge is apparently wrong in supposing that any such words as "purapad adakki kanom" appear in it.

But the fact that no rent was reserved by the deed remains and this, though not conclusive as to the character of the transaction, is some evidence that it was an otti, and I think that the Lower Courts were right in holding that the enaks or notices to tenants issued at the date of the mortgage (exhibits G and H) were admissible in evidence to show what the transaction was. It appears however that these documents were not proved and therefore there is nothing in evidence to show that the mortgage was an otti, but the deed itself, and that is not decisive on the point. In this state of the evidence I should not have been disposed to concur with the finding of the Lower Court that the transaction was an otti. In my view however that question is of no importance. The plaintiff sued upon an express agreement for sale and both Courts have found that agreement to be proved and that defendants Nos. 8 and 9 had notice of it. It is argued that if there was any sale to plaintiff it was invalid by section 54 of the Transfer of Property Act, not being by registered instrument. As to this it is clear that what was set up and proved by plaintiff was an agreement for sale, and that it was contemplated by the parties that a regular jenm deed should be executed on payment of the balance of the purchase-money. Such a transaction need not be by registered instrument under section 54 of the Transfer of Property Act, for the latter part of that section expressly declares that it does not create any interest in the property. Then it is contended for the appellants that by section 48 of the Registration Act the subsequent registered sale-deed to defendants Nos. 8 and 9 must prevail over the oral agreement for sale to plaintiff, and that whether defendants Nos. 8 and 9, had notice of the agreement with plaintiff or not.

The respondent's vakil relies upon section 27 of the Specific Relief Act, and section 53 of the Transfer of Property Act as protecting the first purchaser against the subsequent purchaser with notice, but I think the appellants' Counsel is right in his contention that these provisions do not override those of section

* Kanom, free of rent.

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48 of the Registration Act. Section 4 of the Specific Relief Act expressly saves the operation of the Registration Act, and section 2(a) of the Transfer of Property Act by saving the operation of any enactment not thereby repealed has the same effect.

The question then is does section 48 of the Registration Act operate to make the registered conveyance to defendants Nos. 8 and 9 prevail over the prior oral agreement for sale to plaintiff, defendants Nos. 8 and 9 being found to have notice of that agreement?

The result of the decisions both of this Court and the other High Courts upon the question is that notice is immaterial except as evidence of fraud, and that taken by itself it is not sufficient evidence of fraud to deprive the subsequent purchaser of his priority under the Registration Act. Most of the Madras decisions are upon section 50 of the Registration Act; but the principle is the same.

In the present case there does not seem to be any evidence of fraud beyond the fact of notice. But the section exempts from its operation cases where the oral agreement or declaration has been accompanied or followed by delivery of possession. Here plaintiff was in possession already under his mortgage, so that actual delivery of possession was impossible; but I think his remaining in possession is a constructive delivery of possession with the meaning of the section.

In *Palani v. Selambara*(1), where the land was in the occupation of tenants, it was held that a notice to them by the vendor to pay rent to the purchaser and attornment by them accordingly to him were sufficient constructive delivery of possession to entitle the purchaser to the benefit of the exception in section 48, and I consider that the same principle may be extended to cases where possession is already with the purchaser and he retains it under the agreement. Such delivery of possession as is possible under the circumstances is made and that I think is sufficient to satisfy the requirements of the section, the object being that possession shall not remain with the vendor, whereby persons dealing with him subsequently might be deceived.

I would confirm the decree of the Lower Appellate Court and dismiss this second appeal with costs.

(1) I.L.R., 9 Mad., 267.

APPELLATE CIVIL.

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

PASUPATI (DEFENDANT No. 2), APPELLANT,

NARAYANA AND ANOTHER (PLAINTIFF AND DEFENDANT
No. 1), RESPONDENTS.*

Landlord and tenant—Estoppel—Collusion.

The plaintiff in an ejectment suit had established in a former suit that land formerly the property of the second defendant's father had been sold under a decree and purchased *benami* for him (the plaintiff), and that a rent agreement in respect of the same lands entered into between the ostensible purchaser and the first defendant had also been entered into by the former on his behalf: and possession had been formally delivered to the plaintiff under process of Court. It now appeared that the second defendant, who contested the validity as against him of the decree under which the land was sold, having withdrawn a suit filed by him to declare the sale invalid as against him after his father's death, had colluded with the first defendant and collected rent from him:

Held, that the second defendant, having come in by collusion with the first defendant, was precluded from denying the plaintiff's title and was liable to the plaintiff for the rent collected by him from the first defendant.

APPEAL against the decree of J. Kelsall, District Judge of Vizagapatam, in original suit No. 11 of 1884, remanded for trial by order of the High Court in appeal suit No. 89 of 1885.

The plaintiff was the Zamindar of Kurapam. In 1866 Annapa Raju, Zamindar of Pachipenta and father of the second defendant, borrowed Rs. 4,000 and executed to Lakshmayya, sheristadar of the plaintiff, a document mortgaging as security for the debt some villages of the Pachipenta estate.

Default having been made in payment, Lakshmayya sued Annapa Raju in original suit No. 18 of 1869, obtained a decree, brought the villages to sale in execution and became the purchaser.

Lakshmayya died in 1878, leaving a son, Ramamoorthy. Disputes arose between plaintiff and Ramamoorthy, and the plaintiff filed against him original suit No. 22 of 1880 to establish that he and not Lakshmayya (whom he represented as a mere name-lender) was the real purchaser at the Court sale. The suit was

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Nov. 25, 26.

* Appeal No. 76 of 1889.

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compromised. Ramamoorthy admitted the plaintiff's claim, and in execution the plaintiff was formally placed in possession of the villages sold. These villages, however, were never separated from the rest of the Pachipenta zamindari, and as part of that zamindari were under attachment by Government for arrears of peishcush until November 1882.

The plaintiff's present case was that the first defendant had for some years been the cultivating tenant of the lands now in suit (admittedly part of the property purchased by Lakshmayya) and that as such he had exchanged pattas and muchalkas with Lakshmayya in 1879. Soon after the lands were released from the Government attachment, the plaintiff called on the first defendant to pay to him the arrears of rent due for fasli 1292 and to exchange pattas and muchalkas with him for fasli 1293. This the first defendant refused to do, and continued to occupy and cultivate the land, paying no rent to the plaintiff and ignoring altogether his title. The plaintiff sought in this suit to recover possession of the land with arrears of rent.

The District Judge passed a decree for the plaintiff rendering defendant No. 2 liable for the amount of the rent for faslis 1292 to 1296.

Defendant No. 2 preferred this appeal.

Mr. *Mitchell* for appellant.

Subba Rau for respondent No. 1.

JUDGMENT.—The plaintiff is the Zamindar of Kurupam, the second defendant (appellant) is the Zamindar of Pachipenta, and the first defendant is the tenant in possession of the land in dispute. In original suit No. 18 of 1869 the plaintiff's sberistadar Lakshmayya obtained a decree upon a bond executed in his name by the second defendant's father, and, in execution of the same, he purchased the land on the 30th May 1876. By right of purchase he was placed in possession under process of Court, and the first defendant executed exhibit K (a kadapa or rent agreement) in his favor, promising to pay Rs. 342 a year as rent. Meanwhile, Lakshmayya died, and the plaintiff instituted original suit No. 22 of 1880 against his son, alleging that the several transactions in the name of Lakshmayya were *benami*, and that they were really concluded on his behalf and for his benefit. His claim was decreed, and, in execution, possession was formally delivered to him under process of Court. The plaintiff's accounts showed that

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the first defendant paid Rs. 80 for rent due for 1289. In the meantime, the second defendant brought original suit No. 7 of 1880 to set aside the Court sale on the ground that the transactions entered into by his father were not binding upon him. His father dying meanwhile, he withdrew the suit with permission to sue again. He has, however, brought no suit since, but colluded with the first defendant and collected rent from him for faslis 1292 to 1296. Upon these facts, the Judge considered that the first defendant held possession as the appellant's tenant and that the second defendant could not be permitted to set up the first defendant to defy the plaintiff so as to force him to establish his title not only against the first defendant, but also against himself. He accordingly decided in the plaintiff's favor and directed the second defendant to pay to the plaintiff Rs. 1,482, the rent which he had collected from the first defendant, and costs, leaving him to institute a fresh suit to set aside the Court sale under which the plaintiff claims if he should be so advised to do. It is urged in appeal that the Judge should have determined in this suit whether the Court sale is binding upon the second defendant without referring him to a fresh suit to establish his title. We see no reason to doubt that exhibit K is genuine and that the first defendant held possession under it and as the plaintiff's tenant. We also agree with the Judge that the appellant, after the death of his father, withdrew original suit No. 7 of 1880, and, colluding with the first defendant, contrived to collect rent from him. The only question then is whether the second defendant came in under the first defendant. It appears, after contending that the Court sale was invalid, he took advantage of his father's death, withdrew his suit, and, gaining over the first defendant, contrived to collect rent from him, and thereby enabled him to dispute the landlord's title in this case. This is an act of collusion, and but for it he would not be in a position to say that the plaintiff could not eject him without showing that the Court sale was binding upon him. It lay upon him to set aside the sale by a suit, and if his contention in appeal were to prevail, he would be enabled to better his position by his own wrong. In *Doc d. Bullen v. Mills* (1), it was held that a party obtaining possession of premises held by a tenant by paying £20 to him and claiming them by a title adverse to that

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of the lessor could not set up his adverse title against the landlord as a valid defence in an action of ejectment. The principle is that he came in by collusion with the tenant who could not deny the landlord's title, and that unless he was also precluded from denying the landlord's title, the tenant would have only to part with the property to another person in order to bring the landlord's right in dispute. Our former order of remand did not preclude the Judge from declining to adjudicate on the question if such adjudication became unnecessary upon the facts found by him. Nor is the refusal to adjudicate on the question for the purposes of this suit a bar to the second defendant seeking to set aside the Court sale by a fresh suit if he should be advised to do so, and if he is not barred on other grounds. The decision of the Judge is right, and we dismiss this appeal with costs.

APPELLATE CIVIL.

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

1890.
Feb. 18, 24.

GNANASAMBANDA (PETITIONER), APPELLANT.

VISVALINGA AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code, s. 244—Appeal against order—Nomination by a pandaram under a decree—Revocation of such nomination by the pandaram's successor.

The pandaram of a mutt being empowered under a decree to nominate a person to be the head of a subordinate mutt, subject to the approval of the Subordinate Court, made a nomination and died before the Subordinate Court had come to a determination as to the fitness of his nominee. His successor in office was brought on to the record and revoked his nomination and made a fresh nomination. The Subordinate Court treated the fresh nomination as a nullity and made an order confirming the first. The pandaram appealed against this order.

Held, (1) that an appeal lay against the order complained of;

(2) that the person, whose nomination had been confirmed, was a necessary party to the appeal;

(3) that the nomination first made was revocable for good cause, and that the fitness of the person nominated by the appellant should be investigated by the Subordinate Judge.

APPEAL against the order of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, on execution petition No. 18 of 1889 in original suit No. 38 of 1881.

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The facts of original suit No. 38 of 1881 appear in the report of the appeal against the original decree, see *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran* (1).

The final decree passed by the High Court in the above appeal was (so far as relates to the subject of the present report) as follows:—

"This Court doth order and decree that the appellant's claim that the properties at Tiruppanandal and Benares belong to the Adhinam at Dharmapuram and to the possession of those properties be, and is, hereby dismissed; that his claim to a declaration of his right to appoint tambiran to management at Tiruppanandal and Benares and to a direction that possession of the said properties be transferred to a tambiran whom he may appoint, be, and is, hereby dismissed; that, in other respects, the decree of the Lower Court is reversed; that it is hereby declared that the appointment of Kumarasami, the original defendant by Ramalingam as his junior and successor and the will in favor of the said Kumarasami are illegal; that such appointment and will are hereby set aside so far as they relate to the mutts at Tiruppanandal and Benares and other subordinate mutts and their endowments and the endowments of the Benares and other charities in the plaint mentioned; that the respondent has no right or title to the aforesaid mutts or properties; that the appellant is entitled, as the head of the Dharmapuram Adhinam, to see that a competent Dharmapuram tambiran is appointed as the head of the mutt at Tiruppanandal; that the Subordinate Judge of Kumbakonam, in order to fill up the now vacant office of tambiran of the Tiruppanandal mutt, do direct the appellant to name a tambiran from among the tambirans of his Adhinam, competent to discharge the duties of managing tambiran of the Benares (Kasi) mutt at Tiruppanandal; that if the Subordinate Judge sees no objection to the fitness of the person so named for the office aforesaid, he do appoint him as such managing tambiran, but that in case the Subordinate Judge should object to the person so named by the appellant as aforesaid, the Subordinate Judge do appoint a competent tambiran of the Dharmapuram Adhinam as managing tambiran of the Benares mutt at Tiruppanandal; that he do thereupon direct the appellant to invest him with arukuttu, sundaravadam and cloth as usual and to certify to such investiture; that upon such investiture being certified, the Subordinate Judge do place the person so appointed and invested in possession of the Benares mutt at Tiruppanandal of the immoveable properties mentioned in the schedule annexed to the plaint, &c."

On 21st January 1889 the plaintiff presented execution petition No. 18 of 1889 and prayed that proceedings be taken for the appointment of a tambiran. The Subordinate Judge accordingly directed the petitioner to nominate a competent tambiran; and on 11th February 1889 he nominated Ponnambala Tambiran. The

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Judge issued a public citation with reference to Ponnambalam's fitness for the appointment and fixed 2nd March for the determination of the matter. The plaintiff died, and on the last-mentioned date his successor, as pandaram of Dharmapuram, applied to be brought on to the record in his stead. His application having been granted, he withdrew the nomination of Ponnambalam, alleging that he was not a fit person for the appointment, and sought to nominate Saminatha Tambiran in his stead. The Subordinate Judge held that he was not entitled to revoke the nomination made by his predecessor or to make one himself. It accordingly became necessary to proceed with the enquiry into the eligibility of the original nominee. This was done by the successor in office of the Subordinate Judge who made the orders above referred to, and in the result he made an order (which was the order now appealed against) confirming the nomination of Ponnambalam and directing the pandaram to invest him with *arakuttu*, &c., as provided in the decree of the High Court.

The pandaram preferred this appeal, the representative of the defendant in original suit No. 38 of 1881 and Ponnambala Tambiran being joined as respondents.

Bashyam Ayyangar for respondent No. 2 objected that no appeal lay against the order of the Subordinate Judge. [A question was raised by the Court as to the *locus standi* in the appeal of respondent No. 2 on the ground that since his appointment had not been finally confirmed he might be regarded as merely a candidate for the office: but the argument was allowed to proceed.] The above objection was based on the contention that neither clause (c) nor any other clause of section 244 of Civil Procedure Code was applicable to the case: but the objection was overruled.

The Advocate-General (Hon. J. H. Spring Branson) and *Krishnasami Ayyar* for appellant.

The evidence shows clearly that respondent No. 2 is unfit for the office and his nomination cannot be allowed to stand. The appellant is the holder of the office to which the right of nomination is attached under the decree and he is entitled to submit to the Court the name of a person whom he regards as fit. Nothing was in fact done on the nomination of the late pandaram. If the view were correct that the right of nomination under the decree was personal to him his death certainly before making a

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nomination, and probably in the event which occurred results in a dead lock.

Bashyam Ayyangar & Pattabhirama Ayyar for respondents.

As to the inference drawn from the evidence, the duty of the Court is to see whether the nominee is reasonably competent: it has not to enquire whether the best possible nomination has been made. In any view the appellant's nomination is invalid, for the decree does not admit of a second nomination in the event of the first not being accepted; in such a case the matter rests in the hands of the Court alone. The nomination under the power created by the decree is not revocable: compare the case of a power limited to a certain class under a will.

For the case of an attempt to make an appointment with the power of revocation, see *Piper v. Piper*(1), *Worrall v. Jacob*(2) and compare *Eastwood v. Clark*(3).

JUDGMENT.—This is an appeal from the order of the Subordinate Judge appointing one Ponnambala Tambiran as the head of the mutt at Tiruppanandal in execution of the decree in appeal No. 13 of 1885. The late Pandara Sannadhi at Dharmapuram nominated him on the 11th February 1889, and thereupon the Subordinate Judge issued a citation in order to ascertain if there was any objection to his appointment. Meanwhile the Pandara Sannadhi died, and his successor, the appellant before us, put in a petition on the 11th March withdrawing the nomination made by his predecessor and nominating one Saminatha Tambiran instead. On the 16th March the late Subordinate Judge held that the appellant had no right to withdraw the nomination made by his predecessor and that the power to nominate given by the decree had been exhausted by the nomination already made. He then called for evidence to see if Ponnambalam was fit for the office for which he had been nominated, and the present Subordinate Judge completed the enquiry and made the order appealed against.

In connection with the citation issued, he referred to a number of petitions (which are, however, no legal evidence) and mahazar-namahs from several persons residing in Southern India and interested in the mutt, and stated that a great majority of them showed that the person named by the appellant was most eligible.

(1) 3 M. & K., 159. (2) 3 Merivale, 256. (3) L.R., 23 Ch.D., 136.

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He then proceeded to consider the specific objections urged as to Ponnambalam's fitness and held that no misconduct nor incompetency for the appointment was sufficiently proved. He accordingly appointed him as the head of the mutt at Tiruppanandal and directed the appellant to invest him with *arukuttu* and *sundaravadam*, the insignia of the office. Hence this appeal.

It is contended that no appeal lies, and that Ponnambalam was not a party to the decree in appeal No. 13 of 1885, but the appellant's predecessor was a party to the decree and it declared his right to see a competent tambiran appointed to Tiruppanandal. The appellant is, therefore, clearly entitled to object by way of appeal to any improper appointment made by the Subordinate Judge, which is, in his opinion, prejudicial to the interests of the institution. In order that Ponnambalam's interest may not be prejudiced, we consider that he is a necessary party to this proceeding as the person to whose appointment the appellant objects.

We have no doubt that the late Subordinate Judge was in error in holding that a nomination once made cannot be withdrawn for good cause. The late Pandara Sannadhi, and, therefore, the appellant was entitled to withdraw it, if there was any valid objection to it. Until the Subordinate Judge acted upon the nomination, there was a *locus poenitentiae*. The person nominated may die or refuse the appointment, or it may be that some misconduct or valid ground of unfitness was discovered subsequent to his nomination. Neither the terms of the decree nor the intention which is to be collected from them support the anomalous construction put by the Subordinate Judge upon the decree. As regards the objection urged against Ponnambalam's appointment, we do not consider it necessary to discuss the evidence at length. It may be that misconduct is not sufficiently proved to warrant the dismissal of a trustee from office, but we are satisfied that there was enough in the evidence to disallow Ponnambalam's claim as a candidate for the responsible and important position of trustee of the mutt at Tiruppanandal. We must observe with reference to the specific charges brought against him concerning his conduct, whilst in charge of Rajan Kattalai at Teruvurur, there are several matters against him in evidence, which he ought to have explained, but has not explained satisfactorily. We are unable to say that his own evidence is not, as pointed out by the learned Advocate-General, extremely unsatisfactory. We,

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therefore, set aside his appointment and direct the Subordinate Judge to enquire if there is any objection to the appointment of the person nominated by the appellant, and, if his appointment is also found on enquiry to be open to objection, to proceed to appoint a competent Dhurmapuram Tambiran to Tiruppanandal.

The Advocate-General has also filed a petition for revision of the order of the Subordinate Judge. We do not consider it necessary to pass a separate order upon it.

The respondents will pay the appellant's costs.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

GURUVADU AND ANOTHER.*

1890.
March 26.

*Criminal Procedure Code, s. 307—Duty of Sessions Judges as to referring cases
tried with a jury.*

The discretionary power to refer cases conferred on Sessions Judges by Criminal Procedure Code, s. 307, should always be exercised when the Judge thinks that the verdict is not supported by the evidence.

APPEAL against the conviction and sentence in sessions case No. 56 of 1889, Bellary.

The Acting Sessions Judge said :—

“The jury found the prisoners guilty of theft. It is a question of credibility, and I do not think it incumbent on me to send the case to the High Court, though being personally doubtful whether the verdict is justified by the evidence. There will probably be an appeal.”

Mr. Wedderburn for the Crown.

JUDGMENT.—This is another case of the unsatisfactory result of a trial by jury under the present law. The Sessions Judge says that he is personally doubtful whether the verdict is justified by the evidence, but that he does not think it incumbent upon

* Criminal Appeal No. 46 of 1890.

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him to send the case to the High Court. He observes that there will probably be an appeal. He should have remembered that there is no appeal on the facts, and the result of his not choosing to refer the case to this Court is that prisoners are convicted on evidence as to the sufficiency of which he is doubtful.

Section 307 leaves the referring of a case to the High Court entirely to the discretion of the Judge, for it is only when he disagrees with the verdict of the jury "so completely that he considers it necessary for the ends of justice to submit the case to the High Court" he should do so. This discretion should, however, always be exercised when the Judge thinks that the verdict is not supported by the evidence. It is the only way in which the miscarriage of justice by a perverse verdict of a jury, which is of too frequent occurrence, can be remedied by the High Court.

Under these circumstances, we reluctantly feel bound to dismiss the appeal.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

SIMSON (PLAINTIFF),

v.

McMASTER (DEFENDANT).*

Civil Procedure Code, ss. 525, 526, 646B—Provincial Small Cause Courts Act—Act IX of 1887, sched. II, clause 24.

A suit to recover a sum of money as payable to the plaintiff under an award which was contested was filed in a Subordinate Court on the small cause side. The Subordinate Judge returned the plaint, being of opinion that the suit was not cognizable by a Court of Small Causes. The plaint was then presented in the Court of the District Munsif as an ordinary suit, but the District Munsif returned it on the ground that the suit was cognizable by a Court of Small Causes. The plaintiff then applied to the District Judge to submit the record for the orders of the High Court:

Held, (1) that the District Judge was bound to submit the record under s. 646B of the Code of Civil Procedure on the requisition of the plaintiff, although the plaintiff might have appealed to the District Court against the order of the District Munsif;

* Referred Case No. 4 of 1890.

(2) that the suit was cognizable by a Court of Small Causes and accordingly that the order made by the Subordinate Judge returning the plaint was wrong.

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CASE of which the record was submitted for the orders of the High Court by C. A. Bird, District Judge of Godavari, under section 646B of the Code of Civil Procedure.

The case was stated as follows:—

"The facts of the case are that the suit was first filed in the Subordinate Court, Cocanada, on the small cause side, but the Subordinate Judge returned the plaint for presentation in a proper Court, on the ground that the suit does not lie on the small cause side. The plaint was then presented in the District Munsif's Court of Cocanada on the original side, but it was returned by that Court on the ground that it must be brought on the small cause side. On this the plaintiff put in a petition in the High Court under section 622 of the Code of Civil Procedure, but the High Court returned the same for an appeal under clause (6), section 588 of the Code of Civil Procedure to be presented to the District Judge.

"The plaintiff then applied to this Court under section 646B of the Code of Civil Procedure to submit the record for the orders of the High Court whichever order this Court thinks wrong. The Court considers the suit one to contest an award. It appears to matter little whether the plaintiff prays to set aside an award, or whether he prays to enforce a contested one."

The order of the Subordinate Judge returning the plaint was as follows:—

"The suit is for recovery of a sum of money awarded by an arbitrator by his award. Defendant contends that the award is unenforceable, as the same relates to certain lotteries which are not legal, and as the arbitrator acted improperly, in that he heard plaintiff in the absence of defendant.

"In this case plaintiff's right to the relief sought by him depends upon a determination of the question whether the award is enforceable or not. That question cannot be finally determined by this Court. Besides, the suit is one for enforcement of an award. An award is, under section 30 of the Specific Relief Act I of 1877, placed on the same footing as a contract for the purposes of that Act, and a suit for specific performance of a contract cannot be taken cognizance of by a Small Cause Court.

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"If suit to contest an award cannot be brought as a small cause, a suit in which an award is impeached by defendant cannot be tried by a Small Cause Court either. I think the plaintiff must be returned to plaintiff for presentation to a proper Court. I return it accordingly and make no order as to costs."

Counsel were not instructed.

MUTTUSAMI AYYAR, J.—The District Judge was bound to make this reference to this Court under section 646B, one of the parties having required him to do so. The fact that an appeal lay to him from the order made by the District Munsif does not preclude him from making the reference. I do not consider that the Judge is right in holding that a suit to contest an award or to set it aside is the same as a suit to enforce a contested award. In the first case the Small Cause Court has no jurisdiction under clause 24 of the second schedule attached to Act IX of 1887. In the second case the suit is practically one to file an award under section 525 and section 526 of the Code of Civil Procedure, and these sections are extended to Courts of Small Causes by the second schedule attached to the Civil Procedure Code. I am of opinion that the order made by the Subordinate Judge is wrong, that it must be set aside and that he should be directed to readmit the plaintiff and deal with it under section 525 and section 526, Civil Procedure Code.

HANDLEY, J.—I agree that the District Judge having referred the case, as he was bound to do on the requisition of a party under section 646B of the Civil Procedure Code, this Court is bound to dispose of it under that section notwithstanding that plaintiff has not filed an appeal to the District Court under clause 6 of section 588, Civil Procedure Code; and I also agree that the jurisdiction of the Small Cause Court to entertain the suit is not barred by clause 24 of schedule II of the Provincial Small Cause Courts Act, 1887, as held by the Subordinate Judge. He also apparently considers the jurisdiction of the Small Cause Court is excluded by clause 15 of the same schedule. I think the suit may be treated either as one to recover money payable under an award or as an application to file an award under section 525 of the Civil Procedure Code, and in either case the Small Cause Court has jurisdiction. I would set aside the order of the Subordinate Judge and direct him to receive the suit on the Small Cause Court side and dispose of it according to law.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

RAMASAMI (PETITIONER), APPELLANT,

v.

ANDA PILLAI (COUNTER-PETITIONER), RESPONDENT.*

Civil Procedure Code, ss. 231, 232—Joint decree-holder—Application for execution of decree—Limitation Act, Act XV of 1877, sched. II, art. 179.

A Hindu obtained in 1878 a decree for partition of certain property and applied in 1888 to have it executed. It appeared that the decree-holder's son, having obtained against him in 1881 a decree for a share of whatever he should acquire under the decree of 1878, had applied for execution of the last-mentioned decree; and reliance was now placed on that application to save the bar of limitation:

Held, that assuming the decree of 1881 had effected an assignment by operation of law of the decree of 1878, the father and son were not joint decree-holders within the meaning of Civil Procedure Code, s. 231, and the father's application for execution was barred by limitation.

APPEAL under section 15 of the Letters Patent from the order of Mr. Justice Wilkinson, dated 5th September 1889, made on appeal against appellate order No. 2 of 1889, reversing the order of H. T. Knox, Acting District Judge of Tanjore, made on civil petition No. 387 of 1888.

The above order of the District Judge was made on appeal from the order of A. Kuppasami Ayyangar, District Munsif of Kumbakonam, on execution petition No. 252 of 1888. This petition prayed for the execution of the decree passed in favor of the petitioner in original suit No. 245 of 1878 (which was a suit for partition between the petitioner and other members of his family) and it was preferred after the lapse of more than three years from the last application for execution made by the petitioner. It appeared however that in original suit No. 29 of 1881, the petitioner's son obtained a decree against the petitioner establishing his right to a one-fifth share of whatever the latter acquired by virtue of the decree in the earlier suit; and that the son had since applied for execution of the decree now sought to be

* Letters Patent Appeal No. 20 of 1889.

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executed stating that he made the application alone because his father refused to join him in it, and notice of this application was served on the father who did not contest the son's right to have the decree executed for the benefit of all.

The District Munsif, and on appeal the District Judge, held that by reason of the son's application, the present petition was not barred by limitation.

Upon this point the District Judge said :

"The sole question now raised in the hearing of the appeal is, 'does that application operate to save limitation under article 179 of schedule II of Act XV of 1877; for if not, this application is barred. I hold that it does so operate. There was not only an application to execute, but an actual step taken in execution. It is too late for the defendant to contend that the application was not in accordance with law. The proceedings taken have established that the decree was executed on behalf of the father as well as on behalf of the son, and the point cannot be now reopened. The son by the effect of the decree in original suit No. 29 of 1881 became an assignee of the decree, and on that ground alone was entitled to take out execution as he in fact did.'"

The counter-petitioner, against whom it was sought to execute the decree, preferred the above appeal to the High Court.

Sivasami Ayyar for appellant.

Ramanuja Charyar for respondent.

WILKINSON, J.—The only question for determination is whether the application by the son takes the case out of the Statute of Limitation. I think the question must be answered in the negative; neither section 231 nor section 232 of the code appears to me to apply. The decree obtained by the father does not become a joint decree, because the son subsequently obtained a decree against the father declaring his (the son's) right to a one-fifth share of the debt due under the former decree. The father would be liable to the son whether or not he had realised the decree debt. Nor do I think it can be said that the effect of the decree in the partition suit was to assign to the son the decree obtained by the father against a third party. Even if it did so operate, the son was only entitled to a one-fifth share, and could not therefore take out execution of the whole. The fact that defendant (appellant) did not oppose the son's execution does not estop him from now pleading that the execution by the father is

barred. The orders of the Lower Courts must be reversed and the application for execution dismissed with costs throughout.

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The petitioner preferred this appeal under letters patent, section 15, against the above order of Wilkinson, J. The case came on for hearing before Muttusami Ayyar and Handley, JJ.

Ramanuja Charyar for appellant.

Sivasami Ayyar for respondent.

JUDGMENT.—The decision appealed against is correct. Assuming that there was an assignment by operation of law in consequence of the decree in the partition suit, the assignment operated not to make the son a joint decree-holder with his father in respect of the entire decree, but to entitle him only to a fifth share of the decree debt in severalty. The father and the son were not therefore joint decree-holders within the meaning of section 231 of the Civil Procedure Code, and the application for execution made by the latter cannot save the limitation in favor of the former under article 179 of the Act of Limitation. Nor can the order made on the son's application operate against the judgment-debtor as an estoppel. The decision of the Privy Council in *Mungul Pershad Dichit v. Grija Kant Lahiri Choudhry*(1) can only apply when the parties to both applications are the same.

This appeal fails and we dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

TIRUNARAYANA (RESPONDENT NO. 1 IN APPEAL
NO. 144 OF 1886), PETITIONER,

1889.
March 26.

GOPALASAMI AND OTHERS (APPELLANTS NOS. 1 TO 4 AND RESPONDENTS IN APPEAL NO. 144 OF 1886), COUNTER-PETITIONERS.*

Civil Procedure Code, s. 595—Final decrees—Leave to appeal to Privy Council.

The plaintiff in a suit to recover certain property set up an adoption. The Court of First Instance held that the adoption was not proved and dismissed the suit without trying the issues framed with reference to other allegations in the

(1) L.R., 8 I.A., 123. * Civil Miscellaneous Petition No. 975 of 1886.

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pleadings. On appeal by the plaintiff the High Court passed a decree setting aside the decree of the Court of First Instance, declaring the alleged adoption to be established and remanding the suit for the trial of the remaining issues. The defendants sought to appeal to Her Majesty in Council against the decree of the High Court.

The defendants' application was refused on the ground that that decree was not a final decree.

APPLICATION for leave to appeal to Her Majesty in Council against the decree of the High Court in appeal suit No. 144 of 1886, dated 6th July 1888.

The appeal above referred to was presented against the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in original suit No. 30 of 1886.

The plaintiff claimed certain property as the adopted son of one Tiruvengada Pillai. The Subordinate Judge held that the adoption of the plaintiff was not proved and dismissed the suit without trying all the issues raised. The plaintiff appealed against the decree of the Subordinate Judge, and the High Court, on appeal, declared that the appellant was the adopted son of Tiruvengada Pillai and remanded the suit for the trial of the untried issues.

The defendants now sought to appeal to Her Majesty in Council against the decree of the High Court before the trial of the above issues.

Mr. W. Grant and Balagi Rau for petitioner.

Subramanya Ayyar for counter-petitioner No. 1.

Rama Rau for counter-petitioners Nos. 2 to 4.

JUDGMENT.—We will follow the decision in *Mahant Ishvargar v. Budhgar v. Caudasama Amarsang*(1), and hold that the decree made on the 6th of July 1888 is not a final decree within section 595, Civil Procedure Code, and we refuse to allow an appeal to the Privy Council. When the other issues not tried shall have been tried and accounts are taken, then the parties will probably be entitled to appeal to the Privy Council. The motion is refused.

Petitioner to bear the costs of first respondent, and no costs to defendants Nos. 2, 3 and 4.

(1) I.L.R., 8 Bom., 548.

APPELLATE CRIMINAL.

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

CALURAM (COMPLAINANT).

v.

CHENGAPPA AND ANOTHER (PETITIONERS).*

1888
Octobe
Noveml

Criminal Breach of Contract Act—Act XIII of 1859—Labourer—Carrier by boat.

An advance was made under a contract by which the party who received the advance undertook to convey salt by boat, but did not bind himself to render personal labour. The party who received the advance broke the contract:

Held, the parties to the contract were not an employer of labour and a labourer respectively, and consequently the contract did not fall within the provisions of Act XIII of 1859.

CASES referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by J. Lee Warner, District Magistrate of Chingleput.

The case was stated as follows:—

“The appellant is a boat-owner, who plied his boat up on the Buckingham Canal. He engaged to carry salt for the complainant, whom for some reason or other he failed. For this default, he was convicted by the Second-class Magistrate of Ponneri under Act XIII of 1859; and on his appeal to the Deputy Magistrate, that officer rules that a boat-owner is a labourer, and that, as such, he comes within the scope of the Act referred to.

“I think that the Deputy Magistrate's opinion is bad in law, the boat-owner coming under the definition of a common carrier, and being therefore liable for the loss caused to the respondent under Act III of 1865; and I make this reference because applications of this sort to enforce Act XIII of 1859 against boat-owners are of very frequent occurrence in this district. It seems to me to make no difference whether the boat-owner works along with his boatmen in bringing the boat along or not.”

* Criminal Revision Cases Nos. 428 and 429 of 1889.

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Mr. Kernan for the accused.

Mr. R. F. Grant for complainant.

JUDGMENT.—The complainant is a contractor for the transport of salt to Madras from certain factories in the Ennore Circle, and on 6th March 1889 entered into an agreement with the defendant, which is termed a "salt transport agreement," by which the latter bound himself to convey salt to Madras in his boat from 5th April to 30th September. The boat was to be used for this service exclusively, the loads and rates being fixed in the agreement and an advance of Rs. 120 paid. The defendant bound himself to give a bond for the amount of license tax required for the boat, which tax was to be paid by the complainant. It was further provided that at the close of the contract accounts were to be settled, and if it was found that defendant was in plaintiffs' debt, his boat was pledged as security for the balance due.

Though by the agreement the defendant pledged himself to convey salt in the boat, there is nothing to show he was himself to render personal labour. It does not appear to us to fall within the provisions of Act XIII of 1859. It was an agreement for the carriage of salt, but we do not think that the complainant can be termed an employer of labour, or the defendant a labourer, within the meaning of Act XIII of 1859. The case appears to us analogous to that reported in High Court Proceedings of 13th July 1877, No. 1427, relating to contracts with cartmen. (Weir's Criminal Rulings, 3rd edition, page 461.)

The orders of the Magistrate must be set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

QUEEN-EMPRESS

v.

CHERIA KOYA AND OTHERS.*

1890.
March 10, 21.

Penal Code—Act XLV of 1860, ss. 1, 2—Criminal Procedure Code, s. 1—Scheduled Districts Act—Act XIV of 1874, ss. 1 to 7 and 11—Laws Local Extent Act—Act XV of 1874, ss. 3, 4—Criminal Procedure in the Laccadive Islands.

The Scheduled Districts Act having been extended to the Laccadive Islands, but no notifications having been made under that Act with regard to the criminal law to be administered there, the Penal Code and the Criminal Procedure Code are in force.

Accordingly, when the Sub-Collector of Malabar, as such, tried and sentenced certain persons on one of the Laccadive Islands, not observing the procedure prescribed by the Criminal Procedure Code :

Held, that the proceedings were void and should be quashed.

PETITIONS praying the High Court to revise the findings and sentences of J. Twigg, Sub-Collector of Malabar, in calendar cases Nos. 1, 3 and 4 of 1889.

Mr. K. Brown, for petitioners in petitions Nos. 30 and 47, supported the petitions, firstly, as being preferred under Criminal Procedure Code, ss. 435 and 439; secondly, if the Criminal Procedure Code was held to be inapplicable, as being preferred under the High Court Charter Act for the exercise of the inherent revisional jurisdiction of the High Court, and referred to *Empress v. Burah and Book Singh*(1) and *Empress v. Burah*(2).

Ryru Nambiar, petitioner in petition No. 46.

The Government Pleader and Public Prosecutor (Mr. Powell) for the Crown.

The facts of these cases and the further arguments adduced at the hearing appear sufficiently for the purposes of this report from the following judgment.

JUDGMENT:—In these cases we are asked to revise the proceedings of Mr. Twigg, Sub-Collector of Malabar, in cases Nos. 1,

* Criminal Revision Cases Nos. 30, 46 and 47 of 1890.

(1) I.L.R., 3 Cal., 78, 122.

(2) I.L.R., 4 Cal., 176.

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3 and 4 of 1889, convicting certain inhabitants of the Island of Androth, one of the Laccadive group of islands situated in the Indian Ocean, of the offences of rioting, causing hurt and committing affray.

From the record it is gathered that, sometime during the year 1889, serious breaches of the peace occurred in the island and were reported, after some delay, to the authorities on the mainland, viz., the district authorities of Malabar. The matter was brought to the notice of the Madras Government, and on the 7th December the following telegram was despatched by the Government of Madras to the Collector of Malabar:—

"No. 443. Man-of-war *Griffon* placed at our disposal by India; will be at Calicut twelfth instant. Government desires Twigg proceed in her with small force police to Androth. His stay there should not exceed two or three days. Issue necessary orders."

It does not appear from the record what orders were issued to Mr. Twigg in compliance with the direction of Government to the Collector of Malabar "to issue necessary orders;" but the record shows that Mr. Twigg, being at the time on the Island of Androth, held an inquiry on the 13th, 14th and 15th December 1889, and on the date last mentioned convicted and punished certain accused persons, the present petitioners, as follows:—

(a) The nine persons concerned in criminal revision case No. 30 of 1890 he convicted of rioting and punished with fines varying from Rs. 10 to Rs. 100; he also, in addition to the sentence of fine, sentenced one of the accused, Kunnangelath Cheria Koya, to be rigorously imprisoned for three months, and he directed that all the convicted persons be bound over in a sum of Rs. 500 to keep the peace and to be of good behaviour for a period of two years.

(b) The two persons, who are petitioners in criminal revision case No. 46 of 1890 he found guilty of having committed the offences of committing an affray and causing hurt, and he sentenced one of the persons convicted, viz., Tanga Koya, to be rigorously imprisoned for two months and the other, Kasim Koya, to pay a fine of Rs. 100. He passed also an order similar to the order passed in criminal revision case No. 30 of 1890 in respect of taking security to keep the peace and be of good behaviour.

(c) The eight persons to whom criminal revision case No. 47 of 1890 relates he found guilty of the offence of causing hurt and sentenced to pay fines varying from Rs. 10 to Rs. 100. He also, as in the preceding cases, required all the convicted persons to give security to keep the peace and be of good behaviour.

It has here to be observed that the proceedings of Mr. Twigg convicting the petitioners purport to have been taken by that officer in the capacity of a Revenue officer, viz., Sub-Collector of Malabar, and not in the capacity of a Magistrate. The copies of the judgments laid before us are headed "In the Court of the Sub-Collector of Malabar."

In this connection it may also be observed that in his judgment and in the record of the proceedings, Mr. Twigg has employed the terminology of the Indian Penal Code, and that in binding over the convicted persons to keep the peace and be of good behaviour he has apparently followed a procedure specially provided in the Criminal Procedure Code.

Although these last-mentioned circumstances might seem at first sight to point to Mr. Twigg having been at least to some extent guided in his proceedings by the Indian Penal and Procedure Codes, it is nevertheless clear on the face of the proceedings, and it is not, we believe, seriously disputed that Mr. Twigg purported to act as Sub-Collector and not as a Magistrate deriving his powers under the Code of Criminal Procedure, and the first objection to Mr. Twigg's proceedings taken before us is that, as Sub-Collector of Malabar, Mr. Twigg had no jurisdiction to try the accused.

Assuming for argument's sake that Mr. Twigg could be taken to have acted as a Magistrate under the powers derived from the Code of Criminal Procedure, it is argued that the proceedings are vitiated by material irregularities, such as the omission apparently to affirm the witnesses, the adoption of a summary mode of procedure in respect of cases not summarily triable, and by other matters that need not be specially noticed.

On the state of circumstances above set out, the question which we have to determine is whether the Indian Penal Code and the Indian Criminal Procedure Code are or are not in force in the Island of Androth.

This island, with the other islands of the southern group of the Laccadives, formed part of the territory of the Beebee of

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Cannanore, and by the storm and conquest of Cannanore towards the end of the year 1791 fell into the possession of the Honorable East India Company along with the rest of the Beebee's dominions. The same islands were also included in the cessions of Tippu's entire dependencies in Malabar made at the peace of Seringapatam in 1792. They thus became an integral portion of the territories which became vested in Her Majesty by the Statute 21 and 22, Vic. Cap. 106, and, though, as appears from the subjoined brief narrative* of the history of the islands extracted from the Manual of the Administration of the Madras Presidency, a large share of administrative independence in their internal management was, till the year 1875, left in the hands of the Beebee and her successors, it is clear, having regard to the provision of sections 1 and 2 of the Indian Penal Code and of section 1 of the Code of Criminal Procedure that the provisions of these codes apply to the islands, unless it can be shown that they are expressly rendered inapplicable by special legislation.

Such special legislation, if it exists, must be sought for in the enactments of the Government of India known as the Scheduled

* In the Cannanore family, which, in addition to their estates on the mainland, held possession of the Southern Laccadive Islands, the chief male representative of the family was called Ally Rajah or Andy Rajah, the prince of the sea. The last of these was succeeded by his niece, whose husband died during the siege of Cannanore in 1790. This lady was succeeded by her daughter and grand-daughter. The last died in October 1861 and was succeeded by her son Ally Rajah, who died in 1870, and was succeeded by his nephew, the present Ally Rajah. This family, at first tributary to the Rajahs of Colatoonad, became independent about the middle of the last century. After Hyder Ally's conquest of Malabar in 1766, the representative of the family became his ally. Cannanore was taken by the British during the war with Tippoo in 1784, an indemnity was exacted from the Beeby, and a tribute of one lakh of rupees was imposed upon her. On the conclusion of peace with Tippoo, matters reverted to their former position; but when, in 1790, war again broke out with Tippoo, the Beeby instigated the Moplahs against the Nayers, the Company's allies. Cannanore was taken by storm, the possessions of the Beeby became the right of the British Government by conquest, and were included in the cessions made by Tippoo. She was, however, allowed to retain her possessions on condition of paying a moiety of the produce of her country, both on the mainland and in the five islands, amounting in all to Rupees 4,340, and Rupees 10,000 per annum as a similar share of the produce and commercial advantages accruing from the Laccadives. She also executed an agreement in 1793 engaging to submit to the sequestration of the Laccadives if it should be ordered by the British Government. Commissioners were sent to investigate the resources of the islands, the treatment of the islanders by the Beeby, the abuses connected with her monopoly of coir and similar matters. After a tedious negotiation, a provisional agreement was, in 1798, signed by the Beeby, subject to ratification by Government, by which she engaged to pay Rupees 15,000 per annum to the British Government, but the rights of Government to the islands under the agreement of 1793 were in no way altered or done away with. Owing to the breaking

Districts Act and the Laws Local Extent Act, Acts Nos. XIV and XV of 1874.

The Scheduled Districts Act provides in section 1 that the Act extends, in the first instance, to the whole of British India other than the territories mentioned in the first schedule hereto annexed, and it shall come into force in each of the scheduled districts on the issue of a notification under section 3 relating to such district. Section 2 of the Act declares that certain enactments set out in schedule II of the Act shall be repealed. Then section 3 of the Act provides that the local Government, with the previous sanction of the Governor-General in Council, may, from time to time, by notification in the Gazette of India and also in the Local Gazette—

- (a) declare what enactments are actually in force in any of the scheduled districts or in any part of any such district;
- (b) declare of any enactment that it is not actually in force in any of the said districts or in any part of any such district.

out of the war with France and other considerations, negotiations for the surrender by the Beeby of her sovereignty of the islands, for the reform of the administration and for the freedom of trade were not completed, and for many years the Laccadive Islands remained unnoticed. In 1848 petitions from the islanders complaining of the oppression of the Beeby attracted attention, and a British officer was deputed to report on the subject. The Beeby's resources having been much crippled by the damage caused by a recent storm, she was compelled to ask for a remission of the peshcush which had fallen much into arrears. The request was granted on condition of her introducing the necessary reforms into her administration, but as she declined to do so, the offer of remission was recalled and her lands at Cannanore were attached for arrears of peshcush. In 1854 the Laccadives were sequestered on a similar account and brought under British management. The island of Minicoy, which the Beeby claimed as her private property, offered open resistance to the authority of Government, and was not finally brought under control till 1858. The islands were restored to the Beeby shortly before her death in 1861 with a distinct intimation that, in the event of any acts of oppression or extortion being proved against her or her agents, Government would sequester the islands in order to compel the introduction of good government. During the rule of her son and successor, Ally Rajah, the same mal-administration continued. While complaints on his part regarding the evasion by the islanders of the monopoly of coir were frequent counter-charges were brought by them of oppression on the part of the Rajah and his agents in collecting the dues. Inquiries conducted on the spot showed that the Rajah's authority was completely in abeyance in the three principal islands, and that he was powerless to enforce the monopoly. Ally Rajah died in 1870 and was succeeded by Moosa Ally Rajah, the present head of the family; but no improvement took place in the relations between the Rajah and the islanders. At length as there was no hope of any reform in the administration as the Rajah declined to abolish the monopoly, and as the arrears of peshcush had again accumulated to a large sum, the islands were attached and their administration was assumed by the British Government in 1875.

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Section 4 of the Act provides that on the issue under section 3 of a notification declaring what enactments are in force or not in force in any scheduled district, the enactments so notified shall be deemed to be in force or not in force according to the tenor of the notification in such district, and every such notification shall be binding on all Courts of law.

Section 5 gives to the local Government, with the previous sanction of the Governor-General in Council, power to extend, by notification, to any scheduled district or to any part of any such district, any enactment which is in force in any part of British India at the date of such extension.

Then section 6 authorizes the local Government from time to time—

- (a) to appoint officers to administer civil and criminal justice and to superintend the settlement and collection of the public revenue and all matters relating to rent, and otherwise to conduct the administration within the scheduled districts;
- (b) to regulate the procedure of the officers so appointed, but not so as to restrict the operation of any enactment for the time being in force in any of the said districts;
- (c) to direct by what authority any jurisdiction, powers or duties incident to the operation of any enactment for the time being in force in such district shall be exercised or performed.

Section 7 preserves and continues pending express alteration the authority of all heretofore existing rules and all previously appointed officials.

Finally, section 11 of the Act provides that nothing contained in this Act or in any notification issued under the powers thereby conferred shall be deemed to affect any law other than laws contained in Acts or Regulations or in Rules made in the exercise of powers conferred by such Acts or Regulations.

In the first schedule to the Act under the heading "Scheduled Districts, Madras," we find as part IV the Laccadive Islands, including Minicoy.

Turning to the Laws Local Extent Act XV of 1874, we find in section 3 that the Acts mentioned in the first schedule thereto annexed are now in force throughout the whole of British India, except the scheduled districts. In the first schedule referred to

it has to be noted, neither the Indian Penal Code nor the Code of Criminal Procedure is mentioned, although the Code of Civil Procedure is mentioned.

The above examination of these special enactments shows that the Scheduled Districts Act comes into force in each of the scheduled districts only on the issue of the notification under section 3 of the Act. Section 3 says the local Government may, by notification, declare what Acts are and what are not in force, and section 4 shows that it is only on the issue of such a notification that the enactments notified shall be deemed to be or not to be in force, and the notification thereof to be binding on all Courts of law.

Now it is admitted that so far the only notification issued by the local Government in any way affecting these islands is a notification, dated 19th February 1889, in the following terms:—

"No. 83. In exercise of the powers conferred by section 3 of the Scheduled Districts Act, 1874, the Governor of Fort St. George in Council is pleased, with the previous sanction of the Governor-General in Council, to declare that the Act is in force in all scheduled districts of Madras in which it has not already been declared in force."

The effect of this notification, as we understand it, is to place all the Madras scheduled districts in a position to be operated on by further notifications under section 3 of the Act, declaring that such and such Acts are in force or are not in force in such districts. These islands have, however, not been operated upon by any such further notification or notifications, and as far therefore as the Scheduled Districts Act is concerned, the position is that the laws applicable to British India generally and not specially excluded from operation by the mere fact of a district being a scheduled district are in force in these islands. Section 2 of the Scheduled Districts Act read with schedule II of that Act and the Laws Local Extent Act, section 3 read with schedule I of the latter Act show that the Code of Criminal Procedure and Penal Code are not excluded from applicability to a scheduled district by the mere fact of such district being declared to be a scheduled district.

It may here be noticed that the local Government by a notification of the same date as that already referred to, viz., 19th February 1889, declared certain sections of the Code of Civil

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Procedure to be in force in the Madras scheduled districts. This action on the part of the Government declaring certain provisions of the Civil Procedure Code applicable to the islands is significant. It may be taken by implication to show that the local Government did not intend to exclude the operation of the Penal Code and Criminal Procedure Code from these islands.

The same inference is also derivable from a number of other notifications issued by the local Government from time to time in respect of certain specified Madras scheduled districts. These notifications are set out in a work* compiled by authority, and their effect is to show that the Madras Government has, when so advised or when it has thought proper, declared certain enactments to be in force in certain of the Madras scheduled districts other than those with which we have to deal. It has also, acting under the authority conferred in that behalf in section 6 (b) of the Scheduled Districts Act framed rules for the guidance of the officials administering certain scheduled districts.

In the course of the argument, it has been stated by the learned Government Pleader that in 1876 the Government considered that it was not desirable to bring these islands under the general criminal law in force in the mainland. Whatever may have been the views of Government on the subject, it has been admitted, as already stated, that no notification under the Scheduled Districts Act affecting these islands has been issued other than the notification of 19th February 1889 already referred to.

The conclusion, therefore, which we arrive at on an examination of the special legislation contained in these two Acts is that the Penal Code and the Criminal Procedure Code, not having been by any notification under section 3 of the Scheduled Districts Act expressly declared to be inapplicable to the Laccadive Islands, are in force in such islands. Any act done in these islands contrary to the provisions of the Penal Code can, therefore, under the provisions of section 2 of that code and of section 5 of the Criminal Procedure Code, be inquired into and tried only in accordance with the provisions of the latter code. In the cases now before us it has been found that Mr. Twigg, although he holds the office of Joint Magistrate of Malabar, and as such possesses the powers of a First-class Magistrate, did not exercise authority or

* List of notifications and rules issued and published under the provisions of Acts and Regulations, printed at the Government Press in 1887.

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purport to exercise authority in the islands in virtue of his office of Joint Magistrate of Malabar, but in virtue of his office of Sub-Collector of Malabar.

This being so, we must hold that in convicting and punishing the accused whose cases are now before us, he acted without authority, and that his proceedings were void and must be quashed.

The proceedings being void *ab initio* for the reasons stated, it becomes unnecessary to notice the other irregularities alleged against Mr. Twigg's proceedings. These latter would only require consideration in case it had been shown that Mr. Twigg had proceeded or professed to proceed under the Indian Penal Code or Criminal Procedure Code.

For the reasons stated, we quash the proceedings and direct that the accused Kunnangelath Cheria Koya and Tanga Koya be set at liberty and that the fines imposed on all or any of the accused, if they have been paid or collected, be refunded.

The orders requiring the accused to give security to keep the peace and be of good behaviour are also quashed.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

EASWARA DOSS (PLAINTIFF), APPELLANT,

v.

PUNGAVANACHARI AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Rent Recovery Act (Madras)—Act VIII of 1865, ss. 3, 7, 51, 87—Jurisdiction of Civil Courts—Suit to enforce acceptance of improper patta—Decree for rent—Limitation—Evidence of local usage—Judgments not inter partes.

A landlord sued his tenants in the Court of a District Munsif to enforce acceptance of pattas and the execution of muchalkas by them, and to recover arrears of rent. The suits were filed more than thirty days after tender of the pattas, which were found to contain certain improper stipulations:

Held, (1) the suit was not barred by the rule of limitation in Rent Recovery Act, section 51;

(2) the Civil Court had jurisdiction to entertain the suit and to modify the pattas where they were found to be improper and to enforce the execution of corresponding muchalkas;

* Second Appeals Nos. 197 to 208, 265 and 541 to 551 of 1889.

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(3) the claim for rent should have been disallowed on the ground that the pattas as tendered were improper pattas—*Narasimma v. Suryanarayana*(1) distinguished.

Per cur.—"The decisions [as to rates of rent] in previous suits are admissible "as evidence of local usage, though the tenants in the cases before them were not "parties to them."

SECOND APPEALS against the decrees of S. T. McCarthy, District Judge of Chingleput, in appeal suit No. 182 of 1888, &c., modifying the decrees of S. A. Krishna Row, District Munsif of Poonamallee, in original suit No. 302 of 1885, &c.

Suits by the Zamindar of Pallavaram against his tenants to enforce the acceptance of pattas and the execution of muchalkas and to recover arrears of rent for *faslis* 1291-93. The suits were filed more than two months after the tender of the pattas. The further facts of these cases appear sufficiently for the purpose of this report from the judgment of the High Court.

The District Munsif and, on appeal, the District Judge made certain alterations in the pattas with reference to stipulations for the payment of merais, but in other respects their decrees were in accordance with the prayer of the plaint.

The plaintiff preferred second appeal No. 197 of 1889, &c., against the decrees, so far as they modified the pattas, and the tenants preferred second appeal No. 541 of 1889, &c., against the decrees on the ground (among others) that they had been passed without jurisdiction.

Mr. *Subramanyam* for appellant in second appeal No. 197 of 1889 and for respondent in second appeal No. 541 of 1889.

Parthasaradhi Ayyangar for respondent in second appeal No. 197 of 1889 and for appellant in second appeal No. 541 of 1889.

JUDGMENT.—In these cases, the plaintiff is the Zamindar of Pallavaram, and the defendants are his Sukavasi tenants. He sued in the Court of the District Munsif of Poonamallee to compel them to accept either the pattas tendered by him or such other pattas as the Court might consider proper, to execute muchalkas in accordance with them and to pay the rent due for three years, viz., *faslis* 1291-93. The Judge held that the tenants were at liberty to pay merais to those who were entitled to them direct, and that no tank merai was payable to the plaintiff, and he

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decreed the claim except so far as it related to the merais. The plaintiff appeals in second appeals Nos. 197 to 208 and 265 of 1889 and contends that the merais should also have been decreed to him. The defendants appeal in second appeals Nos. 541 to 551 of 1889 and object to the rest of the decree on several grounds. It is first urged on their behalf that a suit to enforce the acceptance of a patta is a special remedy provided by a special Act, and that it can only be available in a Revenue Court. But it was held by this Court in *Karim v. Muhammad Kadar*(1) in 1879 that a regular suit might be maintained in a Civil Court to enforce the acceptance of a patta. The plaintiff in that case asked that the defendant who denied the tenancy might be directed to accept a patta and to execute a muchalka and it was decided that the remedy by summary suit was originally given as an alternative remedy as pointed out in *Gopalasawmy Mudelly v. Mukkee Gopalier*(2), and that there was nothing in Act VIII of 1865 to show that the landlord was debarred from the remedy by a regular suit. It was observed that section 3 of Act VIII of 1865, imposed on a landholder the obligation to enter into written engagement with his tenants, and that if the action of the tenants precluded him from doing what the law enjoined him to do, and without which he was disabled from making use of the summary remedies under the Act, he would have the right of action to compel the tenants to do that which would enable him to conform to the law, unless such right of action was taken away by other provisions of the law. We may add that the landlord is also precluded by section 7 of the Rent Recovery Act from suing for rent or otherwise enforcing the terms of a tenancy in a Civil Court unless pattas and muchalkas have been exchanged as directed by section 3, or unless the party attempting to enforce the contract has tendered such a patta or muchalka as the other party was bound to accept or execute or unless both parties have agreed to dispense with pattas and muchalkas. The principle recognized by the decision was that a suit to enforce the acceptance of a patta is, when brought in a Civil Court, a remedy necessary to the fulfilment of the obligation imposed upon the landlord by section 3, and to the exercise of his right to sue in a Civil Court for arrears of rent or for enforcing other terms of the tenancy which he is at

(1) I.L.R., 12 Mad., 481.

(1) I.L.R., 2 Mad., 89.

(2) 7 M.H.C.R., 312.

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liberty to do under section 87 of Act VIII of 1865. The decision in *Narasimma v. Suryanarayana*(1) to which our attention has been drawn is not in conflict with the case already cited. It was observed in that case also that the object of the Act in requiring the exchange of patta and muchalka was to ensure the existence of evidence of the terms of the holding, and that, in order to secure this evidence, a landlord might maintain a declaratory suit and the execution of a muchalka by the tenant might be treated as a relief consequential on such declaration. It is open to the landlord to ask for a declaration that the patta tendered by him was the one which it was lawful for him to tender, and if it was not, what was a proper patta which he was bound to tender, and the observation, therefore, that the Court was not at liberty to amend the patta had reference to the frame of the plaint in that particular case and the form in which a declaration ought to be made with reference to it. We also find that *Karim v. Muhammad Kadar*(2) was not cited and overruled in *Narasimma v. Suryanarayana*(1). The first objection must therefore be disallowed.

Another contention is that the Courts below were in error in decreeing rent whilst they found that the patta tendered required to be modified so far as it related to the merais claimed from the tenants. They considered that the rates of rent claimed were proper and that the insertion in the pattas of the item of merais which were in their opinion not due to the landlord either wholly or partly was not important. But it is provided by section 4 of Act VIII of 1865 that the pattas shall also include the fees payable with the rent according to local usage, and if they were not really due and yet were included in the patta tendered by the landlord, we cannot say that the patta was one which the tenant was bound to accept within the meaning of section 7 of Act VIII of 1865. The patta must be regarded as indivisible, otherwise the terms of the tenancy will be left in part uncertain and the intention of the legislature thereby frustrated. We must set aside the decree of the District Judge so far as it directs payment of rent and order that the claim for rent be disallowed on the ground that the patta tendered was not the proper patta.

The next objection taken before us is that the suit was barred by section 51 of Act VIII of 1865. The remedy sought to be

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enforced is not under the Act, but it is a regular suit for a declaration with such consequential relief as may be lawfully awarded. We are, therefore, of opinion that section 51 is no bar to the suits before us.

Nor do we consider that the Judge's finding as to the rates at which rent is payable is open to any valid objection. The decisions in previous suits are admissible as evidence of local usage, though the tenants in the cases before us were not parties to them. There is also other evidence on the record in support of the finding.

It is urged on behalf of the plaintiff, who is the appellant, in second appeals Nos. 197 to 208 and 265, that merais are payable to him according to local usage. On this point the evidence was conflicting, and, though the District Munsif decided in his favor except as to the tank merai and the merai payable to Village Officers, the Judge disagreed with him and found that the merais were payable by tenants so far as they were due direct to the parties entitled to them. *Primâ facie* tenants are liable to pay only to the parties who are entitled to them unless a special usage to the contrary is clearly established. There was evidence upon which the Judge was entitled to come to the conclusion at which he arrived and we are not at liberty to interfere with his finding in second appeal.

In modification of the decree of the District Court, we direct that the plaintiff's suit be dismissed so far as it relates to rent and that the decree be otherwise confirmed. The costs of second appeals preferred by the tenants, in Nos. 541 to 551, will be assessed proportionately. The second appeals preferred by the landlord, in Nos. 197 to 208 and 265, are hereby dismissed with costs.

(1) I.L.R., 12 Mad., 481.

(2) I.L.R., 2 Mad., 89.

APPELLATE CIVIL.

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

GURUVA (DEFENDANT NO. 1), APPELLANT,

v.

SUBBARAYUDU (PLAINTIFF), RESPONDENT.*

*Civil Procedure Code, s. 283—Party to execution proceedings—Limitation Act—Act
XV of 1877, sched. II, art. 11.*

A in execution of a decree against B attached a house. C intervened and the property was released from attachment. A then brought a suit against B and C to establish the title of B to the house and obtained a decree. B was *ex parte* throughout. In an appeal by C a decree was passed by consent of A and C reversing the decree appealed against. B now sued C and another, more than a year from the date of the order removing the attachment, to obtain a declaration of title to the house:

Held, that since there was nothing to show that the order releasing the attachment was an order against the plaintiff the suit was not barred by limitation.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 776 of 1888, reversing the decree of O. V. Nanjudayya, Acting District Munsif of Guntur, in original suit No. 128 of 1888.

Suit to declare the plaintiff's title to a certain house which defendant No. 2 purported to have mortgaged to defendant No. 1.

In original suit No. 281 of 1880 one Subba Reddi obtained a decree against the plaintiff and attached this house. Defendant No. 2 intervened and the property was released from attachment. Then Subba Reddi filed original suit No. 139 of 1881 to establish the title of his judgment debtor to the house. It was dismissed, but Subba Reddi filed appeal No. 105 of 1882 before the District Court and there obtained a decree. Second appeal No. 679 of 1883 was then made to the High Court by Subba Reddi. The present plaintiff did not appear, but defendant No. 2 appeared. Subba Reddi's decree being satisfied, the parties entered into a compromise and the High Court, by consent of the parties, passed a decision reversing the decree of the District Court and dismissing the suit.

The defendants contended that the order releasing the property from attachment on the petition of defendant No. 2 remained

good, and that under section 283 of Civil Procedure Code it was conclusive against plaintiff who did not bring a suit within a year.

The District Munsif held that the above plea should avail and dismissed the suit. On appeal the District Judge reversed the decree of the District Munsif and passed a decree as prayed observing with reference to the above plea:—

"The Full Bench decision in *Metietom Perengaryprom v. P. Davodren Nambudry* (1) shows that such an order is binding "between the judgment-debtor and the intervening claimant, but "I understand that plaintiff's reply to this is that the Courts "must deal with this question in a manner similar to the mode of "dealing with *benami* transactions. Plaintiff says that in the "previous proceedings he and second defendant, who is his mother, "were in collusion to delay or defeat the satisfaction of the decree "held by the creditor Subba Reddi, and that their collusive pleas "even if successful then against the creditor ought not to prevent "an inquiry upon the merits into the present dispute between the "two parties who then colluded. I consider that there is much "force in this answer and that it must be allowed."

Defendant No. 1 preferred this second appeal.

Subba Rau for appellant.

Bhashyam Ayyangar and Desika Charyar for respondent.

JUDGMENT.—The District Munsif was clearly wrong in dismissing the suit on the ground that plaintiff is debarred from suing by the decree in second appeal No. 679 of 1883. In the first place, that was a decree by consent of the only parties who appeared in the appeal, viz., the plaintiff in that suit, Subba Reddi, and the present defendant No. 2. And the result was that there was no adjudication in that suit upon the rival titles of the present plaintiff and second defendant. The suit which Subba Reddi had brought to establish the title of his judgment-debtor, the present plaintiff, to the house in question as against the present defendant No. 2 was dismissed by consent of Subba Reddi and the present defendant No. 2 Subba Reddi's claim having apparently been satisfied. But it is argued for defendant No. 1, the appellant in this second appeal, that at least the result of the consent decree in second appeal No. 679 of 1883 dismissing the suit was to leave matters as they were before the suit was filed, viz., that the

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claim by the present defendant No. 2 in the execution proceedings against the present plaintiff had been allowed and Subba Reddi's attachment had been released; and it is further argued that the present plaintiff being a party to those execution proceedings is bound by them, not having brought a suit to establish his right within the one year prescribed by article 11 of schedule II of the Limitation Act. With the first part of this argument as to the result of the consent-decree dismissing the suit we agree, but not with the latter. Whether the present plaintiff is barred by article 11 of schedule II of the Limitation Act depends upon whether he was the party against whom the order allowing the present second defendant's claim was made within the meaning of section 283 of the Civil Procedure Code. It is contended that he was so, on the authority of the Full Bench decision of this Court in *Metietom Perengaryprom v. P. Damodren Nambudry*(1). That decision though doubted in *Arakel Kunhi Kuttiyali v. Imbichi Ammah*(2) and dissented from by the High Courts of Calcutta and Bombay in *Kedar Nath Chatterji v. Rakhal Das Chatterji*(3), and *Shivapa v. Dod Nagaya*(4) has never been overruled and is still binding on this Court; but it really amounts to no more than this, that a judgment-debtor may be the party against whom an order upon a claim in execution proceedings is made so as to be bound by the special rule of limitation prescribed for suits by such a party. Whether he is such a party or not must depend upon the facts of each case. It is obvious that in some cases he could not be the party against whom an order on a claim is made, for the order may be made without notice to him, and, even if he has notice, the order may not be one in any way affecting his title. For instance, the attachment might be released on the ground that the property was not at the time of the attachment in the possession of the judgment-debtor. It is, we think, for the person who sets up the special bar of limitation against the judgment-debtor to show that he was a party to the execution proceedings and that the order was an order against his interest. In the present case there is nothing to show whether the order releasing the attachment was against the interest of the judgment-debtor, the present plaintiff. Apparently it was not against his inclination

(1) 4 M.H.C.R., 472.
(3) I.L.R., 15 Cal., 674.

(2) 6 M.H.C.R., 416.
(4) I.L.R., 11 Bom., 114.

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for he was found to be colluding with the claimant, the present defendant No. 2. We think it is not shown that plaintiff is barred by article 11 of schedule II of the Limitation Act. The District Judge finds on the evidence that the house is the property of plaintiff and not of his mother, defendant No. 2. That he says that his conclusion is the same as that of his predecessor in the Court does not make the finding on the evidence less binding in second appeal and upon that finding his decision is correct.

The fifth ground of second appeal appears to be founded on a mistake. We understand the case of the two brothers, the plaintiff in this suit, and the plaintiff in original suit No. 119 of 1888, to have been not that they divided the houses, but that they built the houses and that each took one as his share. But whether this be so or not, no question was raised by defendant No. 1 as to the plaintiff being only entitled to half of the house and we cannot allow that plea to be set up for the first time in second appeal.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SECRETARY OF STATE FOR INDIA (DEFENDANT No. 14),
APPELLANT,

v.

KADIRIKUTTI AND OTHERS (PLAINTIFFS AND DEFENDANTS
Nos. 4 AND 5), RESPONDENTS.*

*Accretion—Alluvion—Tidal navigable river—Cause and nature of variation
in high water line.*

The rules of English law, according to which the rights of the Crown or of riparian owners to accretions caused by alluvion are determined with reference to the character of the river and the manner in which the accretion is occasioned, are applicable in British India unless excluded by enactment or local usage.

Accordingly, where a rapid variation in the natural high water line of a tidal navigable river in Malabar had been caused by acts unlawfully done by the tenants of the riparian owner:

Held, that the Crown was entitled as against the riparian owner to the accretion caused by such variation.†

* Second Appeal No. 7 of 1889.

† Compare *North Shore Railway Company v. Pion*, L.R. 14, App. Cas., 612, [Reporter's note.]

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November 11.
1890.
March 18.

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SECOND APPEAL against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 522 of 1887, affirming the decree of J. A. deRozario, District Munsif of Pynad, in original suit No. 81 of 1886.

Suit to recover possession of certain land, of which part was in the possession of defendants Nos. 1—13, under an expired demise from the plaintiffs' karnavan, and part (consisting of accretions to the land, the subject of the above demise, resulting from recession of a river) was in the possession of Government.

The District Munsif passed a decree as prayed, and his decree was affirmed on appeal by the District Judge.

The Secretary of State (defendant No. 14) preferred this second appeal.

The Government Pleader (Mr. Powell) for appellant.

As far as this Presidency is concerned, this case is one of first impression. Many cases have arisen in Bengal both as to new formation by the process of alluvion and as to reformation after diluviation; they were all, however, governed by the Bengal Regulation XI of 1825, which proceeds on the assumption that the beds of navigable rivers are the property of the Crown. See *Felix Lopez v. Maddan Thakoor*(1), *Pahalwan Singh v. Maharajah Muhessur Bukhsh Singh Bahadoor*(2), and compare *Baban Mayacha v. Nagu Shrivarcha*(3). In *Doe d. Seebkristo v. The East India Company*(4), however, the Privy Council lay down in general terms the proposition that the East India Company, as representing the Indian Government, had a freehold estate in the beds of navigable rivers in India, apparently regarding it as a proposition applicable to the whole country unlimited by any question of custom and independent of any evidence as to the assertion of the right. In deciding that appeal, the Privy Council referred to, and were guided by, the common law as to the right of the Crown in such property in England; and that is the course which the Lower Courts should have adopted here. The judgment of the District Court in the present case, however, would imply that the Crown has no such right in Malabar, because it has been held that the Government has no right to waste there: whether or not the decision referred to goes further than to establish that the Government has not the same right to waste lands there as elsewhere

(1) 5 B.L.R., 521.

(3) I.L.R., 2 Bom., 40.

(2) 9 B.L.R., 150.

(4) 6 M.I.A., 267.

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in India, it cannot affect its rights as regards rivers or the foreshore. And the District Munsif has suggested the Hindu common law as a guide to a decision, but a rule which recognized as owner the first person who made a beneficial use of the soil would be impracticable and would be the cause of endless confusion.

According to the English law, the soil of the sea estuaries and of navigable rivers is *prima facie* the property of the Crown (see *Hale de jure Maris*, pp. 12, 25) and *Malcomson v. O'Dea*(1). See also *Gann v. Free Fishers of Whitstable*(2), *Lyon v. Fishmongers' Company*(3), in which it was laid down as an axiom that the soil of tidal navigable rivers was *prima facie* the property of the Crown. To determine the line of demarcation between the property of the Crown in such rivers and the property of the riparian owners, the rule is that up to the line of medium high tides throughout the year the soil vests in the Crown. See *Attorney-General v. Chambers*(4).

The principle according to which the results of alluvion or imperceptible accretion are given to the owner of the lands adjoining the sea estuaries and tidal rivers appears to be inapplicable to cases where the original boundary line between the shore and the land can be made out clearly by marks or otherwise. In such cases no reason can be assigned why the Crown should be deprived of its property, see per Lord Chelmsford in *Doe d. Seebkristo v. The East India Company*(5). The case should probably be remanded for completer findings as to the character of the river, but in any case the plaintiff here cannot be said to have established the title set up by him.

Sankara Menon (*Bashyam Ayyangar* with him) for respondents Nos. 1 and 2.

The plaintiff is entitled under the common law of England as a riparian owner to the property in the soil of the river bed up to the middle line. Angel on Water-courses, p. 16. He can also rely on the rules stated in 2 Blackstone, 262, that where alluvion is so gradual as not to be perceived as it progresses, the proprietor, whose bank on the river, is increased, is entitled to the addition—see *Scrutton v. Brown*(6), *Hull and Selby Ry. Co.*(7), *The King*

(1) 10 H.L.C., 593.

(3) L.R.I., App. Ca., 662.

(5) 6 M.I.A., 267.

(2) 11 H.L.C., 192.

(4) 4 De Gex. M. & G., 206.

(6) 4 B. & C., 485.

(7) 5 M. & W., 327.

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v. *Lord Yarborough*(1). But in Malabar all the soil belongs to private owners, *Secretary of State v. Vira Rayan*(2), and see Sir C. Turner's Minute, p. 23; so the Crown has not the right claimed, and the plaintiff should succeed as owner of the land to which the land in question has become annexed.

Even, if it is conceded that the case must be governed by the English law, and that the first of the above rules does not apply where the river is a public tidal navigable river, still the appellant cannot succeed, for he has not proved its navigability, &c. As to navigability, it is a question of fact, see *Chunder Jaleah v. Ram Churn Mookerjee*(3). A public navigable river is a river which is actually navigable, and in which the tide ebbs and flows; all other rivers on which navigation is carried on are private rivers over which the public have acquired a right or easement of navigation, see per Denman, C.J., in *Mayor of Colchester v. Brooke*(4), *Horne v. Mackenzie*(5), Coulson and Forbes on the Law of Water, p. 58. Moreover a river may be public and tidal in part only, see *Bickell v. Morris*(6), *Hargreaves v. Diddams*(7), *Bristow v. Cormican*(8).

Though the flux and reflux of the tide is *prima facie* evidence that a river is navigable, it does not necessarily follow that because the tide flows and reflows in a particular place that the river is therefore a public navigable river although of sufficient size. The importance to be attached to that circumstance must depend on the nature and situation of the channel. The best evidence is the actual user of a tidal river for navigation by the public, but even such evidence will not suffice if the user is only temporary and by small boats. *The King v. Mountague*(9), *Chunder Jaleah v. Ram Churn Mookerjee*(3).

Assuming the navigability, &c., of the river, still land gained from it by alluvion or gradual accretion goes to the owner of the adjoining land. *Attorney-General v. Chambers*(10), 2 Blackstones' Commentaries, 262, Hunt's Law of Boundaries and Fences, p. 30. Moreover, the rules that hold good as to accretions arising from natural causes seem equally applicable to cases of accretions resulting from artificial causes or from causes partly natural and

(1) 3 B. & C., 91; 2 Bligh N.S., 117.

(3) 15 W.R., 212.

(5) 6 Cl. & F., 628.

(7) L.R., 10 Q.B., 582.

(9) 4 B. & C., 598.

(2) I.L.R., 9 Mad., 175.

(4) L.R., 7 Q.B., 339.

(6) L.R., 1 Sc. & D. App., 47.

(8) L.R., 3 App. Ca., 641.

(10) 4 De Gex. M. & G., 206.

partly artificial, so long, at any rate, as the person causing them has merely exercised the lawful rights of property, and has not abused them with the sole or express view of encroachment—see per Lord Chelmsford in *Attorney-General v. Chambers*(1), *Doe d. Seebkristo v. The East India Company*(2). Compare also *Foster v. Wright*(3).

Govinda Menon for respondents Nos. 3 and 4.

Mr. Powell in reply.

JUDGMENT.—The question to be decided is whether the strip of land designated as item No. 1 in the plaint is the jenm property of the plaintiff or whether it belongs to the Government.

This question is raised in a written statement filed on behalf of the Government, in which it is alleged that this strip of land belongs to Government by reason of its having been artificially reclaimed from the bed of a navigable river, and that even if it were a natural accretion (which it is not) the property in it nevertheless vests by local usage in the State. The District Munsif without recording any opinion as to the character of the river, finds that the land was an accretion gradually formed from the river bed and brought about by artificial means which he explains. He rules, as a matter of law, that such accretions belong to the riparian owner, and not to Government, and he further holds that no local usage was proved whereby such accretions became vested in the State. The District Judge treats the claim of Government as one founded solely on custom, and agrees with the District Munsif in holding that the custom was not proved. He considers that the fact that Government has no claim to waste lands in Malabar renders the claim of Government most questionable. With regard to the character of the river, and the means by which and manner in which the accretion came to be made, he records no opinion. Before dealing with the facts of the case, as to which it was complained in the argument that there were no sufficient findings, it may be well to state the principles on which the rights to soil gained from a river by accretion are determined.

According to English law the general rule has always been that laid down by Justinian:—"That ground which a river has "added to your estate by alluvion becomes your own, by the law

(1) 4 De Gex. M. & G., 206. (2) 6 M.I.A., 267. (3) L.R., 4 C.P.D., 438.

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"of nations. And that is said to be alluvion which is added so gradually that no one can judge how much is added in each moment of time." Justinian's Institutes, lib. II, tit. I, 20. Speaking of "lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma*; or by dereliction, as when the sea shrinks back below the usual low water mark." Blackstone says, "in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the King; for, as the King is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry." (Blackstone's Commentaries, Volume II, p. 262; Stephen's Commentaries, Volume I, edition of 1863, p. 457.) The principle on which this rule as to gradual accretion rests is founded as well "on the necessity which exists for some such rule of law for the permanent protection and adjustment of property" as "on the impossibility of identifying from time to time small addition to or subtraction from land caused by the constant action of running water." In re *Hull and Selby Ry. Co.*(1), *Foster v. Wright*(2).

From the passage cited from Blackstone it further appears that the Crown is regarded as owner of the land covered by the sea, and that to the Crown therefore belongs land which is gained from the sea by sudden dereliction or alluvion. What is true with regard to the sea is equally true with regard to tidal navigable rivers. The ownership in the land between the ordinary high and low water marks is vested in the Crown and subject to the user of the public for purposes of navigation and otherwise. *Gann v. Free Fishers of Whitstable*(3).

The theory is that such lands are not capable of ordinary cultivation and occupation, and so in the nature of unappropriated soil; whereas lands that are only covered by extraordinary tides

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being for the most part dry are or may be capable of cultivation. See *Attorney-General v. Chambers*(1). The rule laid down in that case was that the extent of the Crown's right to the sea-shore landward is *primâ facie* in the absence of particular usage limited by the line of the medium high tide between the springs and the neaps. The rule referred to by the District Munsif according to which the riparian proprietors are entitled to the bed of the river, *ad medium filum*, is not applicable in the case of navigable rivers in which the tide flows and reflows. It is a question of fact whether any particular river is a tidal navigable river. A river may be tidal and yet not navigable, but the fact that it is tidal has been said to be *primâ facie* evidence that it is navigable. Regard must, however, be had also to the nature and situation of the channel, its depth at different periods of the tide and the use that has been actually made of it in order to determine whether it is a navigable river. See *The King v. Montague*(2).

There seems no reason to doubt that the principles above indicated are the principles according to which the law must be administered in British India in the absence of local usage or statutory enactment to the contrary. The rule that the Government is the owner of the soil in the bed of a navigable river up to high water mark is recognized in the Regulation XI of 1825, see *Felix Lopez v. Maddan Thakoor*(3), and it was further recognized by the Judicial Committee in the case of *Doe d. Seebkristo v. The East India Company*(4). Nor is there any ground for the contention that this rule is inconsistent with the law prevailing in Malabar with regard to ownership in land. It is true that there is no presumption in Malabar that waste lands are the property of Government: but land covered by the water of the sea or of a tidal river is not within the category of waste land, for as land it is incapable of occupation and, whoever may be the owner, it is subject to rights of user by the public. If this is so, and if the neighbouring jenmi is not the owner of the land as long as it remains covered with water, on what principle should it be held to belong to him when by some sudden recession of the water it becomes dry land? Any principle on which the jenmi's title to such land so gained from a river can be supported would be equally applicable to land similarly gained from the sea and even

(1) 4 De Gex. M. & G., 206, 218.
(3) 5 Beng. L.R., 527.

(2) 4 B. & C., 598.
(4) 6 M.I.A., 267.

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to an island formed in the sea. It is difficult to believe that any private rights to such land can have grown up among a people like the inhabitants of Malabar given to agricultural habits and possessed of a strong feeling of horror and aversion towards the sea and the navigation of it. Otherwise it might be conceivable that such new and unoccupied land should belong to the first occupant or to the sovereign by a title similar to title by escheat—*Collector of Maṣulipatam v. Caval Vencata Narrainapah*(1); but on what principle the neighbouring owner should be entitled to it has not been explained. In our opinion there is nothing in the system of property as recognized in Malabar to displace the rights of the Crown as they are ordinarily understood. On the contrary the evidence indicates a recognition of those rights in recent times; and in the grant traditionally recorded to have been made by the Brahmans to Keralan are enumerated among other sovereign rights “the regulation of the beds of streams and accretions from the seas,” Malabar Manual, Volume I, p. 226.

On the assumption then that we have to apply the principles which we find in the English books there are two matters to which regard has to be had in order to ascertain whether in the case of a given accretion from a river the property in it vests in the Crown. There is the character of the river to be considered, and the manner in which the accretion is occasioned. On the former of these matters we have already made some observations, and concerning the latter we have noted the distinction between an accretion which is gradually and imperceptibly produced, and one which is sudden and considerable. The right of the owner, and therefore, in the case of a tidal navigable river, of the Crown is not lost where the alluvion or dereliction is of the last-mentioned character. It was argued on the respondent's behalf that provided the accretion in this case was gradually made, as appears to have been the opinion of the District Munsif, it was immaterial whether it was produced or accelerated by artificial means adopted by or on behalf of the respondent. Subject to a proviso which will be hereafter mentioned this position is correct and is well supported by authority. So long as the accretion has been slow and imperceptible in its progress so that it could not be marked from day to day, but only at the end of some considerable period of time, the rule

(1) 8 M.I.A., 525.

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in favor of the riparian owner is applicable notwithstanding that the accretion may have been brought about by operations conducted by him lawfully on his own lands or by neighbours on their lands—*Attorney-General v. Chambers*(1), *Doe d. Seebkristo v. The East India Company*(2). In the latter case the Judicial Committee observes “a question of law was raised whether supposing the “accretion (granting it to be gradual) was one which had been “contributed or even purposely contributed to, by the act of the “defendants, that would not take the matter out of the ordinary “law with respect to the accretion. The Court below thought, and “we think rightly, that that made no difference. If there were a “gradual accretion which was not denied, it was one which would “be dependent on ordinary law.” This passage might at first sight seem to justify the contention that a riparian proprietor was at liberty to employ any means to promote the formation of soil on his own bank and thus to transfer to himself part of the bed of the river. But an examination of the facts of the case will show that no such point was decided. It was found as a fact that the defendants in the case, the East India Company, were the owners of the land adjoining the high water mark, and that in constructing a road and works protecting it along the bank of the river the Company were acting within their rights. Being the owners of the land to which a gradual accretion was made, they were necessarily owners of that accretion, which moreover was gained from the bed of the river which itself was vested in the East India Company. This case therefore is no authority even for the proposition that a deliberate intention on the part of a riparian owner to produce an accretion and adoption of means to that end are immaterial in considering whether the accretion so gained belongs to him or not. In the later case of *Attorney-General v. Chambers*(1), the Lord Chancellor did not entertain that opinion, for after saying that the rule with regard to accretion is not affected by the nature and character of the operation employed to produce it, he observes that, “of course an exception must always be “made of cases where the operations upon the party's own land “are not only calculated, but can be shown to have been intended, “to produce this gradual acquisition of the sea-shore, however “difficult such proof of intention may be.” If there is not only

(1) 4 De Gex. & J; 55, 69.

(2) 6 M.I.A., 267.

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proof of that intention but it also appears that the party has by unlawful acts done upon the land below the high water mark contrived to raise the bed of the river adjoining his own land, and thus endeavoured to appropriate to himself soil which is vested in the Crown, there can be no doubt that he cannot claim the benefit of the ordinary rule with regard to accretions. To allow him to do so would be to allow him to take advantage of his own wrong. The proposition therefore that the means whereby an accretion is occasioned are immaterial must be taken subject to the proviso expressed in the judgment of the Lord Chancellor, viz., that it is by a lawful use of the party's own land that the accretion is caused. Acts not coming within that category done with the intention and result of annexing the soil of a public river are nothing else than acts of encroachment.

It is apparent from what has been already said with regard to the findings in this case that in neither of the Courts have the facts requisite for a determination of the rights of the parties been considered and adjudicated upon. There were no proper issues raised with regard to the matters upon which the claim made on behalf of Government would rest. We must therefore ask the District Judge having regard to the observations above made to record findings on the following issues:—

- (1) Whether as far as the point near which the land No. 1 in the plaint lies the river Kottapuya is a tidal navigable river.
- (2) Whether the variation if any in the natural line of high water has at the same point been slow, gradual and imperceptible or otherwise.
- (3) Whether such variation has been caused by acts unlawfully done by the plaintiffs and persons claiming under them or otherwise.

[The parties are at liberty to adduce further evidence.

The findings will be returned within three months from the date of the receipt of this order, when seven days after the posting of the findings in this Court will be allowed for filing objections.

In compliance with the above order the District Judge submitted the following finding:—

“I find the first issue in the affirmative, and the second in the negative, and on the third issue I find that the variation in the high water line has been caused by acts unlawfully done

“by persons alleged by the contending respondents (plaintiffs) to be their lessees or tenants under their lessees.”

This second appeal coming on for final hearing upon receipt of the above finding the Court delivered judgment as follows:—

JUDGMENT:—The findings are against the plaintiffs. It is objected that the District Judge declined to issue a commission for the purpose of ascertaining whether there was any tree 50 years old on the spot in dispute. This application was not made until the re-hearing was closed, and the Judge observes that the Sheristadar and the Amshom Menon, who inspected the locality, denied the existence of such a tree, and that none of the respondents' witnesses, except one, who is discredited, referred to its existence.

We accept the finding, and must accordingly reverse the decrees of the Courts below and direct that the suit be dismissed. The plaintiffs (respondents Nos. 1 and 2) must pay the costs of appellant throughout. The other respondents, who need not have appeared but have benefited by the appeal, will bear their own costs.

ORIGINAL CIVIL.

Before Mr. Justice Handley.

ADMINISTRATOR-GENERAL OF MADRAS (PLAINTIFF),

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WHITE AND OTHERS (DEFENDANTS).*

Will, construction of—Absolute gift—Repugnant gift over indefiniteness of gift—Reputed wife.

On the construction of a will which was as follows:—

“I hereby declare all former wills cancelled. I desire that my wife should obtain possession of all my property and enjoy the benefit of all monies that may accrue until her death, when I wish that whatever may remain shall be used for the education of the children of the Eurasian and Anglo-Indian community. I desire that this will be administered by the Official Trustee of Madras:”

Held,

(1) that the reputed wife should take under the will without strict proof of the marriage, no fraud being imputed to her in the matter of the marriage;

(2) that the gift to the wife was absolute and the gift over bad for repugnancy.

* Civil Suit No. 268 of 1889.

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SUIT by the Administrator-General of Madras holding letters of administration (with the will annexed) to the estate of D. E. S. White, deceased, praying that the rights of the defendants under the will be declared and for directions.

The facts of this case and the arguments adduced at the hearing appear sufficiently for the purpose of this report from the judgment.

The *Advocate-General* (Hon. Mr. Spring Branson), for plaintiff.

Mr. *Johnstone* for defendant No. 1.

Mr. *R. F. Grant* for defendant No. 2.

Mr. *W. Grant* for defendants Nos. 3 and 4.

Cur. ad. vult.

JUDGMENT.—David Emanuel Starckenburgh White, a Eurasian inhabitant of Madras, made his last will and testament, dated 18th December 1888, in the following words:—“I hereby declare all former wills cancelled. I desire that my wife should obtain possession of all my property and enjoy the benefit of all monies that may accrue until her death, when I wish that whatever may remain shall be used for the education of the children of the Eurasian and Anglo-Indian community. I desire that this will be administered by the Official Trustee of Madras.”

The testator died on the 1st February 1889. The Official Trustee declined to take out probate, and letters of administration with the will annexed were granted to the Administrator-General, who brings this suit to have the rights of the parties interested declared. Defendant No. 1 is the widow and defendants Nos. 2, 3 and 4 some of the next-of-kin of the testator. The question to be determined is whether, upon the true construction of the will, the widow takes an absolute interest in the whole of the testator's property, or only a life interest followed by a gift over for the charitable purpose indicated in the will. If the latter be the true construction, the gift over fails, because the provisions of section 105 of the Indian Succession Act as to charitable bequests were not complied with, and there is an intestacy as to the devolution of the property after the widow's death. For the widow it is argued that the words used amount to an absolute gift to her, and therefore the subsequent attempt to provide for the devolution of the property after her death is void as being repugnant to the absolute gift. For the next-of-kin the contention is that only a life interest is given to the widow coupled with a gift over to the charity, which

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having failed by reason of non-compliance with the provisions of section 105 of the Succession Act, the next-of-kin take on the death of the widow. I am referred to English decisions upon the subject, amongst others, for the widow to *Henderson v. Cross*(1), *Boyes v. Goslett*(2), and *re Wilcocks' Settlement*(3), and for the next-of-kin to *Constable v. Bull*(4), *Bradly v. Westcott*(5), *Le Marchant v. Le Marchant*(6), *Bibbens v. Potter*(7). Some of these cases are rather difficult to reconcile, but I think the general principle of construction to be deduced from these and other cases—a principle intelligible and reasonable and which this Court should follow—is that where there is a gift which upon the face of it appears to be absolute, but subsequent provisions, either of the same will or of a codicil, show an intention to cut down the interest to a life interest, the Court reading the whole will or will and codicil together will allow the intention to prevail; but where there is an absolute gift in the first place and no subsequent words purporting to cut it down but provisions in favor of other objects purporting to limit or restrain the complete power of alienation or testamentary disposition of the first donee, or to compel the devolution of the property on the intestacy of the first donee otherwise than the law would prescribe, then such provisions are void as being inconsistent with and repugnant to the absolute gift to the first donee. Applying these principles to the present case, the first question to be determined is, do the words of the will purport to give an absolute interest in the property to the widow; for if they do, there is certainly nothing in the subsequent words to cut that interest down to a life estate, and I think that they do. The wife is to obtain possession of all the testator's property and enjoy the benefit of all monies that may accrue. The property consists chiefly of money with the testator's bankers, shares in various loan societies and companies, and money on deposit with them. Possession and enjoyment of the benefit of shares and money are equivalent, I think, to absolute ownership with full power of disposal and that such was the testator's intention is further manifested by the words following “until her death when I wish that whatever may remain;” what can these latter words

(1) 29 Beav., 216.

(3) L.R., 1 Ch. D., 229.

(5) 13 Ves., 446.

(2) 27 L.J. Ch. (N.S.), 249.

(4) 3 De G. & Sm., 411.

(6) L.R., 18 Eq., 414.

(7) L.R., 10 Ch. D., 733.

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refer to except to the contingency that the wife might dispose of the whole or part of the property in her life time. It is true that in *Constable v. Bull* quoted above similar words were held not to imply a power of disposal in the donee, but in that case the property consisted partly of household leases held for terms of years and the Vice-Chancellor holding that without these words the gift was only of a life interest, considered that there were several meanings capable of being rationally attributed to those words which would be inconsistent with the construction giving to the widow the power of disposing of the property.

Here I can see no other rational construction of the words, but that they refer to the widow's power of disposal in her life time. It was pressed upon me in argument that the words "until her death" show an intention to give only a life interest. If they stood by themselves they doubtless would do so, but they must be read with the words following "when I wish that whatever may remain," and the preceding words "my wife should obtain possession of all my property after my decease and enjoy the benefit of all monies that may accrue." That the possession which the wife was to have was not merely possession for the purpose of administration of the estate is evidenced by the fact that testator intended the estate to be administered by the Official Trustee. I come to the conclusion that testator's intention was to give his wife absolute power of disposal over his property during her life time, but to provide that whatever she should not dispose of in her life time should go for the education of the Eurasian and Anglo-Indian community. This provision being repugnant to the absolute interest in the wife previously given is void, and the wife takes an absolute interest unfettered by any limitation of her power of disposal.

The attempted disposition of "whatever may remain," would I think also be void for indefiniteness.

I find that first defendant takes under the will of the testator an absolute interest in all his property with full power of disposal and that there is no valid gift over or residuary bequest after the death of the first defendant, and there will be a declaration to that effect. A question was raised as to the validity of the marriage of first defendant to testator as it appears she was married many years ago to a man named Jordian, who deserted her soon after the marriage and has not been heard of since. In the

view I take of the proper construction of the will it is necessary to consider this point. There can be no doubt that as testator's wife by repute first defendant is sufficiently indicated by the will, and the bequest to her is good in the absence of any suggestion that there was any fraud upon the testator in the matter of her former marriage. It is clear that he was fully cognizant of all the facts about it.

The costs of all parties to be taxed as between attorney and client will come out of the estate.

Branson and Branson—Attorneys for plaintiff.

Carr—Attorney for defendant No. 1.

D. Grant—Attorney for defendant No. 2.

Wilson and King—Attorneys for defendants Nos. 3 and 4.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

MADRAS BUILDING COMPANY (PLAINTIFFS),

v.

ROWLANDSON AND ANOTHER (DEFENDANTS).*

Transfer of Property Act—Act IV of 1882, ss. 78, 101—Priority of mortgages—Gross negligence—Extinguishment of charges—Registration Act—Act III of 1877, ss. 17(d), 48—Notice by registration.

In a suit for declaration of priorities of mortgages and for foreclosure, it appeared that the mortgage premises were mortgaged to defendant No. 2 in 1879 and to the plaintiff in 1883, and again in 1884, and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff and defendant No. 2 had no actual notice at the date of their mortgage and conveyance, respectively, of the previous incumbrances. The plaintiff received the title-deeds to the estate from the mortgagor on the execution of the mortgage of 1883; defendant No. 2 alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that previous to the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody:

Held (apart from the question whether the mortgage of 1879 had been extinguished by the conveyance of 1886), that the conduct of defendant No. 2 in

* Civil Suit No. 8 of 1889.

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TRATOR-
GENERAL
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Suit by the plaintiff company for a declaration of the priority of their two mortgages over a mortgage of December 1879, under which defendant No. 2 claimed to be interested in the same premises, and for foreclosure. The mortgagor, Mrs. Anne Smith, was an insolvent, and defendant No. 1 was the Official Assignee of Madras, and, as such, assignee of her estate.

The further facts of the case appear sufficiently for the purposes of this report from the judgment.

The first five issues originally framed in this suit were as follows :—

- (1) Did Mrs. Anne Smith execute to the plaintiff mortgage, and, further charge, and what is due ?
- (2) Had plaintiff notice of alleged mortgage of 5th December 1879 at date of execution of their mortgages ?
- (3) Was second defendant guilty of fraud or gross neglect in allowing Mrs. Smith to remain in possession of the title-deeds ?
- (4) If so, did defendant No. 2 lose his priority ?
- (5) Did Mrs. Smith execute in favor of second defendant mortgage of 5th December 1879 ?

An additional issue was framed at the hearing as to the question whether the alleged mortgage of 5th September 1879 was merged in, or extinguished by the subsequent conveyance by the mortgagor to defendant No. 2.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and Mr. *K. Brown* for plaintiffs.

Mr. *Norton* and Mr. *R. F. Grant* for defendant No. 2.

Cur. ad. vult. *

JUDGMENT.—This is a suit upon a mortgage, in which the defendant No. 1 is the Official Assignee, representing the estate of the mortgagor, and defendant No. 2, another mortgagee of the same property, and the question arises between the plaintiff and the defendant No. 2 which of the two mortgages is to have priority. A further question is raised by the fact that defendant No. 2, subsequently to the date of the plaintiff's mortgage, purchased the

property already mortgaged with him. The facts of the case, for the most part undisputed, are these. It appears that the property subject to these mortgages before 1878 belonged to a Muhammadan family. There is a Court certificate filed, in favor of two Muhammadans, dated 14th April 1874. The representatives of one of these two Muhammadans appear to have mortgaged the property on the 5th August 1876 to Agarchund, defendant No. 2. The same persons on the 16th January 1878, with the concurrence of the mortgagee, Agarchund, conveyed the property to the insolvent Anne Smith by name. The consideration for that conveyance being the amount due on the mortgage to Agarchund, and a further sum of Rs. 3,500 payable to the vendors. These three documents, the Court certificate, the mortgage to Agarchund and the conveyance to Anne Smith, together with the Collector's certificate of 1877, constituted the title-deeds at that time, and they all appear to have been handed over to Mrs. Smith in 1878. Defendant No. 2 says that Mrs. Smith executed two mortgages of the same property in his favor, one in February and the other in October. These mortgages are not proved, except by the word of defendant No. 2 and his gumastah. The documents themselves are not forthcoming. In May 1878, Mrs. Smith obtained a new certificate from the Collector; on the 5th of December 1879 she mortgaged the same property to Agarchund. That mortgage is said to have been in consolidation of the two prior mortgages of 1878; but it is noticeable that there is no recital of these prior mortgages. On the 10th of October 1883, Mrs. Smith applied to the plaintiff for a loan, and her request was complied with, and money was advanced to her in or about the month of October or later to the extent of Rs. 10,000 upon the security of a mortgage of the property. In that mortgage she purports to deal with the property as unincumbered, and she does not disclose Agarchund's mortgage of 1879. The same day the plaintiffs took a rent agreement from her. In August 1884, the plaintiff advanced a further sum of money, and a further charge was effected to secure it, and again a rent agreement was taken from the insolvent. When advancing the money on the mortgage of 1883, the plaintiffs' officers obtained from the insolvent the three title-deeds which I have already mentioned, namely, the Court certificate, the mortgage to Agarchund and the conveyance to the insolvent. No Collector's certificate was handed over to the

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MADRAS BUILDING Co. v. ROWLANDSON. plaintiffs, and no search was made by the Company's officers in the Registration Office. In 1886 a suit was brought by Agarchund against the insolvent upon his mortgage. The suit was withdrawn on Mrs. Smith consenting to sell her property, which she did by a conveyance of the 19th August 1886. Apart from the question whether the plaintiffs had notice of Agarchund's mortgage by reason of its registration, it admitted that the plaintiff had no actual notice of Agarchund's mortgage, and it is equally admitted that Agarchund when he took this conveyance in 1886, had no notice of the plaintiff's mortgage. These are the admitted facts of the case. It is clear from the recital that the title-deeds of the property were not in October 1883 with the person with whom they should naturally have been, namely, with Agarchund, the mortgagee, either he never obtained them when the mortgage was executed in his favor or he gave them up. The question then arises whether his conduct with reference to the title-deeds can be said to amount to fraud or gross negligence within the meaning of section 78 of the Transfer of Property Act. If there was such fraud or gross negligence, there can be no doubt that it was in consequence of that fraud or gross negligence that the plaintiffs were induced to advance money on the security of their mortgage. Now, several cases have been cited with regard to the question of what constitutes evidence of such fraud or negligence as to deprive a first mortgagee of the priority which he ordinarily enjoys. In *Northern Counties of England Fire Insurance Company v. Whipp*(1) is given a summary of the law on the subject at page 494 of the report. It is there said that the authorities justify the following conclusion "that the Court will "postpone the prior legal estate to a subsequent equitable estate; "whether the owner of the legal estate has assisted in or connived "at the fraud which has led to the creation of a subsequent equitable estate without notice of the prior legal estate, of which "assistance or connivance, the omission to use ordinary care in "inquiry after or keeping title-deeds may be, and in some cases "has been, held to be sufficient evidence, where such conduct "cannot otherwise be explained." One of the cases which that passage referred to is the case of *Hewitt and Loosemore*(2). There the law is laid down in these terms:—"That the legal mortgage is

(1) 26 Ch. D., 482.

(2) 9 Hare, 449.

MADRAS BUILDING Co. v. ROWLANDSON. "not to be postponed to a prior equitable one upon the ground of "his not having got in the title-deeds unless there is fraud or gross "or wilful negligence on his part, and the Court will not impute "fraud or gross or wilful negligence to the legal mortgagee if he "has *bona fide* inquired for the title-deeds and a reasonable excuse "is given for the non-delivery of them to him. But the Court will "impute fraud or gross or wilful negligence to the mortgagee "if he omits all inquiry as to the deeds." Now the question then is whether there has been given by Agarchund a reasonable explanation for his not having these title-deeds with him. His explanation is that he did obtain the title-deeds when his first mortgage of January 1878 was effected in his favor, but that he gave them up a month or two afterwards, in order that Mrs. Smith might obtain a Collector's certificate. He says that she required them for that purpose, and for that purpose he gave them to her. She did obtain the Collector's certificate in the month of May, and, on his asking her to give up the title-deeds which she had taken, he was told that the Collector had retained them. He got the new certificate, but he never got the title-deeds which he had given up in the early part of the year. All this happened in 1878, some months before the mortgage, now in question of 1879. As far as the mortgage of 1879 is concerned, it is admitted by Agarchund that he never had the title-deeds at all. Assuming that it is true that there were these two mortgages, of which, as I have said, there is no evidence except his own statement and that of his gumastah, and assuming that on the first mortgage being executed he obtained these title-deeds, there is no evidence whatever that he ever had the title-deeds in connection with the mortgage of 1879. It appears to me to make very little difference whether the case is one of a man who never had the title-deeds or a man who had them and subsequently gave them up. In either case he has to show some reasonable excuse for his conduct. I must find that the explanation given is not a reasonable one and that the defendant No. 2 has failed to show them that he *bona fide* made inquiries for the title-deeds and that a reasonable excuse for not delivering these to him was given to him. It appears to me absurd to suppose that defendant No. 2, an experienced sowcar, can really have believed Mrs. Smith when she told him, if she ever did tell him, that the Collector was in the habit of retaining the title-deeds which had been lodged with him for the purpose of issuing a new certificate.

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I am, therefore, of opinion that Agarchund has failed to explain satisfactorily his conduct with reference to these title-deeds, and on the authority of the cases I have cited, I must find that he has been guilty of such fraud or gross negligence as to entitle the plaintiffs to the benefit of section 78 of the Transfer of Property Act.

But another question has been raised by the defendant. It is said that the plaintiffs had notice of the prior mortgage of Agarchund. If that notice was proved as a matter of fact, I apprehend there can be no doubt that section 78 would have no application. It is not proved as a matter of fact, but it is argued that notice is to be assumed because the prior mortgage to Agarchund was registered and might have been discovered by the plaintiff's officers had they taken the trouble to make a search. It is contended as a matter of law that the registration of a document conveys a notice to all subsequent purchasers and reliance is placed on the authority of some Bombay cases, and also on some observations made in the case of *Kettlewell v. Watson*(1). Now as regards the Bombay cases, I am of opinion that they do not justify me in holding that such effect ought to be given to registration. Professedly the opinion of the Bombay High Court in *Lakshmandas Sarupchand v. Dasrat*(2) is founded on its own judgments and on the doctrine obtaining in America only. It is admitted that neither in England nor in Ireland is it held that mere registration can amount to notice to subsequent purchasers. Besides the authority of these and other cases referred to in the judgment, there is, as far as I have learnt, no authority in this country to the effect that registration operates to give notice to subsequent purchasers. This absence of authority appears to me a strong indication that the doctrine does not obtain here, and there is further a negative authority on the point in the case referred to in the arguments of *Madras Hindu Union Bank v. Venkatrangiah*(3), in which the prior document was registered, and yet no point with regard to notice was taken. The case of *Kettlewell v. Watson*(1)—I am also of opinion has no application to the present facts. That is a case in which the contest was not between the legal mortgagee and a later mortgagee, but between two persons having merely equitable titles. In that state of things mere negligence on the

part of one or the other would have the effect of turning the scale against him. It may well be that here in a like case, for instance, supposing the contest to be between one claiming a lien for unpaid purchase money and an equitable mortgagee, omission to search the register would be imputed as negligence with the consequence of postponing the claim of the party guilty of it, but it does not follow that the party guilty of such omission can be treated as having had notice and therefore precluded from asserting the priority to which he is otherwise entitled. For these reasons I must decline to hold that in point of law the plaintiff had notice of Agarchund's mortgage of 1879.

It is unnecessary to express any opinion on the additional issue with regard to which the contention on the part of the plaintiffs was that inasmuch as Agarchund when taking the conveyance was unaware of the plaintiff's mortgage and hopeless of realizing his money by his own mortgage, no other intention could be attributed to him than that of extinguishing his mortgage. The question must be taken on the construction of the last words of section 101 of the Transfer of Property Act, and I would only observe that if those words demand the adoption of the plaintiffs' contention, it would seem to follow that a purchaser without notice is now in the position occupied by a purchaser with notice under the rule in *Toulmin v. Steere*(1), or in a less favorable position than such purchaser. In my opinion the plaintiffs are entitled to a finding in their favor on the 1st, 2nd, 3rd and 4th issues and consequently to a decree in the terms of the plaintiff Defendant No. 2 must pay the plaintiffs' costs.

Branson & Branson, Attorneys for plaintiffs.

Champion & Short, Attorneys for defendant No. 2.

(1) 3 Mer., 210.

(1) 21 Ch. D., 685. (2) I.L.R., 6 Bom., 168. (3) I.L.R., 12 Mad., 428.

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PRIVY COUNCIL.

Ex parte, RANI MATHUSRI JIJAI AMBA AND OTHERS,
PETITIONERS.*

[On appeal from the High Court at Madras.]

*Discretionary refusal to remove a Receiver and Manager of the
Estate of Hindu widows.*

Rights and proceedings rendering a Court's order, refusing to remove an appointed Receiver and Manager of the estate, of which the widowed Ranis of the late Maharaja of Tanjore had become possessed by grant from the Government, entirely a matter for the discretion of the Court, which had exercised its discretion soundly.

APPEAL from an order (17th February 1888) of the High Court, affirming an order (13th September 1887) of the District Judge of Tanjore.

A Divisional Bench of the High Court (Collins, C.J., and Parker, J.) made the above order on the petition filed in the Original Court on 24th August 1887, by the surviving widows of the last Maharaja of Tanjore, they having been parties to a decree in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1). That decree (8th May 1868) declared "that the permanent appointment of a Receiver and Manager of the property was necessary;" and directed "that the Collector, if possible, should be continued as Receiver and Manager;" that, if such was not practicable, the Civil Court of Tanjore should appoint a Receiver and Manager after taking proper security, and "from time to time make fresh appointments during the lives of the widows and the survivors or survivor of them, or until it shall be considered by the Civil Court that a Receiver and Manager is no longer necessary."

The reason given in the order from which this appeal was preferred was thus given:—"The decree clearly contemplates that the Receiver shall be permanent during the lives of the widows, and the survivors, or survivor, of them; and having regard to the history of the litigation, the nature of the property, and the

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

(1) 3 Mad. H. C. Rep., 424. The estate of the last Maharaja of Tanjore came into the possession of the E. I. Company by an act of State in 1866. *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 7 M.I.A., 476.

"circumstances of the family, we are clearly of opinion that the District Judge exercised a right discretion in refusing this application."

All the parties having joined in applying for a certificate under section 602, Civil Procedure, the same Judges recorded their reasons, more fully, as follows:—

"As the surviving Ranis are the only persons at present entitled to participative enjoyment of the estate, and as all have united in this application, we think that there is a substantial question of law which will admit of an appeal to the Privy Council within the meaning of section 596 of the Civil Procedure Code, but we think it right to place on record our reasons for holding that the District Judge exercised a sound discretion in refusing to grant the prayer for the removal of the Receiver.

"The circumstances of the litigation which led to the appointment of a Receiver are fully reported in the third volume of the Madras High Court Reports, pp. 424-455. The property in question was seized by Government at the annexation of the Tanjore State, not under color of any legal title, but by the forcible exercise of Sovereign power. It was afterwards transferred to the senior widow by order of Government, dated 21st August 1862, as a matter of grace and favor. The order after making over the management and control to Her Highness went on to state:—'It will be her duty to provide in a suitable manner for the participative enjoyment of the estate in question by the other widows, her co-heirs. On the death of the last surviving widow, the daughter of the late Raja or, failing her, the next heirs of the late Raja, if any, will inherit the property.'

"Within four years of the transfer of this estate to the senior widow this suit was brought by two of the junior Ranis. They complained of various acts done by the senior widow in detriment of their rights, and more especially that she had, without their consent, adopted a boy as the son of the late Raja, to whose possession she had transferred or was about to transfer the whole property. That son was included as the fourteenth defendant, and the first defendant alleged that she herself and all the other Ranis were entitled only to receive maintenance from him.

"The Court held that the evidence as to the senior widow's management of the estate since it had been under her charge showed 'reckless dealing with the property and the lavish

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'expenditure of large sums for purposes of which the accounts afford no satisfactory explanation. Not only has the large sum of ready money received from the Government and the whole proceeds of the immoveable property been dissipated, but a considerable portion of the moveable property itself has been got rid of and debts to a considerable amount been left unpaid. We are at the same time of opinion that it would be most imprudent to entrust the management of the property to the second defendant or to either of the other junior widows. Little, if anything, we are sure, would be gained as respects the care and preservation of the property, and there would very soon be violent disputes and further litigation. It appears to us to be absolutely necessary that the estate should remain in the custody and under the control and direction of a competent Receiver and Manager appointed from time to time by the Civil Court and invested with general powers for the management and regulation of the property and its enjoyment, and the application of the rents and profits. The Collector is at present the appointed Receiver, and there is no doubt that it is of the very greatest advantage to the estate and the parties interested that he should continue to act as Receiver and Manager, as we trust he will be able to do. The continuance of his appointment will therefore be decreed; but should it be necessary, the Civil Judge must appoint a fit and proper person in the Collector's place, taking sufficient security for the discharge of his duties and fixing a fair and reasonable remuneration for his services.'

"The High Court in the view that it took of the case found it unnecessary to raise an issue as to the validity of the alleged adoption of the fourteenth defendant, observing that 'if found to be valid (a result at present very problematic), his present claim by right of adoption being as lineal heir of the Raja in preference to the widows would not be maintainable. To that claim the absolute ownership of the Government in the interval between the death of the Raja until the act of State by which the transfer was made to the widows and daughter is, we think, fatal,' see 3 Mad. H.C. Rep., p. 455.

"More than twenty years have passed since that decree, and we are of opinion that the same reasons which in 1868 made the appointment of a Receiver imperatively necessary still exist in all

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their force. Old age and twenty years more of that seclusion which is the lot of ladies of exalted rank in this country can hardly have made their Highnesses better fitted for the management of an estate whose annual income is more than 1½ lakhs of rupees and which was valued in 1868 as worth about 68 lakhs of rupees (the moveable property in jewels and cash alone being worth nearly 20 lakhs). If given back at all, the chief management would, under the terms of the Government order, vest in the senior widow,—a lady now over 70 years of age and who twenty-four years ago, on 5th January 1864, intimated to the then Civil Judge of Tanjore that she had formed the resolution 'of withdrawing from all worldly transactions and transient pleasures and resolved from that moment to lead a life of seclusion, &c.,' see 3 Mad. H.C. Rep., p. 437.

"For more than twenty years this decree has secured the estate and these ladies immunity from litigation,—but, at the death of the last surviving widow, the Government order vests the estate in the daughter of the late Raja, or failing her, in the next heirs of the late Raja if any."

The Judges concluded by adverting to the probability of future litigation if the management of the property should be restored to the widows.

On this appeal,

Mr. J. D. Mayne appeared for the appellants.

His argument was that under the Proceedings of the Madras Government of 21st August 1862, printed in the report of *Jijoyi-amba Bayi Saiba v. Kamakshi Bayi Saiba*(1), and the construction put upon it in the judgment in the latter suit, the property vested in the Ranis for the estates of Hindu widows. They, thereby, became full owners, and represented the estate, subject to the legal restrictions upon their disposing of the property. One of the incidents of a widow's estate was a right to management. Of this she could only be deprived on the objection of some one interested in the good management of the property; but no such objection was made here. The present application was supported by all who had a vested interest in the estate. The Receiver had been appointed in consequence of the proceedings in a suit which had come to an end.

(1) 3 Mad. H.C. Rep., 428.

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Ex parte.

Their Lordships' judgment was delivered by

Sir BARNES PEACOCK :—Their Lordships are of opinion that it was entirely a matter of discretion with the Court as to the removal of the Receiver, and, looking to the case, their Lordships think that the Court have exercised a very sound discretion in not removing him. They will therefore humbly advise Her Majesty to dismiss this appeal.

Solicitors for the Appellants : Messrs. Lawford, Waterhouse, and Lawford.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

HALL AND OTHERS (DEFENDANTS), APPELLANTS,

v.

VENKATAKRISHNA (PLAINTIFF), RESPONDENT.*

Malicious prosecution—Matters in issue—Burden of proof.

In a suit for damages for malicious prosecution it was found that the charge brought by the defendant against the plaintiff was unfounded, and that it was brought without probable cause :

Held, that the absence of probable cause did not imply malice in-law, and that on the failure of the plaintiff to prove that the defendant did not honestly believe in the charge brought by him, the suit should have been dismissed.

SECOND APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Cocanada, in appeal suit No. 452 of 1887, confirming the decree of L. Narayana Row, District Munsif of Rajahmundry, in original suit No. 67 of 1887.

The District Munsif passed a decree for the plaintiff, which was confirmed on appeal by the District Judge.

The defendants preferred this second appeal.

Mr. *Michell* for appellants.

Mahadeva Ayyar for respondent.

The facts of this case appear sufficiently for the purposes of this report from the judgment.

JUDGMENT :—The appellants are merchants carrying on business at Cocanada on their own account and as agents of Messrs.

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Arbuthnot and Company of Madras. In payment of a debt due to them by one Butchi Ramesam they took over the unexpired portion of a lease which he had in regard to certain lankas or islands in the Godavari, and the respondent was a tanadar on the establishment entertained by them for the purpose of collecting rents due to them under the lease. Mr. Maonab, a member of the appellants' firm, charged the respondent and two others before the Joint Magistrate of the Godavari district with having misappropriated Rs. 309-4-3 out of the collections made for them in fasli 1294. After hearing the complainant and his witnesses, the Joint Magistrate discharged the accused, as he was of opinion that there were no grounds for putting them on their defence. The complaint not being since revived, the respondent sued the appellants for damages and claimed Rs. 200 as compensation due for the false and malicious prosecution which he said they had instituted against him. They contended that they acted *bonâ fide*, and also pleaded to the jurisdiction of the District Munsif at Rajahmundry, and that the claim was barred by limitation. Both the Courts below decreed the claim and disallowed the appellants' pleas. Hence this second appeal.

The preliminary objections taken in the Courts below are again urged before us, and we shall deal with them first. The respondent brought this suit first in the Subordinate Court at Cocanada on the Small Cause Side, and it is conceded that it was brought in time. But the Subordinate Court held that it had no jurisdiction and returned the plaint for presentation to the Court of competent jurisdiction. The suit was then filed in the Court of the District Munsif of Rajahmundry, and it is not shown that the suit would be barred by limitation if the time during which it was pending in the Subordinate Court were deducted. We see no reason to doubt that the suit was first brought in the Subordinate Court under a *bonâ fide* mistake as to the Court of competent jurisdiction, and that the respondent was entitled to rely on section 14 of the Act of Limitations. We are also of opinion that the conclusion arrived at by the Lower Court on the question of jurisdiction is correct. The appellants' counsel urged that there was no evidence that any member of the appellants' firm other than Mr. Maonab was responsible for the respondent's prosecution; but this contention, which is at variance with the admission made in their written statement, cannot be supported. The substantial question, however,

* Second Appeal No. 1300 of 1888.

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for decision is whether the Courts below have rightly apprehended what the respondent is bound to show in support of his claim, and tried it in accordance with law. The Subordinate Judge observes: "There was thus no reasonable and probable cause for making this prosecution, and especially so against the plaintiff, and this clearly imports malice in law even if there was no proof of actual malice." Again, the District Munsif states the law in somewhat similar terms: "Want of probable cause, therefore, implies malice, and the burden is shifted to the defendants to prove that there was probable cause for the prosecution." After referring to certain dissensions in order to account for the prosecution, the District Munsif observes: "Mr. Macnab believed all that was reported to him and hurried the proceedings without proper inquiry. Not a single witness in this case would say that Mr. Macnab inquired of him about the truth of the charges. He made no inquiry whatever, and is much to blame for his hastiness." In advertence to the same point, the Subordinate Judge remarks that: "Ramesam Suraiya and Viraragavulu bore personal ill-will to Bhashiyacharlu, that they were the trusted agents of Mr. Macnab, and employed by him to fish out information against Bhashiyacharlu when he went to inquire about his conduct in consequence of some anonymous petition received by him. No case could be concocted against Bhashiyacharlu alone, and some one else needed to be connected with him, and as the plaintiff would not agree to give any evidence against Bhashiyacharlu, he (plaintiff) was associated with him as a delinquent." The facts found by the Courts below are that the charge brought against the respondent was not true, that he showed that there was no probable cause for it, that it was not necessary for him to prove more, that two persons who bore personal ill-will to Bhashiyacharlu gave false information to Mr. Macnab, that he hastily accepted it as correct without proper inquiry, that the respondent was charged because he gave no information against Bhashiyacharlu, and that, as the absence of probable cause implied malice in law, the respondent was entitled to a decree. We are unable to say that the law applicable to the case has been correctly understood. In *Abrath v. North Eastern Railway Company*(1), the legal import of reasonable and probable

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cause and the law as to burden of proof in suits of the kind now before us were explained by Cave, J., in his lucid charge to the Jury. That learned Judge said: "It was for the plaintiff to establish a want of reasonable and probable cause and malice," and then proceeded as follows: "I think the material thing for you to examine about is, whether the defendants in this particular case took reasonable care to inform themselves of the true facts of the case. That, I think, will be the first question you will have to ask yourselves—did they take reasonable care to inform themselves of the true facts of the case? Because, if people take reasonable care to inform themselves, and notwithstanding all they do they are misled, because people are wicked enough to give false evidence, nevertheless they cannot be said to have acted without reasonable and probable cause; with regard to this question, you must bear in mind that it lies on the plaintiff to prove that the Railway Company did not take reasonable care to inform themselves. The meaning of that is, if you are not satisfied whether they did or not, inasmuch as the plaintiff is bound to satisfy you that they did not, the Railway Company would be entitled to your verdict on that point. Then there is another point, and that is, when they went before the Magistrates, did they honestly believe in the case which they laid before the Magistrates? If I go before Magistrates with a case which appears to be good on the face of it, and satisfy the Magistrates that there ought to be a further investigation, while all the time I know that the charge is groundless, then I should not have reasonable and probable cause for the prosecution. Therefore, I shall have to ask you that question along with the others, and according as you find one way or the other, then I shall tell you presently, or I shall direct you, whether there was or was not reasonable and probable cause for this prosecution. If you come to the conclusion that there was reasonable and probable cause, or rather that those two questions should be answered in the affirmative, that is, that the defendants did take care to inform themselves of the facts of the case, and they did honestly believe in the case which they laid before the Justices, then I shall tell you, in point of law, that this amounts to reasonable and probable cause, and in that case the defendants will be entitled to your verdict; if, on the other hand, you come to the negative conclusion, if you think that the defendants

(1) L.R., 11 App. Cases, 247.

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" did not take reasonable care to inform themselves of the facts of
" the case, or that they did not honestly believe the case which
" they laid before the Magistrates, then in either of those cases you
" will have to ask yourselves this further question, were they in
" what they did actuated by malice, that is to say, were they
" actuated by some motive other than an honest desire to bring
" a man whom they believed to have offended against the criminal
" law to justice? If you come to the conclusion that they did
" honestly believe that, then they are entitled again to your
" verdict; but if you come to the conclusion that they did not
" honestly believe that, but that they were actuated by some
" indirect motive other than a sincere wish to bring a supposed
" guilty man to justice, then the plaintiff is entitled to your
" verdict, and then it will become necessary to consider the
" question of damages."

As pointed out by Lord Justice Bowen, " the plaintiff in an
" action for malicious prosecution has to prove, first, that he was
" innocent, and that his innocence was pronounced by the tribunal
" before which the accusation was made; secondly, that there was
" want of reasonable and probable cause for the prosecution, or, as
" may be otherwise stated, that the circumstances of the case were
" such as to be in the eyes of the Judge inconsistent with the exist-
" ence of reasonable and probable cause; and, lastly, that the
" proceedings of which he complains were initiated in a malicious
" spirit, that is, from an indirect and improper motive, and not in
" furtherance of justice. All those three propositions, the plaintiff
" has to make out, and if any step is necessary to make out any
" one of those three propositions, the burden of making good that
" step rests upon the plaintiff. I think that the whole of the
" fallacy of the argument addressed to us, lies in a misconception
" of what the learned Judge really did say at the trial, and in a
" misconception of the sense in which the term 'burden of proof'
" was used by him. Whenever litigation exists, some body must
" go on with it; the plaintiff is the first to begin; if he does nothing,
" he fails; if he makes a *prima facie* case and nothing is done to
" answer it, the defendant fails. The test, therefore, as to the
" burden of proof or onus of proof, whichever term is used, is sim-
" ply this, to ask oneself which party will be successful if no evi-
" dence is given, or if no more evidence is given than has been given
" at a particular point of the case, for it is obvious that as the con-

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" troversy involved in the litigation travels on, the parties from
" moment to moment may reach points at which the onus of proof
" shifts, and at which the tribunal will have to say that if the case
" stops there, it must be decided in a particular manner. The test
" being such as I have stated it is not a burden that goes on for
" ever resting on the shoulders of the person upon whom it is first
" cast. As soon as he brings evidence which, until it is answered,
" rebuts the evidence against which he is contending, then the
" balance descends on the other side, and the burden rolls over
" until again there is evidence which once more turns the scale.
" That being so, the question of onus of proof is only a rule for
" deciding on whom the obligation of going further, if he wishes
" to win, rests. It is not a rule to enable the Jury to decide on the
" value of conflicting evidence. So soon as a conflict of evidence
" arises, it ceases to be a question of onus of proof. There is
" another point which must be cleared in order to make plain what
" I am about to say. As causes are tried, the term 'onus of
" proof' may be used in more ways than one. Sometimes when
" a cause is tried the Jury is left to find generally for either the
" plaintiff or the defendant, and it is in such a case essential that
" the Judge should tell the Jury on whom the burden of making
" out the case rests, and when and at what period it shifts. Issues
" again may be left to the Jury upon which they are to find gene-
" rally for the plaintiff or the defendant, and they ought to be
" told on whom the burden of proof rests; and indeed it is to be
" observed that very often the burden of proof will be shifted
" within the scope of a particular issue by presumptions of law
" which have to be explained to the Jury. But there is another
" way of conducting a trial at *Nisi Prius*, which is by asking
" certain definite questions of the Jury. If there is a conflict of
" evidence as to these questions, it is unnecessary, except for the
" purpose of making plain what the Judge is doing, to explain to
" the Jury about onus of proof, unless there are presumptions of
" law, such as, for instance, the presumption of consideration for a
" bill of exchange, or a presumption of consideration for a deed.
" And if the Jury is asked by the Judge a plain question, as, for
" instance, whether they believe or disbelieve the principal witness
" called for the plaintiff, it is unnecessary to explain to them about
" the onus of proof, because the only answer which they have to
" give is Yes or No, or else they cannot tell what to say. If the

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"Jury cannot make up their minds upon a question of that kind, it is for the Judge to say which party is entitled to the verdict. I do not forget that there are canons which are useful to a Judge in commenting upon evidence and rules for determining the weight of conflicting evidence; but they are not the same as onus of proof. Now in an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a Judge can see no reasonable or probable cause for instituting it. In one sense that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. The terms 'negative' and 'affirmative' are after all relative and not absolute. In dealing with a question of negligence that term may be considered either as negative or affirmative according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively. It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff have not gone the length of contending that in all those cases the onus shifts, and that the person within whose knowledge the truth peculiarly lies is bound to prove or disprove the matter in dispute. I think a proposition of that kind cannot be maintained, and the exceptions supposed to be found amongst cases relating to the game laws may be explained on special grounds."

On appeal to the House of Lords the direction of the Judge to the Jury was held to be right. Lord Bramwell said: "To maintain an action for a malicious prosecution, it must be shown that there was an absence of reasonable and probable cause and that there was malice or some indirect and illegitimate motive for the prosecution" *Abrath v. North Eastern Railway Company* (1).

The Subordinate Judge was in error in holding that it was sufficient for the plaintiff to prove absence of probable cause, for

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the essence of the wrong consists in putting the criminal law into motion without reasonable cause against an innocent person from malice or some indirect and illegitimate motive. The question for decision was not simply whether Mr. Macnab used proper care to inform himself of the facts, but also whether he honestly believed the case which he laid before the Magistrate. Again, it is not correct to say that the burden of proof lies only in part on the plaintiff, for, as already explained, the burden of proving both the propositions rests on him. Moreover the Subordinate Judge observes that the agents employed by Mr. Macnab included the plaintiff among the accused, not because he was considered to be guilty, but because he was reluctant to give information against Bhashiyacharlu and that Mr. Macnab was responsible for it. There is no distinct finding that Mr. Macnab was aware that his informants gave information from such motive, or that he was influenced by such motive in instituting the prosecution against the accused. Though there is a finding that Mr. Macnab did not use proper care to inform himself of the facts, there is no finding as to whether he honestly believed the case which he laid before the Magistrate. We shall therefore direct the Subordinate Judge to return a finding on that question after considering the evidence on record with reference to the foregoing observations. The finding will be returned within six weeks after the re-opening of the Court, and seven days after the posting of the finding in this Court will be allowed for filing objections.

[The finding recorded in compliance with the above order was to the effect that Mr. Macnab did honestly believe the case which he laid before the Magistrate.]

The second appeal having come on for final hearing their Lordships reversed the decrees of the Lower Courts and dismissed the suits with costs throughout.]

Barclay & Morgan Appellants' Attorneys.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Handley.

VEDAPURATTI (DEFENDANT No. 1), APPELLANT,

v.

VALLABHA (PLAINTIFF), RESPONDENT.*

Limitation—Adverse possession—Suit by a trustee of a devasom disaffirming the act of his predecessor.

The trustee of a Malabar devasom, who had succeeded to his office in June 1883, sued in 1887 to recover for the devasom possession of land which had been demised on kanom by his predecessor in February 1881, on the ground that the demise was invalid as against the devasom. The defendant had been in possession of the land for more than twelve years, falsely asserting the title of kanomdar with the permission of the plaintiff's predecessor in office:

Held, (1) the suit was not barred by limitation;

(2) the plaintiff was entitled to maintain the suit for the purpose of recovering for the trusts of the devasom property improperly alienated by his predecessor. *Suppammal v. The Collector of Tanjore* (I.L.R., 12 Mad., 387) distinguished.

SECOND APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 723 of 1888, confirming the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 11 of 1887.

Suit in 1887 by the *udamu* of a devasom to recover possession of certain land with mesne profits.

The plaintiff's case was that the land in question was the *jenm* property of the devasom, which was attached to his stanom; that he succeeded to the stanom on 24th June 1883; that in December 1884 he first came to know of a demise on kanom of the land in question by his predecessor in office to defendant No. 1 and another dated 25th February 1881; that the demise was invalid as against the devasom; and that he had demanded possession of the land, but it had been refused.

The case for defendant No. 1 was that the demise of February 1881 was valid, being a consolidation of various other kanoms under which she had been in possession for more than twelve years: limitation was also pleaded.

The District Munsif passed a decree for the plaintiff, which was confirmed on appeal by the District Judge.

Defendant No. 1 preferred this second appeal.

Subramanya Ayyar and *Sundara Ayyar* for appellant.

Sankaran Nayar for respondent.

JUDGMENT.—The contention first raised on behalf of the defendant (appellant) was that the suit, being a suit in ejectment, was barred by limitation, inasmuch as it was shown that for many years previously to the kanom of 1881, from the date of which only the plaintiff avers that the defendant was in possession, she was in possession asserting a kanom title to the same land.

The defendant's case was that the kanom of 1881 was given by the plaintiff's predecessor in the stanom by way of consolidation of previously existing kanoms, and it appears to have been found that for some years the defendant had been in possession by means of tenants to whom she had represented herself as kanomdar. Both Courts, however, find that there were no such prior kanoms and that the kanom of 1881 was therefore a mere fraud on the stanom. On this state of facts it is argued that the defendant is entitled to assert that her possession, based on an asserted, though groundless, title, was adverse to the plaintiff and his predecessor, and that the suit ought therefore to have been dismissed as barred by limitation, and we are referred to *Madhava v. Narayana*(1), to which also the District Judge refers. In our opinion that case is entirely distinguishable from the present. In that case there was an actual kanom granted by the plaintiff's father, which, however, was invalid against the plaintiff. It was held that the kanomdar's possession having remained unquestioned for more than twelve years was adverse, and that a suit for ejectment therefore would not lie. In the present case there was the mere assertion of a kanom which is found to have had no existence, and it does not appear that the defendant's possession as against the plaintiff's predecessor was referable to the alleged kanom. On the contrary, the finding is that the defendant, being a member of the kovilagam to which the stanis, with one exception, for a considerable time back have belonged, were allowed to occupy the land belonging to the stanom. Under these circumstances, the fact that in dealing with their tenants the defendants

(1) I.L.R., 9 Mad., 244.

* Second Appeal No. 1043 of 1889.

VEDAPURATTI made a pretence of holding kanoms cannot alter the character of their possession. We see nothing inconsistent in the findings, and, on the other hand, it is consistent with probability that the plaintiff's predecessor should, after allowing the defendants to occupy the lands, have endeavoured to secure them in their possession by a kanom.

In this view of the facts it becomes unnecessary to consider the applicability of section 10 of the Indian Limitation Act, for which Mr. Sankaran Nayar argued on the strength of the decision of this Court in *Mundakkel Govinda Paniker v. Zamorin of Calicut*(1).

A further contention raised on behalf of the appellant was that the plaintiff, being the trustee of a devasom, was bound by the act of his predecessor, and therefore could not maintain the suit, and reliance was placed on a case decided in this Court, *Suppammal v. The Collector of Tanjore*(2). According to this contention, while it was conceded that the suit, if brought to recover stanom property, would be maintainable, it was urged that the plaintiff, being a mere trustee, could have no other or greater right than his predecessor in the trust, and that, if any action was maintainable, it should be at the suit of a beneficiary and not of the present plaintiff. There can be no doubt that the holder of a stanom has a life-interest only in the property attached to it, and that any alienation by him of that property, if not made under justifying necessity, may be set aside at the suit of his successor, subject, of course, to the rules of limitation, see *Mana Vikraman v. Sundaran Pattar*(3).

In our opinion it is equally clear that the present suit is maintainable if the property sought to be recovered is property dedicated to religious purposes. Such property is, as a general rule, inalienable, and although, for some purposes, the manager or trustee for the time being represents the estate, it has never been doubted that his successor in office may recover for the trust property improperly alienated by him. He may insist on the restoration of the property to its intended uses. The judgment in *Mundakkel Govinda Paniker v. Zamorin of Calicut*(1) is sufficient authority for this proposition.

(1) S.A. No. 332 of 1881, unreported.

(2) I.L.R., 12 Mad., 387.

(3) I.L.R., 4 Mad., 148.

In our opinion the decision in *Suppammal v. The Collector of Tanjore*(1) does not trench upon this principle. In that case the plaintiff, widow of one Ponnusami, sought to recover certain property alleged to be dedicated to charitable purposes, representing herself to be the person entitled to maintain the charities. The property was in the hands of purchasers who had acquired it on sales in execution of decrees obtained against the late Ponnusami and his brother. All that was decided was that the plaintiff, as heir of Ponnusami, was bound by those sales and could not be permitted to say that her interest in the property had not passed. There was no question in that case of recovering the property for the charity, for the defendants were holding it subject to the charges imposed upon it by Ponnusami. It was the right of management and the incidental right of enjoying the surplus profits, which, by the grant, had been reserved to Ponnusami and his heirs, that the plaintiff sought to recover, and it was never suggested on the plaintiff's behalf that the property had, by virtue of the declaration of trust, become inalienable as a religious endowment in the hands of Ponnusami. In our opinion the decision has no bearing on a case like the present, in which it is assumed, for the purpose of the defendant's case, that the property forms part of a religious endowment, and is, as such, sought to be recovered by the new trustee or manager.

Whether the property is of that character, or whether it is simply property of the stanom, we think the plaintiff can maintain the suit, and we therefore dismiss this second appeal with costs.

(1) I.L.R., 12 Mad., 387.

PRIVY COUNCIL.

SRIMANTU RAJA YARLAGADDU MALLIKARJUNA

(DEFENDANT),

and

SRIMANTA RAJA YARLAGADDA DURGA (PLAINTIFF) AND
ANOTHER (Co-DEFENDANT).

[On appeal from the High Court at Madras.]

Impartibility of zamindari shown by evidence—Grant by sanad in 1802 of zamindari without change of rule of succession by primogeniture—Madras Regulation XXV of 1802.

The question whether an estate is impartible and descends by the law of primogeniture, or is subject to the ordinary Hindu law of inheritance, must be decided in each case according to the evidence given in it. The result of the evidence in this suit was to show that before, and in, the year 1802, the zamindar was in possession of the Devarakota zamindari, by right of primogeniture, as an impartible estate; and that he was so regarded by the Government.

On the passing of Madras Regulation XXV of 1802, and the issue to him of a sanad-i-milkiyat-i-istimrari, in accordance with it, he acquired a permanent property in the zamindari lands at a fixed assessment, but they remained heritable as before; the estate remained entire; and there was no evidence of any intention on the part of the Government to alter the nature of the tenure. What was said in the judgment in the *Hansapur* case(1) was applicable here. The estate continued to be impartible, and the rule of succession to it was not altered. It descended by the rule of primogeniture.

APPEAL from a decree (18th August 1885) of the High Court at Madras, reversing a decree (30th September 1882) of the District Judge of Kistna.

The parties to this appeal were the three sons of Raja Ankinidu Garu, the last Zamindar of Devarakota in the Kistna district, who died on the 6th April 1875. The appellant, his eldest son, Mallikarjuna, was the first and principal defendant in the suit, which was brought by his younger brother, Yarlagadda Durga Prasad, claiming that he and another brother, Venkataramalinga, who was joined as a defendant, were each entitled to a one-third share.

* Present: LORD MACNAUGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) *Baboo Beer Pertab Sahoe v. Maharajah Rajender Pertab Sahoe*, 12 M.I.A., 1.

And the question was whether the zamindari was partible or impartible, the lower Courts having differed on the point.

Devarakota was one of the zamindaries making up the district of Condapillee, one of the Northern Circars. The history of the latter is given in Grant's Political Survey, which forms one of the appendices to the fifth report of the Select Committee (1812) on the affairs of the East India Company. The Circars originally were part of the dominions of the Hindu Rajas in Southern India. Afterwards they were acquired by the Muhammadans of the dynasty founded by Sultan Kuli Kutub Shah in 1571, called the Kutubshahi. In 1687, when the last of this race was subdued by Aurangzeb, also named Alam Gir, the Northern Circars were taken by him. In 1724 the Nizam-ul-Mulk became the ruler of this district, nominally on account of the Delhi Emperor, but in reality as an independent ruler. His Amildar, Rustum Khan, administered the government of these districts for about seven years from 1732, breaking up the zamindari system which he found established, and bringing in another of his own. After his time the descendants of the former zamindars regained their proprietary rights.

In 1753 the French under Bussy obtained an assignment of the Northern Circars from the Nizam. They suspended the zamindars from their functions as representatives of the sovereign, but left them in the enjoyment of savarams and such other privileges as they possessed in connection with their zamindari estates. Their military duties were also enforced as before. In 1759 the conquest of Masulipatam by the English put an end to the French administration, and for a period of seven years, any authority which existed was exercised in the name of the Nizam, and especially by his Amildar, Hussein Ali Khan. Under his administration the zamindars appear to have resumed their former authority. This state of things was terminated in 1766, when the Nizam, by treaty with Lord Clive, confirmed the grant of these Circars to the East India Company, which had been made by the Mogul Emperor in the previous year. The British continued the zamindari system, which they found in existence, making settlements of the revenue with the zamindars, first from year to year, afterwards for longer periods, until at length the permanent settlement was introduced in 1802 under the Madras Regulation XXV of that year.

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In 1766 Clive who had procured a sanad from the Court of Delhi transferring in perpetuity to the Company the sovereignty of the Circars compelled the Nizam to confirm it by treaty. At first the Company was not in a position to undertake the direct collection of the revenue; and a farm of the Circar comprising the Devarakota lands, was granted to Hussein Ali Khan, under the name of the Mustaphanagar Circar. The commercial factory established by the East India Company at Masulipatam was replaced by a chief in Council, by whom the administration was directed until 1794, when Collectors of Revenue were appointed.

The history of the Devarakota Zamindari is given as follows by Mr. Grant: "Devarakota 15 miles south of Masulipatam on the north bank of the Kistna, adjoining to Divi on the West, fertile in rice and joary and well managed, Parganna zamindari of Yarlagadda Kodandaram of the Kommawar caste; the family first settled here as combies or husbandmen, in the year 1580, are supposed to have got their first sanads for desmukhi jurisdiction from Abdullah Kuttub Shah in 1640, though not constantly confirmed in the possession of it, by future rulers. In 1726 one of the family obtained the zamindari of Guntur and Auchilminar, but in 1732, being involved in the general proscription of Rustum Khan, lost all territorial jurisdiction, rights and privileges. In the confusion of future revolutions, have by some means or other regained possession and were numbered in the convention of 1766, paid formerly Rs. 2,19,455, are supposed actually to collect pagodas 70,000 exclusive of savarams, &c., but by the Dowle bandobust only 60,000.

"At that time (about 1761) Hussein Ali Khan acted in the capacity of Amildar in the Circars. This man had in vain instigated the English Government to assert its rights; at the same time he found his authority curtailed in the exercise of his office by the protection given to the zamindars. Among numberless instances of this kind one Kodandaram, of Devarakota, a small but compact, fruitful and highly cultivated parganna, lying 15 miles south of Masulipatam on the banks of the Kistna, had been invariably assessed in the books of the Circar of Condapillee for a revenue of rupees two lacs, nineteen thousand four hundred and fifty-seven and six annas (2,19,457-6-0); the gross mofussil receipts exceeded this amount in the sum of sixty thousand rupees which defrayed the expense

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"of internal management, such as sibundy, with the rusums and savarams of the zamindar and other lesser officers of Government. Kodandaram, a sensible, intelligent man, and at this day, without exception, the most skilful farmer in any of the provinces according to popular estimation, availed himself of the prevailing distraction on re-instatement in the zamindari management from which he had been suspended by the French, to obtain an annual diminution of his usual rent on the plea of predatory and other losses sustained by the inhabitants of the district, in the period of his suspension."

A description of the position of Devarakota was given by Mr. Roberts, Collector of Masulipatam, in a letter to the Revenue Board, dated 30th October 1824. In 1860 the Madras Government recorded the following:

"Devarakota was not a newly-created zamindari, but one of the most ancient in the Masulipatam district, having been held by the family under Padshahi grants for upwards of a century before the permanent settlement." "Whatever may have been the origin or position of the zamindars, they were most probably the men of chief local influence in their districts when they were selected for the service of Government; and in many instances, no doubt among which it is likely the Devarakota family may safely be included, they really possessed old feudal rights, of origin long anterior to that of the Mussulman Government whom they served."

The order of succession of the Devarakota Zamindars was given in a pedigree table, furnished in 1792 by Venkatramanna, then in possession, to the Chief in Council at Masulipatam, in obedience to orders received from the Board of Revenue. Ankinidu was by this shown to be ninth in descent from Gurva Naidu, the first holder of the zamindari, who possessed it from 1576 to 1607. Kodandaram (1746 to 1791) appeared in the fifth pusht, or generation, from the founder. With one intermediate holder, Naganna, who held for a short time, the succeeding Zamindar Yarlagadda Ankinidu was the one who received the sanad in 1802. Two successive adoptions followed, and in 1835 Ankinidu, the father of the now contending parties, held the zamindari, and continued down to 1875. The sanad which was dated 8th December 1802, and was in the same terms as other sanads issued at that time in conformity with Madras Regulation

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XXV of 1802, was granted to Yarlagadda Ankinidu. Upon this the plaintiff, filed 18th April 1880, relied, it having been granted to him, and to his heirs, successors and assigns, without any condition of descent, impartibility, or by primogeniture. And the plaintiff alleged that for some time under British rule, his ancestors "used to rent, temporarily, Devarakota and other estates, "on frequently varying terms and for varying amount of rent," and were frequently divested of those rights.

The appellant, by his written statement, averred that for at least 600 years his ancestors had been in uninterrupted enjoyment of the Devarakota Zamindari, and that it was impartible, and had always descended by the rule of primogeniture, and been enjoyed by only one member of the family; the other male members of it being entitled to nothing but maintenance.

Of the issues only one was now material, viz., whether the zamindari was impartible and descended to the eldest son, or was partible among all the sons.

The District Judge was of opinion that regard being had to the judgments of the Committee in *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*, the *Hansapur case*(1), in *Rajah Venkata Narasinha Appa Row v. The Court of Wards*, the *Nuzvid case*(2), and in *Mutta Vaduganatha Tevar v. Dorasinga Tevar*, the *Shivagunga case*(3), the effect of the sanad of 1802 was not to alter the previous law of succession, and that the zamindari, if impartible before that grant, continued to be so after it.

He added that the only effectual mode of dealing with the question of impartibility was to see whether, according to the custom of the family, impartibility had come to be recognized as its usual incident, and whether there was any well-authenticated instance of a partition of it amongst more than one member. Upon this he said: "In reviewing the history of the zamindari "it will be observed that on three occasions the Government "recognized the custom of descent by primogeniture. The first "was on the death of Kodandaram in 1791, when his second son, "Nageswara Naidu, having attempted to usurp the zamindari, the "Government officers intervened and bestowed it on his elder "brother, Venkatramanna, alone, although he had at that time "two brothers living. Secondly, in 1792, Nageswara Naidu

(1) 12 M.I.A., 1. (2) L.R., 7 I.A., 38. (3) L.R., 8 I.A., 99.

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"succeeded alone on the death of his elder brother, though his "other brother, Venkatadri, was then alive. Thirdly, in 1798, "Ankinidu was alone appointed in place of his father, who had "been suspended, although he had a brother named Gangadhara "Naidu, and an uncle, Venkatadri, living at the time. Ankinidu, "after his accession to the zamindari, had to pay a certain "amount for maintenance to his brother and uncle, and this fact, "which is fully proved by documentary evidence, is strong "evidence of the prevalence of such a rule of descent amongst the "members of the family.

"There is certainly no well-authenticated instance of a par- "tition amongst the members of the family, or of the estate "having descended to more than one person at a time."

The Judge accordingly dismissed the suit, except as to a small parcel of inam lands, and mesne profits in respect thereof, and a sum of Rs. 1,806-15-0, which he considered the plaintiff entitled to in respect of certain personal property.

The plaintiff appealed to the High Court; and the present appellant preferred a cross appeal as to the personal property and certain debts due by his father's estate, which he alleged he had discharged, and was entitled to credit for in the accounts.

The High Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.,) held the zamindari partible. They went through the documentary evidence and traced the connection of this family from the earliest time with Devarakota considering that time to be about A.D. 1640, when desmukh jurisdiction was alleged to have been conferred on the family, under a sanad issued by Abdul Kutub Shah, who was at that time, and before its conquest in 1687 by the Emperor Aurangzeb, the ruler of the district. That sanad was not produced.

The Judges then traced the history of this family, so far as it was possible, under the rule of Aurangzeb and subsequent conquerors, and found them, with interruptions, styled always desmukhs, or, by similar appellations, "all titles of the same office," down to 1732, when they were deprived of "all territorial jurisdiction, rights and privileges," by Rustum Khan, acting on behalf of the First Nizam, who had "proclaimed his independence of the "Court of Delhi." Then followed the cession, in 1753, of the country to the French East India Company, who were ousted in

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1765-66 by the English East India Company, who obtained, in 1766, a sanad for the district from the Court at Delhi.

The High Court was of opinion, in effect, that when this family is referred to in the documents produced of a date prior to the establishment of British rule it is as revenue officers, or renters of a few villages, and that for some years they "had ceased to have any official connection with the parganna," and that "prior to the establishment of British rule we have no evidence of the existence of any Zamindari of Devarakota." That in 1765 "the fortunes of the family were restored and augmented" by Kodandaram, who, in a letter of Mr. Pybus, "Chief at Masulipatam," dated the 25th June, 1763, to the Governor of Madras in Council, was for the first time styled "Zamindar of Sallapalli" (which seems to have been the name of the fort or principal place of Devarakota); and afterwards, in a letter, dated the 4th April 1765, was styled Zamindar of Devarakota. That in 1769 a cowle or engagement was taken from Kodanda, described in it as Zamindar of Devarakota, for one year, and was followed by other similar engagements for short periods up to 1778.

In reference to the rule of primogeniture the Judges said:

"If the rule attached to no estate except a zamindari and could not attach to an estate which had in comparatively recent times been erected into a zamindari, we should have little difficulty in disposing of the claim; for there is no trace of the existence of any estate known as the Zamindari of Devarakota prior to the exclusion of the French from the Northern Circars. Nor have we evidence that before that period any member of the Yarlagadda family laid claim to or was addressed as Zamindar of Devarakota, or Challapalli, where the family resided.

"The evidence taken in this suit confirms the information collected by Mr. Grant in his Political Survey of the Northern Circars, and again by Mr. Roberts in 1824, that about the year 1640 the Yarlagadda family obtained the office and jurisdiction of desmukh in the parganna.

"A full account of the office of desmukh and its origin is to be found in the Political Survey II, Fifth Report, Madras Edition, 155.

"From about 1640 until the expedition of Rustum Khan in 1732 we find members of the family addressed severally or jointly as desmukhs and with some interruptions they enjoyed

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"the office. Similarly we find members of Yaddanapudi family addressed sometimes severally and sometimes jointly as despan-dyas or stalakarnams. The Yarlagadda family as desmukhs were collectors of revenue. They themselves rented at some times a few villages, at others the whole parganna. So far as there is evidence before us they did not always rent the same villages and on one occasion we find the village from which they took their name rented by a stranger. They had doubtless private property in the parganna, but no evidence has been given to show of what it consisted prior to 1732. There were savaram lands and rusums attached to the office, but whether these were held jointly or severally prior to the time of Kodandaram we have no sufficient evidence to show."

Another extract from the judgment is as follows:

"In 1732 the family was deprived of its desmukh jurisdiction, although it may have still held property out of which it may have made inam grants. We may observe that such grants were at times made by renters or even by claimants to revenue officers who had no property in the soil. However this may be, we find no evidence of a recognition of their enjoyment of territorial rights over the parganna until after 1759.

"When Hussein Ali endeavoured to collect revenue on behalf of Nizam Ali, he issued sanads to Kodandaram who was then in possession of the fort of Challapalli and had troops in his pay. What may have been the nature of these sanads we know not. We do know that he rented the parganna, for, payments to which he was liable were assigned for maintenance of the Company's troops which were assisting Hussein Ali to maintain order. Kodandaram appears to have again assumed the office of desmukh and possession of rusums and savarams attached to it.

"These savarams and rusums were resumed in 1789, the sanads he had produced in support of his title to those being declared invalid. Nevertheless the title of desmukh continued to be borne by Kodandaram and his successors up to the date of the permanent settlement.

"That he was addressed as zamindar as well as desmukh in the earlier cowles issued by the British and that the payments he was bound to make were styled tribute, may be accounted for by the loose way in which the term was then employed in the case of mere renters who had some local importance. We find then

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"that prior to the issue of these cowles there is no proof that a zamindari existed; nor is there any sufficient proof that by a custom of the family the rule of *primogeniture* attached to any estate possessed by the family and invested it with the incident of impartibility. Kodandaram, under the style of zamindar, held the parganna as rented on cowles for short terms. His eldest son was accepted as renter on his undertaking to fulfil the engagements made by his father, the terms of whose cowle had not expired on his death. The family had so long held the position of rent collectors or renters that they no doubt considered they had a claim to be recognized as zamindars though it was a claim which was dependent on the pleasure of the Government."

And the High Court, after examining into what occurred during Kodanda's life-time, and at his death in 1791, when the Government appointed as his successor, in the first instance, his second son Naganna, and then, on Naganna proving unfit, resumed the estate in November 1796, and kept it under their own management until April 1798, when the Government appointed Ankanna, son of Naganna, and great-grandfather of these parties, in his place, with whom the perpetual settlement was made by the grant of a sanad in 1802, expressed their conclusion thus:

"It appears to us that whatever estate the family had in the desmukhi emoluments came to an end in 1789, when the Government indicated, as its reason for resuming those emoluments, that the services attached to the office had long been discontinued and were no longer required; that Kodanda obtained the zamindari in virtue of the possession he held as renter and that this right which was regarded terminable at the pleasure of the Government was eventually confirmed to his grandson in perpetuity; that the changes of possession which followed Kodandaram's death until the first succession after the permanent settlement were not regarded as successions governed by any law or custom of inheritance, but as acts of the administration which the other members of the family could not question, or at any rate that they cannot be regarded as instances of a family custom, to which the other members submitted with a consciousness that they were bound to do so.

"In the view we take, the estate cannot be said to be the self-acquisition of Ankinidu, though it may have been so regarded

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"by the members of the family who were alive in 1832, and might have contested the brief possession of the widow.

"We must then hold that the first respondent failed to prove the existence of a usage over-riding the ordinary law, and that the zamindari is partible."

The decree reversed so much of that of the First Court as disallowed the plaintiff's claim to a share in 67 villages of which the zamindari consisted, and the kamatam lands and certain houses and buildings lying within the ambit of the zamindari; and directed that partition into three equal shares should be made; and that the plaintiff and second defendant should each recover from the present appellant a one-third share with mesne profits; and that as to the devasthanam, or temples, and the property appertaining thereto, the parties should be entitled to the management in yearly turns; and that a receiver should be appointed to collect the outstandings, which the plaintiff had agreed to take, as amounting to Rs. 31,609-10-1.

The first defendant, Mallikarjuna, preferred this appeal, in which the plaintiff and the second defendant were respondents.

Mr. J. D. Mayne, for the appellant, argued that the High Court should have found upon the evidence that the zamindari was ancient, impartible and passed by primogeniture. He referred to Grant's Political Survey (1812), Appendix to Fifth Report, pp. 18 and 155; Gleig's Life of Sir T. Munro, vol. 3, 1831, p. 425; Mill's British India, vol. 7 (Wilson, H.H.), pp. 437, 442; Fifth Report, p. 203, Shore's opinion; Collector of Masulipatam to Board of Revenue, 30th October 1824; Manual of the Kistna District by Nelson, 1883, p. 325; Fifth Report, p. 22, as showing the state of things at an early date in the Circars.

Although early sanads were absent, grants from 1738 onwards were in evidence; and Kodandaram, who was shown to have been zamindar at the commencement of British rule, was recognized as such; and Devarakota was his zamindari. With him a series of revenue settlements between 1769 and 1783 were made, and he was referred to in documentary evidence as Zamindar of Devarakota, or Sallipalli, the central fort, as well as desmukh of the Muslaphanagar Circar. The cowles were the same in form as those granted to the Zamindar of Nuzvid, to the Rajas of Vizianagram, and others, whose estates were well known to descend by primogeniture; the language of these cowles differing from those

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granted to mere renters. As with the desmukh, so with the zamindar, the revenue was settled from time to time, that involving no change of the tenure; and down to Kodanda's death in 1791, and during the disputes as to the succession after his death, there was no suggestion that the zamindari could be held by more than one person at a time. It was assumed that primogeniture prevailed. Also, in 1794, when the Government changed the Provincial Chief and Council for Collectors, a proclamation was issued to the zamindars, including the one of Devarakota, stating that their rights and privileges were to be preserved. Previously, in 1791 when Kodanda died, the Chief of Masulipatam had summoned his sons, Venkatramanna and Naganna, to meet him that the orders of Government might be taken regarding the succession. It was upon this occasion that the pedigree table was produced, and in the subsequent dispute as to the succession, seniority prevailed, the eldest son becoming zamindar. This pedigree was most important. The weight given to such evidence was apparent in *Narayany Lutchmee Dacamah v. Vengama Naidoo*(1), and in *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora*(2).

The sanad was granted to Ankinidu in 1802 in the same form, that sanads were granted to other zamindars, some of whom held impartible estates, for instance, the Ramnad Zamindar; *Collector of Madura v. Moottoo Ramalinga Sathupathy*(3). The present appellant's position was exactly parallel to that of the plaintiff in the last Shivagunga case, *Mutta Vaduganadha Tevar v. Dorasinga Tevar*(4). One of the principal precedents as to the result of the issue of a sanad in 1802 under the regulation was *Collector of Trichinopoly v. Lekkamani*(5) which maintained the judgment of the High Court delivered by Scotland, C.J., reported in *Lekkamani v. Srimat Ranga Kristna Muttu Vira Puchaya Naikar*(6). Neither the sanad, nor the Madras Regulation XXV of 1802 gave new rights to the owners of lands, except in respect of the permanency of the assessment, nor did either of them take any rights away, merely vesting in all zamindars the right to have the amount of revenue payable permanently fixed. There was no

(1) 9 M.I.A., 66, at p. 88.

(3) 12 M.I.A., 397.

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

(2) 13 M.I.A., 333, at p. 339.

(4) L.R., 8 I.A., 99; I.L.R., 3 Mad., 290.

(6) 6 Mad. H.C. Rep., 208.

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evidence here that when the Government was granting the sanad of 1802 there was any intention on its part to alter the rule of succession or the impartibility of the zamindari. The Regulation which in Bengal might be said to have indicated such an intention was not applied to Madras where Regulation XX of 1802 could not bear any such construction. The *Shivagunga Case*(1), which this closely resembled, established that where an estate was impartible previously to 1802 it was not altered by the grant of a sanad. The pedigree table showed single ownership. The tenure, originating in an office which must have been impartible, the holder having exercised civil, criminal, and revenue powers, was also impartible. The whole nature of such estates was properly described by Sir T. Munro as that of "petty principalities" in the Northern Circars.

Mr. T. H. Cowie, Q.C., and Mr. R. V. Doyme, for the respondents, supported the judgment of the High Court. It had not been shown that, at the end of the last century, and at the time of the passing of Madras Regulation XXV of 1802, there was an impartible zamindari in the possession of the plaintiff's ancestors. A distinction prevailed between an estate, hereditary and impartible, in proprietary possession, and an hereditary office. It was to the latter that the pedigree related; and it was not disputed that neither under the Mahomedan rule, nor under the French, nor after the cession of the Diwani to the British, was there any alteration in the position of this family as regards the office of desmukh. But what the appellant had to establish was the impartibility of the Devarakota Zamindari, the presumption being that it was partible. Kodandaram, it was true, obtained cowles for short periods, by which he became responsible for varying amounts of the revenue. But these were no more than temporary settlements for so much revenue to be received from such and such person. There was nothing in them to show an hereditary right in any one member of this family to Devarakota as impartible estate. No such pretension was put forward in 1802, nor was any ancient sanad produced. The High Court had, therefore, rightly inferred that when the family was referred to in documents prior to British rule, it was as revenue Collectors, or assignees of the revenue of a few villages. Impartibility must

(1) L.R., 8 I.A., 99; I.L.R., 3 Mad., 290.

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rest upon tenure, not upon settlement. In the years 1738, 1753, 1760 and 1788 members of the family were desmukhs, but there was no evidence, documentary or other, to show that they had a zamindari title to Devarakota. The title to be zamindari must, then, rest upon the sanad of 1802—as it would according to the principle on which the *Hansapur Case*(1) was decided—the title from those who had the power to grant, or to withhold; and a sanad was granted in accordance with the Regulation XXV of 1802; but in the sanad there was no reference to impartibility, or to any rule of descent by primogeniture. The grant was of the zamindari to Ankinidu, his heirs, successors, and assigns. And this must be according to the ordinary law. Even if the first Court had been right in holding that the office of desmukh was hereditary, and held by one person only, and that person the eldest son, the appellant's contention that the zamindari was to descend, subject to the like conditions, was not maintainable. Such a custom would not govern the descent of the zamindari after December 1802, and certainly could not be assumed to have done so; it being a point on which evidence was required. Since the grant to Ankinidu, in 1802, down to the death of his grandson, Ankinidu, father of these parties, on the 6th April 1875, no previous descent occurred on which the present question could have arisen. Ankinidu, the first grantee, died in 1819, without a son of his body; and was succeeded by an adopted son, Durga Prasada, who died in 1834; and was succeeded at first by his widow, and then by a son, whom she adopted under a power to her from her husband. This son was Ankinidu, the father of these parties. On his death, in April 1875, the disputes arose leading to the present litigation.

In all the decided cases the question of impartibility was held dependent on continuity from an estate impartible before the Regulation and sanads of 1802. The Regulation did not affect to alter the character of the estate. For these reasons the plaintiff's evidence had failed to establish his claim.

Mr. J. D. Mayne replied, relying on the evidence as to the character of the zamindari at the time when the istimrar sanad was granted in 1802, and the absence of any intention shown on the part of the Government to alter its impartible character at the

(1) 12 M.I.A., 1.

time of such grant; the Regulations, also, not authorizing any alteration.

The following cases were referred to on both sides during the argument:

Rawut Urjun Sing v. Rawut Ghunsiam Sing(1), *Baboo Gunesh Dutt Singh v. Maharaja Moheshur Singh*(2), *Naraguntty Lutchmee-davamah v. Vengama Naidoo*(3), *Katama Natchiar v. The Rajah of Shivagunga*(4), *Collector of Madura v. Moottoo Ramalinga Sathupathy*(5), *Baboo Beer Pertab Saher v. Maharajah Rajender Pertab Saher*(6), *Stree Rajah Yunumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora*(7), *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*(8), *Collector of Trichinopoly v. Lekkamani*(9), *Chowdhry Chintamun Singh v. Mussamut Noulukho Konwari*(10), *Rajah Venkata Narasimha Appa Row v. The Court of Wards*(11), *Mutta Vaduganadha Tevar v. Dorasinga Tevar*(12) *Rani Sartaj Kuari v. Rani Deoraj Kuari*(13).

Afterwards, on 1st May 1890, their Lordships' judgment was delivered by

Sir R. COUCH.—The question in this appeal is whether a large estate called Devarakota, in the Northern Circars in the Presidency of Madras, is impartible, and descends to the eldest son of the last owner. The parties to the suit are the three sons of Ankinidu, who died possessed of the estate on the 6th April 1875. The appellant is the eldest son, and shortly after his father's death he took possession of the estate, and had remained in possession of it till the bringing of the suit. The respondent, Durga Prasada, is the second son, and on the 16th April 1880 he brought the suit in the District Court of Kistna against his brothers, praying that he and the two defendants might be declared each entitled to a one-third share in the property. Issues were framed, of which only the second is now material. That is, whether the estate called in the issues the Zamindari of Devarakota is an impartible zamindari, and descendible to the eldest as against other sons, or partible. The District Judge held that the estate

(1) 5 M.I.A., 169.

(3) 9 M.I.A., 66.

(5) 12 M.I.A., 397.

(7) 13 M.I.A., 333.

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

(11) L.R., 7 I.A., 38.

(13) L.R., 15 I.A., 51; I.L.R., 10 All., 272.

(2) 6 M.I.A., 164.

(4) 9 M.I.A., 543.

(6) 12 M.I.A., 1.

(8) 14 M.I.A., 570.

(10) L.R., 2 I.A., 263; I.L.R., 1 Cal., 153.

(12) L.R., 8 I.A., 99; I.L.R., 3 Mad., 290.

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was impartible; and disallowed that part of the plaintiff's claim. In respect of other matters, which need not now be noticed, his claim was allowed. The High Court of Madras, on appeal, held that the estate was partible, and reversed that part of the decree.

In Mr. Grant's Political Survey of the Northern Circars, submitted to the Governor-General and Council at Calcutta on the 20th December 1784, and inserted in the Appendix to the Fifth Report from the Select Committee of the House of Commons on the affairs of the East India Company, there is a notice of the family in which it is stated that they first settled at Devarakota as combies or husbandmen in 1580, and were supposed to have got their first sanads for desmukhi jurisdiction from Abdullah Kootub Shah in 1640, though not constantly confirmed in the possession of it by future rulers. In 1732, being involved in the general proscription of Rustum Khan, they lost all territorial jurisdiction, rights and privileges, but in the confusion of subsequent revolutions they regained possession, and were numbered in the Convention of 1766, by which the Northern Circars were transferred to the East India Company. Devarakota is stated by Mr. Grant to be in the Circar of Condapillee, and appears from the rental concluded with the ryots to have been one of the largest estates there.

Their Lordships think that, in considering the evidence upon the question of impartibility, it is not necessary to go further back than 1766. At that time one Kodandaram was in possession of the estate. He died on the 20th November 1791, leaving three sons, Venkatramanna, Naganna, and Venkatadri. Venkatramanna succeeded to the whole estate, and died after a few months in 1792. On his death the zamindari was claimed by Naganna, and a claim was set up on behalf of his son Ankanna, then a boy of 13 or 14 years old, on the ground of his having been adopted by Venkatramanna. The adoption was denied by Naganna. The Government, which appears at that time to have been the only authority which had power to decide the question, there being no Civil Court competent to do so, resolved that the right of succession was in Naganna, and ordered him to be put in possession. In November 1796 Naganna was dispossessed of the estate by the Collector of Masulipatam, who, in his letter to the Board of Revenue assigning his reasons for doing so, said, "It appears that the zamindar has failed in the payment of the customary tribute due by him to

"the Company on account of that zamindari." And in a letter from the Board of Revenue to the Governor in Council, dated the 22nd March 1798, they say, "The conduct of Nageswaram Naidu (another name for Naganna), although it ought to disqualify him from being longer entrusted with the care of a zamindari, certainly has not been such as to set aside for ever the rights of his son, who, it appears by the report of the Chief and Council of the 12th March 1792, contested the succession with his father, under the plea of having been adopted by his uncle Venkataramayya, the late Kodandaram's eldest son, who died without issue soon after his father. We, therefore, in consideration of this right, not as giving a preference to zamindari management, concur in Mr. Oakes' (the Collector) recommendation in his favour."

The Governor in Council, in a letter to the Board of Revenue of the 4th April 1798, said as to this recommendation, "We owe it to the rights of the young Zamindar Ankanna, as well as to considerations which arise from the late Collector's administration, to concur in the recommendation of Mr. Oakes and your Board for the restoration of this zamindari to Ankanna." The words "rights of the young zamindar" are opposed to the view of the High Court that the changes of possession were simply acts of administration. At this time Ankanna had a younger brother named Gungadhara, and there is evidence of allowances for maintenance being made to him and to Venkatadri, the youngest son of Kodandaram. In a letter from the Secretary of the Board of Revenue to the Collector in February 1800 the Board approves of his making an allowance out of the revenue of Devarakota to Ankanna (there called Ankinidu) of 100 pagodas per month during the period his zamindari is under assumption, and directs him to continue the allowances granted to Nagesha Naidoo (Naganna) and the uncle of Ankanna (Venkatadri).

On the 28th February 1801 the Collector wrote to Ankanna by the name of Ankinidu as follows: "It is surprising that you have written to say that you will pay 10 pagodas per mensem to your younger brother, Gungadhara Naidu, though the responsibility of maintaining him rests to a great extent with you. I think that at least 15 pagodas per mensem should be given him. If you do not do so how will you acquire our good will?"

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It is apparent from this that Ankanna had before this time been restored to the zamindari, though it does not appear in the proceedings when this took place.

Their Lordships think that the result of the evidence in the suit is that at this time Ankanna was in possession of the estate by right of primogeniture as an impartible estate, and was so regarded by the Government.

Regulation XXV of 1802 (Madras) was passed on the 13th July. It recites that the public assessment of the land revenue had never been fixed, and that the Government had resolved to grant to zamindars and other landholders, their heirs and successors, a permanent property in their land in all time to come, and to fix for ever a moderate assessment of public revenue on such land, the amount of which should never be liable to be increased under any circumstances. On the 8th December 1802 an *istimrar sanad* was granted by Lord Clive, then Governor in Council of Fort St. George, to Ankinidu, otherwise Ankanna, fixing the assessment of the zamindari at the annual sum of 29,340 star pagodas, and declaring it to be permanent. Ankinidu thus acquired a permanent property in the land at a fixed assessment, but there was no grant of the land, and the rule of succession to it was not altered. The estate remained entire, and there is no evidence of any intention of the Government to alter the nature of the tenure. What is said by this Board in the judgment in the *Hansapur Case*(1) is applicable to the present case. The estate continued to be impartible, and the rule of succession to it was not altered.

There is evidence of a later date which is some proof in support of this. Ankanna adopted Durga Prasada, the son of Gungadhara, and after his death in 1833 his widow adopted Ankinidu, the father of the appellant and respondents. Venkatadri left a son Karkotaka, and in 1866 his mother and guardian brought a suit on his behalf against Ankinidu for a monthly maintenance of Rs. 161-11-2, which had been paid to her late husband Venkatadri from the estate of Devarakota Zamindari, and for arrears from the 1st May 1856 to the 1st August 1866. The defendant pleaded that the maintenance was for Venkatadri's life only, and did not descend to his son. In the judgment of the

(1) 12 M.I.A., 35.

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Principal Sadr Amin it is said, "The parties have agreed that the 'zamindari descended to the eldest son,' and the decision 'that the defendant be held liable to the payment of Rs. 50 per mensem to the plaintiff's minor son during the period of his minority' is founded upon the assumption that Venkatadri was by usage excluded from inheritance. No objection appears to have been made to this judgment being admitted in evidence, if it could have been made successfully.

The question whether an estate is subject to the ordinary Hindu law of succession, or descends according to the rule of primogeniture, must be decided in each case according to the evidence given in it. In this it appears that the claim of the plaintiff under the ordinary Hindu law has been answered, and that the decree of the District Court disallowing the claim ought not to have been reversed. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the High Court, and to affirm the decree of the District Court, with the addition of the costs of the appeal to the High Court.

The respondents will pay the costs of this appeal.

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

Solicitors for the respondents—Messrs. Lawford, Waterhouse, and Lawford.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

QUEEN-EMPRESS

v.

KATHAPERUMAL.*

*Criminal Procedure Code, s. 188—Offence committed in foreign territory—
Trial without certificate of the Political Agent.*

A District Magistrate instituted criminal proceedings in British India against a native Indian subject of the Queen, in respect of offences under ss. 419, 467 and 114 of the Indian Penal Code, said to have been committed by him in French territory, without a certificate under s. 188 of Criminal Procedure Code. The accused was committed to the Sessions Court:

* Criminal Revision Case No. 422 of 1889.

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Held, although the District Magistrate was the Political Agent who might have certified under Criminal Procedure Code, s. 188, that the proceedings were void for want of the certificate, and the commitment should be quashed.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure, by J. A. Davies, Sessions Judge of Tanjore.

The facts of the case were stated by the Sessions Judge as follows :

" A preliminary objection is taken by the prisoner's pleader to the commitment to the effect that the offence having been committed in Karikal, French territory, no inquiry could be made into it without a certificate of the Political Agent for Karikal that the charge is in his opinion one that ought to be inquired into in British India, as provided in section 188 of the Code of Criminal Procedure.

" The following being undisputed facts in the case, (1) that the prisoner is a native Indian subject of Her Majesty, (2) that the offence of which he is accused, knowingly abetting the payment of a money order for Rs. 99 to a wrong person, was committed beyond the limits of British India, that is, in the French settlement of Karikal, (3) that there is, a Political Agent for that territory, namely, Mr. Edward Gibson of the Madras Civil Service (*vide* page 218 of the Madras Quarterly Civil List, corrected up to 1st July 1889), and (4) that the certificate required under section 188, Code of Criminal Procedure, has not been issued by him—it seems to me the objection raised is fatal to the commitment, and I must, therefore, refer the case to the High Court, under section 215 of the Code of Criminal Procedure, for the quashing of the commitment on the grounds stated above.

" It happens that Mr. Edward Gibson, the Political Agent for Karikal, is also the District Magistrate of Tanjore, and, in this latter capacity, it appears that he initiated the case and transferred it from his own file to that of the Sub-divisional Magistrate of Negapatam; but these acts of his, as District Magistrate, cannot be taken as having been done in his other capacity as Political Agent. Further, it is contended by the public prosecutor that if the required certificate were now given by Mr. Gibson in his capacity as Political Agent, it would fulfil the requirements of the law, but I hold that the certificate was

" a preliminary requisite to the institution of proceedings, which cannot now be validated by an *ex post facto* authorization. However, this is a point I submit and leave for the High Court's decision.

" If the offences charged were offences falling under the Post Office Act (XIV of 1886), then under the terms of section 59 of that Act, the prisoner could have been tried here without a certificate from the Political Agent, but the particular offences on which the prisoner is committed to this Court are not offences under that Act, but only under the Penal Code.

" Pending the orders of the High Court, the prisoner will be released on bail, on his own recognizance for Rs. 200, with two sureties for Rs. 200 each."

The Government Pleader and Public Prosecutor (Mr. Powell) for the Crown.

The accused was not represented.

JUDGMENT.—The accused in this case is a native Indian subject of Her Majesty, and the offence with which he is charged was committed in the French settlement of Karikal. The District Magistrate of Tanjore initiated criminal proceedings against him as regards the offence, and transferred the case from his own file to that of the Sub-divisional Magistrate of Negapatam. The District Magistrate, Mr. Edward Gibson, is also the Political Agent for Karikal; but he omitted to certify in his capacity as such, that in his opinion, the charge ought to be inquired into in British India. The inquiry held by the Sub-divisional Magistrate was therefore not in conformity to the provisions of section 188 of the Code of Criminal Procedure, and on this ground, the Sessions Judge objected to accept the commitment when the Magistrate committed the accused for trial. The Public Prosecutor offered to produce a certificate to remedy the defect in the commitment; but the Judge, considering that it could not be validated by *ex post facto* authorization, has referred it to this Court for orders.

Having regard to the language of the proviso to section 188, we agree with the Sessions Judge that the certificate mentioned therein is a preliminary requisite as well to an inquiry before the Magistrate as to the trial before him. The offence being committed in foreign territory, it is not capable of being inquired into under the Code of Criminal Procedure which is applicable only to British India, until it is certified by the Political Agent to be one

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which ought to be inquired into in British India. The inquiry held by the Sub-divisional Magistrate was *ultra vires*, and the commitment wholly void. Section 188 corresponds to section 9 of Act XXI of 1879, and before it was introduced into the Code of Criminal Procedure, this Court quashed a trial held by the Sessions Judge of Mangalore without the prescribed certificate in *Bapu Daldi v. The Queen*(1). The defect cannot, in our judgment, be cured under section 532 of the Code of Criminal Procedure, for, it is not a case of mere irregular commitment under the Code of Criminal Procedure, but it is a case which cannot be dealt with at all under the Code until a certificate has been produced. If that section applied, it would not be necessary to produce a certificate even at the trial, and such a construction would tend to take away from the accused the protection to which he is entitled under section 188. Though the District Magistrate happens, by accident, also to be Political Agent in this case, that circumstance cannot alter the construction which we have to place on the last-mentioned section. The commitment is illegal, and must be quashed as such. It will be open to the District Magistrate to institute criminal proceedings *de novo*, in accordance with law.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

QUEEN-EMPRESS

v.

SAMI AND ANOTHER.*

Evidence—Trial for robbery and murder—Offences constituting parts of the same transaction—Evidence of robbery considered in trial for murder.

Persons convicted of robbery by a Sessions Judge and a Jury, and of murder by the Sessions Judge with Assessors appealed to the High Court against the conviction on the charge of murder:

Held, that in coming to a conclusion as to whether the evidence justified the conviction appealed against, the verdict of the Jury should not be taken into consideration.

But on its appearing that the two offences constituted parts of the same transaction:

(1) I.L.R., 5 Mad., 23.

* Referred Trial No. 58 of 1889.

Held, that recent and unexplained possession of the stolen property which would be presumptive evidence against the prisoners on the charge of robbery was similarly evidence against them on the charge of murder.

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APPEAL against the conviction of the appellants on the charge of murder by W. Dumergue, Sessions Judge of Salem.

Mr. Gantz for appellant No. 1.

Mahadeva Ayyar for appellant No. 2.

The Government Pleader and Public Prosecutor (Mr. Powell)

for the Crown.

The facts of this case appear sufficiently for the purposes of this report from the following judgment.

JUDGMENT:—The appellants who were charged on three counts, viz., of kidnapping, of robbery and of murder, were tried on the second count by the Sessions Judge and a Jury and on the first and third counts by the Sessions Judge and Assessors. The charges had reference to a boy named Thevoo who is alleged to have been enticed away, robbed and murdered by the appellants on the evening of the 31st August last. The Assessors were of opinion that the appellants were guilty on the charge of kidnapping, and as a Jury found them also guilty on the charge of robbery, but returned a verdict of not guilty on the charge of murder.

The Sessions Judge agreed with the opinion of the Assessors as to the first count and with the verdict as to the second count, but dissented from the verdict of not guilty on the charge of murder. He passed a sentence of death subject to the confirmation of this Court on the latter charge, but also in deference to the verdict of the Jury, as he observed, sentenced the appellants to a term of ten years' rigorous imprisonment on the charge of robbery. It was argued before us by the Vakil for the second appellant that the Sessions Judge ought not, having regard to the proceedings of this Court, dated 11th February 1889, No. 336, to have tried the three charges together in one trial and that the conviction was therefore bad. The Sessions Judge has, under section 239 of the Criminal Procedure Code, a discretion to try prisoners separately or together as he thinks fit, accused of several offences committed in the same transaction, and the circular order referred to was merely intended to suggest the procedure which in such cases it would be most convenient to adopt. It is not alleged that the appellants have been prejudiced by the course adopted by the Sessions Judge.

We think there is no ground for setting aside the conviction as illegal. The sentence passed by the Sessions Judge appears to us however anomalous. Having sentenced the appellants to death it was obviously unnecessary to pass any further sentence on the other counts, and he ought to have refrained from doing so, though he might have not improperly mentioned the sentence which might, in his opinion, be appropriately passed if the conviction on the charge of murder were set aside. Neither of the appellants has questioned the conviction on the charges of kidnapping and robbery. What we have to consider is whether the evidence justifies the conviction of both or either of the appellants on the charge of murder. In coming to a conclusion on this question, we dismiss from our minds the verdict of the Jury.

There is no doubt that the boy Thevoo was enticed away from the temple in the agrapharam, robbed of two gold bangles he had been wearing and murdered on the evening of the 31st August last. As to these facts the evidence of his father (the first witness) and the Hospital Assistant is conclusive.

The material question is whether the offences are sufficiently brought home to the appellants or either of them. Against appellant No. 1 the principal evidence is that contained in a confessional statement made by him before the Second-class Magistrate of Salem on the 27th September 1889, two days after he was arrested in the Madras Roads by the Chief Inspector Eaton. In this statement he says that the boy was brought by appellant No. 2 and another to the entrance of the Eswaran temple in the garden where the body was found and he admits that he and the other appellant removed the bangles from the boy's wrists and that he went to his house to secure them in an almirah. On his return after doing this, he says that he found his companion in a room near the temple, and, hearing a gurgling noise, was told by them in answer to his question that they had killed the boy. He reproached them, as he says, and went off to his own house, but in a short time appellant No. 2 came to him, told him the body of the boy had been disposed in the well of Gopalasami Mudaliyar and asked him to come away with him to Kumbakonam. They thereupon the same night went to the railway station and took the train to Kumbakonam. He then describes how he and appellant No. 2 remained together for two days, and afterwards the appellant No. 2 on his brother-in-law appearing went away, taking one of the bangles and leaving the

other with appellant No. 1. This bangle, he says, he sold at Tiruvadamarudur for Rs. 75. He then went to Negapatam and embarked in a steamer for Rangoon, but on the way he was arrested at Madras by the Inspector Eaton. He further related how, while he and appellant No. 2 were at Kumbakonam, a bond was executed by him in favor of a relative, and how that bond was ante-dated, the date of Saturday, the day on which the murder was committed being inserted instead of Monday, the day on which it was really executed. Before appellant No. 1 made this confessional statement he had been duly warned by the Magistrate that his statement would be used against him and the Magistrate certified his belief that the statement was made voluntarily and not under any threat or inducement. On the 31st October appellant No. 1, when his statement was read out to him, declared that it was not made voluntarily and he made another statement to the effect that he was not in Salem on Saturday the 31st August. The next day when he was about to be committed for trial, he told the Magistrate that he had retracted his confession, because the other accused were with him and he feared their speaking against him. As the Magistrate, although he made a note of the statement and appended it to the answers given by the appellant to questions put to him, had not recorded the statement itself in the appellant's words, we thought it desirable to have the Magistrate's evidence on this matter taken. In his evidence the Magistrate repeats what he had recorded in his note and he says that the appellant asking at the same time that he might be admitted to bail and permitted to change his dress, volunteered the statement. Before the Sessions Court appellant No. 1 left his defence to his counsel and no further questions were put to him.

There is a considerable body of evidence which goes to corroborate material parts of the confessional statement made on the 27th September. Several witnesses referred to by the Sessions Judge prove that the two prisoners were seen together near the Perumal kovil on the evening of the 31st August. They also say appellant No. 2, who is proved to have been on friendly terms with the boy Thevoo, was seen speaking to him at the same time and place. The fact that the body of the murdered boy was hidden in a pit in Gopalasami's garden is established by the evidence of the first witness and others who were present at the discovery of the body on Monday the 2nd September. The fact that the two

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appellants went to the Suramangalam station the same night and took the train is proved by the seventeenth witness who, being a relation of Thevoo, had gone to the station in search of him. This witness says that he found appellant No. 1 sitting there with his companion lying down and having his face covered, and in answer to his inquiries he was told by appellant No. 1 that the man lying down was a stranger to him, though in fact he was known to him. The witness afterwards saw the man standing up and recognized him. That the two appellants did take the early morning train for the south as this witness deposes is further proved by the evidence of the twenty-sixth witness, the first appellant's brother-in-law, who says that he and appellant No. 2 came to his house at Bhagavatapuram on the Sunday evening. According to this witness the two stayed at his house over the Monday night, and meanwhile on the Monday the bond mentioned in the confessional statement was executed in favor of Krishnasami, the eighteenth witness. The execution of this document, dated the 31st August, on the 2nd September, is spoken to by this witness and by the twenty-third, twenty-fourth and twenty-fifth witnesses, who with appellant No. 2, attested the execution. At the trial the evidence of the stamp-vendor, whose endorsement bearing date 31st August appears on the document, was not taken, and we thought it desirable that he and his son, who, according to the witnesses, was said to have brought the paper to the house of the first witness, should be examined. Their evidence has now been taken and it appears that the endorsement was written entirely by the son, a boy of ten years old. His account of what took place with regard to the stamped paper and his father's, though the two do not altogether agree, is to the effect that in the absence of the latter the paper was given out as endorsed by the son on the 31st August and an entry made accordingly in the diary. Having regard to the strong evidence proving the presence of the prisoners in Salem on the evening of Saturday and to the twenty-third and other Tanjore witnesses, some of whom are related to the appellant, we are unable to accept the testimony of the stamp-vendor and his son as true with regard to the date on which the stamped paper was sold. The next fact mentioned in the confessional statement is the parting of the two appellants, and this is proved by the 26th witness who did not see appellant No. 2 in his house on the Tuesday and the ninth witness, who says he saw him at Srirangam on

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that day. This witness also says that this appellant and his mother-in-law Ratna Sabapathi came to her house, and stopped there that night, and that the latter and her husband went out to the aazaar, saying they had a bangle to sell. There is further evidence with regard to the sale of this bangle which will be mentioned hereafter in dealing with the second appellant's case.

In the present connection it is important to mention that these facts—the execution of the bond at Tiruvadamardur and the sale of a bangle at Srirangam—were brought to light in consequence of a communication made by appellant No. 1 to Inspector Jay Singh when the two were travelling from Madras to Salem. This statement, in so far as it led to the discovery of the matters mentioned in it, is evidence against the appellant. From the time when appellant No. 1 parted from the twenty-sixth witness on Tuesday, the 30th September, at Kumbakonam, there is no direct evidence as to his movements until he is found at Madras on the 24th or 25th September consulting Mr. Michell's gumasta.

On the 25th September he was arrested on board the S.S. *Sirsa* by Inspector Eaton. He had on his person a ticket for Rangoon. When at first accosted by the Inspector as Sambia, he said he was not Sambia and was not a Brahman, but that his name was Narainasami Pillai, but in the boat on the way to the pier he admitted that he was the man whom the Inspector wanted. He was dressed as he was when he appeared before the Sessions Court, that is to say, in a manner which is proved to be unusual among Brahmans and he was not wearing the Brahmanical thread. It is suggested by the learned Counsel who appeared to support the appeal that this intended journey to Rangoon was undertaken in search of work and that was the explanation offered by the appellant himself in his statement of the 31st October. In our opinion, however, the explanation is entitled to no weight. The whole conduct of the appellant, as exhibited in his dress and in his conversation with the Inspector, points irresistibly to the conclusion that he was acting under a strong impulse to conceal his identity and escape from the country.

All the circumstances which have thus been detailed tend to corroborate the confessional statement made by appellant No. 1. In that statement he admits that he took part in the robbery and that one of the bangles was disposed of by him, the other being left with the other appellant. The evidence of the first and other

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witnesses with regard to the sale of a single bangle at Srirangam on the return of appellant No. 2 from Kumbakonam about the same time renders it probable that this part of the story is true. His attempt to make evidence for himself by ante-dating the bond, his projected flight by sea, his endeavour to conceal his identity are strong evidence to show that he was conscious of some great danger impending and that he was actuated by a strong desire to escape; and this conduct is the more important, because, so far at least as the execution of the bond is concerned, it was the conduct of a man who was not at the time pursued or even suspected. With all these facts proved we are of opinion that there is a strong case to justify the conviction on the charge of robbery. This being so, it must follow that the appellant was one of the persons who was last with the murdered boy before his death, because there is nothing to suggest the supposition that the robbery and the murder were separate transactions, committed at different times, and on the contrary, according to the confessional statement, the two crimes formed parts of one transaction. Moreover it is extremely unlikely that the deceased boy would not have returned to his house if he had been left free after he had been robbed. The appellant lived in the same aghaharam with the boy, and the strong probability is that the motive for the murder was the desire to escape detection which, had the boy escaped alive after being robbed of his bangles, must almost inevitably have ensued. Under these circumstances, and in the absence of any explanation, the presumption arises that any one who took part in the robbery also took part in the murder. In cases in which murder and robbery have been shown to form parts of one transaction, it has been held that recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder. All the facts which tell against the appellant, especially his conduct indicating a consciousness of guilt, point equally to the conclusion that he was guilty as well of the murder as of the robbery committed on the evening of the 31st August. His own account of what took place on that evening in so far as it exonerates himself from any part in the act of killing the boy is extremely improbable. It is very improbable that he being older in years than appellant No. 2, the latter would have acted, as he says, without his knowledge or privy. Still less is

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it probable that if, as he says, the boy was being murdered when he returned to the temple and without his connivance, he would afterwards have left Salem with appellant No. 2 and associated himself with him in efforts to create evidence in his favor. In addition there is the evidence of the third witness, which, if believed, makes it clearer that the appellant was not, as he says, a mere spectator when the murder was committed. This witness's story to the effect that, on the evening of the 31st August, he saw some men carrying a corpse near the temple and that he recognized the first prisoner as one of the party, was first communicated to the Police on the 13th October. On the previous day only he had been found and brought before the Head Constable at Tiruvadamardur. The Inspector who, on the 13th October, wrote down the substance of the man's statement and the Head Constable both say that he and his wife were not in police custody. Observations were made with regard to the language said to have been used to the witness by the Head Constable when the witness was brought before him, but it is now explained that the words used were not intended to have any threatening significance, and then the Head Constable was in fact ignorant as to the position which the witness occupied, whether he was an accused person or a witness. The fact that the witness when first brought into communication with the police gave the same account of what he saw on the evening of the 31st August as he gave before the Sessions Court, and there is no evidence to show that any improper influence was brought to bear upon him, is strongly corroborative of the truth of his evidence. Moreover, except for the explanation which he himself gives for his hurried departure from Salem, there is nothing to account for that fact. It may be added in favor of the acceptance of his testimony that he incriminates only one of the persons whom he says he saw and does not attempt to name the others. Taking into account these circumstances, as well as what may be said on the other side with reference to the status of the witness and the fact of his having been under police surveillance, we agree with the Sessions Judge in thinking that the evidence of the third witness, corroborated by that of his wife, may be accepted as true. The importance of the evidence is great; for while it corroborates the other evidence connecting the appellant with the robbery of the boy, it directly contradicts the appellant's own story of the part he took after

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the robbery and the murder had taken place and shows that he was actively engaged with the others in carrying away the corpse from the scene of the crime. To sum up the evidence which has now been dealt with as against the first prisoner we may state the matter as follows:—that it has been admitted by him that he was a party to the robbery, that his account of the transaction exculpating himself from all other part as being contradicted by other evidence and the probabilities of the case cannot be accepted as true, that he assisted in carrying away the corpse of the boy after murder, that he afterwards acted in concert with appellant No. 2 until they parted on the Monday night, and finally that in his flight, his abandonment of caste and other concealment of his identity he acted in a manner evincing an extreme desire to escape from an impending danger of a serious character. We are unable to reconcile these facts with any reasonable hypothesis of innocence on the part of appellant No. 1; on the contrary we see no reason to doubt that he was concerned in the murder. We must therefore uphold the conviction. The double crime of robbery and murder was an atrocious one and cannot be adequately expiated by any other punishment than that of death. We confirm the conviction and sentence against this appellant.

Against the second prisoner the evidence is not altogether the same. From his first arrest he made no statement except that he was absent from Salem for some days before the 31st August and with the first prisoner at Tiruvadamardur on the Sunday.

There is the evidence of several witnesses that he and the murdered boy were on friendly terms, and it is mentioned that the prisoner, who was a compositor, had given the boy some types on the previous day and those types were found by the boy's father in his jacket pocket. The witnesses say they saw the prisoner and the boy talking together on the Saturday afternoon about 3 o'clock, and that both prisoners were together near the temple in the evening about the time when the boy disappeared. Inasmuch as the boy was at that time in the agra-haram in the neighbourhood of his father's house, and could not have been carried away from the street by force, it is clear that the persons who robbed him must have been assisted by some friend of the boy's who was able to persuade the boy to accompany them away from the street. So far as the events which occurred in Salem are concerned, the evidence carries the case no further. But from the moment of leaving

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Salem, as has been already shown, the two prisoners acted in concert. Both leave Salem suddenly and for no explained reason and are seen at the railway station in the early morning of Sunday taking the train for the south. They go together to the house of the twenty-sixth witness, arriving there on the Sunday without baggage or clothes. The second prisoner remains there on the Monday, but is not seen by the witness on Tuesday morning. Meanwhile on Monday the bond was executed by the first prisoner in the way already described and the second prisoner attested it appending to his name a description of himself which is noteworthy—he calls himself “son of Virasami Pillai who is come to Tiruvadamardur on this current date from Salem.” It is clear that he and the first prisoner were equally anxious to create clear written evidence to prove their absence from Salem on that day, the 31st August. The second prisoner is next found on the Tuesday at Srirangam in company with his brother-in-law Ratnasabapathi. They go to the house of the ninth and tenth witness, himself a brother of Ratnasabapathi, and stay there over the next day; while there they went out into the bazaar saying they had a jewel to sell, and taking a bangle with them. The sale of a child's bangle by Ratnasabapathi to the thirty-first witness is proved by him and the twenty-ninth witness. The purchaser says that in buying it he had it cut up and sold the pieces. The bangle is described as weighing $15\frac{1}{8}$ pagodas and the price paid was Rs. 94. The pair of bangles worn by the murdered boy are described by his father as worth from Rs. 200 to Rs. 250. Although the bangle then sold to the thirteenth witness could not be produced for identification by the father, there is strong reason to think that this bangle is one of the pair taken from the boy. In addition to the facts already stated, namely, the presence of the prisoner with the boy and with the other prisoner at Salem on the afternoon of the 31st, the departure from Salem with the other prisoner, his co-operation with that prisoner in antedating the bond and his being in company with his brother-in-law, and that a single bangle was sold only four days after the murder, we are at liberty to take into account against the second prisoner the statement of the first prisoner in so far as it is a confessional statement. According to this statement the two prisoners took an equal part in robbing the boy. It is probable that the robbery was, as the first prisoner thus admits, committed by more than one person, and for reasons already given, it is

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almost inevitable that one of those persons should have been well acquainted with the murdered boy.

As already observed, there is considerable evidence to show that appellant No. 2 was regarded by the deceased boy as his friend, and the fact that the boy would not have gone to the scene of the offence unless he had been enticed, corroborates the confession of the first prisoner that it was the second prisoner who in company with another brought the boy to the temple. This being so it is reasonable to infer in the absence of any satisfactory explanation that the second prisoner was equally implicated in the crime of murder. His motive for committing the murder in order to save himself from detection was even stronger than that of the first prisoner, for he was well known to the boy. His subsequent conduct from the time he left Salem, acting in concert with the other prisoner, in making evidence to prove an alibi and in securing the sale of the bangle—as it is presumptive evidence against him that he was a party to the robbery—is equally evidence against him on the other charge. There seems to be no reasonable ground for saying that while both of the prisoners assisted in the robbery, the first only took part in the murder.

We are therefore of opinion that we must come to the conclusion that this appellant also was concerned in the murder.

Seeing however that the evidence against him is almost wholly circumstantial and that he is only eighteen years of age, we consider it safer to commute the sentence into one of transportation for life. The sentences of ten years' rigorous imprisonment are set aside and the sentence of death passed upon Sami Iyer is confirmed. The sentence of death passed upon Narayana Sami is commuted into a sentence of transportation for life.

APPELLATE CIVIL.

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

NARAYANA (DEFENDANT) APPELLANT,

v.

NARAYANA AND ANOTHER (PLAINTIFFS NOS. 3 AND 4),
RESPONDENTS.*

Civil Procedure Code, s. 244—Execution proceedings—Limitation Act—Act XV of 1877, sch. II, arts. 29, 61, 62, 97, 120.

In a suit of 1867 the present defendant obtained a decree for possession of a certain village and mesne profits for one year. Pending an appeal against that decree execution was stayed on the present plaintiff depositing a note for Rs. 15,000 as security. The decree was affirmed on appeal, and the present defendant had the note sold in execution and drew out of the proceeds a sum for mesne profits for subsequent years; but an appeal was preferred in the execution proceedings to the High Court which set aside the execution so far as concerned the mesne profits for the years subsequent to that to which the original decree related. The present plaintiff thereupon attached and sold the village to recover the balance: before that amount was paid to the present plaintiff the present defendant brought a suit against him in the District Court and there obtained a decree for mesne profits for the subsequent years and in execution drew the amount of the decree out of Court. In second appeal however the High Court on 26th September 1881 reversed the decree of the District Court, whereupon the present plaintiff applied for restitution under Civil Procedure Code, s. 583, which application was ultimately disallowed. The present suit was brought to recover the amount to which that application related:

Held, (1) that the suit was not barred by the provisions of Civil Procedure Code, s. 244.

(2) that Limitation Act, sch. II, art. 120, was applicable to the suit, which having been filed on 9th August 1887, was accordingly not barred by limitation.

APPEAL against the decree of J. Kelsall, District Judge of Vizagapatam, in original suit No. 26 of 1887.

Suit to recover a sum of money alleged to be due by the defendant under the following circumstances:—

In a suit of 1867 the zamindar of Kurupam, who was the defendant in the present suit, sued Kannam Dora and Appanna Dora to recover from them the village of Arnada with mesne profits for *fasli* 1276. He was declared entitled to the village and to Rs. 600 in respect of mesne profits for *fasli* 1276. No provision

* Appeal No. 113 of 1888.

1889.
July 25, 26.
November 27.

NARAYANA v. NARAYANA. was made in the decree with regard to mesne profits for subsequent years. The decree was confirmed on appeal by the District Court and on second appeal by the High Court. Pending these appeals execution was stayed, one Sadasiva Parabrahmam depositing a Government promissory note for Rs. 15,000 as security for the due fulfilment of the decree to be passed.

On the decree of the High Court being known the zamindar had the note sold and received from the proceeds Rs. 11,175 which he represented as due to him under the decree for mesne profits of fasli 1276 and subsequent years. On appeal to the High Court these proceedings were set aside, on the ground that the decree was silent as to subsequent mesne profits and execution should not be in excess of the decree.

Thereupon Parabrahmam attached the village of Arnada, representing that Rs. 8,728 had been collected in excess from him and recovered that amount by sale. The Kurupam zamindar then filed original suit No. 11 of 1878 in the District Court of Vizagapatam against him to recover this amount, the decree in that Court was in favor of the zamindar, but it was on appeal to the High Court reversed on the ground that Parabrahmam had undertaken no liability for rents subsequent to fasli 1276. The sum of Rs. 8,728 realized by the sale of the Arnada village had, pending these proceedings, remained in deposit in the District Court. As soon as the decree of the District Court in original suit No. 11 of 1878 was given in his favor, the Kurupam zamindar drew Rs. 7,887 of it, the balance having apparently been taken by Parabrahmam, at whose instance the property had been sold.

On the passing of decree of the High Court reversing the decree in original suit 11 of 1878 was received Parabrahmam applied under section 583 of the Code of Civil Procedure to recover from the zamindar Rs. 12,294, the above sum with interest and costs. This was allowed by the District Court, but disallowed on appeal on the ground that the application was barred by the limitation (*Kurupam Zamindar v. Sadasiva*(1)).

Parabrahmam now sued to recover from the zamindar, with interest, the sum of Rs. 7,100 improperly drawn out of Court by him.

(1) I.L.R., 10 Mad., 66.

Among other pleas the defendants raised the plea of limitation. On this the District Judge said—

"Plaintiff's vakil contends that the suit falls under articles '61, 62, or 97 of the Limitation Act and refers to *Bhawani Kuar v. Rikhi Ram*(1); these articles cannot apply. In *Jogesh Chunder Dutt v. Kali Churn Dutt*(2) it was held that a suit of this nature 'must be brought within six years under Act IX of 1871, 'sch. II, art. 118, which is the same as article 120 of the present 'Act. I hold article 120 to apply.

"The defendant drew the Rs. 7,100 on 28th January 1881; 'the High Court by reversing the District Court's decree decided 'on 26th September 1881 that he had no right to do so. The 'present suit to recover the money so improperly drawn was filed 'in July 1887. It was therefore within six years."

The District Judge found the other issues also in favor of the plaintiff and he passed a decree as prayed.

The defendant preferred this appeal.

Subba Row for appellant.

Subramanya Ayyar for respondents who were the representatives of Parabrahmam, deceased.

JUDGMENT.—The appellant is the zamindar of Kurupam, and in original suit No. 10 of 1867 he obtained a decree against two persons—Kannam Dora and Appanna Dora. The decree awarded to him possession of a village, called Arnada, and mesne profits for one year, viz., fasli 1276. It was confirmed by the District Court on appeal and by the High Court on second appeal. Pending the appeals, execution of the original decree was stayed on the first plaintiff in the present suit, Sadasiva Parabrahmam depositing a Government promissory note for Rs. 15,000 as security for the satisfaction of the decree that might ultimately be passed. After the High Court confirmed the original decree, the appellant had the Government promissory note sold in execution, and drew Rs. 11,175 as due to him under the decree for mesne profits for fasli 1276 and for subsequent years. On appeal the High Court set aside this execution so far as it related to mesne profits subsequently to fasli 1276, on the ground that they had not been awarded by the decree. Thereupon Sadasiva Parabrahmam attached the village of Arnada and brought it to sale in

(1) I.L.R., 2 All., 354.

(2) I.L.R., 3 Cal., 30.

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order to recover back by way of restitution the amount collected by the appellant in excess of the amount decreed in his favor. Before the sum of Rs. 8,728 realized by the sale was paid out to the surety, the appellant brought original suit No. 11 of 1878 to recover subsequent mesne profits from the former and obtained an order for the amount being held by the Court in deposit pending the disposal of his suit. Subsequently the District Court decreed his claim and he drew out of the amount in deposit Rs. 7,887 in execution of that decree on 20th January 1881. On appeal, however, the decree was reversed by the High Court and original suit No. 11 of 1878 was dismissed, the surety being considered not liable for mesne profits subsequent to fasli 1276. The High Court passed its decree on the 26th September 1881, and the surety applied to enforce his claim to restitution under section 583, Civil Procedure Code. His application was allowed by the District Court, but disallowed by the High Court as barred by article 178 of the Act of Limitations. Thereupon the surety, Sadasiva Parabrahmam, brought the present suit on the 9th August 1887, and claimed Rs. 7,100 as repayable by the appellant and Rs. 5,563 as interest due thereon at 12 per cent. per annum from 20th January 1881 to 31st July 1887.

It was contended for the appellant, first, that the claim was *res judicata*; secondly, that it was barred by limitation; thirdly, that the right to sue was personal to the surety, and, as he died after suit, it did not survive to his legal representatives, the respondents before us. He filed his written statement on the 13th October 1887, and his pleader argued at the final hearing on the 23rd January 1888, four days before the date of the original judgment, that the suit was also barred by section 244 of the Code of Civil Procedure. The Judge observed that the question did not arise upon the written statement, but referring to the Full Bench Ruling of the Calcutta High Court (*Jogesh Chunder Dutt v. Kali Churn Dutt*(1)) considered that section 244 did not bar the suit. As regards limitation he held that article 120 of the Act of Limitations applied, and that articles 61, 62, or 97 did not apply and relied on the decision of the High Court at Calcutta already mentioned. He disallowed the plea of *res judicata* and decreed the principal sued for with interest thereon at 6 per cent. per annum

(1) I.L.R., 3 Cal., 30.

from the 28th January 1881 to date of payment. The defendant appeals, and it is contended for him (i) that the suit cannot be maintained under section 244, (ii) that it is barred by limitation, and (iii) that no interest was claimed in the plaint subsequent to 31st July 1887. The objection regarding interest is not pressed at the hearing. Though no subsequent interest was in terms claimed in the plaint, yet it prayed for such further and other relief as the Court might deem just and equitable, and the Judge, whilst reducing the past interest claimed by the plaintiff from 12 per cent. to 6 per cent., considered it fair to award future interest also at the reduced rate. Neither is section 244 a bar to this suit. The Privy Council said in *Shama Purshad Roy Chowdery v. Hurro Purshad Roy Chowdery*(1)—“There is no doubt that according to “the Law of England (and their Lordships see no reason for “holding that it is otherwise in India) money recovered under a “decree or judgment cannot be recovered back in a fresh suit “or action whilst the decree or judgment under which it was “recovered remains in force; but this rule of law rests, as their “Lordships apprehend, upon this ground, viz., that the original “decree or judgment must be taken to be subsisting and valid “until it has been reversed or superseded, by some ulterior proceeding. If it has been so reversed or superseded, the money “recovered under it ought certainly to be refunded, and, as their “Lordships conceive, is recoverable either by summary process or “by a new suit or action. The true question, therefore, in such “cases is whether the decree or judgment under which the money “was originally recovered has been reversed or superseded.” In the case before us the decree in original suit No. 11 of 1878 under which the money in deposit was drawn was reversed by the High Court on appeal. Reading section 244 in the light thrown by the principle laid down by the Privy Council it must be taken to relate to decrees which are still subsisting and in force and which have not been superseded in appeal and to be no bar to the institution of a suit for restitution after the decree has been reversed. The only question then which remains for us to consider is that of limitation. In its nature the suit is one for restitution or to be restored to the *status quo ante*. Under color of a decree since superseded, the appellant intercepted the money which the surety

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(1) 10 M.I.A., 203.

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had realized by summary process instituted under section 583, Civil Procedure Code. There is no article in the schedule attached to the Act of Limitations which expressly prescribes a period of limitation for such suits. We consider that the Judge was right in holding that article 120 applied. The surety was not in a position to claim a refund until the decree was superseded and neither article 61 or 62 applies as time runs under it from the date on which the money was paid or received. There was a subsisting decree when the money was paid to the appellant, and its receipt cannot be regarded as a wrongful seizure of moveable property as mentioned in article 29. Article 97 refers to contracts in which the consideration has failed. None of the specific provisions suggested by the appellant's pleader appear to us to contemplate a suit like the one before us.

We are therefore of opinion that this appeal cannot be supported, and we dismiss it.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Handley.

ANNAJI (PLAINTIFF), APPELLANT,

v.

SUBRAMANYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Local Boards Act—Act V of 1884 (Madras), ss. 128, 156—Suit for malicious prosecution against officers of panchayat union—Notice of suit.

A suit was brought against the chairman and accountant of a panchayat union for damages for malicious prosecution more than six months after the close of the criminal proceedings:

Held, (1) that the defendants were liable for torts committed by them, and that notwithstanding Local Boards Act, s. 128, the plaintiff was not confined to his remedy against the Taluk Board;

(2) that Local Boards Act, s. 156, was not applicable unless it were proved that the act complained of was done by servants of the Taluk Board within the scope of their authority as such, acting or purporting to act under the Act.

SECOND APPEAL against the decree of C. W. W. Martin, District Judge of Salem, in appeal suit No. 144 of 1888, confirming the

* Second Appeal No. 1024 of 1889.

decree of T. T. Rangachariar, District Munsif of Tripatore, in original suit No. 97 of 1888.

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Suit for damages for malicious prosecution against the *ex-officio* chairman and the accountant of the union panchayat of Dharampuri. The criminal proceedings had terminated more than six months before suit. The defendants pleaded, *inter alia*, that the suit was precluded by Local Boards Act, section 128, and also by want of notice to the President of the Taluk Board under section 156 of the same Act.

The District Munsif held that both these pleas were well founded and dismissed the suit: his decree was affirmed on appeal by the District Judge who held that the want of notice pleaded was a bar to the suit.

The provisions of the sections 128 and 156 above referred to are as follows:

Section 128.—(1) “Every panchayat shall, subject to the provisions of this Act, be the agent and under the control of the Taluk Board;

(2) “and the Taluk Board, and not the panchayat, may sue and be sued in respect of any act or omission of the panchayat giving rise to a cause of action.

Section 156.—“No action shall be brought against any Local Board, or any of their officers, or any person acting under their direction, for anything done or purporting to be done under this Act until the expiration of one month next after notice in writing shall have been delivered or left at the office of the Local Board, or at the place of abode of such person, explicitly stating the cause of action and the name and place of abode of the intended plaintiff; and unless such notice be proved, the Court shall find for the defendant; and every such action shall be commenced within six months next after the accrual of the cause of action, and not afterwards: and if any person to whom any such notice of action is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.”

The plaintiff preferred this second appeal.

Seshagiri Ayyar for appellant contended that two months' notice of the institution of the suit which was given under section 424 of the Civil Procedure Code was sufficient notice, that the suit

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was not one brought under the Local Boards Act, that the suit was for a tort committed by the defendants, and that accordingly compliance with the preliminaries prescribed by the Local Boards Act was not necessary.

Pattabhirama Ayyar for respondents. Under section 128 of the Local Boards Act the Taluk Board and not the panchayat must be sued. No notice was given under section 156 of the Local Boards Act.

JUDGMENT.—The plaintiff's suit has been dismissed on the ground that it should have been instituted against the Taluk Board and not against the defendants, and on the ground that notice ought to have been given under the provisions of section 156 of Act V of 1884. It is also urged in this Court that the suit was not brought within six months of the date of accrual of the cause of action as required in the same section.

It is stated that two months' notice was given with reference to section 424 of the Code of Civil Procedure, and unless this is incorrect, the objection founded on the want of notice which is apparently the ground of the District Judge's judgment fails. The other and more important contention is that by force of section 128, the defendants who are the chairman and the gumasta or accountant of the panchayat are not personally liable for any act done by them as members of the panchayat. The object of section 128 seems to have been to make it clear that the relation of the panchayat to the Taluk Board was to be that of agent and principal. The Taluk Board is incorporated, whereas the panchayat is not, and it would have been unreasonable that members of the latter should be personally liable on their contracts or otherwise whereas the Taluk Board could only be liable in its corporate capacity. The special provision contained in section 128 must be construed with reference to the general principle of law and cannot be extended in the manner contended for by the respondents. It would be absurd to hold that the Taluk Board could be sued for the tortious acts of the panchayat which the Board had never authorized and may even have prohibited. Either this must be so according to the respondents' contention, or a person aggrieved in such cases has no remedy. We cannot construe the section in such a manner as to bring about such unreasonable results.

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It remains to mention the argument that the latter part of section 156 applies and that the suit is brought too late, being instituted more than six months after the date of the accrual of the cause of action. In order to make that provision apply it would be necessary to show that the act complained of was done within the scope of their authority as servants of the Board and also that the act was done or purported to be done under the Act. We cannot at present deal decisively with these questions, the facts not being fully before us, but we may observe that it appears to us extremely doubtful whether such a prosecution as that which is the subject of the suit can be said to be an act done under the Act.

We must reverse the decrees of both Courts and remand the suit to the Court of First Instance.

The appellant is entitled to costs of this appeal : costs in the Courts below to be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

KANAKASABAI AND ANOTHER (PLAINTIFFS NOS. 1 AND 2),
APPELLANTS,

1890.
July 21.

v.

MUTTU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, sch. II, art. 120—Suit for perpetual injunction—Claim of possession.

In a suit for a perpetual injunction to restrain the defendant from preventing the plaintiff from entering a certain house it was alleged that the defendant had been in exclusive possession for more than six years before suit :

Held, that Limitation Act, sch. II, art. 120, applied to the suit which was therefore barred by limitation.

Per cur : It was open to the plaintiff to sue for such possession other than exclusive possession (the right to which had already been negatived by suit) as he might be entitled to.

SECOND APPEAL against the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in appeal suit No. 769 of 1888, reversing the decree of A. Kuppusami Ayyangar, District Munsif of Kumbakonam, in original suit No. 100 of 1888.

* Second Appeal No. 969 of 1889.

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"ship to another, cannot be attached and sold," and accordingly dismissed the suit.

The plaintiff preferred this appeal.

Bhaskyam Ayyangar and Krishnasami Rau for appellant.

Subramanya Ayyar for respondents.

MUTTUSAMI AYYAR, J.—It is contended for the appellant that Ramamurti's interest as a partner in the business which he had carried on in partnership with defendants Nos. 1, 2 and 3 was liable to be attached and sold in execution, and that the Judge was in error in holding that the court-sale was bad in law and that Ramamurti's right to an account did not pass by it to the appellant. I am of opinion that this contention must prevail.

Prior to 1885 Ramamurti and defendants Nos. 1—3 traded in jaggery in partnership at Chodavaram, and the former died on 23rd April 1885. The partnership was therefore dissolved on that date by his death, and his son became entitled to sue for an account and to recover what might be found to be due to him. In February 1887 the appellant attached that interest and bought it at the court-sale held in execution of the decree which he had obtained against Ramamurti's son in original suit No. 386 of 1885. Thereupon he brought the present suit as purchaser against Ramamurti's partners to ascertain and recover the balance which might be found due to him upon the partnership account. The Judge considered that the balance which was unliquidated at the time of attachment and sale, and which might possibly turn out to be nothing, was not saleable property within the meaning of section 266 of the Civil Procedure Code. That the right to an account is a vested and heritable interest, there can be no doubt. Section 265 of Act IX of 1872 recognizes the right of a deceased partner's representative to apply for winding up the partnership business, for an account being taken, and for the distribution of the surplus according to the shares of the several partners. Nor is there any reason to doubt that, although a partner is not at liberty to introduce a new partner into the firm without the consent of all the partners, and thereby give him the *status* of a partner, his interest in the partnership may be legally transferred. The effect of such transfer is that it is operative for all purposes but that of forcing him as a partner on the other partners without their consent, the relation of partners being one of mutual confidence and fiduciary in its character. This is clear from sec-

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tion 254, clause 3, and section 262 of the Indian Contract Act. This being so, it is not correct in principle to say that a partner's unascertained interest in partnership business is not his saleable property, or that a Court is not entitled to sell it, though he himself can do so during his life. It is argued for the respondents that the sale of an unascertained interest may not fetch an adequate price at a public auction, and that it is the practice of the Courts of Chancery to ascertain first the *quantum* of interest which is to be put up to sale with precision, and then to proceed to sell it. But it is to be observed that the interest of an undivided co-parcener, though equally uncertain, is liable to be sold in execution. So also the right of redemption may be an uncertain interest when there are several incumbrances, and yet it is sold in execution. Again, the right, title, and interest of a judgment-debtor may be uncertain in some cases, but it has not been considered to bar its sale in execution. I think, therefore, that the contention that a vested interest is not saleable whenever its *quantum* is uncertain and until it is made certain cannot be upheld with reference to the provisions of the Code of Civil Procedure. There is a distinction between such interest and a mere expectancy or contingent or possible right or interest which is not liable to be attached in execution (see section 266, clause K). In that case, there is no vested right of property upon which the attachment can operate when it is made, and no future right nor mere possibility can be attached by anticipation. But the interest of a partner is one growing out of a pre-existing contractual relation, and though, under certain circumstances, it may turn out infructuous in common with several other recognized forms of saleable property, it does not on that ground cease to be saleable property. That this is the proper construction to be put upon section 266 is clear from the observations of the Privy Council in *Deendyal Lal v. Jugdeep Narain Singh* (1). The question in that case was as to the rights of an execution creditor and of a purchaser at an execution sale in regard to the interest of an undivided co-parcener in a Hindu family and it was held that such interest was liable to be attached and sold. In stating the ground of decision, their Lordships of the Privy Council observed as follows:—"It is sufficient to instance the seizure and sale of a

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

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v.
MUTTU.

Suit filed on 6th March 1888 for a perpetual injunction restraining defendant No. 1 from preventing the plaintiffs from entering a house attached to a certain temple. It was alleged that defendant No. 1 had been in exclusive possession of the house since 2nd March 1888 and it appeared that the father of the plaintiff had brought a suit for the declaration of his right over the house now in question in 1885 and had failed to establish his right to exclusive possession.

The further facts of the case appear sufficiently for the purposes of this report from the judgment.

Ramachandra Rau Saheb for appellants.

Pattabhirama Ayyar for respondent No. 1.

JUDGMENT.—A preliminary objection is urged on behalf of the first respondent, viz., that on the statement of the plaintiffs in the plaint to the effect that the first defendant has been wrongfully enjoying the property exclusively since 2nd March 1882 the suit is barred, inasmuch as the suit, not being otherwise provided for, must be taken to be governed by article 120 of the Limitation Act and more than six years had passed since the right to sue accrued the plaint not having been filed until the 6th March 1888.

The suit is one of a special character, viz., a suit for a perpetual injunction and no specific provision is made for such suits in the schedule to the Limitation Act.

For the appellants, it is argued that article 127 of the schedule applies, and if not article 144 of the schedule. It appears to us, however, that neither of these last-mentioned articles applies to a suit such as the present which, as already observed, is a suit of a special character specially defined by statute, i.e., section 54, Specific Relief Act; the Limitation Act and the Specific Relief Act are both enactments of the year 1877, and if the Legislature had intended to provide any special period of limitation for suits under section 54 of the latter Act, it may be presumed they would have done so.

We think, therefore, article 120 of the schedule applies and we hold accordingly that the suit as brought is barred, and on this ground, we must support the decision arrived at by the Lower Court.

Adverting to the question, which has been raised in connection with the frame of the suit, we think it right, although it is not necessary to our decision, to state our opinion that as the plaintiff

was out of possession, it was open to him to sue for such possession (other than *exclusive* possession the right to which had already been negatived by suit) as he might be entitled to. And this being so, we are of opinion that the subordinate court rightly decided that the exceptional form of relief by way of perpetual injunction was not open to the plaintiffs and that such relief was rightly refused to them.

For the reasons already stated, however, we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

PARVATHEESAM (PLAINTIFF), APPELLANT,

1890.
Mar. 27, 31.

v.

BAPANNA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 266—Unascertained interest in a partnership.

The plaintiff having purchased at an execution sale the interest of the judgment-debtor in a partnership, of which the undivided father (deceased) of the judgment-debtor had been a member, now sued the other partners praying that an account be taken and that the share of the judgment-debtor be paid to him:

Held, that the execution sale was not bad in law and that the present suit was accordingly maintainable. *Dwarika Mohun Das v. Luckhinoni Dasi* (I.L.R., 14 Cal., 384) dissented from.

APPEAL against the decree of J. Kelsall, District Judge of Vizagapatam, in original suit No. 15 of 1888.

One Ramamurti, who died on 23rd April 1885, and the first three defendants, carried on business in partnership. In February 1887, in execution of the decree passed in original suit No. 386 of 1885 against an undivided son of Ramamurti, the present plaintiff became the purchaser of Ramamurti's interest in the partnership. The plaintiff in this suit prayed that an account of the late partnership be taken and that he be declared entitled to receive such sum as may be found due by the other partners to Ramamurti.

The District Judge held that "an uncertain sum of money which may or may not be payable by one member of a partner-

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"ship to another, cannot be attached and sold," and accordingly dismissed the suit.

The plaintiff preferred this appeal.

Bhashyam Ayyangar and Krishnasami Rau for appellant.

Subramanya Ayyar for respondents.

MUTTUSAMI AYYAR, J.—It is contended for the appellant that Ramamurti's interest as a partner in the business which he had carried on in partnership with defendants Nos. 1, 2 and 3 was liable to be attached and sold in execution, and that the Judge was in error in holding that the court-sale was bad in law and that Ramamurti's right to an account did not pass by it to the appellant. I am of opinion that this contention must prevail.

Prior to 1885 Ramamurti and defendants Nos. 1—3 traded in jaggery in partnership at Chodavaram, and the former died on 23rd April 1885. The partnership was therefore dissolved on that date by his death, and his son became entitled to sue for an account and to recover what might be found to be due to him. In February 1887 the appellant attached that interest and bought it at the court-sale held in execution of the decree which he had obtained against Ramamurti's son in original suit No. 386 of 1885. Thereupon he brought the present suit as purchaser against Ramamurti's partners to ascertain and recover the balance which might be found due to him upon the partnership account. The Judge considered that the balance which was unliquidated at the time of attachment and sale, and which might possibly turn out to be nothing, was not saleable property within the meaning of section 266 of the Civil Procedure Code. That the right to an account is a vested and heritable interest, there can be no doubt. Section 265 of Act IX of 1872 recognizes the right of a deceased partner's representative to apply for winding up the partnership business, for an account being taken, and for the distribution of the surplus according to the shares of the several partners. Nor is there any reason to doubt that, although a partner is not at liberty to introduce a new partner into the firm without the consent of all the partners, and thereby give him the *status* of a partner, his interest in the partnership may be legally transferred. The effect of such transfer is that it is operative for all purposes but that of forcing him as a partner on the other partners without their consent, the relation of partners being one of mutual confidence and fiduciary in its character. This is clear from sec-

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tion 254, clause 3, and section 262 of the Indian Contract Act. This being so, it is not correct in principle to say that a partner's unascertained interest in partnership business is not his saleable property, or that a Court is not entitled to sell it, though he himself can do so during his life. It is argued for the respondents that the sale of an unascertained interest may not fetch an adequate price at a public auction, and that it is the practice of the Courts of Chancery to ascertain first the *quantum* of interest which is to be put up to sale with precision, and then to proceed to sell it. But it is to be observed that the interest of an undivided co-parcener, though equally uncertain, is liable to be sold in execution. So also the right of redemption may be an uncertain interest when there are several incumbrances, and yet it is sold in execution. Again, the right, title, and interest of a judgment-debtor may be uncertain in some cases, but it has not been considered to bar its sale in execution. I think, therefore, that the contention that a vested interest is not saleable whenever its *quantum* is uncertain and until it is made certain cannot be upheld with reference to the provisions of the Code of Civil Procedure. There is a distinction between such interest and a mere expectancy or contingent or possible right or interest which is not liable to be attached in execution (see section 266, clause K). In that case, there is no vested right of property upon which the attachment can operate when it is made, and no future right nor mere possibility can be attached by anticipation. But the interest of a partner is one growing out of a pre-existing contractual relation, and though, under certain circumstances, it may turn out infructuous in common with several other recognized forms of saleable property, it does not on that ground cease to be saleable property. That this is the proper construction to be put upon section 266 is clear from the observations of the Privy Council in *Deendyal Lal v. Jugdeep Narain Singh*(1). The question in that case was as to the rights of an execution creditor and of a purchaser at an execution sale in regard to the interest of an undivided co-parcener in a Hindu family and it was held that such interest was liable to be attached and sold. In stating the ground of decision, their Lordships of the Privy Council observed as follows:—"It is sufficient to instance the seizure and sale of a

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

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"share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not have himself sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value. The same principle may and ought to be applied to shares in a joint and undivided Hindu estate." In this connection, the pleader for the respondents draws our attention to the decision of the Judicial Committee in *Syud Tuffuzsool Hossein Khan v. Rughoonath Pershad*(1). The particular interest attached in that case was, as observed by the Privy Council, not an unliquidated demand *ex contractu* nor an antecedent share of the existing assets, but an uncertain future right which was to come into existence under a future award, the terms of which depended on the extensive discretionary powers conferred upon certain arbitrators. Far from this decision being an authority in support of the respondent's contention, it appears to me to illustrate the distinction between a possible future interest and a vested interest.

As to the case of *Karimbhai v. The Conservator of Forests* (2), it is not in point, and, so far as it goes, it recognizes the right of the purchaser to the partner's share in the assets.

As to the decision in *Abbott v. Abbott and Crump*(3), which seems to support the respondents' contention, it is to be observed that it is the decision of a single Judge and cannot prevail against the authority of the Privy Council. As to the decision of the Divisional Bench in *Dwarika Mohun Das v. Luckhimoni Dasi*(4), it purports to proceed on the decision of the Privy Council in *Syud Tuffuzsool Hossein Khan v. Rughoonath Pershad*(1), but it appears to me not sufficiently to recognize the distinction between a saleable interest which might turn out to be infructuous under certain circumstances and a mere expectancy or possibility. The reasoning of the Privy Council in *Deendyal Lal v. Jugdeep Narain Singh*(5), was not considered in that decision. The contention for the appellant is, in my judgment, sound in principle and supported by authority.

(1) 14 M.L.A., 40.

(2) I.L.R., 4 Bom., 222.

(3) 5 Beng. L.R., 382.

(4) I.L.R., 14 Cal., 384.

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

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The next objection argued before us is as to limitation. Ramamurti died on 23rd April 1885, and the plaint was presented on 26th April 1888. It appears that the Court was closed for the annual recess from 23rd April, but that arrangements were made and duly notified for the reception of plaints on every Monday and Thursday during the recess. There is an endorsement on the plaint apparently by the Sheristadar of the Court that Monday the 23rd April was a local holiday and that the plaint was presented on the 26th *idem*. It is conceded that, if the 23rd April were a local holiday, the suit would be brought in time, but it is contended that the endorsement is not sufficient legal evidence. I consider it desirable to ask the Judge to ascertain whether the 23rd April 1888 was a local holiday and the Court was closed on that day.

I would set aside the decree of the Judge and remand the case with the direction that the Judge do re-try the issue as to limitation with reference to the foregoing remarks, and that if he comes to the conclusion that the suit is not barred, he do proceed to dispose of it on the merits.

Costs hitherto incurred will be provided for in the revised decree.

BEST, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

NARASIMMA AND OTHERS (DEFENDANTS), APPELLANTS,

1890.
May 1.

MUTTAYAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Limitation Act—Act XV of 1877, s. 14—Exclusion of time of proceeding with suit bonâ fide—Cause of like nature.

Of six persons in whom was vested the obligee's interest under a hypothecation bond, three brought a suit upon it in a District Court and the other three brought a similar suit in a District Munsif's Court to recover, with interest, their respective shares of the sum secured. The former suit was dismissed as not being maintainable and the latter was withdrawn. The present suit was brought by all six:

* Appeal No. 71 of 1889.

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Held, that in computing the time within which the plaintiffs had to sue, the time occupied by them in prosecuting the former suits should be deducted. *Deo Prosad Sing v. Pertab Kairee* (I.L.R., 10. Cal., 86) followed.

APPEAL against the decree of W. Austin, District Judge of Trichinopoly, in original suit No. 20 of 1887.

Suit by six persons in whom was vested the obligee's interest in a hypothecation bond to recover the principal and interest due thereon.

It appeared that the plaintiffs did not at first agree in bringing one suit for the whole amount due under the bond, and the plaintiffs Nos 1—3 brought original suit No. 28 of 1886 in the District Court for recovery of their three-fourth share of the whole amount, while plaintiffs Nos 4—6 brought original suit No. 359 of 1886 in the Court of the Kulitalai District Munsif to recover their one-fourth share.

Original suit No. 28 of 1886 was dismissed on the ground that the plaintiffs were not entitled to bring a suit for a portion of the mortgage amount. The suit in the District Munsif's Court was withdrawn as soon as the dismissal of original suit No. 28 of 1886 became known with permission of that Court to bring a fresh suit.

Upon these facts the defendants raised a plea under section 43 of the Civil Procedure Code and also pleaded limitation as to which the District Judge delivered judgment as follows:—

"As to the first issue, the defendants contend that this suit is barred by suits 28 and 359 of 1886 above alluded to, because in those suits plaintiffs intentionally omitted to sue for the whole amount due under exhibit A, and further that in any case they cannot now ask for more than three-fourths of the whole amount. In reply, it is said that the two suits taken together comprised the whole claim and therefore nothing has been omitted.

"This issue I find for plaintiffs, for it is clear that no portion of the claim was intentionally omitted, but that the claim was merely split into two portions.

"The second issue I find also for plaintiffs. I think they are clearly entitled to exclude, as far as bar by limitation is concerned, the time occupied by them in prosecuting suits 28 and 359 of 1886. The decisions in *Deo Prosad Sing v. Pertab Kairee*(1), *Putali Meheti v. Tulja*(2), *Obhoy Churn Nundi v.*

(1) I.L.R., 10 Cal., 86.

(2) I.L.R., 3 Bom., 223.

"*Kritarthamoyi Dossee*(1) and *Khetter Mohun Chuckerbutty v. Narasimma v. Mutayan*(2) seem to me to settle the point, and I hold that the words in section 14 of the Limitation Act 'or other cause of a like nature' would certainly apply to the suit now brought with reference to suits 28 and 359 of 1886 above referred to."

The District Judge recorded findings in favor of the plaintiff on the other issues raised in the suit and accordingly passed a decree as prayed.

The defendants preferred this appeal upon the ground among others that the suit was barred by limitation.

Parthasaradhi Ayyangar (*Kristnasami Rau* with him) for appellants.

Mere withdrawal of the suit does not prevent time from running under section 374 of the Code of Civil Procedure, as to which see *Pirjade v. Pirjade*(3), *Kifayat Ali v. Ram Singh*(4), *Krishnaji Lakshman v. Vithal Ravji Renge*(5) and *Bai Jamna v. Bai Ichha*(6). Limitation Act, section 14, does not help the defendant. See *Chunder Madhub Chuckerbutty v. Ram Coomarr Chowdry*(7), *Ram Subhag Das v. Gobind Prasad*(8), questioned in *Deo Prosad Sing v. Pertab Kairee*(9).

(*Best, J.*, referred to *Jag Lal v. Har Narain Singh*(10)).

Krishnasami Ayyar for respondent.

Permission under section 374 alone is not enough to save limitation. See *Deo Prosad Sing v. Pertab Kairee*(9), *Rajendro Kishore Singh v. Bulaky Mahton*(11) and *Putali Meheti v. Tulja*(12).

Upon the question of limitation the Court delivered judgment as follows:—

JUDGMENT.—The only point argued before us is as to limitation. We agree with the Judge that the plaintiffs in original suit No. 28 of 1886 are entitled to the benefit of section 14 of the Limitation Act, and that the case of *Deo Prosad Sing v. Pertab Kairee*(9) was rightly decided.

(1) I.L.R., 7 Cal., 284. (2) I.L.R., 10 Cal., 265. (3) I.L.R., 6 Bom., 681.
(4) I.L.R., 7 All., 359. (5) I.L.R., 12 Bom., 625. (6) I.L.R., 10 Bom., 604.
(7) B.L.R., Sup. Vol., 553. (8) I.L.R., 2 All., 622. (9) I.L.R., 10 Cal., 86.
(10) I.L.R., 10 All., 524. (11) I.L.R., 7 Cal., 367. (12) I.L.R., 3 Bom., 223.

APPELLATE CIVIL.

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

[In S.A. No. 1321 of 1888.]

VALIA TAMBURATTI (PLAINTIFF), APPELLANT,

v.

PARVATI AND OTHERS (DEFENDANTS, NOS. 1—3), RESPONDENTS.*

[In S.A. No. 1367 of 1888.]

PARVATI AND OTHERS (DEFENDANTS), APPELLANTS,

v.

VALIA TAMBRUATTI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Malabar Compensation for Tenants' Improvements Act—Act I of 1887 (Madras),
ss. 1, 2, 4, 6—*Mode of assessing compensation for improvements.*

The sum to be allowed for compensation for a tenant's improvements under Act I of 1887 (Madras) is not to be determined by capitalizing either the annual rent or the annual increment due to the improvement, but a reasonable sum should be awarded, assessed with reference to the amount by which the market value or the letting value or both has been increased thereby; and the Court should take into consideration the actual condition of the improvement at the time of the eviction, its probable duration, the labor and capital which the tenant has expended in effecting it and any reduction or remission of rent or other advantage which the landlord has given to the tenant in consideration of the improvement. In the absence of evidence as to the actual market value in the place where the land is situated, the reasonable mode of estimating the compensation consists in taking the cost of the improvement and interest thereon and in adjusting the compensation to be awarded with reference to the matters specified in section 6.

SECOND APPEALS against the decree of V. P. deRozario, Subordinate Judge at Palghat, in original suit No. 1012 of 1887, modifying the decree of S. Subramanya Ayyar, District Munsif of Temelprom, in original suit No. 362 of 1886.

The predecessor in title of plaintiff No. 1 had demised certain land, now in question, on kanom to the tarwad of defendants Nos. 1—3 in July 1874. Plaintiff No. 2 claimed, under a second mortgage, from plaintiff No. 1 and defendants Nos. 4—12 were sub-mortgagees under defendants Nos. 1—3.

* Second Appeals Nos. 1321 and 1367 of 1888.

The plaintiffs brought this suit to redeem the above kanom and recover the land with arrears of rent. The defendants pleaded that they had made improvements on the land.

The District Munsif passed a decree for the plaintiff, allowing to the defendants Rs. 85-10-8 for their improvements. On appeal, the Subordinate Judge modified this decree by allowing Rs. 837-4-0 for the improvements.

Plaintiff No. 1 and defendants Nos. 1—3 preferred these cross-appeals against this decree of the Subordinate Judge.

Subramanya Ayyar and Sundara Ayyar in support of the plaintiff's appeal.

Bhashyam Ayyangar and Govinda Menon in support of the defendants' appeal.

JUDGMENT.—This is a suit for the redemption of land demised on kanom upon payment of the value of improvements.

Compensation is claimed for the following improvements:—

(1) the conversion of one-crop into two-crop land, (2) the conversion of paramba into one-crop land, (3) the conversion of paramba into seed-bed, (4) trees. The District Munsif awarded Rs. 85-10-8 as the value of improvements. The defendants appealed and the Subordinate Judge ordered the plaintiff to pay Rs. 837-4-0 as compensation.

Both plaintiff and defendants have appealed, the former on the ground that the Subordinate Judge has not arrived at a correct estimate of the value of the improvements effected by conversion and that he has allowed compensation for trees of spontaneous growth; the latter on the ground that the principle adopted by the Subordinate Judge was unsound and injurious to their interests. It is not clear on what principle the Subordinate Judge has proceeded. He states that the increased value of a holding is determined by the higher rent which the landlord will be able to obtain by reason of the improvement, and appears to think that the only way to arrive at the amount due to the evicted tenant is to capitalize the enhanced produce of the land at so many years' purchase. He finds that, in consequence of the improvements effected by the tenant, the holding yields 423 paras of paddy in excess of what it yielded when demised. Taking into consideration the fact that the tenant has by long enjoyment more than recouped the actual costs of the reclamation, Rs. 338 and the interest thereon, and that the improvement is a permanent one,

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he awarded Rs. 600, the value of six years' increased profits, as compensation. On what ground he selected the number six is not apparent. In another portion of the judgment he suggested ten times the annual produce as the proper compensation.

We are unable to accept this method of ascertaining the value of improvements.

The word improvement is defined in Madras Act I of 1887 as meaning "any work which adds to the value of the holding, "provided (1) that the work is suitable to the holding and (2) that "it is consistent with the purpose for which it is let." By section 4 it is provided that, on eviction, every tenant shall, any custom to the contrary notwithstanding, be entitled to compensation for all improvements effected by him or his predecessor, provided they have not been already paid for. Section 6 of the Act then lays down the principles on which compensation is to be awarded. It provides that the compensation to be paid shall be the amount by which (1) the value of the holding or (2) the produce of the holding or (3) the value of that produce is increased. The wording of the section is not felicitous, but we take it that the object which the legislature had in view was to secure to the tenant the full value of his improvements and that it recognized, what is an undoubted fact, that in the different taluks of Malabar such value had been habitually ascertained in various and arbitrary ways. In order to secure uniformity in the assessment of compensation, the legislature would appear to have intended that the Court should, in arriving at a conclusion as to the amount due, look at the matter from every point of view. To take the present case as an example, the market value of the holding may be materially increased (in other words, the holding may, in consequence of the improvement effected, fetch a higher price in the market than before), or the letting value of the holding may have been enhanced, and the landlord may be enabled to demand and obtain from the in-coming tenant a higher rent either in money or kind. The Court is bound to ascertain the amount by which the market value or the letting value or both has been increased by the improvement. But in arriving at a conclusion on these points, the Court must take certain other matters into consideration, viz., the actual condition of the improvement at the time of the eviction, its probable duration, the labor and capital which the tenant has expended in effecting it, and any reduction or remission of rent

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or other advantage which the landlord has given to the tenant in consideration of the improvement. The amount of compensation to be awarded will be the sum, which, after due consideration of all these matters, appears to the Court to be, in the circumstances of the case, reasonable. No hard-and-fast rule, such as that suggested by the Subordinate Judge, can be laid down. Each case must be decided on its own merits.

The pleader for the plaintiffs does not impeach the principle on which the Judge has awarded compensation for the trees on the holding, but objects to the inclusion of certain trees (iripa, puvam, bamboo and margosa), which were held by the District Munsif to be trees of spontaneous growth. The tenant would be entitled to compensation for such trees if it were found that he had protected or maintained them; but the Subordinate Judge has recorded no finding on this point.

The Subordinate Judge will, therefore, be required to submit a revised finding (with reference to the above remarks) as to the compensation to be awarded to the defendant for conversion and improvement of the land and as to the amount of compensation, if any, to be awarded for trees of spontaneous growth. He will submit his finding within six weeks from the date of receipt of this order.

Fresh evidence may be adduced. Ten days will be allowed after posting of the finding in this Court for filing objections.

In accordance with the above order, the Subordinate Judge returned his finding as follows:—

"I am directed to submit a revised finding (with reference to the "remarks contained in the order of remand) as to the compensation to "be awarded to the defendant for conversion and improvement of the "land and as to the amount of compensation, if any, to be awarded "for trees of spontaneous growth.

"Neither party has adduced any fresh evidence.

"As regards the trees, it is observed in the order that iripa, "puvam, bamboo, and margosa were held by the Munsif to be trees "of spontaneous growth. I beg respectfully to point out that the "trees, which the Munsif held to be of spontaneous growth, are teak "and some others referred to in the twenty-second paragraph of his "judgment, for which no compensation was allowed by him or by me. "The trees above described are those referred to in the twenty-first "paragraph of the Munsif's judgment, which were not asserted to be "spontaneous, which the evidence showed to be planted and for which

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"compensation was allowed by him. No appeal was preferred by plaintiff to this Court against the Munsif's decision, nor was any objection filed.

"As regards the conversion and improvement of the land, I have, in the fourteenth paragraph of my judgment, stated my reasons for the opinion that the annual produce, that is, net rent of the land demised, was increased by 423 paras of paddy, the value of which is about Rs. 100, by reason of the labor and capital valued at Rs. 338 employed by the tenant in the conversion and improvement of the land. No fresh evidence has been adduced by either party, nor any argument advanced, to show my estimate to be incorrect.

"The amount to be awarded as compensation for an improvement under the Improvements Act is the amount by which the value, or the produce of the holding, or the value of that produce is increased by the improvement.' In the present case the produce of the land has been increased by 423 paras of paddy per annum, the price of the increased produce at the current rate being about Rs. 100. By what amount has the increased produce of Rs. 100 per annum increased the value of the holding? The value contemplated by the Act is, as the title of the Act indicates, the market value. The value to be ascertained is the increased market value of the 'holding' by reason of the improvement.

"'Holding' means land forming the subject of tenancy, or as defined in the Bengal Tenancy Act, from which many of the provisions of the Improvements Act have been taken, it means 'a parcel or parcels of land held by a rayat and forming the subject of a separate tenancy.' The value of the holding is the value of the leasehold or the letting value, and not the value of the freehold or the jenm value. The letting value of a land is not always in a direct ratio to its proprietary value. The proprietary value of a land may be increased without any influence on the rent. There are lands which yield no rent and still have a proprietary value.

"What I have to determine is the amount by which the market value, or the letting value of the holding, is increased by the improvement. It is not easy to determine the market value, for the tenant's improvement under 'the Malabar Compensation for Tenants' Improvement Act, 1886,' is a commodity which has never before been in the market. The landlord's estimate of the value never accords with the tenant's and the Court's estimate agrees with neither. While one Court estimates the value of the tenant's improvement at the cost of production and one year's produce, another Court estimates it at twelve times the annual produce. The

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"market value (in the ordinary acceptance of the term) of the pre-sent holding after the expiration of the lease may be said to be an uncertain value, for, of the several elements which constitute it, only some are constant, the cost of production and yearly produce, if this latter which varies with the season may with propriety be termed constant. The term for which the produce can be enjoyed is uncertain, for it would depend solely upon the pleasure of the landlord.

"The letting value alone can furnish some help in determining the value of the improvement.

"The higher rent which the landlord may be enabled to demand and obtain from the in-coming tenants is 423 paras of paddy or Rs. 100 per annum. This is the profit which the landlord will derive annually from the holding. The exchange value of the profit must be a certain number of years' purchase of the rental. The number of years cannot exceed twenty, for twenty times the yearly rent is the proprietary value of the land. If the value of the jenm is only twenty times the produce, it is clear that the letting value must be less. It appears to me that a sum sufficient at the current rate of interest (5 per cent. when land is the security) to replace the capital on the expiration of the usual term of a lease of twelve years should be taken to be the letting value. In the present case, the sum which, at the usual rate, would be replaced at the end of twelve years is Rs. 900. This sum would be equivalent to nine years' produce, and it is what the tenant would be entitled to, if, on consideration of certain other matters, to which regard must be had in fixing the amount of compensation, it is not to be increased or reduced. These matters are—

- "(a) The condition of the improvement and the probable duration of its effects.
- "(b) The labor and capital required for the making of the improvement.
- "(c) Any reduction or remission of rent, or any other advantage given by the landlord to the tenant in consideration of the improvement.

"With regard to clause (a), the improvement is of a permanent nature. The landlord, after he has replaced the capital by the produce of the land in twelve years, has the benefit of the improvement for an indefinite period free from any burden. The present improvement is of a different kind from planting of trees or plants, the effects of which are of short duration. Would nine years' produce be a sufficient compensation? To determine this, we

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"have to look also to the amount of labor and capital required for the improvement.

"(b) In the present case the amount of the capital and labor employed in producing an improvement of a permanent nature is Rs. 300. The effect produced is an income of Rs. 100 per annum. I think, therefore, nine years' produce, Rs. 900, or three times the amount of the capital and labor expended by the tenant is not an inadequate compensation. The extra Rs. 600, if invested by the tenant in land, will yield to him at the end of twelve years Rs. 900. So that, while the landlord at the end of twelve years replaces the price paid, Rs. 900, and has thenceforward the unrestricted use of the improvement, the tenant at the end of the same term realizes a profit of about Rs. 900 by his improvement.

"I have now to consider clause (c) whether any reduction should be made in the amount of compensation found due upon consideration of clauses (a) and (b) by reason of any reduction or remission of rent or any other advantages given by the landlord to the tenant in consideration of the improvement.

"In paragraph 11 of my judgment, I gave the following as my reason for taking into consideration the length of time (30 years) during which the tenant has had the benefit of the improvement at an unenhanced rent:—

"It is contended that the profits realized by the tenant by the improvement should not be taken into account unless there is a special clause in the lease allowing the tenant any reduction or remission of rent or any other advantage. I do not think any special clause necessary. If a tenant, who is expressly or impliedly allowed to make improvements on a land let to him for a certain number of years at a fixed rent, makes the improvement and enjoys the produce without paying any increased rent, he enjoys an advantage impliedly allowed to him by the landlord in consideration of the improvement. That advantage should be taken into account in estimating the compensation due to him."

"Taking this advantage into account, I allowed the tenant six years' produce.

"I have now, upon re-consideration, found reason to alter my original opinion. The land was let for a certain rent, and that rent was the consideration for the use of the land by the tenant. That the legislature did not intend that the length of time during which a tenant has had the benefit of the improvement at an unenhanced rent should be taken into consideration is clear from the fact that this clause, which appears in the Bengal Tenancy Act, section 83, clause (c) in addition to clause (c) of the Improvements Act is not

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"incorporated in this latter Act. The former Act takes into consideration both the 'reduction or remission of rent or any other advantage given by the landlord to the rayat in consideration of the improvement' [clause d (1)] as well as 'the length of time during which the rayat has had the benefit of the improvement at an unenhanced rent' [clause (e)]. The provisions in the Bengal Tenancy Act show that enjoying the benefit of the improvement at an unenhanced rate is distinct from, and is not comprehended in, the advantage contemplated in the preceding clause. The legislature having had this Act before it when it framed the Improvements Act, the omission of the last clause in the latter Act seems intentional. The legislature was probably apprehensive that, if this clause were introduced in the Act, advantage would, in some cases, be taken of it by the landlord to deprive the tenant of all compensation and thus defeat the main object of the Act.

"I am of opinion, therefore, the fact 'that the tenant has enjoyed the increased produce for about thirty years without paying any additional rent' should not be taken into consideration in ascertaining the amount of compensation.

"My finding on the second issue referred to me is that the amount of compensation due to the tenant for the conversion and improvement of the land is Rs. 900."

These second appeals having come on for final hearing, the Court delivered the following judgment.

JUDGMENT:—The finding returned by the Subordinate Judge is that the amount of compensation due to the tenant for the conversion and improvement of land is Rs. 900. Both the appellants and respondents object to it, and the question is whether the compensation is fixed in accordance with the provisions of Act I of 1887. These are discussed in our former judgment and it only remains for us to consider whether they have been correctly applied to the facts of this case. The letting value of the holding, it is found, has been increased by 423 paras of paddy, of which the price at the current rate is Rs. 100. The capital and labor expended for effecting the improvement are estimated at Rs. 338. Neither party has attempted to show what is the market value of the holding, where it is situated, and what addition it has received by reason of the improvement. The improvement is found to be of a permanent character and the tenant has had the benefit of the enhanced rent for nearly thirty years, the porapad payable to the landlord being the same throughout, viz., As. 13-9

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a year. The Subordinate Judge drew a distinction between the proprietary value and the letting value of the land and estimated the former at twenty times the rent and the latter at the sum sufficient at 5 per cent. per annum to replace the capital expended on the expiration of the usual kanom period of twelve years. He took this amount to be Rs. 900 and referring to clauses (d) and (e), section 83, of the Bengal Tenancy Act, held that the benefit of the improvement, which the tenant had had, was not a matter to be taken into consideration under section 6, explanation (e). There is no provision in the Act for capitalizing either the annual rent or the annual increment due to the improvement. The intention was to provide an adequate compensation for the out-going tenant in substitution for the arbitrary and varying rates at which compensation had been previously assessed.

The mode of capitalizing the additional rent, which the Subordinate Judge has adopted, tends also to introduce an arbitrary and a variable standard. There is no evidence to warrant the assumption that twenty or twelve years' purchase at 5 per cent. is a correct measure of the market value in every part of Malabar. In the absence of evidence as to the actual market value in the place where the land is situated, the reasonable mode of estimating the compensation consists in taking the cost of the improvement and the interest thereon at the local rate during the period that has elapsed subsequent to the improvement and in adjusting the compensation to be awarded with reference to the matters specified in section 6. This would replace the capital laid out by the tenant and thereby provide an adequate compensation as far as it can be ascertained, in cases in which there is no evidence of the market value. We cannot accede to the suggestion made by the Subordinate Judge that the period for which the tenant has had the benefit of the enhanced rent is not intended to be taken into account. It may be that clause (e), section 83, of the Bengal Tenancy Act, was considered to be explanatory of clause 2. As the kanom is ordinarily redeemable on the expiration of twelve years the landlord's forbearance after twelve years to raise the rent payable to him clearly implies an intention to confer an advantage on the tenant.

In cases like this, however, in which there is no evidence as to the actual market value, regard should be had in adjusting the compensation to the fact that, in the absence of a special agree-

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ment, the tenant ordinarily expects to have the capital expended replaced, though the benefit of the enhanced rent, which he has had, may be set off against the interest which he lost on the capital. The tenant ordinarily spends his income received from the land and he is not expected, in the absence of express agreement, to replace his capital out of it. It would, we think, be reasonable to allow the tenant the actual cost of effecting the improvement, as he would otherwise lose both the holding and the money spent upon it, and would be placed, on eviction, in a position much worse than he would be in if he spent no money on improving the land. We would, therefore, fix the compensation due to the tenant for the conversion and improvement of the land at Rs. 338.

The objection in regard to trees of spontaneous growth is not pressed.

The decree of the Subordinate Judge will be modified accordingly. Each party will bear his own costs in this Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

APPAYASAMI (DEFENDANT), APPELLANT,

v.

SUBBA (PLAINTIFF), RESPONDENT.*

1890.
Feb. 14.
July 22.

Rent Recovery Act (Madras)—Act VIII of 1865, ss. 2, 7.

In a suit by a tenant against a zamindar to release an attachment made under Rent Recovery Act, s. 40, it appeared that, according to the kistbandi obtaining in the zamindari, rent was payable in monthly instalments, commencing with November in each fasli:

Held, that the unit for the rule of limitation prescribed by Rent Recovery Act, s. 2, for proceedings by the landlord was the aggregate rent in arrear at the end of the fasli.

SECOND APPEAL against the decree of H. T. Ross, Acting District Judge of Madura, in appeal suit No. 396 of 1888, affirming the decision of C. H. Mounsey, Acting Sub-Collector of Madura, in summary suit No. 25 of 1888.

* Second Appeal No. 667 of 1889.

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Summary suit to set aside an attachment under Rent Recovery Act, section 40, for arrears of rent due for fasli 1296 (1886-87). The rent was payable by custom in monthly instalments, beginning in November. A patta for the fasli in question was tendered in June 1887; the attachment took place in April 1888. The plaintiff alleged, *inter alia*, that the attachment was bad, in that it had been made more than a year from November 1886. He also alleged that the patta tendered was not such as he was bound to accept and this was the subject of the second issue.

The Sub-Collector and on appeal the District Judge held that the attachment was bad for the first of the above reasons.

The landlord preferred this second appeal on the following grounds:—

“Under the provisions of section 38 of Rent Recovery Act, the rent becomes due for purposes of issuing process under the Act only at the end of the fasli. According to the custom of the country instalments are fixed only for the convenience of the tenant and no legal process can be issued for the realization of the rent until the expiration of the fasli.”

Bhashyam Ayyangar for appellant.

Mr. Johnstone for respondent.

JUDGMENT.—The appellant is the zamindar of Kannivadi in the district of Madura and the respondent is his tenant. The former tendered a patta to the latter for fasli 1296 in June 1887, but the latter neither accepted it nor paid rent for that fasli which commenced with July 1886 and ended with June 1887. According to the kistbandi obtaining in the zamindari, rent was payable in monthly instalments, commencing with November in each fasli. In April 1888, the appellant attached the tenant's holding in order to bring it to sale under section 38 of Act VIII of 1865 for arrears of rent due for fasli 1296. The respondent brought this suit to set aside the attachment under section 40 of that enactment on the ground that the patta tendered was not such as he was bound to accept, and that the attachment was not made within one year, as prescribed by section 2 of the Act, from November 1888. The Sub-Collector, who tried the suit in the first instance, and the Judge, on appeal, held that the attachment was *ultra vires* so far as it related to instalments which had accrued due between November 1886 and April 1887 and set it aside *in toto* as being *excessive*; hence this second appeal.

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It is provided by section 2 that process against a tenant under the Act must be taken within one year from the time *when the rent became due*. It is settled law that a landlord is entitled to tender a proper patta at any time within the fasli and that he is not at liberty to enforce the terms of a tenancy until he has tendered a proper patta. It is also provided by section 38 that it shall be lawful for a landholder to sell the tenant's interest in land when arrears of rent may not be liquidated within the current revenue year, that is to say, before the end of fasli. The question arising for decision upon these provisions of law and the kistbandi sanctioned by custom is whether the unit for the special limitation prescribed by section 2 is the instalment in arrear according to the kistbandi or the aggregate rent in arrear at the end of the fasli. The lower Courts considered that it was the former, but, in this opinion, we are unable to concur. In its ordinary sense, the expression in section 2, “when rent became due,” means when rent became recoverable by action or other legal proceeding, and as no suit or other proceeding can be instituted under section 7 to enforce the terms of a tenancy unless and until a proper patta has been tendered, it is not right to say that rent accrued due to the appellants for fasli 1296 in November 1886, when patta was tendered only in June 1887. If the patta tendered was the one which the tenant was bound to accept, the rent, which the appellant sought to recover, became due in June 1887, that is to say, within one year prior to the date of the attachment in question. Again all rules of limitation, whether general or special, rest on the doctrine of *laches* and reading section 2 in the light thrown by it, the proper construction is that the section pre-supposes that the process contemplated by it is available under the Act when rent becomes due and keeps the remedy alive for one year from the date when time begins to run. By section 38, the tenant's saleable interest in his holding is not liable to be attached until after the expiration of the fasli, for which the rent claimed is due. The process of attachment becomes, therefore, available only at the end of the fasli, and, as one year is the special period prescribed by section 2, the time from which it ought to be computed with reference to the process mentioned in section 38 is from the commencement of the next fasli. The construction that the unit for limitation is the first instalment results in this anomaly, viz., that, whilst section 2 prescribes a special limitation

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No distinct finding has, however, been recorded with reference to the second issue, and the decrees of both the lower Courts must be set aside, and the case remitted to the Court of First Instance for disposal after trial of the second issue. The costs of this appeal will be provided for in the revised judgment.

APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

SANKARAN (DEFENDANT No. 1), APPELLANT,

v.

PERIASAMI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Limitation—Regulation II of 1802 (Madras), s. 18—Act IX of 1871, sch. II, art. 142—Starting point of limitation—Acknowledgment of title—Adverse possession of partial interest in land.

Suit by the Zamindar of Shivagunga to recover certain land as part of his zamindari from the defendants who claimed title under a deed of gift dated 1830 from the person then in possession of the zamindari.

The istimrar zamindar died in 1829. After his death certain persons were in possession without title; but in February 1863 his daughter Katama Natchiar obtained a decree in the Privy Council against the person then in possession of the zamindari in execution of which she was put into possession. In 1876 she brought a suit against the present defendants to recover the property now in question; but that suit was withdrawn on a petition presented by her vakil stating that the case had been compromised and praying that the suit be struck off the file, which was accordingly done. She died in 1877 and the plaintiff was her successor. It appeared that *poruppu* was always paid for the land now in question.

Held, (1) that the payment of *poruppu* did not prevent the possession of the defendants from being adverse to the plaintiff as possession of a limited interest in immovable property may be as much adverse for the purpose of barring a suit for the determination of that limited interest as is adverse possession of a complete interest in the property to bar a suit for the whole property;

(2) that the date of the Privy Council decree could not be taken as the starting point of limitation;

(3) that the transactions in reference to the suit of 1876 did not amount to an acknowledgment of the zamindari's title and did not give a new cause of action to her successors;

(4) that the cause of action having arisen to the then rightful owner of the zamindari in 1830, the plaintiffs' suit was barred by limitation.

APPEAL against the decree of S. Gopalachari, Subordinate Judge of Madura (East), in original suit No. 5 of 1888.

Suit by plaintiff No. 1 as owner of the zamindari of Shivagunga, to which he succeeded in 1883, to recover with mesne profits certain land, part of the zamindari. Plaintiff No. 2 was lessee from plaintiff No. 1 of the land in question. The defendants were in possession under title derived from one of a line of

1890.
Mar. 11, 14.
April 14.

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occupants of the zamindari, who came into possession in 1830, but were in 1863 held not to be entitled to it. The further facts of the case appear sufficiently, for the purposes of this report, from the judgment of the High Court.

The Subordinate Judge passed a decree in favor of the plaintiffs.

The defendants preferred this appeal.

Mr. Johnstone and Pattabhiramayyar for appellants.

Subramanya Ayyar and Bhashyam Ayyangar for respondents.

The following cases were quoted in the argument on the question of limitation:—*Nobin Chunder Chuckerbutty v. Guru Persad Doss*(1), *Aumirtolall Bose v. Rajoneekant Mitter*(2), *Saroda Soondury Dossee v. Doyamoyee Dossee*(3), *Subramaniam Chetti v. Subramaniam Chetti*(4), *Vijayasami v. Periasami*(5), *Kalee Coomar Nag v. Kashee Chunder Nag*(6), *Pursut Koer v. Palut Roy*(7), *Gya Persad v. Heet Narain*(8), *Srinath Kur v. Prosunno Kumar Ghose*(9), *Kokilmoni Dassia v. Manik Chandra Joaddar*(10), *Azam Bhuyan v. Faizuddin Ahamed*(11), *Atchamma v. Subbarayudu*(12), *Sheo Narain Singh v. Khurgo Koerry*(13), *Dwarka Nath Gupta v. Komolmoni Dasi*(14).

JUDGMENT.—We consider that the appeal must be disposed of on the ground of limitation and that the suit is barred upon the plaintiffs' own case. Their case is that the possession of those under whom defendants claim began in 1830 under a gift by the usurping zamindar to his daughter or her husband and this possession would be adverse to the rightful owners of the zamindari from that time. Under the law of limitation, prior to Act IX of 1871 coming into force, when once a cause of action had accrued to a person capable of enforcing the same, whether that person was a full owner or not, time began to run, and no subsequent disability of any person claiming in succession to the person against whom time had so begun to run could prevent the bar of limitation arising at the expiration of the prescribed time,

(1) B.L.R., Sup. Vol., 1008; s.c. 9 W.R., 505.

(2) L.R., 2 I.A., 113; s.c. 15 B.L.R., 10; 23 W.R., 214.

(3) I.L.R., 5 Cal., 938.

(4) I.L.R., 4 Mad., 124.

(5) I.L.R., 7 Mad., 242.

(6) 6 W.R., 180.

(7) I.L.R., 8 Cal., 442.

(8) I.L.R., 9 Cal., 93.

(9) I.L.R., 9 Cal., 934.

(10) I.L.R., 11 Cal., 791.

(11) I.L.R., 12 Cal., 594.

(12) 5 M.H.C.R., 428.

(13) 10 Cal., L.R., 337.

(14) 12 Cal., L.R., 548.

and adverse possession for more than the prescribed period against a widow or other holder of a female's estate barred the reversioner—*Nobin Chunder Chuckerbutty v. Guru Persad Doss*(1) and *Aumirtolall Bose v. Rajoneekant Mitter*(2).

In 1830, on the plaintiffs' own case, a cause of action arose to the then rightful owner of the zamindari, who was Ungamuttu Natchiar, the widow of the istimrar zamindar, and in twelve years from that time she and all those claiming in succession to her were barred.

It is argued for the plaintiffs that the widow and daughter of the istimrar zamindar could not sue for this village until their right to the zamindari had been established, which was not until the final decree of the Privy Council in favor of Katama Natchiar in 1863, and, therefore, that time did not begin to run against Katama Natchiar until the date of that decree, viz., 8th December 1863. No express authority is quoted in support of this position, which was assumed also by the Subordinate Judge and we are not prepared, in the absence of authority, to admit its soundness. Doubtless it would have been highly inconvenient for the rightful owner of the zamindari to be bringing suits against the various persons in wrongful possession of portions of the estate, while their title to the whole estate was as yet unestablished; but this inconvenience can be no reason for allowing exceptions to the law of limitation which are not to be found in it. Even if the rather vague words of exception in clause 4 of section 18 of Madras Regulation II of 1802 could be stretched so as to prevent time running against Ungamuttu Natchiar and Katama Natchiar until the decree of the Privy Council in the latter's favor, certainly Act XIV of 1859 contains no exception, which could be so stretched in their favor, and that Act repeals the regulation, and, by section 18, makes the limitation prescribed by the Act applicable to all suits instituted within two years from the passing of the Act, which time was extended by Act XI of 1861 to 1st January 1862, "any Statute, Act or Regulation now in force notwithstanding." In January 1862, therefore, Katama Natchiar was barred from suing for recovery of this property, not having brought a suit for that purpose within twelve years from 1830 when the cause of action accrued.

(1) B.L.R., Sup. Vol., 1008; s.c. 9 W.R., 505.

(2) L.R., 2 I.A., 113 s.c. 15 B.L.R., 10; 23 W.R., 214.

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It is contended by the learned vakil for the respondent that the present suit is not barred, because, before the bar was complete under the former Act, Act IX of 1871 came into force and introduced a new limitation for persons entitled to immovable property on the death of a Hindu female (art. 142, sch. II, of Act IX of 1871), viz., twelve years from the death of such female. This argument depends for its validity upon the contention that time began to run against the rightful owners of the zamindari only from the date of the Privy Council decree in 1863, which position we have already decided to be untenable. In our opinion the cause of action arose at the time when adverse possession began in 1830 and Katama Natchiar was barred by Act XIV of 1859 before Act IX of 1871 came into force. If this were so, then, by section 2, paragraph 2, of Act XV of 1877, nothing in that Act or in Act IX of 1871 contained, revived any right to sue barred by Act IX of 1871 or any enactment thereby repealed. Neither article 142 of Act IX of 1871 therefore nor article 141 of Act XV of 1877 can help the plaintiffs. Article 142 of schedule II of Act IX of 1871 could not help them in any case, for it only applies to widows and does not affect the question of limitation in the case of persons claiming in succession to Katama Natchiar, whose estate was not a widow's but a daughter's estate. Article 141 of the present Limitation Act (XV of 1877) extends the provision to the case of all Hindu and Muhammadan females, but that cannot help plaintiffs. But, in our view, neither of these articles apply to this case.

The Subordinate Judge got over the difficulty of limitation by treating the proceedings resulting in the withdrawal of original suit No. 7 of 1876 by Katama Natchiar as amounting to the creation of a fresh title by her in favor of defendants, and holds, therefore, that the cause of action to the first plaintiff's father to set aside such alienation and recover the village only accrued on Katama Natchiar's death, and the present suit being brought within twelve years from that date is not barred.

We cannot agree in this view of the effect of the withdrawal of the suit. All that is proved is that the Rani's vakil presented a petition (exhibit F-1) to the Court, stating that the case had been compromised and asking that the suit might be struck off the file, which was ordered accordingly (exhibit F-2). There is also some evidence that the defendants in that suit paid Rs. 1,300 to the Rani, but they did not join in any application to the Court and

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there is nothing to show that they acknowledged the right which the Rani asserted in the suit. On the contrary, it would appear, from the vakil's application (exhibit F-1), that the terms of compromise were that they were to continue to enjoy the village at the same rent as before. The transaction would certainly not have been a sufficient acknowledgment of the Rani's title to give a new starting point under the law of limitation, and *a fortiori* it would not be sufficient to create a new title in the defendants and give a new cause of action to the Rani's successors. To allow a mere withdrawal by a plaintiff, in which defendants did not formally concur, to operate as the creation of a new title in defendant which gets rid of all questions of adverse possession and limitation, would, we think, open a door to fraud and be contrary to all principles of equity.

It is argued, for respondents, that possession never was in fact adverse to the zamindari because *poruppu* was always paid and that therefore the question of limitation does not really arise. The answer to this is, that possession of a limited interest in immovable property may be just as much adverse, for the purpose of barring a suit for the determination of that limited interest, as is adverse possession of a complete interest in the property to bar a suit for the whole property—see *Madhava v. Narayana* (1).

As we hold that the plaintiffs' suit is barred by the law of limitation, it is unnecessary to decide the other questions raised in this appeal.

We must reverse the decree of the lower Court and dismiss the suit with costs throughout.

(1) I.L.B., 9 Mad., 244.

ORIGINAL CIVIL.

Before Mr. Justice Handley.

1890.
July 17, 22.

MACKENZIE AND OTHERS (PLAINTIFFS),

v.

STRIRAMIAH (DEFENDANT).*

Contract Act, s. 27—Restraint of trade.

One having a license for the manufacture of salt entered into a contract with a firm of merchants, whereby it was provided that he should not manufacture salt in excess of the quantity which the firm at the commencement of each manufacturing season should require him to manufacture; and that all salt manufactured by him should be sold to the firm for a fixed price. The agreement was to be in force for a period of five years. In a suit by the merchants for an injunction restraining the licensee from selling his salt to others:

Held, that whether or not the first of these clauses was invalid under s. 27 of the Contract Act, it was separable from the second clause which was not bad as being in restraint of trade.

Suit by the members of the firm of Messrs. Arbuthnot & Company for an injunction restraining the defendant from selling salt manufactured by him under a license to others.

The defendant was the holder of a license for the manufacture of salt and had entered into an agreement with the plaintiffs for the sale to them of all the salt manufactured by him. The material parts of the agreement which was executed in counterpart are set out in a judgment of the Court.

Krishnasami Ayyar for the defendant objected that the contract was void as being in restraint of trade. Reliance was placed on the judgment of *Muttusami Ayyar, J.*, which is printed at the end of this report, and upon *Oakes v. Jackson*(1), *Brahmaputra Tea Company v. Scarth*(2), *Madhub Chunder Poramanick v. Rajcoomar Doss*(3), *Auchterlonie v. Bill*(4), *Pollock on Contracts*, p. 301. *Vaithelingam v. Saminada*(5), *Catt v. Tourle*(6), *Allsopp v. Wheatcroft*(7).

* Civil Suit No. 144 of 1888.

(2) I.L.R., 11 Cal., 545.

(4) 4 M.H.C.R., 77.

(6) L.R., 4 Ch. App., 651

(1) I.L.R., 1 Mad., 134.

(3) 14 B.L.R., 76.

(5) I.L.R., 2 Mad., 41.

(7) L.R., 15 Eq., 59.

Mr. K. Brown for the plaintiffs referred to *Donnell v. Bennett*(1), *Montague v. Flockton*(2), *Walverhampton and Walsall Railway Company v. London and North-Western Railway Company*(3), *Brahmaputra Tea Company v. Scarth*(4), *Prem Sook v. Dhurum Chand*(5) and to the illustrations to section 57 of the Specific Relief Act and section 87 of the Contract Act. He argued that the decision of *Muttusami Ayyar, J.*, could not be regarded as governing the present case as it proceeded upon the terms of a contract which was not now available for reference and which appeared to have been very wide in its provisions for its duration. It was also contended that the construction put on section 27 on behalf of the defendant involved the substitution of the words "restrained in exercising," &c., for the words "restrained from exercising," &c.

Judgment having been reserved was delivered as follows:—

HANDLEY, J.—"Additional issue. Is the contract evidenced "by agreements of 23rd April 1887 in paragraphs 1 and 2 of "the plaint mentioned void as being in restraint of trade?" I thought it convenient to decide this point at once, as the objection goes to the root of the plaintiffs' case, and, if I found the issue in defendant's favor, it would dispose of the case. But on consideration of the arguments and the authorities quoted on both sides, I am satisfied that there is nothing in the objection. The defendant's *vakil* relies on the judgment of *Muttusami Ayyar, J.*, in *Rajavayya v. Subbayya*(6). The point decided in that case following the decisions in *Oakes v. Jackson*(7), *Brahmaputra Tea Company v. Scarth*(4), and *Madhub Chunder Poramanick v. Rajcoomar Doss*(8) is that section 27 of Indian Contract Act does away with the distinction observed in English cases following upon *Mitchel v. Reynolds*(9) between partial and total restraint of trade and makes all contracts falling within the terms of the section void, unless they fall within the exceptions. I was quite prepared to follow the decision upon this point, but I am asked to follow it still further and to hold that because the contract in question in that case appears (as far as one can tell from the judgment) to have been a salt contract similar to the one in

(1) L.R., 22 Ch. D., 835.

(3) L.R., 16 Eq., 433.

(8) Civil Revision Petitions, Nos. 3 to 16 of 1889, *vide* below.

(7) I.L.R., 1 Mad., 134.

(2) L.R., 16 Eq., 189.

(4) I.L.R., 11 Cal., 545.

(5) I.L.R., 17 Cal., 320.

(6) 14 B.L.R., 76.

(9) 1 Sm. L.C., 406.

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STRIRAMIAH. question in this suit, therefore the contract, the subject of this suit, is void. This, I think, I am not bound to do. Whether a contract is in restraint of trade within the meaning of section 27 of the Contract Act is a question to be determined on construction of the contract in each case. I have no copy of the contract in question in the case before Mr. Justice Muttusami Ayyar, and, I think, I cannot safely take that decision as any guide in deciding whether the contract in this suit is in restraint of trade or not, and I do not consider that it is. The clauses in the contract, which are said to be void, are as follows :—

Clause 6.—The licensee shall not manufacture any salt in excess of the quantity which the said firm of Arbuthnot & Company shall, from time to time, at the commencement of each manufacturing season, require the licensee to manufacture.

Clause 12.—All salt manufactured and stored by the licensee under the said license, and, in accordance with these presents, shall be sold by the licensee to the said firm of Arbuthnot & Company at, and for the price or sum of, Rs. 11-8-0 for each and every garce of 120 maunds of the said salt measured and taken delivery of by them at Madras, and the licensee shall and will accept such sum of Rs. 11-8-0 for every such garce of salt in full payment and satisfaction for the same.

I think these clauses may be separated and that it does not follow that because one is bad the whole contract is void. Clause 6 may be bad: it is not necessary to pronounce an opinion upon that; it is not in question in this suit and is not sought to be enforced. Clause 12 does not, in my opinion, purport to restrain defendant from exercising his trade or business within the meaning of section 27 of the Contract Act. It is merely an agreement to sell all the salt he manufactures during a certain period to plaintiffs at a certain price. No doubt a negative covenant not to sell to anybody else may be implied, but that is not such a restraint from exercising his trade or business as the section contemplates. In one sense, every agreement for sale of goods whether *in esse* or *in posse* is a contract in restraint of trade for, if *A. B.* agrees to sell goods to *C. D.*, he precludes himself from selling them to anybody else. But a reasonable construction must be put upon the section and not one which would render void the most common form of mercantile contract.

I understand the section to aim at contracts, by which a person precludes himself altogether either for a limited time or over a limited area from exercising his profession, trade or business, not contracts by which, in the exercise of his profession, trade or business, he enters into ordinary agreements, with persons dealing with him which are really necessary for the carrying on of his business. I think I am supported in this decision by the Calcutta cases of *Carlisles Nephews & Company v. Ricknauth Bucktearmull*(1) *Prem Sook v. Dhurum Chand*(2) and by the principles which govern the English decisions upon the subject.

I find the additional issue for plaintiffs as far as clause 12 of the contract is concerned. The case must proceed.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

RAGAVAYYA AND OTHERS (PLAINTIFFS), PETITIONERS,

v.

SUBBAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1889.
Aug. 7.
Sept. 3.

This was a petition under Provincial Small Cause Court Act of 1887, s. 25, praying for the revision of the proceedings of T. Ramachendra Row, District Munsif of Nellore, in small cause suit No. 664 of 1887. The plaint, as summarised by the District Munsif, was as follows :—

The plaint sets forth that in 1883 defendant No. 1 obtained a license to sell salt in the Salt Factory at Krishnapatam: that, on 15th July 1884, he executed an agreement, along with some others, to Messrs. Mulam Krishnayya and Company providing (1) that defendant No. 1 should manufacture salt in the said factory as long as the excise system would be in force and deliver the same to plaintiffs for sale; (2) that plaintiffs should pay him at 12 rupees per garce for kudivaram, &c.; (3) that defendant No. 1 should receive 4 rupees per garce in advance for manufacturing expenses; (4) that, after delivery of salt defendant No. 1 should receive from plaintiffs the balance of money due as kudivaram, after deducting the advances made; (5) that plaintiffs should execute all the necessary repairs in the said factory, except those for salt pans; and (6) that plaintiffs should be responsible for any loss that might result from failure to execute the repairing; that, relying on the said agreement, plaintiffs executed, at great cost, permanent, as well as temporary repairs; that defendant No. 1 delivered to plaintiffs the salt manufactured by him in 1885, and received all his dues; that defendant No. 1 received advances from

(1) I.L.R., 8 Cal., 809.

(2) I.L.R., 17 Cal., 320.

* Civil Revision Petitions, Nos. 3 to 16 of 1889.

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plaintiffs up to 18th April 1886; that, in violation of the contract, defendant No. 1 sold to defendant No. 2 the 18 garce of salt manufactured by him in 1886, and put plaintiffs to great loss; that interest is charged on the advances made to defendant No. 1, though not provided for in the registered deed, as there was an oral agreement on the subject; and that defendant No. 2 also is responsible, as he purchased the salt with notice of the contract between defendant No. 1 and plaintiffs. Hence the suit against both defendants to recover (1) Rs. 132-10-9, advances received by defendant No. 1 and interest thereon and (2) Rs. 852-12-0, as damages for the breach of contract on the part of defendant No. 1, or, in all, Rs. 985-6-9.

Rama Rau for petitioners.

Anandachariu for respondents.

Judgment having been reserved was delivered as follows:—

MUTTUSAMI AYYAR, J.—It is contended in support of this petition that the Small Cause Court was in error in holding that the agreement sued on was in restraint of trade and void as such under section 27 of the Indian Contract Act. The petitioners-plaintiffs are dealers in salt and the first counter-petitioner-defendant was a licensee entitled to manufacture and sell salt in the Salt Factory at Krishnampatam. On the 15th July 1884, the agreement sued on was entered into between defendant No. 1 and others on the one part and the plaintiffs and their partners on the other part. It was to be in force as long as the excise system was in force and it provided *inter alia* that defendant No. 1 was to deliver all the salt he manufactured to the plaintiffs for sale and to sell it to no one else, and that in return the plaintiffs were to pay him Rs. 12 per garce for kudivaram and to execute all the necessary repairs in the factory save those which might be required for the salt pans. As licensee, defendant No. 1 would be at liberty but for the agreement to sell the salt manufactured by him to any one he liked and at such price as he might fix. But the agreement in question debarred him from selling the salt to any but the plaintiff and demanding as its price more than the stipulated kudivaram. The question for decision is whether, by reason of such restraint, the agreement is void under section 27 of Act IX of 1872. That section provides that "every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void." Of the three exceptions to that section, the second and the third pre-suppose the relation of partners between the parties and the first premises that of the buyer and the seller of the good-will of a business, and, in dealing with this revision petition, I may dismiss them from consideration. The rule of English law on the subject, as laid down in the case of *Mitchel v. Reynolds*(1) is that law favors trade much, and all restraints of trade are bad, subject, however, to the exception among others recognised by that leading case, viz., when the restraint is only partial in respect to time or place and there is good consideration given to the party restrained, the restraint is not unlawful. A partial restraint is again good or bad according as the consideration given for it is adequate or inadequate. On a comparison of the rule, as illustrated by English decisions with the rule embodied in section 27 of the Indian Contract Act, two questions arise for consideration, viz., (1) whether section 27 intended to vary the English rule, and (2), if not, whether the restraint imposed by the agreement in the case before me can be upheld according to English cases.

(1) 1 Sm. L.C., 406.

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As to the first question, the omission to make an exception in favor of a partial restraint of trade to the general prohibition contained in section 27 clearly indicates an intention not to give legal effect to such restraint in this country. It was so held by KINDENSLY, J., in *Dukes v. Jackson*(1), though he was also of opinion that the covenant in that case was unreasonable even under the English law. In *Madhule Chunder Poramanick v. Rajcoomar Doss*(2), COUCH, C.J., and PONTIFEX, J., held that the words in section 27 "Restrained from exercising a lawful profession, trade or business" do not mean an absolute restriction and are intended to apply to a partial restriction also. That decision was followed by the High Court at Calcutta in *Brahmaputra Tea Company v. Searth*(3). The conclusion I come to, therefore, on the first question, is that the agreement, so far as it restrains the sale to others than the plaintiff, is bad.

In this view it is not necessary to decide the second question. I may add, however, that the restriction is to endure according to the agreement so long as the excise system is in force and it is not confined within a reasonable limit in respect of time. Practically, the agreement was intended to debar the first defendant from dealing in salt which he might manufacture for an indefinite period, except with the plaintiffs and for the stipulated kudivaram. It seems to me that such agreement would be unreasonable even if legal effect could be given to a partial restraint. The decision of the District Munsif is not illegal, and I dismiss this petition with costs.

APPELLATE CIVIL.

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

SAMA (PLAINTIFF), APPELLANT,

v.

STRINIVASA (DEFENDANT), RESPONDENT.*

Revenue Recovery Act (Madras)—Act II of 1864, ss. 42, 44—Sale of part of a holding for arrears of revenue due on another part.

The plaintiff sued, as the purchaser under a court-sale, for possession of certain land, which the defendant's vendor had purchased at a sale held under the Revenue Recovery Act for arrears of revenue accrued due on other land belonging to the judgment-debtor:

Held, the suit should be dismissed.

SECOND APPEAL against the decree of C. W. W. Martin, District Judge of Salem, in appeal suit No. 246 of 1887, reversing the decree of T. S. Kristna Ayyar, District Munsif of Krishnagiri, in original suit No. 123 of 1887.

(1) I.L.R., 1 Mad., 134. (2) 14 B.L.R., 70. (3) I.L.R., 11 Cal., 545.
* Second Appeal No. 1298 of 1889.

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Suit for the declaration of the plaintiff's title to, and for possession of, certain land with mesne profits.

The land in question was formerly the property of one Krishna Char. The land was sold in execution of a decree against Krishna Char and the plaintiff became the purchaser and it was ordered that possession be given to him. The defendant put in an objection petition, stating that he had purchased the land from one Venkataramayyan, who purchased it at a revenue sale under Act II of 1864 for arrears of revenue due to Government by Krishna Char in respect of some other lands. The Court allowed the objection and ordered the plaintiff to give up possession to the defendant. The plaintiff, therefore, now sued as above.

The District Munsif passed a decree for plaintiff, which was reversed, on appeal, by the District Judge, who said:—

"The words, immovable property, in section 5, of the Revenue Recovery Act, refers to immovable property other than land and includes house, &c., not standing on land subject to the payment of revenue. The Act does not give the defaulter the power to elect what portion of his land shall be held to be in arrear. Whether he has one patta or many, he has a certain amount on the aggregate to pay to Government, and, if he falls into arrear, the Collector may say that he considers the arrear to be due from one piece of land in his holding as much as from another, though the defaulter may have absolutely paid up the dues on that patta for that particular piece of land; but it is made the duty of the Collector to sell only such portion of the whole land as will satisfy the arrear and to give such notice of the sale of the land on the land itself as will enable incumbrancers to protect their own interests by paying up the arrears."

The plaintiff preferred this second appeal.

Seshagiri Ayyar for appellant.

Parthasaradhi Ayyangar for respondent.

JUDGMENT.—Having regard to the language of sections 42 and 44 of the Revenue Recovery Act, we think the District Judge has arrived at a right conclusion.

In sales of land for arrears of revenue no procedure other than that of section 42 of the Act is provided. No provision is made for the case of separate portions of a holding, on which arrears have not actually accrued, being sold subject to incumbrances, and

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the only procedure prescribed for sales for arrears of revenue is that contained in section 42, which enacts that the lands shall be sold free of all incumbrances.

Then section 44 provides that it shall be lawful for a Collector to sell the whole or any portion of the land of the defaulter. These words, in our opinion, clearly mean the whole or any portion of the holding of the defaulter and not merely the whole or any portion of the fraction of the holding on which the arrears have actually accrued.

The object of making the provision so wide in its terms is the necessity of securing the public revenue.

For the same reason we are of opinion that the words "the land," in section 2, where it is said that the land, &c., shall be regarded as the security for the public revenue, mean the lands of the holding and not the portion of land in respect of which the arrears may accrue.

The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

PALANI (DEFENDANT No. 1), APPELLANT,

v.

PARAMASIVA (PLAINTIFF), RESPONDENT.*

Regulation XXV of 1802 (Madras), s. 12—Revenue Recovery Act II of 1864 (Madras) ss. 32, 41—Rent Recovery Act—Act VIII of 1865 (Madras), ss. 3, 9.

The purchaser at a revenue sale is *prima facie* entitled to claim the faisal rate of rent.

SECOND APPEAL against the decree of V. Rangayyar, Subordinate Judge of Salem, in appeal suit No. 120 of 1888, confirming the decree of D. Iyyavayyar, District Munsif of Namkal, in original suit No. 410 of 1887.

Suit by the plaintiff, a mittadar, who had purchased the land now in question at a revenue sale, to enforce the acceptance by the defendants of pattas for fasli 1294, containing a stipulation

* Second Appeal No. 1037 of 1889.

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for the payment of rent at the faisal rate. The defendants pleaded that they were only liable to pay rent at a lower rate in accordance with a cowle, to which it was not alleged that the plaintiff had been a party.

The District Munsif, and, on appeal, the Subordinate Judge, decreed in favor of the plaintiff. The following cases were alluded to in their judgments:—*Ramchandra Mankeshwar v. Bhimrat Ravi(1)*, *Adimulam Pillai v. Kovil Chinna Pillai(2)*, *Venkata-gopal v. Rungappa(3)*.

The defendants preferred this second appeal.

Sadagopacharyar for appellant.

Bhashyam Ayyangar and *Desikacharyar* for respondent.

JUDGMENT.—It is argued that the lower Court is wrong in holding that, as purchaser at the revenue sale, respondent is entitled to demand the faisal rate. Having regard to section 12 of Regulation XXV of 1802 and to the provisions of sections 32 and 41 of the Revenue Recovery Act, the purchaser at a revenue sale is *prima facie* entitled to demand the faisal rate. In the present case the tenant (now appellant) has cited no evidence to show the circumstances under which the lower rent was accepted, or that the purchaser was under any legal obligation to accept such lower rate.

This second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

NATESAYYAN (PLAINTIFF), APPELLANT,

v.

NARASIMMAYYAR (DEFENDANT), RESPONDENT.*

Minor—Suit against guardian of a minor—Immaterial irregularity—Minor's interest bound.

In a suit by an adopted son, after the death of his adoptive father, to recover ancestral land sold in execution of a decree against his adoptive mother therein

(1) I.L.R., 1 Bom., 577. (2) 2 M.H.C.R., 22. (3) I.L.R., 7 Mad., 366.

* Appeal No. 182 of 1888.

described as the guardian of the present plaintiff, who was then an infant, it appeared that the decree had been passed on a bond executed by the then defendant in respect of a debt due by her late husband:

Held, that the plaintiff should be regarded as a party to the suit in which the decree executed against the land had been passed, and that the present suit should be dismissed.

APPEAL against the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in original suit No. 28 of 1887.

The plaintiff sued to recover possession from the defendants of certain land, part of the property left by his adoptive father, Mahalinga Ayyar, who died in August 1869. It appeared that, on the death of Mahalinga Ayyar, his wife, Seshi Ammal, took the management of the property, the plaintiff being a minor. Seshi Ammal in 1870 executed a bond in favor of one Subramanya Sastri, who, in 1872, brought a suit upon it against her and obtained a decree and in execution brought the land now in question to sale. The plaint and the decree in that suit described the defendant as "Seshi Ammal, guardian and mother of Natesan (the present plaintiff), 11 years old, adopted son of Mahalinga Ayyar deceased, residing at Veppattur," and the sale certificate issued to the execution-purchaser from whom the present defendant derived title described her in similar language.

In the present suit the plaintiff's case was that Seshi Ammal's debt did not bind him and that the decree against her and the proceedings taken in execution of it could not affect his title to the land.

The Subordinate Judge held that Seshi Ammal's bond was executed in respect of a debt due by her late husband and that the plaintiff was to be regarded as a party by his guardian to the suit brought upon it, notwithstanding the informality in the description of the parties, which was found not to have prejudiced the plaintiff: he accordingly dismissed the suit.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Pattabhirama Ayyar* for appellant.

Ramachandra Rao Sahib and *Mahadeva Ayyar* for respondent.

MUTTUSAMI AYYAR, J.—The property in dispute originally belonged to one Mahalinga Ayyar, who died in August 1869, leaving him surviving a widow, named Seshi Ammal, and the appellant, his adopted son. The appellant was then a minor and attained his majority only in 1879. During his minority

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it would seem his adoptive mother was in management of the property. In 1872 one Subramanya Sastri instituted original suit No. 119 on the file of the District Munsif of Kumbakonam upon a bond executed in his favor by the guardian in 1870 and it resulted in a money decree in his favor in July 1872. In execution of that decree the property in dispute was put up to sale and Subramanya, the then plaintiff, became its purchaser. In consequence of other transactions, which it is not necessary to mention here in detail, the property passed from him to the respondent, who entered into possession in 1875. It is not disputed that the decree passed in original suit No. 41 of 1875 for Rs. 8,500 and odd created a valid charge on the property in question and that Subramanya Sastri satisfied the charge before he resold the property to the respondent. The appellant's case was that he was not properly made a party to original suit No. 119 of 1872, that the debt which was decreed in that suit was fictitious, or even if real, not binding upon him, and that he was entitled to set aside the Court sale as fraudulent and to recover back the property subject to payment of what might be found due on account of the charge created by the decree in original suit No. 41 of 1875. The Subordinate Judge has found that the bond, which was the basis of original suit No. 119 of 1872, was executed by Seshi Ammal for a debt due by Mahalinga Ayyar and not either for money raised for her own purposes or without consideration.

The oral evidence as to the nature of the debt was conflicting and satisfactory reasons are given by the Subordinate Judge in support of his finding. The admission before us that exhibit III is genuine and the appellant's omission to produce the list of debts attached to his father's will appear to me also to turn the balance of testimony against him and I see no ground for disturbing the finding of the Subordinate Judge; but the substantial question for decision is whether the appellant was a party to original suit No. 119 of 1872. The plaintiff in that suit (exhibit F) described the defendant in the following terms:—Seshi Ammal, guardian and mother of Natesan, 11 years old, adopted son of Mahalinga Ayyar deceased, residing at Veppattur, Kumbakonam taluk. The decree passed in that suit described the defendant in the same terms.

The sale certificate (exhibit VII) described the defendant, whose right, title and interest was sold, as Seshi Ammal, guardian and

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mother of Natesan, 11 years old. It is urged, for the respondent, that the appellant was the real defendant in the suit and that the execution sale binds him. Our attention is also drawn to the fact that the decree-debt was one which was binding on the appellant and that the description disclosed, according to the practice of the Courts prior to 1869, an intention to make the appellant liable by suing his natural guardian in her capacity as his guardian.

On the other hand, it is contended, for the appellant, that he was not a party to the suit of 1872 and that the sale is not binding on him. It is argued that the description was not in accordance with the rule of practice prescribed by the High Court on the 23rd July 1869 and that there is also no trace of Seshi Ammal's appointment as guardian *ad litem*. It is also said that, as the guardian, who executed the bond, she would not be eligible for appointment as guardian *ad litem* if the debt was to be disputed. The omissions, to which the appellant's pleader draws attention, are no doubt errors of procedure, but there remains the fact that the debt was binding upon him and there was the intention, as disclosed by the description in the plaint, decree and sale certificate, to make him liable, however defective that description might have been. In cases like this, where a Court sale is sought to be set aside nearly twelve years after it had taken place, I think we should look at the substance of the plaint and the decree and the sale certificate, and, if, by doing so, the intention to make the minor the responsible defendant is clear and the errors of procedure have in no way prejudiced him, we ought not to set aside the sale. The same principle was laid down by the Full Bench of this Court in *Ittiachan v. Velappan*(1) with reference to sales in execution of decrees against persons, who appear, from the proceedings in the suit, to have been sued as karnavans of Malabar tarwads. In *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb*,(2) it was held by the Full Bench of the High Court at Calcutta that, when the suit was substantially brought against the minor, the error of description was one of form and could not without proof of prejudice invalidate a decree against him. The real question is whether the appellant was substantially a party to the suit. Having regard to the description of the defendant in exhibits F, VI and VII and to the fact that the plaint of 1872 was framed in

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

(2) I.L.R., 14 Cal., 204.

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accordance with the practice prior to 1869, I am unable to hold that the minor was not the real defendant in original suit No. 119 of 1872. The pleader for the appellant lays stress on the omission to appoint the natural guardian as guardian for the suit, but I fail to see how it has prejudiced him when the decree-debt was one which he was bound to pay. He had an opportunity in the present suit to show that the debt was not binding upon him, but he has failed to show it.

Reliance is placed on the case of *Ganga Prosad Chowdhry v. Umbica Churn Coondoo*(1), in which it was said that the Full Bench decision referred to an affidavit by the guardian. In the case before us the plaintiff stated that Seshi Ammal was the guardian and it was verified. In 1872, the present Procedure Code was not in force and the error of description was a mere irregularity or error of form. The plaintiff impugned the decree and the purchase as fraudulent, and no fraud being made out, the appellant's pleader falls back on errors of procedure, whereby he has not been prejudiced.

I do not consider that the appeal can be supported and I would dismiss it with costs. As regards the memorandum of objections we have already disposed of the question of jurisdiction, and, in the view, which I take of the merits of the appeal, it is unnecessary to discuss the other questions. It is also dismissed.

SHEPHARD, J.—I felt some difficulty in the case owing to the fact that there was no evidence that Seshi Ammal was appointed guardian to defend the suit of 1872 or that the plaintiff's interests were properly represented in that suit; but seeing that Seshi Ammal was admittedly guardian of the plaintiff and was treated as such in the proceedings in the former suit, and, moreover, that the plaintiff had no real defence, I do not think that he can now take advantage of the irregularity. In other respects I agree with the judgment of Muttusami Ayyar, J.

(1) I.L.R., 14 Cal., 754.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

NARAYANA (DEFENDANT), APPELLANT,

RAMACHANDRA AND OTHERS (PLAINTIFF'S REPRESENTATIVES),
RESPONDENTS.*

Land Acquisition Act—Act X of 1870—Land given as compensation—Regulation II of 1803 (Madras), s. 44—Darkhast rules.

The owner of certain land taken up under the Land Acquisition Act, after the amount of compensation had been fixed, conveyed her interest to the present defendant, who applied for the land now in dispute in lieu of compensation, it being then Government waste, and this application was granted and the deed of exchange executed. The plaintiff and another had previously applied under darkhast rules for the land now in dispute, but the Collector ordered the land to be placed in possession of the defendant. The Board of Revenue, however, directed that the land be made over to the prior darkhastdars on terms which were complied with and they were put into possession. The plaintiff having been subsequently dispossessed by the defendant, now sued for a declaration of title and for possession: Held, that the plaintiff was entitled to the land as against the defendant.

SECOND APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in appeal suit No. 98 of 1888, confirming the decree of T. Ramachandra Row, District Munsif of Nellore, in original suit No. 371 of 1887.

Suit for a declaration of title to, and for possession of, certain land. The plaintiff and one Ragavacharlu (deceased) were the owners of the land adjoining the land in question in the suit; about 10 years before suit, they had darkhasted for the land now in question and the plaint set out that they had paid Rs. 300 and been put in a possession on the 29th of March 1887 and that the plaintiff had since been dispossessed by the defendant of the moiety of the land of which he had been put into possession.

It appeared that certain land belonging to one Kamakshamma was taken up by Government under the Land Acquisition Act in December 1884; the compensation was agreed upon in the following month and shortly afterwards Kamakshamma sold her interest to the present defendant, who applied for the land now in suit, which was then Government waste in lieu of money compensa-

* Second Appeal No. 621 of 1889.

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tion. This application was granted as appears by exhibit D, which is referred to in the judgment, being a letter from the Collector of the district to the Board of Revenue, in which reference was made to G.O., No. 66, dated 15th of January 1885, of which paragraph 2 is as follows :—

“ When the amount of compensation has been determined by the Court, it will of course be open to the zamindar to accept a reduction of peishoush or to demand payment of the amount awarded by the Court.”

The Collector expressed the opinion that “ in allowing the money compensation to be commuted to land compensation ” he acted in accordance with the spirit of that paragraph “ which,” he added “ clearly recognises the principle that it is not binding on us to pay money compensation only, though it may be awarded to suit the requirements of law, whether the party desires to have either money or land.”

On the 14th of October 1885, the plaintiff and Viraragava-charlu protested against the grant of the land to the defendant, and, in right of their darkhast, offered to pay to Government the compensation money fixed for the land of Kamakshamma. This application was refused by the Collector and the defendant was put into possession; the plaintiff and Ragavacharlu appealed to the Board of Revenue, who, on receipt of the letter from the Collector alluded to above, directed that the land should be delivered to the applicants on their paying the amount which the defendant had paid for Kamakshamma's title. The applicants complied with the above condition. No patta had been issued in the name of the defendant.

The District Munsif held that the plaintiff was entitled to a half share of the land in question and passed a decree accordingly. On appeal, the District Judge confirmed this decree, observing :— “ The plaintiff and Raghavacharlu should have got the land if it had been disposed of under the darkhast rules as prior darkhast-dars and as occupants of adjacent lands. They were entitled to the first refusal, which the Collector would undoubtedly have allowed them and avoided interference of the Board with his order if the whole case had been fairly laid before him in time. If it was thought that the darkhast rules need not be followed when lands governed by them are to be given in exchange of lands taken up as in this case, it would have the effect of

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“ defeating *bond fide* claimants under the rules. The Collector's order permitting exchange was not final and it was not an act done by him under a statute, which alone would vest in the assignee an undefeasible title such as cannot be upset except by a law suit. The order was appealable and reversible by the Board, who have, in the exercise of their power, modified the order and awarded the land to the plaintiff and Raghavacharlu. The patta is not yet issued to the defendant's name, and, consequently, no title had been created in his favor. The Land Acquisition Act X of 1870 does not provide for assignment of waste land for money compensation awarded, and, consequently, assignment of waste land cannot be under the Act. What was the Collector's power? He had power to dispose of assessed waste land under the darkhast rules, and he would be justified in granting such lands consistently with the rules. His orders are appealable to the Board of Revenue, who have power to cancel or modify the order.”

The defendant preferred this second appeal.

Blashyam Ayyangar for appellant.

Parthasaradhi Ayyangar and *Subramanya Ayyar* for respondents.

MUTTUSAMI AYYAR, J.—The question for decision in this second appeal is whether, upon the facts found, the appellant is entitled, as purchaser, to the lands sued for. Land survey No. 654 in the village of Viragalla, Nellore taluk, belonged to a Hindu lady named Kamakshamma. In December 1884, it was taken up for public purposes by the Government under Act X of 1870, and in January 1885 compensation was awarded to her, the amount being fixed with her consent at Rs. 237 plus 15 per cent. thereon. In February 1885, the appellant purchased Kamakshamma's interest in the land for Rs. 300 and applied to the Deputy Collector for the land sued for being given to him in lieu of compensation in money. In October 1885, the Deputy Collector granted, with the Collector's permission, the appellant's application, and took from him a deed of exchange. The land in dispute was then Government waste. The respondent and another had previously applied for it under the darkhast rules and their application had been rejected on the ground that the land had been reserved as tank-bed. In October 1885, they protested against its grant to the appellant and contended that, as prior

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darkhastdars and occupants of adjacent lands, they had a preferential claim under the darkhast rules. The Collector, however, overruled their objection, and directed, on the 30th October 1885, that the land be placed in the appellant's possession. The respondents appealed to the Board of Revenue, who ordered, on the 3rd April 1886, that the land in dispute be made over to the prior darkhastdars on their paying, within one week from that date, the purchase money which the appellants had paid to Kamakshamma. But the appellant refused to receive the purchase money and give up the land. On the matter being reported to the Board of Revenue, the Board directed the Collector to receive the money and place it in deposit for payment to the appellant when he might desire to take it and to put the prior darkhastdars in possession. When this order was carried out, the appellant brought a possessory suit (original suit No. 249 of 1887) on account of his dispossession and obtained a decree for possession being restored to him. Thereupon the respondent brought this suit to establish his title to the land and to recover it from the appellant. Both the Courts below upheld the respondent's claim to a moiety of the land. Hence this second appeal. I am of opinion that the decision of the Courts below is correct. Neither the appellant nor his vendor Kamakshamma had a right to insist upon a grant of land in exchange for the one taken up by the Government under Act X of 1870. That enactment only contemplates an award of compensation in money and lends no support to the appellant's claim. It is not denied that respondent was prior darkhastdar and occupied adjacent lands; consequently, the appellant's claim cannot likewise be supported under the darkhast rules which recognise the respondent's preferential claim and allow an appeal to the Board of Revenue. Assuming that the Collector granted the land as stated in exhibit D under the impression that he was at liberty to do so with reference to the spirit of paragraph 2 of G.O. No. 66, I find no warrant in it for his declining to recognise any preferential claim which third parties may have under the darkhast rules, and I cannot therefore say that the Board of Revenue was precluded from holding that he ought not to have refused to recognise such claim. As regards the contention that the land in question was the property of Government and after the Collector gave it under a special contract, in exchange for some land taken up for the Government, it was not competent to

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the Board of Revenue to entertain an appeal and to rescind the contract, it is not in my judgment tenable. As already observed, the contract was not one made under Act X of 1870. Nor was the Collector authorized by the Government Order cited either to disregard preferential claims under darkhast rules or to act otherwise than subject to the supervision and the authority of the Board of Revenue. I may here refer to section 44, Regulation II of 1803, which provides that Collectors shall not, in any case, authorize the alienation of land without authority from the Board of Revenue. The conclusion I come to is that the order of the Board is not at variance with any rule of law. On this ground I would dismiss this appeal with costs.

SHEPARD, J.—I am of the same opinion. The appellant's case depends on the validity of the Collector's proceedings with regard to the land in dispute. The Collector's action was overruled by the Board of Revenue in an order passed on the 5th June 1886 in favor of the present plaintiff and his fellow petitioner; and, unless the Collector was competent to give the appellant a good title, independently of the darkhast rules and the control of the Board of Revenue, it is clear that the appeal must fail. The Regulation II of 1803, to which reference was made in the argument, distinctly negatives any independent authority in the Collector to alienate public lands and the circumstances that the land was granted in lieu of compensation for other land taken up under Act X of 1870 does not make the darkhast rules any the less applicable. I would dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

KANHARANKUTTI (PLAINTIFF), APPELLANT,

v.

UTHOTTI (DEFENDANTS), RESPONDENTS.*

*Malabar law—Right of pre-emption under otti—Waiver—Limitation Act—
Act XV of 1877, s. 28.*

A jenmi having demised certain land in Malabar on otti to defendant No. 3 in 1869, sold the jenm title to the plaintiff and defendants Nos. 1 and 2 in 1886. In 1888 defendant No. 3 made a further advance to and obtained a renewed demise from defendants Nos. 1 and 2. The plaintiff now sued more than six years after the sale to recover his share (defendant No. 3 being in possession) on payment of one-third of the otti amount:

Held, that (whether or not the suit was maintainable as framed) the third defendant had a right of pre-emption as *otti-dar*, which had not been waived by him and was not barred by limitation, and which constituted a good defence to the suit.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 478 of 1888, confirming the decree of V. Kelu Erati, District Munsif of Pynad, in original suit No. 176 of 1888.

Suit to recover a one-third part of a paramba demised on otti to defendant No. 3 on 28th January 1869.

It appeared that plaintiff and defendants Nos. 1 and 2 were the younger children of the jenmi, by whom the land in question was demised on otti to defendant No. 3 on the above date. The eldest son of the jenmi took the land on lease from defendant No. 3. Subsequently, in October 1886, the jenmi sold her right to the paramba now in question to the plaintiff and defendants Nos. 1 and 2 and sold the jenm of another paramba to the wife of her eldest son, reserving the otti of Rs. 300 due to defendant No. 3 equally on each of them. Defendant No. 3 brought original suit No. 277 of 1887 against his lessee and the vendees of the jenmi for recovery of both parambas under the otti and obtained a decree on the 15th of February 1888. After the decree, defendant No. 3

advanced a further sum of Rs. 50 to defendants Nos. 1 and 2 and a further sum to the wife of the lessee and obtained renewed demises of both parambas.

The District Munsif dismissed the suit, holding that the plaintiff's purchase was invalid as against defendant No. 3, who, being the holder of the otti, had a right of pre-emption, which he held had not been waived. His decree was affirmed on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Sankaran Nayar for appellant.

Sankara Menon for respondents.

JUDGMENT.—The first point argued before us on second appeal is that third defendant's right of pre-emption, assuming it to exist, is no bar to this suit, inasmuch as it does not invalidate the sale to plaintiff and first and second defendants altogether, but only gives third defendant a right to have the sale transferred to him on offering to pay the price paid to the jenmi. In support of this contention *Ajudhia Bakhsh Singh v. Arab Ali Khan*(1) and *Vasudevan v. Keshavan*(2) are relied on. Neither of these cases appears to us to be in point. The case of *Ajudhia Bakhsh Singh v. Arab Ali Khan*(1) relates to the right of pre-emption among co-sharers under Muhammadan law, which is a very different thing from the right of pre-emption of an otti-holder under Malabar law. In *Vasudevan v. Keshavan*(2) all that was decided was that a holder of a veppu mortgage, which appears to carry with it the right of pre-emption and also the preferential right to make further advances, had no right to set aside the further mortgage, but was only entitled, on tendering the price, to claim that the further mortgage should be transferred to him. As to the right of pre-emption it was found in that case that an offer was made to the karnavan at the auction sale to purchase at the price offered by the highest bidder and the offer was refused, so that the question of pre-emption did not arise. On the other hand, *Cheria Krishnan v. Vishnu*(3) is a distinct authority that the right of pre-emption is a good defence to a suit to redeem.

Another point raised is that the third defendant's right of pre-emption is extinguished by section 28 of the Limitation Act, more than six years having elapsed since the sale; but section 28 only

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July 21.
Aug. 5.

* Second Appeal No. 970 of 1889.

(1) I.L.R., 7 All., 892. (2) I.L.R., 7 Mad., 309. (3) I.L.R., 5 Mad., 198.

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applies to suits for possession of property. Third defendant has no need to bring any suit for possession of the property in question. He has already obtained a decree for such possession. The only suit he would have to bring to assert his right of pre-emption would be a suit to set aside the sale to the plaintiff and the first and second defendants and to compel them to convey the property to him on his paying the price they had paid, and, even if such a suit is barred, the right is not extinguished by section 28.

It has been found by both Courts that third defendant's right of pre-emption has not been waived, and, that being so, it is a good defence to this suit and it is unnecessary to consider the other ground upon which the District Munsif decides against plaintiff, viz., that he cannot redeem one-third of the paramba on paying one-third of the otti amount due on it, though that appears to us equally fatal to plaintiff's suit as framed. The second appeal fails and must be dismissed with costs.

APPELLATE CIVIL.

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

SUNDARAM (PLAINTIFF), APPELLANT,

v.

ANNANGAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, s. 561—Act VII of 1888, s. 48—Time
allowed for memorandum of objections.*

An appeal cannot definitely be posted until the Court has ascertained that notice of the appeal has been served on the respondent and a date must then be fixed not less than one month from the date of service.

SECOND APPEAL against the decree of W. F. Grahame, District Judge of Tinnevely, in appeal suit No. 1691 of 1888, modifying the decree of C. Srirangachariar, District Munsif of Srivilliputtur, in original suit No. 335 of 1887.

Suit for Rs. 300 for damages for defamation. The District Munsif passed a decree that the plaintiff do recover from all the defendants, other than the defendants Nos. 9 and 14, Rs. 10.

* Second Appeal No. 908 of 1889.

On appeal against this decree, which appeal was disposed of less than a month after the date of the service of notice on the plaintiff, the District Judge modified the decree of the District Munsif by decreeing the plaintiff four annas damages with proportionate costs.

The District Judge said:—"For plaintiff, as respondent, I have been told that I ought not to take up the appeal until a month has elapsed from the date of plaintiff receiving notice, because he is 'thinking' of filing a cross-appeal in the shape of a memorandum of objections under section 561, Civil Procedure Code, and that, under section 561, as amended by Act VII of 1888, respondent can file a memorandum of objections within a month from the date of receiving notice. No petition was filed informing me of plaintiff's intention or asking for an adjournment, and I was not asked in so many words to adjourn the appeal to enable plaintiff to put in a memorandum of objections. I was merely told that the pleader would like the hearing to be put off, because plaintiff is 'thinking whether he will put in a memorandum of objections or not.' Plaintiff signed his pleader's vakalat on 16th instant just a fortnight ago and he is not, in my opinion, entitled to have an appeal kept pending merely to enable him to make up his mind. I am the less inclined to put off the hearing, inasmuch as I find that plaintiff is entitled to no more than four annas damages for his wounded feelings."

The plaintiffs preferred this second appeal.

Parthasaradhi Ayyangar for appellant.

Sankaran Nayar for respondents.

JUDGMENT.—The law—section 561, Civil Procedure Code, as amended by Act VII of 1888, s. 48—allows a respondent to file a memorandum of objections within one month from the date on which notice has been served on him or on his pleader. The right so conferred is an absolute right and the hearing of the appeal cannot be advanced so as to defeat this provision. The District Judge in this case was made aware that the respondent contemplated, but had not quite decided on filing a memorandum of objections; but this circumstance was, we think, immaterial. Whether the District Judge knew of the respondent's intention or not, the respondent had a month's time within which to file his memorandum of objections, and the appeal could not be definitely

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posted, we consider, until the Court or its officer had ascertained that notice had been served. It should then have been posted for some date not less than a month from the date of service on the respondent.

We must, therefore, allow this appeal, and, reversing the District Judge's judgment, we remand the appeal for rehearing, after giving due notice to the parties and allowing to the respondent the time prescribed by law for filing a memorandum of objections.

The second appellant will have his costs in this appeal. The costs in the Courts below must abide the event.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

VENKATRATNAM (DEFENDANT NO. 3), APPELLANT,

v.

REDDIAH AND OTHERS (PLAINTIFF AND DEFENDANTS
Nos. 1 AND 2), RESPONDENTS.*

1890.
Aug. 11.

Evidence Act—Act I of 1872, s. 92—Collateral evidence to show that an apparent sale-deed was a mortgage—Variance between pleading and proof.

In a suit by an attaching creditor to set aside an order (which allowed an objection made to his attachment by one claiming under a sale-deed from the judgment-debtor,) and for the declaration of the judgment-debtor's title, the sole issue framed was whether the sale-deed was *bonâ fide* and supported by consideration :

Held, that the plaintiff was entitled to show by collateral evidence that the sale-deed was really a usufructuary mortgage and that the mortgage had expired.

SECOND APPEAL against the decree of G. T. Maackenzie, District Judge of Kistna, in appeal suit No. 745 of 1888, reversing the decree of M. B. Sundara Rau, District Munsif of Masulipatam, in original suit No. 42 of 1888.

In original suit No. 669 of 1885 in the Subordinate Court of Cocanada, the present plaintiff obtained a decree against defendant No. 1 and in execution attached the land in question in the present suit. The son, since deceased, of defendant No. 3, intervened in execution, claiming title under a registered instrument, dated 24th May 1877, and executed to him and defendant No. 2 by defendant

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No. 1. That claim having been allowed, the plaintiff now sued for the cancellation of the order allowing that claim and for a declaration of the title of defendant No. 1.

The only issue which was framed in the case was as follows :—
“ Was the suit property sold *bonâ fide* to defendant No. 2 and the late son of defendant No. 3 and for consideration ? ”

The District Munsif recorded a finding on this issue in the affirmative and accordingly dismissed the suit. On appeal the District Judge, relying upon the oral evidence of the case and upon certain letters, which had passed between defendants Nos. 1 and 2 and the son of defendant No. 3, came to the conclusion that the sale-deed was in reality a usufructuary mortgage which had now spent itself and that it was accordingly open to the plaintiff to attach the land.

Defendant No. 3 preferred this second appeal.

Mr. Ramasami Raju for appellant.

Rama Rau for respondents.

JUDGMENT.—It is argued that document I being registered, the Judge was in error in finding that the real transaction between the parties was a mortgage. We do not consider that section 92 of the Evidence Act has any bearing on the question. Where one party alleges that a transaction is a sale and the other contends that it is a mortgage, it has been held that oral evidence is admissible to prove that the real transaction was a mortgage (see *Govinda v. Jesha Premaji*(1), *Mahadaji Gopal Baklekar v. Vithal Ballal*(2), *Hem Chunder Soor v. Kally Churn Das*(3), *Baksu Lakshman v. Govinda Kanji*(4), and *Kashi Nath Dass v. Hurrihur Mookerjee*(5)).

Another contention is that neither plaintiff nor defendant alleged that the transaction was a mortgage, as found by the District Judge. There is, however, in the third defendant's written statement a distinct reference to a promise made by the third defendant's son to restore the land on payment of the money due to him, and the issue framed in the case admitted of either party showing what the transaction really was. The fact of plaintiff (a stranger) having stated that the sale was for no consideration and collusive did not preclude the Judge from finding, upon the evidence, that there was consideration and that the transaction was in fact a mortgage. We dismiss the second appeal with costs.

(1) I.L.R., 7 Bom., 73. (2) I.L.R., 7 Bom., 78. (3) I.L.R., 9 Cal., 528.
(4) I.L.R., 4 Bom., 594. (5) I.L.R., 9 Cal., 898.

* Second Appeal No. 830 of 1889.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr Justice Shephard.

1890.
July 17, 28.

BANGARUSAMI (PLAINTIFF), APPELLANT,

v.

BALASUBRAMANIAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Judgment of foreign court—Jurisdiction—Notice.

The defendants, who were British subjects, purchased goods from the plaintiff in French territory. The plaintiff sued the defendants in the French Court and obtained judgment against them, but the defendants neither resided nor owned property in French territory, and did not appear at the trial and had no actual notice of the proceedings. In a suit brought in British India on the judgment of the French Court:

Held, that the want of notice to the defendants was fatal to the suit.

Quere, whether the French Court would have had jurisdiction (apart from the question of notice) if it had been proved that it was intended that payment should be made in French territory?

SECOND APPEAL against the decree of S. Gopalachari, Subordinate Judge of Madura (East), in appeal suit No. 55 of 1888, confirming the decree of P. S. Gurumurti Ayyar, District Munsif of Madura, in original suit No. 163 of 1887.

The plaintiff, who was a merchant of Karikal within the French dominions, sold goods to the defendants who were British subjects and resided at Madura. Their dealings extended from 17th August 1878 to 22nd August 1884. For the balance due to the plaintiff in respect of such dealings, viz., Rs. 402-11-2, he sued the defendants in the Karikal Court and obtained a decree *ex parte* on 14th March 1885. The defendants having no property within the French territories, he got a certificate to collect the debt from them in British India. He accordingly brought this suit as above on the judgment of the Karikal Court.

The defendants admitted the dealings from October 1879 to September 1883, but denied being indebted to the plaintiff. They pleaded that they were not aware of the decree or other proceedings in the Karikal Court, that the Karikal Court had no jurisdiction as they neither resided nor owned properties within the French territory, that the decree relied on by the plaintiff was

obtained fraudulently, that they could not defend the case for BANGARUSAMI want of notice and summons, that the suit was time-barred, &c.

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Both the District Munsif and, on appeal, the Subordinate Judge found that the defendant had no notice of the French suit, and that the French Court had no jurisdiction, and accordingly passed decrees for the defendants.

The plaintiff preferred this second appeal.

Mr. Wedderburn for appellant.

Mr. Gantz for respondents.

Reference was made in the argument to the following cases besides those referred to in the judgment, viz., *Hinde & Co. v. Ponnath Brayan*(1) *Parry & Co. v. Appasami Pillai*(2), *Copin v. Adamson*(3).

MUTTUSAMI AYYAR, J.—This second appeal arises from a suit brought by the appellant upon a judgment which he had obtained against respondents in the French Court at Karikal. Both the Courts below held that the foreign tribunal had no jurisdiction, and that respondents had no actual notice of the proceedings. The District Munsif held, also, that the French judgment was at variance with the Act of Limitations in force in British India, but on appeal the Subordinate Judge expressed no opinion on that point. He referred, however, to the appellant's statement that respondents had promised to make payments at Karikal and carried on dealings with him on that footing and to the respondents' denial that such was the case, but he considered that such promise would not, even if true, give jurisdiction, and, therefore, that it was unnecessary for him to come to a distinct finding upon the conflicting evidence on the record. The contention in second appeal is that the French Court had jurisdiction.

The principle upon which actions on foreign judgments rest is that the judgment of a Court of competent jurisdiction imposes a duty on the defendants to pay the sum for which the judgment has been given (*Russell v. Smyth*(4) and *Williams v. Jones*(5)). The material question, therefore, is whether upon the facts of this case the French Court had jurisdiction.

The question of jurisdiction depends on the consideration whether the defendant owed, at the time the suit was brought,

* Second Appeal No. 1711 of 1888.

(1) I.L.R., 4 Mad., 359. (2) I.L.R., 2 Mad., 407. (3) L.R., 9 Ex., 345.
(4) 9 M. & W., 810. (5) 13 M. & W., 628.

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allegiance to the French law, either permanent or temporary, or voluntarily submitted to the foreign jurisdiction. In the case before us, respondents were not French subjects and they were not domiciled in French territory, and, therefore, they owed no permanent allegiance to the French law. Nor did they reside or own property in French territory when the suit was brought or at any other time. Taking the word "domicile" in its widest sense, there is no foundation for saying that they owed at least temporary, if not permanent, allegiance, or had the protection of the French law in respect of their property. So far the decision of the Courts below is right. It is argued by the appellant's counsel that respondents bought goods at Karikal, they were there when they did so, and that that circumstance was sufficient to give jurisdiction to the French Court. To this contention I cannot accede. In *Mathappa Chetti v. Chellappa Chetti*(1) the defendant casually resorted to the foreign territory of Puduchottah, and, whilst there drew a bill for money due to the plaintiff who resided in that territory, and this Court held, relying on the Civil Law, that a casual passage through, or a momentary presence in, a state was not sufficient to create jurisdiction, but that something much more permanent was necessary, although it might not amount to *domicilium*. Again in *Rousillon v. Rousillon*(2) the defendant, a Swiss subject, entered into the agreement sued upon with the plaintiffs, French subjects, residing in France when he was in France on a temporary visit, and Fry, J., held that that circumstance was not sufficient to give jurisdiction to the French Court, and observed that at the time of making the contract there was no intention on his (defendant's) part, or, as far as he can gather, on the part of the plaintiffs that he should take up his residence in France. As to the *dictum* of Blackburn, J., in *Schibsby v. Westenholz*(3), on which the appellant's counsel appears to rely, Fry, J., considered that the *dictum* referred to a casual unexpected leaving of the foreign country by a person who was permanently resident there at the time when the contract was entered into. It is an undisputed fact in the case that the respondents did not appear during the trial in the French Court and that judgment was passed against them *ex parte*, consequently no question of voluntary submission to jurisdiction or waiver could arise from their conduct with reference to the trial in

the Court at Karikal. There is, however, one point in regard to which further inquiry might be necessary before adopting the opinion of the Lower Courts as to jurisdiction. The Subordinate Judge considered it unnecessary to decide whether the respondents promised to make payments to the appellant at Karikal, and if so, whether Karikal was not the *locus solutionis*. On this point Fry, J., observed in *Rousillon v. Rousillon*(1) that the place where the contract is to be performed is a very material circumstance, adding, however, that in that case the contract was one which might be performed or broken anywhere. The question does not appear to have arisen in *Mathappa Chetti v. Chellappa Chetti*(2). The passage on which the Subordinate Judge apparently relies is the one in which Bar is cited as having remarked that Savigny's rule—the place of fulfilment indicates the proper *forum*—although very often giving the true solution, cannot be treated as a principle. The Subordinate Judge has evidently misapprehended the import of this passage. Both Bar and Wharton, while referring to the rule that the debtor's domicile indicates the competent *forum* as embodying the true general principle, they do not deny that the *locus solutionis* is material, but say, on the contrary, that when the obligation definitely fixes the place of performance, it will furnish the true solution. The finding in this case, however, that the respondents had no actual notice of the proceedings in the French Court is decisive. The general rule is that a personal judgment based solely on extra-territorial service, the defendant not being domiciled within the jurisdiction, is internationally invalid, and one state cannot in this way obtain jurisdiction over a person domiciled in another state—See Wharton, 649. Whatever effect, therefore, the service under the *Code Civil* of France may have in French territory, it cannot be treated as sufficient when the defendant is a British subject domiciled in British territory where there is no special contract on his part for service and when the service is internationally invalid.

The case of *Becquet v. MacCarthy* (3) is not in point, for the Island of Mauritius at the time of the suit belonged to the Sovereign of Great Britain, though French law was administered there, and the defendant was only absent from the island when the proceedings were instituted there.

(1) I.L.R., 1 Mad., 196. (2) L.R., 14 Ch. D., 351. (3) L.R., 6 Q.B., 156.

(1) I.L.R., 14 Ch. D., 351. (2) I.L.R., 1 Mad., 196. (3) 2 B. & Ad., 951.

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On this ground, I am of opinion that the second appeal cannot be supported and must be dismissed with costs.

SHEPARD, J.—The appellant's suit, based on a judgment of the French Court at Karikal, has been dismissed on the ground that that Court had no jurisdiction and that the defendants had no notice of the proceedings against them. The defendants reside in Madura and are British subjects, and it is not suggested that they even have property in Karikal. But it is argued that the French Court, nevertheless, had jurisdiction, because it was at Karikal that the goods were purchased in respect of which a balance was claimed by the appellant, and there is evidence, with regard to which the Subordinate Judge has recorded no decided finding, that a promise was made by the defendants to pay at that place. It is further contended that sufficient notice of the proceedings was conveyed to the defendants.

The exact circumstances under which the dealings between the plaintiff, who resides in Karikal, and the defendants took place are not stated, and it does not appear that the defendants personally visited Karikal, but it is said that whether he did go there or not, he must be taken to have promised to pay at that place and that, therefore, Karikal was the proper *forum*. Reliance is placed on a passage in Blackburn, J.'s, judgment in *Schibsby v. Westenholz*(1) where that learned Judge says:—"Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued."

It is said that this *dictum* justifies us in holding that a traveller casually passing through a foreign country and incurring a debt

thereby, becomes subject to the jurisdiction of the Courts of that country and therefore under an obligation to obey their judgment.

The decision in *Mathappa Chetti v. Chellappa Chetti*(1) is a distinct authority against this contention, and I can find no support for it in the later case of *Rousillon v. Rousillon*(2), which was also cited. * In the course of the argument in that case Fry, J., asks whether in the passage above cited Blackburn, J., did not refer to a casual unexpected leaving of the foreign country by a person who was permanently resident there at the time when the contract was entered into, and the decision was that as the defendant's stay in France, where the contract was made, was only temporary and casual, and it did not appear that either party contemplated performance in France, the judgment of the French Court imposed no duty upon him. Although not an authority for the main contention of the appellant's counsel, this judgment would tend to support the proposition that the French Court might have had jurisdiction if it had been proved that it was intended that payment should be made at Karikal; and the decision in *Mathappa Chetti v. Chellappa Chetti*(1) is in no wise inconsistent with that proposition. (See also Wharton's Conflict of Laws, first edition, § 793.) It is not, however, necessary to express any opinion on this point, because I think that the finding that no notice was given to the defendant is fatal to the plaintiff's suit—See Wharton, second edition, § 654. On this latter point, the case of *Becquet v. MacCarthy*(3) was cited by Mr. Wedderburn. But that case is an entirely different one from the present, for it appeared there that the testator, whose executrix was defendant, had been possessed of real estate in the Island of Mauritius, and that in the case of a person formerly resident in the island absenting himself and not leaving any attorney, it was the duty of the Procurator-General to take care of his interests. No such circumstances were proved in the present case. The service of notice may have been sufficient for the purpose of the French Court; but in reality there was no service at all.

The appeal must be dismissed with costs.

(1) I.L.R., 1 Mad., 196. (2) L.R., 14 Ch. D., 351. (3) 2 B. & Ad., 951.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1890.
Aug. 11, 12.

MALIKAN (PLAINTIFF), APPELLANT,

v.

SHANKUNNI AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Malabar Compensation for Tenants' Improvements Act—Act I of 1887 (Madras), s. 7—
General Clauses Act, s. 6.*

A suit to recover property in Malabar demised on kanom was pending when the Malabar Compensation for Tenants' Improvements Act came into force:

Held, on the construction of ss. 1, 5, and 7, that the tenant's right to compensation should be dealt with in accordance with the provisions of that Act.

SECOND APPEAL against the decree of E. K. Krishna Menon, Subordinate Judge of South Malabar, in appeal suit No. 280 of 1888, modifying the decree of N. Sarvothama Row, District Munsif of Calicut.

This was a suit filed before the Malabar Compensation for Tenants' Improvements Act came into force to recover a paramba, which had been demised to the defendants on kanom; the plaintiff offered to pay a certain sum in respect of the improvements effected on the property by the defendants and the amount of the compensation was the substantial question in the suit.

The District Munsif passed a decree for the plaintiff, fixing the sum payable in respect of the improvements Rs. 706-3-8; on appeal, the Subordinate Judge modified the decree by reducing the sum payable to Rs. 561-5-8.

The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Sankaran Nayar for respondents.

JUDGMENT.—The first contention in support of this appeal is that due effect has not been given to exhibit II. That document shows that the sub-kanomdar paid the kanomdar in 1871 compensation for 201 cocoanut trees, but the jenmi was no party to the instrument, and the Subordinate Judge relied on the report made by two commissioners regarding the age of the trees. The

jenmi paid costs for improvements in 1851, and the finding that compensation is now payable for trees, which are planted or came to bear fruit afterwards, is open to no legal objection.

The next contention is that the present suit was pending when Madras Act I of 1887 came into force and that the Sub-Judge was in error in assessing the compensation under the Act. Our attention is also drawn to section 6 of the General Clauses Act and to the decision of this Court in *Arudulla v. Mahadevi*.⁽¹⁾ It is provided by section 1 of Act I of 1887 that the Act shall come into force at once and by section 5 that, whenever a Court makes a decree for the ejectment of a tenant, it shall determine the amount of compensation (if any) due to the tenant for improvements and make the decree conditional on the payment of that amount to the tenant. It is further provided by section 7 that nothing in any contract made after the 1st January 1886 shall take away or limit the right of a tenant to make improvements and claim compensation for them in accordance with the provisions of this Act.

The present suit was instituted after the 1st January 1886, and section 7 discloses an intention to recognize the tenant's right to claim compensation from that date in accordance with the provisions of the Act, notwithstanding an express contract to the contrary. The customary mode of computing compensation cannot have a higher effect than an express contract. The decision in *Arudulla v. Mahadevi*⁽¹⁾ is not in point. This second appeal cannot be supported and is dismissed with costs. The memorandum of objections is not pressed and it is also dismissed with costs.

(1) Appeal No. 164 of 1887 (not reported).

* Second Appeal No. 897 of 1889.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1890.
April 18, 24.

MUTTIA (PLAINTIFF), APPELLANT,

APPASAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 244, 318, 334—Petition by purchaser at Court-sale for possession—Obstruction—Appeal against order—Limitation Act—Act XV of 1877, sched. II, arts. 167, 179.

On an application made in 1888 under Civil Procedure Code, s. 318, by the purchaser at a Court-sale (who was the assignee of the decree which was being executed), praying for delivery of possession of the property purchased, it appeared that the sale took place in 1885, that it was confirmed in 1886, and that in January 1887 an order was made for delivery of possession to the purchaser. The judgment-debtor had resisted the purchaser's efforts to obtain possession in 1887 and set up in bar of the application in 1888 an oral agreement alleged to have been made between him and the purchaser. The application was rejected:

Held, (1) that an appeal lay against the order rejecting the application;

(2) that the application not being a complaint of obstruction, was not barred by limitation and should be heard and determined on the merits.

APPEAL against the order of C. Venkoba Chariar, Subordinate Judge of Madura (West), made on miscellaneous petition No. 181 of 1888 in original suit No. 36 of 1878.

Application under Civil Procedure Code, s. 318, for delivery of immoveable property in the occupancy of the judgment-debtor. The judgment-debtor set up an agreement between him and the applicant in bar of the application and raised also a plea that since a former attempt to obtain delivery was rendered futile by the assertion of his right, the present application was barred under Limitation Act, sched. II, art. 167. The Subordinate Judge held that the application was not barred by limitation, and, after referring to circumstances which in his view rendered the agreement set up probable, added that "as the obstruction was under colour of a legal right," the matter should be determined in a regular suit, which under the circumstances should be brought by the present applicant.

The plaintiff preferred this appeal.

* Appeal against order No. 16 of 1889.

Subramanya Ayyar for appellant.

Mr. Wedderburn, Bhashyam Ayyangar and Sambamurti Ayyar for respondents.

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BEST, J.—The appellant is the assignee of the decree obtained by the plaintiff in original suit No. 36 of 1878 on the file of the Subordinate Court of Madura (West). As such assignee he executed the decree, and on the attached property being put up for sale, himself purchased the house now in question. Respondent No. 1 was one of the defendants in the suit No. 36 of 1878 and owner of this property at the time of the sale above mentioned. The order appealed against was passed by the Subordinate Judge on a petition presented by the appellant as purchaser at the auction sale for possession of the property under section 318 of the Code of Civil Procedure, which application was opposed by the respondent No. 1, alleging that he was entitled to retain the property under an oral agreement come to between himself and appellant subsequent to the sale. He further contended that appellant's present application was barred under article 167 of schedule II of the Limitation Act, by reason of a period of more than 30 days having elapsed since appellant was obstructed by respondent No. 1 in former proceedings taken for obtaining possession of the same property.

The Subordinate Judge has held this latter objection to be invalid on the authority of *Ramasekara v. Dharmaraya*(1); but he has, at the same time, rejected the appellant's application to be put in possession of the property on the ground that the first respondent's obstruction is "under cover of a legal right, though inchoate and contingent, and this being so, the question practically is, who has to go to a regular suit to establish his right," and that, "in the circumstances, the purchaser should have recourse to it."

The preliminary objection is taken on behalf of respondent No. 1 that the order objected to is not appealable.

If the order in question had been passed on a complaint of resistance made either under section 334 or under section 328 of the Code of Civil Procedure, it is possible that both the objections (1) that the order is not appealable, (2) that the application as made to the Lower Court was time barred, would have had to be

(1) I.L.R., 6 Mad., 113.

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allowed. But as a matter of fact, the application made by the appellant was expressly made with reference to section 318 of the Code, for delivery of possession of the property purchased. It was in no sense a complaint either under section 328 or under section 334 of the Code. The mere fact of the Court below applying these sections to the case is not sufficient to deprive the appellant of the right of appeal that he might otherwise possess. Section 334 is solely for the benefit of a purchaser at a sale in execution, and read with section 328 it is very clear that it is not imperative on the part of such purchaser to complain of resistance or obstruction; as pointed out by West, J., in *Balvant Santaram v. Babaji*(1), the language of section 328 is that the decree-holder "may," not that he "must," proceed in the way indicated. There is, therefore, nothing to prevent the decree-holder or purchaser who has been obstructed or resisted in his attempt to get possession of the property decreed or purchased (as the case may be) from making a fresh application for delivery, without making any complaint under sections 328 or 334 of the Code.

The question is one relating to the execution of the decree between the representative of the original decree-holder (now assignee) and one of the defendants in the suit. It falls, therefore, within section 244 of the Code of Civil Procedure and is appealable. The fact of the decree-holder having subsequently become the purchaser of the property makes no difference, as has been held by this Court in *Viraraghava v. Venkata*(2) and *Vallabhan v. Pannunni*(3).

Being a question falling within section 244, it must be decided by the Court executing the decree and not in a separate suit; consequently the Lower Court's order is erroneous in that it leaves the matter in dispute for settlement in a regular suit to be brought by the appellant as purchaser.

The Subordinate Judge is also in error in saying that the purchase by the decree-holder was in 1884. The sale took place on the 9th May 1885, but it was not confirmed till 2nd August 1886, and the first order for delivery of the property to the purchaser (now appellant) was made on the 12th January 1887.

The case must be remanded for disposal by the Lower Court unless, as contended by respondent No. 1, the application is barred

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under article 167 of schedule II of the Limitation Act. That article is, however, inapplicable for, as already pointed out, this was not a complaint of resistance or obstruction, but an application for delivery of possession in execution of a decree, the limitation period for which is three years under article 179 of schedule II.

The Lower Court's order must, therefore, be set aside and the case remanded for disposal on the merits.

Respondent No. 1 must pay the appellant's costs of the appeal. The rest of the costs incurred hitherto will be provided for in the order to be passed by the Subordinate Judge.

MUTTUSAMI AIYAR, J.—I am also of opinion that the matter in dispute between the purchaser at the Court-sale and the judgment-debtor should be determined under section 244 of the Code of Civil Procedure. Having regard to the language of section 334, I am unable to uphold the contention that the Court-sale operated to satisfy the decree in original suit No. 4 of 1882 and that a subsequent agreement regarding the purchase prior to the delivery of possession under section 318 does not relate to the execution of the decree. The purchaser in this case was the decree-holder and the party obstructing the delivery of possession was a judgment-debtor, and the oral agreement set up in justification of the obstruction prevents in effect the completion of the purchase by transfer of possession. By declaring in section 334 that the provisions of Chapter XIX relating to resistance or obstruction to a decree-holder in obtaining possession of the property adjudged to him are applicable to resistance or obstruction to the purchaser of any immoveable property at a Court-sale obtaining delivery of the property purchased, the Legislature regarded such delivery as a step in execution of the decree. When the purchaser is also the decree-holder, the question whether there was a just cause for the obstruction caused by the judgment-debtor, is also one relating to the execution of the decree between the parties to it within the meaning of section 244. The intention of the Legislature in such cases seems to be, as pointed out by the late Chief Justice in *Viraraghava v. Venkata*(1) to prevent matters in execution becoming the cause of fresh litigation. I may also here draw attention to the fact that section 334 renders the provisions of the

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

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whole chapter applicable, whilst section 268 of Act VIII of 1859 rendered only sections 226, 227 and 228 applicable.

For these reasons I think an appeal lies and concur in the order proposed by my learned colleague. I do not consider that the question of limitation under article 167 arises, for the application for delivery under section 318 is substantially an application for execution of the decree by ordering delivery of possession of the property purchased.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1890.
September 15.

RAMASAMI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SUBBUSAMI (DEFENDANT No. 2), RESPONDENT.*

Court Fees Act—Act VII of 1870, sched. I, art. 1, sched. II, art. 17.

In a suit upon a hypothecation bond it was found by the Court of first appeal that the bond and the debt secured thereby were binding on the first defendant, but not on the second defendant. The plaintiff preferred a second appeal against the second defendant as sole respondent:

Held, that the Court fee payable on the second appeal should be calculated on the amount of the debt sought to be recovered.

SECOND APPEAL against the decree of P. Narayanasami Ayyar, Acting Subordinate Judge of Tanjore, in appeal suit No. 829 of 1888, reversing the decree of W. Gopalachariar, District Munsif of Tiruvadi, in original suit No. 101 of 1888.

The plaintiff set out that defendant No. 1 had executed to plaintiff No. 1 (who with plaintiff No. 2 was the manager of their undivided Hindu family) on 22nd October 1882 a hypothecation bond for Rs. 900, that certain payments had been made and credited towards the amount of the bond, and the prayer of the plaintiff was as follows:—

“We therefore pray for a decree for the recovery of the amount undermentioned due on the said hypothecation bond, together with the subsequent interest and the costs of the suit, making the property hypothecated liable, as also the body of

“plaintiff No. 1 who executed the hypothecation bond and such other property as the defendants may own.
“To be recovered—

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	RS.	A.	P.
“The principal of the said bond	900	0	0
“Interest thereon at $\frac{3}{4}$ per cent. per mensem as shown “in the bond from the date of the bond to date.	435	6	0
“Total principal and interest ..	1,335	6	0
“Amount of credit as made in the bond of the pay- “ment on the 14th June 1886 towards the principal.	196	0	0
“Amount of counter-interest thereon from the said “date to date at the above rate of $\frac{3}{4}$ per cent. ..	30	8	6
“Total payment with counter-interest ..	226	8	6
“Balance due ..	1,108	13	6”

Defendant No. 2, who had been adopted by the husband (deceased) of defendant No. 1, claimed that the debt was not binding on him.

The District Munsif passed a decree against the defendants for the amount claimed and directed that if that amount were not paid before 12th April 1889, it should be “realised by the sale of the hypotheca mentioned in the plaint, and that if deficiency should arise, the second defendant’s other properties may be proceeded against.”

On appeal the Subordinate Judge said:—“the only point for determination is whether the debts referred to in the hypothecation bond were *bond fide* contracted for the second defendant’s benefit,” and having determined this point in favor of defendant No. 2, he passed a decree exonerating the second defendant and his property, including the land hypothecated.

The plaintiff’s preferred this second appeal, joining the second defendant only as respondent and affixing to the memorandum of appeal a Rs. 10 stamp as if a declaratory decree were sought.

Subramanya Ayyar for appellant.

Rama Rau for respondent.

JUDGMENT.—The appeal is substantially to establish the plaintiffs’ right to render the hypothecated property belonging to the second defendant liable to be sold in satisfaction of the debt

* Second Appeal No. 1136 of 1889.

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claimed in the suit. The Court fees payable must, therefore, be calculated on this amount.

The appellant is allowed six weeks within which to pay the deficient Court fees.

APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

SHAIK SAHEB (PLAINTIFF), APPELLANT,

v.

MAHOMED AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 13, 102, 158—Failure to pay
Commissioner's fee—Res judicata.

A suit for land was dismissed in 1886 on the plaintiff's failure to comply with an order to pay a fee for the appointment of a commissioner to value the land. No issues were framed in the suit, and the order directing payment of the fee prescribed no time within which it was to be made. The plaintiff now sued the defendants again for the same land:

Held, that the claim was not *res judicata*.

SECOND APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in appeal suit No. 387 of 1888 reversing the decree of V. Subramania Sastri, District Munsif of Poonamallee, in original suit No. 107 of 1887.

Suit to recover possession of certain land. It appeared that in original suit No. 13 of 1886 on the file of the District Munsif of Poonamallee the plaintiffs had sued to eject the defendants from the same land; that a question having arisen as to the valuation of that suit, the plaintiff was ordered to pay a fee for a commissioner to be appointed to value the land, and that the plaintiff having failed to comply with this order, the suit was dismissed, no issues having been framed.

The District Munsif passed a decree as prayed, holding that the suit of 1886 was no bar to the present suit. Upon this question he referred to *Alwar v. Seshammal*(1), *Venkatachalam v. Mahalakshamma*(2), *Shankar Baksh v. Daya Shankar*(3), *Ganesh Rai*

v. *Kalka Prasad*(1), *Kudrat v. Dinu*(2) and expressed the opinion that the suit had not been disposed of under Civil Procedure Code, s. 102, which was not alluded to in the order of dismissal, but under section 158; and in that view he held that the matter in dispute was not *res judicata* under section 13, because the issues arising in the suit had not been heard and determined.

The District Judge on appeal reversed the decree of the District Munsif, holding that the present suit was barred, whether the suit of 1886 was dismissed under section 102 or section 158.

The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Balaji Rau for respondents.

JUDGMENT.—We are of opinion that the District Judge has erred in holding that the suit is *res judicata*. Without expressing an opinion on the decision relied on by the District Judge, *Venkatachalam v. Mahalakshamma*(3), we are of opinion that the circumstances of the former suit did not fall under section 158 of the Civil Procedure Code, inasmuch as, although there was a default in respect of paying the commissioner's fee, it appears that no time was granted, or in other words no date was fixed within which the fee should be paid. We think the somewhat stringent provisions of this section cannot be put in force unless the party has had distinct notice in respect of time, of what is required of him, and that default in the matter of time (compare *Ramaya v. Rangaya*)(4), is of the essence of the particular kind of default contemplated. In the present case an order was made in general terms that the commissioner's fee should be paid and the suit was adjourned to a certain date for inquiry.

As there was in our opinion no such default as is provided for in section 158 of the code, we must hold that the case was not dealt with under that section, and that therefore the suit now brought is not governed by the opinion expressed in *Venkatachalam v. Mahalakshamma*(3). It is clear also from exhibit VI that the case was not disposed of under section 102 of the code.

We must therefore take it that the former suit was not disposed of under any of the special sections of the code which raise a statu-

* Second Appeal No. 961 of 1889.

(2) I.L.R., 10 Mad., 272

(1) I.L.R., 10 Mad., 270

(3) I.L.R., 15 Cal., 422.

(1) I.L.R., 5 All., 596.

(3) I.L.R., 10 Mad., 272.

(2) I.L.R., 9 All., 155.

(4) I.L.R., 7 Mad., 41.

SHAIK SAHEB v. MANOMED. tory bar to the present suit, and as it was not adjudicated on the merits, it cannot be barred under section 13 of the code.

For the reasons stated we allow the appeal and reverse the District Judge's decision and remand the appeal for retrial on the merits.

The costs of the suit and appeal will abide the result. Appellant will have his costs in this second appeal.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1890.
July 15.

SAMBASIVA (PLAINTIFF), APPELLANT,

v.

RAGAVA (DEFENDANT No. 44), RESPONDENT.*

Limitation—Act XIV of 1859, s. 1, cl. 12—Act XV of 1877, sched. II, art. 141—Hindu Law—Suit by reversioner on expiry of widow's and daughter's estate.

Plaintiff sued in 1887 to recover property as part of the estate of his maternal grandfather, who died about 1845, leaving (1) a widow, who inherited the property and died in 1846, (2) his daughter by her, who took the property on her mother's death and alienated it to the defendants about 1850 and died before suit, and (3) the plaintiff's mother, who was his daughter by another wife. The plaintiff's mother made no claim on the property and died in 1883:

Held, the suit was not barred by limitation.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 758 of 1888 modifying the decree of T. Ganapati Ayyar, Subordinate Judge of Kumbakonam, in original suit No. 12 of 1887.

The plaintiff sued in 1887 as reversioner to recover possession of certain immoveable properties that had belonged to his grandfather Venkatachalla and thence descended to his widow Thevanai and thence to his daughter Bapu, who was a half-sister of plaintiff's mother Swarnam, a daughter of Venkatachalla by another wife. Bapu inherited the property about the year 1846 and about 1850 made alienations of it to the defendants. Her half-sister Swarnam, plaintiff's mother, who was entitled to joint

possession of these properties, made no claim to them then, nor up to the time of her death, which happened in 1883.

The District Munsif passed a decree for the plaintiff against the defendants Nos. 1-44, who were the alienees of the grandfather's property. Defendant No. 44 alone appealed against this decree and the District Judge reversed it as against him, holding that the plaintiff had not established title to part of the land claimed from the appellant and that the claim as a whole was barred by limitation.

On the question of limitation the District Judge said:—

"It will be seen from the facts stated above that plaintiff's mother's cause of action arose in 1850 and became barred in 1862 or thereabouts. The question is whether her son can claim the benefit of article 141 of the second schedule of the Limitation Act of 1877 and thereby gain twelve years to sue from the date of his mother's death in 1883, in which case his present suit would be in time. Now this case must be governed by the Limitation Act XIV of 1859, for the cause of action became barred by limitation under that Act, that is, in 1862 or 1863, long before the Act of 1871 or 1877 came into operation. Under that Act it has been held by the Privy Council that the period of limitation as against the reversionary heir of a dispossessed female claiming the succession after the female's death is to be reckoned not from the time of the female's death, but from the time from which it would have run against the female had she lived and sued to recover the inheritance (see *Amirtolal v. Rajoneekant Mitter*(1). That it seems to me settles the question here. It is said by plaintiff's vakil in reply that there is a difference between dispossession by trespass and loss of possession by alienation, a distinction recognized by the Calcutta High Court—*Gya Persad v. Heet Narain*(2). But the point for the purposes of limitation is, when did the possession of others become adverse to plaintiff's mother, and it is clear that it became so on the alienation of the property (in which she had a joint inheritance) to strangers. That was about the year 1850, and it was then that her cause of action arose, and she had only twelve years from that date to sue according to the old Act. The ruling of the Privy Council above quoted must, therefore, govern this case, and *Atehamma v. Subbarayudu*(3) must be considered as overruled by the Privy Council's decision. The Full Bench Ruling of the Calcutta High Court, *Srinath Kur v. Prosunno Kumar Ghose*(4), applies to the Limi-

SAMBASIVA
v.
RAGAVA.

* Second Appeal No. 962 of 1889.

(1) 15 B.L.R., 10.
(3) 5 M.H.C.R., 428.

(2) I.L.R., 9 Cal., 93.
(4) I.L.R., 9 Cal., 934.

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"tation Acts of 1871 and 1877, and in that case the female's right to sue was not barred before the coming into operation of the former Act. The case of *Kokilmoni Dassia v. Manik Chandra Joaddar*(1) would, however, appear to extend the principle of that ruling to a case where the female's right was so barred; but there is no express ruling to that effect and the exact point does not seem to have been considered. The Limitation Act of 1877 (section 2) itself declares that nothing contained therein shall be deemed to revive any right to sue barred under previous Acts, so it is not probable the High Court of Calcutta would have thought of ruling otherwise by finding that a new cause of action to parties was given under the latter Act.

"I must accordingly find that the plaintiff's suit was barred by limitation, and, in allowing the appeal, I dismiss the suit with costs throughout as regards the 44th defendant, the appellant."

The plaintiff preferred this second appeal.

Mr. Gantz and Krishnasami Ayyar for appellant.

Bhashyam Ayyangar for respondent.

JUDGMENT.—The appellant claims as daughter's son of one Venkatachalla, who died, leaving a widow and two daughters.

The widow died in 1846, and subsequently, in 1850, one of the daughters, Bapu, made an alienation of the property claimed by the 44th defendant. Her sister, the plaintiff's mother, made no claim to it and died in 1883. It does not appear when Bapu died. The plaintiff sued to set aside the alienation in 1887. The Judge found that the suit was barred by limitation and that the plaintiff had failed to prove his reversionary right to items Nos. 91, 32 and 88. The question is whether the appellant's claim in regard to the other items is barred. At the date of the suit the present Act of Limitation was in force and article 141 would be applicable.

As the plaintiff's mother died only in 1883, the period would run from that date, provided that, as observed by the Judge, his right was not barred by the Act of 1859. Under that Act, section 1, clause 12, the period would run from the date when the cause of action accrued. The point for determination is when the cause of action arose in the case before us. Under Hindu Law the widow and the daughters take a qualified estate, which is interposed between that of the last male owner and the male reversioner, but as between the family and strangers each also represents the

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inheritance for the time being. In *Nobin Chunder Chuckerbutty v. Guru Persad Doss*(1) it was held that when a stranger dispossessed the widow by an act of trespass and remained in possession for twelve years, his possession was adverse as well against the reversioner as against the widow. This principle has been approved by the Privy Council in *Amirtolal v. Rajoneekant Mitter*(2). But where the possession of the defendant originates in an invalid alienation by a widow, the alienee is entitled to continue in possession during the widow's life-time and the reversioner's estate becomes an estate vested in possession on her death only, and from that date only the period of limitation would run against him. This view was adopted by this Court in *Atchamma v. Subbarayudu*(3). We take it therefore as settled law that when the defendant gets into possession under an invalid alienation made by a widow, his possession is not adverse against the reversioner until the widow's death, but when a defendant comes into possession by an act of trespass, then the title which he acquires is good against the representative of the inheritance for the time being and consequently against the reversioner.

The peculiar feature in this case is that there were two daughters, Bapu and Swarnam, and though the former took the property in 1846 and alienated it in 1850, the latter did not assert her claim either to participation in enjoyment of the profits or to her right of survivorship on Bapu's death. It is argued for the respondent that Swarnam would at any rate be barred if she brought the suit after the lapse of twelve years from Bapu's death, and that the plaintiff's claim must, therefore, be taken to be barred.

We are, however, unable to adopt this view. The plaintiff as reversioner does not claim from or under his mother but as the next male sapinda of his maternal grandfather. Even assuming that a suit by the mother either to establish her right of survivorship or her right of participation had she been alive and brought, it a suit at the date of the present suit would have been barred, it would by no means follow that the plaintiff's claim would be also barred. The title which the alienee would acquire as against the plaintiff's mother by the lapse of twelve years could not be higher than that which might be created by a conveyance by the plaintiff's mother. It is hardly necessary to observe that it has

(1) B.L.R., Sup. Vol., 1008. (2) 15 B.L.R., 10. (3) 5 M.H.C.B., 428.

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been repeatedly held that the title acquired by adverse possession for twelve years is only equivalent to that given by a parliamentary grant of the interest vesting in the party affected by the adverse possession.

We do not consider that the existence of two daughters instead of one daughter makes any difference as to the time when the period of limitation would run against the reversioner, when the person in possession has obtained possession under an invalid alienation as in this case; none of the cases cited is on all fours with this.

We are of opinion that the ruling of the District Judge that the claim as against the 44th defendant is barred by limitation is wrong.

The decree appealed against will, therefore, be set aside so far as it relates to items other than 91, 32 and 88 and the decision of the Subordinate Judge restored. As regards the items mentioned, the decree appealed against is confirmed. The respondent will pay appellant's costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

RAMACHANDRA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

VENKATARAMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act, s. 135 (d)—Adjudication on claim.

In a suit upon a hypothecation bond brought by an assignee for value from the obligee, it appeared that the obligee had previously to the assignment obtained a decree by consent against the obligors for an instalment of the money due upon it, and had also made good his claim to the land comprised in it as against an attaching creditor of the obligors:

Held, that there had been no adjudication on the claim to exclude the rule in Transfer of Property Act, s. 135, and accordingly the plaintiff was entitled to recover only the sum paid by him for the assignment with interest from the date of payment to the date of the decree.

APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in original suit No. 1 of 1888.

* Appeal No. 47 of 1889.

RAMA-
CHANDRA
v.
VENKAT.
RAMA.

This was a suit upon a hypothecation bond for Rs. 5,599 which was executed on the 22nd June 1871 by the first defendant and the father (deceased) of the defendants Nos. 2, 3, and 11 to Rangappa Naidu, and which was assigned by Rangappa Naidu's sons after his death to the plaintiff on the 20th of April 1883.

It appeared that Rangappa Naidu sued defendant No. 1, defendant No. 2, the father of defendant No. 3, defendant No. 4, and defendant No. 11 for the first instalment of the amount due on the bond in original suit No. 131 of 1873 in the Court of the District Munsif at Nellore, and obtained a decree on the 8th March 1873, the decree being passed by consent. One Chenchu Rama Reddi, a creditor of the defendants' family, sued them in original suit No. 433 of 1873 to recover a debt, and, having obtained a decree by consent on 16th September 1873, caused the property comprised in the hypothecation bond now sued upon to be attached. Rangappa Naidu intervened in execution, claiming title under the bond and his claim was allowed on the 24th of August 1874. On 22nd December 1875, one Ayyappa Naidu obtained a decree against the defendants in original suit No. 219 of 1875; that decree was also passed by consent, and in accordance with its terms some of the land comprised in the hypothecation bond was mortgaged to satisfy the decree.

With regard to the assignment of the bond to the plaintiff, it was admitted that the assignment was taken merely as a speculation and not in satisfaction of any debt due to the assignee by the assignor, who received only Rs. 2,600 in consideration of the assignment. It further appeared that that sum was paid by instalments, which began after the expiration of one year from the date of the assignment.

The District Judge passed a decree for the plaintiff for the sum of Rs. 2,600 with interest calculated from the date of the payment of that sum to the assignor of the bond up to the date of the plaint.

The plaintiff preferred this appeal.

Seshagiri Ayyar for appellants.

Mahadeva Ayyar for respondents.

JUDGMENT.—It is first contended that, although section 135 of the Transfer of Property Act is applicable, the case falls within the fourth proviso, inasmuch as on a claim being made by the plaintiff's transferor as against third persons, who had attached

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the property in execution of a decree against the present defendants, an order was passed in favor of the transferor. Such order cannot be accepted as an adjudication within the meaning of the proviso, nor in fact was it an adjudication as between the transferor and the debtors. Our attention is next drawn to the judgment in original suit No. 131 of 1873 brought to recover the first instalment due under the mortgage. That again is no adjudication on the claim now set up. The appellants, however, were clearly entitled to interest on the price paid not only up to date of plaint but up to date of decree, and the decree must be amended by awarding interest on the sum of Rs. 2,600 at 4 per cent. for the interval. As regards interest from the date of the assignment to the date on which Rs. 2,600 was paid, we are referred to no evidence that the plaintiffs did make any payment over and above the Rs. 2,600.

As to the costs of attachment before judgment, the Judge considered the attachment unnecessary and refused to allow them as costs in the suit. We see no sufficient reason to interfere with the discretion exercised in the matter. The decree must be amended as indicated above, but in other respects is affirmed.

Under the circumstances we direct that each party do bear their own costs.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

SHAIK IBRAHIM.*

*District Municipalities Act (Madras)—Act IV of 1884, s. 103—Attachment of
movable property—Doors of a house.*

The doors of a house are not attachable as movable property under District Municipalities Act (Madras), s. 103.

CASE referred for the orders of the High Court by A. W. B. Higgins, Acting District Magistrate of Ganjam. The facts of this case were stated in the letter of reference as follows:—

* Criminal Revision Case No. 631 of 1889.

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"The Sub-Magistrate convicted one Shaik Ibrahim of Chicacole for resisting an attachment made under section 103 of Madras Municipal Act IV of 1884, and sentenced him to pay a fine of Rs. 5, but the Principal Assistant Magistrate reversed the conviction on appeal on the ground that the front doors of appellant's house are not movable property and the house to which they belonged was not the house in respect of which the tax was due.

"I consider that the conviction should be upheld, as section 103 of the Act empowers the Chairman to distrain movable property of defaulter wherever it is, and as attaching doors is a most frequent form of attachment."

The Government Pleader and Public Prosecutor (Mr. Powell) for the Crown.

JUDGMENT.—This was a case referred to the High Court by the Acting District Magistrate of Ganjam.

The principal facts of the case were as follows:—Shaik Ibrahim of Chicacole was convicted for resisting an attachment made under section 103 of the Madras Municipal Act IV of 1884 and sentenced to pay a fine of Rs. 5. On appeal, the Principal Assistant Magistrate reversed the conviction, and the question for the High Court to decide is, was such reversal of the conviction right.

It appears that Shaik Ibrahim was assessed in the sum of Rs. 5 for house-tax under the above Act, and, on his refusing to pay, a warrant of attachment of his movable property was granted. The officer charged with the execution of the attachment went to the dwelling house of Shaik Ibrahim and demanded the tax, and, upon being told by Shaik Ibrahim to go to the house upon which the tax was due and seize movable property there, refused to do so and proceeded to take off the outer doors of the house. Shaik Ibrahim tried to prevent the removal of the doors of the house, but the officer and those with him persisted and ultimately removed the doors from their hinges. The attempt made by Shaik Ibrahim to prevent his doors from being removed was the resistance to the attachment with which he was charged.

Section 103 of the Madras Act IV of 1884 enables a municipality to recover the amount of a tax remaining unpaid after fifteen days' service of a notice by distress and sale of the movable property of the defaulter, and the question before us is whether the outer door of a house is movable property.

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v.
SHAIK
IBRAHIM.

We are clearly of opinion that the Principal Assistant Magistrate was right in reversing the conviction: the front or outer door of a house is not movable property, and is, therefore, not liable to be distrained. The terms immovable and movable property have been defined in various Acts of the Indian Legislature (General Clauses Act I of 1868, section 2 (5) and (6), Indian Penal Code, section 22, and Indian Registration Act III of 1877, section 3); the definitions thus given render it clear that that which is attached to the earth is not movable property, and the words attached to the earth have been interpreted by the Legislature itself to mean attached to what is imbedded in the earth for the permanent beneficial enjoyment of that to which it is attached, Transfer of Property Act, section 3 (c). Moreover by the Transfer of Property Act (IV of 1882), section 8, it is enacted that when the property is a house, the transfer thereof includes, *inter alia*, the doors.

It has been held in *Peru Bepari v. Ronuo Maifarash*(1) that the doors of a building form part of an immovable property. We are, therefore, of opinion that the conviction was wrong and that the doors of a house cannot be distrained under the first portion of clause (1) of section 103 of the Madras Act IV of 1884.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

1890.
July 24, 28.

KALIMA (DEFENDANT NO. 1), APPELLANT IN APPEAL NO. 28
OF 1888,

MAHOMED (DEFENDANT NO. 7), APPELLANT IN APPEAL
NO. 66 OF 1888,

v.

NAINAN KUTTI (PLAINTIFF), RESPONDENT IN BOTH CASES.*

Civil Procedure Code—Act XIV of 1882, s. 331—Appeal—Jurisdiction—Civil Courts
Act (Madras)—Act III of 1873, s. 13.

The plaintiff being the holder of a decree of a Subordinate Court for more than Rs. 5,000 was obstructed in execution by the present defendants. He applied to

(1) I.L.R., 11 Cal., 164.

* Appeals Nos. 28 and 66 of 1888.

the Court for the removal of the obstruction, the property, which was the subject of the application, being valued at less than Rs. 5,000, and the Subordinate Judge directed that the application be registered as a regular suit under Civil Procedure Code, s. 331, and ultimately passed a decree in favor of the plaintiff: Held, that the appeal against this decree did not lie to the High Court.

APPEALS against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 77 of 1885.

The facts of the case appear sufficiently for the purposes of this report from the judgments of the High Court.

Mr. Gover for appellant in appeal No. 289 of 1888.

Sankara Menon and Narayana Rau for respondent.

Sundara Ayyar for appellant in appeal No. 66 of 1888.

Narayana Rau and Ryru Nambiar for respondent.

SHEPARD, J.—A preliminary objection was taken by Mr. Sankara Menon on behalf of the respondent that no appeal lay to this Court, because the value of the subject-matter of the suit was less than Rs. 5,000, and, therefore, the appeal ought to have been instituted in the District Court.

It appears from the schedules attached to the petition in which the suit originated that the whole property, in respect of which obstruction to execution was complained of, was valued at Rs. 4,549-3-6, of which property the plaintiff claims two-sevenths, 4,549-3-6, of which property the plaintiff claims two-sevenths, that share being valued at Rs. 1,299-12-5. Whether we take the value of the entire property or the value of the plaintiff's share, the value of the subject-matter is therefore below Rs. 5,000. Our attention, however, has been called to two cases which lend some support to the contention that the appeal was nevertheless rightly instituted in this Court and not in the District Court, the subject-matter of the original suit having exceeded Rs. 5,000 in value. In *Ravloji Tamaji v. Dholapa Rayha*(1) the same point arose with reference to a section of the Bombay Civil Courts Act similar to that in the Madras Act and to the Code of Civil Procedure of 1859. It was decided that, although the property attached was worth less than Rs. 5,000, the District Judge had rightly held that an appeal from the decision of the Subordinate Judge who had passed the decree in the original suit did not lie to him. In *Sithalakshmi v. Vythilinga*(2) the point decided was that in a claim arising in execution of the decree of a Subordinate Judge, that Judge had jurisdiction to try it notwithstanding that the subject-

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(1) I.L.R., 4 Bom., 123.

(2) I.L.R., 5 Mad., 548.

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matter of the claim was less than Rs. 2,500 in value. In the judgment of the majority of the Court in this case the decision in the Bombay case is approved and some doubt is thrown on the judgment in an earlier Madras case, *Muttammal v. Chinnana Gounden*(1). For the purposes of the case before the Court, it was not, however, necessary to consider the position laid down in *Muttammal v. Chinnana Gounden*(1), viz., that by section 229 of the Code of 1859, a special jurisdiction was given only in those cases in which the value of the property claimed is not at the date of the claim in excess of the ordinary power or the pecuniary limit of the jurisdiction of the Court that passed the decree. If it were necessary to consider that proposition in the present case, I should be disposed to agree with the reasoning of Muttusami Ayyar, J., in his two judgments in *Muttammal v. Chinnana Gounden*(1) and *Sithalakshmi v. Vythilinga*(2). But, accepting the reasoning of the majority of the Court in *Sithalakshmi v. Vythilinga*(2) as to the object of the Legislature in enacting the provisions of the Code with respect to claims of property attached in execution of decrees, I fail to understand how it follows that the rules as to appeal from the decision of a Court upon a claim must differ from the rules governing appeals from decrees in ordinary suits. I can see no reason why any special character should attach to the suit instituted under section 331 of the Code of Civil Procedure after it has once been disposed of and a decree has been passed on it. And in the last clause of that section it is expressly provided that the order having the same force as a decree shall be subject to the same conditions as to appeals or otherwise. The similar provision in section 229 of the Code of 1859 is not noticed in the judgment of the Bombay High Court.

I am of opinion that the amount now in dispute being under Rs. 5,000, although the subject-matter of the original suit exceeded that amount, the appeals do not lie to this Court. The petitions of appeal must, therefore, be returned to be presented to the proper Court and the appellants must pay the respondent's costs.

MUTTUSAMI AYYAR, J.—I am also of opinion that the appeal lies to the District Court and not to the High Court. The subject-matter of the respondent's claim, so far as it was investigated under section 331 of the Code of Civil Procedure, was

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valued at Rs. 1,299-12-5, and under section 13 of Act III of 1873 the District Court is the proper appellate tribunal. The decision in *Sithalakshmi v. Vythilinga*(1) is an authority only for the proposition that a Subordinate Court has a special jurisdiction as the Court executing a decree to try under section 331 a claim of which the value of the subject-matter falls below the pecuniary limits of its ordinary jurisdiction, Rs. 2,500. The question which we have now to decide is whether an appeal lies to the High Court from the decree of the Subordinate Judge exercising the special jurisdiction when the value of the subject-matter of the claim is below Rs. 5,000. It is provided by section 331 that the Court (executing the decree) shall proceed to investigate every such claim "in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Chapter V and shall pass such order as it thinks fit for executing or staying execution of the decree and that every such order shall have the same force as a decree and shall be subject to the same conditions as to appeal or otherwise." According to the language of the section, the claim is to be regarded as a suit to recover the property claimed from the person or persons obstructing the execution of the decree and the order adjudicating upon it as a decree passed in such suit subject as to appeal to the law by which such decree would ordinarily be governed. It may be that a special original jurisdiction is created in favour of the Court executing the decree in consideration of special convenience, but those considerations have no bearing on the question whether the Appellate Court should be the District Court or the High Court. It is said that it is the value of the entire property which was the subject-matter of the decree under execution that ought to be considered; but this contention is inconsistent with the plain wording of section 331, which only places the claim on the same footing with an original suit instituted to recover the specific property claimed and as to which the respondents have obstructed execution. As to the decision reported in the Bombay series, I was one of the Judges who dissented from it in *Muttammal v. Chinnana Gounden*(2), and, though the majority of the Court did not approve of it in *Sithalakshmi v. Vythilinga*(1), it was on a point which does not arise in the suit

(1) I.L.R., 4 Mad., 220.

(2) I.L.R., 8 Mad., 548.

(1) I.L.R., 8 Mad., 548.

(2) I.L.R., 4 Mad., 220.

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before us. I think that the preliminary objection must prevail and that the order should be that the appeals be returned to the appellants for presentation, if so advised, to the District Court. The appellants must pay respondent's costs.

APPELLATE CIVIL.

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

RANGACHARIAR (DEFENDANT), APPELLANT,

YEGNA DIKSHATUR (PLAINTIFF), RESPONDENT.*

1890.
Feb.
24, 26, 27.
April 2.

Hindu law - Succession to a jeer of a mutt - Nomination requiring assumption of the character of a sannyasi - Time fixed by decree for assumption of that character - Enlargement on appeal of that time - Evidence of custom.

The plaintiff sued for a declaration of his right as jeer of a mutt and for possession of the property of the mutt. The plaintiff alleged that the immemorial custom with reference to the succession to the office of jeer was that the jeer for the time being nominated his successor, and that, failing such nomination, the disciples assembled at the place where he died, elected his successor, and that the person so nominated became jeer by virtue of such nomination alone. The plaintiff's case was that he was nominated by the late jeer, although the nomination was not concurred in by the disciples, and that the late jeer had initiated him and directed him to become a sannyasi a day or two after his initiation, and that he was accordingly entitled to the rights and privileges of jeer. The plaintiff obtained a decree which was, however, made contingent upon his assuming the character of a sannyasi within the period of four months. The defendant preferred an appeal against this decree, and the plaintiff preferred an appeal praying for the enlargement of the period fixed, within which he was to become a sannyasi, pending the disposal of the appeal preferred by the defendant.

On the plaintiff's appeal:

Held, the Court had power to extend the time as prayed.

On the defendant's appeal:

Held, (1) on its appearing that the plaintiff did not repeat the presha mantram that his upadesam was insufficient;

(2) that the plaintiff's right, if any, to the status of jeer ceased on his omission to become a sannyasi soon after the initiation alleged;

(3) on the evidence that no similar case of succession had taken place in the history of the institution that the plaintiff had established merely an imperfect nomination which could not be upheld on the principles deducible from the known cases of succession.

* Appeals Nos. 16 and 20 of 1889.

APPEAL against the judgment of Mr. Justice Kernan sitting on the Original Side of the High Court in civil suit No. 256 of 1888.

RANGA-
CHARIAR
v.
YEGNA
DIKSHATUR.

Suit for a declaration of the plaintiff's title as the lawfully appointed successor of the late jeer of the Ahobalam mutt at Trivellore to a branch of that mutt situated in Madras, &c.

The facts of the case appear sufficiently for the purposes of this report from the judgment on appeal. Mr. Justice Kernan passed a decree as prayed, provided, however, that, if the plaintiff did not become a sannyasi within the period of four months from the date of the decree, the suit should stand dismissed.

The plaintiff, on the 16th August 1889, preferred appeal No. 16 of 1889, on the ground that he was entitled to have a longer period fixed than the four months provided in the decree. The defendant, on 22nd August 1889, preferred against the decree generally appeal No. 20 of 1889, in which the plaintiff raised objections to the decree as being defective in some particulars.

The appeal by the plaintiff came on for hearing on the 23rd August 1889.

The *Advocate-General* (Hon. Mr. *Spring Branson*) for appellant.

The decree appealed against was passed on 3rd May 1889 and the object of the provision now sought to be varied was to prevent the plaintiff from being compelled to take the irrevocable step of becoming a sannyasi until his right to be jeer is finally decided. The time should have been made to run from the date when the defendant's right to appeal should become barred or from the date of the decree passed in such appeal.

Mr. *Norton* for respondent.

If this appeal is allowed while the defendant's appeal is pending, the result will be that ultimately there will have to be two decrees in one suit.

(*Muttusami Ayyar*, J.—Is it not the rule that the decree affects the interest only of the particular appellant?)

Not quite so when one appellant claims a right which the other appellant claims against him. If *Phear*, J., is right in *Lalla Rughoobuns Sahoy v. Mussamat Asloo* (1) there should be only one

(1) 20 W.B., 296.

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decree in cross-appeals. That case is a distinct authority against the plaintiff's present application. Again, the application to vary rests upon the assumption that the plaintiff is entitled to the decree, that he be jeer if he become a sannyasi, and the application cannot be granted except upon that assumption which prejudges the defendant's appeal which is not yet ready.

The plaintiff was not entitled to the decree on the case set up in the plaint, even if the findings of the learned Judge are correct. The plaintiff sued as jeer: the learned Judge found he was not a jeer when he sued as he was not a sannyasi. The suit should accordingly have been dismissed, and the learned Judge should not have given him a relief he never asked for by allowing him time to fulfil what was admittedly a condition precedent to the assumption of the character of jeer. *Hansbutti Kevain v. Ishri Dutt Koer*(1), *Eshenchunder Singh v. Shamachurn Bhutto*(2).

Moreover the Court had no jurisdiction to entertain the suit conferred on it merely by the fact that the mutt has a branch at Madras for the cause of action, viz., the trespass to title took place outside the jurisdiction. As to the right construction of Letters Patent, section 12, see *Jairam Narayan Raje v. Atmaram Narayan Raje*(3).

JUDGMENT.—We think the decree should be amended by extending the time during which the plaintiff may become a sannyasi to twelve months from the date of the decree (instead of four months), and we order the decree to be amended accordingly. The issuing of the decree with such amendment is postponed until after the hearing of the respondent's appeal. The other questions argued by the respondent's counsel are reserved until the hearing of the respondent's appeal. This appeal is adjourned until such hearing.

The appeals came on for hearing together on 24th February 1890.

Mr. Norton for appellant.

The suit should have been dismissed on its appearing that the plaintiff who sued as jeer was not within the spiritual brotherhood of the person to whom he claimed to have succeeded. Spiritual succession cannot exist except between persons who are within spiritual brotherhood—See *Giyana Sambandha Pandara Sannadhi*

(1) I.L.R., 5 Cal., 512. (2) 11 M.I.A., 7. (3) I.L.R., 4 Bom., 482.

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v. *Kandasami Tambiran*(1) and here the plaintiff was not even a saunyasi. He may have held the rank of a disciple who merely recites mantrams and does certain temple duties, but he was not a member of the inner circle from which only the jeer can be chosen, and it appears that after his alleged appointment he actually went back to his family. The evidence shows that no one not a sannyasi has ever before been made a jeer and the plaintiff has failed to establish that the custom of the institution admits of the claim which he sets up as jeer. See *Srimati Janaki Debi v. Sri Gopal Acharjia*(2). Nor is it open to the Court to introduce a new custom into the institution—*Genda Puri v. Chhatar Puri*(3). It may be that one not being a sannyasi may be elected, but his appointment is not complete and he acquires no right until he assumes that character, and the plaintiff has not been in any way obstructed from assuming it. There is no authority for supplementing a defective appointment as has been done by the learned Judge: see 2 Sugden on Powers, p. 143—*Buckell v. Blenkhorn*(4). And the analogy from adoption into a natural as distinguished from a spiritual family supports the contention that the present objection is fatal to the plaintiff's case—*Mahashoya Shosinath Ghose v. Srimati Krishna Soondari Dasi*(5).

Further, the relief given was not asked for, and since the right, according to the above argument, was not and is not vested in the plaintiff, it is questionable whether the relief could have been given in the form of a declaration under Specific Relief Act, section 42. To satisfy the requirements of that section the right must be a vested right, as to which compare Indian Succession Act, sections 106, 107, and *Davis v. Angel*(6). Here there is a condition precedent, and the rule in *Greeman Singh v. Wahari Lal Singh*(7) is applicable.

(*Muttusami Ayyar, J.*—We have refused to follow that case*.)

There must be a present interest and not a mere expectancy in any view of the section.

Again, as to the jurisdiction of the Court, the existence of property of the mutt in Madras is not sufficient. The words "other cases" in the Letters Patent, section 14, do not mean suits

(1) I.L.R., 10 Mad., 384. (2) L.R., 10 I.A., 32. (3) L.R., 13 I.A., 100.
(4) 5 Hare, 131. (5) L.R., 7 I.A., 250. (6) 4 De G. F. and J., 524.
(7) I.L.R., 8 Cal., 12. * See I.L.R., 10 Mad., 90.

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which include relief in respect of immovable property out of the jurisdiction—see *Jairam Narayan Raje v. Atmaram Narayan Raje*(1), and as to the meaning of cause of action see *Saikappa Chetti v. Rani Kulundapuri Nachiyar*(2), *Sami Ayyangar v. Gopal Ayyangar*(3), and compare *Kessonji Damodar Jairam v. Luckmidas Ladha*(4).

The *Advocate-General* (Hon. Mr. Spring Branson) for respondent.

No relief was in fact granted which was not asked. The plaintiff asserted the right which was found to exist in him and which it was unnecessary for him to seek to have declared in terms. He desired to be permitted to qualify himself for the full enjoyment of the right and for the discharge of the duties it involved. The assumption of the character of a sannyasi, which, according to the appellant's argument, was necessary to complete the status of jeer, was not in fact on the evidence of custom or on general principles necessary for that purpose, although it was no doubt necessary to enable him to enter upon the duties of the office. It is similar to a case where one appointed to an office has to take a prescribed oath before he discharges the functions which become incumbent on him by reason of his appointment in itself complete, rather than to an ordinary case of Hindu adoption. The evidence shows that there is a distinction to be observed between nomination and appointment in the present case. The plaintiff was nominated by the late jeer, who, according to the evidence, if not according to the defendant's admissions, was entitled to nominate his successor, and he then and there received an initiation from the late jeer. Complete initiation as a sannyasi was not necessary to a complete nomination to the office. It might be that the right of the plaintiff under the nomination was liable to defeasance on failure of the further initiation as sannyasi, which was, however, in the nature of a condition subsequent. That condition would have been fulfilled had it not been for the obstruction of the defendant and his party, but it will be fulfilled within the time named by the Court. The late jeer himself regarded this further step as distinct from the upadesam conferred by him, for he did not direct that it should be taken at once.

(1) I.L.R., 4 Bom., 492.

(3) 7 M.L.C.R., 176.

(2) 3 M.H.C.R., 84.

(4) I.L.R., 13 Bom., 401.

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JUDGMENT.—As the lawful successor of the late jeer of the Ahobalam mutt at Trivellore in the Chingleput District, the respondent brought this suit on the original side of the High Court to recover possession of a branch mutt at Madras, together with its endowments. The appellant claimed to be already in possession by virtue of his appointment as jeer. The late jeer died on the 10th August 1888. It is stated in the plaint that, prior to his death, he nominated the respondent as his successor according to immemorial custom, and that, by reason of such appointment, he became the lawful jeer of the Ahobalam mutt, and, as such, entitled to possession of the said mutt and of all its branches and their endowments. After describing the ground of claim and the interest which vested in the respondent, the plaint proceeded to state that there was a branch mutt at Madras, that it had, in movable property, an endowment of Rs. 32,200 value, that the appellant had it in his possession, and that such possession being unlawful, he was bound to deliver it up to the respondent. The plaint then prayed, first, for a decree declaring the respondent to be entitled to such possession and directing the appellant to deliver it up to him; secondly, for an account of movable property belonging to the branch mutt and its endowments and of their net income realized by the appellant and for a decree for possession and payment in accordance with such account; and, thirdly, for an injunction restraining the appellant from interfering for the future with the respondent's possession of the branch mutt and its endowments.

For the appellant it was contended that this Court had no jurisdiction, that the so-called branch mutt was not a mutt at all, but that it was a small house belonging to the mutt at Trivellore and occasionally used as a residence by its disciples and servants who visited Madras on business, that the movable properties mentioned in the plaint were not in the said house nor anywhere else at Madras, that the Ahobalam mutt had no branch mutt at all, that its head-quarters were at Trivellore, and that the appellant neither resided at Madras nor carried on business, nor personally worked for gain there.

Another ground of defence was that the respondent was not and could not, be the jeer of the mutt in question, unless and until he was properly constituted a sannyasi and initiated in

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accordance with the rules and usages of the institution, and that, without first acquiring that *status*, he had no right to sue for possession of the properties attached to the mutt.

It was next urged that the late jeer had no absolute authority to nominate his successor as alleged in the plaint; that, in fact, he never nominated the respondent; that, even if he made the nomination, it was most prejudicial to the interests of the institution, and, as such, it was invalid.

It was further alleged that at a meeting held at Trivellore on the 5th August 1888 a large body of disciples then present strenuously opposed the respondent's nomination and nominated the appellant as a fit successor to the late jeer, who approved of such nomination; that on the 13th August 1888 a very large number of disciples from various districts, then present at Trivellore, appointed the appellant as jeer conformably to the usage of the institution and pursuant to the arrangement made on the 5th August 1888.

The Ahobalam mutt is an ancient religious and charitable institution established for the spiritual instruction and benefit of Vaishnava Brahmins and others of the Vadakalai sect, and it has a large number of disciples in Southern India, and endowments of considerable value in immovable and movable properties in different districts in this Presidency. As regards the immemorial custom of the institution with reference to the right of succession to the office of jeer, the averment in the plaint is that the jeer for the time being nominates his successor, and, failing such nomination, the disciples assembled at the place where he dies select his successor, and that the person so nominated becomes jeer without more and by virtue of such nomination. In his written statement the appellant admits that when a successor has to be appointed after the death of the jeer, it is customary for the disciples present at the spot on the occasion to appoint such successor, provided no appointment had previously been made during the lifetime of the jeer. The contention, however, as to his power of appointment according to custom is that he had no *absolute* authority to nominate his successor as alleged by the respondent, and it is therefore urged that the respondent's nomination, even if true, was not valid, as it was prejudicial to the institution. It must be noted that the appellant did not say in his written statement how the jeer's

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authority was limited, if not absolute, but it is suggested at the hearing of this appeal that the disciples ought to ratify the nomination. The issues recorded for decision were—

- (1) Whether this Court had jurisdiction in respect of the subject-matter of the suit;
- (2) Whether the plaintiff was the properly-constituted jeer of the mutt;
- (3) What was the nature and value of the property belonging to the mutt in the hands of the defendant; and
- (4) To what relief, if any, the plaintiff was entitled.

Mr. Justice Kernan who tried the issues held that there was no question as to jurisdiction and that there was no evidence as to the property at Madras except the house. As regards the second question, the learned Judge held that the respondent's nomination took place on the 4th August, that it was publicly announced on the 5th August, and that the result of the nomination was that the respondent became, by custom, entitled, from the date of the nomination, to succeed the jeer on his death whenever that should take place, and on the death of the late jeer, the respondent became the legally-constituted jeer and the property of the mutt, together with the right of management, vested in him. The learned Judge observed further that the respondent was no doubt bound to go through any ceremonies not already gone through and necessary to becoming a sannyasi and thereby to become a sannyasi, but that it was not indispensable to the validity of the respondent's title as jeer accruing immediately after the death of the former jeer that he should have performed any of the ceremonies before the jeer died. He observed also that custom no doubt required these ceremonies should be performed within a few days after the death of the last jeer, and that the respondent had not become a sannyasi as yet, but that such omission was not fatal to his claim, as the appellant was the cause of such non-compliance, first, by denying his nomination, and secondly, by occupying the mutt. He accordingly passed a decree in favor of the respondent declaring that the late jeer nominated him as his successor, and that, by virtue of such nomination, the respondent immediately upon the death of the former jeer became, according to custom, legally appointed, and, as such, entitled to the position of jeer and to the possession and management of the mutt in Madras and bound to perform the duties of jeer, and directing

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that the respondent be put into the possession of the house and ground mentioned in the plaint, that he do perform the necessary ceremonies for becoming a sannyasi within a period of four months, and that, in default of his becoming a sannyasi as aforesaid, the suit do stand dismissed with costs. From this decree the defendant has preferred this appeal.

We agree with the learned Judge that the late jeer intended to nominate the respondent as his successor and expressed his desire to do so both on the 4th and 5th August 1888. There is evidence for the respondent to that effect (see exhibits A, F and G besides oral evidence), and the appellant did not and does not deny that such was the case. His contention was that when the late jeer expressed such desire on 5th August, his disciples objected and suggested that the appellant was a fit successor and that the jeer then changed his mind and approved of the suggestion.

As regards this alleged change of intention, we agree with the learned Judge that, up to the moment of his death, the late jeer desired to appoint no one as his successor but the respondent. Any other view is utterly inconsistent with his conduct on the 5th in sending to vakils, Messrs. Sadagopa Chariar and Vija Raghava Chariar, in instructing the former on the 8th August to apply to the Deputy and District Magistrates for aid to carry out his intention, and in thinking of making a will and sending for Messrs. Sadagopa Chariar and Rama Row on the night of his death. On this point the evidence of the 2nd and 13th witnesses for the plaintiff and that of the 13th and 14th witnesses for the defendant and exhibits F and G are conclusive.

The suggestion for the defence is that on the 5th August the jeer gave up his desire to appoint the plaintiff after listening to the remonstrance of his disciples against the intended nomination, but again changed his mind and wished to carry out his original intention. But the conduct of the jeer described above negatives any such change of purpose. Moreover, it is immaterial whether the jeer wavered between the 5th and 9th August, since it is admitted that he adhered to his intention from before the 9th August. Though the 4th witness for the plaintiff states that the meeting on 5th August was adjourned to 12th, yet he adds it was arranged on Saturday that upadesam should take place on Sunday. This is quite consistent with the view that, owing to the obstruction caused by the disciples, the jeer then intended to

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defer the upadesam to the 12th and hoped to secure the aid of superior magistrates in the meantime.

The material question of fact in connection with the appellant's claim is whether the jeer made upadesam to him or initiated him in the presha or sannyasa mantram on the morning of the 10th and gave him the cloth called kashayam in token of sannyasiship on the same night shortly before his death. The learned Judge found as a fact that upadesam was made and kashayam was given as alleged. We shall discuss the evidence and the probabilities of the case bearing on this point later on in this judgment: but we shall now refer to the appellant's version of what took place on the 5th August. The incidents of that meeting according to such version are that when the disciples opposed the plaintiff's nomination, the late jeer made two alternative proposals: that the one was that he would abdicate his office and allow the disciples to appoint any person they might like in case Rs. 20,000 was paid to him, that the other alternative was that the person selected should lead the life of a disciple without transgressing his orders until he died and hold the office after his death:—that when the disciples were considering these proposals, the Tahsildar of Trivellore, who was present, said that the defendant could alone manage the office, all the disciples present except three concurred in that opinion, that the three suggested, however, that no decision should then be arrived at, as the mutt had a large number of disciples in many parts of the country and their opinion should be taken, and that all the disciples then agreed that eight days' time should be allowed and notice given:—that the defendant was then asked to which of the two alternatives he would agree, that he agreed to the second proposal, and that it was arranged to hold a meeting on the 12th August. It is then alleged that the jeer died without making upadesam and giving kashayam to the plaintiff on the 10th August, that on the 12th and 13th the disciples met and appointed the defendant, that he became a sannyasi on the 14th August and took charge of the mutt and its property on the 15th.

The plaintiff's case was that it was not the jeer who demanded Rs. 20,000 for abdicating his office, but that the defendant offered Rs. 20,000 and the jeer declined the offer with indignation and contempt, that he never wavered in his determination to appoint the plaintiff, and did not agree to nominate the defendant or to any

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adjournment, and that, as the local magistrate sided with the disciples instead of assisting him, he forbore to make upadesam that day lest there might be interruption and disturbance. There was conflict of evidence as to what actually occurred on 5th August, but the learned Judge, who had the witnesses before him and was dissatisfied with the demeanour of the witnesses of the appellant, came to the conclusion that the plaintiff's version was true. We cannot interfere with the finding of the Judge on this point on a bare perusal of the evidence, especially as it is more probable that an office-seeker like the defendant stooped to such conduct than that the old jeer did so with the prospect of approaching death before him.

The substantial question, however, before us is whether the plaintiff became the duly constituted jeer and not whether the defendant was disqualified for the office by disgraceful conduct, and whether he is lawfully in office. On this point the learned Judge was of opinion that mere nomination by the jeer on the 4th and 5th August was sufficient to create a right for the plaintiff to succeed him on his death.

As to the legal effect of such nomination, there can be no doubt and it is indeed conceded on both sides that it is in the usage of the institution a rule of decision must be found. The learned Judge considers it to be this:—the person nominated becomes, immediately on the death of the jeer, the legally appointed jeer, and, as such, entitled to the possession and management of the mutt and the endowment and bound to perform the duties of the jeer, though subject to the obligation of becoming a sannyasi within a few days after the death of his predecessor. The appellant's contention is that mere nomination by the jeer is by usage of no legal effect whatever, unless it is concurred in by his disciples and unless until the person nominated becomes a sannyasi. In this connection the opinion of the late jeer as to what was necessary to give the respondent the *status* of jeer is of importance. The plaintiff states in his evidence that the jeer said on 4th August:—"the essential to this office is upadesam of mantrams or initiation." He states again that the late jeer said on the night of the 10th August:—"upadesam had been done," and wished to give me the cloth that pertained to the office, gave it to me and admonished me to use my office properly." The plaintiff then went on to say: "the performance of upadesam,

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"the delivery of the kashayam, and the saying of the jeer that he "gave me over the seat or office, by these means, I have become "jeer." On the respondent's own evidence, then, mere nomination was not sufficient and upadesam or initiation in the sannyasam or what is called "Presha mantram" was an essential, and the investiture or delivery of the cloth pertaining to the office and the formal declaration that he gave over the office was another requisite.

Again, the respondent's own case as attempted to be established by evidence was that the late jeer made up his mind to nominate him on 4th August and expressed his determination to do so on 5th August, prepared to make upadesam or initiate him in the sannyasa mantram at 9 o'clock in the morning, which he considered to be a propitious hour, but that, fearing a disturbance owing to the opposition made by his disciples, the altercation which ensued thereupon, and the reluctance of the local magistrate to help him, the late jeer gave up the attempt that day on plea that the propitious hour had passed, that from the 5th to the 9th he had been endeavouring to procure the aid of superior magistrates through his vakils in order that he might make upadesam and install the plaintiff with such aid, that on the 10th he became worse, changed his mind and made upadesam in the morning between 9 and 10, and that about 9 or 10 at night, apprehending that he might die soon, sent for the respondent, gave him kashayam, and saying that he gave over his office, admonished him to use it well. He stated further that the jeer uttered the sannyasam or "Presha mantram," but that he (respondent) did not repeat it, that he intended to do so when he becomes a sannyasi, and that it was the utterance of the mantram by the jeer that he characterised as initiation. He added that it was necessary that he should become a sannyasi, but not at the time of appointment. The declaration, therefore, that a person becomes by mere nomination a legally appointed successor on the death of his predecessor and that his right of succession is a vested interest goes beyond the respondent's case and practically treats even upadesam and gift of kashayam as surplusage.

Turning to the evidence regarding custom, there is no dispute as to two of its incidents. The first is, when a jeer nominates his successor, when the person nominated is either present in the

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a will and the person named by him was recognized. As to the appointment of the last jeer the witness added, "when Sreenivasa Raghava Jeer was about to die, he called the last jeer and handed "to him the kashayam and then died. I have never known any "jeer to be elected by disciples, nor did I hear of it." He said further when the kashayam was handed to the last jeer by his predecessor, the latter told the former to perform the duties of the office. In cross-examination he said he was not present at the appointment of the jeer before the last. He stated further that the last jeer on the day he was appointed went through jeeva-sraddham or death ceremony.

We may observe that according to Hindu ritual a Brahman, when he is about to become a sannyasi, performs a ceremony whereby he is considered to have suffered civil death and determined his secular *status* prior to entering the order of sannyasi. That ceremony is called jeeva-sraddham.

Exhibit J is the will referred to by the witness, dated the 10th September 1879. The material passage runs in these terms:—

"Therefore I have, while in the enjoyment of good memory and with good intention (sound mind), sent a message to a person named Sreenivasa Raghava Chariar who is residing in Attiputtoo to come here to be installed in lieu of me in our Ahobala muttum on account of his being a very learned man that observes religious rites and one more versed in the traditional doctrines of the muttum than others. Therefore after he arrives, I shall have him installed in this office. In case of my departing this life before his arrival, he shall be installed in this office and all the properties connected with this muttum and the devasthanams or temples which are under the control (or in the possession) of the sannidhy shall be put in his possession and all the immovable and movable properties which are with Vanamamala Chari shall also be put in his possession. The aforesaid Attiputtoo Sreenivasa Raghava Chariar shall, after I depart this life, enjoy all [affairs] the properties connected with this muttum. In the case of the aforesaid Attiputtoo Sreenivasa Raghava Chariar not agreeing to [accept] this office, then, as Kalathoor Narasimha Raghava Chariar has been declared to be competent for this office, it has been determined that this office should be conferred on him. Therefore the aforesaid person shall be installed in the aforesaid

office and he shall take the immovable and movable properties of the aforesaid Lakshmi Narasimha Svami."

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The evidence as to jeeva-sraddham or death ceremony is important as showing that the last jeer performed it at once. The passage in the will is important as showing that a former jeer believed that he should see his nominee installed if he arrived before his (the jeer's) death. It is also important as showing that he directed his installation on his arrival after death. It shows further that the possibility of a refusal was anticipated and that it had been declared and determined with reference to such contingency that the office should be conferred upon another person named in it.

The third witness is a *purohit* specially sent for, as he states, by the late jeer in order that the ceremonies necessary to make the plaintiff a sannyasi might be performed. Adverting to jeeva-sraddham or death ceremony he stated that the late jeer said to the plaintiff, among other things, "you should go through the ceremony of jeeva-sraddham (death ceremony) to-morrow. In case I have strength of body to do this, I will do it, if not, you had better get it performed properly to-morrow." The jeer told me, the witness adds, to be with the plaintiff and to get the ceremony of sannyasam performed properly that day. The witness is the plaintiff's cousin and his evidence is important as showing that the late jeer enjoined the plaintiff to perform the jeeva-sraddham and go through the sannyasam ceremony on the next day after upadesam or initiation.

The fourth witness, a cook in the service of the late jeer, deposes only that the last jeer's predecessor sent for him and gave him kashayam. This witness signed exhibit III.

The next witness is Pullapakam Nattu Ramanuja Chari and he is a grandson of the late jeer. He gives the same evidence as the last witness. He signed exhibit III, which purports to be signed by those who were willing that the defendant should succeed the last jeer, and states, though he calls himself a shrotri-yamdar, that he signed it under the impression that it related to the appointment of an archaka.

The next witness is Moragasi Ranga Chari of Kolattur and speaks to the appointment of the last jeer. He says:—"the jeer before him sent for him, told him to take up the office, handed

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"to him the kashayam, and said, I have given you the office to manage for the future." The witness' father was in the employment of the last jeer.

The next witness is one Neeradi Raghava Chari, who gives evidence regarding the second and third cases of succession. He deposes:—"I know the last jeer the jeer, who preceded him, and the jeer before that. The jeer before the last was appointed by Sadagopa Jeer. Sadagopa made the will (exhibit J). Ceremonies were performed afterwards, kashayam and jeeva-sraddham. There is a practice of taking up kashayam after appointment. The Attipat Jeer acted until his death, appointed the last jeer, and gave him kashayam. The last jeer got other ceremonies performed for himself with the aid of books and purohita." In cross-examination he continues:—"Attipat was a sannyasi. He was called jeer from the time kashayam was taken. Kashayam is a token of sannyasiship. Until the other ceremonies are performed, he need not wear it. The consent of disciples was not taken when either Attipat or the last jeer was appointed. Plaintiff pronounced mantram apparently. I did not hear: ceremony lasted quarter or half an hour. The man who makes upadesam sits down and the disciple stoops in front and puts his ear close to the mouth of the man who makes the upadesam. This is done to be a jeer. There is no man among Vadagalai Brahmans who is a jeer and not a sannyasi. A man who is made a jeer may afterwards become a sannyasi, but the time is only for a day or two, and in that time he may take up the property. Attipat Jeer was house-holder when he received kashayam and afterwards got the ceremonies of jeeva-sraddham performed and became a sannyasi. He did not go back after receiving kashayam to be house-holder, but lived in the mutt. The last jeer received kashayam on the last day he was house-holder, and on the next day he got jeeva-sraddham performed. I do not know any instance among Vadagala heads of mutts not being sannyasis. There are certain of them being jeer and not a sannyasi for a day or two."

This witness is one of those who deposed that he saw the late jeer make upadesam to the plaintiff and give him kashayam though he signed exhibit III, which acknowledged the defendant as jeer. His explanation is that he signed that document under the impression that it related to the appointment of some archaka.

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The next witness is one Varadachari, a sub-magistrate near Trivellore, and wrote about six years ago a draft will. He deposes that the last jeer was installed at or about the time the Attipat Jeer died in the presence of disciples. "There were two or three candidates, and all people were saying that the last jeer should get it. I told this to Attipat Jeer: he said the same 'I don't know the custom who is to appoint.'" This witness is a Tengalai Vaishnava Brahman. The foregoing is the evidence for the respondent about prior practice.

On the other hand four witnesses gave evidence on the same subject on behalf of the appellant.

Rangachari (seventh witness) gave evidence about the first case of succession. He stated that the disciples consulted together, selected Sadagopa Jeer, and asked Veera Raghava Jeer to appoint him, and that Veera Raghava did so. Sadagopa was made a sannyasi and upadesam was made the next day. He pronounced the mantrams and took kashayam. He owns lands and looks after some muttam lands. The eighth witness, T. Srinivasa Chari, also gave evidence about the first case of succession, and stated that at the request of the disciples Veera Raghava appointed Sadagopa Jeer. He said also that after all the ceremonies were gone through, Veera Raghava pronounced the upadesa mantram and told Sadagopa to repeat it and that kashayam was then given. The witness was questioned about the practice when there was a disagreement between the jeer and his disciples. He said there was no such case; the disciples would not disagree; the jeer has power to appoint without consent; if the nominee was a proper man the disciples would necessarily agree with the jeer. Another witness is Sreenivasa Raghava Chari, who is the defendant's nephew and the son of Sadagopa Jeer. He states that his father asked the disciples first and then nominated the Attipat Jeer. When the last jeer became jeer, the witness says, the disciples asked him to become jeer and Attipat Jeer was unconscious for three days prior to his death. The next witness is S. Venkata Chari agent or srikarya of the mutt. He says:—"I was at the mutt when the last jeer was appointed. He was appointed there, he was made a sannyasi there, and he was put in the place by the jeer and by all the disciples. Attipat Jeer whom he succeeded took no part in the appointment and he was unconscious at the time." He states again that Sadagopa Jeer

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asked the disciples who should be appointed. They named Attipat, and he appointed him.

Having stated the evidence on both sides, we now proceed to consider its effect as to the usage of the institution. We must premise that the evidence is very meagre. The last jeer was the 35th in the order of succession, the mutt has a large number of disciples throughout the Presidency, and yet the evidence above referred to is the only material upon which we have to form an opinion.

As to the first of the three cases of succession, the jeer nominated his successor, initiated him, gave him *kashayam* and saw him installed and become a *sannyasi* before he died. The relation of father and son in a spiritual family was thus completed. As to the second case of succession, the person nominated by the jeer did not arrive until after the jeer had died. The disciples recognized the appointment when he arrived, and he became a *sannyasi* at once. It is a case of nomination which was not accepted until after the death of the jeer and which, when accepted, the disciples recognized. The second witness for the plaintiff and his brother refer to the recognition. The nominee became a *sannyasi* at once.

This was a case of incomplete nomination by the jeer as it was not known before he died whether the nominee would accept the office and as he was at liberty to refuse it. It was also a case in which the disciples honored the nomination by their guru in theory the appointment was made by the disciples, the relation of preceptor and disciple not being constituted by *upadesam* between the jeer and his nominee.

As regards the third case, there is a conflict of evidence. The witnesses for the appellant say that the Attipat Jeer was unconscious and that it was the disciples who appointed him. On the other hand, the witnesses for the respondent state that Attipat made *upadesam* to the last jeer and gave him *kashayam*. They add, however, that the last jeer performed *jeeva-sraddham* and became a *sannyasi* next day: the witness Neeradi Raghava Chari adds that he never returned to his house again nor resumed the *status* of a house-holder, and that the nominee must, according to usage, become a *sannyasi* in a day or two after *upadesam*. Taking the view most favorable to the plaintiff, this is a case in which the dying jeer made the *upadesam* and gave *kashayam*

and the nominee became a *sannyasi* next day. This was precisely what the last jeer told the plaintiff to do according to his third witness, but which he did not do.

According to the evidence on both sides, there was no disagreement prior to the present litigation as to the fitness of the person nominated by the jeer. Though several of the plaintiff's witnesses deny, that the disciples were ever consulted, his own witness, K. Varadaachari, who is a sub-magistrate near Trivellore, states that the disciples suggested the appointment of the late jeer.

The conclusion we have to come to is that the plaintiff's case is anomalous in three ways:—(i) It is not a nomination concurred in by the disciples. (ii) He did not repeat the *presha mantram* when he was initiated. (iii) He did not become a *sannyasi* in a day or two after his initiation as stated by his own witness Neeradi Raghava Chari, nor abstain from returning after *upadesam* and acceptance of *kashayam* to be a house-holder and to live with his family. His case stands by itself and is not supported by custom in the sense that there was a similar case before, though the last jeer was the 35th in the order of succession, and though looking to the number of disciples which the Ahobalam mutt has, evidence must be available if the plaintiff's case was warranted by any precedent in the history of the mutt.

Another serious defect in the plaintiff's case is that he was not initiated in the proper sense of the expression. In ordinary parlance, the essence of initiation consists in the person initiated repeating the *presha* or *sannyasa mantram* as it is pronounced by the jeer who nominates him. Not one of his witnesses states that such is not the case. On the other hand his own witness, Neeradi Raghava Chari, deposes that the plaintiff apparently repeated the *mantram* and describes initiation as including such repetition. The text of *presha mantram*, as given in the *Vaidyanatha Diskshitiyam*, means I hereby renounce love of children, of wealth, and of the world; and when time and circumstances permit, it is uttered whilst going through the ritual prescribed for becoming *sannyasi* and after performing certain preliminary ceremonies, one of which consists in *jeeva-sraddham*, whereby the person becoming *sannyasi* is required to perform his own *sraddha* or death ceremony and thereby determine his *status* as a *grihastha* or a house-holder or in legal phraseology to suffer civil death in relation to his natural family. He receives *upadesam*, if made

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in the regular mode, after performing jeeva-sraddham and by pronouncing presha mantram.

The intention in making upadesam and giving kashayam otherwise than during the ritual is to constitute the spiritual relation of guru and disciple by fulfilling what is the essential part or mantric essence of the ritual in advance when there is urgency for it such as the jeer's approaching death, and there is no time for going through it in detail and to leave its religious efficacy to be perfected by the observance of the ritual as soon as possible. Having regard to the intention with which the upadesam is made, the repetition of the upadesa mantram by the disciple was of its essence, otherwise he could not have become the disciple of the late jeer.

The plaintiff himself admits that the effect of repeating it is equivalent to a determination of his *status* as a house-holder. Save his own interested statement, there is no evidence to show that he may be considered to have received upadesam though he has not repeated the presha mantram. The evidence of the defendant's witnesses and of his own witnesses Neeradi Raghava Chari and of the practice of those nominated before are inconsistent with such view. The inference is irresistible that he had not been properly initiated according to the usage of the institution. There is no doubt upon his own evidence and that of his witnesses that the late jeer considered that upadesam was an essential.

There is another defect in the plaintiff's case. His own witness, Neeradi Raghava Chari, states that none can be a jeer without being a sannyasi, and that the person receiving upadesam must become a sannyasi in a day or two. The late jeer died on 10th August 1888 and this suit was brought on 18th November 1888, and until then or now the plaintiff has not become a sannyasi, but continued to be a house-holder and lived with his family. The delay is fatal to his claim. There has been no such instance in the history of the mutt. The ritual for becoming a sannyasi is postponed for a day or two, not in view to allow the plaintiff to take his own time, but as a matter of necessity and on the understanding that it is to be deferred only for a day or two, so that it may relate back to the upadesam and both may form together, as nearly as possible, one continuous ceremony by analogy to

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ritualistic or regular upadesam and sannyasam and be unbroken by resumption of the *status* of house-holder. According to the plaintiff's own third witness the late jeer enjoined the plaintiff to perform jeeva sraddham and become a sannyasi on the day after upadesam. According to the plaintiff's brother and his witness Neeradi Raghava Chari, the late jeer performed his own jeeva-sraddham and became a sannyasi the day after his initiation. The learned Judge considered that the delay was excusable because the defendant denied the plaintiff's nomination and occupied the mutt, but we do not see how this conduct of the defendant can operate to dispense with the customary requisite of a valid nomination. The intention was to perfect and validate the relation of spiritual father and son by the formal observance of the ritual prescribed for a sannyasi and thereby to generate the capacity to impart spiritual instruction to the disciples of the mutt. How can the defendant's wrong abrogate the requirement of the religious usage of the institution? The learned Judge has apparently come to this conclusion, because he has held that no ceremony at all needs be performed before the jeer's death.

The question is not simply between the plaintiff and the defendant, but is one of custom regulating the relation between the head of a mutt and his disciples. It is not in our power to dispense with one of the incidents of custom and to impair the efficiency of his spiritual instruction in the estimation of his disciples. The plaintiff's delay in becoming a sannyasi cannot be justified by the usage of the institution and must be taken to disentitle him to the *status* of a jeer. It is true that when the person nominated does not arrive before the jeer's death, the ceremony of sannyasam is gone through after he takes up the appointment. But that is in principle a case of nomination by the disciples in deference to the suggestion of their guru and not by virtue of the relation of preceptor and disciple constituted by upadesam. If not, why did the late jeer say upadesam and kashayam are essentials, and why did he enjoin the plaintiff to go through his own death ceremony and become a sannyasi next day? The principle underlying the nomination of the jeer is that upadesam followed up at once or in a day or two by the observance of sannyasam ritual is indispensable to the nominee's admission into the jeer's family as his sannyasi-disciple or spiritual son. Nomination by disciples is an inferior substitute

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sanctioned by necessity like adoption to prevent the extinction of the spiritual family.

Again, the learned Judge deduces the plaintiff's title to the position of jeer from his nomination by the late jeer on the 4th or 5th August and considers that such nomination alone is sufficient. This was not the late jeer's opinion, and he considered that the making of upadesam and gift of kashayam as a token of sannyasiship were essential. We see another difficulty in adopting the learned Judge's view. The late jeer made a distinction between a mere nomination and the formal declaration of transfer of office after upadesam and gift of kashayam and treated the latter as essential. In the petition presented to the Deputy Magistrate by his vakil on the 9th August it is stated, with reference to what took place on 5th August, that "your petitioner was compelled to forbear from making his nomination conformably to the usage of the *adhinam*." How is this to be accounted for except on the view indicated above, and that the word nomination is used in the sense of final or irrevocable appointment.

Again, the plaintiff himself referred in his evidence to the declaration after upadesam and kashayam "I have given the seat or office" as one of the means by which he became jeer. It is also stated by several of his witnesses that the late jeer and his predecessors used to make such declaration or to say something equivalent to it after they made upadesam and gave kashayam. We are of opinion that the nomination on the 4th and 5th August was not the final nomination in accordance with the usage of the mutt, which appears to point to the existence of other requisites, viz., upadesam and gift of kashayam with the declaration that the nominee has been appointed successor subject to his going through the sannyasam ritual in a day or two.

We do not also see our way to believe that the late jeer made upadesam to the plaintiff or gave him kashayam. Most of the witnesses who gave evidence in his favor are his relations or servants of the former jeer, or men who at one time acknowledged the defendant's nomination by signing exhibit II or III. The defendant's witnesses 1, 4, 5, 6, 8, 10, 15, and 22 deny that on the 10th August upadesam was made to the plaintiff or kashayam given. The probabilities of the case are also against the plaintiff's evidence. The 13th witness, Sadagopa Chariar, denies that the plaintiff ever told him of upadesam though he was with

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him on the 10th August. The story about the gift of kashayam is inconsistent with Sadagopa Chariar's statement that the plaintiff was with him in the village at the time kashayam is alleged to have been given in the mutt and until the jeer died on 10th August. Both he and Rama Rao say that on the evening of the 10th, the jeer asked them to call next morning as he felt a little better. Is it likely that he would have done so if he had got so far worse on the 10th as to resolve to make upadesam in the morning contrary to his previous arrangement with Sadagopa Chari for postponing it until the aid of superior magistrates was secured? It is, again, in evidence that the disciples who opposed the plaintiff's nomination were watching in the mutt on the 10th August and that there were policemen both inside and outside the place. Is it probable that the upadesam would have taken place quietly on the morning of the 10th when there was so much opposition and excitement on the 5th? Exhibit III shows that the evidence about the place being watched is *bona fide*. It is much more probable that the jeer was looking forward to the arrival of the Deputy Magistrate on the 11th August to initiate and install the plaintiff, but that his illness took a critical turn after Rama Rao and Sadagopa Chariar had left the mutt and that it terminated in his death before he could carry out his intention. The defendant's conduct on the 5th August in offering Rs. 20,000 to the late jeer for his nomination marks him, as observed by the Judge, as a very unscrupulous person. The unfavorable impression produced by such conduct has led the learned Judge not to attach the weight which he should have attached to the improbabilities in the plaintiff's case. But the *onus* of proof is on the plaintiff, and the question is one of compliance with the usage of a religious institution. His case must stand or fall according as he proves or fails to prove such compliance, irrespective of the defendant's conduct or title. We find it difficult to believe that this plaintiff's story about upadesam and the gift of kashayam is true.

Another question is whether the concurrence of the disciples is necessary to the validity of the appointment of a jeer. The power of nomination vests in the jeer, but the weight of evidence is that, according to practice, the disciples are consulted. This is asserted by the witnesses for the defendant, and the plaintiff's witness, Varadachari, who is a sub-magistrate, states that the last jeer was suggested as a fit person by the disciples, and that

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the jeer made the appointment in accordance with such suggestion. Seeing that installation ordinarily takes place with their co-operation, the probability is in favor of such consultation. There is no evidence, however, that any formal subsequent ratification is necessary. Whether, if not consulted, the nomination is good is a question in regard to which there is no evidence of prior usage. The power of nomination is a power to be exercised for the benefit of the institution and the general body of disciples attached to it. The principle that ought to guide its exercise, as enunciated by a former jeer in his will (exhibit J) is that the person selected should be "a very learned man that observes religious rites and one more versed in the traditional doctrines of the mutt than others." The ground of opposition on the part of the disciples was that the late jeer desired to befriend his brother's son, and that such a nomination would bring the mutt under the unwholesome influence of a single family, of which several members held influential positions in connection with the mutt and had leases of mutt lands. It may be that usage sanctions such consultation to ensure due exercise of the power for the end for which it is conferred and to prevent its exercise for the improper advancement of relatives of the jeer for the time being in his natural family to whom he is civilly dead, and regard and love for whom he has solemnly abjured, or from any other indirect motive. Or it may be that the power of nomination vests in the jeer, as the recognized principle of succession is the relation of the nominee to him as his disciple and that the disciples were consulted as a matter of expediency. The question is one of very great importance to the institution and one that ought to be determined in strict conformity to usage. The learned Judge himself observes that the persons who gave evidence in plaintiff's favor are interested parties and the material before us is extremely meagre. If it were necessary to determine this question for the purposes of this appeal, we should order a more extended inquiry as to usage and as to the opinions of experts connected with the mutt.

We agree with the learned Judge in the opinion he has expressed about the defendant's conduct, but we are unable to uphold the plaintiff's nomination on the grounds:—first, that he probably received no upadesam at all; secondly, that the upadesam alleged to have been received by is not sufficient;

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thirdly, that his right, if any, to the *status* of jeer ceased on his omission to become a sannyasi in a day or two, or soon after the alleged upadesam or initiation; fourthly, that there was no similar case of succession in the history of the institution; fifthly, that his case is one of imperfect nomination which cannot be upheld on principles deducible from the known cases of succession. The appeal must be allowed, the decree appealed against must be set aside, and the suit dismissed.

We have already referred to the defendant's conduct as unscrupulous and discreditable in offering to buy the sacred office from the late jeer so properly animadverted upon by the learned Judge. We also see reason to think that his story that the late jeer changed his mind and agreed to nominate him and actually asked him to attend upon him at the moment of his death is absolutely false and apparently designed to tack on his appointment by the disciples after the jeer's death to the alleged nomination by the jeer himself during his life and thereby to create an analogy between his case and the second case of succession. Under these circumstances we consider that we must dismiss the suit without costs both in this Court and in the Court below. We dismiss also the memorandum of objections.

Biligiri Ayyangar attorney for appellant.

Branson & Branson attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

IYYAPPA (DEFENDANT), APPELLANT,

v.

RAMALAKSHMAMMA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 50—Inconsistent causes of action—Specific Relief Act—Act I of 1877, s. 40—Cancellation of instruments—Interest necessary to support the suit.

In a suit for cancellation of a sale-deed by the person whose name appeared on it as executant, it was alleged in the plaint that it was a forgery, and that if it was not a forgery, its execution had been obtained by fraud and that it was,

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moreover, void for want of consideration. The plaintiff's interest in the property to which the instrument related had been assigned by her to another by a conveyance which contained certain covenants by her with regard to the land :

Held, that the plaintiff was not entitled to maintain the suit.

Per cur : The gist of the plaintiff's charge against the defendant was that she had never executed a sale-deed in his favor, and that the document set up by him was a forgery. It was not competent to the plaintiff to combine with this charge as an alternative the wholly inconsistent charge that if she did execute the document no consideration was received by her or that fraud had been practised upon her.

APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in original suit No. 13 of 1888.

Suit to cancel a sale-deed as to which it was alleged in the plaint that the defendant had forged it in the name of the plaintiff as executant, and also that if it was in fact executed by the plaintiff, the execution had been obtained by fraud, and no consideration had passed under it. It appeared at the hearing that the plaintiff had assigned all her interest in the property to which the sale-deed related to her nephew under an instrument which contained certain covenants by her with regard to the land.

The following were the issues framed in the suit :—

1. Whether or not the sale-deed was in fact executed by the plaintiff ?
2. Whether or not the plaintiff received Rs. 5,000 as affirmed by the defendant ?

The District Judge passed a decree declaring the sale-deed to be void for want of consideration.

The defendant preferred this appeal.

Bhashyam Ayyangar and Desika Charyar for appellant.

Mr. Subramanyam and Subramanya Ayyar for respondent.

JUDGMENT.—The plaintiff sues for the cancellation of a sale-deed alleged to have been "fraudulently concocted by defendant in respect of certain property," and the defendant appeals against the decree made in the plaintiff's favor. It is stated in the judgment, and is admitted by the plaintiff's counsel, that before the date of the suit the plaintiff had assigned all her interest in the property comprised in the sale-deed to the son of her husband's sister. This being so the question arises whether the plaintiff had any legal interest remaining in her entitling her to maintain this suit. Clearly she had no legal interest in the property comprised in the sale-deed, but it is suggested that she is entitled to have

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that instrument cancelled in case any action for damages should be brought against her on the covenant contained in the document executed in her nephew's favor. We are of opinion that this bare possibility does not entitle a plaintiff who has divested herself of all interest in the property to maintain this suit. It is not alleged that the suit is brought on behalf of the person immediately concerned to have the sale-deed cancelled, and it is plain that the decision in the present suit could determine nothing as between him and the defendant.

But this want of legal interest in the plaintiff is not the only objection to the maintenance of the suit as the facts are found by the District Judge. The finding of the District Judge is that, although the plaintiff did not receive the consideration spoken to by the defendant's witnesses, she did in fact execute the sale-deed, undue advantage being taken of her ignorance and helpless condition after her husband's death. To this finding exception has been taken on behalf of the plaintiff, and it has been contended that the District Judge ought, on the evidence before him, to have found that the plaintiff never did put her mark to the instrument of sale. On the other hand it was contended on behalf of the appellant (defendant) that there was sufficient evidence of payment of the alleged consideration, and that the finding on the second issue was, therefore, wrong. Seeing that the suit is, for reasons already mentioned, not maintainable, we do not desire to express any opinion on these questions of fact. But assuming that the Judge's findings are right, we must observe that the suit ought to have been dismissed. The gist of the plaintiff's charge against the defendant was that she never had executed a sale-deed in his favor, and that the document set up by him was a forgery. It was not competent to the plaintiff to combine with this charge as an alternative the wholly inconsistent charge that, if she did execute the document, no consideration was received by her, or that fraud was practised upon her (see *Mahomed Buksh Khan v. Hosseini Bibi*(1)). For this reason the second issue was, we think, an improper one, and it is further open to the objection that, assuming that the document was executed, but that the consideration did not pass, the relief prayed for in this suit could not have been granted. It is obvious that in case of default in payment of consideration the vendor's

(1) L.R., 15 I.A., 86.

IYYAPPA right is not to have the sale-deed cancelled and delivered up,
RAMA- but to have the money paid to him by the purchaser.
LAKSHMAMMA. Being of opinion that the plaintiff, having divested herself of
all interest in the property, was not entitled to maintain this suit,
we must reverse the decree of the District Judge and dismiss the
suit; but, inasmuch as the point was not taken by the appellant,
we shall make no order as to costs in this Court and the lower
Court. The memorandum of objections is dismissed.
