



THE INDIAN LAW REPORTS.

MADRAS SERIES,

CONTAINING

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

REPORTED BY

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Chief Justice.

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

„ T. MUTTUSAMI AYYAR, C.I.E. (*Offg. from 13th
July—12th Aug.*).

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MADRAS:

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- ACT OF STATE—INAM COMMISSION—REGULATION IV OF 1831 (MADRAS)—ACT IV OF 1862 (MADRAS)**—*Resumption of inam—East India Company's jaghire—Menkaval lands—Mirasi rights, evidence of—Secondary evidence of lost grant by Government :*
- In a suit to declare the plaintiff's title to a shrotriam village which was included in the jaghire granted in 1763 by the Nabob of the Carnatic to the East India Company, it appeared that the village in question had been previously granted by the Nabob free of assessment to the Kazi of Madras as an endowment for his office, and afterwards to the son of the first grantee personally, without condition of service. In 1779 the British Government confirmed the village in perpetuity to the second grantee on account of the office of Kazi which he filled, and to his direct heirs who should be fit for that office. In 1862, on failure of the direct male line, the grantee's grandson by a daughter was nominated to the office of Kazi with the approval of Government, who directed he should hold the village, adding that it had been assigned as an endowment for that office. In the same year the Inam Commissioner confirmed it as a personal inam, enfranchised it and granted a title-deed to the holder. In 1866 Government ordered that the village should be registered as an endowment of the Kaziship and the title-deed cancelled, and in 1868 notified in the Gazette that the title-deed which was not produced was cancelled. Between the dates of the above order and notification the Kazi transferred the village to the plaintiff under a deed of perpetual lease and placed him in possession. But in 1873 Government resumed the village and subsequently directed that the whole of its net revenue be paid to the Kazi. The Kazi, from whom the plaintiff claimed, died in 1868. An inam of certain Menkaval lands, which had formerly been allotted to the village watchman as inam, had been granted to the Kazi in 1802-3; they were cultivated by raiyats who paid varam to the inamdar. The order of resumption in 1873 had no reference to these lands, but in 1877 Government issued pattas to the raiyats:—*Held*, (1) that the grant of 1779, the original document not having been produced by the plaintiff, was sufficiently proved by a translation produced from official custody and certified by the Collector in 1838 to be corrected and attested by the Persian Translator to Government; (2) that it was competent for the Government in 1779 to alter the nature of the grant of 1761 as an act of State; (3) that on the right construction of Regulation IV of 1831 and Act IV of 1862, and in view of the facts that the plaintiff must have been aware of the nature of the tenure and of the contents of the grant of 1779 and the cancellation of the inam title.

deed, the Government was not acting *ultra vires* in cancelling the enfranchisement, &c.; (4) that the Kazi, through whom the plaintiff claimed, having died in 1868 there was no reason to question the resumption in 1873; (5) that the plaintiff was entitled to possession of the Menkaval lands, the action of Government in issuing pattas to the raiyats being *ultra vires*. Issues first framed on appeal as to the plaintiff's claim to mirasi rights and Menkaval lands. Evidence of mirasi rights considered.

Karunakara Menon v. Secretary of State for India 431

AGENCY TRACTS—*Jurisdiction of High Court over—Criminal Procedure Code, s. 2—Letters Patent, s. 28—Scheduled Districts Act—Act XIV of 1874, notifications under—Agency Rules—Act XXIV of 1839 (Madras), s. 3:*

The High Court set aside a conviction by the Agent to the Governor in Vizagapatam on a charge of culpable homicide not amounting to murder, and directed that the accused be tried in the Sessions Court at Vizagapatam on a charge of murder. The accused was tried accordingly, and was convicted of murder, and he appealed to the High Court. The Agency tract of Vizagapatam is a scheduled district under Act XIV of 1874, and the Governor in Council extended the operation of the Criminal Procedure Code of 1861 to it by a notification made under that Act in 1862. In 1863 the Governor in Council, by a notification under Madras Act XXIV of 1839, constituted the Agent a Sessions Judge under the Criminal Procedure Code:—*Held*, that the High Court had jurisdiction to direct that the accused be tried by the Sessions Judge under the provisions both of the Letters Patent and of the Criminal Procedure Code.

Queen-Empress v. Budara Janni 121

ALIYASANTANA LAW—*Inheritance—Uncongenital insanity—Suit by an unadjudged lunatic by the Agent of the Court of Wards as guardian—Authority of the Court of Wards—Regulation V of 1804—Estates of lunatics subject to Mufassal Courts—Act XXXV of 1858—Code of Civil Procedure, s. 464:*

A Jain, who was subject to the Aliyasantana law, made a will, whereby he disposed of the property of his family in favour of certain persons, and died. The plaintiff, a female, was the sole surviving member of the testator's family, but it was admitted that she was, and for more than fifty years had been, a lunatic, though she had not been declared to be so under Act XXXV of 1858; it appeared that her lunacy was not congenital. She sued, by the Collector of South Canara, the agent for the Court of Wards:—*Held*, (1) that the plaintiff was not excluded from inheritance by reason of lunacy under Aliyasantana law, and the will, in favour of the defendants, was invalid; (2) that the Court of Wards had power to take cognizance of the plaintiff's case under Regulation V of 1804; (3) that although the Court of Wards should ordinarily obtain a declaration under Act XXXV of 1858 in cases where the lunacy of a ward is open to question their failure to do so in the present case was not fatal to the suit; (4) that Civil Procedure Code, s. 464, was accordingly applicable to the case; (5) that the appointment of the Collector, as guardian to the plaintiff, was legal and valid. In deciding what was the extent of the property which the plaintiff was entitled to inherit under the above rulings, certain documents adduced as evidencing partition of the family property were held to evidence merely arrangements for separate enjoyment.

Sanku v. Puttamma 289

2. **Unjustified alienation of family property by a member of undivided family—Limitation—Adverse possession:**

In 1851 the ejaman of an Aliyasantana family mortgaged family property to the ancestor of some of the defendants who and whose alienees were now in possession. The mortgagor died leaving besides one brother, two sisters, each having a son—the family remaining undivided. In 1856 one of the sons, with the concurrence of his uncle and mother, conveyed the land to the mortgagee, but this transaction was not justified by any family necessity; and in 1857 the other son and his mother sold their undivided moiety to the plaintiff's predecessor in title. In a suit to redeem the mortgage of 1851, the plaintiff obtained a decree for redemption of a moiety of the mortgage property:—*Held*, that although it may have been supposed in 1857 that

compulsory partition was permitted by the Aliyasantana law, yet as the right to the half share purported to be sold in 1857 had no legal existence, nothing could pass by that sale and the suit should be dismissed. *Per cur.*—Neither the original mortgagee nor his son can rely on the 12 years' rule of limitation unless he can prove a subsequent valid sale, in the absence of which his possession must be taken to retain its original character.

Byari v. Puttanna 38

CHRISTIAN MARRIAGE ACT—ACT XV OF 1872, ss. 5, 68—Marriage solemnised by an unauthorised person “knowingly”—Presence of a Marriage Registrar:

The lay trustee of a church in which the banns of marriage between Christians had been published, solemnised a marriage between them according to the rites of the Church of England. The Marriage Registrar attended the ceremony in a private and unofficial capacity. The person who solemnised the marriage was not of any of the classes of persons authorised to solemnise a marriage in the absence of a Marriage Registrar and he was convicted of an offence under Act XV of 1872, s. 78:—*Held*, that the conviction was right.

Queen-Empress v. Fischer 342

CITY OF MADRAS MUNICIPAL ACT—ACT I OF 1884 (MADRAS), ss. 103, 109, 192—Profession tax—Liability of members of a firm—Extent of appeal allowed against decision of President of Municipality:

A member of a firm in Madras, another member of which was absent, was assessed under the Madras Municipality Act to pay a certain sum for the tax on arts, professions, trades and callings as agent in charge of the business of the absent member of the firm. He complained to the President against the assessment under ss. 104, 190 of the Act on the ground that he was not liable to pay any tax as agent, &c., but the assessment was confirmed. He thereupon preferred an appeal to the Magistrates:—*Held*, (1) that the Magistrates had jurisdiction under Madras Municipal Act, s. 192, to decide the question of the liability of the appellant to be taxed under s. 103; (2) that, although the absent partner might be called upon through the appellant as his agent to pay the tax due by the firm with reference to its whole income, he was not otherwise chargeable with any tax in respect of the business carried on by him.

Davies v. President of the Madras Municipal Commission 140

2. **s. 433—Statement of cause of action—Address of intending plaintiff:**

In a suit against the Municipal Commissioners of the City of Madras for damages sustained by the plaintiff by reason of an accident occasioned to his horses through the ill-repair of a road within the limits of the Municipality, it appeared that at the close of a correspondence between the plaintiff and the President of the Municipality, the plaintiff, in a letter headed “Madras,” stated that he had directed auctioneers to sell the horses, and that he would “proceed against you by law to recover such loss or damage as I may have sustained,” and added “kindly consider this as notice of claim under section 433 of Municipal Act No. I of 1884,” and that the plaintiff's attorneys, in a subsequent letter, demanded payment of Rs. 1,000, “being the damages sustained by our client by reason of the neglect to keep in proper repair that portion of the road, &c.,” and stated that if the sum claimed were not paid, the plaintiff would be “compelled to have recourse to law to recover the same without further notice”:—*Held*, (1) that the two letters should be read together; (2) that the cause of action was stated sufficiently in the second of the above letters; (3) that the plaintiff's address was sufficiently given in the first of the above letters.

Eales v. Municipal Commissioners of Madras 386

CITY OF MADRAS POLICE ACT (ACT III OF 1888, MADRAS), s. 71, cls. XI AND XV—Crowd collected by music—Obstruction of street—Music performed in private place:

Members of the Salvation Army were found by the Magistrate to have played tambourines and sung “at the angle” of a street in Madras, and thereby collected a crowd which thronged the street, and they were convicted of offences under the City of Madras Police Act, s. 71, cls. xi and

xv :—*Held, on revision*, that, since the intention of the accused was to collect a crowd in the street, the conviction under cl. xi was right, whether or not the place, where the accused played and sang, was a private place; but that if it was a private place, the conviction under cl. xv was wrong.

Queen-Empress v. Suka Singh

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CIVIL COURTS ACT (MADRAS) ACT III OF 1873, s. 12—Jurisdiction—Valuation of relief—Suits Valuation Act—Act VII of 1887, s. 11—Suit by a court purchaser for partition :

The purchaser at a court-sale of eight pangus out of an estate of 28½ pangus sold them to the plaintiff. The whole estate was worth more than Rs. 2,500, but the eight pangus sold to the plaintiff were worth less than that sum. The plaintiff brought this suit in a Subordinate Court against his vendor and certain persons, who were in possession of and claimed to be entitled by right of purchase to the whole estate, for partition and possession of his eight pangus. It was found that the plaintiff was entitled to the eight pangus purchased by him as against the defendants :—*Held*, (1) that the suit was within the pecuniary limits of the jurisdiction of a District Munsif; (2) that since the disposal of the suit had not been prejudicially affected, Suits Valuation Act, s. 11 was applicable and the decree of the Subordinate Court should be confirmed. *Quere* :—Whether the Subordinate Court has not concurrent jurisdiction with a District Munsif in suits less than Rs. 2,500 value.

Krishnasami v. Kanakasabai

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2. —, s. 13—Malabar Law—Suit to remove a karnavan for mismanagement as de facto karnavan—Minor members of tarwad not joined—Valuation of suit :

A suit was brought to remove the karnavan of a Malabar tarwad from office on the grounds of mismanagement of tarwad property to the extent of more than Rs. 2,500. The acts of mismanagement complained of were really done by the present defendant No. 1 as karnavan de facto. The above suit was withdrawn with leave to sue again. The defendant therein died and was succeeded by defendant No. 1, against whom the plaintiffs brought the present suit in the Court of a District Munsif (to which all the adult, but none of the minor members of the tarwad were made parties), to obtain his removal from the office of karnavan alleging against him the acts of mismanagement above referred to :—*Held*, (1) that the suit was not barred by the previous suit and was within the jurisdiction of the District Munsif; (2) that the minor members of the tarwad were sufficiently represented on the record; (3) that the grounds alleged supported the action.

Kunhan v. Sankara

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8. —, s. 13 (2)—Appeal from a Subordinate Court—Proceeding to be adopted when a District Court erroneously returns an appeal petition for presentation in High Court—Civil Procedure Code, s. 57 :

Certain members of a Moplah family sued the others in a Subordinate Court to recover their distributive share under Muhammadan law. The property to be divided was more than Rs. 5,000 in value, but the share claimed by the plaintiffs was less. The Subordinate Judge passed a decree, against which an appeal was preferred to the District Court, but the District Judge returned the appeal for presentation in the High Court. The appellants preferred a second appeal to the High Court against the decision of the District Judge, and also presented a petition praying for the revision of his proceedings under Civil Procedure Code, s. 622 :—*Held*, (1) that the District Court had jurisdiction to entertain the appeal; (2) that neither a second appeal nor a petition under Civil Procedure Code, s. 622, was the appropriate proceeding to be adopted by the appellants, but an appeal as from an order being one of form merely, the Court amended the second appeal as an appeal from an order of the District Court and directed the District Judge to receive and dispose of the appeal from the Subordinate Court.

Kunhikutti v. Achotti

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CIVIL PROCEDURE CODE—ACT X OF 1877, s. 294, AMENDED BY ACT XII OF 1879—Practice—Non-joinder—Purchase at a Court-sale on behalf of a judgment-creditor without permission of the Court :

Under Civil Procedure Code of 1877, as amended by Act XII of 1879, a purchase made at a Court-sale on behalf of a judgment-creditor was not invalid for want of permission of the Court. Where a suit is brought by one member of an undivided Hindu family to recover land, the property of the family, and no objection is taken at the hearing on the ground of the non-joinder of the plaintiff's co-parceners, it is not open to an unsuccessful defendant to raise such objection on appeal.

Paramasiva v. Krishna

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—ACT XIV OF 1882, ss. 2, 244, 258, 588—Appeal against an order under s. 258 :

Semble.—An appeal lies against an order dismissing an application made under Civil Procedure Code, s. 258, that the adjustment of a decree be recorded as certified.

Lingayya v. Narasimha

99

—, s. 13, EXPLANATION V—Res judicata—Suit for possession of a share in the property of a Muhammadan family :

In a suit in 1882 between the members of a family following the Muhammadan law of inheritance, in which the plaintiffs sued as sharers for the recovery of their share in certain property, one of the defendants pleaded that a paramba, part of the property in dispute, was not subject to division, but this plea was unsuccessful, and a decree was passed for the plaintiffs. The present suit was brought by a mortgagee from one of the defendants in the former suit (who had been ex-parte) to recover his share of the above-mentioned paramba, the subject-matter of his mortgage; the mortgagor was joined as defendant, among others, including the defendant who had raised the plea above stated. This plea was repeated by the same person :—*Held*, (1) distinguishing *Venkatarama v. Labai Meera* (I.L.R., 13 Mad., 276), on the ground that the parties were governed by the Muhammadan law of inheritance, that the suit was maintainable; (2) that the claim that the paramba was not subject to division was *res judicata* by virtue of Civil Procedure Code, s. 13, explanation v.

Chandu v. Kunhamed

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4. —, s. 13, EXPLANATION V—Res judicata—Limitation—Creditor of a devasom placed in possession as samudayam :

In a suit brought by the Uralers of a devasom in Malabar to recover certain land in the possession of the defendant, it appeared that the defendant held under an instrument, dated 1741, whereby his predecessor in title was appointed samudayam and was authorised to appropriate part of the rents of the devasom properties to the interest on a loan made by him to the Uralers. Two of these Uralers had brought a previous suit against the defendant for an account of the rents received by him and for an injunction : that suit was dismissed on second appeal when the High Court described the defendant as a mortgagee in possession, but the question whether or not he was a mortgagee with or without possession was not then directly and substantially in issue :—*Held*, (1) that the status of the defendant was not *res judicata*, by reason of the judgment in the previous suit; (2) that the Court having held, following *Krishnan v. Veloo* (ante p. 301), that the defendant was not a mortgagee in possession under the instrument of 1741, the suit was not barred by limitation.

Raman v. Shathanathan

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5. —, s. 13, EXPLANATION V—Res judicata—Mortgage—Transfer of interest—Appointment of a creditor as agent to collect rents and appropriate part towards the debt :

In a suit to redeem a kanom on certain land, the jenm of a devasom in Malabar, it appeared that the plaintiff held a melkanom in respect of the same land executed to him (subsequently to the date of the kanom sought to

- be redeemed) by defendant No. 3, the samudayam of the devasom. Defendant No. 3 represented one Chitambaram, in whose favour the Uralers had, in 1741, executed a document appointing him samudayam and stating that they had received from him a kanom of 18,000 fanams on the devasom properties and providing that he should appropriate part of the rents towards the loan. It appeared that in a suit to eject tenants, the Uralers had sued as co-plaintiffs with samudayam: in subsequent suits, however, two of the Uralers had sued other tenants for rent, and the samudayam for an account; both of these suits were dismissed on second appeal, and in the judgments of the High Court the samudayam was described as a mortgagee in possession:—*Held*, (1) on its appearing that no opinion was expressed in the former suits as to the construction of the document of 1741 that the former decisions had not the force of *res judicata*; (2) in view of the conduct of the parties and on the terms of the document of 1741 that the samudayam was not thereby constituted a mortgagee in possession and the melkanom set up by the plaintiff was invalid.
- Krishnan v. Veloo 301
6. *ss. 13, 43—Act XXIV of 1839, appeal under—Limitation—Res judicata—Land-lord and tenant—Service-tenure with rent—Enhancement of rent—Resumption:*
- In a suit brought in 1886 by a zamindar to recover an estate granted by his predecessor to the predecessor of the defendant on a service tenure, a small money rent being also reserved, it appeared that in 1864 the right of the plaintiff's predecessor to rent had been established by suit, but there was no evidence that the service was then dispensed with, but in 1885 it was intimated to the defendant that the service was dispensed with, and a notice to quit was given to him; the option of holding the estate at an enhanced rent was however given to him at the same time:—*Held*, (1) that the suit was not barred by limitation, nor precluded by Civil Procedure Code, s. 13 or s. 43; (2) that the plaintiff was not precluded by any implied contract from increasing the rent; (3) that the burden of proving the plea that the plaintiff was not entitled to eject lay on the defendants and had not been discharged. In computing the time for an appeal to His Excellency the Governor in Council, under the rules made by virtue of Act XXIV of 1839 against a decree passed by the Agent to the Governor, the time necessary for procuring copies of decree and judgment appealed against may be deducted.
- Mahadevi v. Vikrama 365
7. *ss. 13, 43, 539—Mutt—Religious Endowments Act—Act XX of 1863, ss. 14, 18—Want of asceticism of paradesi—Removal of paradesi—Form of decree—Res judicata—Charity:*
- The plaintiff, the zamindar of Sivagunga, sued in a Subordinate Court to remove the defendant from the office of head of a mutt. The defendant was a married man living with his wives and children, whom he maintained with the produce of the property of the mutt, and it appeared that he had failed to perform the ceremonies of the institution. The mutt in question came into existence under a deed of endowment or "charity grant," whereby the first zamindar of Sivagunga granted land to his guru for the erection and maintenance of a mutt and the performance of certain religious exercises in perpetuity, and provided that the head of the mutt should be of the line of disciples of the original grantee whose spiritual family he desired to perpetuate. In 1867 a predecessor in title of the plaintiff had sued unsuccessfully to recover certain property of the mutt from the defendant, alleging another cause of action than his status as a married man and his misappropriation of the mutt property; and in that suit it was established that the head of the mutt for the time being had the right to appoint his successor and that such appointment was not subject to confirmation by the zamindar. No sanction had been obtained for the institution of the present suit. It appeared that the trusts of the mutt had been violated and the income misapplied, and that there was no qualified disciple in whom the right of succession had vested, and that the members of the plaintiff's family were the only persons interested in the appointment:—*Held*, (1) that the jurisdiction of the Subordinate Court was not ousted by Act XX of 1863 since the trusts of the institution

were in the nature of private trusts; (2) that sanction under s. 539 of the Civil Procedure Code was not a pre-requisite of the suit for the same reason; (3) that the suit was not barred by limitation, its object being to prevent a specific endowment from being diverted from its legitimate object and to re-attach it to that object; (4) that the suit was not barred under s. 13 or s. 43 of the Civil Procedure Code; (5) that the proper decree was (1) to declare the plaintiff's right to appoint a qualified person with the concurrence of the rest of his family, (2) to direct him to do so within a given time, failing which the suit should stand dismissed with costs. If such appointment was made, notice should be given to the other members of the plaintiff's family before it was confirmed: if such appointment were confirmed, the property should be directed to be delivered to the person appointed to be administered in accordance with the trusts and usage of the mutt. *Seemle*: that the paradesi or head of the mutt might be a married man, provided he had been duly initiated.

Sathappayyar v. Periasami 1

8. *ss. 13, 211, 214—Res judicata—Claim as to which judgment is silent—Mesne profits subsequent to suit:*

In a suit for the partition of a zamindari, the plaintiffs asked, *inter alia*, for "ten years' past profits and for subsequent profits." The Judge passed a decree for partition in which mesne profits for three years prior to the suit were decreed to the plaintiffs, but his judgment and decree were silent with regard to the subsequent profits claimed in the plaint. The defendant appealed against this decree, and the plaintiffs preferred a memorandum of objections against part of it, but did not object to it so far as it omitted to provide for subsequent mesne profits. The plaintiffs instituted the present suit to recover from the defendant mesne profits from the date of the above suit:—*Held*, that the plaintiffs' claim so far as concerned mesne profits accrued since the decree in the former suit was not *res judicata*, and the suit to that extent was not precluded by Civil Procedure Code, s. 13.

Ramabhadra v. Jagannatha 328

9. *s. 30—Representation of numerous plaintiffs—Advertisement—Community of interest—Decree for management of a Hindu temple—Application for execution by person interested:*

In a suit by certain Tungalai Brahmins for declarations as to the mode of electing dharmakartas of a certain pagoda, &c., an order was made for a proclamation inviting "all persons interested to come in and be made parties, or see that others by whom they are content to be represented are made parties," and a decree was passed comprising a scheme to be carried out for such election, &c. A person not on the record and not a member of the Tungalai community, but claiming certain rights under the decree now applied to compel the observance of the scheme:—*Held*, that the above order did not invest the suit with a representative character, and the applicant had no right to apply.

Ragava v. Rajaratnam 57

10. *s. 31—Misjoinder of causes of action—Religious Endowments Act—Act XX of 1863, ss. 3, 4—Hereditary trusteeship—Suspension from trusteeship and right of puja—Maintenance in office on terms:*

Suit by certain Dikshadars or hereditary trustees of the Chidambaram temple against others of the Dikshadars praying for their removal from office and for a money decree, alleging that they had been jointly guilty of misconduct in respect of temple property in their custody and had obstructed the repair of certain shrines. The District Judge passed a decree suspending some of the defendants from the office of trustee and the right of puja for a period which was not defined, he also passed a decree for the money claimed:—*Held*, (1) that the suit was not bad for misjoinder of causes of action; (2) that the operation of Act XX of 1863 was not excluded by the admission that the trusteeship was hereditary in certain families; (3) that the District Judge had jurisdiction under Act XX of 1863 to deprive the defendants of the right of puja:—*Held further*, on the evidence, that the defendants merited the punishment which had been inflicted on them. Decreed that the suspension of the defendants be withdrawn on the terms that they file an undertaking with two sureties that they would restore

- certain property belonging to the temple now missing, and that they would duly conform to the decision of the majority of Dikshadars as to the management of temple affairs, &c.
- Natesa v. Ganapati* 103
11. *Suit for possession after cancellation of Court-sale*, s. 43—"Distinct cause of action"—
In execution of a decree the defendant, who was sued as the representative of her deceased brother, objected, under s. 244 of the Code of Civil Procedure, to the attachment of certain lands to which she set up independent title. The objection was disallowed and the land was sold. She then sued the execution purchaser to set aside the court-sale and obtained a decree against which no appeal was preferred. She now sued for possession, and it was found that at the date of the previous suit she was not aware that the execution purchaser had obtained possession:—*Held*, that the suit was not barred by Civil Procedure Code, s. 43.
- Ambu v. Kethilamma* 28
12. *action—Res judicata*, ss. 44, 45—*Joinder of causes of action*—
A suit for recovery of a mortgage debt, with an alternative prayer for sale of the mortgaged property, is not a suit for the recovery of immoveable property within the meaning of s. 44 of the Civil Procedure Code. A suit seeking to enforce liability for a mortgage debt on a Malabar tarwad is not barred by a previous personal decree obtained against certain members of the tarwad for the same debt.
- Govinda v. Mana Vikraman* 284
13. *of 1873 (Madras), s. 13 (2)—Appeal from Subordinate Court—Proceeding to be adopted when a District Court erroneously returns an appeal petition for presentation in High Court*, s. 57—*Civil Courts Act—Act III*
Certain members of a Moplah family sued the others in a Subordinate Court to recover their distributive share under Muhammadan law. The property to be divided was more than Rs. 5,000 in value, but the share claimed by the plaintiffs was less. The Subordinate Judge passed a decree, against which an appeal was preferred to the District Court, but the District Judge returned the appeal for presentation in the High Court. The appellants preferred a second appeal to the High Court. The appeal proceedings under Civil Procedure Code, s. 622:—*Held*, (1) that the District Court had jurisdiction to entertain the appeal; (2) that neither a second appeal nor a petition under Civil Procedure Code, s. 622, was the appropriate proceeding to be adopted by the appellants, but an appeal as from an order made under Civil Procedure Code, ss. 57, 582. The error of the appellants being one of form merely, the Court amended the second appeal as an appeal from an order of the District Court and directed the District Judge to receive and dispose of the appeal from the Subordinate Court.
- Kunhikutti v. Achotti* 462
14. *1869, s. 36—Alimony pendente lite—Nett income—Allowable deductions—Change of circumstances—Letters Patent, s. 15—Order fixing date of hearing*, s. 156—*Divorce Act—Act IV of 1869*
A petition by a wife—petitioner in the one and respondent in the other of two cross-suits (matrimonial)—for an increase of alimony—was treated by the Court as a petition for alimony. It appeared that the respondent was in receipt of a salary from Government which was subject to deductions on account of the pension and annuity funds, that his circumstances were involved and he had agreed with his creditors to discharge his liabilities by certain instalments, that as part of such agreement he was keeping up a policy of insurance on his life, and that he was maintaining and educating three children in England, but that his salary had increased since the order first made for alimony:—*Held*, that the respondent was entitled as of right to have only the deductions on account of pension and annuity funds taken into consideration in the computation of his nett income.

- Per cur.*—"We resolve to take into consideration the expenses the respondent is put to in maintaining his children and also any arrangement he has made for liquidating his debts." An order made by a Judge of the High Court at settlement of issues fixing a distant date for the hearing of a suit is not an order under Section 156 of the Civil Procedure Code and is appealable under Letters Patent, section 15. *Quare*, whether the Court has power to increase or diminish an allotment of alimony made *pendente lite* on account of change of circumstances?
- R. v. R.* 88
15. *execution*, s. 206—*Amendment of decree after execution*:
In a suit for money against the karnavan and two anandravans of a Malabar tarwad, the judgment directed a "decree for the plaintiff as prayed," but the decree ordered payment by one anandravan only. Land belonging to the tarwad was attached and sold in execution, an objection by the other members of the tarwad having been overruled. After the sale, the decree was amended and brought into conformity with the judgment. In a suit brought by other members of the tarwad against the karnavan, the decree-holder and the execution-purchaser, it was found that the judgment-debt had been contracted for proper tarwad purposes, and that the land had been sold for its proper value:—*Held*, that the sale was binding on the plaintiffs.
- Pydel v. Chathappan* 150
16. *holders—Assignment by operation of law of a share in a decree—Application for execution—Review, grounds of—Limitation Act (Act XV of 1877), sched. II, art. 179, cl. 4*, ss. 231, 232, 623—*Joint decree-holders*
A Hindu obtained in 1878 a decree for partition of certain property, and he now applied in 1888 to have it executed. He relied in bar of limitation on an application for execution made by his son, who had obtained a decree against him in 1881 in a partition suit, whereby his right was established to one-fifth of whatever should be acquired by the father by virtue of the decree of 1878. The father's application for execution in 1888 was held to be barred by limitation in *Ramasami v. Anda Pillai* (I.L.R., 13 Mad., 347). On review it appeared that the son had applied for execution of the whole decree, stating that his father would not join him in such application, and that notice was given to the father:—*Held*, (1) that the son was an assignee by operation of law of one-fifth of the judgment-debt in the suit of 1878; (2) that his application accordingly kept the decree alive under Limitation Act, 1877, sched. II, art. 179, cl. 4, and the father's application in 1888 was not barred by limitation.
- Ramasami v. Anda Pillai* 252
17. *Assignee of decree—Regular suit*, s. 244—*Execution of decree*:
The assignee of a decree applied for execution; his application was dismissed and he was never brought on to the record as decree holder. He now sued for the cancellation of the order refusing execution and for a declaration of his right to execution:—*Held*, that the suit was not precluded by Civil Procedure Code, s. 244.
- Raman v. Muppil Nayar* 473
18. *Section 305 of the Civil Procedure Code contemplates a mortgage or lease or private sale only where "the amount of the decree" can be thus provided for. A Court executing a decree can neither grant a certificate under this section, nor confirm a mortgage or other alienation of property, unless it appears that by such alienation the decree will be satisfied in full. It is not sufficient that after grant of certificate, a mortgage by the judgment-debtor is, as between him and his mortgagee, bona fide, nor can it affect the lien acquired by the judgment-creditor under s. 276.*, ss. 276, 305.
- Gurusami v. Venkatsami* 277

19. _____, s. 290—Court-auction—Withdrawal of bid :
It is competent to a bidder at a Court auction-sale to withdraw his bid.
Agra Bank v. Hamlin 235
20. _____, s. 306—Court-sale—Material irregularity :
Per cur.—We do not consider that the commencement of a Court-sale, prior to the expiry of the thirtieth day or any delay in making the deposit required by s. 306 or the adjournment of the sale from time to time without sufficient ground, is more than a mere irregularity.
Venkata v. Sama 277
21. _____, s. 411—Stamp duty on a pauper's plaint—Decree for less than the amount of claim—Disreputable defence :
A pauper sued his sister for the partition of property valued at a large sum. The parties belonged to the Bogam caste, residing in the Godavari district. The defendant pleaded that the property had been acquired by her as a prostitute, and denied the plaintiff's claim to it. The plaintiff obtained a decree for Rs. 100, being a moiety of the property found to have been left by their mother :—*Held*, (1) on the evidence as to the local custom of the caste that the decree was right; (2) that the defendant was liable to pay Court-fees only on the sum decreed.
Chandrarekha v. Secretary of State for India 163
22. _____, s. 464—Aliyasantana Law—Inheritance—Uncongenital insanity—Suit by an unadjudged lunatic by the Agent of the Court of Wards as guardian—Authority of the Court of Wards—Regulation V of 1804—Estates of lunatics subject to Mufassal Courts—Act XXXV of 1858 :
A Jain, who was subject to the Aliyasantana law, made a will, whereby he disposed of the property of his family in favour of certain persons, and died. The plaintiff, a female, was the sole surviving member of the testator's family, but it was admitted that she was, and for more than fifty years had been a lunatic, though she had not been declared to be so under Act XXXV of 1858; it appeared that her lunacy was not congenital. She sued, by the Collector of South Canara, the agent for the Court of Wards :—*Held*, (1) that the plaintiff was not excluded from inheritance by reason of lunacy under Aliyasantana law, and the will, in favour of the defendants, was invalid; (2) that the Court of Wards had power to take cognizance of the plaintiff's case under Regulation V of 1804; (3) that although the Court of Wards should ordinarily obtain a declaration under Act XXXV of 1858 in cases where the lunacy of a ward is open to question their failure to do so in the present case was not fatal to the suit; (4) that Civil Procedure Code, s. 464, was accordingly applicable to the case; (5) that the appointment of the Collector, as guardian to the plaintiff, was legal and valid. In deciding what was the extent of the property which the plaintiff was entitled to inherit under the above rulings, certain documents adduced as evidencing partition of the family property were held to evidence merely arrangements for separate enjoyment.
Sanku v. Puttamma 289
23. _____, ss. 539, 575—Removal of trustee—Jurisdiction of District Court—Composition of Bench on hearing referred appeal :
In a suit under Civil Procedure Code, s. 539, in the District Court to remove the hereditary trustee of a public trust for breach of trust, the District Judge held that he had no jurisdiction to pass the decree prayed for. The plaintiff appealed and the appeal came on before two Judges, who differed in opinion. The appeal was thereupon referred under Civil Procedure Code, s. 575, and was heard by a Bench of three Judges, including the Judges who first heard the appeal :—*Held*, by *Best and Weir, J.J.* (*Muttusami Ayyar, J.*, dissentiente) that the District Judge had jurisdiction to remove the trustee hostilely for breach of trust in a suit under Civil Procedure Code, s. 539.
Navasimha v. Ayyan (I.L.R., 12 Mad., 157) considered.
Subbaya v. Krishna 186

24. _____, ss. 600, 602—Appeal to Privy Council—Enlargement of time for making deposit :
The Court may enlarge the time for making the deposit required by Civil Procedure Code, s. 602, for cogent reasons under the rule in *Burjore and Bhawani Pershad v. Mussumat Bhagana* (L.R., 11 I.A., 7; s.c. I.L.R., 10 Cal., 557), but those reasons must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from doing so not owing to absence and the difficulty of getting funds, but owing to some circumstances accidental or otherwise over which he had no control or owing to mistake which the Court would consider not unreasonable or caused by negligence.
Rangasayi v. Mahalakshamma 391
25. _____, s. 622—Letters Patent, s. 15—Judgment—Landlord and tenant—Suit for rent :
In a suit in a Small Cause Court for rent due in respect of two pieces of land, the Court passed a decree in favour of the plaintiff. The defendant preferred a petition to the High Court under Civil Procedure Code, s. 622, which came on for hearing before one Judge. He held that the Small Cause Court had failed to give effect to a former decree between the parties in respect of one piece of land, and made an order reversing the decree as to that, and calling for a report of what was due on the other piece of land. The plaintiff preferred an appeal under Letters Patent, s. 15 :—*Held*, (1) the above-mentioned order was subject to appeal as being a judgment; (2) even if the Subordinate Judge had failed to give effect to the previous decree, the error was not such as to give the Court jurisdiction to revise his proceedings under Civil Procedure Code, s. 622.
Vanangamudi v. Ramasami 706
- CLUB—Goods supplied to a member—Suit on behalf of club—Parties :
An action to recover the price of goods supplied to a member of a non-proprietary club, or on his responsibility cannot be brought in the name of the secretary of the club.
Michael v. Briggs 362
- CONTRACT ACT—ACT IX OF 1872, s. 39—Stamp Act—Act I of 1879, s. 3, cl. 4—Bond—Specific Relief Act—Act I of 1877, ss. 20, 54, 57—Contract for personal service—Contract for more than three years—Interim injunction :
The defendant signed an agreement in England with a railway company, whereby he contracted to serve the company exclusively for four years in India under a penalty of £100. The defendant having come to India at the expense of the company and served it for two years, left its service for that of another employer, alleging that he had not been fairly treated by a locomotive superintendent :—*Held*, (1) that the instrument executed by the defendant was an agreement merely and did not require to be stamped as a bond; (2) that the defendant had no right to rescind the agreement and the plaintiff company was entitled to an interlocutory injunction restraining defendant from serving others on the terms that the plaintiff company should consent to retain him in its employ.
Madras Railway Company v. Rust 18
- CONTRACT TO PAY INTEREST—Construction :
In reference to a debt carrying interest at a certain rate, the debtor gave to the creditor, on the approach of the date when the debt would have been barred by limitation, an acknowledgment to prevent that from occurring :—*Held*, that the acknowledgment, being intended only for the purpose of eliding the law of limitation, had not, by any novation of the contract, given to the creditor a right, in the absence of special stipulation to the contrary, to claim interest at a rate higher than that which the debt had borne down to the date when the acknowledgment was made.
Tanjore Ramachandra Rau v. Vellyanadan Ponnusami 258

COURT FEES ACT—VII OF 1870, s. 7—Suit on a mortgage—Institution fee :

In a suit for the redemption of a kanom the institution fee must be computed on the kanom debt as it originally stood.

Reference under Court Fees Act, s. 5 480

2. —————, ss. 7, 12—Suit to cancel an instrument affecting land—Partial interest of plaintiff in the land—Appeal against an order for payment of additional Court Fees :

In a suit in a Subordinate Court by members of a Malabar tarwad to set aside an instrument affecting the whole of the tarwad property, the Subordinate Judge held that court-fees were leviable, assessed on the value of the property, and accordingly ordered an additional payment to be paid by the plaintiffs. The plaintiffs failed to make the payment, and the Subordinate Judge dismissed the suit :—*Held*, (1) that the order was erroneous since the plaintiffs would not be gainers to the extent of the value of the property if they obtained a decree; (2) that the High Court was not precluded by Court Fees Act, s. 12, from revising it, and reversing the decree.

Kanaran v. Komappan 169

CRIMINAL PROCEDURE CODE—ACT X OF 1882, s. 2—Letters Patent, s. 28—Scheduled Districts Act—Act XIV of 1874, notifications under—Agency tracts, jurisdiction of High Court over—Agency Rules—Act XXIV of 1839 (Madras), s. 3 :

The High Court set aside a conviction by the Agent to the Governor in Vizagapatam on a charge of culpable homicide not amounting to murder, and directed that the accused be tried in the Sessions Court at Vizagapatam on a charge of murder. The accused was tried accordingly, and was convicted of murder, and he appealed to the High Court. The Agency tract of Vizagapatam is a scheduled district under Act XIV of 1874, and the Governor in Council extended the operation of the Criminal Procedure Code of 1861 to it by a notification made under that Act in 1862. In 1863 the Governor in Council, by a notification under Madras Act XXIV of 1839, constituted the Agent a Sessions Judge under the Criminal Procedure Code :—*Held*, that the High Court had jurisdiction to direct that the accused be tried by the Sessions Judge under the provisions both of the Letters Patent and of the Criminal Procedure Code.

Queen-Empress v. Budara Janni 121

2. —————, ss. 17, 528 :

A Magistrate, who is subordinate to Sub-Division Magistrate, is also subordinate to the District Magistrate within the meaning of Criminal Procedure Code, s. 528.

Thaman Chetti v. Alagiri Chetti 399

3. —————, ss. 198, 345—Defamation of a wife

—Complaint by husband :

When a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved, upon whose complaint the Magistrate may take cognizance of a complaint under Criminal Procedure Code, s. 198.

Chellam Naidu v. Ramasami 379

4. —————, ss. 307, 418—Verdict of jury—Perversity of verdict—Procedure when Sessions Judge disagrees with verdict—Appeal against conviction :

A jury returned a verdict of guilty against the accused in a trial for dacoity. The Sessions Judge accepted the verdict, although he said he did not agree with it and had charged the jury for an acquittal; he observed that he could not refer the verdict as perverse since there was evidence against the accused which it was open to the jury to believe. The accused appealed to the High Court on the ground (*inter alia*) that the Sessions Judge "ought to have referred the case to the High Court under Criminal Procedure Code, s. 307 :"—*Held*, that since there had been no misdirection by

the Sessions Judge, and there was some evidence to support the verdict, the High Court had no power to interfere, however absurd the verdict might be considered.

Queen-Empress v. Chinna Tevan 36

5. —————, ss. 435, 439, 440—Petition to revise a judgment of acquittal :

An appeal against an acquittal by way of revision is not contemplated by the Code, and it should, on public grounds, be discouraged.

Thandavan v. Perianna 363

6. —————, s. 437—"Further enquiry"—Revisional jurisdiction :

It is competent to a Sessions Judge acting under Criminal Procedure Code, s. 437, to direct further enquiry to be held where additional evidence is not forthcoming.

Queen-Empress v. Balasimantambi 334

7. —————, s. 489—Maintenance :

A Magistrate has no power under Criminal Procedure Code, s. 489, to make an order for maintenance at a progressively increasing rate, but the fact that the child has grown older might constitute a change in the circumstances calling for a variation in the rate.

Ramayee in re 398

CUSTOM OF TRADE—Notoriety and definiteness of custom—Requirements of a binding custom of trade :

Suit for damages for breach of a contract to let horses on hire. The plaintiff hired a pair of horses at Ootacamund from the defendant for a period of six months and on one occasion drove them beyond the Municipal limits of the station; on their return the defendant took away the horses from the plaintiff, which was the breach complained of. The defendant pleaded that the plaintiff's user of the horses as above was contrary to the local custom of the trade :—*Held*, that since the alleged custom was not shown to be either certain or invariable or so notorious that persons should be held to enter into agreements with reference to it, formed no defence to the action.

Price v. Browne 420

DECLARATORY DECREE—Withdrawing portion of claim—Specific Relief Act, s. 42 :

Plaintiffs, members of a Malabar tarwad, sued (1) for the cancellation of a deed of gift of certain immovable property alleged to belong to their tarwad; (2) for restoration of the property the subject of gift either to plaintiff wad; No. 1, or defendant No. 1, the present karnavan, on behalf of the tarwad. The Mansif dismissed plaintiffs' suit on the merits. On appeal, the Subordinate Judge allowed plaintiffs, who were unable to pay the Court fees for recovery of the property, to withdraw that portion of the claim, and decreed for plaintiffs as to the remaining portion, viz., for cancellation of the document. On second appeal it was held, reversing the decree below, that the prayer for restoration of the property being in the circumstances of the case maintainable, it was not competent to plaintiffs to restrict themselves to the other kind of relief sought, and that the maintenance of the suit in its maimed form would be an evasion of s. 42 of the Specific Relief Act.

Bikutti v. Kalendan 267

DEFAMATION—Privilege—Communication by a servant of a company to one of his subordinates as to another subordinate :

In an action for damages for defamation brought by a brewer recently employed by a brewery company against the local manager of the company, the defamatory statements complained of were contained in letters written by the defendant to the directors of the company, and also in a letter written to another brewer in the employ of the company, in which he said that the

	PAGE
plaintiff "had failed most utterly, and I have been compelled to inform him that you will take the position of senior brewer at the brewery:"— <i>Held</i> , that all these statements were in the nature of privileged communications.	
<i>Leishman v. Holland</i>	51
DISTRICT MUNICIPALITIES ACT—ACT IV OF 1884 (MADRAS), ss. 102, 103, 100 — <i>Towns' Improvement Act—Act III of 1871 (Madras), s. 51—Distraint-notice:</i>	
A Municipal Council under the District Municipalities Act has, under section 110, a power to distrain after due notice, besides that given by section 103, but the property distrained must be that of the defaulter, and the doors of a house cannot be removed in execution of a warrant of distress. The notice which an owner of property must give in order to entitle himself to a remission of the house-tax is an annual notice.	
<i>Purushottama v. Municipal Council of Bellary</i>	467
DIVORCE ACT—IV OF 1869—Native Christian—Hindu convert to Christianity:	
A pariah, who had been converted to Christianity, presented a petition of divorce under Act IV of 1869 on the ground of adultery committed by his wife before his conversion:— <i>Held</i> , that the Court had no jurisdiction to entertain the petition.	
<i>Perianayakam v. Pottukanni</i>	382
2. ———, s. 36— <i>Alimony pendente lite—Nett income—Allowable deductions—Change of circumstances—Letters Patent, s. 15—Order fixing date of hearing—Civil Procedure Code, s. 156:</i>	
A petition by a wife—petitioner in the one and respondent in the other of two cross-suits (matrimonial)—for an increase of alimony was treated by consent on appeal as a petition for alimony. It appeared that the respondent was in receipt of a salary from Government which was subject to deductions on account of the pension and annuity funds, that his circumstances were involved and he had agreed with his creditors to discharge his liabilities by certain instalments, that as part of such agreement he was keeping up a policy of insurance on his life, and that he was maintaining and educating three children in England, but that his salary had increased since the order first made for alimony:— <i>Held</i> , that the respondent was entitled as of right to have only the deductions on account of pension and annuity funds taken into consideration in the computation of his nett income. <i>Per cur.</i> —"We resolve to take into consideration the expenses the respondent is put to in maintaining his children and also any arrangement he has made for liquidating his debts." An order made by a Judge of the High Court at settlement of issues fixing a distant date for the hearing of a suit is not an order under section 156 of the Civil Procedure Code and is appealable under Letters Patent, section 15. <i>Quare</i> , whether the Court has power to increase or diminish an allotment of alimony made <i>pendente lite</i> on account of change of circumstances.	
<i>R. v. R.</i>	88
ESTATES OF LUNATICS SUBJECT TO MUFASSAL COURTS—Act XXXV of 1858— <i>Aliyasantana Law—Inheritance—Uncongenital insanity—Suit by an adjudged lunatic by the Agent of the Court of Wards as guardian—Authority of the Court of Wards—Regulation V of 1804—Code of Civil Procedure, s. 464:</i>	
A Jain, who was subject to the Aliyasantana law, made a will, whereby he disposed of the property of his family in favour of certain persons, and died. The plaintiff, a female, was the sole surviving member of the testator's family, but it was admitted that she was, and for more than fifty years had been, a lunatic, though she had not been declared to be so under Act XXXV of 1858; it appeared that her lunacy was not congenital. She sued, by the Collector of South Canara, the Agent for the Court of Wards:— <i>Held</i> , (1) that the plaintiff was not excluded from inheritance by reason of lunacy valid; (2) that the Court of Wards had power to take cognizance of the plaintiff's case under Regulation V of 1804; (3) that although the Court of Wards should ordinarily obtain a declaration under Act XXXV of 1858 in	

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cases where the lunacy of a ward is open to question, their failure to do so in the present case was not fatal to the suit; (4) that Civil Procedure Code, s. 464, was accordingly applicable to the case; (5) that the appointment of the Collector, as guardian to the plaintiff, was legal and valid. In deciding what was the extent of the property which the plaintiff was entitled to inherit under the above rulings, certain documents adduced as evidencing partition of the family property were held to evidence merely arrangements for separate enjoyment.	
<i>Sanku v. Puttamma</i>	289
FOREST ACT—ACT V OF 1882 (MADRAS), ss. 2, 3, 4, 6, 8, 9, 50:	
The accused, who were servants of the shrotriendmar of an agraharam, destroyed a cairn erected by the Forest Department on the shrotriendmar land along the boundary line of a proposed forest reserve. No notice under Forest Act, s. 6, was proved to have been served on the shrotriendmar, and it did not appear whether the land in question was comprised in the boundaries specified in the notification published under s. 4. The accused were convicted under s. 50 (d):— <i>Held</i> , (1) that the provisions of the Act did not apply to the shrotriendmar land; (2) that the right of a forest officer to enter upon and demarcate land under s. 9 is limited to the purpose of the inquiry directed by s. 8; (3) that the conviction was wrong.	
<i>Queen-Empress v. Jangam Reddi</i>	247
HINDU LAW—Adoption made the day after the adoptive father made his will—Adoptive son bound by the will—Inconsistent pleas:	
A Hindu wrote his will devising certain ancestral property to his wife and on the following day he registered it and took the plaintiff in adoption. The testator died shortly afterwards. It was found that the plaintiff's natural father was aware of the dispositions contained in the will and that the testator would not have adopted the plaintiff but for the consent of the natural father to those dispositions. The defendants who claimed under a gift from the wife had denied the adoption in their written statement, and on appeal raised the further plea that the adoption, if any, was conditional on the provisions of the will being acquiesced in:— <i>Held</i> , (1) that the defendants were not precluded from succeeding on the latter of these inconsistent pleas; (2) that the plaintiff was not entitled to the ancestral property devised by the will to the testator's wife. <i>Lakshmi v. Subramanya</i> (I.L.R., 12 Mad., 490) followed.	
<i>Narayanadasami v. Ramasami</i>	172
2. ——— <i>Adoption—Niyoga—Gift—Specific Relief Act—Act I of 1877, s. 18</i> (a)— <i>Transfer of Property Act—Act IV of 1882, s. 43:</i>	
A member of an undivided Hindu family, consisting of himself, his adoptive son and his uncle, sold certain land belonging to the family to the plaintiff. In a suit by the plaintiff for a declaration of his title to, and for possession of the land, it appeared that the sale was not justified by any circumstances of family necessity; and that the above-mentioned adoptive son was the son of the paternal uncle of the adoptive father. During the pendency of the suit the uncle died, having made a gift of his property to his daughter-in-law:— <i>Held</i> , (1) that the adoption was not invalid by reason of the above-mentioned circumstances; (2) that the gift by the uncle to his daughter-in-law was invalid as against the plaintiff; (3) that the plaintiff was entitled to a moiety of the land sold to him.	
<i>Tirayya v. Hanumanta</i>	450
3. ——— <i>Inheritance—Bandhu—Son's daughter:</i>	
A son's daughter is entitled to inherit to her grandfather as a bandhu.	
<i>Nallanna v. Ponnal</i>	149
4. ——— <i>Marriage—A Brahman bride given in marriage by her mother without her father's consent:</i>	
A Vaishnava Brahman girl was given to the plaintiff in marriage by her mother without the consent of her father who subsequently repudiated the	

marriage. It appeared that the mother falsely informed the Brahman, who solemnized the marriage, that the father had consented to it:—*Held*, that the plaintiff was entitled to a declaration that the marriage was valid and to an injunction restraining the parents from marrying the bride to any one else.

Venkatacharyulu v. Rangacharyulu 316

5. ———— *Suit by the purchaser of an undivided share of family property—Time when the share is ascertained:*

The purchaser from a member of a joint Hindu family of his share of a house which belonged to the family, sued for the partition and delivery of possession of the share purchased by him. The number of persons entitled as coparceners to the property of the family had increased between the date of the purchase and that of the suit. It did not appear whether the house constituted the whole or only part of the property of the family, and no question was raised as to the competency of the plaintiff to sue for a partial partition:—*Held*, by the Full Bench, that the share to be awarded to the plaintiff should be computed with reference to the state of the joint family at the date of the suit; by the Divisional Bench that the decree appealed against, by which the plaintiff was to recover the value of the share of the house computed as above and not the share itself, was right.

Rangasami v. Krishnagyan 408

6. ———— *Hindu Widow—Interest in immoveable property—Power of alienation:*

A Hindu testator, leaving a grandson by adoption him surviving, besides certain moveable property, bequeathed to his wife T. a house "on account of her maintenance":—*Held*, confirming the decision below, that though it was competent to the testator by apt language to clothe his widow with a power of alienation, yet in the absence of such words, regard being had to the surrounding circumstances and to the ideas which Hindus have regarding the interest ordinarily enjoyed by women in immoveable property, it must be presumed that testator only meant to bequeath a life-interest:—*Held*, also, that the heir-at-law was not liable to make good moneys expended on the premises by one holding under the widow with knowledge of the contents of the will.

Nunnu Meah v. Krishnasami 274

HINDU WILLS ACT—ACT XXI OF 1870, s. 2—*Succession Act—Act X of 1865, s. 187—Estate of deceased Hindu—Legal representative:*

A Hindu, who was one of the defendants in a suit, died leaving a will. The executors appointed by the will did not take out probate; and the property of the deceased came into the possession of his divided brothers, who were thereupon brought on to the record of the suit as the representatives of the deceased defendant. A decree was passed for the plaintiff by consent. The mother of the deceased who would, apart from the will, have been his legal representative, now sued to set aside the above decree, having previously obtained a declaration that she was entitled to the property of the deceased in a suit against his brothers above referred to:—*Held*, that the plaintiff was not entitled to maintain the suit.

Janaki v. Dhanu Lall 454

INAM COMMISSION—Regulation IV of 1831 (Madras)—Act IV of 1862 (Madras)—*Resumption of inam—East India Company's jaghire—Act of State—Menkaval lands—Mirasi rights, evidence of—Secondary evidence of lost grant by Government:*

In a suit to declare the plaintiff's title to a shrotriem village which was included in the jaghire granted in 1763 by the Nabob of the Carnatic to the East India Company, it appeared that the village in question had been previously granted by the Nabob free of assessment to the Kazi of Madras as an endowment for his office, and afterwards to the son of the first grantee personally, without condition of service. In 1779 the British Government confirmed the village in perpetuity to the second grantee on account of the office of Kazi which he filled, and to his direct heirs who should be fit for that office. In 1862 on failure of the direct male line, the

grantee's grandson by a daughter was nominated to the office of Kazi with the approval of Government, who directed he should hold the village, adding that it had been assigned as an endowment for that office. In the same year the Inam Commissioner confirmed it as a personal inam, enfranchised it and granted a title-deed to the holder. In 1866 Government ordered that the village should be registered as an endowment of the Kaziship and the title-deed cancelled, and in 1868 notified in the Gazette that the title-deed which was not produced was cancelled. Between the dates of the above order and notification the Kazi transferred the village to the plaintiff under a deed of perpetual lease and placed him in possession. But in 1873 Government resumed the village and subsequently directed that the whole of its net revenue be paid to the Kazi. The Kazi, from whom the plaintiff claimed, died in 1868. An inam of certain Menkaval lands, which had formerly been allotted to the village watchman as inam, who had been granted to the Kazi in 1802-3; they were cultivated by raiyats who paid varam to the inamdar. The order of resumption in 1873 had no reference to these lands, but in 1877 Government issued pattas to the raiyats:—*Held*, (1) that the grant of 1779, the original document not having been produced by the plaintiff, was sufficiently proved by a translation produced from official custody and certified by the Collector in 1838 to be correct and attested by the Government Translator to Government; (2) that it was competent for the Government in 1779 to alter the nature of the grant of 1761 as an act of State; (3) that on view of the facts that the plaintiff must have been aware of the nature of the tenure and of the contents of the grant of 1779 and the cancellation of the inam title-deed, the Government was not acting *ultra vires* in cancelling the enfranchisement, &c.; (4) that the Kazi through whom the plaintiff claimed having died in 1868 there was no reason to question the resumption in 1873; (5) that the plaintiff was entitled to possession of the Menkaval lands, the action of Government in issuing pattas to the raiyats being *ultra vires*. Issues first framed on appeal as to the plaintiff's claim to mirasi rights and Menkaval lands. Evidence of mirasi rights considered.

Karnakara Menon v. Secretary of State for India 431

INSOLVENT ACT—11 & 12 Vic., Cap. 21, ss. 40, 73—*Commission—Cesser of interest on filing of petition:*

By a document styled an "agreement of commission" the executant acknowledged the receipt of a loan and bound himself to pay commission thereon at the rate of 10 per cent. per month and to repay the principal in two years and nine months. It appears that the so-called commission was in the nature of interest, and was fixed at a high rate, because the debtor was expected to obtain the lease of a forest and to derive large profits therefrom. The debtor filed his petition in the Insolvency Court on 1st September 1884:—*Held*, that the creditor was not entitled to a dividend in respect of commission claimed to have accrued due after that date.

Subbarayalu v. Rowlandson 183

2. ————, ss. 72 and 73—*Appeal—Limitation—Evidence:*

Certain creditors of an insolvent appealed against an order declaring him entitled to his personal discharge. The appeal time expired during the vacation of the Court and appeal petition was presented on the day when the Court re-opened. During the insolvency proceedings evidence was not recorded under section 72, and appellant sought on appeal to use the Commissioner's notes of evidence:—*Held*, (1) that the appeal was not barred by limitation; (2) that it was not competent to the Court to refer to the Commissioner's notes.

Abdool v. Mahamed 404

JOINDER OF CAUSES OF ACTION—*Civil Procedure Code, ss. 44, 45—Res judicata:*

A suit for recovery of a mortgage debt, with an alternative prayer for sale of the mortgaged property, is not a suit for the recovery of immoveable property within the meaning of s. 44 of the Civil Procedure Code. A suit seeking to enforce liability for a mortgage debt on a Malabar tarwad is not

barred by a previous personal decree obtained against certain members of the tarwad for the same debt.	PAGE
<i>Govinda v. Mana Vikraman</i>	284
JURISDICTION—Civil Courts Act (Madras)—Act III of 1873, s. 12—Valuation of relief—Suits Valuation Act—Act VII of 1887, s. 11—Suit by a court purchaser for partition :	
The purchaser at a court-sale of eight pangus out of an estate of 28½ pangus sold them to the plaintiff. The whole estate was worth more than Rs. 2,500, but the eight pangus sold to the plaintiff were worth less than that sum. The plaintiff brought this suit in a Subordinate Court against his vendor and certain persons, who were in possession of and claimed to be entitled by right of purchase to the whole estate, for partition and possession of his eight pangus. It was found that the plaintiff was entitled to the eight pangus purchased by him as against the defendants:— <i>Held</i> , (1) that the suit was within the pecuniary limits of the jurisdiction of a District Munsif; (2) that since the disposal of the suit had not been prejudicially affected, Suits Valuation Act, s. 11, was applicable and the decree of the Subordinate Court should be confirmed. <i>Quære</i> :—Whether the Subordinate Court has not concurrent jurisdiction with a District Munsif in suits less than Rs. 2,500 in value.	
<i>Krishnasami v. Kanakasabai</i>	183
LAND ACQUISITION ACT—ACT X OF 1870—Specific Relief Act, s. 42—Objection that consequential relief available—Claim to share of compensation—Valuation in private transaction :	
The plaintiff, as heir to her husband, brought a suit, in which Government was not represented, for a declaration of title to a quarter share of the jennu value of land taken up under the Land Acquisition Act. It appeared that the plaintiff's husband had mortgaged his share of the land in question to the defendants' predecessor in title in 1872 by an instrument in which his share was valued at Rs. 375:— <i>Held</i> , (1) that the suit for a declaration only was maintainable; (2) that the valuation of the plaintiff's husband's share in the instrument of 1872 was not binding on the plaintiff in the present suit. <i>Per cur.</i> —Assuming, for the moment, that the plaintiff was able and called upon in this case to ask for further relief, we are of opinion, following the decision of the Bombay High Court in <i>Limba Bin Krishna v. Rama Bin Pimplu</i> (I.L.R., 13 Bom., 548), that the suit should not, at the present stage, be dismissed on this ground, the objection not having been raised in either of the Lower Courts.	
<i>Chomu v. Umma</i>	46
LAND-LORD AND TENANT—Act XXIV of 1839, appeal under—Limitation—Civil Procedure Code, ss. 13, 43—Res judicata—Service-tenure with rent—Enhancement of rent—Resumption :	
In a suit brought in 1886 by a zamindar to recover an estate granted by his predecessor to the defendant on a service tenure, a small money rent being also reserved, it appeared that in 1864 the right of the plaintiff's predecessor to rent had been established by suit, but there was no evidence that the service was then dispensed with, but in 1885, it was intimated to the defendant that the service was dispensed with and a notice to quit was given to him; the option of holding the estate at an enhanced rent was however given to him at the same time:— <i>Held</i> , (1) that the suit was not barred by limitation, nor precluded by Civil Procedure Code, s. 13 or s. 43; (2) that the plaintiff was not precluded by any implied contract from increasing the rent; (3) that the burden of proving the plea that the plaintiff was not entitled to eject lay on the defendants and had not been discharged. In computing the time for an appeal to His Excellency the Governor in Council, under the rules made by virtue of Act XXIV of 1839 against a decree passed by the Agent to the Governor, the time necessary for procuring copies of decree and judgment appealed against may be deducted.	
<i>Mahadevi v. Vikrama</i>	365

2. ————— Lessee—Power to bring ejectment suit :	PAGE
A lessee is entitled to maintain a suit for ejectment against the party in possession, notwithstanding the fact that, at the date of the lease, his lessor was not in possession of the property. <i>Prankrishna Dey v. Biewambhar Sein</i> (2 B.L.R., 207) and <i>Tiery v. Kristo Mohun Bose</i> (L.R., 1 I.A., 76) referred to.	
<i>Achayya v. Hanumantrayudu</i>	269
LEASE DEED—Compulsory registration :	
Where a lease deed contained a clause whereby the tenancy thereunder was absolutely determinable at any moment at the option of the lessor, it was held, that such deed was not compulsorily registrable, notwithstanding that it also contained provisions for an "annual rental," and for payment of "rent in advance each year," provisions, which, had they stood alone, would have raised a presumption that a tenancy exceeding a year was contemplated— <i>Jasgivandas Javherdas v. Narayan</i> (I.L.R., 8 Bom., 493), <i>Morton v. Woods</i> (L.R., 3 Q.B., 658), and <i>Hand v. Hall</i> (L.R., 2 Ex. D., 355), referred to and approved.	
<i>Ratnasabhpathi v. Venkatachalam</i>	271
LEGAL PRACTITIONERS' ACT—ACT XVIII OF 1879, ss. 28, 29—Promissory note made by a party in favour of his pleader in respect of his agreed fee—Agreement not certified—Suit on promissory note :	
A party to a suit made and delivered to his pleader in respect of his agreed fee a promissory note which was not filed in Court in that suit. In a suit by the pleader upon his promissory note:— <i>Held</i> , that the promissory note was invalid and that the plaintiff was entitled to recover only the amount to which he was found to be entitled for his labour.	
<i>Krishnasami v. Kesava</i>	63
LETTERS PATENT, s. 15—Civil Procedure Code, s. 622—Judgment—Landlord and tenant—Suit for rent :	
In a suit in a Small Cause Court for rent due in respect of two pieces of land, the Court passed a decree in favour of the plaintiff. The defendant preferred a petition to the High Court under Civil Procedure Code, s. 622, which came on for hearing before one Judge. He held that the Small Cause Court had failed to give effect to a former decree between the parties in respect of one piece of land, and made an order reversing the decree as to that, and calling for a report of what was due on the other piece of land. The plaintiff preferred an appeal under Letters Patent, s. 15:— <i>Held</i> , (1) the above-mentioned order was subject to appeal as being a judgment; (2) even if the Subordinate Judge had failed to give effect to the previous decree, the error was not such as to give the Court jurisdiction to revise his proceedings under Civil Procedure Code, s. 622.	
<i>Vanangamudi v. Ramasami</i>	406
2. ————— s. 15—Divorce Act—Act IV of 1869, s. 136—Alimony pendente lite—Nett income—Allowable deductions—Change of circumstances—Order fixing date of hearing—Civil Procedure Code, s. 156 :	
A petition by a wife—petitioner in the one and respondent in the other of two cross-suits (matrimonial)—for an increase of alimony was treated by consent on appeal as a petition for alimony. It appeared that the respondent was in receipt of a salary from Government which was subject to deductions on account of the pension and annuity funds, that his circumstances were involved and he had agreed with his creditors to discharge his liabilities by certain instalments, that as part of such agreement he was keeping up a policy of insurance on his life, and that he was maintaining and educating three children in England, but that his salary had increased since the order first made for alimony:— <i>Held</i> , that the respondent was entitled as of right to have only the deductions on account of pension and annuity funds taken into consideration in the computation of his nett income. <i>Per cur.</i> —“We resolve to take into consideration the expenses the respondent is put “to in maintaining his children and also any arrangement he has made for “liquidating his debts.” An order made by a Judge of the High Court at	

settlement of issues fixing a distant date for the hearing of a suit is not an order under section 156 of the Civil Procedure Code and is appealable under Letters Patent, section 15. *Quære*, whether the Court has power to increase or diminish an allotment of alimony made *pendente lite* on account of change of circumstances?

R. v. R. 88

3. ———, s. 28—*Criminal Procedure Code, s. 2—Scheduled Districts Act—Act XIV of 1874, notifications under—Agency tracts, jurisdiction of High Court over—Agency Rules—Act XXIV of 1839 (Madras), s. 3:*

The High Court set aside a conviction by the Agent to the Governor in Vizagapatam on a charge of culpable homicide not amounting to murder, and directed that the accused be tried in the Sessions Court at Vizagapatam on a charge of murder. The accused was tried accordingly, and was convicted of murder, and he appealed to the High Court. The Agency tract of Vizagapatam is a scheduled district under Act XIV of 1874 and the Governor in Council extended the operation of the Criminal Procedure Code of 1861 to it by a notification made under that Act in 1862. In 1863 the Governor in Council, by a notification under Madras Act XXIV of 1839, constituted the Agent a Sessions Judge under the Criminal Procedure Code:—*Held*, that High Court had jurisdiction to direct that the accused be tried by the Sessions Judge under the provisions both of the Letters Patent and of the Criminal Procedure Code.

Queen-Empress v. Budara Janni 121

- LIMITATION—Aliyasantana Law—Unjustified alienation of family property by a member of undivided family—Adverse possession:**

In 1851 the ejaman of an Aliyasantana family mortgaged family property to the ancestor of some of the defendants who and whose alienees were now in possession. The mortgagor died leaving besides one brother, two sisters, each having a son—the family remaining undivided. In 1856 one of the sons, with the concurrence of his uncle and mother, conveyed the land to the mortgagee, but this transaction was not justified by any family necessity; and in 1857 the other son and his mother sold their undivided moiety to the plaintiff's predecessor in title. In a suit to redeem the mortgage of 1851, the plaintiff obtained a decree for redemption of a moiety of the mortgage property:—*Held*, that although it may have been supposed in 1857 that compulsory partition was permitted by the Aliyasantana law, yet as the right to the half share purported to be sold in 1857 had no legal existence, nothing could pass by that sale and the suit should be dismissed. *Per cur.*—Neither the original mortgagee nor his son can rely on the 12 years rule of limitation, unless he can prove a subsequent valid sale, in the absence of which his possession must be taken to retain its original character.

Byari v. Puttanna 38

2. ————*Insolvent Act—11 and 12 Vic., Cap. 21, ss. 72 and 73—Appeal—Evidence:*

Certain creditors of an insolvent appealed against an order declaring him entitled to his personal discharge. The appeal time expired during the vacation of the Court and the appeal petition was presented on the day when the Court re-opened. During the insolvency proceedings evidence was not recorded under section 72, and the appellant sought on appeal to use the Commissioner's notes of evidence:—*Held*, (1) that the appeal was not barred by limitation; (2) that it was not competent to the Court to refer to the Commissioner's notes.

Abdool v. Mahamed 404

3. ————*Malabar Law—Melkoima—Compromise by Uralers of the right to manage a devasom—Claim of certain Uralers to exclude others from management:*

The uraima right in a Malabar devasom was vested in the illom, of which plaintiff No. 1, a Nambudri Brahman, was a member; the defendants represented the family which formerly ruled over the tract of country where the devasom was situated. The plaintiffs sued for a declaration that their

families were entitled to the exclusive management of the affairs of the devasom. It appeared that the plaintiffs' and defendants' families had been in joint management since 1845 in accordance with the provisions of a deed of compromise:—*Held*, (1) on its appearing that the compromise had been entered into by the karnavan of the plaintiffs' illom, and that the compromise was not vitiated by fraud or the like, that the compromise was binding on the plaintiff; (2) that the claim to exclusive management was barred by limitation. *Per cur.*—A legal origin to which the joint enjoyment of the rights of management may be referred may be found in the continuance of what was Melkoima in ancient times as a co-trusteeship subsequent to the British rule with the tacit sanction of the British Government, or in the status of the Nambidi family as patrons of the institution.

Nilakandan v. Padmanabha 153

4. ————*Malabar Law—Suit by junior members of a tarwad—Suit for declaration of invalidity of kanom:*

The junior members of a Malabar tarwad brought a suit against their karnavan and senior anandravan and certain persons claiming under a kanom granted by the former for a declaration that the kanom was invalid and for possession of the land demised with mesne profits. The suit was filed nearly twelve years after the execution of the kanom:—*Held*, (1) that the suit was maintainable by the plaintiffs; (2) that the suit was not barred by limitation.

Anantan v. Sankaran 101

5. ————*Malabar Law—Will—Gift of a life interest:*

The karnavan of a Malabar tarwad executed an instrument described as a vasyat whereby he made a gift of a life interest in certain self-acquired property, to come into operation at once. The members of his tarwad acquiesced in this disposition of the property. In a suit by his successor in the office of karnavan to recover the property:—*Held*, that time began to run for the purposes of limitation from the death of the donee. *Quære*, whether the principle laid down in *Alami v. Komu* (I.L.R., 12 Mad., 126) would apply in the case of a will made by a member of a Malabar tarwad having heirs in the tarwad.

Kuttyassan v. Mayan 495

- LIMITATION ACT—ACT XV OF 1877, ss. 5, 12—Time occupied in seeking review of judgment—Computation of time for appeal:**

An appellant is not entitled as of right to the exclusion of the time occupied by him in seeking a review of judgment, in the computation of the time within which his appeal is preferred. Where it appeared that the application for review proceeded on grounds dealt with in the judgment sought to be reviewed and on the discovery of fresh evidence which was made nearly three months before the application, the Court declined to exercise its discretionary power to exclude the time so occupied.

Govinda v. Bhandari 81

2. ————, s. 10—*Suit against a trustee:*

The plaintiff sued his father in 1887 for a declaration of his title to, and for possession of, certain property as being stridhanam property of his late mother, whose only son he was. The plaint alleged that some of the property had been given to the plaintiff's mother about the time of her marriage in 1836; that in 1843 her father had appointed the defendant trustee of the property for the plaintiff and his mother, and that further sums had been since paid to the defendant in his capacity of trustee on account of the stridhanam of the plaintiff's mother, and that he had traded with the property and misappropriated it:—*Held*, that under Limitation Act, s. 10, the suit was not barred by limitation on the allegations in the plaint.

Sethu v. Krishna 61

3. —————, sched. II, arts. 64, 116—*Suit between partners—Registered partnership deed*:
The plaintiffs and the defendants entered into a partnership agreement, which was registered, whereby it was, among other things, provided expressly that each partner should bear the loss, if any, incurred in the business in proportion to his share. The plaintiffs, alleging that loss had been incurred and borne by them, sued to recover the defendants' share of the loss:—*Held*, that since the partnership agreement was registered, the suit was governed by Limitation Act, sched. II, art. 116.
Ranga Reddi v. Chinna Reddi 465
4. —————, sched. II, art. 91—*Specific Relief Act—Act I of 1877, ss. 39, 40, 42—Cancellation of instrument—Declaratory decree*:
A suit was filed in 1888 on behalf of a Malabar tarwad by two of its members to recover property improperly alienated in 1879 under a kanom instrument by the karnavan, who had since been removed from office:—*Held*, that since a prayer for the cancellation of the kanom instrument was not an essential part of the plaintiffs' relief, the suit was not barred by the three years' rule in Limitation Act, 1877, sched. II, art. 91.
Unni v. Kunehi Amma 26
5. —————, sched. II, arts. 142, 144—*Adverse possession—Burden of proof*:
The plaintiff, who was the sister of the defendant, sued in 1888 to recover from him a moiety of a paramba purchased by them jointly in 1877. In 1878 the plaintiff went to live elsewhere, but, from time to time, returned and spent a few days with the defendant on the land in suit. The defendant pleaded limitation:—*Held*, that Limitation Act, sched. II, art. 144, applied to the suit, and the burden of proving adverse possession lay on the defendant.
Alima v. Kutti 96
6. —————, sched. II, art. 179, cl. 4—*Civil Procedure Code, ss. 231, 232, 623—Joint decree-holders—Assignment by operation of law of a share in a decree—Application for execution—Review, grounds of*:
A Hindu obtained in 1878 a decree for partition of certain property, and he now applied in 1888 to have it executed. He relied in bar of limitation on an application for execution made by his son, who had obtained a decree against him in 1881 in a partition suit, whereby his right was established to one-fifth of whatever should be acquired by the father by virtue of the decree of 1878. The father's application for execution in 1888 was held to be barred by limitation in *Ramasami v. Anda Pillai* (I.L.R., 13 Mad., 347). On review it appeared that the son had applied for execution of the whole decree, stating that his father would not join him in such application, and that notice was given to the father:—*Held*, (1) that the son was an assignee by operation of law of one-fifth of the judgment-debt in the suit of 1878; (2) that his application accordingly kept the decree alive under Limitation Act, 1877, sched. II, art. 179, cl. 4, and the father's application in 1888 was not barred by limitation.
Ramasami v. Anda Pillai 252
7. —————, sched. II, art. 179, cl. 6—*Decree for periodical payments*:
If it can be gathered from a decree that payments are directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree the requirements of Limitation Act, sched. II, art. 179, cl. 6, are satisfied.
Kaveri v. Venkamma 396
- MALABAR LAW**—*Court sale—Decree on a mortgage to secure two debts—One debt only binding on tarwad*:
In a suit by members of a Malabar tarwad to set aside a sale in execution of a decree, passed on a mortgage which had been executed by their karnavan and senior anandravans in consolidation of two prior mortgages executed,

- respectively, to secure two debts, it appeared that one of these debts was binding and the other not binding on the tarwad:—*Held*, that the Court should declare the plaintiffs entitled to the property sold notwithstanding the sale, but subject to the charge created to secure the binding debt.
Kunhi Mannan v. Chali Vaduvath 494
2. —————, *Kanom—Redemption suit brought within twelve years from the date of kanom—Special stipulation for redemption*:
In a suit to redeem a kanom executed less than twelve years before suit it appeared that the kanom instrument provided for the surrender of the property "if at any time the property should be necessary" for the jenmi. It was found that no special exigency had been established by the plaintiff:—*Held*, on the above finding that the special stipulation did not oust the general rule that the kanom was not redeemable for twelve years and the suit was therefore premature.
Mahomed v. Ali Koya 76
3. —————, *Melkoima—Compromise by Uralers of the right to manage a devasom—Claim of certain Uralers to exclude others from management—Limitation*:
The uraima right in a Malabar devasom was vested in the illom, of which plaintiff No. 1, a Nambudri Brahman, was a member; the defendants represented the family which formerly ruled over the tract of country where the devasom was situated. The plaintiffs sued for a declaration that their families were entitled to the exclusive management of the affairs of the devasom. It appeared that the plaintiffs' and defendants' families had been in joint management since 1845 in accordance with the provisions of a deed of compromise:—*Held*, (1) on its appearing that the compromise had been entered into by the karnavan of the plaintiffs' illom, and that the compromise was not vitiated by fraud or the like, that the compromise was binding on the plaintiff; (2) that the claim to exclusive management was barred by limitation. *Per cur.*—A legal origin to which the joint enjoyment of the rights of management may be referred may be found in the continuance of what was Melkoima in ancient times as a co-trusteeship subsequent to the British rule with the tacit sanction of the British Government, or in the status of the Nambidi family as patrons of the institution.
Nilakandan v. Padmanabha 153
4. —————, *Partition of tarwad—Tarwad debt—Construction of decree*:
In 1870 the managers of the plaintiff's tarwad demised certain land now in suit on kanom. In 1885 they sued to redeem the kanom and a decree was passed that the plaintiff do pay a certain sum to the kanomdar, and that he do surrender the land; but in the judgment it was said that the kanom amount should be charged on the land. In 1886 the tarwad was divided and the land above referred to was allotted to the present plaintiff's branch. In 1887 the kanomdar, in execution of the above decree, brought the land to sale and it was purchased by defendant No. 1:—*Held*, that the sale was not binding on the plaintiff.
Sankara v. Kelu 29
5. —————, *Practice—Non-joinder—Suit by one of two co-uralers*:
In a suit by one of two co-uralers of a Malabar devasom to recover land, the property of the devasom, the other uralan being joined as defendant, there was no evidence that the latter had repudiated the right of the plaintiff to sue in conjunction with himself, and it appeared that he had not been consulted as to the institution of the suit:—*Held*, that the suit was bad for non-joinder of the co-uralan as plaintiff.
Parameswaram v. Shangaran 489
6. —————, *Specific Relief Act—Act I of 1877, s. 53 (b)—Suit by junior members of a tarwad—Injunction restraining execution of a decree obtained in a suit against plaintiffs' karnavan*:
In a suit brought in a Subordinate Court by the junior members of a Malabar tarwad against their karnavan and others, the plaintiffs prayed for

a declaration of the uraima right of their tarwad in a certain devasom, and for an injunction to restrain the defendants, other than the members of the plaintiffs' tarwad, from executing a decree of a District Court, passed on appeal from a Munsif's Court, whereby certain lands of the devasom were decreed to be surrendered to them in the character of uralers; it appeared, (1) that plaintiffs' karnavan was a party to the suit in which the above-mentioned decree was passed, (2) that the plaintiffs' tarwad was otherwise entitled to the uraima right by adverse possession, if not immemorial title:—*Held*, (1) that the plaintiffs were entitled to maintain the suit without proof of fraud and collusion on the part of their karnavan in the previous suit; (2) that the injunction sought was not precluded by Specific Relief Act, s. 56 (b); (3) that the plaintiffs were entitled to the decree as prayed.

Appu v. Raman

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7. ———— *Suit by junior members of a tarwad—Suit for declaration of invalidity of kanom—Limitation:*

The junior members of a Malabar tarwad brought a suit against their karnavan and senior anandravan and certain persons claiming under a kanom granted by the former for a declaration that the kanom was invalid and for possession of the land demised with mesne profits. The suit was filed nearly twelve years after the execution of the kanom:—*Held*, (1) that the suit was maintainable by the plaintiff; (2) that the suit was not barred by limitation.

Anantan v. Sankaran

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8. ———— *Suit to remove a karnavan for mismanagement as de facto karnavan—Minor members of tarwad not joined—Civil Courts Act (Madras)—Act III of 1873, s. 13—Valuation of suit:*

A suit was brought to remove the karnavan of a Malabar tarwad from office on the grounds of mismanagement of tarwad property to the extent of more than Rs. 2,500. The acts of mismanagement complained of were really done by the present defendant No. 1 as karnavan *de facto*. The above suit was withdrawn with leave to sue again. The defendant therein died and was succeeded by defendant No. 1, against whom the plaintiff brought the present suit in the Court of a District Munsif (to which all the adult but none of the minor members of the tarwad were made parties), to obtain his removal from the office of karnavan alleging against him the acts of mismanagement above referred to:—*Held*, (1) that the suit was not barred by the previous suit and was within the jurisdiction of the District Munsif; (2) that the minor members of the tarwad were sufficiently represented on the record; (3) that the grounds alleged supported the action.

Kunhan v. Sankara

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9. ———— *Will—Gift of a life-interest—Limitation:*

The karnavan of a Malabar tarwad executed an instrument described as a vasyat whereby he made a gift of a life interest in certain self-acquired property, to come into operation at once. The members of his tarwad acquiesced in this disposition of the property. In a suit by his successor in the office of karnavan to recover the property:—*Held*, that time began to run for the purposes of limitation from the death of the donee. *Quere*, whether the principle laid down in *Alami v. Komu* (I.L.R., 12 Mad., 126) would apply in the case of a will made by a member of a Malabar tarwad having heirs in the tarwad.

Kuttiyassan v. Mayan

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MIRASI RIGHTS—Kasavargam tenant—Ejectment suit—Notice to quit:

The mirasidars of a village in the Tanjore District sued to recover a *manai* which had been put into the possession of the ancestors of defendant No. 8, who were village blacksmiths, as kasavargam tenants. Defendant No. 8 had left the village and sold the land as if it were his ancestral property to others of the defendants, who were now in occupation:—*Held*, that the plaintiffs were entitled to recover the land without proof of notice to quit to the occupants.

Subbaraya v. Nataraja

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2. ———— **EVIDENCE OF—Inam Commission—Regulation IV of 1831 (Madras)—Act IV of 1862 (Madras)—Resumption of inam—East India Company's jaghire—Act of State—Menkaval lands—Secondary evidence of lost grant by Government:**

In a suit to declare the plaintiff's title to a shrotriam village which was included in the jaghire granted in 1763 by the Nabob of the Carnatic to the East India Company, it appeared that the village in question had been previously granted by the Nabob free of assessment to the Kazi of Madras as an endowment for his office, and afterwards to the son of the first grantee personally, without condition of service. In 1779 the British Government confirmed the village in perpetuity to the second grantee on account of the office of Kazi which he filled, and to his direct heirs who should be fit for that office. In 1862 on failure of the direct male line, the grantee's grandson by a daughter was nominated to the office of Kazi with the approval of Government, who directed he should hold the village, adding that it had been assigned as an endowment for that office. In the same year the Inam Commissioner confirmed it as a personal inam, enfranchised it and granted a title-deed to the holder. In 1866 Government ordered that the village should be registered as an endowment of the Kaziship and the title-deed cancelled, and in 1868 notified in the Gazette that the title-deed which was not produced was cancelled. Between the dates of the above order and notification the Kazi transferred the village to the plaintiff under a deed of perpetual lease and placed him in possession. But in 1873 Government resumed the village and subsequently directed that the whole of its net revenue be paid to the Kazi. The Kazi, from whom the plaintiff claimed, died in 1868. An inam of certain Menkaval lands, which had formerly been allotted to the village watchman as inam, had been granted to the Kazi in 1802-3; they were cultivated by rayats who paid varam to the inamdar. The order of resumption in 1873 had no reference to these lands, but in 1877 Government issued pattas to the rayats:—*Held*, (1) that the grant of 1779, the original document not having been produced by the plaintiff, was sufficiently proved by a translation produced from official custody and certified by the Collector in 1838 to be correct and attested by the Persian Translator to Government; (2) that it was competent for the Government in 1779 to alter the nature of the grant of 1761 as an act of State; (3) that on the right construction of Regulation IV of 1831 and Act IV of 1862, and in view of the facts that the plaintiff must have been aware of the nature of the tenure and of the contents of the grant of 1779 and the cancellation of the inam title-deed, the Government was not acting *ultra vires* in cancelling the enfranchisement, &c.; (4) that the Kazi through whom the plaintiff claimed having died in 1868 there was no reason to question the resumption in 1873; (5) that the plaintiff was entitled to possession of the Menkaval lands, the action of Government in issuing pattas to the rayats being *ultra vires*. Issues first framed on appeal as to the plaintiff's claim to mirasi rights and Menkaval lands. Evidence of mirasi rights considered.

Karunakara Menon v. Secretary of State for India

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MORTGAGE—Civil Procedure Code, s. 13—Res judicata—Transfer of interest—Appointment of a creditor as agent to collect rents and appropriate part towards the debt:

In a suit to redeem a kanom on certain land, the jenm of a devasom in Malabar, it appeared that the plaintiff held a melkanom in respect of the same land executed to him (subsequently to the date of the kanom sought to be redeemed) by defendant No. 3, the samudayam of the devasom. Defendant No. 3 represented one Chitambaram, in whose favour the uralers had, in 1741, executed a document appointing him samudayam and stating that they had received from him a kanom of 18,000 fanams on the devasom properties and providing that he should appropriate part of the rents towards the loan. It appeared that in a suit to eject tenants, the uralers had sued as co-plaintiffs with the samudayam; in subsequent suits, however, two of the uralers had sued other tenants for rent and the samudayam for an account; both of these suits were dismissed on second appeal, and in the judgments of the High Court the samudayam was described as a mortgagee in possession:—*Held*, (1) on its appearing that no opinion was expressed in the former suits as to the construction of the document of 1741 that the former decisions had not the force of *res judicata*; (2) in view of the conduct of the parties and on

	PAGE
the terms of the document of 1741 that the samudayam was not thereby constituted a mortgagee in possession and that the melkanom set up by the plaintiff was invalid.	
<i>Krishnan v. Veloo</i>	301
2. ————— <i>Malabar law—Court-sale—Decree on a mortgage to secure two debts—One debt only binding on tarwad :</i>	
In a suit by members of a Malabar tarwad to set aside a sale in execution of a decree, passed on a mortgage which had been executed by their karnavan and senior anandravans in consolidation of two prior mortgages executed, respectively, to secure two debts, it appeared that one of these debts was binding and the other not binding on the tarwad :— <i>Held</i> , that the Court should declare the plaintiffs entitled to the property sold notwithstanding the sale, but subject to the charge created to secure the binding debt.	
<i>Kunhi Mannan v. Chali Vaduvath</i>	494
3. ————— <i>Suit for arrears of interest and sale—Suit before principal sum became due :</i>	
A suit for arrears of interest accrued due on a mortgage and for the sale of the property comprised therein was brought before the date fixed for the repayment of the principal. The mortgage provided that, on default of payment of interest on the due date, interest should be chargeable on the arrear, and also that interest at an enhanced rate should be chargeable on the principal :— <i>Held</i> , that the plaintiff was not entitled to sue for the arrears of interest or to bring the mortgage premises to sale before the principal became due.	
<i>Kannu v. Natesa</i>	477
4. ————— <i>BY CONDITIONAL SALE—Vendor and purchaser—Conditional right of re-purchase :</i>	
A having previously hypothecated certain land to B, executed a conveyance of it to him in 1873 for a consideration which was now found to have been an inadequate price. On the same day, B executed to A a "counter-part document" by which he covenanted to reconvey the land and return the sale-deed if the sale amount be repaid to him in cash on 27th May 1875. The documents contained no provision as to interest and reserved no power for the purchaser to recover his purchase money. In 1888 A's representative, alleging that the transaction evidenced by the above documents was a mortgage, brought a suit to redeem it :— <i>Held</i> , that the transaction did not constitute a mortgage, and that the plaintiff was not entitled to redeem.	
<i>Ayyavayyar v. Rahimansa</i>	170
NATIVE CHRISTIAN—Hindu convert to Christianity—Divorce Act—Act IV of 1869 :	
A pariah, who had been converted to Christianity, presented a petition of divorce under Act IV of 1869 on the ground of adultery committed by his wife before his conversion :— <i>Held</i> , that the Court had no jurisdiction to entertain the petition.	
<i>Perianayakam v. Pottukanni</i>	362
NEGOTIABLE INSTRUMENTS ACT—Act XXVI of 1881, s. 61—Hundi—Presentment—Notice of dishonour—Indemnity bond :	
In a suit on an indemnity bond executed by way of collateral security by the maker of six hundies, it appeared that three of the hundies were paid and when three which were unpaid were presented to the maker, he did not at once insist upon want of notice of dishonour or on non-presentment as a ground of discharge :— <i>Held</i> , that since the defendant did not prove that the drawee had effects of his to meet the hundies on presentment, or that he had sustained damage by reason of the want of notice of dishonour, the plaintiff was entitled to a decree.	
<i>Shanmugam v. Chinmasami</i>	470

NON-JOINDER—Practice—Civil Procedure Code—Act X of 1877, s. 294, amended by Act XII of 1879—Purchase at a Court-sale on behalf of a judgment-creditor without permission of the Court :

Under Civil Procedure Code of 1877, as amended by Act XII of 1879, a purchase made at a Court-sale on behalf of a judgment-creditor was not invalid for want of permission of the Court. Where a suit is brought by one member of an undivided Hindu family to recover land, the property of the family, and no objection is taken at the hearing on the ground of the non-joinder of the plaintiff's co-parceners, it is not open to an unsuccessful defendant to raise such objection on appeal.

Paramasiva v. Krishna 498

2. ————— *Practice—Malabar law—Suit by one of two co-urals :*

In a suit by one of two co-urals of a Malabar devasom to recover land, the property of the devasom, the other uralan being joined as defendant, there was no evidence that the latter had repudiated the right of the plaintiff to sue in conjunction with himself, and it appeared that he had not been consulted as to the institution of the suit :—*Held*, that the suit was bad for non-joinder of the co-uralan as plaintiff.

Parameswaran v. Shangaran 489

OBSTRUCTION OF PUBLIC STREET—Suit for declaration and injunction—Special damage :

A gate was erected in a public street (by the permission of the Municipal Council), which obstructed the exercise by the plaintiff and the public of their right to resort to and draw water from a well. It appeared in evidence, although it was not alleged in the plaint, that the plaintiff had to use the land between the newly erected gate and the well when he repaired his house. The plaintiff not having obtained permission to sue under Civil Procedure Code, s. 30, sued for a declaration of his right to use the street and draw water from the well and for an injunction compelling the removal of the gate :—*Held*, that the suit was within the rule precluding private actions for public wrongs without special damage alleged and proved, and was accordingly not maintainable.

Siddeswara v. Krishna 177

PARTIES—Club—Goods supplied to a member—Suit on behalf of club :

An action to recover the price of goods supplied to a member of a non-proprietary club, or on his responsibility cannot be brought in the name of the secretary of the club.

Michael v. Briggs 362

PENAL CODE—ACT XLV OF 1860, ss. 43, 177—"Legally bound" :

On 22nd November 1890 the accused, who was a Deputy Tahsildar, submitted to his official superior a false "nil" return of lands in his enjoyment, and also on 5th December 1890 made a false statement to the same effect in a revenue enquiry before the Principal Assistant Collector. He was convicted of an offence under Penal Code, s. 177 :—*Held*, that the conviction was wrong. *Virasami Mudali v. The Queen* (I.L.R., 4 Mad., 144) dissented from.

Queen-Empress v. Appayya 484

2. —————, ss. 109, 209—*Nuisance—Keeping a gaming house—Abetment :*

The lessee of a house, who permitted disorderly people to use it for gambling and thereby caused annoyance to the public, was convicted of an offence under Penal Code, s. 290 ; it appeared, however, that the accused had not engaged the house with the object of letting it out as a gaming-house :—*Held*, that the conviction was right.

Queen-Empress v. Thandavarayudu 364

3. ———, ss. 141, 143—*Unlawful assembly—Assertion of right:*

One of two village factions objected to the other passing in procession over a vacant piece of ground in the main street of the village. An injunction prohibiting the procession was obtained in the Court of the District Munsif on 20th March. On 11th May a procession was formed and approached the ground in question. Forty-six members of the first-named faction were assembled there to prevent the procession by force: the police ordered them to disperse: this order having been neglected the police prevailed on the other faction to abandon the procession:—*Held*, that the persons who did not disperse on being ordered to do so were guilty of the offence of being members of an unlawful assembly.

Queen-Empress v. Tira Kadu

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4. ———, s. 214—*Screening an offender:*

The accused agreed to give Rs. 10 to Saminatha Pillai in consideration of his not giving evidence against Kolundavelu who was charged with the offences of house-breaking by night and theft in a building. Saminatha Pillai gave evidence against Kulundavelu who was, however, acquitted. The accused was charged under Penal Code, s. 214, but was acquitted:—*Held*, that the acquittal was right.

Queen-Empress v. Saminatha

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5. ———, ss. 378, 403—*Post Office Act—Act XIV of 1866, s. 48—Secreting and fraudulently appropriating letters—Theft—Dishonest misappropriation:*

The accused, being in the employ of Government in the Post Office Department, while assisting in the sorting of letters, secreted two letters with the intention of handing them to the delivery peon, and sharing with him certain moneys payable upon them. He was charged under the Indian Post Office Act, s. 48:—*Held*, (1) that since the intention of the accused was not to prevent the delivery of the letters to the addressees, he was not guilty of the offence of secreting them within the meaning of that section; (2) that he was guilty of the offence of stealing and of fraudulently misappropriating the letters within the meaning of that section, and of the offences of theft and attempt to commit dishonest misappropriation of property within the meaning of the Penal Code.

Queen-Empress v. Venkatasami

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- POST OFFICE ACT—ACT XIV OF 1866, s. 48—*Secreting and fraudulently appropriating letters—Theft—Dishonest misappropriation—Penal Code (Act XLV of 1860), ss. 378, 403:*

The accused, being in the employ of Government in the Post Office Department, while assisting in the sorting of letters, secreted two letters with the intention of handing them to the delivery peon, and sharing with him certain moneys payable upon them. He was charged under the Indian Post Office Act, s. 48:—*Held*, (1) that since the intention of the accused was not to prevent the delivery of the letters to the addressees, he was not guilty of the offence of secreting them within the meaning of that section; (2) that he was guilty of the offence of stealing and of fraudulently misappropriating the letters within the meaning of that section, and of the offences of theft and attempt to commit dishonest misappropriation of property within the meaning of the Penal Code.

Queen-Empress v. Venkatasami

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- PRACTICE—*Civil Courts Act—Act III of 1873 (Madras), s. 13 (2)—Appeal from Subordinate Court—Proceeding to be adopted when a District Court erroneously returns an appeal petition for presentation in High Court—Civil Procedure Code, s. 57:*

Certain members of a Mapilla family sued the others in a Subordinate Court to recover their distributive share under Muhammadan law. The property to be divided was more than Rs. 5,000 in value, but the share claimed by the plaintiffs was less. The Subordinate Judge passed a decree, against

which an appeal was preferred to the District Court, but the District Judge returned the appeal for presentation in the High Court. The appellants preferred a second appeal to the High Court against the decision of the District Judge, and also presented a petition praying for the revision of his proceedings under Civil Procedure Code, s. 622:—*Held*, (1) that the District Court had jurisdiction to entertain the appeal; (2) that neither a second appeal nor a petition under Civil Procedure Code, s. 622, was the appropriate proceeding to be adopted by the appellants, but an appeal as from an order made under Civil Procedure Code, ss. 57, 582. The error of the appellants being one of form merely, the Court amended the second appeal as an appeal from an order of the District Court and directed the District Judge to receive and dispose of the appeal from the Subordinate Court.

Kunhikutti v. Achotti

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2. ——— *Inconsistent pleas—Hindu Law—Adoption made the day after the adoptive father made his will—Adoptive son bound by the will:*

A Hindu wrote his will devising certain ancestral property to his wife and on the following day he registered it and took the plaintiff in adoption. The testator died shortly afterwards. It was found that the plaintiff's natural father was aware of the dispositions contained in the will and that the testator would not have adopted the plaintiff but for the consent of the natural father to those dispositions. The defendants who claimed under a gift from the wife had denied the adoption in their written statement, and on appeal raised the further plea that the adoption, if any, was conditional on the provisions of the will being acquiesced in:—*Held*, (1) that the defendants were not precluded from succeeding on the latter of these inconsistent pleas; (2) that the plaintiff was not entitled to the ancestral property devised by the will to the testator's wife. *Lakshmi v. Subramanya* (I.L.R., 12 Mad., 490) followed.

Narayanamsami v. Ramasami

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3. ——— *Non-joinder—Civil Procedure Code—Act X of 1877, s. 294, amended by Act XII of 1879—Purchase at a Court-sale on behalf of a judgment-creditor without permission of the Court:*

Under Civil Procedure Code of 1877, as amended by Act XII of 1879, a purchase made at a Court-sale on behalf of a judgment creditor was not invalid for want of permission of the Court. Where a suit is brought by one member of an undivided Hindu family to recover land, the property of the family, and no objection is taken at the hearing on the ground of the non-joinder of the plaintiff's co-parceners, it is not open to an unsuccessful defendant to raise such objection on appeal.

Paramasiva v. Krishna

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4. ——— *Non-joinder—Malabar Law—Suit by one of two co-uralers:*

In a suit by one of two co-uralers of a Malabar devasom to recover land, the property of the devasom, the other uralan being joined as defendant, there was no evidence that the latter had repudiated the right of the plaintiff to sue in conjunction with himself, and it appeared that he had not been consulted as to the institution of the suit:—*Held*, that the suit was bad for non-joinder of the co-uralan as plaintiff.

Parameswaran v. Shangaran

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5. ——— *Succession Act—Act X of 1865, s. 187—Hindu Wills Act—Act XXI of 1870, s. 2—Estate of deceased Hindu—Representative:*

A Hindu, who was one of the defendants in a suit, died leaving a will. The executors appointed by the will did not take out probate; and the property of the deceased came into the possession of his divided brothers, who were thereupon brought on to the record of the suit as the representatives of the deceased defendant. A decree was passed for the plaintiff by consent. The mother of the deceased who would, apart from the will, have been his legal representative, now sued to set aside the above decree, having previously obtained a declaration that she was entitled to the property

of the deceased in a suit against his brother above referred to :—*Held*, that the plaintiff was not entitled to maintain the suit.

Janaki v. Dhanu Lall 454

PRIVY COUNCIL—Practice—Refusal of rehearing—“res noviter :”

The judgment of the Judicial Committee reported to and confirmed by Her Majesty in Council cannot be re-opened only for the reason that new evidence is forthcoming. In re *Appa Rao* (I.L.R., 10 Mad., 73) referred to.

Srimantu Raja Yarlagaddu Durga v. Srimantu Mallikarjuna 439

REGISTRATION ACT—ACT III OF 1877, ss. 17 (d), 49—Specific Relief Act—Act I of 1877, s. 4 (c)—Admissibility of unregistered sale-deed—Suit for specific performance of contract to sell land :

The defendant executed a sale-deed of certain land to the plaintiff. The instrument bore Re. 1 stamp only. The plaintiff alleged that the defendant had improperly refused to register the sale-deed and prayed for a decree compelling its registration and for the possession of the land in question :—*Held*, that the unregistered instrument was admissible in evidence, and that in any case, secondary evidence of its contents was admissible, the document having remained unregistered through no fault of the plaintiff.

Nagappa v. Devu 55

REGULATION V OF 1804—Aliyasantana Law—Inheritance—Uncongenital insanity—Suit by an unadjudged lunatic by the Agent of the Court of Wards as guardian—Authority of the Court of Wards—Estates of lunatics subject to Mufussal Courts—Act XXXV of 1858—Code of Civil Procedure, s. 464 :

A Jain, who was subject to the Aliyasantana law, made a will, whereby he disposed of the property of his family in favour of certain persons, and died. The plaintiff, a female, was the sole surviving member of the testator's family, but it was admitted that she was, and for more than fifty years had been, a lunatic, though she had not been declared to be so under Act XXXV of 1858; it appeared that her lunacy was not congenital. She sued, by the Collector of South Canara, the Agent for the Court of Wards :—*Held*, (1) that the plaintiff was not excluded from inheritance by reason of lunacy under Aliyasantana law, and the will, in favour of the defendants, was invalid; (2) that the Court of Wards had power to take cognizance of the plaintiff's case under Regulation V of 1804; (3) that although the Court of Wards should ordinarily obtain a declaration under Act XXXV of 1858 in cases where the lunacy of a ward is open to question their failure to do so in the present case was not fatal to the suit; (4) that Civil Procedure Code, s. 464, was accordingly applicable to the case; (5) that the appointment of the Collector, as guardian to the plaintiff, was legal and valid. In deciding what was the extent of the property which the plaintiff was entitled to inherit under the above rulings, certain documents adduced as evidencing partition of the family property were held to evidence merely arrangements for separate enjoyment.

Sanku v. Puttamma 289

REGULATION IV OF (1831 MADRAS):

See INAM COMMISSION.

RELIGIOUS ENDOWMENTS ACT—ACT XX OF 1863, ss. 3, 4—Civil Procedure Code, s. 31—Misjoinder of causes of action—Hereditary trusteeship—Suspension from trusteeship and right of puja—Maintenance in office on terms :

Suit by certain Dikshadars or hereditary trustees of the Chitambaram temple against others of the Dikshadars praying for their removal from office and for a money decree, alleging that they had been jointly guilty of misconduct in respect of temple property in their custody and had obstructed the repair of certain shrines. The District Judge passed a decree suspending some of the defendants from the office of the trustee and the right of puja for a period which was not defined, he also passed a decree for the money claimed :—*Held*, (1) that the suit was not bad for misjoinder of causes of

action; (2) that the operation of Act XX of 1863 was not excluded by the admission that the trusteeship was hereditary in certain families; (3) that the District Judge had jurisdiction under Act XX of 1863 to deprive the defendants of the right of puja. *Held further*, on the evidence, that the defendants merited the punishment which had been inflicted on them. Decreed that the suspension of the defendants be withdrawn on the terms that they file an undertaking with two sureties that they would restore certain property belonging to the temple now missing, and that they would duly conform to the decision of the majority of Dikshadars as to the management of temple affairs, &c.

Natesa v. Ganapati 103

ss. 14, 18—Mutt—Want of asceticism of paradesi—Removal of paradesi—Form of decree—Civil Procedure Code, ss. 13, 43, 539—Res judicata—Charity :

The plaintiff, the zamindar of Sivagunga, sued in a Subordinate Court to remove the defendant from the office of head of a mutt. The defendant was a married man living with his wives and children, whom he maintained with the produce of the property of the mutt, and it appeared that he had failed to perform the ceremonies of the institution. The mutt in question came into existence under a deed of endowment or “charity grant,” whereby the first zamindar of Sivagunga granted land to his guru for the erection and maintenance of a mutt and the performance of certain religious exercises in perpetuity, and provided that the head of the mutt should be of the line of disciples of and the original grantee whose spiritual family he desired to perpetuate. In 1867 a predecessor in title of the plaintiff had sued unsuccessfully to recover certain property of the mutt from the defendant, alleging another cause of action pro than his status as a married man and his misappropriation of the mutt property; and in that suit it was established that the head of the mutt for the time being had the right to appoint his successor and that such appointment was not subject to confirmation by the zamindar. No sanction had been obtained for the institution of the present suit. It appeared that the trusts of the mutt had been violated and the income misapplied, and that there was no qualified disciple in whom the right of succession had vested, and that the members of the plaintiff's family were the only persons interested in the appointment :—*Held*, (1) that the jurisdiction of the Subordinate Court was not ousted by Act XX of 1863 since the trusts of the institution were in the nature of private trusts; (2) that sanction under s. 539 of the Civil Procedure Code was not a pre-requisite of the suit for the same reason; (3) that the suit was not barred by limitation, its object being to prevent a specific endowment from being diverted from its legitimate object and to re-attach it to that object; (4) that the suit was not barred under s. 13 or s. 43 of the Civil Procedure Code; (5) that the proper decree was (1) to declare the plaintiff's right to appoint a qualified person with the concurrence of the rest of his family, (2) to direct him to do so within a given time, failing which the suit should stand dismissed with costs. If such appointment was made, notice should be given to the other members of the plaintiff's family before it was confirmed: if such appointment were confirmed, the property should be directed to be delivered to the person appointed to be administered in accordance with the trusts and usage of the mutt. *Semble*: that the paradesi or head of the mutt might be a married man, provided he had been duly initiated.

Sathappayyar v. Periasami

RENT RECOVERY ACT—ACT VIII OF 1865 (MADRAS), ss. 3, 4, 7, 8, 9, 37—Suit to enforce exchange of patta and muchalka—Amendment of patta :

Held by Collins, C.J., Muttusami Ayyar and Parker, JJ. (Shepherd, J., diss.) that an ordinary Civil Court has jurisdiction to entertain a suit to enforce acceptance of a patta and execution of a muchalka :—*Held further*, that if the patta which has been tendered is found not to be a proper one, such a Court cannot amend it and direct the tenant to execute a muchalka corresponding with it as amended, but can, in a suit properly framed for that purpose, pass a decree declaring what is a proper patta.

Ramayyar v. Vedachalla 441

2. *patta—Form of rent determined by implied contract—Variation in amount of rent:* ss. 9, 11—*Form of*
 In a landlord's suit to enforce acceptance of a patta and execution of a muchalka by the defendants, it appeared that the predecessor in title of the defendants had accepted from the predecessor in title of the plaintiff in 1849 a cowle for 11 years, which provided for payments in kind, but since the expiry of that period the rent had always been paid in money, though the amount varied. The tenant was described in the cowle as a sukavasi raiyat, and the defendants also claimed to be sukavasi tenants:—*Held*, that it was unnecessary to determine the cause of the variations in the amount of rent, and that an agreement that the rent should continue to be paid in money should be implied, and the landlord accordingly was not entitled to impose a patta providing for payment of rent in kind.
Polu v. Ragavammal 52
3. *to rent—Land irrigated under Kistna anicut—Collector's sanction to increase of rent:* s. 11—*Implied contract as*
 Land in a zamindari in the Kistna delta was newly irrigated from anicut channels. The zamindar tendered pattas at wet rates:—*Held*, (1) that the zamindar was not entitled to levy increased rates without the Collector's sanction under s. 11 of Act VIII of 1865, although he had expended money on the channels; (2) that payment for five years of such wet rates under a five years' lease did not imply a contract to continue such payments; (3) that a stipulation in the previous lease binding the tenants to pay such increased rates in case of future irrigation did not bind the tenants after the term of that lease expired.
Narasimha v. Ramasami 44
- RES JUDICATA:**
See CIVIL PROCEDURE CODE, s. 13.
- "**RES NOVITER**"—*Privy Council—Practice—Refusal of rehearing:*
 The judgment of the Judicial Committee reported to and confirmed by Her Majesty in Council cannot be re-opened only for the reason that new evidence is forthcoming. In re *Appa Rao* (I.L.R., 73) referred to.
Srimantu Raja Yarlagaddu Durga v. Srimantu Mallikarjuna 439
- SCHEDULED DISTRICTS ACT—ACT XIV OF 1874, NOTIFICATION UNDER—**
Criminal Procedure Code, s. 2—Letters Patent, s. 28—Agency tracts, jurisdiction of High Court over—Agency Rules—Act XXIV of 1839 (Madras), s. 3:
 The High Court set aside a conviction by the Agent to the Governor in Vizagapatam on a charge of culpable homicide not amounting to murder, and directed that the accused be tried in the Sessions Court at the Vizagapatam on a charge of murder. The accused was tried accordingly, and was convicted of murder, and he appealed to the High Court. The Agency tract of Vizagapatam is a scheduled district under Act XIV of 1874, and the Governor in Council extended the operation of the Criminal Procedure Code of 1861 to it by a notification made under that Act in 1862. In 1863 the Governor Agent a Sessions Judge under the Criminal Procedure Code:—*Held*, that the High Court had jurisdiction to direct that the accused be tried by the Sessions Judge under the provisions both of the Letters Patent and of the Criminal Procedure Code.
Queen-Empress v. Budara Janni 121
- SECONDARY EVIDENCE of lost grant by Government—Inam Commission—Regulation IV of 1831 (Madras)—Act IV of 1862 (Madras)—Resumption of Inam—East India Company's jaghire—Act of State—Menkaval lands—Mirasi rights, evidence of:**
 In a suit to declare the plaintiff's title to a shroetrim village which was included in the jaghire granted in 1763 by the Nabob of the Carnatic to the East India Company, it appeared that the village in question had been previously granted by the Nabob free of assessment to the Kazi of Madras as an endowment for his office, and afterwards to the son of the first grantee

personally, without condition of service. In 1779 the British Government confirmed the village in perpetuity to the second grantee on account of the office of Kazi which he filled, and to his direct heirs who should be fit for that office. In 1862 on failure of the direct male line, the grantee's grandson by a daughter was nominated to the office of Kazi with the approval of Government, who directed he should hold the village, adding that it had been assigned as an endowment for that office. In the same year the Inam Commissioner confirmed it as a personal inam, enfranchised it and granted a title-deed to the holder. In 1866 Government ordered that the village should be registered as an endowment of the Kaziship and the title-deed cancelled, and in 1868 notified in the Gazette that the title-deed which was not produced was cancelled. Between the dates of the above order and notification the Kazi transferred the village to the plaintiff under a deed of perpetual lease and placed him in possession. But in 1873 Government resumed the village and subsequently directed that the whole of its net revenue be paid to the Kazi. The Kazi, from whom the plaintiff claimed, died in 1868. An inam of certain Menkaval lands, which had formerly been allotted to the village watchman as rainam, had been granted to the Kazi in 1802-3; they were cultivated by raiyats who paid varam to the inamdar. The order of resumption in 1873 had no reference to these lands, but in 1877 Government issued pattas to the raiyats:—*Held*, (1) that the grant of 1779, the original document not having been produced by the plaintiff, was sufficiently proved by a translation produced from official custody and certified by the Collector in 1838 to be correct and attested by the Persian Translator to Government; (2) that it was competent for the Government in 1779 to alter the nature of the grant of 1761 as an act of State; (3) that on the right construction of Regulation IV of 1831 and Act IV of 1862, and in view of the facts that the plaintiff must have been aware of the nature of the tenure and of the contents of the grant of 1779 and the cancellation of the inam title-deed, the Government was not acting *ultra vires* in cancelling the enfranchisement, &c.; (4) that the Kazi through whom the plaintiff claimed having died in 1868 there was no reason to question the resumption in 1873; (5) that the plaintiff was entitled to possession of the Menkaval lands, the action of Government in issuing pattas to the raiyats being *ultra vires*. Issues first framed on appeal as to the plaintiff's claim to mirasi rights and Menkaval lands. Evidence of mirasi rights considered.

Karunakara Menon v. Secretary of State for India 481

2. *Registration Act—Act III of 1877, ss. 17 (d), 49—Specific Relief Act—Act I of 1877, s. 4 (c)—Admissibility of unregistered sale-deed—Suit for specific performance of contract to sell land:*

The defendant executed a sale-deed of certain land to the plaintiff. The instrument bore Re. 1 stamp only. The plaintiff alleged that the defendant had improperly refused to register the sale-deed and prayed for a decree compelling its registration and for the possession of the land in question:—*Held*, that the unregistered instrument was admissible in evidence, and that in any case, secondary evidence of its contents was admissible, the document having remained unregistered through no fault of the plaintiff.

Nagappa v. Devu 55

- SPECIFIC RELIEF ACT—ACT I OF 1877, s. 4 (c)—Admissibility of unregistered sale-deed—Suit for specific performance of contract to sell land—Registration Act—Act III of 1877, ss. 17 (d), 49:**

The defendant executed a sale-deed of certain land to the plaintiff. The instrument bore Re. 1 stamp only. The plaintiff alleged that the defendant had improperly refused to register the sale-deed and prayed for a decree compelling its registration and for the possession of the land in question:—*Held*, that the unregistered instrument was admissible in evidence, and that in any case, secondary evidence of its contents was admissible, the document having remained unregistered through no fault of the plaintiff.

Nagappa v. Devu 55

2. *s. 18 (a)—Hindu Law—Adoption—Niyoga—Gift—Transfer of Property Act—Act IV of 1882, s. 43:*

A member of an undivided Hindu family, consisting of himself, his adoptive son and his uncle, sold certain land belonging to the family to the

plaintiff. In a suit by the plaintiff for a declaration of his title to, and for possession of, the land, it appeared that the sale was not justified by any circumstances of family necessity; and that the above-mentioned adoptive son was the son of the paternal uncle of the adoptive father. During the pendency of the suit the uncle died, having made a gift of his property to his daughter-in-law:—*Held*, (1) that the adoption was not invalid by reason of the above-mentioned circumstances; (2) that the gift by the uncle to his daughter-in-law was invalid; (3) that the plaintiff was entitled to a moiety of the land sold to him.

Virayya v. Hanumanta

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3. —————, ss. 20, 54, 57—*Stamp Act—Act I of 1879, s. 3, cl. 4—Bond—Contract Act—Act IX of 1872, s. 39—Contract for personal service—Contract for more than three years—Interim injunction*:

The defendant signed an agreement in England with a railway company, whereby he contracted to serve the company exclusively for four years in India under a penalty of £100. The defendant having come to India at the expenses of the company and served it for two years, left its service for that of another employer, alleging that he had not been fairly treated by a locomotive superintendent:—*Held*, (!) that the instrument executed by the defendant was an agreement merely and did not require to be stamped as a bond; (2) that the defendant had no right to rescind the agreement and the plaintiff company was entitled to an interlocutory injunction restraining defendant from serving others on the terms that the plaintiff company should consent to retain him in its employ.

Madras Railway Company v. Rust

18

4. —————, ss. 39, 40, 42—*Cancellation of instrument—Declaratory decree—Limitation Act—Act XV of 1877, sch. II, art. 91*:

A suit was filed in 1888 on behalf of a Malabar tarwad by two of its members to recover property improperly alienated in 1879 under a kanom instrument by the karnavan, who had since been removed from office:—*Held*, that since a prayer for the cancellation of the kanom instrument was not an essential part of the plaintiff's relief, the suit was not barred by the three years' rule in Limitation Act, 1877, sch. II, art. 91.

Unni v. Kunchi Amma

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5. —————, s. 42—*Declaratory decree—Withdrawal portion of claim*:

Plaintiffs, members of a Malabar tarwad, sued (1) for the cancellation of a deed of gift of certain immoveable property alleged to belong to their tarwad, (2) for restoration of the property the subject of gift, either to plaintiff No. 1, or defendant No. 1, the present karnavan, on behalf of the tarwad. The Munsif dismissed plaintiff's suit on the merits. On appeal, the Subordinate Judge allowed plaintiffs, who were unable to pay the Court fees for recovery of the property, to withdraw that portion of the claim, and decreed for plaintiff as to the remaining portion, viz., for cancellation of the document. On second appeal it was *held*, reversing the decree below, that the prayer for restoration of the property being in the circumstances of the case maintainable, it was not competent to plaintiffs to restrict themselves to the other kind of relief sought, and that the maintenance of the suit in its maimed form would be an evasion of s. 42 of the Specific Relief Act.

Bikutti v. Kalendan

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6. —————, s. 42—*Objection that consequential relief was available—Land Acquisition Act—Act X of 1870—Claim to share of compensation under—Valuation in private transaction*:

The plaintiff, as heir to her husband, brought a suit, in which Government was not represented, for a declaration of her title to a quarter-share of the joint value of land taken up under the Land Acquisition Act. It appeared that the plaintiff's husband had mortgaged his share of the land in question to the defendants' predecessor in title in 1872 by an instrument in which his share was valued at Rs. 375:—*Held*, (1) that the suit for a declaration only was maintainable; (2) that the valuation of the plaintiff's husband's share in the instrument of 1872 was not binding on the plaintiff in the

present suit. *Per cur.*—Assuming, for the moment, that the plaintiff was able and called upon in this case to ask for further relief, we are of opinion, following the decision of the Bombay High Court in *Limbu Bin Krishna v. Rama Bin Pimplu* (I.L.R., 13 Bom., 548), that the suit should not, at the present stage, be dismissed on this ground, the objection not having been raised in either of the Lower Courts.

Chomu v. Amma

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7. —————, s. 42—*Suit for declaration—Fraudulent decree—Injunction*:

Suit for a declaration that a decree of a Subordinate Court was passed fraudulently, the Judge having been bribed by the present defendant:—*Held*, that the suit did not lie. *Per cur.*—The remedy would appear to be by way of injunction to restrain the party from executing the decree.

Kunhamed v. Kutti

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8. —————, s. 56 (b)—*Malabar Law—Suit by junior members of a tarwad—Injunction restraining execution of a decree obtained in a suit against plaintiffs' karnavan*:

In a suit brought in a Subordinate Court by the junior members of a Malabar tarwad against their karnavan and others, the plaintiffs prayed for a declaration of the uraima right of their tarwad in a certain devasom, and for an injunction to restrain the defendants, other than the members of the plaintiffs' tarwad, from executing a decree of a District Court, passed on appeal from a Munsif's Court, whereby certain lands of the devasom were decreed to be surrendered to them in the character of uralers; it appeared (1) that plaintiffs' karnavan was a party to the suit in which the above-mentioned decree was passed; (2) that the plaintiffs' tarwad was otherwise entitled to the uraima right by adverse possession, if not immemorial title:—*Held*, (1) that the plaintiffs were entitled to maintain the suit without proof of fraud and collusion on the part of their karnavan in the previous suit; (2) that the injunction sought was not precluded by Specific Relief Act, s. 56 (b); (3) that the plaintiffs were entitled to the decree as prayed.

Appu v. Raman

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- STAMP ACT—ACT I OF 1879, s. 3, cl. 4—*Bond—Specific Relief Act—Act I of 1877, ss. 20, 54, 57—Contract Act—Act IX of 1872, s. 39—Contract for personal service—Contract for more than three years—Interim injunction*:

The defendant signed an agreement in England with a railway company, whereby he contracted to serve the company exclusively for four years in India under a penalty of £100. The defendant having come to India at the expense of the company and served it for two years, left its service for that of another employer, alleging that he had not been fairly treated by a locomotive superintendent:—*Held*, (1) that the instrument executed by the defendant was an agreement merely and did not require to be stamped as a bond; (2) that the defendant had no right to rescind the agreement and the plaintiff company was entitled to an interlocutory injunction restraining defendant from serving others on the terms that the plaintiff company should consent to retain him in its employ.

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2. —————, ss. 9, 33, 34, Rule 6—*Promissory note—Hundi Stamp*:

In a suit on a promissory note for Rs. 4,300, which was executed on an impressed sheet bearing an impressed stamp with the word "hundi" at the top and the words "three rupees" at the bottom of the impression:—*Held*, on its appearing that the instrument was correctly stamped as to the amount of duty, that the instrument was admissible in evidence.

Bank of Madras v. Subbarayalu

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3. —————, ss. 17, 33, 37(b)—*Act XXXVI of 1860, s. 13—Act X of 1862, s. 15—Unstamped document executed in 1862 out of British India—Penalty*:

A document comprising an assignment of the executant's interest under a will, and also a power-of-attorney, was executed on 26th May 1862 in Australia. It was sought in 1890 to use the document in Madras, but it was

	PAGE
not stamped:— <i>Held</i> , that no penalty could be levied upon it under the Stamp Act of 1879.	
Reference under Stamp Act, s. 46	255
STATUTES 11 and 12 Vic., Cap. 21:	
See <i>INSOLVENT ACT</i> .	
SUCCESSION ACT—ACT X OF 1865, s. 187—Hindu Wills Act—Act XXI of 1870, s. 2—Estate of deceased Hindu—Legal representatives:	
A Hindu, who was one of the defendants in a suit, died leaving a will. The executors appointed by the will did not take out probate; and the property of the deceased came into the possession of his divided brothers, who were thereupon brought on to the record of the suit as the representatives of the deceased defendant. A decree was passed for the plaintiff by consent. The mother of the deceased who would, apart from the will, have been his legal representative, now sued to set aside the above decree, having previously obtained a declaration that she was entitled to the property of the deceased in a suit against his brothers above referred to:— <i>Held</i> , that the plaintiff was not entitled to maintain the suit.	
<i>Janaki v. Dhanu Lall</i>	454
SUCCESSION CERTIFICATE ACT—ACT VII OF 1889, s. 4 (b)—Application for execution:	
Act VII of 1889, s. 4, cl. (b) does not apply to applications to execute decrees which were pending at the date of the passing of the Act, but it refers to applications made after the Act came into force.	
<i>Rama Rau v. Chellayamma</i>	458
2. of deceased creditor:, s. 4— <i>Suit by undivided son</i>	
A Hindu is not entitled to sue on a bond executed in favour of his undivided father, deceased, without the production of a certificate under Act VII of 1889, unless it appears on the face of the bond that the debt claimed was due to the joint family, consisting of the father and the son.	
<i>Venkataramanna v. Venkayya</i>	377
SUITS VALUATION ACT—ACT VII OF 1887, s. 11—Jurisdiction—Civil Courts Act (Madras)—Act III of 1873, s. 12—Valuation of relief—Suit by a court purchaser for partition:	
The purchaser at a Court-sale of eight pangus out of an estate of 28½ pangus sold them to the plaintiff. The whole estate was worth more than Rs. 2,500, but the eight pangus sold to the plaintiff were worth less than that sum. The plaintiff brought this suit in a Subordinate Court against his vendor and certain persons, who were in possession of and claimed to be entitled by right of purchase to the whole estate, for partition and possession of his eight pangus. It was found that the plaintiff was entitled to the eight pangus purchased by him as against the defendants:— <i>Held</i> , (1) that the suit was within the pecuniary limits of the jurisdiction of a District Munsiff; (2) that since the disposal of the suit had not been prejudicially affected, Suits Valuation Act, s. 11, was applicable and the decree of the Subordinate Court should be confirmed. <i>Quære</i> :—Whether the Subordinate Court has not concurrent jurisdiction with a District Munsiff in suits less than Rs. 2,500 in value.	
<i>Krishnasami v. Kanakasabai</i>	183
TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 43—Hindu Law—Adoption—Niyoga—Gift—Specific Relief Act—Act I of 1877, s. 18 (a):	
A member of an undivided Hindu family, consisting of himself, his adoptive son and his uncle, sold certain land belonging to the family to the plaintiff. In a suit by the plaintiff for a declaration of his title to, and for possession of, the land, it appeared that the sale was not justified by any circumstances of family necessity; and that the above-mentioned adoptive son was the son of the paternal uncle of the adoptive father. During the pendency of the suit the uncle died, having made a gift of his property to his	

daughter-in-law:— <i>Held</i> , (1) that the adoption was not invalid by reason of the above-mentioned circumstances; (2) that the gift by the uncle to his daughter-in-law was invalid; (3) that the plaintiff was entitled to a moiety of the land sold to him.	
<i>Virayya v. Hanumanta</i>	459
2., s. 52—" <i>Lis pendens</i> :"	
Of the three owners of certain properties, two executed a mortgage of their interest in December 1872. In 1879 a creditor of the three obtained a money-decree against them, and, in execution, attached, <i>inter alia</i> , the properties subject to the mortgage. In July 1880 the mortgagee intervened in execution, and an order having been made directing that the property be sold subject to his mortgage lien, filed a suit upon his mortgage. The property was brought to sale in execution of the money-decree in November 1880, and the defendant became the purchaser. The mortgagee obtained a decree in the following February, and the mortgaged property was sold in execution in March 1884 and was purchased by one who assigned his interest to the plaintiff:— <i>Held</i> , that the defendant's purchase was subject to the doctrine of <i>lis pendens</i> .	
<i>Kunhi Umah v. Amed</i>	491
3., ss. 58 (d), 67— <i>Usufructuary mortgage with a personal covenant—Suit by mortgagee for sale:</i>	
In a suit for sale by a mortgagee, it appeared that the mortgage comprised a covenant by the mortgagor for payment of the mortgage amount, but otherwise answered the definition of an usufructuary mortgage contained in Transfer of Property Act, s. 58(d):— <i>Held</i> , that the mortgagee was not precluded by Transfer of Property Act, s. 67, from bringing the property to sale under the mortgage.	
<i>Ramayya v. Gururua</i>	282
4., ss. 60, 62— <i>Partial redemption—Contribution:</i>	
In 1884 A and B, being divided brothers, hypothecated to X and Y the house now in suit, which was A's family property, and a house belonging to B. In 1886 A hypothecated the house now in suit to the plaintiff. In 1898 B sold his house for Rs. 700 by a conveyance attested by X and Y who accepted Rs. 650 in discharge of a moiety of the debt secured by the hypothecation of 1884, the balance of Rs. 150 being retained by B. In this suit the plaintiff sought to recover the principal and interest due on his security of 1886, and he contended that X and Y who were defendants Nos. 4 and 5 were not justified in permitting B to retain Rs. 150 of the price and that that sum should accordingly be debited against them in the accounts:— <i>Held</i> , that under Transfer of Property Act, s. 62, plaintiff was not entitled to compel defendants Nos. 4 and 5 to satisfy their debt against B's house so far as it extended.	
<i>Neelamegan v. Govindan</i>	71
5., s. 83— <i>Deposit in Court by mortgagor:</i>	
The deposit intended by Transfer of Property Act, s. 83, must be made unconditionally. Accordingly when the mortgagor in making the deposit prays that the amount should be paid out to the mortgagee on his producing certain deeds the provisions of the section are not complied with.	
<i>Nanu v. Manchu</i>	49
6., s. 99— <i>Money decree "on the responsibility of" mortgage premises—Attachment of mortgage premises—Purchase by mortgagee:</i>	
A usufructuary mortgagee left the mortgage premises in the possession of the mortgagor under a rent agreement in 1878. The rent having fallen into arrear, the mortgagee sued the mortgagor in October 1882 and obtained a decree for the arrear which provided for its payment by the mortgagor "on the responsibility of the defendant's mulgeni right" in the mortgage	

premises. The decree-holder attached the mortgage premises in execution, and having brought them to sale and purchased them himself, he now sued for possession:—*Held*, that the sale was invalid under Transfer of Property Act, s. 99.

Durgayya v. Anantha 74

VENDOR AND PURCHASER—Conditional right of repurchase—Mortgage by conditional sale:

A having previously hypothecated certain land to B, executed a conveyance of it to him in 1873 for a consideration which was now found to have been an inadequate price. On the same day, B executed to A a "counter-part document" by which he covenanted to reconvey the land and return the sale-deed if the sale amount be repaid to him in cash on 27th May 1875. The documents contained no provision as to interest and reserved no power for the purchaser to recover his purchase money. In 1888 A's representative, alleging that the transaction evidenced by the above documents was a mortgage, brought a suit to redeem it:—*Held*, that the transaction did not constitute a mortgage, and that the plaintiff was not entitled to redeem.

Ayyavayyar v. Rahimansa 170

WILL, CONSTRUCTION OF—Restricted power to widow to adopt:

A Hindu in 1884 made a will therein described as being executed in favour of the testator's wife in which he said "you must adopt for me a boy you like from the children that may be born in the families of my brothers," and after making certain provisions as to his property, &c., added "the principal object of this will is that you should adopt for me any suitable boy." After the testator's death the widow, as in exercise of the power conferred on her by the will, purported to adopt a boy who did not come within the description in the first of the above clauses, although one of the testator's brothers offered his own son in adoption. In a suit by the testator's brothers for a declaration that the adoption purported to have been made by the widow was invalid:—*Held*, that notwithstanding the general terms of the second of the above clauses, the widow's power to adopt was restricted by the first and the adoption purported to have been made by her was invalid.

Amirthayyan v. Ketharamayyan 66

ZAMINDARI—Present partibility of a zamindari originally existing before 1759—Grant by Government in 1802, and again in 1835 of the same zamindari—Absence of intention to grant it as impartible—*Sanad-i-milkiyat-i-istimrari*:

Although it might be taken that the Mirangi zamindari was formerly held on a military tenure under a rāj, and that it continued to be held on the same tenure after it had been incorporated in another zamindari, and, subsequently, when, by conquest, it became part of the Vizianagaram zamindari, which was dismembered in 1795, and, even if impartibility was the rule then applicable to the estate, yet the subsequent dealings with the zamindari, the nature and terms of the grants under which it was held after 1802, and the absence of proof of its having been impartible during the present century, also the character of the estate, which was in no way distinguishable from that of an ordinary zamindari assessed to the revenue, all led to the conclusion that the zamindari was now partible. It was clear from the kabulyat, or instrument of assent to the *Sanad-i-milkiyat-i-istimrari* of 25th April 1804, that the latter was in the ordinary form of such grants, and there was no ground for inferring that the Government intended to create an impartible zamindari, or to restore an old one with impartibility attached. In 1835, there was, for a second time, such a dealing with the estate by the Government, in granting it again by *sanad*, as showed that there was no intention to the effect above-mentioned. The case of the *Hansapur Zamindari* (12 M.I.A., 1) situate in Behar, as to which their Lordships in 1867 held that it must be taken to retain its previous old quality of impartibility, after having been granted in 1790, was distinguished.

Sri Raja Satrucharla Jagannadha Razu v. Sri Raja Satrucharla Ramabhadra Razu 237

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SATHAPPAYYAR (DEFENDANT No. 1), APPELLANT,

v.

PERIASAMI (PLAINTIFF), RESPONDENT.*

1890.
April 22, 23.
August 13.

Mutt—Religious Endowments Act—Act XX of 1863, ss. 14, 18—Want of asceticism of paradasi—Removal of paradasi—Form of decree—Civil Procedure Code, ss. 13, 43, 539—Res judicata—Charity.

The plaintiff, the zamindar of Sivagunga, sued in a Subordinate Court to remove the defendant from the office of head of a mutt. The defendant was a married man living with his wives and children, whom he maintained with the produce of the property of the mutt, and it appeared that he had failed to perform the ceremonies of the institution.

The mutt in question came into existence under a deed of endowment or "charity grant," whereby the first zamindar of Sivagunga granted land to his guru for the erection and maintenance of a mutt and the performance of certain religious exercises in perpetuity, and provided that the head of the mutt should be of the line of disciples of the original grantee whose spiritual family he desired to perpetuate. In 1867 a predecessor in title of the plaintiff had sued unsuccessfully to recover certain property of the mutt from the defendant, alleging another cause of action than his status as a married man and his misappropriation of the mutt property; and in that suit it was established that the head of the mutt for the time being had the right to appoint his successor and that such appointment was not subject to confirmation by the zamindar. No sanction had been obtained for the institution of the present suit. It appeared that the trusts of the mutt had been violated and the income misapplied, and that there was no qualified disciple in whom the right of succession had vested, and that the members of the plaintiff's family were the only persons interested in the appointment:

Held, (1) that the jurisdiction of the Subordinate Court was not ousted by Act XX of 1863 since the trusts of the institution were in the nature of private trusts;

(2) that sanction under s. 539 of the Civil Procedure Code was not a prerequisite of the suit for the same reason;

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(3) that the suit was not barred by limitation, its object being to prevent a specific endowment from being diverted from its legitimate object and to re-attach it to that object;

(4) that the suit was not barred under s. 13 or s. 43 of the Civil Procedure Code;

(5) that the proper decree was (1) to declare the plaintiff's right to appoint a qualified person with the concurrence of the rest of his family, (2) to direct him to do so within a given time, failing which the suit should stand dismissed with costs. If such appointment was made, notice should be given to the other members of the plaintiff's family before it was confirmed: if such appointment were confirmed, the property should be directed to be delivered to the person appointed to be administered in accordance with the trusts and usage of the mutt.

Semole: that the paradesi or head of the mutt might be a married man, provided he had been duly initiated.

APPEAL against the decree of S. Gopalachariar, Subordinate Judge of Madura (East), in original suit No. 12 of 1888, passed in favour of the plaintiff.

The facts of this case appear sufficiently for the purposes of this report from the following judgments.

The defendant No. 1 preferred this appeal.

Mr. Johnstone for appellant.

Subramanya Ayyar and Bhashyam Ayyangar for respondent.

MUTTUSAMI AYYAR, J.—This is a regular appeal preferred by defendant No. 1 from the decree of the Subordinate Judge of Madura in the plaintiff's favour. The appellant is the paradesi or representative for the time being of a religious foundation called Sathappayyar's mutt, which is situated at Sivaganga in the district of Madura; and the respondent is the present zamindar of Sivaganga, who succeeded to the zamindari upon his father's death in 1883.

The matter in contest between them is the appellant's liability to be removed from possession of the mutt and its endowments in order that they may be made over either to the respondent or to an ascetic whom he may hereafter appoint. The respondent insisted on the appellant's removal from his position, first, because he was a married man living with his wives instead of being an ascetic who had renounced all secular ties, and, secondly, because he had violated the trusts of the institution by diverting the income of the endowment from its legitimate objects and mispending it upon his family and for his own purposes. Admitting his status as a married man, and the fact that he had two wives living with him, the appellant contended that the representative of the mutt

was not bound to be an ascetic. He denied the alleged breach of trust and the respondent's right to interfere with the management of the mutt or its endowments. He urged further (i) that the Subordinate Judge had no jurisdiction to entertain the suit, (ii) that it was bad for misjoinder of causes of action, (iii) that it was not maintainable without the sanction prescribed by section 539, Code of Civil Procedure, or Act XX of 1863, (iv) that the claim was *res judicata*, (v) that it was barred by limitation, (vi) that the respondent was not entitled to rely on matters which might have been, but had not been, urged by Ranee Kattama Natchiyar, his predecessor in title, in original suit No. 20 of 1867, (vii) that he had no cause of action at all, and that, if he had any, he could only sue to compel the appellant duly to perform the trusts of the institution. The Subordinate Judge overruled all the preliminary objections, and held on the merits that the paradesi of the mutt must be an ascetic, that the appellant was guilty of breach of trust, and that the respondent was entitled to ask the Court to remove the appellant from his position and to provide for the due performance of the trusts of the mutt by a competent person. On this view of the case, he passed a preliminary decree declaring that the appellant had rendered himself unfit for holding the mutt and its endowments, that he was liable to be ousted therefrom, that unless he obtained an order from the Appellate Court within three months staying further proceedings, the Subordinate Judge would, after issuing a notification in as public a manner as the circumstances of the case might require, calling for candidates for the headship of the mutt and after consulting the wishes and opinions of the appellant and the respondent, proceed to appoint, as a new trustee, such person as might, by his qualifications and character, promise to advance the interests of the institution, and after such appointment, to place the office and the properties in suit in his possession, removing the appellant therefrom. The Subordinate Judge directed also that the respondent's claim for mesne profits be dismissed and that the appellant do pay the respondent proportionate costs. Hence this appeal. The respondent too has objected to the decree under section 561 of the Code of Civil Procedure.

The institution came into existence in June 1734 under document I, which purports to be a "charity-grant" and to evidence a gift of land made by the first zamindar of Sivaganga to his guru or religious preceptor Sathappayyar. Thus, the relation

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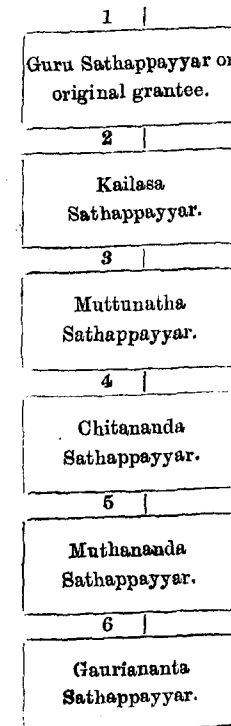
between the grantor and the grantee was that of disciple and preceptor. The grant was made in perpetuity and designed to endure so long as the sun and moon last and the line of disciples continues to exist. The grant purports also to have been made with power to alienate by sale or gift, but the power of alienation could only have been intended to be exercised consistently with the trusts mentioned in the instrument and without prejudice to the same. Though the transaction is described to be a gift of land, yet the document is termed a dharmasashanam or charity-grant. The land at Sivaganga, as comprised within the boundaries mentioned in the deed of endowment, is declared to be given in order that a muttam may be built thereon, that Sivayoga nishtai and other penances may be performed, and that the expenses of the necessary establishment may be paid. The first object of the gift or the first specific trust created by the document consists, therefore, in the erection and maintenance of a mutt in perpetuity, in the performance therein by the paradesi or head of the mutt for the time being of Sivayoga nishtai and other penances, and in the maintaining of the necessary establishment. Two more lands are described in the document to be granted for the performance of the annual gurupuja and for dehapuja.

Sivayoga nishtai is a form of meditating on god Siva in conventional use among paradesis or men of piety, and it consists in uttering alternately for a certain time, once in the morning and once in the evening, the two sacred words of five and eight letters, respectively, called panchaksharam and ashtaksharam with one's attention devoutly centered in God and in the attitude prescribed for religious meditation. In substance the expression denotes a form of worship and prayer. The expression "Gurupuja" signifies the annual ceremony performed by the head of the mutt for the time being in honor and for the spiritual benefit of his guru; and the word dehapuja means, in polite language, the self-support of a person who has a sacred or religious *status*.

Apart from the specific trusts indicated by the terms of the grant, there are two more trusts to be noticed. The first of them consists in the distribution of food among paradesis or Sudra ascetics and others whenever gurupuja is performed, but it must be observed that it is not an independent trust, but only the accompaniment or incident of gurupuja according to religious usage. The other trust consists in opening and keeping up a

water-shed in the mutt for the supply of drinking water to the poor during the hot season. Though the appellant denied in his evidence that it was customary to open and maintain a water-shed as part of the mutt charity, yet he admitted that the fact was otherwise in exhibit P, as was deposed to by several witnesses cited by the respondent. The maintenance, therefore, of a water-shed for supplying drinking water during the hot season as part of the mutt charity rests on custom rather than on the original grant. Document I states that succession to the office of paradesi of the mutt shall be in the line of disciples, but it is silent as to how and by whom the successor is to be chosen. It was, however, finally determined in original suit No. 20 of 1867 that the right of appointment vested in the head of the mutt for the time being, and that it did not require to be confirmed or ratified by the zamindar. It is also in evidence that the paradesi presiding over the institution first makes a person his disciple by initiating him in what is called "Brahmamantram," then teaches him "Sivayoga nishtai" and other penances and appoints him as his successor. After the death of the original grantee there have been five cases of succession, as shown below:—

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As regards the status of these representatives of the mutt, the first three had renounced all secular ties and then entered the order of ascetics or paradesis. The fourth was a married man who left a widow surviving him, the fifth was a widower when he became a paradesi, and the sixth is a married man living with his two wives. It would seem that the third paradesi died without appointing his successor, and that it was the zamindar who selected him. It was probably in advertence to this fact that the High Court observed in its judgment in second appeals Nos. 569 of 1870 and 226 of 1871 that it was not to be understood as expressing any opinion against the zamindar's right to appoint a successor in the event of the last holder of the office failing to do so. The foregoing is a summary of facts throwing light on the nature and constitution of the mutt and on its trusts so far as they can be collected from the terms of the grant and the usage of the institution.

As to the preliminary objections to the suit, the question of misjoinder is not pressed in appeal. The contention regarding jurisdiction is that under Act XX of 1863, the District Court is the proper *forum*. This would be so if the institution were endowed and dedicated to any section of the public either as a place of worship, such as a temple, or a religious establishment where religious instruction is to be had like a public mutt. For Act XX of 1863 only replaced Regulation VII of 1817 so far as religious institutions are concerned, which, as shown by its preamble and its provisions, dealt with trusts, express or implied, created for public purposes. But the grant in the case before us discloses no intention to confer a benefit either upon the people in general or upon any class of sectarians; on the other hand, the grantor desired only to perpetuate the spiritual family of his guru by providing for succession in the line of his disciples and the religious services designated Sivayoga nishtai and gurupuja performed by the grantee by enjoining their continuance by his disciples. Neither the general public nor any section of the people had an interest either in the erection and maintenance of the mutt or in the performance of the prescribed religious duties, the motive for the grant being the grantor's conviction that the performance of such services in perpetuity by the class of persons named by him in the mutt and with the aid of funds provided by him was an act of religious charity which would ensure the prosperity of his family. The original grantor and his descendants are thus the

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only persons interested in seeing that the institution is kept up for their benefit in accordance with the intention of the former. Although a few paradesis and others are fed when gurupuja is performed and a water pandal is maintained in the mutt during the hot season, these were not contemplated as independent charities in which any class of the public was to have a direct and independent interest. The decision in *Jusagheri Gosamiar v. The Collector of Tanjore*(1) proceeded mainly on the ground that the Board of Revenue were bound under section 4 of Act XX of 1863 to restore every endowment created for some religious purpose, which was in their possession, to the trustee entitled to its management. In *Agri Sharma Embrandri v. Vistnu Embrandri*(2) it was held that the jurisdiction of the ordinary Courts was not excluded when the plaintiff sued only to establish his right to share in the management of a temple. Neither of these decisions is in point. It may be, as argued by appellant's counsel, that the oral evidence for the respondent is meagre so far as it tends to show that the mutt is the zamindar's *private* charity, but it is materially corroborated by the nature of the grant and the description of religious and other duties required to be performed in perpetuity. I am of opinion that the Subordinate Judge is well founded in holding that the trusts of the institution concerned in this litigation are in the nature of private trusts.

Another contention was that the zamindar had no cause of action. This rests mainly on the fact that exhibit I does not state expressly that the grant is to be resumed, and that the paradesi is to be removed from his position as the representative of the mutt either if it is not kept up or if the prescribed religious service is not duly performed, but that on the contrary it enables the grantee and his disciples to alienate the land given by sale, gift, &c. I consider that this contention was properly disallowed by the Subordinate Judge. Exhibit I shows that the land in dispute was given for a specific religious purpose in order that that purpose might be carried out in perpetuity for the benefit of the grantor's family, and the respondent, as the representative of that family for the time being, is entitled to step forth when that purpose is neglected and the produce of the land is misapplied, and to ask the Court to prevent the misappropriation, and to see that the income of the endowment is applied to its legitimate purposes.

(1) 5 M.H.C.B., 234.

(2) 3 M.H.C.B., 198.

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Again, exhibit E, the inam register of Marudavayal, describes the grant as jivitam for the support of Sathappayyar's mutt at Sivaganga. Exhibits K, L and M, which are inam title-deeds, describe the land given as held in trust for the support of the mutt, and confirm the grant as one not to be interfered with only so long as the conditions of the grant are duly fulfilled. Exhibits A, N and O also lead to the conclusion that the grant was conditional and not absolute.

The objection that the suit could not be maintained without the sanction prescribed by section 539 of the Code of Civil Procedure is also not tenable, the section purporting in its terms to relate to trusts created for public purposes. The preliminary questions which remain to be considered are those of limitation and *res judicata*. As to the former, the suit is certainly not barred, the object with which it is brought being to prevent a specific endowment from being diverted from its legitimate object and to re-attach it to that object. It is not simply a suit to remove a person from the management of an endowment on the ground that, although it is duly administered, the defendant has no personal right to administer it. If the appellant's removal from his position as paradesi of the mutt is part of the relief claimed in the plaint, it is only claimed as necessary to ensure due appropriation of the endowment to its original trusts. In this view of the nature of the claim, it falls, as suggested by the respondent's pleader, under section 10 of the Act of Limitations. Article 143, to which our attention has been drawn on the appellant's behalf, is not applicable to suits in which the property has vested in trust for any specific purpose and there has been a continuous breach of trust.

Neither is the respondent's claim *res judicata* by reason of the decree in original suit No. 20 of 1867. That was a suit instituted by Ranee Kattama Natchiyar and her lessee to recover half of the village of Marudavayal from the present appellant together with monies collected by the execution creditor in original suit No. 107 of 1865 and to set aside the attachment, made at his instance, in execution of the decree in the same suit. The ground of claim then urged as against the appellant was that the right of appointing heads of the mutt in dispute vested in the representatives of the grantor and that no zamindar appointed the appellant to the office. The High Court held on second appeal that the appellant was appointed by his predecessor in office, that the right

of appointment vested in the latter unconditionally, and that the zamindar had no such right as he claimed except when the representative of the institution died without nominating his successor. The ground upon which the present suit is brought is that by reason of his status as a married man and of misappropriation of the endowment to his own purposes the appellant has become unfit to retain his office or continue in charge of the mutt and its endowments. Neither of these matters was the subject of adjudication in the previous suit, and in this sense the claim is not *res judicata*. But it is argued for the appellant that he had married prior to his accession to the office in 1858 and that his status as a married man and his omission to rebuild and live in the mutt were grounds of attack upon which the ranee did not choose to rely, though they were available to her when she brought original suit No. 20 of 1867, and that her omission to do so precludes the respondent from urging them now in support of his claim. It may be that such omission is evidence that there was no breach of trust, but I am not prepared to say that when the breach of trust is clear, its condonation by a prior beneficiary is binding upon his successor so as to enable the trustee to take advantage of his own wrong and justify the continuance of the breach. In this case the disqualification and the misfeasance imputed to the appellant are said to have continued even subsequent to the former suit and up to the date of the present action.

Passing on to the merits, the first question to be considered is whether appellant's status as a married man incapacitates him for presiding over the mutt. The Subordinate Judge has decided it in the affirmative, but the contention for the appellant is that a married man is not incompetent to preside over the mutt. The usage of the institution conveys the impression that either an ascetic or a married man is eligible for the office. In former times there was a conventional notion that the management of a religious charity by an ascetic was more disinterested than that of a married man, and, therefore, likely to prove more beneficial, but when the usage of the institution is clear on this point, we are not at liberty to ignore it. In ordinary parlance, the words paradesi and mutt, no doubt, designate a Sudra ascetic and the institution presided over by him, but they are of themselves inconclusive, since there are mutts in this presidency of which the representatives are

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not ascetics. Though the direction in exhibit I is that succession should be in the line of disciples, it loses much of its significance when it is remembered that the succession ordained by the copper-plate grant of 2nd May 1733, which was produced and acted upon in original suit No. 20 of 1867, was that of sons and grandsons. In second appeal No. 569 of 1870, which arose from that suit, the High Court, which then had before it both that grant and exhibit I, observed that the phrase, in regular succession of sons and grandsons, should not be taken literally, but that succession by disciples qualified to discharge the peculiar trusts was in the contemplation of the parties. Referring to the appellant's evidence that the paradesi for the time being makes one his disciple by initiating him in what is called Brahma mantram and qualifies him for discharging the peculiar trusts of the mutt in question by teaching him Sivayoga nishtai and other penances, it does not appear that the successor must belong to the order of ascetics, though it is clear that he must be a qualified disciple in the sense indicated above. This view receives strong corroboration from the course of succession from the early part of this century. That the fourth paradesi left a widow surviving him at his death is clear from the judgment in original suit No. 110 of 1838, exhibit F. The Sudder Amin Pundit says distinctly that "since it is proved that the defendant is "a woman married by the said Sathappayya (the fourth paradesi), "and that the said person lived with the said defendant, it follows "that the plaintiff (fifth paradesi) should give food and raiment to "the said woman and protect her to the end of her lifetime." To this observation the Subordinate Judge declines to give effect and remarks that the Sudder Amin Pundit erred in directing the fifth paradesi to maintain the widow of the fourth, and that it might be that the latter did not live with his wife after he had become paradesi. But I do not deem it proper to impugn a judgment which has become final and hazard a statement at variance with it on mere conjecture. Another material fact overlooked by the Subordinate Judge is the conduct of successive zamindars from the time of the fourth paradesi to the date of the present suit. It is urged that the fifth was a widower, but there is nothing to show that he belonged to the order of ascetics as contradistinguished from that of *grahastas*. Nor does it appear that the Court of Wards raised any objection to the appellant's succession in 1858, whilst his evidence is that he was then not only

married but had two wives as at present. It is, again, strange that Rane Kattama Natchiyar should have ignored his status as a disqualification, if, as is now suggested, it should have rendered him according to the known usage of the institution ineligible for the office. The result of the evidence is that of the six paradesis who represented the mutt during a period of about 150 years, the first three belonged to the order of ascetics, the fourth was a married man, the fifth was a widower, and the sixth is a married man, whilst the grant did not enjoin, either expressly or by necessary implication, the status of an ascetic as a qualification, and whilst for more than fifty or sixty years there has been no trace of a consciousness either among the zamindars or the paradesis that such status is indispensable. The conclusion, therefore, I come to is that the paradesi for the time being may be either an ascetic or a married man, but that he must be initiated by his predecessor in Brahma mantram and in Sivayoga nishtai and other penances and to this extent be a qualified disciple.

I agree, however, in the opinion of the Subordinate Judge that the trusts of the mutt have altogether been violated, and the income of the endowment has been misapplied for a series of years. It is proved that the mutt building has ceased to exist and that no attempt has been made to restore it for more than twenty years. Though the appellant states that he attempted twice to rebuild it, but that he was prevented by the zamindar from doing so there is no evidence to corroborate his interested statement. It appears also that no Sivayoga nishtai or any other penance nor gurupuja has been performed for more than ten years. Several witnesses cited by the respondent depose to that effect, and the appellant has called no evidence in answer to it, although considerable evidence must be available, if, as stated by him, he has continued to perform them in his own house. Another act of mismanagement shown by the evidence is the mortgage of portions of the endowment without adequate necessity. Although the alienees state that the money raised by the mortgage was applied to the payment of arrears of poruppu, the appellant has produced no evidence to explain why the poruppu was not regularly paid from the income derived from the lands. According to the Kurnams of the villages in which the lands are situated their average income is sufficient for the payment of poruppu and for the due execution of all the

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trusts. It is, again, in evidence that whilst no attempt has been made to keep up the mutt or restore it, the income of the endowment has been spent upon the improvement of the appellant's family house. The period during which these acts of mismanagement have continued shows that it has been wilful, and their continuance after the promise made at the inam inquiry to restore the mutt and after the execution of the karinama A indicates that the mismanagement has been perverse as well as wilful. I, therefore, concur in the opinion that the appellant has been guilty of breach of trust for a series of years, and that in the circumstances of this case, it is necessary to remove him from management in order to ensure due performance of the trusts of the institution. On this ground I am of opinion that the appeal fails, and that it must be dismissed with costs.

As to the memorandum of objections, the first question is whether, in the contingency that has arisen, the respondent is entitled to the reversion of management of the endowment. By exhibit I it is provided that the endowment should continue in perpetuity and that it should be administered by the head of the mutt for the time being. Consequently no right can be deduced from its terms for the respondent either to resume the endowment or to manage it in person. Though the trust created is one intended for the exclusive benefit of his family, all the members of that family are not plaintiffs in this suit. The only right which the respondent has as the representative and manager for the time being of the grantor's family is a right to claim due performance of the trusts of the institution by a person competent to perform them according to the intention of the grantor and the usage of the institution.

Another contention is that the removal of the appellant creates a vacancy, that the power of appointment vests in the zamindar for the time being, and that the appellant, who is found to be guilty of breach of trust and dismissed from his office, ought to have no voice in the appointment of a new trustee. The appellant, who is dismissed, has lost his status as a *paradesi* of the institution, and the right to name his successor, which is an incident of that status, cannot subsist after the status itself has been lost. The direction, therefore, so far as it recognizes any right in the appellant to name a successor, must be set aside.

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In the absence of a qualified disciple in whom the right of succession has already vested, the beneficiaries, who are the members of the zamindar's family, are the only persons interested in the appointment and entitled as such to express an opinion regarding the fitness of the proposed new trustee for the office. The case is then analogous to that of a vacancy arising from the death of a *paradesi* without appointing his successor. The proper decree is to declare the respondent's right to appoint a person qualified to discharge the peculiar trusts as new trustee with the concurrence of the rest of his family, to direct him to do so within a given time, and, upon his doing so, to confirm such appointment after notice to the other members of the respondent's family, and to direct that upon such confirmation the properties in dispute be made over to the person newly appointed to be administered so as to carry out the trusts of the institution in accordance with its usage. The decree should further direct that on default of the zamindar's doing so, the suit do stand dismissed with costs. I see no reason to interfere with the decree of the Subordinate Judge so far as it dismisses the respondent's claim to *mesne profits*. The decree appealed against will be modified as indicated above.

There will be no separate costs on the memorandum of objections.

BEST, J.—This is an appeal by the defendant against the decree of the Subordinate Judge of Madura (East) declaring that the appellant has rendered himself disqualified to hold the office of head of a certain mutt and is liable to be ousted therefrom and from the possession of the properties appertaining thereto.

The suit was brought by the zamindar of Sivaganga, alleging that the properties in question were given by the zamindar's ancestors "to the guru Sathappayyar in order that a mutt might be built on item No. 1 of the plaint schedule and concentrated meditation on Siva and other devotions might be performed, for the expenses of *gurupuja* and charities, with a view to the everlasting prosperity of the members of the zamindar's family," that the said properties were held by Sathappayyar, and after him by succeeding gurus till they came to the possession of the present appellant, who has disqualified himself for holding the mutt and its properties by reason that he, "(a) instead of being an ascetic, has intercourse with women and indulges in other pleasures, and, (b) instead of appropriating the

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"income of the mutt to the devotions and charities thereof, he
"expends the same on women and his issue and for his own
"purposes."

It is further alleged in the plaint that, in consequence of misconduct as above on the part of appellant, he was, in January 1883, removed from the headship of the mutt by plaintiff's father, who also attached the properties of the mutt, since which appellant "without any regard to the devotions and charities which should be conducted in the mutt, with a view to the benefit of his issue and departing from the course of succession in the line of disciples," has arranged that his son should get the properties in dispute after his death. Thus the son was included as the second defendant in the suit, and though the decree is silent on the point, the Subordinate Judge has in his judgment stated that his appointment by the first defendant (now appellant) is "clearly fraudulent and unsustainable." The son, however, is not a party to this appeal.

The first objection now urged is that the Subordinate Judge had no jurisdiction to entertain the suit, it being one coming within the scope of Act XX of 1863. But even assuming that the suit might have been brought under that Act, I do not find anything in that Act making it obligatory on parties to proceed thereunder and not otherwise. Section 14 merely provides that any person or persons interested in a temple "may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court," (i.e., the District Court, see section 2). As remarked in *Syed Amin Sahib v. Ibrahim Sahib* (1)—"The enactments in sections 14 and 15 are enabling and intended to give to the persons described and who are individually not interested otherwise than in connection with others the right to sue individually;" and the proviso in section 18 that "no suit shall be entertained under this Act without a preliminary application being made to the Court for leave to institute such suit" was, I take it, intended for the protection of trustees, &c., from a multiplicity of suits. The wording of section 14 is merely enabling and permissive and intended to apply to the case of only a few of the interested parties suing in the interest of the public. Where all the parties interested join in bringing the suit, and

(1) 4 M.H.C.R., 112.

where, therefore, no special sanction of the Court is necessary, I see no reason why the suit should not be entertained in a Court having jurisdiction to entertain ordinary suits of the same value. Moreover, in the present case, the institution happens to be a private one created for the benefit of the plaintiff's family. I agree, therefore, with the Subordinate Judge in finding that this objection is not valid.

It is next objected that the suit is bad for want of sanction of the Collector under section 539 of the Code of Civil Procedure, if not for want of sanction of the District Court under section 18 of Act XX of 1863. It follows from what I have already said that I do not think the case is one requiring the previous sanction of the District Court under the latter Act, which, it is to be observed, only requires such previous sanction for the entertainment of a suit under that Act—and the present is not a suit brought under that Act; while as to section 539 of the Code of Civil Procedure, not only has it reference to public charities, but just as is section 14 of Act XX of 1863 so also is this section merely enabling and permissive, its object being to allow of two or more persons interested in a public institution to sue without joining all the others interested in the same, the previous sanction of a public official being prescribed in order to prevent a multiplicity of suits which might otherwise be brought.

It is next contended that the present suit is barred by sections 13 and 43 of the Code of Civil Procedure as the present objection that appellant is a married man living with his wife and children might and ought to have been taken in the former suit brought against him by the late Ranee of Sivaganga—the judgments in which suit (1) in the Court of first instance, (2) in the Appellate Court, and (3) in second appeal respectively are filed as exhibits G, H and J. That was a suit to remove this appellant from the office of guru on the ground that he had no right to it in consequence of his not having been appointed by the zamindarni. If the fact of his being a married man disqualified him for the office, I think that this objection to him would not then have been lost sight of, for his marriage undeniably dates from a period prior to that suit. Though this objection to him *might* have been taken, then I am not prepared to say that it *ought* to have been taken. In any case the present suit alleges acts of misappropriation of the mutt property of more recent date, which could not have been

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urged in the former suit. I agree, therefore, with the Subordinate Judge in holding that the present suit is not barred either as *res judicata* or under section 43 of the Code of Civil Procedure.

We now come to the main question which is the subject of the fourth issue recorded in the Court below in the following words: "whether the allegation in clauses (a) and (b) of paragraph 3 of the plaint are true, and if so, has the first defendant become disqualified to continue as the head of the mutt?"

Clauses (a) and (b) of paragraph 3 of the plaint are as follows:

"(a) Instead of being an ascetic he keeps intercourse with females and pursues other pleasures.

"(b) Instead of appropriating the income of the said mutt for the up-keep of the devotions and charities of the mutt, he expends it on women and his issue and for his own purposes."

It is admitted at the hearing that by the "females" in clause (a) and "women" in clause (b) are meant only the defendant's wives, that no actual immorality is laid to his charge, and that the meaning of these two clauses is nothing more than that he lives with his wives and children and maintains them with the produce of the lands given for the maintenance of the mutt.

The question, therefore, narrows itself to this:—"Is defendant disqualified for the office of guru by the fact of his living with his wife and children and devoting to their maintenance the produce of this property given as an endowment for the office of guru?"

My opinion as to the first part of this question is that the mere fact of the defendant being a married man cannot be held to disqualify him for the office of paradesi of the mutt. Had such been the case, no doubt the objection would have been taken in the Rance's suit of 1867. Moreover, it is seen from the evidence that the two immediate predecessors of the defendant were both married men and it is also in evidence that defendant was already married when he succeeded to the office of paradesi of the mutt in question. Further, as is seen from the judgments in the suit of 1867, in the copper plate produced in that suit, the succession prescribed was to "sons and grandsons," see exhibit J. On a consideration of all these circumstances I come to the conclusion that the mere fact of the defendant being a married man and living with his wives and children is not a valid ground for removing him from his office of paradesi of the mutt.

But there remains the question whether he has by misappro-

priating the proceeds of the endowments rendered himself liable to dismissal from this office. It is proved that the mutt itself has ceased to exist and no attempt appears to have been made to restore it notwithstanding the defendant's undertaking at the inquiry before the Deputy Collector on behalf of the Inam Commissioner (in 1864) that he would "build a separate muttam within a period of six months" (exhibit E) and his subsequent promise to the same effect in the karar A, dated 22nd June 1878. At the same time the defendant's own family house has been improved. Moreover it is shown that the ceremonies for the performance of which the endowment was made have not been performed for some years past. The defendant has entirely failed to prove the performance of these ceremonies at his house, as stated by himself examined as the sole witness for the defence. He has also admittedly mortgaged portions of the endowed property, whereas, as appears from the evidence of the kurnams examined on behalf of the plaintiff, the income of the endowed lands was sufficient for both payment of the poruppu and also for the expenses of the pujas, &c., for which the endowment was made. There can be no doubt, I think, as to the fact of the defendant having for years past misapplied the income of the endowed lands to the maintenance of his wives and children and to the improvement of his family house. This fact alone is sufficient to justify his removal from the office and to uphold the Subordinate Judge's decree to that effect.

I would therefore uphold the decree of the Court below modified as suggested by my learned colleague.

I agree in disallowing mesne profits and dismiss the respondent's objections taken under section 561 of the Code of Civil Procedure except in so far as it relates to the first defendant having a voice in the appointment of the new trustee.

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ORIGINAL CIVIL.

Before Mr. Justice Handley.

1890.
July 23.

MADRAS RAILWAY COMPANY (PLAINTIFFS),

v.

THOMAS RUST (DEFENDANT).*

Stamp Act—Act I of 1879, s. 3, cl. 4—Bond—Specific Relief Act—Act I of 1877, ss. 20, 54, 57—Contract Act—Act IX of 1872, s. 39—Contract for personal service—Contract for more than three years—Interim injunction.

The defendant signed an agreement in England with a railway company, whereby he contracted to serve the company exclusively for four years in India under a penalty of £100. The defendant having come to India at the expense of the company and served it for two years, left its service for that of another employer, alleging that he had not been fairly treated by a locomotive superintendent:

Held, (1) that the instrument executed by the defendant was an agreement merely and did not require to be stamped as a bond.

(2) that the defendant had no right to rescind the agreement and the plaintiff company was entitled to an interlocutory injunction restraining defendant from serving others on the terms that the plaintiff company should consent to retain him in its employ.

MOTION for an *interim* injunction restraining the defendant from serving working for, or being employed by any person or persons other than the plaintiff company pending the disposal of the suit.

The plaint in the suit prayed for an injunction restraining the defendant as above during the term of an agreement entered into by him and the plaintiff company, dated 20th June 1888, and for damages for breach of the agreement. The plaint stated and it was admitted by the defendant—

“That by an agreement bearing date the 20th day of June 1888 entered into between the defendant of the one part and the plaintiffs of the other part, the defendant thereby engaged himself in the service of the plaintiffs for four years from the day of his embarkation or departure for Madras on the following conditions (*inter alia*):—

(a) “That he should proceed to Madras, and, while in India, should employ himself as might be required by the

“board of directors or their agent at Madras or locomotive superintendent for the time being or other officer appointed in that behalf.

(b) “He should faithfully and diligently employ the whole of his time in the service of the plaintiffs as a carriage painter, or in such other manner as the board of directors or their agent at Madras or locomotive superintendent or other officer as aforesaid should require.

(c) “He should in all things be subservient to, and obey the orders and directions of, the board of directors and of their agent at Madras or locomotive superintendent or other officer appointed in that behalf.

(d) “And in consideration of the agreement thereinbefore contained on the part of the defendant to be done and performed and of the due and faithful service to be rendered by him to the plaintiffs for four years, the said directors promised and agreed with him in manner following:—

(e) “That the board of directors should pay the expense of the passage of the defendant to Madras, and should pay him, during the continuance of his services, the sum of Rs. 200 per mensem, any increase of pay after or beyond the first annual increment of Rs. 13 per mensem to be subject to the defendant passing the Government examination in the vernacular, the amount of such salary to commence from the day of defendant's embarkation for Madras.

(f) “And, lastly, the defendant thereby bound himself under a penalty of £100 to the said directors diligently and faithfully to perform the various matters and things contained in that agreement.

“(The agreement provided also for the dismissal of the defendant on three months' notice).

“That the defendant left England on or about the 21st day of June 1888 and in due course arrived in Madras and was, from the date of such arrival, employed by the plaintiffs at their workshops at Perambur, Madras, under the orders and directions of the locomotive superintendent and continued to be so employed under the terms of the said agreement up to the 31st day of March 1890.

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"That the defendant, on the 1st day of April 1890, absented himself and has since absented himself from the plaintiffs' said workshops and has been, plaintiffs are informed, since the said 1st day of April 1890, working for Mr. Arcot Dhanacoti "Moodelly in Madras."

The defendant admitted that he was working for the person named, but claimed that he had a right to cancel the agreement on the grounds that Mr. Phipps, the Acting Locomotive Superintendent, had insisted on his disclosing a trade secret which he possessed, and that the language and manner of Mr. Phipps towards the defendant was such as to injure his feelings and lower him in the estimation of the men working under him, &c.

On the motion coming on, Mr. R. F. Grant for defendant objected that the document put in for the plaintiffs in proof of the agreement containing the above terms, which was signed by the defendant only, was not admissible for want of a stamp as on a bond for £100 and he relied on *Reference by Board of Revenue, N. W. P., under Act I of 1879*(1).

Mr. K. Brown for plaintiffs. The reasoning of the dissenting judgment in that case is correct and is in accordance with the decision in *Gisborne and Co. v. Subal Bowri*(2). The document should not be regarded as a bond, but an agreement for the purposes of the Stamp Act.

HANDLEY, J., ruled that the document did not require to be stamped as a bond, but was an agreement merely.

Mr. K. Brown. This is a case for an *interim* injunction under Civil Procedure Code, section 493, as on the pleadings and affidavits the plaintiffs would be entitled to the injunction prayed for in the suit. *Nusserwanji Merwanji Panday v. Gordon*(3). Specific Relief Act, section 57, governs the case. Compare the illustrations, which refer to cases of personal service and *Lumley v. Wagner*(4) and *Montague v. Flockton*(5). There is nothing in the nature of the contract which bars this remedy; see *Brahmaputra Tea Co., Ltd. v. Scarth*(6) distinguishing *Oakes & Co. v. Jackson*(7) and the defendant's affidavit discloses no ground for rescinding it.

(1) I.L.R., 2 All., 659.

(3) I.L.R., 6 Bom., 286.

(5) 16 Eq., 189.

(7) I.L.R., 1 Mad., 134.

(2) I.L.R., 8 Cal., 285.

(4) 1 De. G., M. & G., 804.

(6) I.L.R., 11 Cal., 546.

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Mr. R. F. Grant. The defendant was justified under Contract Act, section 39, in rescinding the contract. In any view, however, since this contract could not be enforced by a decree for specific performance as being a contract of service and also as extending over a period of three years (see Specific Relief Act, sections 12, 21), under section 54 it should not be enforced by way of injunction. Section 57 has never been applied to a case where the two objections to specific performance above stated have concurred. Further the agreement is unfair, one-sided and wanting in mutuality; moreover on the face of it it appears the parties regarded money-payment as sufficient compensation for its breach. Before granting an injunction the Court must regard the balance of convenience and weigh the consequences of an injunction on the defendant against the substantial mischief done to the plaintiffs by rescission of the contract. See *Shamnugger Jute Factory Co. v. Ram Narain Chatterjee*(1), *Doherty v. Allman*(2), *Mogul Steamship Co. v. McGregor, Gow & Co.*(3), *Newson v. Pender*(4).

Mr. K. Brown in reply. The argument as to balance of convenience fails in view of the circumstances of the case and that as to money-compensation is not supported by the penal clause in the agreement; see Specific Relief Act, section 20. There was clearly no ground for rescission by the defendant.

JUDGMENT.—I consider that this is a case in which an *interim* injunction should be granted.

No sufficient reason is shown in defendant's affidavit for his breach of the agreement. If any question arose between him and Mr. Phipps as to his right to conceal any trade secret he possessed, or if he had any complaint to make as to his treatment by Mr. Phipps, he should have brought the matter before the governing authority of the company and not have thrown up his employment in direct violation of his contract. It is argued that there is no mutuality in the contract because the company has not executed the agreement, and because they can dispense with defendant's services on three months' notice. As to the first point, the company sets up the agreement and of course is bound by it equally with the defendant. As to the second point, the company does enter into certain covenants with the defendant, and whether on the whole the bargain is more advantageous to them or to the

(1) I.L.R., 14 Cal., 189.

(3) 15 Q.B.D., 476.

(2) L.R., 3 App. Cas., 709

(4) 27 Ch. D., 43.

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defendant is a question not now to be determined. The defendant made the contract, and, in the absence of fraud or duress, must be bound by it.

And I do not think that pecuniary damages will adequately compensate the company for the defendant's breach of contract. Unless persons who enter into contracts of this sort, on the faith of which their passage out to this country is paid, are kept to their agreement, the consequences will be very serious to employers, who will often be unable to secure the services of persons to supply the places of the defaulters in a short time.

It is argued that when the remedy by specific performance of a contract is expressly refused by Chapter II of the Specific Relief Act, then by virtue of section 54, clause 2, an injunction cannot be granted, and therefore that this contract, being one extending over more than three years and therefore not capable by section 21, clause (g) of specific performance, cannot be the subject of an injunction. It seems to me that this argument would make section 57 of the Act a nullity. That section provides in the case of an affirmative agreement coupled with a negative agreement express or implied, that an injunction may be granted though specific performance could not, and it gives as illustrations some of the contracts specific performance of which is precluded by section 21, clause (b). If an injunction may be granted in the case of contracts, specific performance of which is refused by section 21, clause (b), why not in the case of those specific performance of which is refused by section 21, clause (g)? It is also argued for the defendant that an injunction should not be granted because the agreement provides for a penalty for its non-performance. But section 20 of the Specific Relief Act provides that this should be no bar to the remedy by specific performance and the same principle applies to injunctions. I think a case has been made out for the interference of the Court by *interim* injunction, but it must be on terms that plaintiff company take back the defendant into their service if he is willing, and do not, pending the decision of this suit, exercise their powers under clause 7 of the agreement of dispensing with his services on three months' notice. Upon these terms there will be an injunction as prayed. Costs of this application to abide the result of the suit.

Barclay & Morgan—Attorneys for plaintiffs.

Champion & Short—Attorneys for defendant.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

AMBU (DEFENDANT No. 4), APPELLANT,

v.

KETLILAMMA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, s. 43—"Distinct cause of action"—Suit for possession after cancellation of Court-sale.

In execution of a decree the defendant, who was sued as the representative of her deceased brother, objected, under s. 244 of the Code of Civil Procedure, to the attachment of certain lands to which she set up independent title. The objection was disallowed and the land was sold. She then sued the execution purchaser to set aside the Court-sale and obtained a decree against which no appeal was preferred. She now used for possession, and it was found that at the date of the previous suit she was not aware that the execution purchaser had obtained possession:

Held, that the suit was not barred by Civil Procedure Code, s. 43.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 261 of 1887, which was remanded by the High Court for rehearing in second appeal No. 1508 of 1888, reported *sub nom. Kettilamma v. Kelappan*(1).

The facts of the case, which are stated at greater length in the report above referred to, were shortly as follows:—The plaintiff had intervened in execution of a decree claiming that the land sought to be brought to sale was her property. Her objection was disallowed and the land was sold. She then brought a suit against the purchaser praying only that the Court-sale be set aside and she obtained a decree as prayed. She afterwards brought original suit No. 542 of 1886 in the Court of the District Munsif of Tellicherry for possession of the land. Her suit was dismissed and appeal suit No. 261 of 1887, in the file of the Subordinate Judge of North Malabar, was her appeal against this decree.

The Subordinate Judge on remand recorded a finding that the plaintiff was not aware at the date of the previous suit that defendant No. 4 had obtained possession of the land and passed a decree

* Second Appeal No. 1026 of 1889.

(1) I.L.R., 12 Mad., 228.

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in favor of the plaintiff overruling a plea raised under section 43 of the Code of Civil Procedure and holding that the cause of action in the present suit was distinct from that in the previous suit, on which points he referred to *Moonshee Buzloor Rukeem v. Shumsoon-nissa Begum*(1), *DeSouza v. Coles*(2), *Viraragava v. Krishnasami*(3), *Pittapur Raja v. Suriya Rau*(4), *Andi v. Thatha*(5), *Jibunti Nath Khan v. Shib Nath Chuckerbutty*(6), *Nonoo Singh Monda v. Anand Singh Monda*(7), *Amanat Bibi v. Imdad Husain*(8).

Defendant No. 4, who claimed to be entitled to the land under the Court-sale, preferred this second appeal.

Sankaran Nayar for appellant.

Bhashyam Ayyangar for respondents.

BEST, J.—The question is whether the plaintiff's present suit is barred under section 43 of the Code of Civil Procedure by reason of her omission to sue for possession of the land in her former suit, in which the present appellant was also included as a defendant?

The former suit (No. 508 of 1884, Tellicherry District Munsif's file) was for setting aside a summary order dismissing the plaintiff's claim to the land which had been attached in execution of a decree and subsequently sold. The statement in the plaint in that suit that the cause of action arose "on and after the 4th December 1883," (see paragraph 5 of exhibit C,) shows that it was in fact a suit brought under section 283 of the Code of Civil Procedure "to establish the right" of plaintiff to the property. It has been held that where a previous suit for a declaration of title and confirmation of possession of property has been dismissed on the ground that plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession of the same property is not barred under section 43, Civil Procedure Code (see *Jibunti Nath Khan v. Shib Nath Chuckerbutty*(6) and *Nonoo Singh Monda v. Anand Singh Monda*(7)). The present plaintiff's case is stronger than were those of the plaintiffs in the cases referred to above: for the present plaintiff's suit was not dismissed, but she obtained a decree setting aside the sale of the property. The decree thus obtained by her was merely declaratory (*Dildar Fatima v. Narain Das*(9)), and such a decree is not sufficient to bar

(1) 11 M.I.A., 551.

(3) I.L.R., 6 Mad., 344.

(5) I.L.R., 10 Mad., 347.

(7) I.L.R., 12 Cal., 291.

(9) I.L.R. 11 All., 365.

(2) 3 M.H.C.R., 384.

(4) I.L.R., 8 Mad., 520.

(6) I.L.R., 8 Cal., 819.

(8) I.L.R., 15 Cal., 800.

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a subsequent suit for possession of the property. Moreover, the Subordinate Judge has found that, though the present appellant was in possession of the property at the date of the bringing of the former suit, plaintiff was not aware of the fact, and, such being the case, the authorities quoted by him are sufficient to justify his finding that this suit for possession is not barred.

The statement in paragraph 2 of the memorandum of appeal that the Lower Appellate Court "has not considered exhibits II, III, IV, V and VII" is incorrect.

This appeal fails and must be dismissed with costs.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. The only question of law that arises for decision upon the facts found is whether section 43 of the Code of Civil Procedure bars the present suit. The ground of claim in original suit No. 508 of 1884 was the order that rejected the claim petition No. 1488 of 1883, and under section 283 the plaintiff was entitled to institute a suit to establish the right claimed by him and thereby to prevent the order from acquiring the force of a decree in a regular suit. The ground of the present suit was the wrongful withholding of possession from the plaintiff after his title had been declared in the previous suit. The grounds of action not being identical, section 43 is not applicable.

It is argued, however, for the appellant that the setting aside the sale and the recovery of possession are remedies consequent upon the declaration that the summary order is invalid. But it must be observed that section 283 gives a special right to sue for a declaration of title by reason of the special attribute with which the order on the claim petition is invested, unless it is invalidated. The right is one which the plaintiff is at liberty to exercise without reference to the Court sale and the transfer of possession under such sale that may or may not at once follow the order, and it is indeed conceded by the appellant's pleader that, if there had been no prayer in the previous suit for setting aside the Court sale, the present suit would be maintainable. After the claimant's title has been declared, he must no doubt sue but once, both to set aside the sale and recover possession, but, until such declaration is made, the sale and transfer of possession are in the nature of successive wrongful acts originating from the invalid order rather than of remedies which he is bound to claim in the declaratory suit which is specially allowed on a stamp of Rs. 10.

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It is found further that, whilst instituting the former suit, the plaintiff was not aware of the transfer of possession under the Court sale which was sought to be set aside. In a case like this, in which several wrongful acts consequent on the same order may occur on different dates, no laches could be imputed to the plaintiff for omitting to unite them all in one suit, unless he was aware of their occurrence. The cause of action in such cases must be ascertained from the facts within his knowledge and averred in the plaint.

I would also dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Weir.

UNNI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KUNCHI AMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Specific Relief Act—Act I of 1877, ss. 39, 40, 42—Cancellation of instrument—Declaratory decree—Limitation Act—Act XV of 1877, sch. II, art. 91.

A suit was filed in 1888 on behalf of a Malabar tarwad by two of its members to recover property improperly alienated in 1879 under a kanom instrument by the karnavan, who had since been removed from office:

Held, that since a prayer for the cancellation of the kanom instrument was not an essential part of the plaintiffs' relief, the suit was not barred by the three years' rule in Limitation Act, 1877, sch. II, art. 91.

SECOND APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 1140 of 1888, confirming the decree of V. P. deRozario, Subordinate Judge of South Malabar, in original suit No. 39 of 1887.

Suit to recover certain property, the jenm of the tarwad of the plaintiffs and defendants Nos. 1 and 2, which had been improperly alienated in 1879 under a kanom instrument by their late karnavan since removed from office. The plaint stated that the plaintiffs had been appointed managers of the tarwad by a decree of Court.

* Second Appeal No. 1268 of 1889.

The Subordinate Judge and, on appeal, the District Judge, held that the plaintiffs could not recover the property without previously obtaining the cancellation of the kanom instrument, and that, as a suit to obtain such cancellation would have been barred under Limitation Act, 1877, sch. II, art. 91, the present suit was not maintainable and they accordingly dismissed it.

The plaintiffs preferred this second appeal.

Sankaran Nayar for appellants.

Narayana Rau for respondents.

JUDGMENT.—This is an appeal against the decree of the District Judge dismissing a suit brought on behalf of a tarwad to recover property improperly alienated by the late karnavan. The alienation, which was in the form of a demise on kanom, executed in favour of one Subban Patter, was made in 1879.

It has been held by the District Judge that, the suit being instituted more than three years after the date of the kanom, is barred by limitation, because before recovering the property it was necessary to have the kanom set aside. It will be observed that the kanom document was not executed by the plaintiffs or any person under whom they claim as heirs or otherwise.

There can be no doubt that when a person seeks to recover property against an instrument executed by himself or one under whom he claims, he must first obtain the cancellation of the instrument, and that the three years' rule enacted by article 91 applies to any suit brought by such person—*Janki Kunwar v. Ajit Singh*(1). In such cases, according to the old practice, it was necessary to have recourse to the Court of Chancery, because at common law the claimant when met by his own deed was helpless. (Story's Equity Jurisprudence, cap. XVII; *Davis v. Duke of Marlborough*(2).) It was only in the Court of Chancery that he could get the requisite relief. Although similar relief might be given in cases where the deed was on the face of it void, on the principle of removing a cloud from the plaintiffs' title and preventing further litigation, we do not think that relief by way of cancelment of the deed was absolutely necessary, except in cases where the deed was sought to be avoided on account of fraud or other such ground. (See Story's Equity Jurisprudence, *ib.*) Provision is made for the two classes of cases above indicated by

(1) I.L.R., 15 Cal., 58.

(2) 2 Swanston, 159.

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section 39 of the Specific Relief Act. In the present case the plaintiffs are seeking to recover property alienated by their late karnavan, and their case, with regard to the alienation, is that the karnavan was not, under the circumstances, authorized to make it. They have no complaint to make of the manner in which the execution of the instrument was obtained by Subban Patter, but their charge is that the instrument cannot have the legal operation which the appellants seek to give to it. In our opinion there is no distinction between this case and other cases where a similar charge is made in respect of an instrument of alienation executed by a person who, not being the full owner of the property, has a conditional authority only to dispose of it. Such are the cases of a guardian of a minor, the manager of a Hindu family or the sonless widow in a divided Hindu family. In these cases, as was argued by the appellants' vakil, it is not only not necessary, but it is not possible, to have the instrument of alienation cancelled and delivered up, because, as between the parties to it, it may be a perfectly valid instrument. All that is needed is a declaration that the plaintiffs' interest is not affected by the instrument, and that declaration is merely ancillary to the relief which may be granted by delivery of possession—*Azim Unnissa Begum v. Clement Dale*(1). The question is really concluded by authority, for it has been held in the case of the guardian, the manager of a Hindu family, and the Hindu widow wrongfully alienating property, that the suit which may be brought to recover it is not governed by article 91 of the Limitation Act, *Sikher Chund v. Dulputty Singh*(2). In the case cited by the District Judge, *Raman v. Valia Amma*(3) which was a case similar to the present, Turner, C.J., and Kernan, J., observed:—"If a person not having authority to execute a deed, or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist." We entirely agree in this statement of the law. We do not think that the decision in *Jagadamba Chowdhurani v. Dakkhina Mohun*(4) has any bearing on the present case. In principle, as well as on authority, we think that a prayer for the cancellation of the kanom document

(1) 6 M.H.C.R., 475

(2) I.L.R., 5 Cal., 370.

(3) S.A. 270 of 1880 not reported.

(4) L.R., 13 I.A., 84.

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was not an essential part of the plaintiffs' relief, and that, therefore, the suit being instituted within twelve years, was not barred by limitation. The result is that the decree must be reversed and the case remanded for disposal by the District Judge on the merits.

Costs will abide and follow the event.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SANKARA (PLAINTIFF), APPELLANT,

v.

KELU AND OTHERS (DEFENDANTS), RESPONDENTS.*

1889.
August 12.
September 2.

Malabar Law—Partition of tarwad—Tarwad debt—Construction of decree.

In 1870 the managers of the plaintiff's tarwad demised certain land now in suit on kanom. In 1885 they sued to redeem the kanom and a decree was passed that the plaintiff do pay a certain sum to the kanomdar, and that he do surrender the land; but in the judgment it was said that the kanom amount should be charged on the land. In 1886 the tarwad was divided and the land above referred to was allotted to the present plaintiff's branch. In 1887 the kanomdar, in execution of the above decree, brought the land to sale and it was purchased by defendant No. 1:

Held, that the sale was not binding on the plaintiff.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 1040 of 1888, confirming the decree of J. A. deRozario, Additional District Munsif of Calicut, in original suit No. 193 of 1888.

Suit to set aside a sale in execution of the decree in original suit No. 11 of 1885 on the file of the Court of the District Munsif at Calicut, and to recover possession of the land, the subject of the sale.

The plaint stated that the land in question in this suit was the property of the tarwad of the plaintiff and defendants Nos. 3 and 4, and that at a partition of the tarwad property, which took place on 7th December 1886, it had been set apart as the share of the plaintiff's branch of the tarwad. It appeared that the above suit

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was brought by defendants Nos. 3 and 4, alleging that they were the managers of the tarwad with the consent of the karnavan against defendant No. 2 to redeem a kanom (dated 1870) on the land now in question, and that the District Munsif in delivering judgment in that suit said he allowed the kanom amount to be charged on the property but by the decree, dated 17th June 1885, it was ordered that the plaintiff do pay to the defendant a certain sum with interest as therein provided, and that "the defendant do surrender the plaint paramba." The defendant in execution of this decree attached the land and brought it to sale and it was purchased on 28th February 1887 by defendant No. 1, who now resisted the plaintiff's claim on the grounds that the decree-debt was contracted for authorized purposes, and that the plaintiff's interest was bound by the decree.

The District Munsif passed a decree dismissing the suit, and this decree was affirmed on appeal by the Subordinate Judge. The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Sankaran Nayar and *Ramachandra Ayyar* for respondents.

MUTTUSAMI AYYAR, J.—The question arising for decision in this second appeal is whether the sale in execution of the decree in original suit No. 11 of 1885 is binding on the appellant. The decree, as it was framed, was only a money decree, and it did not direct the sale of the property in dispute. Although the judgment recorded in that suit might be considered in construing the decree, it could not be used for varying the decretal order so as to convert a money decree into a decree for the sale of property in default of payment. The interest then that passed by the sale was only the right, title and interest of the judgment debtors at the date of the attachment in execution in 1887. But by the partition effected in December 1886, the property in question vested in the present plaintiff subject, upon the facts found, to the payment of the decree debt, and his equity of redemption could not therefore be prejudiced by the sale. The decision of the Courts below rests on the ground that a money decree against the karnavan is sufficient to validate a sale of tarwad property as against an anandravan, provided that the decree debt is one which binds the tarwad. But in the case before us, the plaintiff had separated from the tarwad and his community of interest with the judgment-debtors had determined before the attachment

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and the sale in execution of the decree in original suit No. 11 of 1885.

The decrees of the Courts below must be reversed, the Court sale set aside, and the 1st defendant declared entitled to remain in possession until the amount due to the 2nd defendant under the decree in original suit No. 11 of 1885 is paid by the plaintiff to the 1st defendant, and the suit dismissed in other respects. The 2nd defendant will pay the plaintiff's costs throughout.

BEST, J.—The decree, in execution of which the plaint property was sold (when 1st defendant purchased the same), was passed in a suit brought by 3rd and 4th defendants, members and managers of the plaintiff's tarwad, for redemption of the plaint paramba from 2nd defendant, who was a kanomdar. Second defendant set up an additional debt or poramkadam of Rs. 37, and the Munsif, finding that the poramkadam set up by 2nd defendant was true and binding on the property, passed a decree (exhibit II), in the following words:—"that the plaintiffs (now 3rd and 4th defendants) do pay to the defendant (now 2nd defendant) Rs. 131-4-4, the sum made up of Rs. 37 due under the poramkadam deed, and Rs. 64-4-4 the interest thereon to the date of the decree at the rate of one per cent., together with interest at the same rate from the date of the decree to that of execution on Rs. 37, the amount advanced; that the defendant (now 2nd defendant) do pay to the plaintiffs (now 3rd and 4th defendants) Rs. 37, the arrears of rent after deducting the kanom, together with rent at the rate of Rs. 6-6-0 and 50 cadjans, from the date of the decree to the surrender of the land;" and then follows the order as to costs.

The Subordinate Judge remarks with reference to this decree "that it is perhaps not artistically drawn out, but paragraph 5 of the judgment (exhibit II) declares the relative rights and liabilities of the mortgagor and mortgagee" and it is, he finds, "capable of execution at the suit of either."

Paragraph 5 of the judgment (exhibit III) is as follows:—"I allow the poramkadam evidenced by exhibit I to be charged on the property, and direct that the sum secured by that bond with one per cent. interest only throughout be paid with the kanom to defendant on eviction. With the above modification, I decree surrender of the land."

A judgment can no doubt be looked into to explain a decree; but neither in the judgment (exhibit III) nor in the decree

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(exhibit II) is there any authority given to the then defendant (now 2nd defendant) to recover the amount then found due to him by execution of that decree. The decree was merely one declaring this 2nd defendant entitled to a certain amount and directing him to surrender the property to the present 3rd and 4th defendants on the payment to him of that amount.

The sale of the property in execution of that decree on the motion of the 2nd defendant must, therefore, I think, be held to be invalid as against the plaintiff; and 1st defendant as purchaser at such sale must be held to have acquired merely a right to possession of the paramba as assignee of the 2nd defendant.

I would, therefore, set aside the decrees of both the Lower Courts and declare the Court sale of no effect as against the plaintiff except in so far as it entitles 1st defendant to possession of the property in place of 2nd defendant, till the amount due to the latter under the decree (exhibit II) be paid by plaintiff to 1st defendant.

The plaintiff's costs throughout should be paid by 2nd defendant.

ORIGINAL CIVIL.

Before Mr. Justice Best.

BANK OF MADRAS (PLAINTIFF),

v.

SUBBARAYALU AND ANOTHER (DEFENDANTS).*

Stamp Act—Act I of 1879, ss. 9, 33, 34, rule 6—Promissory note—Hundi Stamp.

In a suit on a promissory note for Rs. 4,300, which was executed on an impressed sheet bearing an impressed stamp with the word "hundi" at the top and the words "three rupees" at the bottom of the impression:

Held, on its appearing that the instrument was correctly stamped as to the amount of duty, that the instrument was admissible in evidence.

SUIT on a promissory note for Rs. 4,300. The defendants pleaded that the note was not duly stamped under the Stamp Act and the rules made thereunder. See notification No. 1288, dated 3rd March 1882, published in the *Fort St. George Gazette* of 23rd

* Civil Suit No. 359 of 1889.

March 1882, p. 157, and notification No. 2955, dated 1st December 1882, and published in the *Fort St. George Gazette* of 19th December 1882, p. 770.

Mr. W. Grant for plaintiff.

Mr. R. F. Grant for defendants.

The following cases were referred to in the argument besides the case mentioned in the judgment.

Reference under Stamp Act, s. 46(1); Reference under Stamp Act, s. 46(2); Radhakant Shaha v. Abhoychurn Mitter(3); Anonymous case(4).

JUDGMENT.—This is a suit by the Bank of Madras for the recovery (with interest) of a sum of Rs. 4,300 due under a promissory note. The first defendant is the drawer of the note and the second defendant the indorser. First defendant admits his execution of the note, but pleads that he did so "at the request" of the plaintiff (Bank) who through their agent T. Murugasa "Mudali" promised and agreed that the plaintiff would not at any "time call upon him, the first defendant, to pay same or any part thereof," and that the note was executed by him (first defendant) for the accommodation of one Gurunatha Chetti, who was at the time already indebted to the Bank under two previous notes for Rs. 2,000 and Rs. 2,500 respectively, both of date 8th March 1889.

The plaint note has been filed as exhibit A; it is dated 10th September 1889. The acceptor of the note is Ramaswami Chetti, brother of the Gurunatha Chetti referred to by first defendant. He has allowed the suit to proceed *ex parte* as far as he is concerned.

The issues are as follows:—

- (i) Whether the promissory note was signed by first defendant on the understanding that he should not be called upon at any time to pay any part thereof?
- (ii) Was Murugasa Mudali empowered to make any such promise so that it should be binding on the plaintiff?
- (iii) Was there no consideration for the note so far as the first defendant is concerned?
- (iv) What relief, if any, is plaintiff entitled to?

(1) I.L.R., 7 Mad., 176.
(3) I.L.R., 8 Cal., 721.

(2) I.L.R., 11 Mad., 377.
(4) I.L.R., 10 Cal., 274.

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On the case coming on for trial it was objected on behalf of the first defendant that the note A is not admissible in evidence as it is written on a hundi paper. In support of this contention reference was made to the rules made under section 9 of the Stamp Act by the Governor-General in Council, dated 3rd March 1882, No. 1288, and 1st December 1882, No. 2955. See Ponnuswami Chettiar's Stamp Manual, pp. 45-60. The rules of 3rd March 1882 relied on are Nos. 4 and 6, the former of which is that "all instruments chargeable with duty, except hundis, may be written on impressed sheets, and, except as provided by section 10 of the said Act (*i.e.*, Stamp Act) and by these rules, shall be so written." While rule 6 relates to the paper on which hundis shall be written. It is as follows :—

"Hundis other than hundis which can be stamped with an adhesive stamp under section 10 of the said Act shall be written as follows :—

"Hundis payable otherwise than on demand, but not more than one year after date or sight and for amounts not exceeding Rs. 30,000 in individual value, on impressed sheets bearing the word hundi." (The rest of the rule need not be quoted.)

The rule of 1st December 1882, No. 2955, is that promissory notes "drawn or made in British India and chargeable with a duty of annas 6, 10 or 12 shall be written on impressed sheets of those values bearing the word hundi."

The contention on behalf of the first defendant is that the rule last quoted allows only of promissory notes chargeable with a duty of annas 6, 10 or 12 being written on paper bearing the word hundi, and as the plaint promissory note is for a sum requiring a stamp of Rs. 3 and as it consequently does not come within this rule, it being written on a hundi paper, must be held to be not duly stamped.

I am unable to accede to this argument. If it was intended that promissory notes requiring a stamp other than 6, 10 or 12 annas should not be written on impressed sheets intended for hundis and bearing the word hundi, the rule might easily have been worded so as to make the intention clear. As the rules now stand, I find that a document such as A must be written on an impressed sheet, and that, though promissory notes chargeable with a duty of 6, 10 or 12 annas must be written on hundi paper, there is no pro-

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hibition against other promissory notes also being so written, as these hundi papers are also "impressed sheets." Had the rule of 1st December 1882 been merely permissive with regard to the promissory notes therein specified, there would be force in the argument for the first defendant—that only such notes could be made on hundi paper, as such a rule would have shown that hundi paper could not have been used theretofore for the execution of promissory notes. But the passing of an obligatory rule with regard to some particular classes of notes is not a sufficient declaration that other notes shall not be executed in the same kind of paper; and to justify the exclusion from evidence of a document like A (which is admittedly executed on an impressed sheet of the proper value) on the ground that the stamp bears the word hundi, there must be a distinct and positive rule against the employment of such paper for the purpose and not merely a dubious inference as to the intention of the framers of the rules. A decision of the Judicial Commissioner of Oudh to the effect now contended for on behalf of the defendant has been brought to my notice. It is not a reported case, and I am unable to accept the conclusion arrived at by the learned Judicial Commissioner in that case. I, therefore, allowed the note A to be filed as an exhibit.

Murugasa Mudali has been examined by the plaintiff and denies that he obtained first defendant's signature to A on the understanding that first defendant should never be called on to pay anything on account of the debt. First defendant's statement to the contrary is unsupported by any evidence except that given by himself. Both Murugasa Mudali and Mr. Duffield swear that the former was not empowered to make any such promise to the first defendant. The letter B admitted by first defendant shows that he was a party to the original loans of December 1888, and it is clear from his letter D, dated 13th December 1889, that he knew he was also liable for the debt. The other exhibits filed on behalf of plaintiff merely show the manner in which the original notes were renewed from time to time. My findings on the first and second issues are in the negative.

On the third issue I find that there was consideration for the note such as to make first defendant also liable for the debts, and as to the fourth issue my finding is that both the defendants are

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liable to pay to the plaintiff the amount sued for, with interest, amounting in all to Rs. 4,527-4-0.

I decree, therefore, that defendants do pay to plaintiff this amount and costs of the suit, with further interest on the whole amount at 6 per cent. per annum from this date to date of payment.

Barclay & Morgan—attorneys for plaintiff.

Branson & Brunson—attorneys for defendants.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

CHINNA TEVAN AND ANOTHER.*

*Criminal Procedure Code, ss. 307, 418—Verdict of jury—Perversity of verdict—
Procedure when Sessions Judge disagrees with verdict—Appeal against conviction.*

A jury returned a verdict of guilty against the accused in a trial for dacoity. The Sessions Judge accepted the verdict, although he said he did not agree with it and had charged the jury for an acquittal; he observed that he could not refer the verdict as perverse since there was evidence against the accused which it was open to the jury to believe. The accused appealed to the High Court on the ground (*inter alia*) that the Sessions Judge "ought to have referred the case to the High Court under Criminal Procedure Code, s. 307."

Held, that since there had been no misdirection by the Sessions Judge, and there was some evidence to support the verdict, the High Court had no power to interfere, however absurd the verdict might be considered.

APPEAL against the conviction of the appellants on 11th June 1890 by H. T. Ross, Acting Sessions Judge of Madura, and a jury on the charge of dacoity.

The appellants and three others were charged with having committed dacoity on the night of 6th November 1889 on the Periyakulam-Ammayanaikanur high road.

The case against the appellants rested mainly upon the evidence given by certain constables and kavalgars as to the circum-

stances under which they were arrested; there was, however, some evidence of their identification by the persons who had been robbed.

The Sessions Judge, in charging the jury, pointed out the inconclusive nature of the above evidence, but the jury returned a verdict of guilty against the appellants—the other persons being acquitted.

The Sessions Judge said as to this verdict:—"The juries in Nos. 7 and 9 refused to believe the story. This jury takes the other view, and though (as will be obvious) I charged this jury plainly for an acquittal and do not agree with their verdict, I cannot say that it was not open to them to believe the Police witnesses if they chose, or to believe the evidence of identification even apart from the Police story of the capture. I cannot, therefore, refer the verdict as perverse, though it is not what I myself should have found. In considering sentence I keep in view the fact that this is a high road in constant use by travellers to and from the railway which has become notorious for dacoity, which it is the duty of the Court to assist in suppressing by due severity of sentence where convictions are obtained. I accordingly sentence, the first and second prisoners each to undergo the maximum term of rigorous imprisonment provided for the offence, namely, rigorous imprisonment for 10 years."

This appeal, which was preferred against the above conviction and sentence, proceeded on the grounds that the Sessions Judge ought to have referred the case to the High Court under Criminal Procedure Code, s. 307; that "there was no evidence on the record to convict the accused;" that "considering the evidence on the record the sentence was excessive," &c.

Mahadeva Ayyar for appellants.

Mr. Wedderburn for the Crown.

JUDGMENT.—This is another case of a conviction by a jury of persons accused of dacoity against the opinion and advice of the Sessions Judge although he declines to refer the case to the High Court under section 307 of the Code of Criminal Procedure; we have no power to interfere, however absurd or wrong we may think the verdict to have been. There has been no misdirection by the Sessions Judge, and there is evidence against the prisoners if the jurymen chose to believe it. The sentence also is not too severe supposing the prisoners are guilty. The prisoners, of

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course, may bring their case to the notice of His Excellency the Governor in Council, if they be so advised.

Our duty under the present state of the law is to dismiss the petition and confirm the conviction and sentence. *

* The appellants preferred a petition to His Excellency the Governor in Council, on which the following order was made, dated 20th November 1890 :—

“In exercise of the powers vested in him by section 401 of the Code of Criminal Procedure, His Excellency the Governor in Council is pleased to direct that “the unexpired portion of the sentence of 10 years’ rigorous imprisonment imposed “upon the convicts No. 726, Chinna Tevan, and No. 727, Karuppa Tevan, *alias* “Vellaya Tevan, be remitted, and that they be set at liberty.”

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

BYARI AND OTHERS (DEFENDANTS 4, 7 AND 8 AND REPRESENTATIVES
OF 10TH DEFENDANT), APPELLANTS,

v.

PUTTANNA (PLAINTIFF), RESPONDENT.†

*Aliyasantana Law—Unjustified alienation of family property by a member of
undivided family—Limitation—Adverse possession.*

In 1851 the ejaman of an aliyasantana family mortgaged family property to the ancestor of some of the defendants who and whose alienees were now in possession. The mortgagor died leaving besides one brother, two sisters, each having a son—the family remaining undivided. In 1856 one of the sons, with the concurrence of his uncle and mother, conveyed the land to the mortgagee, but this transaction was not justified by any family necessity; and in 1857 the other son and his mother sold their undivided moiety to the plaintiff's predecessor in title. In a suit to redeem the mortgage of 1851, the plaintiff obtained a decree for redemption of a moiety of the mortgage property :

Held, that although it may have been supposed in 1857 that compulsory partition was permitted by the aliyasantana law, yet as the right to the half share purported to be sold in 1857 had no legal existence, nothing could pass by that sale and the suit should be dismissed.

Per cur. Neither the original mortgagee nor his son can rely on the 12 years rule of limitation unless he can prove a subsequent valid sale, in the absence of which his possession must be taken to retain its original character.

SECOND APPEAL against the decree of A. Venkataramana Pai, Acting Subordinate Judge of South Canara, in appeal suit

† Second Appeal No. 242 of 1880.

No. 157 of 1888 confirming the decree of K. Krishna Rau, District Munsif of Udipi, in original suit No. 83 of 1887.

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Suit to redeem a mortgage executed in 1851 by one Basava Shetti, the ejaman of an aliyasantana family, in favor of Uskunhi Byari, from whom defendants Nos. 1—6 claimed as heirs, and some of the other defendants claimed title under conveyances from them made less than 12 years before suit.

The mortgagor died in or about 1854, leaving a brother, Tukra, and two sisters, Putta and Mani, each of whom had a son, called Mahalinga Shetti and Subbu Shetti respectively. In 1856 Mahalinga sold the entire estate to the mortgagee in satisfaction of the mortgage debt and another debt, with the concurrence of his mother, under circumstances of no justifying family necessity. In 1857 Subbu Shetti and his mother purported to sell an undivided moiety of the family property to the predecessor in title of the plaintiff. At the last mentioned date, Putta, Mani and their sons were members of an undivided aliyasantana family.

The District Munsif passed a decree for redemption of one moiety of the mortgaged property, and this decree was affirmed on appeal by the Subordinate Judge.

Defendants Nos. 4, 7 and 8 and the representatives of defendant No. 10 preferred this second appeal.

Narayana Rau for appellants.

Ramasami Mudaliar for respondent.

“JUDGMENT.—Both Courts have failed to record a finding on “several points essential to the decision of this case, and, before “deciding this second appeal, we must ask the Subordinate Judge “to return findings on the following issues :—

“(i) Was the sale of 1856 evidenced by exhibit I concluded “by the ejaman for purposes binding on the family.

“(ii) Whether the two sisters, Puttamma and Mani, were “at that time divided or undivided.

“(iii) Whether, at the date of the sale evidenced by exhibit “I, Mani was the vendor of an undivided share.

“(iv) Whether Uskunhi and his heirs have been in possession “of the whole land since 1856, and, if not, who “has been in possession, of how much, and for what “length of time.

“The findings should be returned within two months from “the date of the receipt of this order, and ten days, after the

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"objections. Fresh evidence may be taken."

The findings returned by the Subordinate Judge in compliance with the above order were—on the 1st issue, in the negative; on the 2nd, to the effect that the sisters were undivided; on the 3rd, in the affirmative; on the 4th, that the whole land had been in the possession of the mortgagee and his heirs and his and their transferees since 1856.

This second appeal coming on for final hearing, the Court delivered the following judgment.

JUDGMENT:—This second appeal comes on again for disposal upon findings returned on issues referred for re-trial. The land in dispute is part of an estate which originally belonged to an aliyasantana family in South Canara. In 1851 one Basava Shetti, who was its ejaman or representative, mortgaged the estate with possession for Rs. 200 to a Mopla named Uskunhi Byari. Basava Shetti died prior to 1855, leaving him surviving a brother named Tukra and two sisters named Putta and Mani, each of whom had a son, called Mahalinga Shetti and Subbu Shetti respectively. In April 1856, Mahalinga sold the entire estate to Uskunhi Byari in satisfaction of the mortgage and for a further payment under document I which was attested by his mother Subbu and his uncle Tukra.

The purchaser continued to hold possession until 1866 when he sold a moiety to his brother-in-law Abdul Kadiri, who gave it in 1872 to his two daughters who are the wives of the first and second defendants respectively. Uskunhi Byari had several wives, and defendants Nos. 1—3 are his sons by his 2nd wife and defendants Nos. 4—6 are his sons by his 3rd wife. In 1868 the latter sued the former for partition of the moiety of which Uskunhi Byari died possessed, and obtained 6/13ths as an allotment for their share and that of their mother, the other 7/13ths of the moiety remaining in the possession of the former. Defendants Nos. 2—6 alienated for value their several shares or portions of them afterwards. Of the entire estate, assessed at Rs. 64, a moiety, assessed at Rs. 32, is in the possession of the wives of the first and second defendants, and of the other moiety the first defendant is in possession of a portion assessed at Rs. 4-8-0, and the fifth and sixth of a part assessed at Rs. 5-12-0. As alienees in no way connected with Uskunhi Byari's family,

defendant No. 7 has in his possession land assessed at Rs. 7-12-0 under sale deeds III and IV, dated October 1877 and April 1880; defendant No. 8 is possessed of a part assessed at Rs. 5 under the sale deed V, dated April 1880; defendant No. 10 of a portion assessed at Rs. 9 under exhibit XV, dated April 1876; defendant No. 9 is in possession of a small portion, but the claim against him was adjusted by compromise.

It was already observed that Basava Shetti had a sister named Mani who had a son called Subbu Shetti. In July 1857 they executed a sale deed in favor of one Sabine Byari purporting to transfer to him for value their undivided moiety of the family estate. Sabine Byari assigned his right of purchase in 1871 to one Moidin Byari whose representatives resold it to the plaintiff in November 1886. It would seem that the sale in favor of Sabine Byari was not heard of until the partition suit of 1868, and that it was during that litigation that the right of purchase was transferred to Moidin Byari, but that no action was taken upon it before the plaintiff bought it in 1886, although the suit of 1868 terminated in a decree for partition among defendants Nos. 1—6 and the decree was followed by sub-division among the several sharers and by sales of several of their allotments. The plaintiff's case was that according to the aliyasantana usage, as recognized by Courts of Justice in 1857, partition was permitted, and that the sale of a moiety of the estate by Mani and Subbu was therefore valid though subject to the mortgage executed in 1851 by Basava Shetti, about which there was no dispute. The defence was that the suit was barred by limitation, and that the prior sale by Mahalinga under which the parties now in possession claimed was binding upon Mani and Subbu, who executed the subsequent sale deed in favor of Sabine Byari under which the plaintiff claimed. As the possession of Uskunhi Byari commenced in 1851 under the mortgage executed by Basava Shetti, both the Lower Courts held that the right of redemption was in force for sixty years. On the merits they found that the several transactions already described were real, and that though the circumstances under which the plaintiff sued upon the sale in favor of Sabine Byari excited some suspicion to the effect that Sabine purchased *benami* for Uskunhi Byari, they could not decline to uphold the purchase on mere suspicion. They found further that in 1857 the sisters of Basava Shetti and their sons belonged to an undivided aliyasantana

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family, that the first sale by Mahalinga Shetti was not justified by family necessity and could not bind his aunt Mani and her son Subbu who were no parties to it. They held that the sale of an undivided moiety was good, but that the plaintiff was entitled by right of purchase *not* to the specific moiety in the possession of the defendants as contra-distinguished from the moiety in the possession of the wives of the first and second defendants, but to a moiety of the whole estate as originally mortgaged subject to the payment of a moiety of the mortgage debt. On the ground, therefore, that the plaintiff did not make the wives of the first and second defendants parties and include the moiety in their possession in this suit, they decreed to the plaintiff possession only of a moiety of the properties mentioned in the plaint less certain portions not included in the mortgage, and directed him to pay to the defendants a quarter share of the mortgage debt, viz., Rs. 50. From this decree defendants Nos. 4, 7, 8 and 10 have appealed.

As this is a second appeal we must accept the facts as found by the Court below and see if the decree can be supported upon them. Two questions of law arise for decision, viz., those of limitation and of impartibility of property governed by aliyasantana usage.

As to the former, we see no reason to doubt the correctness of the decision of the Courts below. The alienations upon which the appellants Nos. 2—5 rely are less than 12 years old, and the first appellant is the son of Uskunhi Byari. The moiety alienated by Uskunhi Byari to Abdul Kadiri Byari and by the latter to his daughters is included in this suit, and it is unnecessary to consider the question in relation to it. Neither the original mortgagee nor his son can rely on the 12 years rule unless he proves a subsequent valid sale, in the absence of which his possession must be taken to retain its original character. We are of opinion therefore that the claim is not barred to the extent to which it has been decreed.

As regards the second question, however, we are unable to hold that the sale by Mani and her son can be upheld at all. The Courts below rest their decision to the contrary on two grounds, viz., (I) that there was an erroneous notion in 1857 that compulsory partition was permitted by the aliyasantana law, and (II) that, as they were entitled to set aside the sale by Putta and Mahalinga in its entirety and to redeem the whole property, they might in

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their discretion relinquish their right to a moiety and redeem the remainder. Neither of these grounds is tenable. It is now settled law that partibility is *not* an incident of aliyasantana property, and a mistake of law in 1857 cannot legalize a sale which is really opposed to law and which has not already been enforced. If the sale by Mahalinga and Putta can be set aside by Mani and her son in its entirety on the ground that it was not justified by family necessity, it can only be done by them on behalf of the family and for the purpose of recovering the property for its use. The right so to set aside the sale is not that of any individual member of an aliyasantana family, but it is the right of the family which the individual is taken to represent. This being so, the right to a half share which Mani and Subbu professed to sell as the separate though undivided interest of their branch in the impartible family property had no legal existence and nothing could pass by such sale. The purchaser could not be permitted to stand in their shoes for the purpose of representing the joint family or enforcing its right because he is a stranger to the family and because the right of the family was not the interest that was sold or that is sought to be realized. If a similar sale by a co-parcener is upheld under Hindu law to the extent of the vendor's share, it is upheld not by virtue of the right of interdiction which he has as a representative of the family under paragraph 28, Sec. I, Chap. I, Part II of the Mitakshara, but because the co-parcener is at liberty to convert his interest into specific separate property by partition, and a purchaser for value has an equity to stand in the shoes of the vendor to that extent. This equity which rests on the partibility of ordinary Hindu property has no place in the aliyasantana law which forbids compulsory partition altogether.

The decrees of the Courts below must be reversed and the suit dismissed with costs throughout save so far as it relates to the land which is the subject of the compromise with the ninth defendant.

APPELLATE CIVIL.

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

NARASIMHA NAIDU (PLAINTIFF), APPELLANT,

v.

RAMASAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Rent Recovery Act—Act VIII of 1865, s. 11—Implied contract as to rent—Land irrigated under Kistna anicut—Collector's sanction to increase of rent.

Land in a zamindari in the Kistna delta was newly irrigated from anicut channels. The zamindar tendered pattas at wet rates:

Held, (1) that the zamindar was not entitled to levy increased rates without the Collector's sanction under s. 11 of Act VIII of 1865, although he had expended money on the channels;

(2) that payment for five years of such wet rates under a five year's lease did not imply a contract to continue such payments;

(3) that a stipulation in the previous lease binding the tenants to pay such increased rates in case of future irrigation did not bind the tenants after the term of that lease expired.

SECOND APPEALS against the decrees of G. T. Mackenzie, District Judge of Kistna, in appeal suits Nos. 34 to 38 of 1888, confirming the decrees of C. Raghava Rao, Temporary Deputy Collector of Kistna, in suits Nos. 12, 13, 14, 15 and 17 of 1887.

The plaintiff in these five suits was the zamindar of Vallur and the defendants were his tenants. The defendants held leases for a five year's term from fasli 1291 to 1295 inclusive. These leases were in a printed form which contained a stipulation that if the tenants brought land under irrigation they should pay not only the water rate due to Government but also an increased rate to the zamindar. In fasli 1296 the defendants brought part of their lands newly under irrigation. The zamindar tendered pattas in the printed form containing that stipulation and imposing wet rates upon the newly irrigated land. The defendants refused to accept these pattas, objecting to that stipulation and contending that they need pay upon the newly irrigated land only the Government water rate and the old dry rate due to the zamindar.

* Second Appeals Nos. 594 to 598 of 1889.

The zamindar then filed these suits to compel acceptance of these pattas. The Deputy Collector held that the zamindar could not levy increased rates without the sanction of the Collector under the proviso to section 11 of Act VIII of 1865 and dismissed the suits. On appeal the District Judge affirmed the decision of the Deputy Collector.

The plaintiff preferred these second appeals.

Parthasaradhi Ayyangar and *Bhashyam Ayyangar*, for appellant.

Pattabhirama Ayyar, for respondents.

JUDGMENT.—“It is not clear from the judgment of the District Judge whether any contract, express or implied, has been entered into between the landlord and his tenants or one or other of them who are parties to these second appeals. Until this has been found, we are unable to dispose of these appeals. Fresh evidence will be allowed. The District Judge is requested to submit a distinct finding on the issue above stated.”

In compliance with this order the District Judge submitted a finding which explained that for convenience of the revenue accounts the land in the Kistna delta is classed as dry and that a water-rate of Rs. 4 per acre is levied by Government upon all land reached by the water of the anicut channels. The raiyats contend that when this irrigation is extended to their lands they need pay only this water rate to Government and the former dry rates to the zamindar. The zamindars contend that in such cases the raiyats must pay increased or wet rates to the zamindar, and a stipulation to that effect is inserted in the printed form of patta. The District Judge expressed an opinion that the acceptance in former years of pattas with this stipulation does not deprive the tenants of the protection given them by the proviso to section 11 of Act VIII of 1865, and does not compel them to accept such pattas in future. The District Judge also was of opinion that payment for five years by the tenant to the zamindar of such increased rates supported the inference of a contract to continue to pay these increased rates. Upon this ground the District Judge found that four of the defendants who had paid the increased rates upon some irrigated land in faslis 1291 to 1295 must continue to pay these increased rates upon that land but not upon the extent newly irrigated in fasli 1296.

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These second appeals coming on for final hearing the Court delivered the following judgment.

JUDGMENT:—The District Judge has, we think, correctly found that there was no contract to pay the wet rates as regards the lands newly irrigated in fasli 1296. The contract, which the appellant seeks to rely on to prove the contrary, was a contract of lease which expired with fasli 1295 or prior to the term for which plaintiff now seeks to enforce a patta. Apart from contract the plaintiff cannot succeed, as he has clearly not brought himself within the requirements of the proviso to section 11 of the Rent Act. Taking it that he has been at some expense for the minor distribution channels, he has not, it is admitted, obtained the sanction of the Collector to the additional rent which he seeks to enforce.

We are unable, however, to accept that portion of the District Judge's finding in which he holds that there was an implied contract to pay wet assessment on the extent of land previously included in the lease for five years ending with fasli 1295. No implied contract as to future years can, in our opinion, be inferred from a single lease extending over a brief period of five years. The result is that we agree in the conclusions at which the District Judge arrived in the first instance and we accordingly dismiss the appeals Nos. 594-7 with costs and No. 598 without costs.

APPELLATE CIVIL.

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

CHOMU (PLAINTIFF), APPELLANT,

v.

UMMA AND OTHERS (DEFENDANTS NOS. 2 TO 4), RESPONDENTS.*

Specific Relief Act, s. 42—Objection that consequential relief available—Land Acquisition Act—Act X of 1870—Claim to share of compensation—Valuation in private transaction.

The plaintiff, as heir to her husband, brought a suit, in which Government was not represented, for a declaration of title to a quarter share of jenm value of

* Second Appeal No. 1122 of 1889.

land taken up under the Land Acquisition Act. It appeared that the plaintiff's husband had mortgaged his share of the land in question to the defendants' predecessor in title in 1872 by an instrument in which his share was valued at Rs. 375:

Held, (1) that the suit for a declaration only was maintainable;

(2) that the valuation of the plaintiff's husband's share in the instrument of 1872 was not binding on the plaintiff in the present suit.

Per cur: Assuming, for the moment, that the plaintiff was able and called upon in this case to ask for further relief, we are of opinion, following the decision of the Bombay High Court in *Limba Bin Krishna v. Rama Bin Pimplu* (I.L.R., 13 Bom., 548), that the suit should not, at the present stage, be dismissed on this ground, the objection not having been raised in either of the Lower Courts.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar at Calicut, in appeal suit No. 514 of 1888, affirming the decree of T. V. Anantan Nayar, Principal District Munsif of Calicut, in original suit No. 127 of 1887.

The plaintiff sued, as the widow of one Unni Chetti, for a declaration of her title to receive Rs. 792-7-2, being her one-quarter share of the jenm value of a piece of land, which had been taken up by Government under the Land Acquisition Act. The land in question was the property of Unni Chetti and his three brothers, but a partition took place between them, and, in June 1872, Unni Chetti conveyed his share to the predecessor in title of the defendants under an instrument held to evidence a mortgage, which provided that the conveyance should become absolute if the kanom amount was not paid in two years, and by which Unni Chetti's share of the jenm was valued at Rs. 375. In those proceedings, the jenm right to the land as a whole was valued at Rs. 3,735-12-10, which sum remained at the date of the suit in the hands of the Collector, who was not made a party to it. The plaintiff came in as defendant in the proceedings held under the Land Acquisition Act, but her name was removed from the record, and she was left to bring a separate suit.

The District Munsif passed a decree dismissing the plaintiff's suit and this decree was affirmed on appeal by the Subordinate Judge, who held that the plaint which bore only a 10-rupees stamp, was insufficiently stamped under the Court Fees Act, which in the view he expressed, required that a court fee should be paid on the amount claimed, and also that the plaintiff was bound by the valuation of her husband's share contained in the instrument of 1874.

The plaintiff preferred this second appeal.

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1890.
August 5.

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v.
UMMA.*Sundara Ayyar* for appellant.*Narayana Rau* for respondents.

JUDGMENT.—On behalf of the respondents, it is objected that, as the plaintiff might have sued for further relief, she is not entitled, with reference to section 42 of the Specific Relief Act, to maintain the present suit for a mere declaration.

Assuming, for the moment, that the plaintiff was able and called upon in this case to ask for further relief, we are of opinion, following the decision of the Bombay High Court in *Limba Bin Krishna v. Rama Bin Pimplu*(1), that the suit should not at the present stage be dismissed on this ground, the objection not having been raised in either of the Lower Courts.

We are of opinion, however, having regard to the circumstances of this case that the relief sought for by way of declaration was sufficient, and that it was not necessary for the plaintiff to ask for any further relief in the suit.

The objections on this ground accordingly fail.

The suit for a declaration being, for the reasons stated, maintainable, we are of opinion that the Subordinate Judge has erred in taking the value of the share of the jenm to have been fixed for the purposes of such a claim as that now advanced by the covenant between the plaintiff's husband and the mortgagee in 1872 (exhibit I). The value of the one-quarter share then fixed was fixed for a specific purpose, viz., the purpose of conditional sale then contemplated by the parties to that exhibit. The transaction contemplated is one which for reasons which need not be entered on the Courts refuse to enforce, and the object for which the valuation was made being therefore ineffectual even for the purposes contemplated by the parties, the party to the instrument cannot be held to be bound by that valuation, when a question actually arises in a suit properly brought as to what is the actual value of this share. In the present case the land to which the mortgage attached has been taken up under the Land Acquisition Act, and the property no longer exists in the shape in which it did at the time of the proposed conditional sale, but has been converted into money. The value of the entire property, of which plaintiff claims one-quarter share, has been realized in the shape of money, is Rs. 3,735, and the plaintiff, if entitled at all,

(1) I.L.R., 13 Bom., 548.

is, we think, clearly entitled to her proportionate share, viz., one-quarter of this amount, less the necessary deductions for kanom interest, &c.

These deductions may be fixed as follows :—

	RS.
Kanom	200
Interest at 12 per cent. up to 30th November 1874	60
Interest approximately up to date at 6 per cent ..	192
Total ..	452

This amount being deducted from Rs. 933-15-2, the one-quarter amount of the proceeds of the land, the value remaining is Rs. 481-15-2, and, in respect of this sum, the plaintiff is, we hold, entitled to the declaration prayed for. We accordingly reverse the judgments of the Lower Appellate Court and of the District Munsif and give a decree for the plaintiff in the terms above stated. Plaintiff is entitled to her costs throughout this suit. The defendants will bear their costs throughout.

APPELLATE CIVIL.

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

NANU (PLAINTIFF), APPELLANT,

v.

MANCHU AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 83—Deposit in Court by mortgagor.

The deposit intended by Transfer of Property Act, s. 83, must be made unconditionally. Accordingly when the mortgagor in making the deposit prays that the amount should be paid out to the mortgagee on his producing certain deeds the provisions of the section are not complied with.

SECOND APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 290 of 1889, reversing the decree of K. Ramanatha Ayyar, District Munsif of Temelprom, in original suit No. 254 of 1888.

* Second Appeal No. 1466 of 1889.

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UMMA.1890.
Aug. 15, 22.

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MANCHU.

Suit to recover principal and interest due on a mortgage, dated 28th February 1877. Defendant No. 1 had acquired the rights of the mortgagee, and the plaintiff had acquired those of the mortgagor. On the 5th July 1888, defendant No. 1 deposited the sum of Rs. 699 in the Court of the District Munsif of Temel-prom, presenting a petition under Transfer of Property Act, section 83, in which he prayed that notice be sent to the plaintiff as provided in that section, and that the plaintiff be called upon to bring in seven documents which were specified, and that, on his doing so, the amount deposited be paid to him. The plaintiff brought in one document only and stated that he was willing to receive the amount deposited; but defendant No. 1 refused to acquiesce in this. In the present plaint, it was stated that the cause of action arose at the date of this refusal.

The District Munsif passed a decree against defendant No. 1 for the amount due on the mortgage and directed that the sum deposited in Court be paid out to the plaintiff in satisfaction of the principal and part of the interest. This decree was reversed on appeal by the District Judge, who held that the suit was not maintainable as framed.

The plaintiff preferred this second appeal.

Rama Rau for appellant.

Sankaran Nayar for respondent No. 1.

JUDGMENT.—We think that the District Judge was right in holding that the deposit intended by section 83 of the Transfer of Property Act should be made unconditionally, and that, therefore, the District Munsif was wrong in accepting the deposit. Putting the deposit aside, Mr. Rama Row argues that his client is still entitled to his remedies on the mortgage. But the decree of the District Munsif is not a mortgage decree and the appellant did not appeal against it. We could not, therefore, modify it to the prejudice of the respondents if, in other respects, we thought that the plaintiff was entitled to ask for a mortgage decree.

This second appeal is dismissed with costs.

APPELLATE CIVIL.

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

LEISHMAN (PLAINTIFF), APPELLANT,

v.

HOLLAND (DEFENDANT), RESPONDENT.*

Defamation—Privilege—Communication by a servant of a company to one of his subordinates as to another subordinate.

1890.
August 1.
September 3.

In an action for damages for defamation brought by a brewer recently employed by a brewery company against the local manager of the company, the defamatory statements complained of were contained in letters written by the defendant to the directors of the company, and also in a letter written to another brewer in the employ of the company in which he said that the plaintiff "had failed most utterly, and I have been compelled to inform him that you will take the position of senior brewer at the brewery: "

Held, that all these statements were in the nature of privileged communications.

APPEAL against the decree of W. E. T. Clarke, Subordinate Judge of Nilgiris, in original suit No. 88 of 1886.

Suit for damages for defamation. The plaintiff was a brewer recently employed by a brewery company and the defendant was the local manager of the company. One of the defamatory statements complained of was set out in the plaint as follows:—

"Defendant in a letter to Mr. Crichton, dated 26th April 1886, writes: 'Mr. Leishman had failed most utterly, and I have been compelled to inform him that you will take the position of senior brewer at the brewery.'"

(The addressee of the above letter was a brewer subordinate to the defendant in the service of the company).

The other defamatory statements complained of were comprised in letters written to directors of the company by the defendant imputing mismanagement, neglect of orders, &c., to the plaintiff.

The Subordinate Judge dismissed the suit and the plaintiff preferred this appeal against his decree.

Mr. W. Grant for appellant.

Mr. K. Brown for respondent.

JUDGMENT.—This suit stands on an entirely different footing from that which has been prosecuted by the plaintiff against the company. Here the first question is whether the statements

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complained of by the plaintiff, which, in themselves, are certainly defamatory, were made under circumstances conferring on the defendant any privilege; and, secondly, it has to be seen whether they were made maliciously and with knowledge on the defendant's part that they were false.

Agreeing with the Subordinate Judge, we are clearly of opinion that the statements were all in the nature of privileged communications, and that the plaintiff has failed to prove that the defendant believed them to be untrue when he made them or acted maliciously in making them. We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Weir.

POLU AND OTHERS (DEFENDANTS), APPELLANTS,

v.

RAGAVAMMAL (PLAINTIFF), RESPONDENT.*

Rent Recovery Act—Act VIII of 1865, ss. 9, 11—Form of patta—Form of rent determined by implied contract—Variation in amount of rent.

In a landlord's suit to enforce acceptance of a patta and execution of a muchalka by the defendants, it appeared that the predecessor in title of the defendants had accepted from the predecessor in title of the plaintiff in 1849 a cowle for 11 years, which provided for payments in kind, but since the expiry of that period the rent had always been paid in money, though the amount varied. The tenant was described in the cowle as a sukavasi raiyat, and the defendants also claimed to be sukavasi tenants:

Held, that it was unnecessary to determine the cause of the variations in the amount of rent, and that an agreement that the rent should continue to be paid in money should be implied, and the landlord accordingly was not entitled to impose a patta providing for payment of rent in kind.

SECOND APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in appeal suit No. 374 of 1888, affirming the decree of A. David Pillai, District Munsif of Trivellur, in original suit No. 681 of 1885.

Suit by a landlord to enforce acceptance of a patta and execution of a muchalka by the defendants. The defendants (who were held by the District Munsif to be permanent sukavasi tenants)

* Second Appeal No. 796 of 1889.

objected to the patta on the ground that it provided for a varam rent, whereas their case was that the rent was payable in money.

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RAGAVAMMAL.

It appeared that the plaintiff's predecessor in title had executed to the defendants' predecessor in title on 5th February 1849 a cowle for 11 years, which contained provision for payments being made in kind. But it appeared that at any rate since the expiry of that period rent had always been paid in money though the amount varied from time to time.

The District Munsif held that the patta was such as the defendants were bound to accept and passed a decree for the plaintiff which was upheld on appeal by the District Judge.

The defendants preferred this second appeal.

Sadagopacharyar for appellants.

Srirangacharyar for respondent.

JUDGMENT.—The District Judge has held that the case did not come within the ruling in *Venkatagopal v. Rangappa*(1), because, although the rents have always been paid in money, there has been a variation in the amount of the money paid.

It is argued, however, that there has, in fact, been no variation in this respect, inasmuch as the increases of payment arose from an increase in the extent of lands occupied, and that a decision on this question which was, it is said, raised in the third issue was essential to a determination of whether there had been an implied contract to pay rent in money only. The question of the circumstances attending the variation has certainly not been gone into in either Court, and, if we considered it necessary, we should direct the question to be tried.

It appears to us, however, not necessary to test this point by a re-trial. In a recent set of cases, which came before this Bench from Ganjam—see *Nilakanta v. Mahadevi*(2)—we held that where the

(1) I.L.R., 7 Mad., 365.

(2) Second appeal No. 508 of 1889, in which the learned Judges said:—

"The question in this case was as to the form of the rent, that is to say, whether the rent should be paid in money or in grain.

"Both the Courts have found that rents had been paid in money for a period of about 50 years. The District Judge has, however, come to the conclusion that the case is not governed by the decision in *Venkatagopal v. Rangappa* (I.L.R., 7 Mad., 365), because the rent is not shown to have been an invariable one. The variation, however, has been a variation in the amount of the rent and not a variation in the form of the rent, for, as already stated, the finding is that the rent has for about 50 years been paid in money alone. We think, therefore, the case is governed by the decision in *Venkatagopal v. Rangappa* (I.L.R., 7 Mad., 363)."

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contest was only as between a varam and money patta, and where payment had all along for a period of over 50 years been shown to have been made in *one form* only, viz., money, a variation in the amount of money paid did not affect the inference that there was an implied contract to receive rent in the form of money, and that that case did come within the decision in *Venkatagopal v. Rangappa*(1).

The circumstances of the present case vary very slightly from those of the cases just referred to. In the present case there has, all along, that is, since 1849, been a payment, it is found in the form of money only.

It is sought, however, to distinguish the present case by the circumstance that the tenancy now in question originated in an express written contract, viz., the cowle of 1849, and, it is argued that this being so, it is not open to the Court to infer an implied contract from the act of the parties. As to this, in the first place, it is not shown that the tenancy did in fact originate only with the cowle of 1849. The defendants, in their written statement, claim to be permanent sukavasi tenants, and the District Munsif has found that they were such. No contest was expressly raised in the matter, which was apparently passed over to some extent in the District Munsif's Court, and entirely in the Lower Appellate Court. In the second place, granting that the tenancy originated in an express written contract, such contract enured only for 11 years, and the parties have, since 1860, been holding without at least an express written contract. During that period, i.e., for 24 years, there can be no dispute that rent has always been paid in money.

In these circumstances, we think, the case clearly does fall within the principle of the decision in *Venkatagopal v. Rangappa*(1), and that a contract to receive rent in money only must be inferred. In the circumstances of this case, the landlord having come into Court to enforce an acceptance of a particular kind of patta, viz., a varam patta, no further question is outstanding as to the propriety or non-propriety of the patta, and it is, therefore, unnecessary to direct an inquiry as to what would be a proper patta.

(1) I.L.R., 7 Mad., 365.

On this view we allow the appeal, and, reversing the decrees of the Lower Courts, we dismiss the original suit with costs throughout.

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v.
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APPELLATE CIVIL.

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

NAGAPPA (PLAINTIFF), APPELLANT,

v.

DEVU (DEFENDANT), RESPONDENT.*

1890.
September 16.

Registration Act—Act III of 1877, ss. 17 (d), 49—Specific Relief Act—Act I of 1877, s. 4 (c)—Admissibility of unregistered sale-deed—Suit for specific performance of contract to sell land.

The defendant executed a sale-deed of certain land to the plaintiff. The instrument bore Re. 1 stamp only. The plaintiff alleged that the defendant had improperly refused to register the sale-deed and prayed for a decree compelling its registration and for the possession of the land in question:

Held, that the unregistered instrument was admissible in evidence, and that in any case, secondary evidence of its contents was admissible, the document having remained unregistered through no fault of the plaintiff.

SECOND APPEAL against the decree of S. Subba Ayyar, Subordinate Judge of South Canara, in appeal suit No. 395 of 1888, reversing the decree of K. Krishna Rau, District Munsif of Udipi, in original suit No. 302 of 1887.

The plaintiff sued to compel the defendant to register a sale-deed of certain land executed to him on 25th June 1885 and to deliver possession of the land in question. The sale-deed was stamped with Re. 1 only: the portion of it which is important for the purposes of the present report was as follows:—

‘I have conveyed to you, for the value of Rs. 100, the “bhagaet garden-land in my possession, which I have been enjoying unencumbered by paying to the Mulgar-heir mulgeni at the rate of Rs. 2 per annum and which is situated within the boundaries mentioned below and appertains to the lands of the three following wargs:—

* Second Appeal No. 1589 of 1889.

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- "(1) Land assessed at Rs. 31, out of Kallappa Shetti's
"warg, Muli No. 14 in Varambali village (not
"Haradi), Brahmawar Magne, Udipi taluk, appertain-
"ing to the sub-district of Brahmawar within the
"registration district of South Canara.
- "(2) Land assessed at Rs. 84-15-0 of Chikkappa Shetti's
"warg, Muli No. 15 in the aforesaid village.
- "(3) Land assessed at Rs. 19, out of Venkappa Shetti's
"warg, Muli No. 16 in the said village, together
"with maramath, house, cow-pen, out-houses and wells,
"also the improvements made by me; and have re-
"ceived from you the said 100 rupees for the purpose
"of discharging the debt incurred for household
"expenses (from Haradi Manjunatha Kamthi, for
"the purpose of paying the amount due to your
"younger brother Shrinivasa Kamthi on account of
"rice, &c., borrowed for the maintenance of our family
"and also for the purpose of paying off other debt."

The plaintiff alleged that the defendant had improperly refused to register this instrument. The District Munsif passed a decree as prayed; but this decree was reversed on appeal by the Subordinate Judge, who held that the instrument in question was a sale-deed and not an agreement for sale; that it would defeat the provisions of the Registration Act to treat an ineffectual sale-deed as a valid agreement to sell, of which specific performance should be decreed; that even if the instrument had contained an agreement to sell, which it did not, it would have required registration, and that the plaintiff was precluded by Registration Act, s. 49, and Evidence Act, s. 91, from proving the agreement to sell by means of the unregistered instrument and the oral evidence of witnesses. He referred to *Ramasami v. Ramasami*(1), *Somu Gurukkal v. Rangammal*(2), *Hurjivan Virji v. Jamsetji Nourji*(3).

The plaintiff preferred this second appeal.

Ramachandra Rau Saheb & Fernandez for appellant.

Mr. Subramanyam for respondent.

JUDGMENT.—*Adakkalam v. Theethan*(4), is authority for holding that a document which, for want of registration is not admissible

(1) I.L.R., 5 Mad., 115.

(3) I.L.R., 9 Bom., 63.

(2) 7 M.H.C.R., 13.

(4) I.L.R., 12 Mad., 505.

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in evidence as creating an interest in land, is admissible for the purpose of obtaining specific performance of the contract, which is in effect the object of the present suit; and *Nynakka Routhen v. Vavana Mahomed Naina Routhen*(1) is authority for the admission of secondary evidence in case of a document being allowed to remain unregistered through no fault of the plaintiff. In either case, therefore, the Subordinate Judge's decision is wrong.

The Munsif has found that there was an agreement for sale.

The Lower Appellate Court having dismissed the suit on a preliminary point without going into the merits of the case, we set aside the decree and remand the case for replacement on the file and disposal on merits. The costs of this appeal will be paid by the respondent. The costs hitherto incurred will be provided for in the revised decree.

APPELLATE CIVIL.

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

RAGAVA (COUNTER-PETITIONER AND DEFENDANT No. 2
IN C.S. No. 36 OF 1884) APPELLANT,

v.

RAJARATNAM (PETITIONER), RESPONDENT.*

Civil Procedure Code, s. 30—Representation of numerous plaintiffs—Advertisement—Community of interest—Decree for management of a Hindu temple—Application for execution by person interested.

In a suit by certain Tungalai Brahmans for declarations as to the mode of electing dharmakartas of a certain pagoda, &c., an order was made for a proclamation inviting "all persons interested to come in and be made parties, or see that others by whom they are content to be represented are made parties," and a decree was passed comprising a scheme to be carried out for such election, &c. A person not on the record and not a member of the Tungalai community, but claiming certain rights under the decree now applied to compel the observance of the scheme:

Held, that the above order did not invest the suit with a representative character, and the applicant had no right to apply.

APPEAL against the order of Mr. Justice Handley, dated 6th September 1889, in civil suit No. 36 of 1884.

(1) 6 M.H.C.R., 123.

* Appeal No. 24 of 1889.

In this suit certain Brahmans of the Tungalai sect for the appointment of dharmakartas for the Sree Parthasaradhi pagoda at Triplicane in lieu of the first defendant, and another dharmakarta then recently deceased, &c. On 8th April 1884, Mr. Justice Hutchins made an order in the suit, of which the portion now in question was as follows:—

"There are now several parties before the Court interested in the result of the suit, and, to make it a really representative suit, I order, under section 30, that a proclamation be made through Triplicane, and that copies be stuck up in at least four conspicuous places on the pagoda gates or walls, inviting all persons interested to come in and be made parties themselves or see that some other or others by whom they are content to be represented be made parties defendants."

The decree, subsequently passed in the suit, declared what persons were eligible as dharmakartas and provided in what manner, and after what notices the elections should be made, &c.

A person, who was not on the record nor a member of the Tungalai sect, but who claimed to be entitled to receive notice of elections of dharmakartas, and to enjoy other privileges under the decree now applied for an order as follows:—

"That the second defendant herein the sole surviving dharmakarta of the Sree Parthasaradhi temple in the plaint mentioned be directed to call upon your petitioner as headman as aforesaid to furnish him with a list of persons belonging to his caste as in and by the decree herein required, for the purposes in the said decree set forth, or for such further or other order in the premises as to this Honorable Court may seem meet and proper."

Mr. Justice Handley made an order as prayed in which he said:—

"I think petitioner is entitled to the order prayed for. It is objected that he has no right to make this application, not being a party to the suit or the representative of a party, and that, if he has any rights under the decree, he must assert them by regular suit. I think that, in the case of a decree like this providing for election of dharmakartas and other matters in which many persons besides the parties to the suit are interested, it is competent to any of the parties so interested to apply to the Court to see that the provisions of the decree are carried out, even though no power to do so is specially reserved in the decree."

"Otherwise, a multiplicity of suits will be necessary to carry out the decree. The Court, if it is informed by whatever method, that its decree is not being carried out, will interfere to prevent its decree from being a nullity; as the decree was not merely a private decree but one affecting a community. Then it is contended that the petitioner is not entitled to receive a notice to furnish a list of voters for the reasons (1), that he is not a headman of a caste within the meaning of the decree, and (2) that, even if he is such a headman, he is not of the Tungalai persuasion. As to (1) I think that the obvious meaning of the decree in speaking of headmen of castes was to include headmen of sub-divisions of castes. . . . It is not denied that petitioner is a headman of the sub-caste he professes to represent, but it is said there is another, viz., one Annasami Mudali, who is a Tungalai, and therefore, shall be preferred to petitioner."

The second defendant in the suit preferred this appeal.

Anandacharlu and Visvanada Ayyar for appellant. .

This application was made after decree by a person who was not a party and the decree did not give leave to apply. The suit, in 1884, was a suit for a scheme by two worshippers. *Vide* also affidavits put in by persons seeking to be joined as supplemental defendants in a representative capacity.

(Shephard, J.—The order does not say that they are to be made parties.)

Then were the people represented by the respondent in fact made parties? A proclamation was made as under section 30 and no one else came in.

The Advocate-General (Hon. Mr. Spring Branson) for respondent.

The decree is unworkable if the order appealed against is wrong.

(Collins, C.J.—You are not party to decree.)

(Shephard, J.—Does section 30 make any difference?)

The Court converted it into a suit under section 30, gave the permission referred to in that section—*Ramayyengar v. Krishnayyengar*(1). If the suit was not one under section 30, I concede, I could not come in.

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Anandachari in reply. See the *Oriental Bank Corporation v. Gobind Lall Seal*(1). The order converting the character of the suit is bad. The plaintiffs are Tengelais and voters, the respondent is neither. The suit was under section 539 of the Civil Procedure Code and the Advocate-General sanctioned it.

JUDGMENT.—The main question arising in this appeal is whether the respondent, who was not a party on the record, was entitled to apply to the Court to compel the surviving defendant to carry out the terms of the decree.

It was admitted in argument by the learned Advocate-General, who appeared for the respondent, that the order appealed against could not be supported except on the supposition that the respondent did, by the order of Mr. Justice Hutchins, made on the 8th April 1884, become constructively a party to the suit, and it is clear that, if the respondent is to be regarded as a mere stranger to the record, he can have no *locus standi* to enforce the decree.

The suit, which was filed on the 22nd February 1884, was instituted by two persons, Tengelai Brahmans, claiming to be directly interested in the pagoda. It was a suit instituted under the provisions of section 539 of the Code, sanction of the Advocate-General having first been obtained. Before the order of the 8th April was made, certain persons, claiming to represent sections of the Tengelai community and to be more intimately connected with the temple than the plaintiffs, came in and applied to be made parties "with a view (as they said) to act on behalf of the vast majority of the Tengelai community in the interests of that community." With reference to, or in consequence of, these applications, the order of the 8th April was passed. That order, after referring to section 30 of the Code, directs that a proclamation be made "inviting all persons interested to come in and be made parties themselves or see that some others by whom they are content to be represented are made parties."

Is this an order under section 30, and, if so, is the respondent a person having the same interest with the plaintiffs, on whose behalf the latter prosecuted the suit? In our opinion; it is clear that the learned Judge did not give and did not intend to give the plaintiffs permission to sue on behalf of other persons having the same interest with themselves in the manner required by the

(1) I.L.R., 9 Cal., 604.

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section. Had he so intended, he could not have invited third persons to make themselves parties to the suit.

We are further of opinion, on the materials that we have before us, that the respondent is not a person having the same interest with the plaintiffs, for he does not belong to the Tengelai community, the members of which only are, as is stated in the plaint, entitled to take part in the election of dharmakartas or themselves be elected as dharmakartas. Nor does it appear from the decree that the respondent is interested in the same way as the plaintiffs were, for he is only one of the headmen through whom communications are to be made to the members of the Tengelai community.

It is unnecessary to express any opinion on the further questions which would have arisen, if the respondent could be regarded as constructively a party to the suit.

In our judgment the order appealed against is wrong and must be reversed with costs and the petition of the respondent dismissed.

Branson & Branson Attorneys for respondent.

APPELLATE CIVIL.

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

SETHU (PLAINTIFF), APPELLANT,

v.

KRISHNA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, s. 10—Suit against a trustee.

The plaintiff sued his father in 1887 for a declaration of his title to, and for possession of, certain property as being stridhanam property of his late mother, whose only son he was. The plaint alleged that some of the property had been given to the plaintiff's mother about the time of her marriage in 1836; that in 1843 her father had appointed the defendant trustee of the property for the plaintiff and his mother, and that further sums had been since paid to the defendant in his capacity of trustee on account of the stridhanam of the plaintiff's mother, and that he had traded with the property and misappropriated it:

* Second Appeal No. 1613 of 1889.

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Held, that under Limitation Act, s. 10, the suit was not barred by limitation on the allegations in the plaint.

SECOND APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 922 of 1888, affirming the decree of V. P. deRozario, Subordinate Judge of South Malabar at Palghat, in original suit No. 24 of 1887.

The plaint in this suit, which was filed in 1887, set out that the plaintiff was the only son of defendant No. 1 by his first wife, since deceased; that at and shortly after the time of the marriage of defendant No. 1 with the plaintiff's mother certain property was given to her and to defendant No. 1 on her behalf: that plaintiff was born in the year 1842; that subsequently in 1843 Ananda Patter, her father, appointed the first defendant trustee for plaintiff and his mother, and entrusted him with all the stridhanam properties, in the capacity of a trustee, at the request of the first defendant and with the consent of plaintiff's mother.

It was further alleged that after the death of the plaintiff's mother, which took place in 1870, further sums of money had been paid to defendant No. 1 on behalf of the plaintiff and with his consent under an agreement entered into by her father at the time of her marriage; that defendant No. 1 had misappropriated the above property and failed to maintain the plaintiff, &c. The plaint prayed for a declaration of the plaintiff's title to and for possession of the above property.

The Subordinate Judge held that the suit was barred by limitation on the allegations in the plaint and passed a decree dismissing the suit. This decree was affirmed on appeal by the District Judge who said:—"the plaintiff's mother died in 1046 (1870-71) and this suit was not brought till 1887; such being the case, it appears that the plaintiff's claim must be held to be barred, unless it can be shown that it comes under the provisions of section 10 of the Limitation Act. That section provides that, notwithstanding anything contained in that Act, no suit against a person in whom property has become vested in trust for any specific purpose for the purpose of following in his hands such property should be barred by any length of time. It appears to me that taking the facts of the case to be as set forth in the plaint it is quite impossible to hold that his wife's stridhanam became vested in the first defendant in trust for any specific purpose. There is

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"not in the plaint any mention of any purpose for which the property was intrusted to him. What appears to have taken place was simply that the first defendant was allowed to remain in possession of his wife's stridhanam and to manage it for her. He was not an express trustee. The case cannot, in my opinion, come under section 10 of Act XV of 1877, and such being the case, the plaintiff's claim must be held to be barred. On this ground I dismiss this appeal with costs."

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and Ramachandra Ayyar for appellant.

Sankaran Nayar for respondents.

JUDGMENT.—The Lower Appellate Court's judgment proceeds on the plaint alone, but the Judge appears to have lost sight of the fact that the property is stated in the plaint to have been entrusted to first defendant for the benefit of plaintiff and his mother. If such is the case, the plaintiff's suit will not be barred, as section 10 of the Limitation Act will apply (*Sethu v. Subramanya*(1) and *Suddasook Kootary v. Ram Ohunder*(2)).

The Lower Court's decree is set aside and the suit remanded for disposal on the evidence as to the portion which is the subject of this appeal.

The costs hitherto incurred will be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

KRISHNASAMI (PLAINTIFF), PETITIONER,

v.

KESAVA AND ANOTHER (DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Legal Practitioners' Act—Act XVIII of 1879, ss. 28, 29—Promissory note made by a party in favor of his pleader in respect of his agreed fee—Agreement not certified—Suit on promissory note.

A party to a suit made and delivered to his pleader in respect of his agreed fee a promissory note which was not filed in Court in that suit. In a suit by the pleader upon his promissory note:

(1) I.L.R., 11 Mad., 274.

(2) I.L.R., 17 Cal., 620.
* Civil Revision Petition No. 274 of 1889.

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Held, that the promissory note was invalid and that the plaintiff was entitled to recover only the amount to which he was found to be entitled for his labour.

PETITION under Provincial Small Cause Courts Act, s. 25, praying the High Court to revise the decree of N. Swaminada Ayyar, District Munsif of Cuddalore, in small cause suit No. 20 of 1889.

Suit for principal and interest due on a promissory note, dated 1st May 1886. The note sued on was made and delivered to the plaintiff for his agreed fee as pleader for first defendant in original suit No. 304 of 1886. The agreement was not filed in Court in that suit and the District Munsif now found that the amount was excessive, and he accordingly passed a decree for a smaller amount only.

The plaintiff preferred this petition.

Mahadeva Ayyar for petitioner.

Nadamuni Chetti for respondents.

JUDGMENT.—The petitioner was the plaintiff in a small cause suit in which he sought to recover from two defendants a sum of Rs. 33-2-0 as principal and interest due under a promissory note, dated 1st May 1886.

Defendant No. 1, admitting the execution of the note, contended that the Rs. 25 mentioned in it were the fee to be paid to the plaintiff as the first defendant's vakil in original suit No. 304 of 1886, which suit the plaintiff had withdrawn and that the plaintiff was entitled to no relief; defendant No. 2 is *ex parte*. The Munsif considered the following points:—

(1) "Whether the note A is invalid under section 29 of the Legal Practitioners' Act?"

(2) If so, what is the fair amount that can be awarded to the plaintiff for his labour in original suit No. 304 of 1886?

As to the first point the Munsif found exhibit A to be invalid under section 29 of the Legal Practitioners' Act, because it was not filed in Court in that suit, and because the sum of Rs. 25 which the plaintiff admits to have been intended as his fee as the first defendant's vakil in that suit "is in excess of the fee allowed in the decree for the defence vakil."

As to the second point the Munsif's finding is that the sum of Rs. 7 "is ample for the plaintiff's advice and labour" in, filing and attending at the first hearing and then withdrawing the suit.

Section 28 of the Legal Practitioners' Act (No. XVIII of 1879) provides that "no agreement entered into by any pleader with any person retaining or employing him, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements, in respect of business done or to be done by such pleader shall be valid, unless it is made in writing signed by such person, and is, within fifteen days from the day on which it is executed, filed in the District Court or in some Court in which some portion of the business in respect of which it has been executed, has been or is to be done."

As the promissory note in the present case was admittedly executed "in respect of business done or to be done" by the plaintiff as pleader for the defendant, and as it was not filed in any Court within fifteen days of its execution as required by the section quoted above, the Munsif is right in holding it to be invalid and in ascertaining, independently of it, the amount to which the plaintiff is entitled for his labour. What this amount is is a question of fact which is not open for our consideration under section 25 of Act IX of 1887.

The Munsif's decision in no way conflicts with the decision of this Court in *Rama v. Kunji*(1), followed by the Allahabad High Court in *Razi-ud-din v. Karim Bakhsh*(2).

The petition is therefore dismissed.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

AMIRTHAYYAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KETHARAMAYYAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Will, construction of—Restricted power to widow to adopt.

A Hindu in 1884 made a will therein described as being executed in favour of the testator's wife in which he said "you must adopt for me a boy you like from the children that may be born in the families of my brothers," and after making certain provisions as to his property, &c., added "the principal object of this will is that

(1) I.L.R., 9 Mad., 375.

(2) I.L.R., 12 All., 169.

* Second Appeal No. 1560 of 1889.

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you should adopt for me any suitable boy." After the testator's death the widow, as in exercise of the power conferred on her by the will, purported to adopt a boy who did not come within the description in the first of the above clauses, although one of the testator's brothers offered his own son in adoption. In a suit by the testator's brothers for a declaration that the adoption purported to have been made by the widow was invalid:

Held, that notwithstanding the general terms of the second of the above clauses, the widow's power to adopt was restricted by the first and the adoption purported to have been made by her was invalid.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 894 of 1888, reversing the decree of K. Krishna Menon, Subordinate Judge of Tanjore, in original suit No. 35 of 1887.

A Hindu made a will in the following terms:—

"The will executed on the 18th December 1884 by A. Panchapakesayyan, Brahmin, Sivite, Mirasdar and a Police Inspector of Nannilam firka, and the son of Annachi Iyen of Agraharapuvanur, Mannargudi taluk, and residing at Nannilam maganam, Nannilam sub-district, Nannilam taluk, in favour of his senior wife, Minatchi Ammal, of the same caste, sect, &c.

"As my health for some time past has not been good, and I have no issue, and as I have to make some arrangement very necessarily for the disposal of my property according to my intentions after my life, I hereby give you permission to do the following. Although an eager desire to take a boy in adoption has now sprung in me, yet as I could not now do it, you must adopt for me a boy you like from the children that may hereafter be born in my brothers' families. Till you do so, you must enjoy personally or through agents the real property mentioned in schedule A hereunto attached, which is my ancestral property obtained by division and enjoyed with absolute right from that time and must continue to do everything required to be done in reference to the same with all the rights I have over it. Besides you must recover all the moveables mentioned in schedule B and do whatever you please with them. Whenever you deem it fit you may convert all the moveables into immoveables and immoveables into moveables. If, for any reason, you do not adopt a boy in your lifetime you must, in your last moments, hand over only to my brothers all the properties that may remain after what you have spent according to your will and pleasure and for the benefit of my soul. My second wife, Vembu Ammal, being very young, and has not yet attained the age of reason, you must keep her in your protection throughout your life along with you and cause Vritham, &c., to be performed for her. If, for any cause, you are necessitated to live apart from her, you must continue to give 30 kalams of paddy according to the measurement obtaining in this district for her maintenance till she remains without transgressing the Hindu dharma sastras, and you need not give her anything in any property. Those that enjoy my properties after your life must continue to give the same quantity for her and cause all her Vrithams, &c., to be performed. But she has no right in any of my properties or in reference to the adoption to be made on my account. If you cannot afford to live jointly with the adopted son, there is nothing to prevent you from making suitable arrangements for your maintenance, &c., according to time. The dwelling house in schedule C, though purchased in my name with

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"our funds, was purchased in fact for your brother E. Vy Sundramaian, and therefore if he pays you the purchase money you must at once convey it to him. Your younger sister Balambal's eldest daughter Soubagiavathy Sivakamasundry having been treated by us as our natural daughter from her infancy, her nuptials and all other marriages yet to come must be performed from our family funds suitably without awaiting for anything from her father. The principal object of this will is that you must adopt any suitable boy on my account that as you very well know all acts that may benefit my soul; you must, with my properties, make the expenditure on that account and gratify my soul, and that you must, with responsibility, manage all the properties mentioned and not mentioned herein. Thus, I have executed the will with free will and consciousness in the presence of many respectable men including my brothers.

Schedule A. B. C.

"Every act you intend to do according to the above directions you must do in the presence of any of my brothers. If any of my brothers either by force or fraud has taken and appropriated to his use or damaged or attempted to take and appropriate or damage any of my aforesaid properties or my properties not stated herein, he shall not only be made to lose all his rights in all my properties, but shall also be sued in Courts of Justice without any objection, and such property be recovered from him. In the case of your making the adoption you must hand over to the adopted son all the aforesaid properties at the end of your life, and if you have a desire to do so before it, there is nothing to prevent it. The property in schedule C need not be given to the said Sundaramayyar unless he pays the price thereof within one year."

After the testator's death his widow purported to adopt (in exercise of the power conferred on her by the above will) a boy who was a sapinda merely and was not a son of one of the testator's brothers. It was in evidence that a son and a grandson of one of the testator's brothers were available to be adopted. Both of these boys had been born at the time of the testator's death. The testator's brothers brought this suit against the boy adopted by the widow and the widow to declare the adoption invalid.

The Subordinate Judge passed a decree as prayed, which was reversed on appeal by the District Judge.

The plaintiffs preferred this second appeal.

Rama Rau & Krishnasami Ayyar for appellants.

Bhashyam Ayyangar & Ramachandra Rau Saheb for respondents.

MUTTUSAMI AYYAR, J.—The question for decision in this second appeal is whether the construction put by the District Judge upon the will (exhibit I) is correct.

The testator, Panchapakesayyan, made his will on the 18th December 1884, and died on the 1st February 1885, leaving him surviving a widow named Minakshi Ammal, the first defendant,

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you should adopt for me any suitable boy." After the testator's death the widow, as in exercise of the power conferred on her by the will, purported to adopt a boy who did not come within the description in the first of the above clauses, although one of the testator's brothers offered his own son in adoption. In a suit by the testator's brothers for a declaration that the adoption purported to have been made by the widow was invalid:

Held, that notwithstanding the general terms of the second of the above clauses, the widow's power to adopt was restricted by the first and the adoption purported to have been made by her was invalid.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 894 of 1888, reversing the decree of K. Krishna Menon, Subordinate Judge of Tanjore, in original suit No. 35 of 1887.

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"As my health for some time past has not been good, and I have no issue, and as I have to make some arrangement very necessarily for the disposal of my property according to my intentions after my life, I hereby give you permission to do the following. Although an eager desire to take a boy in adoption has now sprung in me, yet as I could not now do it, you must adopt for me a boy you like from the children that may hereafter be born in my brothers' families. Till you do so, you must enjoy personally or through agents the real property mentioned in schedule A hereunto attached, which is my ancestral property obtained by division and enjoyed with absolute right from that time and must continue to do everything required to be done in reference to the same with all the rights I have over it. Besides you must recover all the moveables mentioned in schedule B and do whatever you please with them. Whenever you deem it fit you may convert all the moveables into immoveables and immoveables into moveables. If, for any reason, you do not adopt a boy in your lifetime you must, in your last moments, hand over only to my brothers all the properties that may remain after what you have spent according to your will and pleasure and for the benefit of my soul. My second wife, Vembu Ammal, being very young, and has not yet attained the age of reason, you must keep her in your protection throughout your life along with you and cause Vritham, &c., to be performed for her. If, for any cause, you are necessitated to live apart from her, you must continue to give 30 kalams of paddy according to the measurement obtaining in this district for her maintenance till she remains without transgressing the Hindu dharma sastras, and you need not give her anything in any property. Those that enjoy my properties after your life must continue to give the same quantity for her and cause all her Vrithams, &c., to be performed. But she has no right in any of my properties or in reference to the adoption to be made on my account. If you cannot afford to live jointly with the adopted son, there is nothing to prevent you from making suitable arrangements for your maintenance, &c., according to time. The dwelling house in schedule C, though purchased in my name with

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"our funds, was purchased in fact for your brother E. Vy Sundramaian, and therefore if he pays you the purchase money you must at once convey it to him. Your younger sister Balambal's eldest daughter Soubagiavathy Sivakamasundry having been treated by us as our natural daughter from her infancy, her nuptials and all other marriages yet to come must be performed from our family funds suitably without awaiting for anything from her father. The principal object of this will is that you must adopt any suitable boy on my account that as you very well know all acts that may benefit my soul; you must, with my properties, make the expenditure on that account and gratify my soul, and that you must, with responsibility, manage all the properties mentioned and not mentioned herein. Thus, I have executed the will with free will and consciousness in the presence of many respectable men including my brothers.

* * * Schedule A. B. C. * * *

"Every act you intend to do according to the above directions you must do in the presence of any of my brothers. If any of my brothers either by force or fraud has taken and appropriated to his use or damaged or attempted to take and appropriate or damage any of my aforesaid properties or my properties not stated herein, he shall not only be made to lose all his rights in all my properties, but shall also be sued in Courts of Justice without any objection, and such property be recovered from him. In the case of your making the adoption you must hand over to the adopted son all the aforesaid properties at the end of your life, and if you have a desire to do so before it, there is nothing to prevent it. The property in schedule C need not be given to the said Sundaramayyar unless he pays the price thereof within one year."

After the testator's death his widow purported to adopt (in exercise of the power conferred on her by the above will) a boy who was a sapinda merely and was not a son of one of the testator's brothers. It was in evidence that a son and a grandson of one of the testator's brothers were available to be adopted. Both of these boys had been born at the time of the testator's death. The testator's brothers brought this suit against the boy adopted by the widow and the widow to declare the adoption invalid.

The Subordinate Judge passed a decree as prayed, which was reversed on appeal by the District Judge.

The plaintiffs preferred this second appeal.

Rama Rau & Krishnasami Ayyar for appellants.

Bhashyam Ayyangar & Ramachandra Rau Sahib for respondents.

MUTTUSAMI AYYAR, J.—The question for decision in this second appeal is whether the construction put by the District Judge upon the will (exhibit I) is correct.

The testator, Panchapakesayyan, made his will on the 18th December 1884, and died on the 1st February 1885, leaving him surviving a widow named Minakshi Ammal, the first defendant,

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and two divided brothers, the plaintiffs. The plaintiffs' case was that Panchapakesayyan authorized Minakshi Ammal only to adopt one of their sons and that the adoption of the second defendant, who was a mere sapinda, was invalid. On the other hand, the contention for the defendants was that the authority was general and that the adoption was, therefore, open to no objection. The Subordinate Judge considered that the testator conferred upon the first defendant an authority to adopt a child only from a particular class, but the Judge held that there was no such restriction. It has been contended before us that the will has been misconstrued by the Judge.

The terms in which the will was made are set out by the Subordinate Judge in paragraph 4 of his judgment, and only two passages in it are material to our present purpose. The first is in these words:— "Although an eager desire to take a boy in adoption has now sprung in me, yet as I could not now do it, hereafter you must adopt for me a boy you like from the children that may be born in the families of my brothers." There can be no doubt that this passage confers an authority to choose a child for adoption from a class or two particular families designated by the testator. It shows further that it was his intention not to make an immediate adoption, but to postpone it until one of the class, viz., his brothers' sons became available for adoption.

The other material passage which occurs near the end of the will is in these terms:—"The principal object of this will is that you should adopt for me any suitable boy, (yaravadu oru takka Putranai) that as you are perfectly acquainted with what is conducive to my spiritual benefit, you shall spend out of my properties for such benefit and that you should take upon yourself the responsibility of managing all my properties." Does this passage mean any boy whom she considers suitable, or any boy who was already indicated by the testator as suitable? I have no doubt that the latter is the correct construction, for, the passage in question was intended to sum up and thereby explain the contents of the will and not to operate as an independent direction. If the other construction were to prevail, there was no occasion for the testator designating a class and thereby limiting his wife's discretion. Nor was there any occasion for the testator forbearing to make an adoption at once and for directing his widow to wait until one of his brothers' children should thereafter be born. It is

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observed by the Judge that if by the words, any suitable boy, the testator meant some boy who was suitable out of his brothers' sons, he should have expressly said so and that the words "any suitable boy," are as imperative as the words, "you should adopt a boy you like from the children that may be born in my brothers' families." But the passage in question states in a general way the object with which the will was framed and the reasonable inference is that the testator intended not that any direction already given by him should be struck out or cancelled, but that it should be read in the light thrown by the object he had in view. "Any or some suitable or fitting boy" would, if read together with the direction contained in the earlier passage, only signify "such boy as I consider suitable or have already indicated as suitable." The Judge's view cannot be accepted, as it ignores the purpose with which the testator presumably inserted the second passage and thereby imputes an intention to him practically to contradict himself. The decree of the District Judge is set aside and that of the Subordinate Judge restored. The second respondent will pay the appellants' costs both in this Court and in the Lower Appellate Court.

BEST, J.—The question for decision in this appeal is whether under the will (exhibit I) the second respondent, the widow of one Panchapakesayyan, was authorized to adopt the first respondent or whether the authority to adopt given to her under the will was limited to a boy belonging to the families of her husband's brothers, who are the appellants in this case.

The Court of first instance, the Subordinate Judge of Tanjore construed exhibit I, as giving only the limited power of adoption stated above, and held the adoption of the first respondent to be void, whereas the District Judge, on appeal, has found that the power conferred on the second respondent was not limited and that the adoption made by her of the first respondent is valid.

I am of opinion that the construction put on exhibit I by the Court of first instance is the correct one.

The primary rule of construing a document in the nature of a will is that the meaning of any clause in it is to be collected from the entire instrument, and all its parts are to be construed with reference to each other. So construed, I am of opinion that the will in question limits the power of adoption given to the second

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respondent to boys born in the testator's brothers' families. It is so expressly stated in the first part of the will. No doubt at the end of the will, in summing up his instructions, the testator has said that the principal object of the will is that his widow should (*inter alia*) adopt "whoever may be fitting" as a son for him. These are general words—but general words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and it is only in cases where two clauses in a will are so absolutely irreconcilable that they cannot possibly stand together, that the latter of the two can be allowed to prevail, the theory being that the testator may have changed his mind. The rule is, however, never applied except on the failure of every attempt to give to the whole will such a construction as will render every part of it effectual. The words "any suitable boy" in the latter part of the will must, therefore, be read with the earlier clause which directs the adoption of a son "out of the children that may hereafter be born in my brothers' families." There is no reason whatever for supposing that the non-repetition of the words "born in my brothers' families" in the latter part of the will indicated any change of mind on the part of the testator. The only fair presumption is that he thought the repetition unnecessary, his intention to limit the selection to a boy born in his brothers' families having been sufficiently stated in the earlier part of the will. The further direction in the will that "every act you intend to do according to the above directions you must do in the presence of any of my brothers" is also significant as showing that the testator remained favourable to his brothers to the end of the will.

The direction to adopt being thus found to be limited to a boy hereafter to be born in one of the brothers' families was the mere fact of no other sons having been subsequently born in those families sufficient to warrant the adoption of any other boy? The Subordinate Judge has answered this question in the negative and he seems to be supported by authority in this answer of his. But even assuming it to be otherwise, the passage from the will already quoted requires that anything done under the will should be done "in the presence of any of my brothers, whereas the so-called adoption of the first respondent was made in the absence of the brothers, without their consent in defiance of the

first appellant's objections, who even offered to give his own second wife's son in adoption if required.

I agree, therefore, in setting aside the decree of the Lower Appellate Court and restoring that of the Court of first instance and in directing the second respondent to pay the appellants' costs both in this Court and in the Lower Appellate Court.

AMIR-
THAYYAN
v.
KETHA-
RAMAYYAN.

APPELLATE CIVIL.

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

NEELAMEGAN (PLAINTIFF), APPELLANT,

v.

GOVINDAN AND ANOTHER (DEFENDANTS NOS. 4 AND 5),
RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, ss. 60, 82—Partial redemption—
Contribution.*

In 1884 A and B, being divided brothers, hypothecated to X and Y the house now in suit, which was A's family property, and a house belonging to B. In 1886 A hypothecated the house now in suit to the plaintiff. In 1888 B sold his house for Rs. 700 by a conveyance attested by X and Y who accepted Rs. 550 in discharge of a moiety of the debt secured by the hypothecation of 1884, the balance of Rs. 150 being retained by B. In this suit the plaintiff sought to recover the principal and interest due on his security of 1886, and he contended that X and Y who were defendants Nos. 4 and 5 were not justified in permitting B to retain Rs. 150 of the price and that that sum should accordingly be debited against them in the accounts: *Held*, that under Transfer of Property Act, s. 82, plaintiff was not entitled to compel defendants Nos. 4 and 5 to satisfy their debt against B's house so far as it extended.

SECOND APPEALS against the decrees of S. Gopalacharyar, Subordinate Judge of Madura (East), in appeal suits Nos. 465 and 462 of 1888, modifying the decree of P. S. Gurumurthi Ayyar, District Munsif of Madura, in original suit No. 501 of 1887.

Suit to recover principal and interest due on a hypothecation bond dated 1886.

The facts of these cases appear sufficiently for the purposes of this report from the judgment of the High Court.

These second appeals were preferred by the plaintiff.

* Second Appeals Nos. 1299 of 1889 and 1002 of 1890.

1890.
September 23.
October 15.

NEELAMEGAN
v.
GOVINDAN.

Mr. R. F. Grant for appellant.

Parthasaradhi Ayyangar for respondents.

JUDGMENT.—The appellant in both these cases is the plaintiff in original suit No. 501 of 1887, on the file of the District Munsif of Madura in which plaintiff sued for the recovery of Rs. 550 (with further interest) on the security of certain mortgaged property. From the Munsif's decree two separate appeals were preferred to the Subordinate Court of Madura (East). The result in both these appeals was adverse to the plaintiff. He thereupon preferred to this Court his second appeal No. 1299 of 1889, with reference only to his own first appeal (No. 465 of 1888), but objecting to the decree of the Lower Appellate Court also in the appeal of fourth and fifth defendants (No. 462 of 1888). He was, therefore, directed to prefer a separate second appeal from this latter decree. Hence the second appeal No. 1002 of 1890.

The only question arising for decision in second appeal No. 1299 of 1889 is whether the Lower Courts are right in holding that the mortgage bond I was not merged in the subsequent sale deed II, which both those Courts have agreed in finding was never carried into effect. Mr. Grant has admitted that he is unable to support this contention on behalf of appellant; second appeal No. 1299 of 1889 must therefore fail, and is dismissed with costs.

The question raised in second Appeal No. 1002 of 1890 is whether the Lower Appellate Court is right in holding that defendants Nos. 4 and 5 were justified in permitting first defendant's brother to appropriate Rs. 150 out of Rs. 700, the amount for which his house was sold under exhibit VI. The Subordinate Judge has held that this was allowable under section 82 of the Transfer of Property Act. For appellant it is contended that section 82 is inapplicable, as it must be read together with the last clause of section 60 of the same Act.

The following are the facts:—In 1884, first defendant and his divided brother Nagasamy jointly hypothecated to defendants Nos. 4 and 5 the plaintiff house together with a house belonging to Nagasamy for Rs. 800 (exhibit I). Subsequently, in 1886 first defendant alone hypothecated his house alone to the plaintiff for a sum of Rs. 400 (exhibit C). In January 1888 first defendant's brother Nagasamy sold his house under exhibit VI (which is attested by defendants Nos. 4 and 5) for a sum of Rs. 700, of which these defendants accepted Rs. 550 as the moiety due to them

under the joint mortgage of 1884, and allowed Nagasamy to retain the remaining Rs. 150.

The plaintiff's contention is that defendants Nos. 4 and 5 were not justified in allowing Nagasamy to retain this sum of Rs. 150, but should have insisted on payment to themselves of the whole Rs. 700, and that they have, under the circumstances, a lien on first defendant's house only for Rs. 400 and not for Rs. 550.

Section 82 of the Transfer of Property Act provides that where "several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage." It is not contended in the present case that the property sold under exhibit VI was of greater value than the plaintiff house. Assuming, therefore, that the houses were of equal value, Nagasamy's share of the debt being a moiety, all that he was liable to pay to defendants Nos. 4 and 5 under exhibit I was Rs. 550, the other moiety being a charge on the first defendant's house.

With reference to the last clause of section 82, it is to be observed that it is clearly not applicable to the present case, as section 81 contemplates the mortgage of two properties owned by the same person:—"If the owner of two properties mortgages them both, &c." Nor do we think the last clause of section 60 relied on on behalf of appellant is applicable to this case. The section declares the right of the mortgagor to redeem; and its last clause is as follows:—"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate share of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor." This proviso is clearly applicable only to parties who stand to each other in the relation of a mortgagor and mortgagee; and as no such relationship existed between plaintiff and Nagasamy, the proviso in question was clearly no bar to Nagasamy's redeeming his property on payment to his mortgagees, the fourth and fifth defendants, of his share of the mortgage debt due under exhibit I.

The Lower Courts decree is therefore right and this appeal No. 1002 of 1890 is also dismissed with costs.

APPELLATE CIVIL.

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

DURGAYYA (PLAINTIFF), APPELLANT,

v.

ANANTHA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 99—Money decree “on the responsibility of” mortgage premises—Attachment of mortgage premises—Purchase by mortgagee.

A usufructuary mortgagee left the mortgage premises in the possession of the mortgagor under a rent agreement in 1878. The rent having fallen into arrear, the mortgagee sued the mortgagor in October 1882 and obtained a decree for the arrear which provided for its payment by the mortgagor “on the responsibility of the defendant’s mulgeni right” in the mortgage premises. The decreeholder attached the mortgage premises in execution, and having brought them to sale and purchased them himself, he now sued for possession:

Held, that the sale was invalid under Transfer of Property Act, s. 99.

SECOND APPEAL against the decree of S. Subba Ayyar, Subordinate Judge of South Canara, in appeal suit No. 47 of 1889, confirming the decree of U. Babu Rau, District Munsif of Kundapur, in original suit No. 278 of 1888.

Suit to recover possession of certain land of which the defendants were in occupation.

In 1878 the father of defendants Nos. 2 and 3 executed a usufructuary mortgage of the land in suit to the plaintiff, from whom he agreed to hold it as tenant at a certain rent. In 1882 the rent having fallen into arrear, the plaintiff brought a suit and obtained a decree (exhibit E) as follows:—

It is ordered and decreed that defendant do pay plaintiff Rs. 97-8-0 with interest at 6 per cent. from the date of plaint (19th October 1882) till date of payment with Court costs, on the responsibility of the mulgeni right in the plaint property.”

In execution of this decree the plaintiff attached the mortgaged premises, and having brought them to sale became the purchaser himself. He now sued as above for possession.

The District Munsif held that the sale to the plaintiff was invalid under Transfer of Property Act, s. 99, and dismissed

the suit, and his decree was upheld on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Ramachandra Rau Saheb for appellant.

Narayana Rau for respondents.

JUDGMENT.—On finding it stated in the judgment of the Lower Appellate Court (para. 10) that the case had been argued before that Court “mainly on the 6th issue and the correctness or otherwise of the decision of the Lower Court under this issue is the only point for determination in this appeal,” the appellant’s vakil has confined his contention in this Court to the same point.

The question is, therefore, whether the Lower Courts are right in holding to be invalid as against the respondents the sale in execution of the decree E obtained by plaintiff against Timmappa Chetti, the father of second and third respondents?

The decree in question was obtained in December 1882, i.e., after the coming into operation of the Transfer of Property Act, No. IV of 1882. Section 99 of that Act disentitles a mortgagee who attaches property in execution of a decree for the satisfaction of any claim “whether arising under the mortgage or not” from bringing such property to sale “otherwise than by instituting a suit under section 67 of the Act.”

The property in the present case was attached by appellant, who is a mortgagee, in execution of a decree obtained by him for arrears of rent due for three years from his mortgagor, and was subsequently sold in execution of the same decree, when appellant himself became the purchaser.

The present case is no doubt distinguishable from *Kaveri v. Ananthayya*(1) in that in the latter case no sale had actually taken place. Moreover in *Kaveri v. Ananthayya*, it does not appear that there was a decree making the debt a charge upon the land. But the mere fact of the decree making the debt a charge on the property cannot be held to be sufficient to exclude the case from the rule contained in section 99 of the Transfer of Property Act; nor is the fact of a sale having taken place sufficient to do so, nor is the judgment of Kernan, J., in *Sathuwayyan v. Muthusami*(2), where he says, “the fact that the sale took place before the suit (i.e., the suit to get back possession of the property sold)

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v.
ANANTHA.

1890.
September 16.
October 15.

(1) I.L.R., 10 Mad., 129.

(2) I.L.R., 12 Mad., 325.

* Second Appeal No. 1616 of 1889.

DURGAYYA was filed cannot give validity to the sale, if it was contrary to the provision of section 99.”
ANANTHA.

We are of opinion that the decrees of the Lower Courts are correct and that this appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

MAHOMED (PLAINTIFF), APPELLANT,

v.

ALI KOYA AND OTHERS (DEFENDANTS NOS. 1, 2 AND 9), RESPONDENTS.*

Malabar Law—Kanom—Redemption suit brought within 12 years from the date of Kanom—Special stipulation for redemption.

In a suit to redeem a kanom executed less than 12 years before suit it appeared that the kanom instrument provided for the surrender of the property “if at any time the property should be necessary” for the jenmi. It was found that no special exigency had been established by the plaintiff:

Held, on the above finding that the special stipulation did not oust the general rule that the kanom was not redeemable for 12 years and the suit was therefore premature.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar at Calicut, in appeal suit No. 247 of 1888, reversing the decree of N. Sarvothama Rau, District Munsif of Calicut, in original suit No. 468 of 1886.

Suit to redeem a kanom executed less than 12 years before suit. The District Munsif held that the ordinary rule that a kanom was a demise for at least 12 years was precluded by the special terms of the instrument referred to in the judgment of the High Court and passed a decree as prayed. The Subordinate Judge found that the special terms in question did not operate, as there was no special exigency proved by the plaintiff, and he dismissed the suit as premature.

The plaintiff preferred this second appeal.

Achuta Menon for appellant.

Govinda Menon for respondents.

* Second Appeal No. 1547 of 1889.

JUDGMENT.—The question for decision in this appeal is whether the Subordinate Judge is right in holding that the plaintiff (now appellant) is not entitled to redeem the property sued for before the expiration of 12 years from date of his document (exhibit A).
MAHOMED
v.
ALI KOYA.

The Court of first instance held that the property could be recovered by plaintiff before the usual period of 12 years, because exhibit A itself provides that the property should be surrendered on demand at any time within 12 years. Were this a correct translation of the stipulation in exhibit A, the decision of this Court in *Shekhara Paniker v. Raru Nayar*(1) would be authority in support of the above finding, for it was there held that, although the right to hold for 12 years is inherent in every kanom according to the custom of the country, it is competent to the jenmi to exclude its operation by express agreement. Consequently it must be held that the agreement in exhibit A for surrender of the property within 12 years is not unenforceable. But the stipulation is not for surrender on demand, but in case of necessity the correct translation is “if at any time the property shall be necessary for you.” Such being the case the Subordinate Judge seems to be right in holding that the case comes within the decision of this Court in *Raman v. Mayan*(2), and that in the absence of any special exigency the suit is premature and must be dismissed.

The second appeal fails therefore and is dismissed with costs.

(1) I.L.R., 2 Mad., 193. (2) Second Appeal No. 747 of 1885 not reported.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

1890.
September 16.

KUNHAN (DEFENDANT NO. 1), APPELLANT,

v.

SANKARA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Malabar law—Suit to remove a karnavan for mismanagement as de facto karnavan—Minor members of tarwad not joined—Civil Courts Act (Madras)—Act III of 1873, s. 13—Valuation of suit.

A suit was brought to remove the karnavan of a Malabar tarwad from office on the grounds of mismanagement of tarwad property to the extent of more than Rs. 2,500. The acts of mismanagement complained of were really done by the present defendant No. 1 as karnavan *de facto*. The above suit was withdrawn with leave to sue again. The defendant therein died and was succeeded by defendant No. 1, against whom the plaintiffs brought the present suit in the Court of a District Munsif (to which all the adult but none of the minor members of the tarwad were made parties), to obtain his removal from the office of karnavan alleging against him the acts of mismanagement above referred to :

Held, (1) that the suit was not barred by the previous suit and was within the jurisdiction of the District Munsif ;

(2) that the minor members of the tarwad were sufficiently represented on the record ;

(3) that the grounds alleged supported the action.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 458 of 1888, affirming the decree of O. Chandu Menon, District Munsif of Shernad, in original suit No. 444 of 1887.

The plaintiffs and defendants were all the adult members of a Malabar tarwad, of which defendant No. 1 was karnavan : the members of the tarwad, who were minors, were not brought on to the record.

Suit in the Court of a District Munsif for the removal of defendant No. 1 from the office of karnavan and manager, and for the appointment of plaintiffs Nos. 1, 2 and 10 in his place. The plaintiffs alleged against defendant No. 1 acts of misfeasance and mismanagement in respect of tarwad property of a greater value than Rs. 2,500. It appeared that the acts complained of

had been done by defendant No. 1 before he had become karnavan *de jure*, in the lifetime of Kunhi Krishnan Nayar his predecessor, as karnavan. KUNHAN
v.
SANKARA.

The plaintiffs had brought original suit No. 443 of 1886 against Kunhi Krishnan Nayar, in which they sought his removal from the office of karnavan, alleging against him the same acts of misfeasance and mismanagement upon which the present suit was founded : that suit, however, was withdrawn with leave to institute a fresh suit.

The District Munsif passed a decree as prayed and his decree was affirmed on appeal by the Subordinate Judge. Defendant No. 1 preferred this second appeal.

Narayana Rau for appellant.

Sankara Menon for respondents.

JUDGMENT.—It is first urged that the District Munsif had no jurisdiction to entertain this suit, the encumbrances found to have been improperly created by the appellant being to the extent of more than Rs. 2,500. The plaint refers to the encumbrances as instances of mismanagement on the part of the appellant and it does not pray for a decree that they be set aside. The only relief prayed for is the removal of the appellant from his position of karnavan and it was held in *Narangoli Chirakal Kunhi Raman v. Puttathu Kimhunni Nambiar* (1) that such relief is incapable of valuation. The decision in *Ganapati v. Chathu* (2) is not in point, for the plaintiffs in that case sued to obtain a declaration that the Uraima right to a certain devasom was vested solely in their tarwads and the ground of decision was that the value of a suit for declaration of title to specific property should be taken, for the purpose of jurisdiction, to be the same as that of a suit to recover possession of that property.

Another contention is that all the members of the tarwad have not been made parties to the suit. The Subordinate Judge observes that all the adult members have been made parties and this is not denied before us. Though minors in the tarwad may not have been made parties to the suit, yet we agree with the Subordinate Judge in thinking that the adult members sufficiently represent the interest of the tarwad for the purposes of this suit.

It is next said that original suit No. 442 of 1885 on the file

* Second Appeal No. 1564 of 1889.

(1) I.L.R., 4 Mad., 314.

(2) I.L.R., 12 Mad., 223.

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v.
SANKARA.

of the District Munsif of Shernad bars the present suit. In that suit there was no adjudication, and when it was withdrawn, permission to institute a fresh suit was asked for, and granted. There is, therefore, no foundation for the contention that the present claim is either *res judicata* or barred by section 373 of the Code of Civil Procedure. But the ground of objection chiefly relied on in support of this appeal is that the misfeasances imputed to the appellant were committed by him whilst he was *de facto* karnavan during the lifetime of Kunhi Krishnan Nayar, and that they ought not to be accepted as a ground for depriving him of his present position as *de jure* karnavan. The question to be kept in view is, however, whether by reason of misconduct the appellant has rendered himself unfit for the office of karnavan, and on this point it can make no difference to the tarwad, whether the misfeasances were committed by him either solely or in conjunction with another; in either case, the interest of the tarwad requires that the management of its affairs should not be entrusted to him. It has also been found that he usurped the management during the life time of Kunhi Krishnan Nayar, and acted not as his delegate and under his direction, but without any restriction or regard to Kunhi Krishnan's authority as *de jure* karnavan. The decision in *Nambiatan Nambudiri v. Nambiatan Nambudiri*(1) shows only that the authority of a *de jure* karnavan is absolute, and that he may, at his pleasure, put an end to the management of tarwad affairs by an anandravan, and that for that purpose, such management is to be taken to have continued by his sufferance or to have been that of his delegate. It is certainly no authority for exonerating the *de facto* manager from responsibility or blame for the mala-administration of tarwad property. Neither are we prepared to attach weight to the appellant's contention that some of the lands unnecessarily encumbered belong to a branch tarwad, and that his acts of mismanagement, so far as they relate to them, should be excluded from consideration whilst coming to a finding as to his fitness for the karnavanship of the whole tarwad. This second appeal fails and is dismissed with costs.

(1) 2 M.H.C.B., 110.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

GOVINDA (DEFENDANT NO. 3), APPELLANT,

v.

BHANDARI (PLAINTIFF), RESPONDENT.*

1890.
November 6.

Limitation Act—Act XV of 1877, ss. 5, 12—Time occupied in seeking review of judgment—Computation of time for appeal.

An appellant is not entitled as of right to the exclusion of the time occupied by him in seeking a review of judgment, in the computation of the time within which his appeal is preferred.

Where it appeared that the application for review proceeded on grounds dealt with in the judgment sought to be reviewed and on the discovery of fresh evidence which was made nearly three months before the application, the Court declined to exercise its discretionary power to exclude the time so occupied.

SECOND APPEAL against the decree of S. Subba Ayyar, Subordinate Judge of South Canara, in appeal suit No. 143 of 1888, modifying the decree of I. P. Fernandes, District Munsif of Kasargod, in original suit No. 28 of 1887.

Defendant No. 3, who had sought to obtain a review of judgment in the Subordinate Court, preferred this second appeal more than eight months after the date of the decree of the Subordinate Judge.

Narayana Rau for appellant.

Ramachandra Rau Saheb for respondent.

JUDGMENT.—A preliminary objection is taken on behalf of respondent that the appeal is 113 days out of time.

If the time occupied in disposing of the application for review by the Subordinate Judge's Court, viz., 152 days is allowed and excluded, it is admitted the appeal will be in time. The question is whether the appellant has shown any sufficient ground for the review time being excluded. He cannot claim its exclusion as of right but merely as a matter of grace within the judicial discretion of the Court. The grounds of review, which have been read, are, with one exception, grounds which were already argued and decided against in appeal and are not grounds for review.

* Second Appeal No. 1421 of 1889.

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Certain documents were said to have been newly discovered, but the circumstances in which they are alleged to have been discovered are said to be such as should not be believed. This was the view taken by the Subordinate Judge and we cannot say that it was unfounded.

It has also been brought to our notice in this connection that additional evidence was taken even at the hearing of the appeal, so that the discovery of further evidence at a later stage seems improbable.

The petition for review moreover was not, we consider, *presented* with reasonable diligence, but after an interval of nearly three months from the alleged discovery of the new evidence.

On these grounds, we think, the appellant is not entitled to have the delay excused, and we must accordingly reject the appeal as barred by limitation.

Respondent is entitled to his costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1890.
Aug. 29.
Sept. 1, 30.

SECRETARY OF STATE FOR INDIA (DEFENDANT), APPELLANT,
v.

CHOYI, PLAINTIFF (RESPONDENT).*

Abkari Act—Act III of 1864 (Madras), s. 6—Rights of renter of Abkari farm—Right of Collector to close shops included in the renter's contract—Collector's orders modified by Board of Revenue—Suit for damages.

The plaintiff rented from Government an Abkari farm, on terms which reserved certain powers of control to the Collector, and obtained a license under the Abkari Act. He did not manage the shops in the contract area himself nor obtain separate licenses for their management by others. The Collector made orders which were subsequently modified by the Board of Revenue, directing the closing of certain shops which the plaintiff had sub-let and directing that others should not be opened. It was found that the Collector's orders were not in excess of the powers reserved to him under the contract, and that they had not been issued arbitrarily or otherwise than in good faith. In a suit for damages occasioned to the plaintiff by these orders:

Held, the plaintiff was not entitled to recover.

* Appeal No. 64 of 1889.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 36 of 1885.

Suit to recover Rs. 12,000, damages for breach of contract.

The Collector of Malabar issued a "notification of the sale of 'joint arrack and toddy farms by existing sub-rent arrears'—exhibit Y—of which the portions material for the purposes of this report are as follows:—

"1. Notice is hereby given that the exclusive privilege of manufacturing and vending arrack and toddy (fermented palm juice) in the several parts of the Malabar District specified in the schedule hereunto annexed, from the 1st April 1885 to the 31st March 1886, will be sold by public auction on the dates and at the places mentioned in the aforesaid schedule, subject to the conditions and limitations hereinafter set forth.

"10. The licensee shall keep true accounts of his receipts and disbursements and of the quantity, strength and description of the liquor manufactured, issued and received at each distillery and depôt established by him. Such accounts shall be produced when required for inspection by the Collector or any officer appointed by him, and the licensee shall be bound to furnish, or cause to be furnished, such information or returns as may be required by the Collector from time to time regarding the consumption of liquor within his farm, or relating in any way to his management as renter.

"11. Liquor shall only be sold under this license in one shop for arrack and toddy combined. Such shop or shops shall be under the personal management of licensee. If he desires to open more shops, or if the above shops are not under his personal management, he must obtain a separate license for each such shop.

"12. The Collector may, whenever he thinks fit, direct shops other than those managed by the licensee to be closed, or permit transfers of shops from one place to another, or direct new shops to be opened and a sufficient supply of spirits to be maintained in all sanctioned shops."

The plaintiff became the purchaser as from 1st May 1885 under the above notification, and on 14th May 1885 he received from the Collector a license—exhibit A E—of which the portions material for the purposes of this report are as follows:—

"1. W. Logan, Esquire, Collector of the District of Malabar, being duly authorized by the Board of Revenue, hereby license you, Kottieth Choyi, son of Nadukudi Kaunan, residing at Cantonment, Cannanore, to manufacture and vend arrack and toddy for the tract specified below in the Taluk of Cherakkal from the 1st day of May 1885 to the 31st day of March 1886, subject to the following conditions and limitations to be observed by you, the said Kottieth Choyi.

"10. You shall sell liquor under this license in one shop for arrack and toddy combined. Such shop or shops shall be under your personal management. If you desire to open more shops, or if the above shops are not under your personal management, you must obtain a separate license for each such shop.

"11. The Collector may, whenever he thinks fit, direct shops other than those managed by you to be closed, or permit transfers of shops from one place to

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"another, or direct new shops to be opened and a sufficient supply of spirits to be maintained in all sanctioned shops."

Neither of these documents specified the number of shops to be opened. The plaintiff proceeded to open some and prepared to open others; he did not manage his shops himself nor obtain any separate license for their management by others.

In May and July 1885 the Collector made certain orders, whereby he directed certain shops of the plaintiff which had been sub-let, to be closed and disallowed the opening of others. Some of these orders were subsequently modified by the Board of Revenue; but it was found that they were not arbitrary or had not been issued otherwise than in good faith.

The plaintiff's claim was for damages occasioned to him by loss of trade consequent on the above orders.

The terms of Abkari Act, s. 6, are as follows :—

"In cases where exclusive privileges of manufacture or sale, or of manufacture and sale, have been granted to a renter or assignee, the Collector, subject to the approval of the Board of Revenue, shall determine the places at which stills and shops shall be erected, the plan on which such shops shall be built, the number of shops and stills in each district or other division of territory, the minimum prices at which liquor shall be sold at such shops, and the measures to be used in the sale of such liquor, the due publication of such prices and measures, and generally all matters relating to the management and control of such places of manufacture or sale."

The Subordinate Judge passed a decree for the plaintiff for Rs. 11,432-8-0.

The defendant preferred this appeal.

The *Government Pleader* (Mr. Powell) for appellant.

Mr. Gantz for respondent.

BEST, J.—This is an appeal by the Secretary of State against the decree of the Subordinate Judge of North Malabar awarding to the respondent a sum of Rs. 11,432-8-0 as damages sustained by the latter in consequence of orders directing the closing of certain shops within the limits of the Abkari farms, of which the respondent had become purchaser for eleven months from 1st May 1885 to 31st March 1886.

It is urged on behalf of the appellant that the Collector had, under section 6 of the Abkari Act, No. III of 1864 (Madras), and also under the sale notification, exhibit Y, and the license granted to the respondent, exhibit A E, power to close the shops; that respondent's suit was therefore not maintainable; and that the damages awarded are excessive.

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The first issue recorded in the case is as follows :—"Whether, under the terms of the agreement with the plaintiff (now respondent), the Collector or other officer exercising his powers had right to pass the orders complained of, directing the closing of the shops within the limits of the farm leased out to the plaintiff."

The terms of the agreement are to be found in the sale notification, exhibit Y, and in the license, exhibit A E, granted to the respondent.

In clause 11 of exhibit Y, after stating that the "shop or shops shall be under the personal management of the licensee," it is added "if he desires to open more shops, or if the above shops are not under his personal management, he must obtain a separate license for each such shop"; and the next clause provides that "the Collector may, whenever he thinks fit, direct shops other than those managed by the licensee to be closed." The license, exhibit A E, granted to the respondent also contains stipulations as above. (*Vide* clauses 10 and 11.) These are the two documents from which we can gather what the contract between the parties was, and it appears to me that under them the Collector had a right to close shops without assigning any reasons for his so doing.

A former decree dismissing the suit with costs was set aside by this Court, and the case remanded for re-trial, for the reason that the decision rested on grounds not set up in defence by the defendant. It was then remarked :—"In paragraph 10 of his judgment, he (the Judge) says that the grounds on which the Collector was justified in making his orders were that the plaintiff did not personally manage the shops and that he sold to sub-renters part of the farm and that, as he did so, he should have procured a separate license so to do, which license he did not obtain. The written statement of the defendant or the issues raised no such questions."

It is true that neither in the defendant's written statement nor in the issues is there anything said of the Collector's right to close the shops on the ground that the plaintiff did not personally manage them, nor is it even now contended that this was the reason for ordering the shops to be closed, or rather for disallowing their being opened, for most of them (49 out of 55) were new shops that had never before existed. The contention is that as both under the notification of sale, exhibit Y, and the license, exhibit A E, the obtaining of a license by the plaintiff was a

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condition precedent both to the opening of new shops and to the keeping of even old shops under management other than that of the licensee himself, and as the plaintiff had admittedly not obtained any separate licenses as thus required, his claim for damages on account of the profits he might have obtained, if such shops had been allowed to be opened or maintained, is altogether unsustainable. This is, I think, an argument allowable to the defendant and comes within the scope of the 1st issue recorded for trial, and also within paragraph 2 of the defendant's written statement, which is as follows:—"According to the stipulations of the karars entered into with the plaintiff, the Collector and other officers who exercise the Collector's powers have full power to regulate the number and situation of shops within the local limits of the plaintiff's farm and for ordering to take away any of the existing shops."

I would therefore allow this appeal, and setting aside the Lower Court's decree, dismiss the plaintiff's suit with costs throughout.

MUTTUSAMI AYYAR, J.—I am also of the same opinion.

The respondent rented on 1st May 1885 the Abkari farm of 19 amshoms in the Cherakkal Taluq in North Malabar. The sale notice, exhibit Y, and the license, exhibit A E, embody the terms of the agreement between the appellant and the respondent and clause 12 of the former and paragraph 11 of the latter reserved power to the Collector *inter alia* to direct, whenever he thought fit, that shops other than those managed by the licensee be closed. Exhibits C, L and N are the orders which, it is asserted, the Collector issued in breach of the contract. Those orders related to shops which had been sub-let and *not* to those under the renter's personal management, and they are therefore clearly *not* in excess of the power reserved by the contract to the Collector. Against this view, four objections are urged on behalf of the respondent. The first is that the orders were issued arbitrarily. Exhibit C, dated 22nd May 1885, directed that sub-contractors should not keep any shop within the area of three miles from the boundary of the farm of town arrack contractors. Exhibit L, dated 9th July 1885, stated that the six toddy shops mentioned therein were very near to the municipal limits, that licenses could not be granted in respect of them, and that the trade in those shops should be immediately stopped. Exhibit N, dated 13th July 1885,

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stated that without special grounds, permission could not generally be granted to keep shops in places lying within a distance of one mile from the municipal limits. It appears that the Board of Revenue since excluded from the operation of this order any old shops in existence. It is provided in paragraph 10 of the license issued to the appellant that "if you desire to open more shops or if the above shops are not under your personal management, you must obtain a separate license for each such shop." It is not the appellant's case that any of the shops ordered to be closed were either those under his personal management or those in respect of which separate licenses had been issued. The orders in question appear to have been designed to ensure what was considered to be reasonable protection against undue interference on the part of the appellant, with the custom of the town arrack contractors and, in this sense, none of them can be said to be arbitrary. Nor does it make any difference that the Board of Revenue modified the orders issued by the Collector in the exercise of their discretion as to what might be deemed sufficient protection to the town contractors as those orders were issued *bonâ fide* in the exercise of the power reserved by the terms of the contract. As regards the contention that neither exhibit Y nor exhibit A E specified the number of shops, as was previously the case, which the appellant was entitled to open or sub-let, I have to observe that the appellant could only exercise his power subject to the restrictions as renter contained in paragraphs 10 and 11 of the license, exhibit A E. Another contention is that the orders in dispute were issued not on public grounds, but to protect the interests of the contractor for the municipal town of Cannanore. The appellant's contract and the town contract were both entered into with reference to the provisions of the Abkari Act and I cannot say that any provision in the latter contract which arms the Collector with power to see that the exclusive privilege conferred by the previous contract is not wantonly interfered with or impaired by the renter from interested motives is not legitimate or unreasonable.

On these grounds, I also hold that there was no breach of contract as alleged by the respondent and that the appeal must

- be allowed with costs.

APPELLATE CIVIL.

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

R—(PETITIONER), APPELLANT,

v.

R—(RESPONDENT), RESPONDENT.*

1890.
August 27, 28.

Divorce Act—Act IV of 1869, s. 36—Alimony pendente lite—Nett income—Allowable deductions—Change of circumstances—Letters Patent, s. 15—Order fixing date of hearing—Civil Procedure Code, s. 156.

A petition by a wife—petitioner in the one and respondent in the other of two cross-suits (matrimonial)—for an increase of alimony was treated by consent on appeal as a petition for alimony.

It appeared that the respondent was in receipt of a salary from Government which was subject to deductions on account of the pension and annuity funds, that his circumstances were involved and he had agreed with his creditors to discharge his liabilities by certain instalments, that as part of such agreement he was keeping up a policy of insurance on his life, and that he was maintaining and educating three children in England, but that his salary had increased since the order first made for alimony:

Held, that the respondent was entitled as of right to have only the deductions on account of pension and annuity funds taken into consideration in the computation of his nett income.

Per cur: “We resolve to take into consideration the expenses the respondent “is put to in maintaining his children and also any arrangement he has made for “liquidating his debts.”

An order made by a Judge of the High Court at settlement of issues fixing a distant date for the hearing of a suit is not an order under section 156 of the Civil Procedure Code and is appealable under Letters Patent, section 15.

Quere, whether the Court has power to increase or diminish an allotment of alimony made *pendente lite* on account of change of circumstances?

APPEAL against the order made by Mr. Justice Best on 8th August 1890 (1) dismissing a petition by a wife—petitioner in the one and respondent in the other of two cross-suits (matrimonial)—praying on the ground of an increase in the husband's income for an increase of the alimony *pendente lite*, fixed by an order of Mr. Justice Handley, made on 26th November 1889, and (2) adjourning the hearing of the suits till the first Monday in March 1891.

* Appeal No. 20 of 1890.

The material circumstances of the case appear sufficiently for the purposes of this report from the judgment on appeal and from the following extract from the order appealed against:—

“The law on the subject of alimony *pendente lite* is contained “in section 36 of the Indian Divorce Act (No. IV of 1869) which “provides that such alimony shall in no case exceed one-fifth of “the husband's average nett income for the three years next “preceding the date of the order.

“At the hearing of the case before Mr. Justice Handley (by “whom was passed the order of 26th November 1889), the nett “income appears to have been accepted as the balance remaining “after deducting all necessary expenses, not only income-tax and “deductions made in the pay bill on account of annuity and other “funds, but also (1) payments made for the maintenance and “education of children, (2) payments made on account of debts, “and (3) on policies of insurance. It is now contended on behalf “of petitioner that these three latter items were improperly “deducted. As to item No. 1, education and maintenance of “children, the case of *Harris v. Harris*(1) is authority against the “petitioner, for there the Court took into consideration the circum- “stance that the husband (who was also the respondent) had two “children to educate and maintain; see also *Otway v. Otway*(2) “and *Hawkes v. Hawkes*(3). As to item 2, payment of debts, “*Patterson v. Patterson*(4) is authority for holding that if the “husband is under obligations to pay off a debt by annual instal- “ments, the amount of each instalment may be deducted from his “annual income. As to item 3, payments made to maintain “policies of insurance the authorities are against their deduction; “see *Harris v. Harris*(1) and *Patterson v. Patterson*(4) referred to “above. But I do not think it is open to me to reconsider this “question of the income of the respondent upon which alimony “has already been allotted,—an amount accepted as correct on “behalf of the petitioner when the matter was before Mr. Justice “Handley. Since Mr. Justice Handley's order of 26th November “last was passed, counter-petitioner has been directed to pay to “petitioner's attorneys Rs. 100 per mensem on account of her

(1) 1 Hagg Eccl., 351.
(3) 1 Hagg Eccl., 526.

(2) 2 Phill., 109.
(4) 33 L.J. P. & M. (N.S.), 38.

R — “costs in the suit, and a further sum of Rs. 25 per mensem on
R — “account of her costs in the cross-suit in which she is first respon-
dent. The increase of counter-petitioner's pay is only about
“360 rupees, of which these additional payments are nearly a
“moiety, and, as stated in *Harris v. Harris*(1), the circumstance
“that the husband will have to pay the expenses of the suits on
“both sides must also be considered in deciding the question as to
“the amount of alimony.

“Section 36 of the Divorce Act merely prescribes the maximum
“that can be awarded. It does not say that the wife is entitled
“to the full one-fifth.

“As remarked by Sir John Nicholl in *Hawkes v. Hawkes*(2)
“though the wife during the pendency of the suit must be pre-
“sumed not to be guilty (this is of course quoted with reference to
“the cross-suit), yet she is not to live exactly in the same way as if
“she were exempt from any imputation. She is as it were under
“a cloud and should seek privacy and retirement. Whereas ‘the
“husband must have a larger proportion (than one-fifth) if his
“rank and condition require more to support them.’

“It is clear from the affidavit filed by the counter-petitioner
“that he is not in a position to pay alimony at a higher rate than
“what has already been awarded to the petitioner.”

This order dismissed the petition for increase of alimony and
adjourned the hearing of the cross-suits to the first Monday in
March 1891.

The petitioner presented this appeal on the grounds that the
nett income of this respondent had not been duly computed, that
the amount allowed as alimony was insufficient, and that the
adjournment was improper.

Mr. Wedderburn for respondent objected that no appeal lay as
to the alimony under Divorce Act, ss. 45, 55, 62, and that the
order of adjournment having been made under Civil Procedure
Code, s. 156 was final, not being appealable under section 588.

He added that in any view the appeal was in great part
precluded by the order as to alimony made by Handley, J., in
November, after a calculation of the respondent's debts and ex-
penses against which order it was now too late to appeal. On

(1) 1 Hagg Eccl., 351.

(2) 1 Hagg Eccl., 526.

the increase of pay a review on fresh matter should have been
applied for under section 562.

(Collins, C.J.—New facts came into existence later.

Shephard, J.—The Divorce Act gives the Court power to
modify the order.)

Most of this appeal is taken up with matters decided by
Handley, J.; this appeal should be therefore limited at any rate
to the new matter, viz., increase of pay. There is no appeal
allowed against an order refusing to grant a review.

(Collins, C.J.—You admit jurisdiction to enquire into the
increased income. So in effect the whole state of affairs must
be considered here. We take the nett pay, Rs. 2,300, less certain
deductions.)

The deductions were gone into before Handley, J. The actual
figure there was taken by consent. The increase, the Judge says,
is about Rs. 360.

The Advocate-General (Hon. Mr. Spring Branson) for
appellant.

As to increase of alimony the whole matter must be opened
up. The actual nett income must be arrived at. Best, J., had
to consider what order was right at the date of his order.

(Collins, C.J., referred as to the maintainability of the appeal
to Letters Patent, s. 15, and the Rules as to matrimonial suits and
said—we can now hear you upon the adjournment, and, if neces-
sary, we can allow you to appeal against Mr. Justice Handley's
order, as you tell us negotiations have been going on.)

Mr. Wedderburn.—As to appeal, Civil Procedure Code prevails
over Letters Patent. See section 638 of the Code of Civil Pro-
cedure. Moreover there was consent to the order of Handley, J.

The Advocate-General (Hon. Mr. Spring Branson).—The figures
only were admitted: they were not gone into.

Shephard, J.—The order does not say so.

[After some discussion the above objections to the appeal were
waived and the argument proceeded as if the whole question of
alimony were before the Court.]

The Advocate-General (Hon. Mr. Spring Branson) addressed
the Court on the affidavits (the contents of which appear sufficiently
for the purposes of this report from the judgment). He argued
that the sum “nett income” did not involve the deduction from the
sum received by the husband as income of the costs of educating

R — the children, &c., and that the interests of the wife should not be
v. sacrificed to those of the children.
R —

Mr. *Welderburn*.—Alimony rules in India are not the same as in England. In India there is no question of present income the only question is what was the nett income.

(*Collins*, C.J.—What is nett income by English practice and rules?)

The section says on what it shall be assessed, and it also provides for its continuance until final decree. *Kelley v. Kelley* and *Saunders*(1). Now the wife says "the income is increased, increase the allowance." As to permanent alimony there is a provision for variation see next section: but even in the English books only one old case of variation of alimony *pendente lite*.

(*Collins*, C.J.—The English cases say we may always make deductions for expenses of education not *must*.)

Shephard, J.—The English cases go on the assumption that the husband must continue to educate the children. Suppose they were to die? Moreover in allotting maintenance the English Courts make allowance for *future* expenses of education, &c.

Collins, C.J.—The bald words of the Indian Act are "nett income" which means all he receives—he can spend it on his debts or children or what he wills.)

Instalments of debts have been deducted, and that is right under the English cases—*Patterson v. Patterson*(2), no doubt however the husband is the richer by the payment of his debts. The matter is reduced to a mere question of discretion; how much is reasonable being not more than one-fifth of the income after these deductions in which it would be reasonable to take the costs into consideration.

(*Collins*, C.J.—None of the English Judges allows the costs to be taken into consideration in this respect.)

As to the costs the English rule is that costs of unsuccessful interlocutory applications should not be given against a husband whose interests are to be safe guarded too. See *Harker v. Harker*(3). Here mistakes may have arisen throughout as to

(1) 3 B.L.R., App. 4.

(2) 33 L.J. P. & M., 36.

(3) L.J. 37, Mat. N.S., 12.

the way the section should be construed; but we do not plead *res*
judicata and waive our technical objections.

The *Advocate-General* (Hon. Mr. *Spring Branson*) in reply, said the argument about debts might result in the wife paying half the debts and referred to *Harmer v. Harmer*(1), *Hawkes v. Hawkes*(2), *Lewis v. Lewis*(3) and *Morrall v. Morrall*(4).

JUDGMENT.—This is an appeal against an order made by Best, J., dismissing an application for increase of alimony *pendente lite* and adjourning the final disposal of the suit until the first Monday in March 1891.

It was objected at the outset that no appeal lay against the latter part of the order, because it was an order made under the provision of the Civil Procedure Code, for which no appeal is provided; and a preliminary objection to be noticed hereafter was also taken to the maintenance of the appeal so far as the amount of the alimony was concerned.

With regard to the so-called adjournment of the suit, we are of opinion that the order is not one made under section 156 of the Code, cited by the learned counsel. It was simply an order made at settlement of issues, fixing the day on which the final hearing was to take place and is only exceptional on account of the distance of the date to which the hearing was postponed. Although we think that an appeal does lie against such order as against every other order of a single Judge, except in matters where the right of appeal is curtailed by legislation subsequent to the Letters Patent, and, although we also think that this order was an unusual one, we do not think it necessary in this case to vary it; for we learn from Mr. Justice Best that the understanding on which the trial of the case was allowed to be postponed for so long a time was that in the meanwhile the parties should obtain such evidence as might be required by commission or otherwise and put themselves in a position to have the case disposed of on the day fixed.

As regards the appeal concerning the amount allowed for alimony, it was at first objected that, although Best, J., might have enhanced it in consequence of the increased pay to which the

(1) 3 Jur. N.S., 168.

(3) 30 L.J. Mat. N.S., 199.

(2) 1 Hagg Eccl., 526.

(4) L.R., 6 P.D., 98.

B — respondent has recently, and since the passing of the original order
 R — of the 26th November 1889, become entitled, he could not other-
 wise modify the order passed on that day by Handley, J. It was
 also contended that the original order of the 26th November was
 practically an order passed by consent, and that anyhow the time
 for appealing against it had long since passed away. The Advo-
 cate-General, who appeared for the petitioner, explained, however,
 that the figures were not examined, as it was then expected that
 the case would be amicably settled. After some discussion, how-
 ever, these objections were withdrawn, and Mr. Wedderburn
 consented to have the whole question of the amount of alimony
 inquired into *de novo* and in the peculiar circumstances of the case
 we allowed that course to be adopted.

The order of Handley, J., by which the sum of Rs. 135 a
 month was made payable to the petitioner, was framed upon the
 supposition that, in calculating the nett income of a husband as
 required by section 36 of the Divorce Act, there should be
 deducted, from his monthly receipts, all sums expended on his
 children or in liquidation of his debts.

The average salary, the only source of the respondent's
 income, for the last three years before the date of Handley, J.'s
 order was about Rs. 1,600 per mensem after deducting income-tax
 and the contribution to pension and annuity fund. This sum re-
 duced by the amounts claimed to be deducted on account of the
 respondent's children and debts, becomes a sum of Rs. 610 a month
 only, and it is this smaller sum which has been taken to represent
 the average nett income of the respondent for the purpose of
 charging alimony against him. In our opinion it is an entire mis-
 take to suppose that the phrase "nett income" in the Act has any
 other meaning than that which it ordinarily bears. The cases
 cited, while they show that in allotting alimony, allowance may
 be made for children that have to be maintained by the husband
 or instalments of debts that have to be paid, have no bearing on the
 question of what constitutes a man's "nett income." Ordinarily
 with an official drawing a fixed salary and having no other means,
 that expression would be taken to mean the amount of his salary
 minus deductions on account of income-tax, charges for a pension
 fund, and the like; and, in our judgment, that is the sense in
 which nett income is to be understood in dealing with a case under
 the Divorce Act.

It is then contended that in allotting alimony on the average
 amount of nett income, viz., Rs. 1,600, the respondent is at least
 entitled to have the charges of maintenance of his children and the
 monthly instalments of debts payable by him taken into consider-
 ation. On the other hand it is contended that inasmuch as the
 respondent's salary has increased since the date of the original
 order, that increase of salary ought to be taken into consideration.
 We do not think it is by any means clear that the Court has power
 to increase or diminish an allotment of alimony made *pendente*
lite on account of change of circumstances; and no case has been
 cited in which such power has been exercised in favor of the wife.
 But, however that may be, we do not in the present case feel justi-
 fied in taking into account any income other than that which was
 received during the three years next before the making of the ori-
 ginal application. The average nett income from that period being
 Rs. 1,600, the maximum alimony which under the Act we could
 allot would be about Rs. 330. To deduct the full amount claimed
 by the respondent on account of the children and on account of
 the debts and then to calculate the one-fifth on the residue would
 leave the petitioner a sum plainly insufficient to maintain her in
 the decent comfort to which she is entitled. Granting that enough
 must be left to the husband to provide, among other things, for the
 maintenance of his children, we think that the sum required for
 such maintenance must be calculated with reference to the means
 of the parties and, although the three children aged, respectively,
 14, 11 and 8 in the present case appear to have cost at the rate of
 £120 each per annum, we think that that expenditure is, under
 the circumstances, excessive. And with regard to the debts said
 to be payable by instalments, we observe that the creditor is
 the respondent's step-father and that he has security for his debt.
 We have, on the other hand, to consider what sum is necessary to
 keep a lady in the petitioner's position in reasonable comfort. It
 seems to be admitted, and, in our minds, there is no doubt, that
 the least sum on which such a person having no other means
 can live in Madras, is between Rs. 200 and Rs. 250 a month.
 And it is to be observed that Mr. Wedderburn stated at the hear-
 ing that the respondent was willing to allow his wife Rs. 222 a
 month. Although we have power to grant as much as one-fifth
 of the respondent's nett income, we resolve to take into consider-
 ation the expenses the respondent is put to in maintaining his

R — children and also any arrangement he may have made for liquidat-
 v. ing his debts. It has been contended, on behalf of the respondent,
 R — that any increase of the alimony should not refer back to the
 date of the original order and we think there is force in this con-
 tention.

Taking all the circumstances into consideration, we order that in substitution for the order of Handley, J., the respondent do pay to Messrs. Barclay and Morgan, the Solicitors of the appellant the sum of Rs. 240 per month, the first payment to be due on the 5th August 1890 and to be made within seven days from this date and the subsequent payments to be made on the 5th of each succeeding month. It has been alleged, on behalf of the petitioner, that the respondent improperly made a deduction from the sum he was ordered to pay as alimony. Although strictly speaking he was not justified in making such deduction, yet, as it appears that it was only made to pay a bill, which otherwise the appellant would have had to pay, we decline to make any order on this part of the case.

[Their Lordships next proceeded to consider the question of the costs incurred in the matter and ordered that they be paid by the respondent.]

Barclay and Morgan, attorneys for appellant.

Wilson and King, attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

ALIMA (DEFENDANT), APPELLANT,

v.

KUTTI (PLAINTIFF), RESPONDENT.*

*Limitation Act—Act XV of 1877, sch. II, arts. 142, 144—Adverse possession—
 Burden of proof.*

The plaintiff, who was the sister of the defendant, sued in 1888 to recover from him a moiety of a paramba purchased by them jointly in 1877. In 1878 the plaintiff went to live elsewhere, but, from time to time, returned and spent a few days with the defendant on the land in suit. The defendant pleaded limitation:

* Second Appeal No. 156 of 1890.

Held, that Limitation Act, sch. II, art. 144, applied to the suit, and the burden of proving adverse possession lay on the defendant.

SECOND APPEAL against the decree of V. P. deRozario, Subordinate Judge of South Malabar, in appeal suit No. 449 of 1889, reversing the decree of P. J. Itteyerah, District Munsif of Kutnad, in original suit No. 653 of 1888.

Suit to recover possession of a moiety of a certain paramba.

The plaintiff and defendant purchased the paramba in question jointly in 1877. In 1878 the plaintiff went to live elsewhere, but it appeared that she occasionally returned and spent a few days on the land in question with the defendant.

The District Munsif dismissed the suit, but his decree was reversed on appeal by the Subordinate Judge.

The defendant preferred this second appeal.

Raman Menon for appellant.

Sankara Menon for respondent.

JUDGMENT.—The appellant is respondent's sister, and in 1859 they jointly purchased the paramba in dispute. It is found that the exclusive title set up by the appellant has not been proved. Though the appellant has been in possession from 1878 when the respondent went to live in Ponnani, yet the Subordinate Judge finds that the latter has been frequently visiting the house on the paramba for ceremonies and festivals. Upon these facts we agree with the Subordinate Judge in thinking that article 142 is not applicable, but that article 144 applies. The onus of proving adverse possession for upwards of twelve years was, therefore, on the appellant, and, as she failed to do so, the Lower Appellate Court was right in decreeing the claim. It was also held in *Sayad Nyamtula v. Nana*(1) and *Faki Abdulla v. Babaji Gungaji*(2) that it was for the defendant to prove adverse possession for twelve years or more when article 144 applied to the suit.

We dismiss this second appeal with costs.

(1) I.L.R., 13 Bom., 424.

(2) I.L.R., 14 Bom., 458.

APPELLATE CIVIL.

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

1890.
September 26.

SUBBARAYA (DEFENDANT NO. 4), APPELLANT,

v.

NATARAJA AND OTHERS (PLAINTIFFS NOS. 1 TO 7),
RESPONDENTS.*

Mirasi rights—Kasavargam tenant—Ejectment suit—Notice to quit.

The mirasidars of a village in the Tanjore District sued to recover [a *manai* which had been put into the possession of the ancestors of defendant No. 8, who were village blacksmiths, as kasavargam tenants. Defendant No. 8 had left the village and sold the land as if it were his ancestral property to others of the defendants, who were now in occupation :

Held, that the plaintiffs were entitled to recover the land without proof of notice to quit to the occupants.

SECOND APPEAL against the decree of V. Strinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 613 of 1888, reversing the decree of S. Dorasami Ayyangar, District Munsif of Valangiman, in original suit No. 103 of 1888.

Suit by the plaintiffs as mirasidars of a certain village in the Tanjore District to recover possession of a *manai*, which had been put into the possession of the ancestors of defendant No. 8, who were the village blacksmiths. In the paimaish account they were described as kasavargam tenants. Defendant No. 8, who was not a blacksmith, left the village; but claiming the land in question as his ancestral property, he sold it to the other defendants, who set up title in this suit under his conveyance.

The District Munsif dismissed the suit, but his decree was reversed on appeal by the Subordinate Judge, who passed a decree for possession.

Defendant No. 4 preferred this second appeal.

Pattabhirama Ayyar for appellant.

Rama Rau for respondents.

JUDGMENT.—Appellant's own exhibit I the paimash account describes Kaliathan's and his father's tenure as kasavargam,

* Second Appeal No. 1642 of 1889.

which, as appears from Wilson's Glossary, gives no right to the land on which the house stands; and, as stated by the Sudder Udalut in *Culleyana Ramien v. Soobramaneya Chetty*(1) means a tenant liable to be ejected by the mirasidars. The Lower Appellate Court has also found on the oral evidence that Kaliathan's family merely held as licensees of the mirasidars on condition of their doing blacksmiths' work.

As to notice to quit, we agree with the Lower Courts in finding that the appellant was not entitled to the same, he being, as stated by himself, not a tenant, but a purchaser from the 8th defendant.

The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

LINGAYYA AND ANOTHER (DEFENDANTS AND JUDGMENT-
DEBTORS), APPELLANTS,

v.

NARASIMHA (PLAINTIFF AND DECREE-HOLDER), RESPONDENT.*

*Civil Procedure Code, ss. 2, 244, 258, 588—Appeal against an
order under s. 258.*

Semle: An appeal lies against an order dismissing an application made under Civil Procedure Code, s. 258, that the adjustment of a decree be recorded as certified.

SECOND APPEAL against the order of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 344 of 1888, affirming the order of V. Suryanarayana, District Munsif of Guntur, dated 12th March 1888, passed on civil miscellaneous petition No. 715 of 1887, in original suit No. 370 of 1887.

Original suit No. 370 of 1887 was filed on 21st October 1887 and came on for hearing on the 8th November 1887; the defendants did not appear and judgment was given for the plaintiff. On the 30th November 1887, the first and second defendants filed civil miscellaneous petition No. 715 of 1887, which stated that the

(1) Sudder Decisions of 1858; 145.

* Second Appeal No. 231 of 1889.

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plaintiff had come to an agreement about the decree debt on November 10 at their village, Timmapuram, that the necessary documents had been executed at Narasaraupett on November 11 and had been registered on November 12, the cash, Rs. 649, being paid to plaintiff in presence of the Sub-Registrar, and prayed that the District Munsif should record that the decree against them in suit No. 370 of 1887 had been satisfied. Plaintiff filed a counter-petition in which he denied the agreement and execution of the document. The District Munsif held an enquiry into the matter and came to the conclusion that the defendants' story was false. Their petition was accordingly dismissed with costs and the Munsif's order was affirmed on appeal by the District Judge. The judgment-debtors preferred this second appeal.

Anandacharlu for appellants.

The *Advocate-General* (Hon. Mr. *Spring Branson*) for respondent.

JUDGMENT.—A preliminary objection is taken that no second appeal and no appeal lies.

The order, which it is sought to appeal against, was made under section 258, Civil Procedure Code, and no appeal is allowed against such orders under section 588, Civil Procedure Code, unless therefore the order is a decree within the meaning of the definition in section 2 of the Civil Procedure Code an appeal will not lie. The definition in section 2 includes orders made under section 244, Civil Procedure Code, but these orders must be orders, it is said, made in execution of a decree, that is to say, after application has been made to a Court in the execution-department to enforce a decree.

Here it is admitted no application had been made for execution to the Court, the decree having been passed on the 8th November and the application of the defendants, out of which the present proceedings have arisen having been made on the 30th November following. We are not prepared to hold that the objection is a good one. The language of section 244, clause (c), viz., any other question relating to the satisfaction of a decree, appears to us to be probably wide enough to embrace such a proceeding as that arising on an application to record satisfaction, even where no application has been made for execution.

A petition by an execution-creditor for execution is not, in our opinion, a necessary preliminary to an order falling within the terms of section 244, Civil Procedure Code.

It is not, however, necessary to determine the question, as on the merits we consider the appeal cannot be sustained. The only objection urged on the merits is that the District Judge did not record an express finding on the sale-deed, which formed part of the consideration for the alleged satisfaction.

The District Judge has not, however, we consider, overlooked this item. The arguments and reasoning employed by him apply to the whole transaction, of which the sale-deed formed an item and he was clearly satisfied to concur in the District Munsif's conclusion that the whole transaction was fraudulent.

On the merits the appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

ANANTAN (DEFENDANT NO. 1), APPELLANT,

v.

SANKARAN AND OTHERS (PLAINTIFF), RESPONDENTS.*

*Malabar law—Suit by junior members of a tarwad—Suit for declaration of
invalidity of kanom—Limitation.*

The junior members of a Malabar tarwad brought a suit against their kar-navan and senior anandravan and certain persons claiming under a kanom granted by the former for a declaration that the kanom was invalid and for possession of the land demised with meane profits. The suit was filed nearly twelve years after the execution of the kanom :

Held, (1) that the suit was maintainable by the plaintiffs ;

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

SECOND APPEAL against the decree of W. Dumergue, Acting District Judge of South Malabar, in appeal suit No. 1 of 1889, affirming the decree of V. Raman Menon, District Munsif of Angadipuram, in original suit No. 191 of 1888.

Suit brought on 3rd July 1888 by the junior members of a Malabar tarwad for a declaration that a kanom granted by defendant No. 11 to defendant No. 1 on 1st July 1876 was invalid as against the tarwad and for possession of the land demised and

* Second Appeal No. 2 of 1890.

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SANKARAN. for mesne profits accrued thereon. Defendant No. 10, the karnavan of the tarwad, had appointed defendant No. 11, who was the senior anandravan, to be the manager of the tarwad under a karar. The other defendants claimed under defendant No. 1.

The District Munsif passed a decree as prayed, which was affirmed on appeal by the District Judge.

Defendant No. 1 preferred this second appeal.

Gorinda Menon for appellant.

Sankaran Nayar for respondents.

JUDGMENT.—It is contended, in the first instance, that the suit brought by the junior members of a tarwad is not maintainable. The karnavan is included as a defendant in the suit, and, as he has failed to sue till the period of twelve years has almost expired, we are of opinion that the suit by the junior members cannot be validly objected to.

The other question is whether the suit is time-barred?

Applying the principle of the decision of this Court in *Pachamuthu v. Chinnappan*(1) and the decision of the Calcutta High Court in *Rughubar Dyal Sahu v. Bhikya Lal Misser*(2), we find the Lower Appellate Court is right in holding the suit to be not time-barred.

The Lower Courts have found, as a fact, that the money was not advanced for tarwad necessity.

This second appeal fails, therefore, and is dismissed with costs.

(1) I.L.R., 10 Mad., 213.

(2) I.L.R., 12 Cal., 69.

APPELLATE CIVIL.

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

NATESA AND OTHERS (DEFENDANTS NOS. 1 TO 5), APPELLANTS
IN APPEAL NO. 108 OF 1888 AND RESPONDENTS IN
APPEAL NO. 159 OF 1888,

v.

GANAPATI AND OTHERS (PLAINTIFFS), RESPONDENTS IN APPEAL
No. 108 OF 1888 AND APPELLANTS IN APPEAL
No. 159 OF 1888.*

Civil Procedure Code, s. 31—Misjoinder of causes of action—Religious Endowments Act—Act XX of 1863, ss. 3, 4—Hereditary trusteeship—Suspension from trusteeship and right of puja—Maintenance in office on terms.

Suit by certain Dikshadars or hereditary trustees of the Chitambaram temple against others of the Dikshadars praying for their removal from office and for a money decree alleging, that they had been jointly guilty of misconduct in respect of temple property in their custody and had obstructed the repair of certain shrines. The District Judge passed a decree suspending some of the defendants from the office of trustee and the right of puja for a period which was not defined; he also passed a decree for the money claimed:

Held (1) that the suit was not bad for misjoinder of causes of action;

(2) that the operation of Act XX of 1863 was not excluded by the admission that the trusteeship was hereditary in certain families;

(3) that the District Judge had jurisdiction under Act XX of 1863 to deprive the defendants of the right of puja.

Held further, on the evidence, that the defendants merited the punishment which had been inflicted on them.

Decreed that the suspension of the defendants be withdrawn on the terms that they file an undertaking with two sureties that they would restore certain property belonging to the temple now missing, and that they would duly conform to the decision of the majority of Dikshadars as to the management of temple affairs, &c.

APPEALS against the decree of E. C. Johnson, Acting District Judge of South Arcot, in original suit No. 7 of 1837.

The facts necessary for the purposes of this report appear from the following judgments.

Ramachandra Rau Saheb and Sadagopacharyar for appellants in appeal No. 108 of 1888.

Subramanya Ayyar, Bhashyam Ayyangar and Desika Charyar for respondents.

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Bhashyam Ayyangar and Desika Charyar for appellants in appeal No. 159 of 1888.

Sadagopacharyar for respondents.

JUDGMENTS.—*In Appeal No. 108.*—The respondents brought this suit to remove the appellants and three others from the offices of dharmakartas and worshippers in the temple of Saba Nayakar at Chitambaram in South Arcot. Both parties to this appeal belong to a class of Smarta Brahmans called Dikshadars who, from time immemorial, have held both offices in that institution which is one of considerable antiquity and renown in Southern India. About 250 families of Dikshadars reside at Chitambaram, and the net income of the temple, which is derived from general offerings, is their recognized means of livelihood. According to their usage every Dikshadar becomes entitled, on marriage, to take part in the management, to do puja or perform service in the minor shrines, and to share in the emoluments of the institution. He is, however, considered not qualified for performing service in the principal shrines, until he is twenty-five years old and initiated in a ceremony called Diksha. There are five principal shrines, and they are called (1) Chit Saba, (2) Kanaka Saba, (3) Deva Saba, (4) Amman Covil, and (5) Mulastanam. Of these, the first is the seat of the presiding deity, named Saba Nayakar or Natesar, and unless service is first held in it, it can be held, according to custom, in no other shrine. The temple being ancient, the necessity for putting it in repair was felt by the Dikshadars in 1877 and a wealthy class of merchants called Nattucottai Chetties, residing in the district of Madura, regarded its restoration as a great act of pious charity. A deputation of the former then waited upon the latter and induced them to undertake the repair. Between 1877 and 1881, the Chetties raised between three and four lakhs of rupees, and some of their leading men visited Chitambaram in 1881. Thereupon, general meetings of Dikshadars were held and an agreement called samakiya was executed in July 1881. It authorized the Chetties, *inter alia*, to proceed with the repair and specified the shrines included in the scheme of repairs. The merchants deputed one of them, named Chitambara Chetty, to carry the scheme into execution, and he commenced the repair at once. The Chetty and the Dikshadars acted in harmony till June 1882, when a minor shrine in the temple called the Pillayar Covil had to be dismantled, in order that it might be

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rebuilt. For this purpose, it was necessary to perform, according to the usage of the temple, a ceremony called Vala Stapanam and an auspicious day was fixed for its performance. A leading Dikshadar, named Sabanatesa and eight or ten others objected to the day fixed as not being sufficiently auspicious and their objections were discussed and overruled at a general meeting of the Dikshadars. The question, whether the opinion of a majority of Dikshadars present at a general meeting, ought to bind the minority or whether all the Dikshadars should concur, before any valid act could be done in connection with the temple, was then brought into controversy. Despite the remonstrance of the minority, the Chetty and the majority of Dikshadars carried out the ceremony; but the result was a disturbance which the police had to interfere to put down. Thenceforward, there was a split among Dikshadars, they divided into two factions, and the minor faction gradually gained strength and development. There are conflicting versions as to the real motive for this party quarrel, but, whether it was the Chetty's refusal to give presents to the minor faction, whilst he gave them to the major faction or a religious scruple as mentioned above, the fact is clear that party strife began at that time and gradually became so acrimonious as often to threaten the public peace and impair the efficient management of the affairs of the temple.

For nearly thirty years previous to 1881, the right of collecting the offerings made by worshippers in the temple, used to be leased out to the highest bidder among Dikshadars at a general meeting convened in the temple once in twenty days and held before a sacred lamp, brought from the Kanaka Saba by a pandaram who held the office of Podumanishiyan or common friend. The proceeds of the lease were first applied to the payment of temple servants and to the expenses of necessary repairs and temple festivals and the residue was then divided among all the Dikshadars. Shortly after the factions came into existence, this practice was objected to by the minor faction and first held in abeyance by mutual consent pending the adjustment of their disputes, the "morai-karars" or turn-holders among the Dikshadars taking the offerings made during their respective turns. After the prior practice had remained in abeyance for some time, it was felt that funds were required for some temple festival, and it was then agreed between the two parties that the system of leasing was

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to be resumed for eleven days, and that, on the expiration of that period, it was again to be held in abeyance. But, when that period expired, the major faction attempted to revive the old practice and the minor faction resisted the attempt. The result was that, when the Podumanishiyan or common friend proceeded, according to usage, to fetch the sacred lamp from the shrine, called Kanaka Saba, a riot ensued, and the sixth defendant stabbed with a knife some of the members of the major faction in June 1882 and caused them grievous hurt. This resort to violence checked any further attempt to restore the previous practice which continues yet to be held in abeyance. Another matter, which it is necessary to mention for the purposes of this appeal in connection with the conduct of the minor faction, is the systematic obstruction which it offered to the repair by the Chetty of the Chit Saba and Kanaka Saba and Tirumalaipati Mantapam. The contention was that such repair was incompatible with the traditions of the temple, that the edifices mentioned above were originally built by divine agency, that they should not be desecrated by repair, and that such desecration would materially lower the prestige of the institution for its sacred character in public estimation. In support of this contention, the minor faction relied on the plea that no act could validly be done in connection with the temple in question, unless all the Dikshadars concurred in it and that the voice of the majority ought not to prevail. It was also contended for it that those shrines needed no repair and that they were exempted from the scheme of repairs sanctioned by the agreement of July 1881. The major faction denied every one of these allegations and insisted that the scheme of repairs sanctioned by the agreement of 1881 should be carried out in its entirety. This was the contention between the two parties from 1884 to November 1888, until the District Court in the first instance and the High Court on appeal, disallowed the several objections of the minor faction and decided in favor of the major faction in original suit No. 16 of 1885 and in appeal suit No. 53 of 1886. The misfeasances imputed to the defendants in connection with the question of repair are: (1) the institution of original suit No. 16 of 1885 otherwise than *bonâ fide*, (2) the closing of the principal shrines, viz., Chit Saba, Deva Saba and Amman Covil from the 29th June to the 4th July 1886, and (3) the obtaining of the agreement (exhibit VI) on the 5th July 1886, under pressure or coercion, whereby the

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custody of the keys of the principal shrines was transferred contrary to usage from the turn-holders to four persons who belonged to the minor faction.

Another result of the party quarrel was the loss of temple jewels and other articles of considerable value which was imputed to the misconduct of some of the members of the minor faction in 1886. After this seven members of the major faction brought the present suit against eight members of the minor faction under Act XX of 1863 with the sanction of the District Court and prayed for their removal from the offices of dharmakartas and worshippers for the acts mentioned above and other acts of misfeasance. The defendants denied that they were guilty of any misfeasance and that they were responsible for the loss of temple property which, they further alleged, was exaggerated. It was also contended for them that the suit was bad for misjoinder of causes of action and that it could not be maintained under Act XX of 1863. The Judge disallowed the two preliminary objections and found that the first five defendants wilfully obstructed the necessary repair of the temple, closed the three principal shrines of Chit Saba, Deva Saba, and Amman Covil from the 29th June to the 4th July 1886 and improperly obtained document VI, whereby the custody of keys of the principal shrines was changed to the prejudice and contrary to the usage of the temple. He also found that the loss of temple property to the extent of Rs. 11,800 was imputable to them and decreed that the first five defendants be suspended from their trusteeship and all right of puja and emoluments connected therewith and from all share in the management of the temple, until such time as they may succeed in showing to the satisfaction of the Court that such suspension may be withdrawn without prejudice to the interests of the institution. He further directed that they be held jointly and severally liable for the sum of Rs. 11,800 on account of the temple property missing. As regards the other defendants, he dismissed the suit as against them and directed that their costs be paid out of the temple funds. The seventh defendant died afterwards and the first five defendants appeal from the decree so far as it is against them, whilst the plaintiffs appeal from it so far as it exonerates the sixth and eighth defendants from liability for suspension or dismissal.

As regards the defendants' appeal (No. 108 of 1888), the two preliminary objections taken in the Court below are again pressed

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upon us, but we are of opinion that the Judge was right in disallowing them. The grounds of decision against the appellants are that they jointly obstructed the execution of necessary repairs to the temple and that they were guilty of negligence or misconduct in respect of temple property in their joint custody and both those grounds concern all the appellants in common. The plea of misjoinder of causes of action cannot, therefore, be supported. It is true that the Judge has found that appellants Nos. 2 to 4 closed the temple and that appellants Nos. 1 and 5 improperly obtained exhibit VI, but he has also found that both those acts were done on behalf of the minor faction and in furtherance of its common object, viz., that of obstructing the repair of the Chit Saba and Kanaka Saba, &c. It is then argued for the appellants that, according to the plaint as originally framed, the suit was bad for misjoinder and that the Judge erred in entering on the merits without dismissing it at once. But we observe that the misfeasances imputed to the defendants, consisted of acts alleged to have been done on behalf of the minor faction and in pursuance of its common policy. Even if the frame of the plaint was defective as alleged, the procedure followed by the Judge is in accordance with section 31 of the Code of Civil Procedure which authorizes him to deal with the matter in controversy so far as regards the liability of the appellants.

As for the objection that Act XX of 1863 is not applicable to this suit, the contention in the Court below was that the temple was not an institution falling either under section 3 or 4 of that enactment, but the Judge held that the Act took the place of Regulation VII of 1817 and that the temple in dispute being endowed both with land and jewels, the trustees were liable to be dealt with under section 14. It is now urged that the temple is the Dikshadars' private property and that its endowments ought to be treated as those of a private temple but this is apparently an afterthought. The appellants admitted in their written statement, paragraph 3, that they were Adinam Dharmakartas or hereditary trustees of the temple and their present contention is at variance with their own averment. It is not denied that the institution has been used as a place of public worship from time immemorial but it is said that the public worship in it by permission of the Dikshadars. Though it is denied that the temple has any endowment in lands, the 86 inam pattas marked as exhibit M series amply sup-

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port the finding of the Judge. There is not a particle of evidence in support of the assertion that this ancient temple is the private property of the Dikshadars, and the occupation of some of the rooms in the temple by the Dikshadars and the inclusion of such rooms in the partition deeds of their families is referable to their status as hereditary dharmakartas, and to an arrangement made between them for mutual convenience whilst in the discharge of their duty as Dharmakartas, worshippers and custodians of the temple and its property.

Turning to the merits, three questions arise for decision, viz., (1) whether the misfeasances, for which the appellants are suspended from office, have been sufficiently proved, and (2), if so, whether the Judge was entitled to deprive them of their right of puja under Act XX of 1863, and (3) whether the finding as to the description and value of temple property lost is supported by the evidence in the case.

As regards the first question, it was finally decided in original suit No. 16 of 1885 between the two factions that the minor faction was not entitled to object to the execution of the repair of the Chit Saba and Kanaka Saba and Tirumalaipati Mantapam. In that suit, six principal questions were raised for decision. The first related to the status of the Dikshadars in the temple and the final decision in regard to it was that it was sufficient for the purposes of that suit to hold that the Dikshadars were the trustees and managers of the temple and were collectively the governing body. The second question was whether Dikshadars of the minor faction originally gave permission to the Chetty to repair Chit Saba, Kanaka Saba and Tirumalaipati Mantapam and whether such permission was validly revoked. It was decided that they did give permission and that it was not since validly revoked. The next three questions were whether the repair of those edifices was contrary to the regulations and usage of the institution, whether the execution of such repair would injuriously affect their sacred character and whether the repair was necessary or called for. It was held that there was necessity for the repair and that the repair of the particular edifices in question was not contrary to Hindu religion, provided that a necessity existed for the same. Another question raised for decision was whether unanimity among Dikshadars was necessary, according to the usage of the institution, for the carrying out of

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any act in connection with the temple, and, if so, whether such usage was valid. It was held that their own rules provided that the *majority* should decide. In accounting for the contention that unanimity was indispensable, the District Judge referred to the practice of oecumenical councils in which resolutions are said to be passed unanimously, because it is the recognized duty of the minority to give way to the majority, and suggested that such was probably the case among Dikshadars and that the procedure was intended to give weight to their resolutions among the general public and not to enable the minority to ignore the voice of the majority. We take it then to have been judicially determined that the minor faction was acting illegally and contrary to the usage of the institution both in treating the decision of the majority at a general meeting duly convened as not binding upon those who dissented from it, and in opposing the repair of the Chit Saba, Kanaka Saba and Tirumalaipati Mantapam as inconsistent with the usage of the temple and its traditions. This being so, it follows that the acts done by them, if done for the purpose of obstructing the repair, were misfeasances within the meaning of section 14 of Act XX of 1863. Of the three acts referred to by the Judge, the first was the institution of original suit No. 16 of 1885, and it is urged, with reference to it, that the minor faction ought not to be blamed for seeking to vindicate what it considered, though erroneously, to be its legal right. The Judge held that the suit was not instituted *bonâ fide* and we concur in his opinion for the reasons mentioned by him; and we may add that the learned Judges who heard appeal suit No. 53 of 1886, observed that the motive, which influenced the action of the minor faction, was personal and not creditable.

The second act which, the Judge considers, was done in order to obstruct the repair, was that of closing three of the principal shrines on the 29th June 1886 and refusing to open them till 5th July next. Such an interruption of public worship is obviously a serious breach of duty on the part of trustees of a public temple and is prejudicial to its interest. That the appellants Nos. 2, 3 and 4 did close the temple, is not disputed. Nor is it denied that they did so on the day prior to that, on which one of the important annual festivals was to commence, and this is an aggravation of their misconduct. But it is urged on their behalf that

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there was a dispute among some of the Dikshadars about the turn, in which puja was to be performed and that the temple was closed for fear that the major faction might, otherwise, take forcible possession of the shrines. Judging, however, of the appellants' conduct in the light thrown by document VI, we consider that the Judge was right in finding that the shrines were closed for the purpose of obstructing the repair and securing to the minor faction possession of the keys of the principal shrines as a means of rendering such obstruction effectual. The provisions in document VI as to the turn are referable to the temporary interruption, and to the festival which was likely to enhance the value of offerings.

The third act of misfeasance which the Judge considered to be proved, was the obtaining of exhibit VI under coercion. It is argued before us that the agreement was executed by five members of each faction as representatives of that faction in provisional adjustment of the dispute between the two factions, and that the fact of the Tahsildar and Inspector of Police having assisted in bringing about the amicable adjustment, shows that no coercion could have been used. We do not consider that any physical restraint was used, for the major faction was numerically stronger than the minor and it is in evidence that the Tahsildar and the Inspector of Police advised the parties to temporarily arrange the matters in dispute between them. But we are of opinion that the document was executed under pressure put by the minor faction by persistently refusing to open the temple at the time of the annual festival and thereby injuring its prestige. The festival time was passing away and the interference of the Magistracy and of the Police raises a presumption that there was probably public excitement owing to the stoppage of public worship at an important juncture. Again, the agreement was on its face beneficial to the minor faction and it secured, thenceforward, possession of the keys of three of the principal shrines to four members of that faction. The only consideration in its support, to which the appellants' pleader can refer us, is the opening of the temple and it cannot be accepted as a legal consideration, as the act of closing a public temple and interrupting public worship, is in itself illegal. Again, the provision as to the possession of keys by four members of a faction is an innovation upon the usage of the institution and as such bad in law. The

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subsequent conduct of the major faction in repudiating the document as obtained under pressure and declining to register it raises a presumption in favor of its contention. Though the oral evidence on the point is conflicting, the probabilities of the case support the evidence for the major faction and justify the conclusion that its members consented to execute the agreement under pressure put upon them by the minor faction. However this may be, the agreement is clearly bad as being contrary to the usage of the temple. According to it, the daily puja or the regular service is performed in rotations of twenty days by a body of twenty Dikshadars and these are again sub-divided into batches of four, each batch serving by turn in one of the five shrines in the temple for four days and each member of that batch being entitled to serve for one of the four days. The twenty Dikshadars who are on duty for twenty days at a time, are called morai-karars or turn-holders and there are thus always twenty morai-karars for the whole temple, four special morai-karars for each of the five shrines for every four days, and one special morai-karar for each day in each shrine. According to custom, the morai-karars had charge of the keys of their respective shrines, during their turn and when each set of four special morai-karars passed from shrine to shrine, the custody of keys of the shrine also changed hands; and the jewels and valuable articles in each shrine were examined once in four days. The change introduced by exhibit VI, in regard to the custody of keys was a departure from the usage of the temple and injurious to its interests, so far as it put a stop to the necessity of seeing once in four days that the property in each shrine was safe. We see no reason to doubt the correctness of the conclusion, at which the Judge has arrived as to this part of the case.

Further, the document purports to have operation pending the settlement of the disputes between the two factions by a civil suit. Not only did the decisions in appeal suit No. 53 of 1886 set at rest the matters in controversy between them regarding the repair and the legal effect of the decision of the majority, but there is also evidence to show that the civil suit in contemplation was the one then pending on appeal in the High Court.

As to the loss of temple property, it consists partly of property kept for ordinary use in the several shrines and partly of property in the Treasury room which is usually called Astantram or Bookusham. The Treasury room is situated in the Deva Saba and no

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access can be had to it except through that shrine. It has also a smaller room inside and the outer door is secured by double locks and keys, whilst the door of the inner room is also usually locked. As valuable property belonging to the temple and not required for ordinary use is secured in it, it is not opened according to custom except in the presence of the general body of Dikshadars. The shrine of Deva Saba has also an outer door which is locked at night when it is not kept open for public worship. According to custom, of the two keys of the outer door of the Bookusham, one was kept in the shrine called Chit Saba and the other in Amman Covil, and the key of the inner room was kept in the shrine called Mulastanam. From the date of exhibit VI, viz., 4th July 1886, the keys of three of the principal shrines, viz., Chit Saba, Deva Saba and Amman Covil, remained in the custody of the four persons mentioned in that document, viz., appellants 2, 3 and 4 and another. The respondents' case was that, from 4th July 1886, the minor faction, especially the four persons named in exhibit VI, had the entire control of the three shrines and of the Astantram and that the appellants were responsible for the missing jewels and articles. It was not denied that appellants Nos. 2 to 4 were responsible for property which was in the three shrines of Chit Saba, Deva Saba and Amman Covil on 4th July 1886 and which was afterwards lost, but they repudiated all responsibility for any other property and for the property kept in the Treasury room. They also contended that the respondent tampered with some of the locks of the Treasury room and that some of the members of the major faction used to sleep in the Deva Saba. But the Judge found that property valued about Rs. 11,000 and odd was proved to be missing, that it was lost between 4th July 1886 and sometime in December of the same year, that the appellants Nos. 2 to 4 might have had access to the Treasury room during that period, that the respondents could not have had access to it, that the imputations made against them were not well-founded and that appellants Nos. 2 to 4, as persons in charge of the shrines under exhibit VI, and appellants Nos. 1 and 5 as their guarantors, were responsible for the missing property. It is argued before us that the appellants had no control over the property in the Treasury room, that the Judge was in error in holding them responsible for any part of the property missing in it and that the finding as to the extent

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and value of property lost, is not warranted by the evidence on record.

We shall first deal with the grounds, on which the Judge considered the appellants liable. It is the case of neither party that the loss was due either to robbery or house-breaking committed by strangers. There was no such complaint before suit. From July 1886, the shrines, in which the keys of the outer door of the Treasury room were usually kept, were admittedly in the possession and under the control of the four persons, named in exhibit VI, including appellants Nos. 2, 3 and 4. This suggests the inference that, if the keys were in the shrines at the date of exhibit VI, they continued to remain under their control. As to one of them, viz., the key usually kept in the Chit Saba, the possession of it is admitted and appellant No. 4 eventually produced it before the Commissioner in March 1887. Though the oral evidence is conflicting as regards the key customarily kept in the Amman Covil, we agree with the Judge that the evidence for the appellants is inconsistent with the omission to note the fact in exhibit VI and with the fourth appellant's conduct in objecting to the Commissioner breaking open the Treasury room and examining its contents in the presence of both parties. We think that the probabilities of the case are in favor of the Judge's finding. It is said that the Astantram was opened in November 1886, when the temple jewels were shown to one Mr. Reid and that the general body of Dikshadars was then present. This is not inconsistent with the Judge's finding that the property was removed some time in December 1886, if not before. This being so, the imputations cast on the major faction and the evidence of partisan witnesses in support of those imputations do not, as observed by the Judge, deserve credit. How could the major faction have found access, through the Deva Saba which was in the possession of the minor faction? How could it have gained access into the Treasury room, whilst the key of the lock which was found to be fastened by the Commissioner, remained with the appellant? If the door had been forced open, how was it there was no complaint made at once by the four persons in charge? As to the possession and control of both the keys of the outer door, we see no ground for differing from the opinion of the Judge. The presumption then in the absence of satisfactory evidence to show how property

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in the Treasury room came to be made away with in part is that those who had the control of the keys and their guarantors, appellants, are answerable for the loss either on the ground of negligence in preserving trust property or of dishonest dealing with it.

The next question which we have to consider is as to the extent and value of property lost from the shrines and from the Treasury room. The Judge has held that the appellants are answerable for items of property Nos. 7, 10, 21, 1 of 27 or 49, 51, 2, 3, 5, 4, 1 and a gold pot and the finding is questioned in appeal as regards each of the items.

As to item No. 7, it is a jewel called Madura Pandiya pada-kam of Rs. 750 in value. The Judge has found that it existed in 1872, and has presumed that it continued to exist until the date of exhibit VI. He relied on exhibit C10, and the appellants' contention was that such a jewel never existed. It is in evidence that the Treasury room is opened at least twice a year and that jewels are taken out for use during the annual festivals. The lists marked C series were found inside the Treasury room by the Commissioner, and they purport to be authenticated by the signature of Podumanishiyan or common friend, and they contain information as to the condition of the jewels on the dates to which the entries refer. C10 and C9 contain two entries regarding this jewel, and there is also the evidence of plaintiffs' witnesses 14 and 21. We cannot say that the decision of the Judge as to this item of property is incorrect.

The next item is No. 10, which is described as Virappa Nayakan diamond padakam of Rs. 1,000 value. The appellants say that it is the same as item No. 49 in the Commissioner's list C8, which is described as consisting of diamonds and rubies. The Judge refused to accept the appellants' statement for two reasons, viz., (i) C10 mentions no rubies, and the appellants did not offer this explanation when the Commissioner prepared C8, in which this jewel was entered as missing and which they signed. Though they allege that the Commissioner did not note their explanation, they omitted to examine him on the point, and the appellants' witnesses Nos. 1 and 15, to whose evidence our attention is drawn, do not identify it as No. 49. There is the evidence of the respondents' 14th witness that such a jewel

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was in existence as shown by C10. We consider that the Judge has come to a correct conclusion.

We may here observe that the endeavour on the part of the appellants to identify these items of property save the gold pot with property found in the Treasury room is probably an afterthought. The respondents stated, in paragraph 6 of the plaint, that the items, save the gold pot, were all in the shrines in appellants' charge when exhibit VI was executed, and that they were not to be found there on the date of the plaint, and the appellants contended that the items were not in the shrines in paragraph 8 of their written statement. Issues were taken as to whether they were in the shrines or not, and the respondents' witnesses deposed that they were in the shrines in appellants' charge, and after they closed their case, the appellants tried to identify them with some of the items of property entered in the Commissioner's list as found in the Astantram. Their first witness was the only one who deposed to the identity. They produced two lists before the Commissioner of jewels in the shrines, and, though these items were not mentioned in those lists, they did not then say that they would be found in the Treasury room. These facts raise a presumption that the attempt to identify them with articles in the Treasury room was an afterthought, and it is in favor of the conclusion arrived at by the Judge.

The next item in dispute is 21 described as Mahalakshmi padakam set with rubies and of Rs. 1,000 value. The Judge has discredited the appellants' statement that it was identical with item No. 57 in the Commissioner's list, and has assigned satisfactory reasons for his opinion. The suggestion that it may be that the jewel derived its name from the name of the donor and not from the figure of the image of Mahalakshmi upon it rests on no reliable evidence, and appears to be an ingenious conjecture. As to the item which is said to be one of item 27 or 49 C10 and respondents' witnesses prove it, and no grounds are shown for disturbing the finding. As to item No. 51, there is evidence that two nose-ornaments existed in 1872, and that only one is now forthcoming. There is the evidence in its support of the respondents' 7th witness, who belongs to neither faction. As to items 2 and 3, which are of Rs. 3,000 value, the appellants admitted that they existed, but alleged that Pandiyaraja Dikshadar and Tungasami Dikshadar of the major faction took them for use during the consecration cere-

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mony of the shrine called Mukkurini Pillayar Covil, but never returned them. This was denied on the other side. Appellants' witnesses 1, 2, 3, 4, 6, 7, 8, 10, 12 and 15 gave evidence for them, and respondents' witnesses 4, 5, 9, 14, 21, 25 and 27 contradicted them. The Judge has considered the evidence, and we see no sufficient reason to say that he was in error in declining to accept the evidence for the appellants as satisfactory. As to items 5 and 41, the appellants' contention was that they were lost when the car of the temple fell down with the idol in it in January 1882. Here again there was conflicting evidence, but the respondents' 22nd witness, a member of the family of the donor of item No. 5, swore that he saw the ornament on the idol some three years after 1882. There was no complaint made of the loss of the jewel at the time of the accident. We do not think that the Judge was wrong in giving credit to the evidence for the respondents in preference to that of the appellants. As regards item No. 41, the respondents' 6th witness, the brother of the donor of the jewel, says that he saw it in the temple about fifteen or sixteen months before he gave his evidence in February 1888 and the Judge relied upon his evidence.

The next item of property is a gold pot of Rs. 5,000 in value. The appellants' contention was that it was damaged and, therefore, it was given to the Chetty in order that it might be melted and that the gold might be used for gilding the vahanams or vehicles which the Chetty was making for use during temple processions. Here again, there was a contradictory evidence of witnesses, plaintiffs' witnesses Nos. 3, 5, 10, 12, 14, 15, 16, 19 and 20 on the one side, and defendants' witnesses Nos. 1, 2, 3, 4, 5, 10 and 12 on the other side. The 28th witness, who was Chitambara Chetty's agent and superintended the making of the vahanams, denied that the gold pot was given as alleged by the minor faction. Having regard to the quantity of gold required for gilding the vahanams, the evidence of the witnesses for the minor faction was open to doubt. We may also observe that the Chetty, who was spending several lakhs of rupees on the temple, would hardly accept the gold pot used for pouring water on the principal idol as a contribution from the Dikshadars for gilding vahanams. Nor is it explained to our satisfaction how the gold pot, which was made in 1859, and which was in use only on special occasions in the temple, came to be so damaged as to induce the Dikshadars to

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consent to its being broken up instead of its being repaired. The probabilities of the case appear to us clearly to point to the conclusion to which the Judge has come upon the conflicting evidence. There is also reliable positive evidence in its support. Among the witnesses, there are several independent persons of respectability who saw the gold pot in the temple in 1886 and subsequently. We may refer to the 3rd witness, Inspector of Police, who saw it in 1886; to the 16th witness, the Taluk Sheristadar, who saw it in use in 1882 or 1885; to the 15th witness a Head Constable; to the 10th witness, who is the agent of the Pandara Sannadi at Tiruvadutorai, and who saw it in use till 1885; and to the 20th witness who is the agent of the donor and who saw it in use until two years before suit.

As to the value of the property lost, the respondents' 29th witness gives general evidence and there is, besides the evidence of the 20th witness as to the gold pot, of the 7th witness as to item No. 51, of the 22nd witness as to item No. 5, and of the 18th witness as to item No. 2. The appellants did not deny the correctness of the value in their written statement. We are not prepared to attach weight to the objection taken to the estimated value of the property missing.

The only question which remains to be considered is as to the decree that has been passed. The suit was in its nature punitive but, having regard to the acts of misfeasance and to the appellants' conduct in connection with the loss of temple property, the Judge has dealt with the appellants rather leniently. It is urged that the Nattukottai Chetty pays the expenses of the litigation and that the suit was vindictive. But, considering the facts proved against the appellants specially, and against the minor faction generally, we cannot say that the conduct of the former did not richly merit the punishment that has been inflicted upon them. It is argued that the Judge was not authorized by Act XX of 1863 to deprive them of their right of puja in the temple. According to the usage of the institution, it is appurtenant to their status as dharmakartas and the interests of the temple would be but inadequately protected if the two rights were severed for their benefit. We consider, however, that, in its present form, the decree is open to amendment so far as it leaves the period of suspension indefinite. We shall, therefore, amend it by directing that the suspension be withdrawn, if the appellants file an under-

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taking with two sureties in the amount of Rs. 2,000 each that they will duly conform to the decision of the majority of Dikshadars recorded at a general meeting duly convened in all matters connected with the repair of the temple, and with the management of its affairs, and to the usage of the temple as to the leasing out of the general offerings, and the custody and preservation of its property, and confirm the decree in other respects. As the appeal has substantially failed, the appellants will pay the respondents' costs in this Court. We direct also that the undertaking do include restoration of so much of the property found to be missing or its value, as cannot be recovered in execution. The sureties must be approved by the District Judge.

In Appeal No. 159 of 1888.—In this appeal it is argued for the plaintiffs that the Judge was in error in not dismissing the defendants Nos. 1 to 5 and in exonerating defendants Nos. 6 to 8 even from liability for suspension. The appellants' pleader states at the hearing that he does not press the appeal against the eighth defendant and the appeal is dismissed as against him with costs.

As regards defendants Nos. 1 to 5, the Judge has considered what punishment would be adequate and has apparently adjusted it with reference to the protection due to the interest of the institution. We consider that the terms we have imposed are also sufficient to prevent the recurrence of the party quarrel. The Judge has taken into consideration the loss of the right of puja and of the right to other emoluments which dismissal is likely to entail.

In connection with the obstruction to the necessary repair of the temple, the acts of misfeasance are excesses in the assertion of a supposed legal right. Though their conduct in connection with the loss of temple property is certainly serious, two of them are held liable as guarantors and it is not clearly established which of the other three took away the property, though their joint civil liability for its loss is made out. There is also the fact that they are only five out of upwards of about 250 trustees belonging to the temple.

We do not, therefore, consider it necessary under the special circumstances of this case to direct their dismissal.

So far, however, as defendant No. 6 is concerned, he obstructed the leasing of the offerings in 1882 and stabbed some of the

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members of the major faction and the Judge himself finds that his special connection with the obstruction is proved.

Again, he was specially connected with the obstruction caused to the repair of the temple. He was one of the plaintiffs in original suit No. 16 of 1885 and one of the five who took exhibit VI on behalf of the minor faction.

The only circumstances in his favor are that no special connection is proved against him with the loss of temple property. But it appears from the evidence of the Commissioner that he was one of those who objected to the Treasury room being opened and to its contents being examined. In a punitive action like this, in which a whole faction consisting of a large number of persons is passively concerned, we are inclined to agree with the Judge that the interests of the temple do not require that all should be punished and that they would be sufficiently protected, if those who took an active part were punished. But applying this principle, we are unable to hold that defendant No. 6 was not liable to be suspended together with defendants Nos. 1 to 5.

We shall, therefore, set aside the decree so far as it exonerates him from liability for suspension and directs that his costs be paid out of temple funds and decree instead that defendant No. 6 also be suspended in the same manner and subject to the same conditions save as to the liabilities to restore the temple property found to be missing and as to the withdrawal of the suspension as defendants Nos. 1 to 5 are, and that he do bear his own costs in the District Court and pay the appellants' proportionate costs in this Court. The appeal against respondent No. 7 is dismissed with costs as it is not pressed.

The appeal is also dismissed so far as defendants Nos. 1 to 5 are concerned but under the circumstances without costs.

APPELLATE CRIMINAL.

Before Mr. Justice Handley and Mr. Justice Weir.

QUEEN-EMPRESS

v.

BUDARA JANNI.*

1890.
Sept. 15, 23.

Criminal Procedure Code, s. 2—Letters Patent, s. 28—Scheduled Districts Act—Act XIV of 1874, notifications under—Agency tracts, jurisdiction of High Court over—Agency Rules—Act XXIV of 1839 (Madras), s. 3.

The High Court set aside a conviction by the Agent to the Governor in Vizagapatam on a charge of culpable homicide not amounting to murder, and directed that the accused be tried in the Sessions Court at Vizagapatam on a charge of murder. The accused was tried accordingly, and was convicted of murder, and he appealed to the High Court. The Agency tract of Vizagapatam is a scheduled district under Act XIV of 1874, and the Governor in Council extended the operation of the Criminal Procedure Code of 1861 to it by a notification made under that Act in 1862. In 1863 the Governor in Council, by a notification under Madras Act XXIV of 1839, constituted the Agent a Sessions Judge under the Criminal Procedure Code:

Held, that the High Court had jurisdiction to direct that the accused be tried by the Sessions Judge under the provisions both of the Letters Patent and of the Criminal Procedure Code.

APPEAL against a conviction and sentence by H. R. Farmer, Sessions Judge of Vizagapatam, in Sessions Case No. 9 of 1890.

The facts for the purposes of this report appear from the following judgment.

Mr. Wedderburn for the Crown.

JUDGMENT.—The appellant, Budara Janni, has been convicted of murder by the Sessions Court of Vizagapatam, and has been sentenced to transportation for life.

In Sessions Case No. 18 of 1889 the appellant, on the same facts, was convicted by the Agent to the Governor in Vizagapatam of the offence of culpable homicide not amounting to murder, but this Court, being of opinion that the facts proved pointed clearly to the offence of murder, set aside, by its order in criminal appeal No. 13 of 1890 and criminal revision case No. 150 of 1890, dated 30th April 1890, the conviction for the offence of culpable

* Criminal Appeal No. 214 of 1890.

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homicide not amounting to murder, and directed that the accused should be re-tried for the offence of murder, and the Court further directed that the re-trial should take place before the Sessions Court of Vizagapatam.

The appellant has been re-tried accordingly by the Sessions Court of Vizagapatam with the result already stated.

The Agent to the Governor in Vizagapatam (through the Government Pleader) now takes the objection that the order of this Court, dated 30th April last directing the re-trial of the appellant before a Court other than the Court of the Agent to the Governor was made without jurisdiction.

The appellant himself objected at the re-trial to the jurisdiction of the Sessions Court of Vizagapatam, but, in his grounds of appeal to this Court, he does not repeat the objection. The objection before us having been taken by the Agent, who is the local representative of Government, and, having been urged through the Government Pleader, it becomes necessary to consider fully the grounds of objection put forward.

The argument of the Government Pleader in support of the objection to the jurisdiction may be summarized as follows:—

Under Madras Act XXIV of 1839, s. 3, the Agents to the Governor in Vizagapatam and Ganjam have special jurisdiction within the limits of the Agency tracts in respect of the administration of criminal justice, and, in the exercise of this jurisdiction, they are to be guided by such rules as the Government of Madras may prescribe, and the authority the Agent is to exercise in criminal trials, as well as the cases he is to submit for the decision of the Faujdari Adalat (High Court), are, under section 4 of the same Act, made subject to definition by the Government of Madras. This enactment created a special jurisdiction and a special procedure. In 1862, the first Code of Criminal Procedure (Act XXV of 1861) came into force, but in that Code it was provided by section 445 that the Act should not take effect in any part of the territories in British India not subject to the general regulations of Bengal, Madras or Bombay, until the same should be extended thereto by the Governor-General of India in Council or by the Local Government to which such territory was subordinate, and until such extension should have been notified in the gazette. No notice extending the Criminal Procedure Code, as contemplated in section 445 of

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Act XXV of 1861 to the Agency tracts, would appear to have been issued by the Government of Madras so far as could be ascertained. This link of the argument was, as will afterwards be seen, found to be non-existent. The fact was not, however, ascertained until after the argument had closed. After Act XXV of 1861, came the Criminal Procedure Code of 1872 (Act X of 1872). This Code in section 2 preserved any special procedure at that time existing, and the Code of Criminal Procedure now in force (Act X of 1882), by virtue of section 1, preserves all existing instances of special jurisdiction or of special forms of procedure prescribed by law. Such being the case, the special and exclusive jurisdiction relating to the administration of criminal justice in the Agency tracts conferred by the Act of 1839 must be held to be still subsisting, and the High Court had accordingly no authority, by its order of 30th April last, to direct that the re-trial of the appellant should be held before a Court other than the Court which, under the Act of 1839, exercises special and exclusive jurisdiction over the Agency tracts of the district of Vizagapatam.

The argument thus stated appears to us, on examination and apart from the erroneous statement of fact already noticed, not to be well-founded.

The question, whether the order made by us, under date the 30th April last, was an order which it was within our competence to make, does not, for reasons which will afterwards appear, depend solely on whether the Code of Criminal Procedure is applicable in the Agency tracts. It must first be seen, however, whether the Code does apply to such tracts. The Agency tracts of Ganjam and Vizagapatam have, by an enactment of 1874 (Act XIV of 1874), been included in the scheduled districts of the Madras Presidency, and the case of *Queen-Empress v. Cheria Koya*(1), recently decided, is authority for the position that the Code of Criminal Procedure is not excluded from operation in a scheduled district by the mere fact of the district being declared to be a scheduled district. The case of *Queen-Empress v. Cheria Koya*(1), which related to the Laccadive Islands, differed from the case now before us in this respect that, in the former case, there was no question of an established jurisdiction and procedure then existing under a special local law and conflicting possibly

(1) I.L.R., 13 Mad., 353.

with the general jurisdiction and procedure prescribed in the Code of Criminal Procedure. This, however, was, on the coming into force of the Criminal Procedure Code of 1861, the state of affairs in the Agency tracts of Ganjam and Vizagapatam, and if the Local Government had not, as it will be seen they have, in the clearest manner indicated their intention to supersede and withdraw the special jurisdiction and procedure then existing and to introduce in its place the jurisdiction and procedure defined in the Code of Criminal Procedure, we should be forced to conclude that the special jurisdiction and procedure continued, notwithstanding the circumstance that the Agency tracts were declared to be scheduled districts by Act XIV of 1874.

We have ascertained, however, that the Government of Madras by notifications dated 29th January and 17th February 1862, notified under section 445 of the then Code of Criminal Procedure (Act XXV of 1861), that the Act was extended to the Agency tracts of Ganjam and Vizagapatam with effect from the 20th February and 20th March 1862 respectively.

It has also been ascertained that early in the following year, the then Agent to the Governor in Ganjam obtained an order from the Government of Madras cancelling the rules for the administration of criminal justice framed under Act XXIV of 1839 on the ground that the same were inconsistent with the provisions of the Code and must be considered to have been superseded by that enactment, the operation of which had been extended to the Agency tracts. The order made by the Madras Government on the question submitted to them by the Agent (through the High Court) is dated 6th January 1863, and is in the following terms:—"Under the authority vested in him by section 4, Act XXIV of 1839, His Excellency the Governor in Council cancels so much of the revised Agency rules sanctioned by the Government in their Proceedings of the 24th July 1860 as relates to criminal justice and authorizes the Agents in Ganjam and Vizagapatam, respectively, to exercise the powers of a Sessions Judge in addition to those belonging to a Magistrate of a district under the Code of Criminal Procedure."

The effect of this order was to withdraw the rules theretofore regulating the administration of criminal justice in the Agencies, to constitute the Agent a Sessions Judge under the Code of Criminal Procedure, and to substitute for the rules then in force

all the rules and conditions under which Sessions Judges exercise the powers conferred on them by the Code of Criminal Procedure. The rules and conditions of the Code of Criminal Procedure render the proceedings of Sessions Courts subject to the powers of the High Court as a Court of Appeal and of Revision, and it is not disputed that the order of this Court, which the Agent now contests, was an order which could lawfully be made by the High Court in the exercise of its powers as a Court of Appeal and of Revision (sections 439 and 423, Criminal Procedure Code).

On the ground, therefore, that the Criminal Procedure Code is in force in the Agency tracts of Ganjam and Vizagapatam, we must hold that the objection taken by the appellant and by the Agent to the jurisdiction cannot be sustained.

It has, however, already been intimated that the jurisdiction of this Court to make the order, to which objection has been taken, does not rest solely on the circumstance of the Code of Criminal Procedure being in force in the Agency tracts. Even if the Code of Criminal Procedure had not been shown to be in force in these tracts, it appears to us that the order could be supported under the powers conferred in the Letters Patent of the High Court. The Letters Patent, by express terms in section 28, confer, on the High Court, unrestricted power to transfer criminal cases or appeals from any one Court to any other Court of equal or superior jurisdiction.

On the grounds stated, therefore, it appears to us that the objection to the jurisdiction of the High Court to make the order, dated 30th April last, must fail.

On the merits, we are satisfied that there are no grounds for questioning that the appellant has been rightly convicted of the offence of murder.

The two individuals, whom the accused is clearly proved to have stabbed, had given him absolutely no provocation beyond interfering to prevent violence to others, and the plea of drunkenness, even if it were clearly established by the evidence, which it is not, cannot avail the prisoner.

The sentence, which the Sessions Judge passed on the appellant, viz., transportation for life, was the only alternative to a sentence of death.

We confirm the sentence and dismiss the appeal.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

QUEEN-EMPRESS

v.

TIRAKADU AND OTHERS. *

*Penal Code—Act XLV of 1860, ss. 141, 143—Unlawful assembly—
Assertion of right.*

One of two village factions objected to the other passing in procession over a vacant piece of ground in the main street of the village. An injunction prohibiting the procession was obtained in the Court of the District Munsif on 20th March. On 11th May a procession was formed and approached the ground in question. Forty-six members of the first named faction were assembled there to prevent the procession by force: the police ordered them to disperse: this order having been neglected the police prevailed on other faction to abandon the procession:

Held, that the persons who did not disperse on being ordered to do so were guilty of the offence of being members of an unlawful assembly.

APPEAL by Government against the judgment of acquittal pronounced by W. C. Holmes, Sessions Judge of Bellary, in Criminal Appeal No. 27 of 1890, setting aside the conviction and sentence of E. S. Laffan, District Magistrate of Bellary.

The accused, before the District Magistrate, were 46 in number, and they were charged under Penal Code, ss. 143, 144 and 145. The District Magistrate convicted 42 of the accused, of whom 4 appealed to the Sessions Court, which reversed the conviction.

The facts of the case were stated by the Sessions Judge as follows:—

“The appellants have been convicted of being members of an unlawful assembly, the first under sections 143 and 145, and the others under sections 144 and 145, Indian Penal Code.

“There does not seem to be much doubt about the main facts in the case. It appears that in the village of Kamalapuram there are several divisions of Bois, and that between two of the divisions there has for some years been a dispute as to the route that one of the divisions—the Manmatakeri division—should follow when on the day succeeding their new year's day they leave the village in procession on their way to hunt in the adjoining hills; the other division, the

* Criminal Appeal No. 354 of 1890.

“Chavidikeri division, objects to their passing over a piece of ground called Hemagi Ukkadam and contends that they should go further on down the main street before turning to go to the hills.

“In 1888, the Manmatakeri Bois did not carry out their procession. In 1889, the Head Assistant Magistrate prohibited the procession under section 144, Criminal Procedure Code. This year before the 21st March, the Ugadi or new year's day of the Bois, in consequence of the representations of the Police Inspector, nine of the chief men of the Chavidikeri Bois were bound over by the Head Assistant Magistrate to keep the peace. This was done on the 15th March. On the 18th March the Chavidikeri Bois in a civil suit that they fled to obtain an injunction preventing the Manmatakeri Bois from taking the procession by the Hemagiri Ukkadam, presented a petition under section 493, Civil Procedure Code, for a temporary injunction till the final disposal of the suit. On the 20th March the District Munsif passed the following order on the petition.

“Defendants, all of them, served in person. None present. Two witnesses sworn for petitioner. I do not see why an injunction should not issue especially as there appear to have been prior attempts made by defendants to hold a similar procession successfully resisted by the plaintiffs. Injunction to issue returnable on 28-3-90.

“On the 21st March, it appears some of the Chavidikeri Bois presented a petition to the District Magistrate for an order under section 144, Criminal Procedure Code, prohibiting the holding of the procession by the Manmatakeri Bois. This was it would appear refused, but on the 22nd March, the day after Ugadi, the Taluk Magistrate apparently because the injunction of the Civil Court was produced before him, verbally prohibited the procession and it was not held.

“On the 2nd May, the Acting Head Assistant Magistrate gave an endorsement on a petition presented by two persons, presumably Manmatakeri Bois, asking that the Police Inspector should strengthen the Police force on the 10th May as they were willing to go in procession on that day. The endorsement ran as follows:—

“The Inspector of Police, Hospett, will strengthen the Police force on the 10th instant. He will be at Kamalapur on the said date.”

“The Police Inspector was at Kamalapur on the 10th, but the expected increase in the number of Constables had not arrived and the procession did not take place and the Manmatakeri Bois said they would go the next day.

“On the 11th, at about noon, some 60 or 100 of the Manmatakeri Bois formed their procession and seem to have proceeded a short distance on their way down the main street. In the meantime, not far off, some 60 or 100 of the Chavidikeri Bois assembled on the Hemagiri Ukkadam. It is alleged that they had sticks and that three of them had daggers, but at any rate there can be no doubt whatever that the crowd was determined to forcibly prevent the Manmatakeri Bois' procession from leaving the village by passing over the Hemagiri Ukkadam.

“There can be just as little doubt that the Chavidikeri Bois had no intention whatever of doing anything else except obstructing the passage of the procession that way. This is clearly shown by their conduct after the Police Inspector came up. The Chavidikeri Bois would not obey his order to leave. He then fired in the air, and then fired with buck shot at the legs of one of the men in the crowd and wounded him. The wounded man was carried off and the crowd

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"remained where they were and made no attack on the Police or on the Manmatakeri Bois.

"The only other question of fact that appears necessary to refer to is the nature of this piece of ground Hemagiri Ukkadam. It is a vacant piece of ground about 15 yards across in the main street of the village with houses of Chavidikeri Bois on each side of it. It was used for rubbish heaps and for stacking straw till some 10 years or so ago. Then there was a foot-path across the land. After the rubbish heaps and straw ricks were ordered to be removed, carts were taken across the land and it was used for traffic generally. The Lower Court has held that, whatever may have been the case many years ago, it is not now private property. The land would appear to be a vacant piece of village site used as a short cut to get out of the village.

"In this appeal it is contended that the facts proved do not constitute an offence. In the Lower Court and here the right of self-defence was pleaded, but this is obviously untenable. In the appeal the main contentions was that the appellants were not members of an unlawful assembly as defined in section 141 of the Indian Penal Code. Their common object does not come, it is contended, under the first class of objects in the section because the object of the assembly was not to overawe the Police Inspector in the exercise of his lawful power, as he had no lawful authority to assist the Manmatakeri Bois in holding a procession which had been prohibited by the injunction of a Civil Court. The fifth class of objects of the section does not cover the case because the object of the assembly was not to compel the Manmatakeri Bois 'to omit to do' what they were 'legally entitled to do'; the object was to compel them to omit to do what they had been prohibited by the injunction of a competent Civil Court from doing. These, it is contended, are the only two paragraphs of the section that can be held to apply to the case. The Public Prosecutor, on the other hand, contends that the case comes under the fourth class of objects as the object was to enforce a right or supposed right."

The following authorities were cited by the Sessions Judge: *Shunker Singh v. Burmah Mahto*(1); Proceedings of the Madras High Court, dated 10th August 1869(2); Proceedings of the Madras High Court, dated 16th November 1869(3); Proceedings of the Madras High Court, dated 8th January 1873(4)—*Queen v. Narain*(5); *Appavu v. The Queen*(6); *Peary Mohun Sircar v. The Empress*(7); Russell on Crimes, ed. 5, Vol. I, p. 373.

The Government preferred this appeal.

The Government Pleader and Public Prosecutor (Mr. Powell) for the Crown.

Ramachandra Rau for accused.

MUTTUSAMI AYYAR, J.—There are two divisions of Bois in the village of Kamalapuram in the District of Bellary, and they used

(1) 23 W.R., 25.

(3) 5 M.H.C.R., App., 6.

(5) 7 N.W.P., 209.

(7) I.L.R., 9 Cal., 639.

(2) 4 M.H.C.R., App., 65.

(4) 7 M.H.C.R., App., 35.

(6) I.L.R., 6 Mad., 245.

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to go in procession on the new year's day to hunt in the hills adjoining the village. For some time past, the Chavidikeri Bois objected to their rivals, the Manmatakeri Bois, passing in procession over a piece of ground called Himagiri Ukkadam. That piece of ground is found not to be private property, but to form part of the vacant village site ordinarily used as a short cut to get out of the village. On the 11th May last, about 60 or 100 of the Manmatakeri Bois formed a procession and proceeded a short distance down the main street. In the meantime, some 60 or 100 of the Chavidikeri Bois assembled on the Himagiri Ukkadam and there is no doubt upon the evidence that they did so to forcibly prevent the Manmatakeri Bois passing in procession over that spot. The Inspector of Police ordered them to disperse, but they did not obey his order. He then fired in the air and then fired with buck shot and wounded one of the men assembled. The wounded man was carried off, but the crowd did not disperse, though they attacked neither the police nor the rival faction. Finding that his efforts to disperse the crowd were ineffectual, the Inspector prevailed on the Manmatakeri Bois to abandon their intention of going in procession on that day. It appears that on the 20th March a temporary injunction issued under section 493, Code of Civil Procedure, in a Civil Suit instituted by the Chavidikeri Bois was in force and that it prohibited the Manmatakeri Bois from going in procession over the ground in dispute until the disposal of the suit. It is thus clear that the Manmatakeri Bois endeavoured to go in procession in contravention of the order of the Civil Court, that the Inspector of Police ordered their rivals to disperse instead of preventing their procession and that, but for the Manmatakeri Bois ultimately giving up their intention to go in procession on that day at the instance of the Inspector of Police, a serious riot would have ensued.

Upon the foregoing facts, the Acting District Magistrate convicted the four persons, whose case is now before us, of offences punishable under sections 143 and 145, and three of them also of offence punishable under section 144 on the further ground that they were armed with daggers. On appeal, however, the Sessions Judge considered that they committed no offence at all and acquitted them. The question which we have now to consider is whether upon the above facts the four persons acquitted by the Judge were not members of an unlawful assembly

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within the meaning of section 141 of the Indian Penal Code. The Chavidikeri Bois assembled at the place in dispute, being about 50 or 100 in number, and their object in doing so being to forcibly obstruct the procession of Manmatakeri Bois, there is no doubt that they formed an unlawful assembly, as defined in clause 4, section 141, of the Indian Penal Code. Even assuming that the assembly was not unlawful at first, it clearly became unlawful after it had been ordered to disperse and failed to disperse. The intention indicated by the heading of Chapter VIII, in which section 141 is inserted, was to constitute certain acts, which endangered the public peace, into Offences against Public Tranquillity, but it does not follow from it either that a person may do what he is entitled to do or prevent another from doing what he is not entitled to do by means of criminal force or by show of criminal force. In construing section 141, regard must be had not only to the general intention deducible from the heading of the chapter, but also to the specific mode in which the Legislature intended to carry out that intention. The words in clause 4 "to enforce a right or a supposed right" show that it is perfectly immaterial whether the act which one seeks to prevent by the use of criminal force or show of criminal force is legal or illegal, the test of criminality being the determination to use criminal force and act otherwise than in due course of law so as to threaten the public peace. Hence it was that Holloway, J., observed in VII, Madras H.C.R., App. 35, that if a procession were actually illegal, it would be no defence whatever to the accused, unless the right of private defence arose. In the case before us, the right of private defence, which was pleaded, was properly held as well by the Judge as by the District Magistrate not to be tenable. This being so, the remedy open to the Chavidikeri Bois, when their rivals acted in contravention of the terms of the injunction issued by the Civil Court, lay in getting them punished for contempt and *not* in seeking to prevent the act by assembling to commit a riot, if necessary. The Inspector of Police was further justified in ordering an unlawful assembly to disperse when a riot was imminent though his prior action in omitting to prevent the rival procession might have been open to question or injudicious. The case reported in 4 Madras H.C.R., App. 63, shows only that a person in possession of crops or grain or other property would be justified in protecting his possession by the use of force, if neces-

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sary, against another who forcibly disturbs that possession in the assertion of a supposed right. But in the case before us, the ground in dispute was neither the exclusive property of Chavidikeri Bois nor in their exclusive possession. On the contrary, it is found to form part of the village site, which both divisions of Bois are entitled to use as a short cut for going out of the village on ordinary occasions. The contention of Chavidikeri Bois was that Manmatakeri Bois were not entitled to use it for going in procession on the Ugadi day, and the exclusive right asserted by the former was denied by the latter and pending adjudication in the District Munsif's Court of Narayanadevarkeri. The present case is therefore not one of protecting subsisting possession of private property against one who forcibly disturbs it, but it is one in which a right which was disputed and pending adjudication in a civil suit, to exclude the Manmatakeri Bois from the use of a common village site or path on a special occasion, was intended to be enforced, on the ground that the latter had forborne to use it for some years. The right of protecting possession of property is substantially part of the right of private defence of property, which the Judge himself has disallowed.

For these reasons, I am of opinion that the order of acquittal cannot be supported and that the sentence of the District Magistrate should be restored and the unexpired portion of it be carried out.

BEST, J.—The Acting Sessions Judge concurs with the Magistrate in finding that the four persons with whom we are now concerned were members of an assembly which had determined to forcibly prevent the Manmatakeri Bois' procession from leaving the village by passing over the Hemagiri Ukkadam, which is "a vacant piece of ground about 15 yards across in the main street of the village with houses of Chavidikeri Bois on each side of it." The Judge has also found the right of self-defence set up on behalf of the accused to be "obviously untenable."

The question is whether, under these circumstances, he was justified in setting aside the conviction of those persons of offences punishable under sections 143, 144 and 145 of the Penal Code?

- The offence punishable under section 143 is being a member of an unlawful assembly; that under section 144 is being such

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member armed with anything which, used as a weapon of offence, is likely to cause death; and that under section 145 is the continuing in an unlawful assembly "knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse."

With reference to this last offence, there can be no doubt that the assembly of which these persons continued to be members was called upon by the Police Inspector to disperse, but would not do so; and that these four persons continued to be members of the assembly notwithstanding the Inspector's order to the contrary.

No doubt, as observed by the Judge, "the general principle underlying section 141 is indicated by the heading of the chapter of which it is the first section, viz., *Of Offences against Public Tranquillity*." I am, however, unable to accept the subsequent reasoning by which the Judge has arrived at the conclusion that the accused in this case are not guilty, although their acts were such as must have resulted in a riot, had it not been for the forbearance of the opposite party.

The circumstance that appears to have influenced the Judge in finding that the accused in this case were entitled to an acquittal, is the fact that they had already instituted a civil suit for an injunction to prevent the Manmatakari Bois from taking their procession over the Hemagiri Ukkadam, and had in that suit obtained a temporary injunction to the above effect. The Judge's argument is that the accused are entitled to an acquittal, because the Manmatakari Bois were acting illegally in attempting to pass over the place in question and because the Inspector also acted illegally in directing the accused to disperse in order to allow of the Manmatakari Bois so passing. But as remarked by Holloway, J., in the case reported in VII, Madras H.C.R., App. 35, the fact of the illegality of the act of the opponents of the accused is wholly immaterial "unless it brings itself within the category of those in which self-defence is permitted;" and, as already observed, the Judge has himself found that the plea of self-defence is, in the present case, "obviously untenable." Most, if not all the authorities referred to and relied on by the Judge in support of this finding in favor of the accused are cases in which the accused acted in defence of property or person.

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The assembly of the accused in the present case was unlawful, because its object was to enforce a right or supposed right by show of criminal force.

The Judge's order of acquittal must therefore be set aside and the finding and sentence of the District Magistrate restored and the incomplete sentences carried out.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SUBBARAYALU (CREDITOR No. 3), APPELLANT,

v.

ROWLANDSON AND OTHERS (DEBTORS Nos. 44, 46, 102 AND 103),
RESPONDENTS.*

*Insolvent Act—11 & 12 Vic., Ch. 21, ss. 40, 73—Commission—
Cesser of interest on filing of petition.*

By a document styled an "agreement of commission" the executant acknowledged the receipt of a loan and bound himself to pay commission thereon at the rate of 10 per cent. per month and to repay the principal in two years and nine months. It appeared that the so-called commission was in the nature of interest, and was fixed at a high rate, because the debtor was expected to obtain the lease of a forest and to derive large profits therefrom. The debtor filed his petition in the Insolvency Court on 1st September 1884:

Held, that the creditor was not entitled to a dividend in respect of commission claimed to have accrued due after that date.

APPEAL against an order made by the Chief Justice, sitting as Commissioner of the Insolvency Court, in insolvent case No. 136 of 1884.

The facts of this case appear sufficiently for the purposes of this report from the following judgments:—

Mahadeva Ayyar for appellant.

Mr. W. Grant for respondent No. 1 (the Official Assignee).

Parthasaradhi Ayyangar for respondents Nos. 3 and 4.

Gopalacharlu for respondent No. 6.

MUTTUSAMI AYYAR, J.—This is an appeal from an order made on the 4th August last in insolvent case No. 136 of 1884 in regard

* Appeal No. 19 of 1890.

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Oct. 10, 28.

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to the appellant's claim to dividend and the directions given to the Official Assignee on his application. One Shunmuga Mudaly of Conjeeveram, an insolvent debtor at Madras, filed his petition and schedule on 1st September 1884, and in the latter the appellant was entered as creditor No. 3 for Rs. 1,300, and commission due under a bond, dated the 19th March 1883. By this document the insolvent agreed to repay Rs. 1,300, which he borrowed, before the end of 1885, and, in the meantime, to pay commission thereon at 10 per cent. per mensem. There is no dispute as to the appellant's claim to be admitted to dividend on Rs. 1,300, the principal debt, and on Rs. 2,262 commission due at 10 per cent. per mensem up to 1st September 1884, the date on which the insolvent filed his petition and schedule. But the appellant contended in his affidavits, dated 2nd May 1889 and 11th April 1890, that he was entitled to dividend also on the commission which he claimed from date of the filing of the schedule until date of payment. The main question for decision was whether this contention was tenable. He alleged, further, that for the purpose of satisfying his claim in full, (i) that an arrangement made with respondents Nos. 3 and 4, two of the insolvent's debtors, in the nature of a composition, ought to be set aside, and that the Official Assignee should be directed to make further collections from the insolvent's debtors, (ii) that two sums of Rs. 1,200 and Rs. 3,000 ought to be treated in addition to Rs. 12,000 as part of the insolvent's estate, (iii) that the costs allowed to the attorneys of the Official Assignee in connection with the arrangement made with respondents Nos. 3 and 4 should not be debited to that estate, and (iv) that an inquiry ought to be made as to the extent to which the claims of creditors Nos. 1, 12, 17, 20 and 21 had been satisfied out of Court by the sale of mortgaged property and the residue actually due to them ascertained and admitted to dividend.

The Official Assignee resisted the appellant's claim and urged that the bond of 19th March 1883 being engrossed on a stamp of 7½ rupees value, the appellant was not entitled to recover under it more than Rs. 1,500.

By the order dated the 4th August last, the learned Chief Justice disallowed the appellant's claim to subsequent commission and directed that dividend be paid to him only on Rs. 1,300 and on Rs. 2,252 commission due to him up to 1st September 1884,

and on Rs. 855-9-0, the taxed costs of his motion. As regards the Official Assignee's contention that no more than Rs. 1,500 was recoverable by the appellant, the learned Chief Justice reserved to the former the right to raise the question if the insolvent preferred an appeal from his order. As to the sum of Rs. 1,000 paid to the Official Assignee by Mr. Laing under an order of the Full Bench, dated the 21st January 1890, it was directed that the amount be not distributed until further orders. Hence this appeal.

[His Lordship here stated the effect of various orders made in this insolvency which are not necessary to be explained for the purposes of this report, and proceeded as follows] :—

The first contention in appeal is that the appellant is entitled to dividend, not only on Rs. 3,562, but also on the subsequent commission ; but the general rule in bankruptcy is that interest ceases at the date of the bankruptcy, and there shall be no proof for interest subsequent to that date. Lord Justice James refers to the rule as well established in *re Savin*(1) which was decided in 1872, and held, in that case, that even a secured creditor, who sought to prove his claim for a deficiency was bound to apply the sale-proceeds of his security in payment of principal and interest up to the date of bankruptcy and up to that date only. There is hardly any room for doubt that the same rule is applicable under the Insolvency Act in India, and section 40 of 11 and 12 Vic., Cap. 21, places the claims which a creditor in insolvency may prove on the same footing with claims provable in bankruptcy. It must be remembered, however, that the rule must be applied subject to the limitation mentioned by Lord Justice Cotton, viz., that there can be no proof in bankruptcy for interest accruing due after the filing of the petition unless the estate is more than sufficient to pay the creditors in full ; *ex-parte Bath* in *re Phillips*(2) decided in 1882.

The principle on which the general rule rests is stated by Lord Justice James in the case first mentioned in these terms, " the theory in bankruptcy is to stop all things at the date of the bankruptcy and to divide the wreck of the man's property as it stood at that time." Directly the insolvent files his petition and a vesting order is made, he is divested of all his property ; and he ceases

(1) L.R., 7 Ch. App., 760.

(2) L.R., 22 Ch. D., 450.

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to be *sui juris* for the purpose of satisfying his obligations, and the Insolvent Court intervenes as a Court of Equity to do equal justice to all his creditors by enforcing an equitable distribution of his property in discharge of his obligations as they stood at the date of the petition and the vesting order. I take the general rule then to rest on this foundation, viz., that the contracts of the insolvent stop at the date of the vesting order as a matter of legal right and the Insolvent Court becomes seized of jurisdiction to deal with his property towards their satisfaction through the Official Assignee as a Court of Equity and according to equitable rules of distribution. The exception to the rule mentioned above pre-supposes that there is a surplus left after all the debts as they stood at the date of the petition are satisfied and rests on the basis that when such is the case, a claim for subsequent interest may be permitted to be proved. But it must be remembered, that even in the contingency indicated, the Insolvent Court deals with such claim as a Court of Equity; and according to rules of equitable compensation for deferred payment, but not according to the letter of the original contract which it stopped at the date of the vesting order, and placed under its protection as a Court of Equity.

How do the facts of this case stand in relation to the foregoing principles? Looking to the rate of commission, viz., 10 per cent. per mensem on Rs. 1,300, it amounts to Rs. 1,560 per annum on a loan of Rs. 1,300. It certainly savours of a gambling transaction, as suggested for the Official Assignee. Looking again to the substance of the transaction, it is clear that the so-called commission is in the nature of interest on the money lent, and the rate was fixed so high, on the appellant's own showing, because the insolvent was expected to realize large profits from the izara of a forest which he was to obtain. It is clear then, that when insolvency supervened, the basis on which the agreement to pay commission rested failed, and its further enforcement would go beyond the original intention of the parties. Moreover, the commission already allowed to the appellant is Rs. 2,262, whereas the amount lent is Rs. 1,300 only. Nor is it shown why the appellant's claim to subsequent commission is entitled to any preference over similar claims to subsequent interest on the part of other creditors; and why it should be admitted to dividend which is to be declared with reference to scheduled debts. The conclusion I come to is that the appellant

is not entitled to insist on his claim to subsequent commission either as an incident of the original contract or in the special circumstances of this case, as a matter of equitable compensation for deferred payment.

[His Lordship next proceeded to deal with the objections taken to the directions as to what ought to be treated as the estate of the insolvent.]

It only remains for me to notice the objection taken by the Official Assignee that the appellant is not entitled to claim more than Rs. 1,500 under the bond of the 19th March 1883. It was argued by his counsel that the document bore a stamp of 7½ rupees value, and that, under section 26 of the General Stamp Act, no more than Rs. 1,500 are recoverable. That section applies to cases in which the subject-matter of an instrument chargeable with an *ad valorem* duty is incapable of valuation at the date of execution; whereas the bond in dispute was for Rs. 1,300 repayable before the end of 1885 with a commission of 10 per cent. per mensem. Moreover, Mr. Justice Kernan recorded a judgment in 1887 recognizing the appellant's claim as against the Official Assignee to the extent of Rs. 3,562, and at that time the objection now urged was not taken. It is too late to take the stamp objection after decree. When these difficulties were pointed out at the hearing, the respondent's counsel did not press the objection.

The result is that the order appealed against should be confirmed with the direction that the matter referred to in paragraph 14 of the appellant's affidavit of 2nd May 1889 be inquired into.

The appeal having substantially failed, it is dismissed with costs.

Mr. JUSTICE BEST.—This is an appeal from the order of the learned Chief Justice, in *re* Conjeeveram Shunmuga Mudaly, an insolvent.

The appellant is T. Subbarayalu Chetti, creditor No. 3 in the schedule. The debt claimed by appellant is due under a document, dated 19th March 1883. It is styled an "agreement of commission," and is, when translated, as follows:—"I have this day received from you Rs. 1,300 in ready money; as I have received these Rs. 1,300, and as the commission on the above-mentioned sum of Rs. 1,300 amounts to Rs. 130 per month, commission being at the rate of Rs. 10 per month per Rs. 100;

SUBBARAYALU therefore I bind myself to pay without fail this monthly commission of Rs. 130 month by month commencing from this day till the year 1885 next, either to you, or to those who may obtain your order. I shall pay the above-mentioned sum of Rs. 1,300 at the end of the year 1885 and receive back this document."

The debt was proved to the satisfaction of Mr. Justice Kernan on the 14th February 1888, when he directed "that Rs. 1,300, principal and commission at 10 per cent. per month up to the filing of the petition be admitted to dividend by the Official Assignee out of the estate in the hands of the insolvent." The question "whether the claimant may be entitled to further payment of commission after the date of the petition in insolvency" being left undecided on the ground that the funds then in the hands of the Official Assignee were not sufficient to discharge the additional claim, and it being "not yet ascertained whether the Official Assignee shall receive further estate of the insolvent."

On appeal the above order was confirmed, because "the objections against the principal sum allowed to creditor No. 3 were not pressed, and it is shown that the interest is not barred," (see judgment in appeal suit No. 10 of 1888).

The order against which the present appeal is preferred was one passed on the motion of the Official Assignee for directions of the Court as to the declaration of the dividend and as to the claim of Subbarayalu Chetti (now appellant) and as to the disposal of the balance that should remain after distribution of the dividend. The order is that appellant should be paid Rs. 3,562 (being Rs. 1,300 plus Rs. 2,262 as interest to 1st September 1884—date of filing the petition) and a further sum of Rs. 855-9-0 as costs; it is added "that no further interest or commission be allowed;" and there is a further order "that the sum of Rs. (1,000) one thousand, paid to the said Official Assignee by Mr. Laing under an order of the Full Bench bearing date the 21st January 1890 be not distributed as dividends by the said Official Assignee pending the further orders of this Court."

The first point taken in this appeal is that appellant is entitled to "further commission from 2nd September 1884, and further interest on the aggregate amount up to date of payment in addition to the said sum of Rs. 3,562, and costs, viz., Rs. 855-9-0." Reference is made to the circumstance (already noticed) that the decree of Kernan, J., reserved this question of further commission

in consequence of the assets then in the hands of the Official Assignee not being sufficient for the payment of such further commission, whereas a further sum of Rs. 6,000 has since been added to the assets.

On the other hand, it has been urged on behalf of the Official Assignee that as the document under which the appellant claims is executed on a stamp of the value of Rs. 7½, the maximum claimable under it is Rs. 1,500, under section 26 of the Stamp Act.

It will be convenient to consider, in the first place, this objection taken on behalf of the Official Assignee. The document in question has been set out above. Though it is styled an agreement of commission, it is in fact a bond for re-payment of Rs. 1,300, with interest thereon at the rate of 10 per cent. per mensem. In calculating the stamp required for a bond, it is the principal amount alone that is taken into consideration, and the stamp of the value of Rs. 7½ used in this case is more than sufficient to cover a debt of Rs. 1,300. Section 26 of the Stamp Act is not applicable, in my opinion. Moreover, even were it otherwise, it would now be too late to raise the question, as the order of Kernan, J., fixing the amount due to appellant at Rs. 3,562 was upheld in appeal No. 10 of 1888.

The next question is as to the validity of the appellant's claim to commission or interest subsequent to the date of filing the insolvency petition. The "proper practice" is that a creditor in an insolvent estate, whose debt bears interest "is not entitled to interest up to the day of payment, but only to the date of the judgment for administration;" see judgment of Jessel, M.R. in *re Summers, Boswell v. Gurney*(1). The rule, as stated by James, L.J., in *re Savin*(2), is that there is to be no proof for interest subsequent to the bankruptcy. With reference to the judgments of Jessel, M.R., and Cotton, L.J., in *ex-parte Bath*, in *re Phillips*(3), it is to be observed that the words "unless there is a surplus," used by the former, and the words, "unless the estate is more than sufficient to pay the creditors in full," found in the judgment of the latter, are mere *obiter dicta*, for it is seen that in that case there was no surplus, and consequently proof in respect of interest accruing due after the filing of the petition was held to be inadmissible. Moreover, as observed by Jessel, M.R., in that same

(1) L.R., 13 Ch. D., 136. (2) L.R., 7 Ch. App., 760. (3) L.R., 22 Ch. D., 450.

SUBBARAYALU case, the Court of Bankruptcy is a Court of Equity and has regard to the substance of the transaction; and it is clear that there will be nothing inequitable in disallowing the appellant's claim for further interest. The agreement on which he rests his claim was entered into on the understanding that the insolvent was to obtain a lease for supplying timber to the railway, and the high rate of commission agreed to was intended to give to the appellant a share of the large profits contemplated as obtainable from the proposed business in timber. But these profits do not appear to have been realized by the insolvent, and the appellant has already been allowed a sum of Rs. 2,262 as interest for less than 18 months on the original debt of Rs. 1,300. I am of opinion that his claim to further commission should be disallowed.

[After dealing with the other points raised in this appeal, His Lordship concurred in dismissing the appeal with costs.]

Barclay & Morgan Attorneys for respondent No. 1.

Biligiri Ayyangar Attorney for respondent Nos. 2 & 3.

APPELLATE CRIMINAL.

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

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v.

PRESIDENT OF THE MADRAS MUNICIPAL COMMISSION.*

City of Madras Municipal Act—Act I of 1884, ss. 103, 109, 192—Profession tax—Liability of members of a firm—Extent of appeal allowed against decision of President of Municipality.

A member of a firm in Madras, another member of which was absent, was assessed under the Madras Municipality Act to pay a certain sum for the tax on arts, professions, trades and callings as agent in charge of the business of the absent member of the firm. He complained to the President against the assessment under ss. 104, 190 of the Act on the ground that he was not liable to pay any tax as agent, &c.; but the assessment was confirmed. He thereupon preferred an appeal to the Magistrates:

Held, (1) that the Magistrates had jurisdiction under Madras Municipal Act, s. 192 to decide the question of the liability of the appellant to be taxed under s. 103;

* Criminal Revision Case No. 391 of 1890.

(2) that, although the absent partner might be called upon through the appellant as his agent to pay the tax due by the firm with reference to its whole income, he was not otherwise chargeable with any tax in respect of the business carried on by him.

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CASE stated for the opinion of the High Court under section 193 of the City of Madras Municipal Act by J. M. Maskell and Sultan Mohidin Saheb, Presidency Magistrates, Black Town, Madras, in calendar case No. 12840 of 1890.

The Magistrates' statement of the case is given in the judgment of Muttusami Ayyar, J.

The *Advocate-General* (Hon. Mr. Spring Branson) and Mr. K. Brown for the President of the Municipal Commission.

Mr. R. F. Grant for appellant.

MUTTUSAMI AYYAR, J.—This is a case stated for the opinion of the High Court under section 193 of Act I of 1884. The questions which we have to determine and the facts upon which they arise for decision are stated by the Magistrates in the following terms:—

"The appellant in this case, Mr. J. F. Davies, is a partner in the firm of Messrs. Oakes and Co. He was assessed under section 103 and schedule A, class I, of the said Act to pay the sum of Rs. 125 as tax on arts, professions, trades and callings for the half-year ending 31st March 1890, 'as agent in charge of the business of Mr. W. H. Oakes, a non-resident shopkeeper, carrying on business under the style of Messrs. Oakes and Co.' He complained under sections 104 and 190 against such assessment, but it was confirmed by the President.

"The appellant next appealed to us under section 192 against the decision of the President, hereinafter called the respondent, and for the purposes of our decision, the following facts were admitted:—that the firm of Oakes and Co. consists of three partners, two of whom are Mr. Oakes and the appellant; that Mr. Oakes left India for Europe in the month of July 1889, the business of the firm being managed in his absence by the other two partners; that Mr. Oakes never carried on any business separate or apart from the business carried on by the firm of Oakes and Co.; and that the appellant holds a power-of-attorney from Mr. Oakes in regard to the management of the firm of Oakes and Co. during his absence. After hearing Mr. Reddy Branson for the appellant and Mr. Kenworthy Brown,

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"instructed by Messrs. Barclay and Morgan, for the respondent, we delivered judgment on a subsequent day to the effect that the appellant was not liable to be assessed as aforesaid.

"After the above adjudication, the respondent requested us to state a case and refer it for the decision of the High Court, and we accordingly beg to submit for Your Lordships' opinion the following questions, which were raised on the hearing of the appeal:—

"(1) Whether this Court has jurisdiction under section 192 of Madras Act I of 1884 to entertain and decide the question of the liability of the appellant to be taxed under section 103?

"(2) Whether, assuming that this Court has jurisdiction to decide as aforesaid, Mr. Oakes is liable to be assessed individually and separately as a member of the firm of Oakes and Co., or whether the partners are liable as such to be assessed collectively under section 103 of the said Act?

"(3) Whether, assuming further that each member of the firm of Oakes and Co. is liable to be assessed individually and separately under section 103, the appellant is liable, in the circumstances of the present case, as set out in paragraph 2 above, to be assessed as a person coming within the designation, 'agents . . . in charge of the business of the aforesaid persons when the principals are non-resident,' appearing in schedule A, class I?

"We decided the first and third questions in the affirmative. In regard to the second question, we held that the partners of the firm are liable to be assessed collectively under section 103, and that consequently the assessment of the appellant as the agent of Mr. Oakes, one of the partners of the firm of Oakes and Co., was illegal."

As regards the first question, I think our answer should be in the affirmative. The Magistrates derive their jurisdiction to hear appeals from decisions of the President under section 190 from section 192. Beyond referring to section 190, section 192 throws no light on the object matter of the jurisdiction. Section 190 describes the matter to be heard and disposed of by the President as "a complaint against or an application for revision of any

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classification or tax preferred under sections 104, 115, 181 and 188." Section 104 provides "The President shall decide in which of the said classes such person ought to be placed. The President may from time to time revise such classification. Any person dissatisfied with any classification or revision may complain to the President who shall deal with the complaint as an application for revision in the manner provided by section 190." The words, "the said classes, and such person," are words of reference to section 103. That section enacts, "If the Commissioners determine to levy a tax on arts, professions, trades or callings and on offices or appointments, every person who, within the city, exercises any one or more of the arts, professions, trades or callings or holds any one or more of the offices or appointments specified in schedule A shall pay in respect thereof the sum specified in the said schedule as payable by persons of the class in which such person is placed subject to the provisions of section 110." Here again schedule A and section 110, which are referred to in section 103, should be read as parts of that section. Schedule A is a schedule of persons liable to be taxed and distributes them into seven classes and mentions the specific amounts as payable either with reference to the capital or income or the nature of the profession or trade or employment.

The contention for the Municipality before the Magistrates was that upon the true construction of section 104, a distinction ought to be made between liability to be taxed and classification, and that the right of complaint conceded by that section to the person taxed extends to classification and to classification only. The Magistrates disallowed the objection; but it is reiterated before us. In the first place, the contention appears to me to be anything but reasonable. For instance, if a person is placed in class VI instead of in class VII, schedule A, and thereby taxed at Rs. 10 instead of Rs. 5, he has a right of complaint under section 104 according to the Municipal Commissioners; whereas a person who is not liable to be placed in any class or to be taxed at all has, according to them, no right of complaint under that section, whatever may be the amount with which he is taxed.

Nor is the contention consistent with the grammatical interpretation of section 104. It commences with the words, "The President shall decide in which of the said classes each person ought to be placed." Who is the person referred to by the words, "such

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person'? We must look for an answer in section 103, and in the words of that section, the answer is, every person who exercises, within the city, any one or more of the arts, professions, trades, &c., specified in schedule A, that is to say, as liable to be taxed; for, schedule A is a schedule of only such persons as are liable to be taxed. Again, section 196 premises the charge of a tax generally and declares the decision of the Magistrates to be final in regard to it. The natural inference is that the liability to be placed in some class in schedule A presupposes the liability to be taxed and such classification must be taken to include and cannot be dissociated from liability to be taxed.

That this is the probable intention of the Legislature appears also from other sections in the Act. Section 107 renders the tax recoverable together with a penalty by prosecution before a Magistrate when the person taxed fails to pay it within the given time and it prescribes a finding by the Magistrate that the person taxed is liable to be taxed as necessary to warrant his conviction. It lends support to the Magistrates' view to this extent, viz., that there is no reasonable ground for excluding from the cognizance of two Magistrates a matter which is liable to be adjudicated on by a single Magistrate or for withholding from the person taxed a means of averting the prosecution by proceeding under sections 190 and 192. As to the contention of the learned Advocate-General that it may be the intention of the Legislature that the party taxed should proceed by a Civil suit if he is not liable to be taxed, I may refer to section 208 which takes away the remedy by suit in respect of any tax provided that the directions of the Act are in substance and effect complied with. If the construction suggested for the Municipal Commissioners were to prevail, there would be this anomaly, viz., that the Legislature took away from every person, who is not liable to be taxed, but who is erroneously taxed by the Municipal President, his remedy by suit without substituting for it any other remedy and left him to wait to be prosecuted before he could obtain any redress.

The intention inferable from section 196, which takes away the remedy by suit in respect of the charge of a tax (which includes both the liability to pay it and the amount to be paid), is that the remedy provided by sections 190 and 192 is substituted for the remedy by suit and that section 107 makes non-liability to be taxed available also as a matter of defence in case of prosecution.

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As to the argument founded upon the wording of section 115, which directs the President to determine what persons are chargeable and the amount of tax, I am not prepared to attach weight to it, as the word classification means, when sections 103 and 104 are read together, liability to be taxed and the rate at which the tax is to be fixed. The conclusion I come to is that the Magistrates have jurisdiction under section 192 to determine as well the question of liability to be taxed as the question whether the person taxed is placed in the proper class.

As to the second question, I agree with the Magistrates in thinking that by reason of the interpretation clause C to section 3, a firm or a partnership is a *person* within the meaning of section 103. I also think that the tax prescribed by section 103 is a tax upon a profession or trade or a calling and that there can be but one tax when several persons jointly carry on one trade or business. The contention that when several carry on a joint trade, each is liable to be separately taxed on his share of the income would lead to two anomalies. Take it, for instance, that the aggregate income of a firm renders it liable to be taxed whilst the share therein of each partner is not liable to be taxed. The result in that case would be that the trade carried on by the firm would altogether escape taxation under section 103. Take, on the other hand, the case in which the aggregate income and the share of each partner are both taxable with the maximum amount of tax prescribed by schedule A. In that case there would be as many taxes as there are partners instead of there being one tax on the one joint business. In section 109 every member of a firm or partnership and every member of a joint Hindu family are placed on the same footing, and in an undivided Hindu family, there is but one family coffer or one family income, and until partition and so long as the family continues to be joint, no member can predicate that he has a specific share in the family income or property. Reading, therefore, sections 103 and 109 together and having regard to the nature of the tax, I consider that there is to be but one tax on the partnership business or joint trade and that the amount of tax payable under schedule A is to be fixed with reference to the aggregate income as under section 110, but that as a facility towards its collection, every member is to be treated as personally and separately liable for the tax. In this view the omission to specify a partnership as a distinct person in schedule A.

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is intelligible. In law a partnership is not a *legal* person, but each member is jointly and severally responsible for a partnership debt and the Legislature accordingly omitted to specify a partnership as a person in schedule A. To indicate, however, that the partnership trade is a single trade or business for purposes of taxation, the Legislature treated a partnership as "a person" within the meaning of section 103, but to deprecate any contention on the part of any individual partner that he is only liable to be taxed on his share of the income, the Legislature provided as regards the liability to pay the tax that each partner is to be regarded as if he was personally and separately liable, subject, however, to the condition that it is the partnership business that is to be taxed according to section 103.

The second question submitted for our decision seems to imply that, unless the person taxed is described as taxed as a member of the partnership, he is not liable. It is no doubt desirable so to describe him, but such accurate description is not of the essence of a valid tax. By section 208 no tax is liable to be impeached by reason of a mistake in the description of the occupation of the person liable to pay the tax.

I would, therefore, answer the second question by stating that, though Mr. Oakes may be called upon through his agent, Mr. Davies, to pay the tax due by the firm with reference to its whole income, yet he is not to be charged solely with reference to his share of that income, or as if his business as partner was separate and distinct from that of the firm.

My answers to the first and second questions render it unnecessary for me to answer the third question.

SHEPARD, J.—The first question is whether the exception taken by Mr. Davies to the decision of the President of the Municipal Commission is a matter which can form the subject of an appeal to two Magistrates under section 192 of the Act, I of 1884. The decision of the President was that Mr. Davies, one of the three members of the firm of Oakes and Co., was chargeable with the tax payable under section 103 of the Act, as being agent in charge of the business of another of the partners, Mr. W. H. Oakes, who was absent from Madras. The main objection taken on behalf of Mr. Davies was that it was the firm that should be taxed, and that, although any member of the firm might be held responsible, the tax could not be levied from each one of them.

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It is contended on behalf of the President that the objection which has regard not to the classification of the person complaining but to his liability to the tax is one which cannot be made the subject of a complaint under section 190, and that therefore the Magistrates had no jurisdiction to entertain the appeal, because under section 192 it is only from decisions of the President passed under section 190 that an appeal to the Magistrate is given. The language of section 104 which is the section giving the President power to decide the class in which any person liable to the tax payable under section 103 shall be placed and of section 190 lends some color to this contention. In terms, those sections have reference to complaints made with regard to the class in which the complainant has been placed and not to the decision of the President, necessarily antecedent to any classification, that the complainant is a person exercising one of the arts, professions, trades or callings mentioned in the schedule. In my opinion, however, the construction contended for on behalf of the President is not the one which should be placed on those sections of the Act. If the object of the Legislature was to empower the President in the first instance, and the Magistrates on appeal to decide questions with regard to the incidence or amount of any tax which otherwise would have to be decided by the ordinary tribunals, it would be strange that in the particular case of the tax payable under section 103 it should not be open to a person charged with it to complain that he was wrongly charged. Admittedly it is open to him to complain of the classification, or in other words, to object that he is overcharged, and the President is bound to entertain his complaint and dispose of it under the provisions of section 190. Yet it is said that the person charged has no right under section 190 to object that he ought not to have been charged at all by showing for instance that he was not the trader he was supposed to be. It seems to me that the jurisdiction to hear a complaint about classification necessarily implies a power to inquire into the particular art, profession, trade, or calling which the person charged may be carrying on. I do not see how, without making this inquiry and without ascertaining what the man's business is, the President can fix the class in which he is to be placed. That the object of the Legislature was what has been indicated above is, I think, rendered clear by reading section 196 with the other sections already mentioned. That section makes the decision of the

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President with reference to the assessment, service or demand of any tax or toll, or in case of appeal the decision of the Magistrates, final, and it also provides that no action shall be maintained to recover money paid in respect of any tax levied under the Act. Unless therefore the question of liability to the tax is one which must be adjudicated upon by the President under section 190, the person charged in respect of a trade which, in fact, he was not carrying on would have no redress. Access to the special tribunal provided by section 192 would not be open to him, and if the tax were levied by distraint, he would have no remedy in a Court of Law. I am of opinion that the Magistrates have put a right construction on the Act and that the first question must be answered in the affirmative.

The next question is whether Mr. Davies, as agent of an absent partner, is liable to the tax payable under section 103. The contention on behalf of the President is that each member of a firm is liable to the tax, his class being determined by the amount of his share of the profits of the business, and it is argued that while "firms" or "partnerships" as such are not made liable in the schedule, section 109 indicates an intention to make each member of it liable. On the other hand, the learned counsel for Mr. Davies called attention to the definition of the word "person," which is so framed as to include a firm or partnership and argued that section 109 should be read with the definition being inserted for the purpose of showing that, notwithstanding the definition, the liability of the firm might still be brought home to any member of it.

In my opinion, the latter contention must prevail, and it was not intended that each member of a firm of merchants carrying on one business should be taxed as several distinct persons.

The tax is not levied in respect of the merchant's income, but in respect of his trade or business and, therefore, it would seem to follow that, if the business is one, there should be one tax only and not several. It would hardly be reasonable that the profits and extent of a business remaining unchanged, the amount leviable from the firm should vary with the number of the members. In the case of a firm the person exercising the trade within the meaning of section 103 is the firm. It is the firm which is to be placed in one of the classes under section 104, and, lest it should be supposed that the liability is to be joint only, it is declared by

section 109 that each member of the firm is to be personally and separately liable. The language of this section is inartificial; but, in my judgment, no other meaning can be given to it, and it cannot be read as imposing on each member of a firm or a Hindu family an obligation to pay a distinct and separate tax in respect of the trade carried on by them.

I am of opinion that the second question must be answered by stating that Mr. Oakes, though he may be liable to be called upon to pay the tax payable by the whole firm, is not otherwise chargeable with any tax in respect of the business carried on by him.

Branson & Branson, attorneys for appellant.

Barclay & Morgan, attorneys for respondent.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

NALLANNA (DEFENDANT No. 1), APPELLANT,

v.

PONNAL AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2),
RESPONDENTS.*

Hindu law—Inheritance—Bandhu—Son's daughter.

A son's daughter is entitled to inherit to her grandfather as a bandhu.

SECOND APPEAL against the decree of D. Venkatarangayyar, Acting Subordinate Judge of Salem, in appeal suit No. 285 of 1887, affirming the decree of P. Ayyavayyar, District Munsif of Namakal, in original suit No. 491 of 1886.

Suit for land formerly the property of Kuppachee Goundan (deceased). Kuppachee Goundan had a son, Sengoda Goundan, who pre-deceased him, leaving two daughters, viz., the plaintiff and the wife (deceased) of defendant No. 2, who was *ex parte*. Defendant No. 1 claimed as a purchaser from the widow of Kuppachee Goundan, but established no circumstances of necessity to justify the sale to him.

The District Munsif passed a decree for the plaintiff which was affirmed on appeal by the Subordinate Judge.

* Second Appeal No. 1041 of 1889.

1890.
August 12, 27.
November 13.

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Defendant No. 1 preferred this second appeal.

Sadagopacharyar for appellant.

Rama Rau for respondents.

JUDGMENT.—It is found by the Subordinate Judge that Sengoda Goundan pre-deceased his father. The question for decision is therefore whether plaintiff is entitled to succeed to her grand father as a bandhu. It was held by this Court in *Kutti Ammal v. Radakristna Aiyar*(1) that a sister is a bandhu. The course of decisions from the date of that decision proceeds on the principle that consanguinity may be recognized as the basis of title to succession in the absence of preferential male heirs. According to the definition of the term sapinda as given in the Achara Kanda of the Mitakshara, there is sapinda relationship when there exists a "connection with one body either immediately or by descent."

On this view a son's daughter is as much a bandhu as is a sister, and thus entitled to succeed as heir of her paternal grandfather in the absence of preferential male heirs. Our attention has been drawn to the observations of Mr. Mayne in paragraph 495 (4th edition) of his work on Hindu Law. But they have been considered and dissented from by the learned Judges who decided the case of *Lakshmanammal v. Tiruvengada*(2).

The appeal therefore fails and is dismissed with costs.

APPELLATE CIVIL.

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

PYDEL (DEFENDANT NO. 2), APPELLANT,

v.

CHATHAPPAN AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 206—Amendment of decree after execution.

In a suit for money against the karnavan and two anandravans of a Malabar tarwad, the judgment directed a "decree for the plaintiff as prayed," but the decree ordered payment by one anandravan only. Land belonging to the tarwad was

(1) 8 M.H.C.R., 88.

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

* Second Appeal No. 949 of 1889.

attached and sold in execution, an objection by the other members of the tarwad having been overruled. After the sale, the decree was amended and brought into conformity with the judgment.

In a suit brought by other members of the tarwad against the karnavan, the decree-holder and the execution-purchaser, it was found that the judgment-debt had been contracted for proper tarwad purposes, and that the land had been sold for its proper value:

Held, that the sale was binding on the plaintiffs.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 401 of 1888, confirming the decree of A. Chathu Nambiar, District Munsif of Nadapuram, in original suit No. 69 of 1888.

Suit for a declaration that certain land, the property of the tarwad of the plaintiffs and defendant No. 1, was not liable to be sold in execution of the decree in original suit No. 162 of 1878 on the file of the District Munsif of Tellicherry and for the cancellation of an order made on miscellaneous petition No. 106 of 1887 by which the land was ordered to be sold. In the suit of 1878, the present defendant No. 2 sued the present defendant No. 1, his late karnavan and another anandravan of the tarwad, to recover from them certain land with arrears of rent. The District Munsif ordered "a decree for the plaintiff as sued for," but the decree as issued ordered that the land be surrendered and that the present defendant No. 1 do pay the arrears of rent, costs, &c. In execution of this decree the land now in question was attached and an objection by the present plaintiffs having been dismissed, it was brought to sale and the present defendant No. 3 became the purchaser. The decree was subsequently amended and the karnavan and both anandravans were ordered to pay the amount decreed.

The District Munsif held that the sale was invalid as against the plaintiffs and passed a decree as prayed, and this decree was affirmed on appeal by the Subordinate Judge.

Defendant No. 2 preferred this second appeal.

Sankaran Nayar for appellant.

Sankara Menon for respondents.

JUDGMENT.—The decree passed in original suit No. 162 of 1878 directed the first defendant alone to pay the amount decreed to the appellant; but the judgment recorded in that suit showed that his karnavan was also intended to be made liable. The appellant attached four parcels of tarwad land in execution, but

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October 20.

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the respondents objected to the attachment on the ground that the decree-debt was not a tarwad debt. Their objection being overruled, they brought this suit to have it declared that tarwad property was not liable to be sold in execution of the decree in question. Subsequently, the attachment was followed by sale and defendant No. 3, who was the purchaser at the Court-sale, was made a party to the suit. Subsequently to the sale, the decree was amended so as to include the karnavan among the defendants who were directed to pay the amount decreed. Both the Courts below decreed the claim, and held that for the purposes of this suit, the decree must be taken to have been as it stood originally and not as it was amended subsequently to the attachment and the sale. The contention before us is that the amended decree should be treated as having been made on the date of the original decree.

It is provided by Civil Procedure Code, section 206, that the decree *must* agree with the judgment, and we must, therefore, take the amendment to have been made in accordance with a rule of law. This being so, it cannot be treated as one made to the prejudice of the respondents' karnavan who was a party to the suit. The contention that the amended decree must be taken as in force from the date of the original decree appears to be well-founded. There is a distinction between a case of amendment and one of novation or substitution. When an instrument is amended so as to express the real intention which it was intended to express, but which it did not completely express, the transaction is not in substance varied, but its inaccurate description is only rectified. It is also true that an amendment ought not to be allowed to operate so as to prejudice a third party, and the question, therefore, is whether the respondents have really been prejudiced in respect of the right which they seek to establish. Their contention that a mere error ought not to be rectified is entitled to no weight. But it may be that they are prejudiced if, as alleged by them, the decree debt is not binding on their tarwad, or if tarwad property has been sold for an inadequate price by reason of the defect in the decree, as it stood originally. In the view which we take of the case, viz., that the amended decree was operative from the date of the decree except as specially provided for by Civil Procedure Code, section 32, it must be decided once for all in this suit whether the plaintiffs are entitled to the relief sought for or to any and what other relief.

We shall ask the Subordinate Judge to return a finding on the third issue, and also on the question whether the lands in dispute have been sold for less than their proper value.

Findings to be returned within six weeks from the date of the receipt of this order, when seven days after the report of the receipt of the finding will be allowed for filing objections.

[In compliance with the above order, the Subordinate Judge submitted findings to the effect that the debt for which the decree was obtained was contracted for the proper purposes of the plaintiffs' tarwad; and that the lands in dispute had not been sold for less than their proper value.]

This second appeal having come on for final hearing, the Court delivered judgment as follows:—

JUDGMENT.—We accept the finding to which no objection is taken. The decrees of the Courts below must, therefore, be reversed and the suit dismissed. The respondents must pay the appellant's costs throughout. No order is necessary on the memorandum of objections.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

NILAKANDAN AND ANOTHER (PLAINTIFFS), APPELLANTS,
v.

PADMANABHA AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Malabar Law—Melkoima—Compromise by Uralers of the right to manage a devasom—
Claim of certain Uralers to exclude others from management—Limitation.*

The uraima right in a Malabar devasom was vested in the illom, of which plaintiff No. 1, a Nambudri Brahman, was a member; the defendants represented the family which formerly ruled over the tract of country where the devasom was situated. The plaintiffs sued for a declaration that their families were entitled to exclusive management of the affairs of the devasom. It appeared that the plaintiffs' and defendants' families had been in joint management since 1845 in accordance with the provisions of a deed of compromise:

Held (1) On its appearing that the compromise had been entered into by the karnavan of the plaintiffs' illom, and that the compromise was not vitiated by fraud or the like, that the compromise was binding on the plaintiff;

(2) That the claim to exclusive management was barred by limitation.

* Appeal No. 43 of 1889.

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Per cur. : A legal origin to which the joint enjoyment of the rights of management may be referred may be found in the continuance of what was Melkoima in ancient times as a co-trusteeship subsequent to the British rule with the tacit sanction of the British Government, or in the status of the Nambidi family as patrons of the institution.

APPEAL against the decree of V. P. deRozario, Subordinate Judge of Palghat, in original suit No. 55 of 1887.

Suit for a declaration that the plaintiffs' families as hereditary Uralers of a devasom in Malabar were entitled to the exclusive management of its affairs, and that the defendants' family which formerly possessed a Melkoima right over it was entitled to no rights of management, their Melkoima right having been extinguished on the British conquest.

In 1845 certain arrangements were entered into between the families of the plaintiffs and defendants, the nature and history of which will appear from the following extracts from the judgment of the Subordinate Judge, referred to in the judgment of the High Court :—

"In 1845, disputes arose between plaintiffs' and defendants' ancestors. Second plaintiff's father filed a suit to set aside a kanom granted to a tenant on devasom land. Who the grantor of the kanom was does not appear. The defendants in the suit were first plaintiff's predecessor, the Samudayam of the temple, defendant's predecessor, and the tenant—plaintiff's first witness—gives the following version of the dispute. Cherukunnat Nambudri, first plaintiff's predecessor, proceeded to collect rents when Cherambatta Nambudri (second plaintiff's father) and Shakden Raja (the Nambidi) prohibited the tenants from paying rents. The latter Nambidi was in collusion with the Raja (Nambidi) and was opposed to Cherukunnat Nambudri. On this account Cherukunnat Nambudri entered into a karar with the other two. The statement of this witness as to the nature of the dispute is not supported by the Razi (D), subsequently filed in the suit, which tends to show that the dispute was as to the validity of a kanom granted by one of the parties. However this may be it is clear that there was a dispute between the Uralers and the Nambidi as to the management of the temple affairs. Plaintiffs' first witness states that the Nambidi had asserted that he was owner of the temple. It is immaterial whether one of the Uralers sided with the Nambidi or whether both the Uralers were opposed to the Nambidi. The dispute was settled by a karar (exhibit C). The karar is in the following terms:—

"Writing executed by Cherukunnat Sree Kumaren Nambudri to Cherampat Narayanan Vasudavan alias Narainan Nambudri.

"Whereas you have instituted suit No. 203 of 1845 on the file of the Palghat District Munsif's Court against me, the second defendant Samudayam, the third defendant Melkoima, and fourth defendant Goldsmith Murukan, the tenant in possession, to set aside the right of 1,100 fanams granted in favour of the said Murukan, it is agreed that we the Uralers and Nambidiri, the Melkoima should cause the Samudayam to manage all the affairs of the devasom as hitherto, should cause him to collect the rents, interests, &c., and defray the expenses, usual and

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"attendant upon ceremonies, that the affairs which ought to be managed by us two and the Nambudri should be managed jointly and not independently of one another, that the devasom funds ought not to be wasted, that the affairs which ought to be managed by the Samudayam according to the powers given to him ought to be managed subject to the approval of all three (of us) and that accounts of each year should be settled by all three (of us) in the month of Chingom. Nambudri (you) having admitted the validity of the right questioned in the suit the matter has been compromised. A karar embodying these terms has been executed to me by you (Nambudri) on a stamp cadjan for 1 rupee No. 1862, fasli 1254, sold from the Palghat taluk, another executed to Nambudri by both of us on 1 rupee stamp cadjan No. 63 of fasli 1255 and a third executed to both of us by Nambudri on 1 rupee stamp cadjan No. 64 of the same fasli year. A Razi ought to be put in Court, and all should act in conformity with these provisions."

"In accordance with the karar the parties filed a Razi (D) withdrawing the suit. The Razi is as follows:—

"The plaintiff has executed to the first defendant a karar regarding the management of the devasom on 1 rupee stamp cadjan No. 1862 of fasli 1254 purchased at the Palghat Taluk Cutcherry on the 2nd Chingom 1020, the first defendant has executed a similar karar to plaintiff on stamp cadjan No. 1863. Plaintiff and first defendant have together executed a karar on stamp cadjan No. 63 of fasli 1255 in favour of the plaintiff and first defendant jointly, plaintiff has also admitted defendant's right of 1,100 fanams now in dispute and plaintiff shall receive the costs, Rs. 19-10-3 from the District Court."

"The karar and the Razi recite that up to 1020 (1845) the affairs of the temple were jointly managed by the Uralers and the Melkoima. Plaintiffs' exhibits A, B and A M do not show that up to 1012 (1836) the Nambidi took part in the management. He probably advanced his claim subsequently to interfere in the affairs and in the management of the temple. That he did interfere in the management before 1020 (1845) is admitted in the plaint (4th para.). In 1020 (1845) when the karar was executed, the nature of Melkoima right was ill-understood. There is nothing to show that the Nambidi did not really believe that as Melkoima he had the right to interfere in the management. In the suit then pending the Court would have decided whether the Nambidi had exclusive or joint right of management or no right of management; but the Uralers chose to settle the dispute amicably out of Court. The plaintiffs do not allege that their predecessors' consent to the agreement was obtained by fraud, coercion, undue influence or misrepresentation. For a period of 30 years subsequent to the date of the karar the parties to it, first plaintiff's granduncle Shrikumaran, second plaintiff's father Narainen, and first defendant's predecessor Shakden Raja and their successors first plaintiff's father and uncle, second plaintiff's uncle and first defendant's uncle, managed the affairs of the devasom in accordance with its terms. (See the deposition of plaintiffs.)

"In 1874 disputes again arose between the Uralers and the Nambidi. The Uralers were plaintiff's uncles, who were not parties to the karar. The disputes led to a suit which the Uralers filed in the Sub-Court of Calicut for the recovery of devasom land from a tenant who held under a demise granted by the Samudayam appointed by the Uralers and the Nambidi. The plaint (exhibit VII) alleged that the tenant in collusion with the Nambudri declined to surrender asserting that the latter had Melkoima. The Nambidi was second defendant

NILAKANDAN "in the suit. He contended (see his written statement exhibit VIII) that he
 PADMANABHA. "was the owner of the temple and in possession of its properties, that the
 "plaintiffs were his appointees and had no special right to sue. Issues were
 "settled and the suit posted for hearing on 24th October 1874. Here was an
 "opportunity offered to the parties to have their dispute settled by a decree of
 "Court. None of the parties were parties to the karar. Now was the time to
 "repudiate it or ratify it, or rely upon the right which each family possessed
 "over the devasom. But the parties preferred like their predecessors before
 "them to settle the dispute amicably out of Court, and for this purpose applied
 "(see exhibit X) to the Court for an adjournment of the hearing for 15 days.
 "The parties represented to the Court that they intended to compromise the dis-
 "pute in the suit and the matter of other suits and decrees filed and obtained by
 "the Nambidi against the tenants of the devasom. They also expressed their
 "intention to conform themselves to the karar of 1020 (1845), but to modify its
 "provisions in one particular, viz., to sue themselves instead of by a Samudayam.
 "On 21st November 1874, the parties presented to the Court a razi (exhibit E) and
 "prayed that the suit might be struck off the file. The razi, which embodies the
 "terms of the compromise, is as follows:—

"First and second plaintiffs and second defendant are hereafter to manage jointly
 "and cause to be managed as hitherto all the affairs of the plaint Kachen
 "Kurshi devasom, all three shall jointly but not severally manage and get man-
 "aged all the affairs of the devasom, first and second plaintiffs and second defendant
 "have now appointed in writing Purapadiat Perumpadappil Vasudevan Subra-
 "manian Adithiri as Samudayam and Kunisberi Gramom Shuppu Pattar's son
 "Ananda Rama Pattar as Pattamali and have taken Kaichit from each of them,
 "the first and second plaintiffs and second defendant shall jointly cause them to
 "perform the duties assigned to each of them, first and second plaintiffs and second
 "defendant shall in future jointly conduct themselves or by their pleader all suits
 "and petitions, civil, criminal and revenue, on behalf of the devasom, second
 "defendant shall keep in his possession the Marupatom deeds and the Shanku
 "Mudra (seal) of the devasom as before, second defendant shall hand them over to
 "all or any of them whenever necessary, second defendant shall be held respon-
 "sible for the loss that may arise on account of his failure to deliver them; the
 "second defendant shall not execute the decree No. 19 of 1874 on the file of the
 "Temelprom District Munsif's Court and its appeal decree No. 215 of 1887 and
 "realize the amount due thereunder, the demise to the first defendant shall be
 "renewed to him on the conditions proposed by first and second plaintiffs and
 "second defendant. The first and second plaintiffs and second defendant shall
 "cause the Samudayam to grant a renewal within one month from this date with
 "the stipulation that the value of the existing improvements has not been ascer-
 "tained and first defendant shall be compensated with the value that may be
 "ascertained at the time of redemption and in case of first defendant's default
 "to execute the kaichit, they (first and second plaintiffs and second defendant)
 "shall sue him again on the basis of the plaint kaichit, and the parties shall
 "bear their own costs in this suit."

"The parties to this razi and their successors, first plaintiff's uncle his elder
 "brother, first plaintiff, second plaintiff, first defendant's uncles and second
 "defendant's mother and guardian acted up to the terms of the razi until the
 "date of the present suit. The Uralers and the Nambidi jointly appointed a
 "Samudayam and a Pattamali (see exhibits L, M, O.)—they joined in suits to

"recover devasom lands (exhibit B, S, T, U, XI and XIII) and in applications NILAKANDAN
 "XIII and XIV to execute decrees." PADMANABHA.

The Subordinate Judge dismissed the suit.

The plaintiffs preferred this appeal.

Subramanya Ayyar and *Sundara Ayyar* for appellants.

Sankaran Nayar for respondents.

JUDGMENT.—This is an appeal from the decree of the Sub-
 ordinate Judge of South Malabar at Palghat, who dismissed the
 appellants' suit for a declaration that, as Uralers, they had the
 exclusive right of managing the affairs of Kachankurishi temple,
 and that neither the first respondent nor his family had a joint
 right of management. The institution in question is an ancient
 Hindu temple in South Malabar, and the first respondent is the
 representative of the Nambidi family which ruled in former times
 over that tract of country in which the temple is situated, whilst
 the Uraima right is vested in the illom or family of the first
 appellant, a Nambudri Brahman, from time immemorial. There
 is no legal evidence before us to show when and by whom the
 temple was founded or what was the nature of management pre-
 scribed by its original constitution. There are, however, certain
 facts which are established beyond doubt and which are, indeed,
 not disputed by the appellants, and the Subordinate Judge rests
 his decision upon them. The appellants admit, and there is con-
 siderable evidence to show that, at least from 1845, the appellants'
 and the respondents' families have been in joint management in
 accordance with the terms of the karar (exhibit C) and the razi
 (exhibit D), dated the 16th August 1845, which were re-affirmed,
 except in one particular, which is immaterial to our present pur-
 pose by document E, dated the 21st November 1874. The circum-
 stances under which documents C, D and E were executed and
 their contents are set forth by the Subordinate Judge in para-
 graphs 16 to 20 of his judgment, and it will be seen that the
 documents referred to the first respondent's predecessors as Mel-
 koimas and the appellants' ancestors as Uralers and that they were
 executed in adjustment of pending litigation regarding the res-
 pective rights of those persons. It is not urged, as pointed out by
 the Subordinate Judge, that either fraud or a wilful suppression
 of material facts vitiates the deeds of compromise; but it is con-
 tended that they do not bind the appellants because (first) all the

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members of their families, as constituted in 1845, had not joined in their execution, (secondly) that the compromise practically created a new right and thereby varied the original trusts of the institution, (thirdly) that the Melkoima right being a right of sovereignty, it ceased on the introduction of the British rule, and (fourthly) because no joint right can be acquired by prescription.

As regards the first ground of claim it is clearly untenable. Prior to 1848 the first appellant's grandfather's brother was the karnavan of his illom, and from 1848 to 1859 it was under the management of the appellant's father. From 1859 to 1876 the appellant's uncle was the managing member, and from 1876 to 1882 the appellant's elder brother was in management. The first appellant has been the head of his family since 1882, and although all the members of the appellant's family in 1845 did not sign documents C and D, the then head of the family signed them, and the arrangement made by him was acted upon by his successors and expressly recognized in 1874 and acquiesced in by all the junior members of his family for more than two generations and during a period of upwards of 40 years. The contention, therefore, that the arrangement had not the sanction of the whole family in 1845 appears to us to be entitled to no weight.

As regards the second contention, the Subordinate Judge is right in holding that, after the compromise of 1845 and its ratification in 1874, the appellants are not at liberty to re-open the question, whether the right of joint management recognized in 1845 was then a subsisting right, and whether as Melkoima, the first respondent's family was entitled to participate in management. It is sufficient to say that the right of joint management was brought into controversy in a Court of Justice, and that it was by way of compromise recognized as a subsisting right and as being in accordance with the prior usage of the institution. It was held by the Privy Council in *Sri Gajapathi Radhika Patta Maha Devi Garu v. Sri Gajapathi Nilamani Patta Maha Devi Garu* (1) that when a state of facts is accepted as the basis of a compromise whereby a suit pending decision is amicably adjusted and when the compromise is not vitiated by fraud, those who were parties to it and their privies should not afterwards be heard to say for the purpose of reviving the controversy that the real

(1) 13 M.I.A., 497.

state of things was otherwise. The principle is the same whether the mistake alleged to have been made is one of law or of fact. We may here draw attention to the words "as hitherto" in document C as indicating that it did not purport to vary the prior usage of the institution.

Even assuming that the appellants may now be permitted to show that the respondents' family had no joint management prior to 1845, the evidence before us cannot be held sufficiently to establish such contention. In 1821 the Collector of the district called upon the then Nambidi to pay up the arrears of revenue due on devasom land (exhibit I), and this implies some control on his part over the temple income. Again in exhibit A, which is the temple pymash of 1822, the Nambidi is described as having a Melkoima right over the temple. Further, exhibit I shows that it was the Nambidi who got the devasom land exempted from assessment by Hyder Ali in 1773. Though the pymash account is of itself no evidence of title, it is of value in this case as confirming the view since taken by the Uralers as to the position of the Nambidi. The appellants' pleader suggests that exhibit VIII disproves exhibit I, but the explanation given by the respondents' pleader is not without weight. It does appear, as stated by him, that Kelu Nair only distributed the assessment payable on 3,500 paras of temple land at the rate of one-fourth of a fanam per para over a portion of it at a higher rate, whilst he entered the rest as rent-free, the aggregate assessment due by the temple remaining the same. Apart from these, there are other facts which indicate that the respondents' family had a special connection with the temple in question, and special interest in its efficient management. The first appellant admits in his evidence that whenever a member of the Nambidi family became its head or, as it is said, attains the stanom of the Nambidi his installation takes place in the temple, and the representative of the first appellants' family for the time being attends the ceremony and strews rice over his head as a token of respect or salutation. It is likewise admitted by him that whenever Brahmans in that part of Malabar perform a yagam or a vedic sacrifice, they obtain first the Nambidi's permission by accepting darbha grass from him as he is seated on a raised platform in the temple and pay him a fee. It is also in evidence that the appellants live in the Cochin territory, or near Trichoor, whilst the respondents' family lives close

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to the temple at the distance of about a mile or two from it. The documentary evidence to which our attention is drawn on behalf of the appellants, exhibits A, B and C to A N, refers to the first appellant's ancestor and another as Uralers, and does not refer to the Nambidi as being one of them. Seeing that he is referred to as Melkoima in documents C, D and E, they are not conclusive on the subject of interference in management. However this may be, it is impossible to hold upon the evidence that prior to 1845 the Nambidi had no connection whatever with the temple nor control over its affairs, and that the recital that document C recognized and regulated the prior practice was not *bonâ fide*.

The next contention is that the Melkoima right is the sovereign right of supervision, and that when the Nambudris ceased to be rulers, their Melkoima ceased likewise, and that it was therefore not a subsisting legal right in 1845. This is the substantial question raised for decision in this appeal. The learned pleader for the appellants relies on the definition of Melkoima given by Mr. Graeme, the Special Commissioner of Malabar, about 1820, as "the right which the sovereign power possessed over property of which ownership is in others. It is a right of superintendence, an incident of sovereignty." The Melkoima right was also described by Mr. Justice Holloway, whilst District Judge of North Malabar, in appeal suit No. 118 of 1861 in the following terms: "This is not only not the same, but absolutely incompatible with ownership. It was the right of the sovereign power possessed over property, of which the legal ownership was in others. That sovereign power and the right of interference which nothing can prevent these Malabar Rajas from asserting have of course wholly ceased." Mr. Wigram, a former District Judge of Malabar, gives a similar definition (see Wigram on Malabar Law and Custom). On the other hand, the respondents' Pleader refers to Logan's treatise on Malabar, Vol. II., p. 177, wherein the Uraima right is included among the four functions of a desavali, and to exhibit A in which the Nambidi is described as naduvali. It appears from Logan's Glossary, page 211, that no one was called a naduvali who had not at least 500 Nayars attached to his range; any number below that ranked a person as a desavali. Our attention is also drawn to the ancient constitution of Hindu temples in Malabar as described by Mr. Conolly, a Collector of Malabar, in his letter to the Board of Revenue which is cited in

Zamorin of Calicut v. Krishnan(1). "The pagodas of Malabar," says Mr. Conolly, "generally are and have always been independent of Government interference. They are either the property of some influential family, the ancestors of which either built and endowed them, or, as is more commonly the case, are claimed and managed by a body of trustees who derive their right from immemorial inheritance and who conduct the affairs of the temple under the patronage and superintendence of some Raja or other person of consideration. This latter state of things, it will be seen, is nearly that which the Government are now desirous of introducing everywhere." It will be seen that the above passage throws light also on the policy which the British Government was inclined to adopt, viz., that of continuing the supervision of the Raja, who was the patron, as it originally existed in the interests of certain temples, instead of referring that supervision solely to the *status* of the person exercising it as sovereign for the time being and declaring it to have ceased on the annexation of Malabar. There is some indication of such policy having been pursued in this case—as in the Guruvayur Devasom case; *Zamorin of Calicut v. Krishnan*(1)—for the Revenue authorities have corresponded with the Nambidi relating to matters connected with the temple, whilst there are traces of the continuance of the right of interference by the Nambidi family subsequent to the annexation of Malabar. The real question then, which we have to decide, is this—are we to ignore the state of things which has existed admittedly from 1845 and probably from the commencement of the century and which was submitted to by the Uralers as one consistent with the ancient usage and constitution of the institution and continued and countenanced by the British Government as conducive to the protection of the interests of the institution, and are we now to deduce a rule of decision from the abstract theory of Melkoima as it existed prior to British rule, and to change the usage and unsettle what was set at rest by a compromise 40 years ago? We have no hesitation in answering the question in the negative. In cases in which there is a conflict between an ancient theory and the modern usage in a religious institution, Courts of Justice must see whether the usage is referable to some other legal origin with

(1) R.A., No. 35 of 1887, not reported.

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reference to the facts of each case, if not to the ancient theory. As observed by the Judicial Committee in the Ramnad case (*Collector of Madura v. Mootoo Ramalinga Sathupathy*)⁽¹⁾ with reference to a theory deduced from the ancient Hindu Law of Niyoga or appointment in connection with the law of adoption, the abstract theory has a juridical value for the purpose of explaining and upholding the existing usage and not for the purpose of ignoring it. It is then urged for the appellants that the joint enjoyment, however long, can be referred to no legal origin. But it must be observed that, from what has been stated above, such legal origin may be found in the continuance of what was Melkoima in ancient times as a co-trusteeship subsequent to the British rule with the tacit sanction of the British Government, or in the *status* of the Nambidi family as patrons of the institution as part of its ancient constitution, a *status* which did not cease on the introduction of the British rule. It must have been well known in 1845 that the sovereign power vested in the British Government and the term Melkoima in document C must therefore be taken to be a word of description or distinction. The parties concerned took for their guide the subsisting usage of the institution and agreed to continue it without caring to ascertain to what legal relation of the Nambidi to the temple the continued participation in management subsequent to the British rule might be referred.

As regards the last question, viz., of limitation, it has been decided by the Privy Council that the 12 years' rule is applicable when there is no question for recovering any property for the trusts of the institution, and when the plaintiff sues only for his personal right to manage or to control the management of the endowment—*Balwant Rao Bishwant Chandra Chor v. Purun Mal Chaube*⁽²⁾. When two persons have been in joint management for more than 40 years, the presumption is that they have a joint right of management. This is not a case of exclusive possession of portions of the same property at different periods or a case of *contraria possessio* and the decision in *Lord Advocate v. Young*⁽³⁾ is not in point. The decision of the Subordinate Judge, that the claim is barred by limitation, is also right.

The appeal fails and is dismissed with costs.

(1) 12 M.I.A., 397. (2) L.R., 10 I.A., 90. (3) L.R., 12 App. Ca., 544.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

CHANDRAREKA (DEFENDANT No. 1), APPELLANT,

v.

SECRETARY OF STATE FOR INDIA, RESPONDENT.*

1890.
Nov. 18.
Dec. 1.

Civil Procedure Code, s. 411—Stamp duty on a pauper's plaint—Decree for less than the amount of claim—Disreputable defence.

A pauper sued his sister for the partition of property valued at a large sum. The parties belonged to the bogam caste, residing in the Godavari district. The defendant pleaded that the property had been acquired by her as a prostitute, and denied the plaintiff's claim to it. The plaintiff obtained a decree for Rs. 100, being a moiety of the property found to have been left by their mother :

Held, (1) on the evidence as to the local custom of the caste that the decree was right ;

(2) that the defendant was liable to pay Court-fees only on the sum decreed.

APPEAL against the decree of C. A. Bird, District Judge of Godavari, in original suit No. 6 of 1888.

The plaintiff, who sued as a pauper, alleged that he and defendant No. 1 (his sister) were members of an undivided family belonging to the bogam or dancing girl caste, and that defendant No. 1 was possessed of property amounting to Rs. 34,662, part of which, viz., a house, was in the occupation of defendant No. 2, and he claimed partition and delivery to him of a moiety of the property. Defendant No. 1 pleaded that she had acquired all the property as a prostitute and denied the plaintiff's claim.

The District Judge passed a decree for plaintiff for Rs. 100 as representing the moiety of the property left by his mother and directed that defendant No. 1 do pay the stamp duty due on the plaint.

Defendant No. 1 preferred this appeal in which the Secretary of State was joined as sole respondent.

S. Subramanya Ayyar and *P. Subramanya Ayyar* for appellant.
Krishna Ayyar for respondent.

* Appeal No. 105 of 1889.

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BEST, J.—The first respondent is dead, and the appellant has elected to proceed against the other respondent alone. This other respondent is the Secretary of State for India, on whose behalf no one has appeared.

The main question is as to the propriety of the Lower Court's order in so far as it directs the appellant (who was the first defendant in that Court) to pay the Court-fees due to Government in consequence of the plaintiff having been allowed to sue *in forma pauperis*. The plaintiff claimed a moiety of property valued at Rs. 34,662, and was given a decree for only Rs. 100. The Court-fees which the first defendant (now appellant) has been directed to pay on account of the plaintiff amount to Rs. 699.

The plaintiff's case was that he was entitled to a moiety of property (of the above value) in the possession of his sister, the first defendant, as being "ancestral property and property jointly acquired" in which he and the first defendant "have equal rights, according to law and the custom of their caste."

As to the plaintiff's allegation that the mother of himself and the first defendant left property, the Judge's finding is that the mother was barely able to maintain herself and her two children, that she used to borrow, and that she did not train up her children in the usual accomplishments of their caste, the reason being that she could not afford it." The Judge finds that there is evidence that the mother "had a gold *patteda* worth Rs. 50," and he adds "she must have had some cooking utensils"; but he "cannot find it proved that she possessed any other property"; and the conclusion arrived at is as follows:—"Giving the plaintiff's case every allowance, I cannot put the value of ancestral property, *i.e.*, property acquired by the mother of the plaintiff and the first defendant at more than a couple of hundred rupees."

As to the second issue recorded, *viz.*, "Whether the property in possession of the first defendant is joint and ancestral property of the plaintiff and first defendant or whether it is the separate and self-acquired property of the first defendant," the Judge's finding is that it was acquired by the first defendant while she was in the keeping of a wealthy man, one Vinam Venkataratnam, and that, with the exception of a very small portion which, giving every allowance to the plaintiff, cannot be put at more than Rs. 200, the rest is the first defendant's own self-acquisition.

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Hence his decree in favour of the plaintiff for a sum of Rs. 100 only.

The reasons assigned for directing the first defendant to pay the whole Court-fees payable on the plaint are as follows:—

"The plaintiff and the first defendant were by birth in the same position. Both plaintiff and the first defendant have lived disreputable lives—the first defendant being a prostitute, while the plaintiff was the hanger-on of a prostitute. Yet himself is a pauper, and the first defendant has acquired comparatively great wealth; in the undefined state of the law, this induced the plaintiff to attempt to get a share, he has failed, and she has succeeded in resisting his claim by setting up a disreputable defence. There is a large sum due to Government for stamp duty. In these circumstances, I think it right to direct that the first defendant, considering the nature of her defence, be ordered to pay her own costs and the stamp duty due to Government."

As to the defence set up by the first defendant, it has been found to be a legally valid one, and such being the case, and she having succeeded in proving her exclusive right to the bulk of the property in her possession, the mere fact of a large sum being due to Government for stamp duty, which it will be impossible to recover from the plaintiff, is no reason for directing the first defendant to pay the same. The utmost that the first defendant could have been directed to pay is the Court-fees on the Rs. 100 decreed to plaintiff. Even as to this, however, it is objected by the appellant that she is not liable as neither by law nor by custom of the caste was the plaintiff, being a male, entitled to any share in the property left by the mother of the plaintiff and the first defendant. There is, however, evidence adduced in the case which goes to show that, by the custom of the *Bogam* caste in the Godavari district, property left by a mother is divided between the sons and daughters.

There is, therefore, no reason for disturbing the Lower Court's decree so far as it awarded to the plaintiff a sum of Rs. 100; but the decree in so far as it directs the first defendant to pay the whole of the Court-fees due to Government on account of the plaint must be modified and the first defendant directed to pay the Court-fees in question only on the Rs. 100 decreed against her; the rest being directed to be paid by the plaintiff, or (as he is now dead) out of the assets if any, left by him.

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The Lower Court's decree must be modified as above. Under the circumstances of the case there will be no order as to the costs of this appeal.

MUTTUSAMI AYYAR, J.—The only question which arises in this appeal is whether the Judge is right in directing the appellant to pay the Government the stamp duty due on the plaint presented by her brother as a pauper. The plaintiff being now dead, the Secretary of State is the only respondent before us, and he does not appear by Counsel to oppose this appeal. The appellant's brother claimed from her partition of what he described to be ancestral and joint property of Rs. 34,662 value, alleging that according to the rules of their caste, he was entitled to a half share. The appellant's defence was that her mother, who was a Sani or a dancing girl, died very poor; that she trained neither the appellant nor her brother in music or dancing; that there was no ancestral property, and that the appellant acquired the property in her possession by practising the profession of her caste, viz., prostitution. The Judge found that the ancestral property of which the appellant's brother was entitled to a moiety was but of Rs. 200 value, and that the rest of the property in her possession was acquired by her from a wealthy man named Vinam Venkataratnam, who had kept her, and inherited considerable property from his father. On this view of the facts, the Judge awarded to the appellant's brother a moiety of property worth Rs. 200, and dismissed the rest of his claim extending to property worth Rs. 34,262. He refused the appellant, however, her costs, and further directed her to pay the Court-fees due to Government mainly on the ground that she had set up a disreputable defence. Two objections are urged in appeal, viz., that, by the custom of the caste, the appellant's brother is not entitled even to Rs. 100 decreed to him, and that the direction as to payment of stamp duty was illegal.

I do not think that either the defence set up by the appellant or her profession as a prostitute is sufficient to support the direction. Notwithstanding her profession, she (appellant) has rights of property and is entitled to the protection of law, and no penalty can lawfully be imposed upon her for pleading what is found to be substantially true to entitle her to such protection. The direction, therefore, that she should pay Court-fees in excess of Rs. 100 decreed against her cannot be supported.

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As regards the sum of Rs. 100, the respondent has clearly a charge to that extent on the property decreed to the pauper plaintiff under section 411, Code of Civil Procedure. Both parties relied on the custom of their caste in support of their respective contentions, and the Judge found upon the evidence that the plaintiff was entitled to a share. I see no sufficient reason to disturb the finding.

I am also of opinion that the decree appealed against must be set aside so far as it directs the appellant to pay Court-fees in excess of Rs. 100.

APPELLATE CIVIL.

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

KUNHAMED (PLAINTIFF), APPELLANT,

v.

KUTTI (DEFENDANT No. 1), RESPONDENT.*

*Specific Relief Act—Act I of 1877, s. 42—Suit for declaration—Fraudulent
decree—Injunction.*

Suit for a declaration that a decree of a Subordinate Court was passed fraudulently, the Judge having been bribed by the present defendant:

Held, that the suit did not lie.

Per Cur: The remedy would appear to be by way of injunction to restrain the party from executing the decree.

SECOND APPEAL against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 407 of 1889, confirming the decree of V. Kellu Eradi, District Munsif of Pynad, in original suit No. 567 of 1888.

Suit for a declaration that the decree in appeal suit No. 23 of 1886, on the file of the Subordinate Court of North Malabar was passed fraudulently.

The plaintiff alleged that certain land was sold to him and defendant No. 2, that defendant No. 1 brought original suit No. 112 of 1885 against them in the Court of the District Munsif of Pynad to recover the land on the strength of a forged title-deed,

* Second Appeal No. 80 of 1890.

1891.
Jan. 21.
Feb. 13.

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that that suit was dismissed, and proceeded that 'Mr. Kunjen Menon, late Subordinate Judge of North Malabar, who heard the appeal against the aforesaid decree, was bribed by first defendant, and he, finding the forged jenm deed a genuine document, reversed the decree of the Munsif's; that the decree of the Appellate Court was confirmed by the High Court, as the decision was not against law, and that in the judgment of the Appellate Court the opinion was expressed that plaintiff was an unnecessary party to the suit.'

Defendant No. 1 denied the allegations in the plaint and pleaded that the suit was not maintainable, that it was barred by section 13 of the Civil Procedure Code, and that plaintiff had no right to the plaint paramba.

The District Munsif, and, on appeal, the District Judge, held that the suit was not maintainable and passed decrees accordingly. The plaintiff preferred this second appeal.

Desikacharyar for appellant.

Narayana Rau for respondent.

JUDGMENT.—We agree with the Acting District Judge that the suit is not properly one for a declaratory decree under section 42 of the Specific Relief Act. The ground of action really is that the defendant by fraud has obtained an advantage in proceedings in a Court having jurisdiction which must necessarily make that Court an instrument of injustice and the remedy would appear to be by way of injunction to restrain the party from executing the decree. The Court cannot itself be made a party to the suit—see *Dhuronidhur Sen v. The Agra Bank*(1) and references thereunder. Daniell's Chancery Practice, 3rd edition, p. 1218 (4th edition, p. 1471). Drury on Injunctions, p. 96. Story's Equity Jurisprudence, §§ 899-900.

We cannot allow the plaint to be amended, as to do so would change the character of the suit.

The second appeal must, therefore, be dismissed with costs.

(1) I.L.R., 5 Cal., 86.

APPELLATE CIVIL.

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

KANARAN AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

KOMAPPAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Court Fees Act—Act VII of 1870, ss. 7, 12—Suit to cancel an instrument affecting land—Partial interest of plaintiff in the land—Appeal against an order for payment of additional Court Fees.

In a suit in a Subordinate Court by members of a Malabar tarwad to set aside an instrument affecting the whole of the tarwad property, the Subordinate Judge held that court-fees were leviable, assessed on the value of the property, and accordingly ordered an additional payment to be paid by the plaintiffs. The plaintiffs failed to make the payment, and the Subordinate Judge dismissed the suit:

Held, (1) that the order was erroneous since the plaintiffs would not be gainers to the extent of the value of the property if they obtained a decree;
(2) that the High Court was not precluded by Court Fees Act, s. 12, from revising it, and reversing the decree.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 40 of 1889.

Suit to set aside an instrument executed in respect of immovable property valued at Rs. 39,000.

The plaint was stamped with a Rs. 10 stamp only as in a suit for a declaration.

The Subordinate Judge who referred to *Naraina Putter v. Aya Putter*(1) held that the court-fee was leviable, assessed according to the value of the property affected by the instrument sought to be set aside, and accordingly ordered the plaintiff to pay the additional duty. The plaintiffs failed to conform to this order and the Subordinate Judge dismissed the suit.

The plaintiffs preferred this second appeal.

Sankaran Nayar for appellants.

Bhashyam Ayyangar for respondents.

JUDGMENT.—In our opinion, the Subordinate Judge was wrong in valuing the plaint according to the value of the whole tarwad

* Appeal No. 76 of 1890.

(1) 7 M.H.C.R., 372.

KANARAN
v.
KOMAPPAN.

property. It is clear that the plaintiffs will not be gainers to that extent if they obtain a decree.

It was argued for on behalf of the respondents that section 12 of the Court Fees Act prevented our revising the decision of the Subordinate Judge, but it has been held by this Court that where it is not a mere question of amount or arithmetical calculation the section does not apply—*Chandu v. Kombi*(1), *Ajoodhya Pershad v. Gunga Pershad*(2). We reverse the decree and remand the case to be dealt with according to law. Appellants must have the costs of this appeal.

APPELLATE CIVIL.

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

1890.
Dec. 9, 10.

AYYAVAYYAR AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

RAHIMANSA (PLAINTIFF), RESPONDENT.*

Vendor and purchaser—Conditional right of repurchase—Mortgage by conditional sale.

A having previously hypothecated certain land to B, executed a conveyance of it to him in 1873 for a consideration which was now found to have been an inadequate price. On the same day, B executed to A a "counterpart document" by which he covenanted to reconvey the land and return the sale-deed if the sale amount be repaid to him in cash on 27th May 1875. The documents contained no provision as to interest and reserved no power for the purchaser to recover his purchase money. In 1888 A's representative, alleging that the transaction evidenced by the above documents was a mortgage, brought a suit to redeem it:

Held, that the transaction did not constitute a mortgage, and that the plaintiff was not entitled to redeem.

SECOND APPEAL against the decree of L. A. Campbell, Acting District Judge of Coimbatore, in appeal suit No. 115 of 1889, reversing the decree of T. Ramasami Ayyar, District Munsif of Udumalpet, in original suit No. 543 of 1888.

Suit to redeem a mortgage executed by Nachimuttu Pillai (the predecessor in title of the plaintiff) to Ayyasami Ayyan, the father (deceased) of the defendants, dated 17th January 1873.

(1) I.L.R., 9 Mad., 208.

(2) I.L.R., 6 Cal., 249.

* Second Appeal No. 193 of 1890.

The alleged mortgage was comprised in two documents, dated 17th January 1873, of which one (exhibit I) was in terms a conveyance by Nachimuttu Pillai and the other (exhibit B) therein described as "a counterpart document" and executed by Ayyasami gave the boundaries of the land and stated that it was "owned and enjoyed before this by you Nachimuttu Pillai and thereafter "by sale on this date by you to me, owned, possessed and enjoyed "by me," and after reciting 'the particulars of the receipt of 'the said sale amount by you from me' proceeded: "and, consequently, if the said sale amount should be repaid to me in cash "on 27th May 1875, I shall put you in possession of the said land, "and, in addition, shall return to you the sale-deed executed to "me by you. I shall also transfer in your name the patta now "transferred in my name. In default of the payment of the "amount within the prescribed time, the sale-deed executed by "you shall become permanent, and this counterpart document shall "be cancelled. Thus have I executed this counterpart document "with my free consent."

The District Munsif referred to *Ramasami Sastrigal v. Samiyappa Nayakan*(1) and held that the transaction evidenced by the above instruments was a sale with a conditional right of repurchase and that the plaintiff was accordingly not entitled to recover the land in 1888 and he dismissed the suit. The District Judge, on appeal, finding that the consideration for exhibit I was an inadequate price for the land and that the transferor's signature had been obtained for a *muhalka* executed to the transferee in respect of the land in question, held that the transaction in question was a mortgage by conditional sale and reversing the decree of the District Munsif passed a decree for redemption.

The defendants preferred this second appeal.

Bhashyam Ayyangar for appellants.

Pattabhirama Ayyar for respondent.

JUDGMENT.—Having regard to the language used in the two instruments, dated 17th January 1873, we think there can be no doubt that a sale with a condition for repurchase on the date specified was intended. The absence of reference to a reconveyance does not appear to us to be important, and there are certainly no words positively indicating that a mortgage was intended. There

(1) I.L.R., 4 Mad., 179.

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is no mention of interest and no power is reserved to the purchaser to recover his purchase money. On the other hand, there is the fact that property was already hypothecated to the purchaser and it is not explained why a different form of mortgage should have been required. The District Judge, however, refers to other circumstances, which, in his opinion, point to an intention that the land should stand as a security for the amount of the consideration stated in the sale-deed. He finds that the price was inadequate, and he refers to the fact that the signature of Nachimuttu Pillai, as an attesting witness, was taken to a muchalka given to the defendant's father by a tenant who appears to have been let into possession in the month of January 1873. This latter circumstance seems to us wholly unimportant for, in any view of the case, Nachimuttu Pillai had at that date a possible right to the property.

The District Judge does not allude to the conduct of the plaintiff in abstaining for some fifteen years from reclaiming the land.

We have to say whether there is any evidence to show that in 1873 the parties intended to enter into a transaction different from that which appears on the face of the instruments to which they are parties. In our opinion, there is no such evidence, and, therefore, we must reverse the decree of the District Judge and restore that of the District Munsif.

The respondent must pay the costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

NARAYANASAMI (PLAINTIFF), APPELLANT,

v.

RAMASAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Hindu Law—Adoption made the day after the adoptive father made his will—
Adoptive son bound by the will—Inconsistent pleas.*

A Hindu wrote his will devising certain ancestral property to his wife and on the following day he registered it and took the plaintiff in adoption. The testator

* Second Appeal No. 670 of 1889.

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died shortly afterwards. It was found that the plaintiff's natural father was aware of the dispositions contained in the will and that the testator would not have adopted the plaintiff but for the consent of the natural father to those dispositions. The defendants who claimed under a gift from the wife had denied the adoption in their written statement, and on appeal raised the further plea that the adoption, if any, was conditional on the provisions of the will being acquiesced in:

Held, (1) that the defendants were not precluded from succeeding on the latter of these inconsistent pleas;

(2) that the plaintiff was not entitled to the ancestral property devised by the will to the testator's wife. *Lakshmi v. Subramanya* (I.L.R., 12 Mad., 490), followed.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 133 of 1888, confirming the decree of N. R. Narsimmayya, District Munsif of Tiruvalur, in original suit No. 422 of 1886.

Suit by the adoptive son of Muttusami Ayyar (deceased) for possession of certain land, being part of his ancestral property. Muttusami Ayyar devised the land in question to his senior wife absolutely by will on 1st March 1880; on the following day he adopted the plaintiff and died shortly afterwards. The defendants, who claimed under the devise, denied that the plaintiff had been adopted as alleged.

The District Munsif found that the adoption as alleged was proved, but held that as it appeared that Muttusami Ayyar intended his adoptive son to take only the residue of his property, the plaintiff was precluded from questioning the validity of the devise, and he accordingly dismissed the suit. His decree was affirmed on appeal by the Subordinate Judge, who held that the case was within the rule laid down in *Vinayak Narayan Jog v. Govindrav Chintaman Jog* (1).

The plaintiff preferred this second appeal.

Bhashyam Ayyangar for appellant.

Subramanya Ayyar for respondents.

SHEPHARD, J.—It was contended on behalf of the plaintiff that, apart from the theory that the plaintiff's adoption was a conditional one, the plaintiff was entitled to the property of his adoptive father, notwithstanding the latter's will executed after the adoption, and that in fact there was no evidence that the adoption was conditional. And further it was argued that the defendants having denied the adoption and not raised in the

(1) 6 Bom. H.C.R., 224.

1890.
Mar. 4.
Nov. 27.

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RAMASAMI.

written statement the contention that the adoption was conditional, should not have been allowed to raise the contention in appeal. In support of this argument we were referred to the case of *Mahomed Buksh Khan v. Hosseini Bibi*(1), where the Judicial Committee expressed the opinion that the plaintiff seeking to recover property conveyed by a deed of gift purporting to be executed by herself should not have been permitted at the same time to allege that the deed was a forgery and that the execution of it was obtained by undue influence. Mr. Bhashyam Ayyangar contended that similarly, in the present case, the defendants ought not to be allowed to plead first that there was no adoption and then that there was an adoption, but that it and the will formed one transaction, so that the adopted son could not question the will. It is doubtless true that the two pleas, the one denying the adoption, the other admitting it and qualifying its effects, are inconsistent. I am nevertheless of opinion that the defendants are not precluded from raising the latter defence. It is to be observed that the defendants are complete strangers to the transaction, being persons who have taken by gift from the widow of the plaintiff's adoptive father. Both the defences which they have raised have reference to matters not necessarily or probably within their own knowledge. Whether or not the plaintiff's natural father consented to his son being taken in adoption on the terms expressed in the will is a matter as to which even the defendants' donor, one of the widows of the adoptive father, would not necessarily have personal knowledge. There is a material distinction, therefore, between the present case and the one cited, where both charges related to matters necessarily within the plaintiff's personal knowledge. Moreover, the circumstance, that in the case before the Judicial Committee it was the plaintiff who sought to raise inconsistent issues is material, for while it is open to a plaintiff, under certain circumstances, to reserve a ground of claim, a defendant, failing to insist on a ground of defence in one action cannot afterwards raise it in another action at the suit of the same party. While I am of opinion that the Subordinate Judge was right in allowing the defendants to raise the contention, on the strength of which judgment has gone in their favour, I do not think he has sufficiently considered the facts with reference to

(1) L.R., 15 I.A., 81 [as to which case see *Jyyappa v. Ramalakshamma*, I.L.R., 13 Mad., 549].

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the principle applied in the case cited by him and in the more recent case of *Lakshmi v. Subramanya*(1). It is not sufficient that the plaintiff's father may have been aware of the dispositions made by the will, nor is the intention of the testator by any means a decisive circumstance. It has to be seen whether the plaintiff's father, while consenting to the adoption at the same time consented to the dispositions of the adoptive father's property as forming the condition on which the adoption should take place. I would direct the Subordinate Judge to try an issue similar to that directed in the case referred to, viz.:—Whether, when the plaintiff was given in adoption, his father or other person giving him in adoption was aware of the dispositions made by the late Muttusami Ayyar, and whether, but for his consent to those dispositions, Muttusami would not have adopted the plaintiff.

The finding should be recorded upon the evidence already taken and returned within six weeks 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.

BEST, J.—The present case is distinguishable from *Mahomed Buksh Khan v. Hosseini Bibi*(2) as pointed out by my learned colleague.

I agree in thinking that the issues suggested should be tried by the Subordinate Judge.

The Subordinate Judge having recorded findings on both of the above issues in the affirmative, this second appeal came on again for final hearing on Monday the 24th day of November 1890, and the case having stood over for consideration, the Court delivered the following judgment.

JUDGMENT.—The findings of the Subordinate Judge on both the issues sent for trial are in the affirmative. To these findings objections have been taken on behalf of the appellant on the ground that they are not supported by any evidence.

It is true that no witness has expressly stated either that plaintiff's natural father was aware, at the time of his giving his son in adoption, of the dispositions made under the will by the late Muttusami Ayyar or that, but for the natural father's consent to those dispositions, Muttusami Ayyar would not have adopted the

(1) I.L.R., 12 Mad., 490.

(2) L.R., 15 I.A., 81.

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plaintiff. But the circumstances, under which the will was executed and the adoption took place, afford evidence which supports the conclusions arrived at by the Subordinate Judge on both the issues.

It is proved that the plaintiff's father was sent for, while the will was being written, and arrived on the following morning at about 10 o'clock. The will was registered in the afternoon of this latter day, and, on the same afternoon, the adoption of plaintiff took place. The witnesses differ in their statements as to whether the registration of the will was effected before or after the adoption took place. But this does not seem to be of much consequence. The two events are so closely connected that there is no room for supposing that, in making the adoption, Muttusami Ayyar had any intention of superseding the will; and, as there can be no doubt that plaintiff's father knew of the will, his giving his son in adoption without any objection to the will must be taken to amount to consent on his part to the dispositions made thereby and this view is further supported by his subsequently carrying out those dispositions as deposed to by plaintiff's seventh witness, Vanji Ayyan.

The intention of Muttusami Ayyar being apparent from his conduct in executing the will simultaneously with the making of the adoption, it may fairly be inferred, in the absence of any evidence to the contrary, that he only made the adoption subject to the dispositions contained in the will. It cannot be said that there is no evidence in support of the Subordinate Judge's findings on the issues, and there is no reason for thinking that these findings are incorrect.

This second appeal fails therefore and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SIDDESWARA (DEFENDANT No. 2), APPELLANT,

v.

KRISHNA (PLAINTIFF), RESPONDENT.*

1890.
Sept. 12.
Dec. 3.

Obstruction of public street—Suit for declaration and injunction—Special damage.

A gate was erected in a public street (by the permission of the Municipal Council) which obstructed the exercise by the plaintiff and the public of their right to resort to and draw water from a well. It appeared in evidence, although it was not alleged in the plaint, that the plaintiff had to use the land between the newly-erected gate and the well when he repaired his house. The plaintiff not having obtained permission to sue under Civil Procedure Code, s. 30, sued for a declaration of his right to use the street and draw water from the well and for an injunction compelling the removal of the gate:

Held, that the suit was within the rule precluding private actions for public wrongs without special damage alleged and proved, and was accordingly not maintainable.

SECOND APPEAL against the decree of R. Sewell, Acting District Judge of Bellary, in appeal suit No. 126 of 1889, modifying the decree of C. Purushottamayya, District Munsif of Bellary, in original suit No. 160 of 1888.

The plaintiff sued the Municipal Council of Bellary and the occupant of a house at a short distance from his own, to establish his right to use a certain lane in Bellary and to draw water from a well situated in the lane and to compel the removal of a gate erected across the lane by defendant No. 2 by the permission of the Municipal Council. The plaint averred that the permission had been given, "without making any inquiry, illegally, fraudulently and through partiality," and that the Municipal Council had no authority to permit the construction of the gate, whereby "trouble and inconvenience were caused to the plaintiff, all the residents of the said street to move about in the said street according to mamool and to go to and bring water from the well." No permission to sue under Civil Procedure Code, s. 30, was obtained.

* Second Appeal No. 1480 of 1880.

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v.
KRISHNA.

The District Munsif found that the ground between the gate and the well was the private property of defendant No. 2. But he recorded a finding in the affirmative on the second issue which was framed as follows:—

“Whether the plaintiff is entitled to walk on the ground on his way to and whether he is entitled to draw water from the well inclosed by the second defendant.”

As to this issue, he said in paragraph 10 of his judgment:—
“It appears from the evidence of the plaintiff’s witnesses that for 25 or 30 years the plaintiff and many other people have been walking on the said ground in going to the said well to get water from the same. Although the well belonged to one Narayana Setti, by whom the well was sunk, yet he allowed people to draw water from the well. His successors also allowed people to draw water from the well. All people who wanted the said well-water used to have free access to the well. The second defendant cannot obstruct this prescriptive right enjoyed by the plaintiff and others for a long time. The plaintiff must walk on the ground mentioned above to go to the said well and to repair the wall, windows, &c., of his house. The second defendant cannot prevent the plaintiff from walking on the ground and from drawing water from the well. I therefore decide the second issue in the affirmative.”

The District Munsif passed a decree declaring the plaintiff’s right so found to exist, but otherwise dismissing the suit.

Both plaintiff and defendant No. 2 appealed to the District Judge, who recorded findings that the lane obstructed was a public street as far as the well and that the obstruction interfered with the exercise by those living near of their right to take water from the well. On these findings he dismissed the appeal of defendant No. 2 and modified the decree of the District Munsif by adding a direction that the gate in question be removed.

Defendant No. 2 preferred this second appeal.

Ramasami Mudaliar for appellant.

Ramachandra Rau Sahab for respondent.

MUTTUSAMI AYYAR, J.—This was a suit to remove an obstruction in a public street at Bellary. There is a main street in that town called Kamsala street and a lane runs from it north to south. Both the appellant and the respondent reside in that lane and there is a well in it near the house of the former. The

respondent and others living in the lane are found to have been using it and getting water from the well at all times, both day and night, for more than 25 years. In May 1888 the appellant obtained permission from the Municipal Council at Bellary, the first defendant in this suit, to build a wall and a gate across a portion of the lane, and accordingly erected a wall and a gate so as to obstruct the respondent and others from freely using the lane and taking water from the well. The respondent then instituted the present suit to establish his right to use the lane and to pass to and from the well for the purpose of drawing water and to compel the appellant to remove the wall and the gate recently erected by him. His case was that the lane was a public street, that the inhabitants of the town, who live in it and in the neighbouring streets, had a prescriptive right to use the lane and to draw water from the well at their pleasure, and that the obstruction caused by the appellant in violation of that right put them to considerable trouble and inconvenience. The appellant contended, on the other hand, that the well was situated in his own compound, that the lane was not a public street, that the well was his own property, and that he erected the wall and the gate on his own ground. He took also the preliminary objection that the respondent, who asserted that the lane was a public street, was not entitled to maintain this suit on his own behalf.

Three issues were recorded for decision by the Court of First Instance, and the first was whether the ground enclosed by the appellant was public property or his private property. The finding is that it belongs to the appellant. The second issue was whether the respondent was entitled to walk on the ground on his way to draw water from the well enclosed by the appellant. Both the Courts find from the evidence of user for a period of 25 or 30 years that the respondent and others have a prescriptive right to do so. The third issue was whether the respondent was entitled to maintain this suit. The District Munsif held that the respondent sought to establish his own prescriptive right and not that of any other parties and that it was not necessary for him to obtain the permission prescribed by section 30 of the Code of Civil Procedure and the Judge concurred in that opinion. In coming to a finding on the second issue, the District Munsif observed that the plaintiff (respondent) must go on the ground mentioned above to get to the said well and to repair the wall and windows, &c., of his house.

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With reference to the second issue, the District Judge remarked that he was satisfied upon the evidence that the plaintiff (respondent) had established his right by prescription to the use of the lane at all times of day and night at least as far as the plaintiff well, and that the appellant had no right to block the lane by a gate or door. He accordingly directed that the new gate or door put up by the appellant be removed and confirmed the decree of the District Munsif so far as it allowed the wall to stand on the ground that it was substituted for an old mud wall which had long stood there, and upheld the plaintiff's right to use the lane as far as the well and to take water from it at his pleasure.

The question argued before us is as to the maintainability of the suit. It is urged that the lane at least as far as the well being found to be a public street, and no special damage being alleged and proved, it is not competent to the respondent to maintain this suit on his own behalf, and in support of the contention, our attention is drawn to the decision of this Court in *Adamson v. Arumugam*(1), which followed the leading case on the subject, viz., *Satku Valad Kadir Sausare v. Ibrahim Aga Valad Mirza Aga*(2), wherein the question was fully discussed and several English decisions were cited. There is no doubt that the English rule, viz., no action can be maintained by one person against another for obstruction to a highway unless special damage is proved, is applicable in India. As observed by my learned colleague, the principle on which this rule is founded is that of protecting the person causing the obstruction against being harassed by a multiplicity of suits and of providing, at the same time, a remedy for the common injury by indictment. I only desire to add that the special damage which it is necessary to plead and prove in order to take a case out of the rule does not necessarily consist in actual pecuniary loss and in a claim to compensation for the same. It is sufficient to show that the party suing has sustained special injury beyond what is sustained by the general public. In *Dobson v. Blackmore*(3), Lord Denman, C.J., explains it as "a damage brought on the individual complaining, which might perhaps be more properly styled particular damage, or a special damage more than the rest of Her Majesty's subjects" ordinarily sustain in consequence of the obstruction, "and not that

(1) I.L.R., 9 Mad., 463. (2) I.L.R., 2 Bom., 457. (3) 9 Q.B., 991.

"sort of damage only which may or may not ensue from the acts done, but which entitles the plaintiff when it does arise to specific reparation in the form of damages." The special injury, however, should not be merely consequential nor remote as in *Ricket v. The Metropolitan Railway Company*(1); nor should it consist in mere delay in getting to a place as in *Winterbottom v. Lord Derby*(2). It should be an injury quite distinct from that of the public in general, and when such is the case, a Court of Equity will grant an injunction and such relief as may compel the wrong-doer to take active measures to discontinue the nuisance, *Satku Valad Kadir Sausare v. Ibrahim Aga Valad Mirza Aga*(3).

The substantial question then for determination is whether, upon the facts found, this case falls under the general rule or forms an exception to it. The finding that the lane obstructed is a public street as far as the well, discloses only a common injury. The finding that the obstruction in the lane obstructs also the exercise of the right of those living in the lane and near it to take water from the well suggests an injury not special to the respondent but common to him and to the general public, though the inconvenience arising from it may be felt more by those living near the well than those living at a distance. There is no averment in the plaint that by deprivation of the use of the well, the beneficial enjoyment of the respondent's house is materially interfered with or its value is lowered. There is, however, the observation of the District Munsif, in paragraph 10 of his judgment, that the plaintiff must enter and go upon the ground enclosed by the appellant to repair the wall, the windows, &c., of his house, but there is no averment in the plaint that any right of easement has been disturbed, nor is any relief claimed in respect of such easement. I thought, at first, that further inquiry was perhaps desirable to ascertain whether the obstruction, in any way, interfered with the beneficial enjoyment of the respondent's house, but, upon further consideration, I agree with my learned colleague that we might thereby vary the case disclosed by the plaint and go beyond the averments in it. The conclusion I come to is that upon the facts found by the Judge there is no special injury such as the law requires to sustain the suit. I concur, therefore, in the decree proposed by my learned colleague.

(1) L.R., 2 Eng. & Ir. App., 175. (2) L.R., 2 Ex., 316. (3) I.L.R., 2 Bom., 457.

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BEST, J.—It is contended, on behalf of the appellant, that the suit by the plaintiff is not maintainable as the right to use the plaint lane and well is, according to his own showing, a public right. In support of this contention, reference is made to the ruling of this Court in *Adamson v. Arumugam*(1), in which it was held that the rule of English law that no action can be maintained by one person against another for obstruction to a highway without proof of special damage would be enforced in India as a rule of "equity and good conscience."

A further contention is that if the plaintiff claims the right to the use of the well in question as an easement to which he is entitled as occupant of the house in which he is now living, his suit must fail by reason of his failure to prove that the well has been used by the occupants of this house for a period of twenty years.

So far as the plaintiff claims the right to use the well as occupant of his present house, his claim must be held to be invalid, as admittedly he has resided in this house only for a period of about 12 years, and there is no proof or even allegation that the right claimed is an easement attached to this particular house. On the contrary, the plaintiff makes up the prescriptive period of 20 years by adding to the period, during which he has occupied his present house, the time of which he was the occupant of a neighbouring house. He does this on the ground that the right of using the well and the lane leading to it belongs to the public of that particular neighbourhood. Such being the case, the plaintiff's suit, even though it purports to be a personal one intended to establish his individual right, is not maintainable in the absence of proof or even allegation of special damage to himself over and above the general inconvenience occasioned to the public. The rule in question is applicable to any public right, the reason of the rule being the avoidance of multiplicity of suits, for, to use the words of Lord Coke, "if any one man might have action, all men might have the like."

In my opinion, therefore, the appeal must be allowed, and both the Lower Courts' decisions being set aside, the suit dismissed, but under the circumstances, each party should be directed to bear his own costs throughout.

(1) I.L.R., 9 Mad., 463.

APPELLATE CIVIL.

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

KRISHNASAMI (DEFENDANT NO. 2), APPELLANT,

v.

KANAKASABAI (PLAINTIFF), RESPONDENT.*

1890.
Dec. 16, 19.

Jurisdiction—Civil Courts Act (Madras)—Act III of 1873, s. 12—Valuation of relief—Suits Valuation Act—Act VII of 1887, s. 11—Suit by a court purchaser for partition.

The purchaser at a court-sale of eight pangus out of an estate of 28½ pangus sold them to the plaintiff. The whole estate was worth more than Rs. 2,500, but the eight pangus sold to the plaintiff were worth less than that sum. The plaintiff brought this suit in a Subordinate Court against his vendor and certain persons, who were in possession of and claimed to be entitled by right of purchase to the whole estate, for partition and possession of his eight pangus. It was found that the plaintiff was entitled to the eight pangus purchased by him as against the defendants:

Held, (1) that the suit was within the pecuniary limits of the jurisdiction of a District Munsif;

(2) that since the disposal of the suit had not been prejudicially affected, Suits Valuation Act, s. 11, was applicable and the decree of the Subordinate Court should be confirmed.

Quære: Whether the Subordinate Court has not concurrent jurisdiction with a District Munsif in suits less than Rs. 2,500 in value.

APPEAL against the decree of K. Krishna Menon, Subordinate Judge of Tanjore, in original suit No. 6 of 1889.

Suit for partition and possession of certain land. The land in question comprised eight out of 28½ pangus, formerly the property of one Ramudu Chetti. The eight pangus were purchased by defendant No. 3 at a court-sale held in execution of a decree against Ramudu Chetti on 7th April 1877. On 17th December 1882 defendant No. 3 sold them to the plaintiff for Rs. 1,500, the "particulars of the land sold" being described as follows:—

"Out of the total number of 40 shares lying within the following four major boundaries, viz., west of the limits of the villages of Avitkottai, Mandala Kottai and Ulayakannam,

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"north of the limits of Audanu, east of the limits of the villages of Valasary and Nemmali and south of the limits of Parava-kottai; Ramudu Chetti's pangus are $28\frac{1}{2}$, out of these Arethi-karai and Samudayam appertaining to my 8 pangus come to "velis 65 and mahs 13 as mentioned in sale certificate."

The plaintiff alleged that he had been improperly prevented from taking possession, &c., by defendants Nos. 1 and 2, who, however, alleged that the purchase by defendant No. 3 was made *benami* for their undivided brother, since deceased, who had purchased the rest of the estate from Ramudu Chetti. It was also pleaded that the Subordinate Court had no jurisdiction to entertain the suit, as the value of the eight pangus was less than Rs. 2,500, although the value of the $28\frac{1}{2}$ pangus was more. The Subordinate Judge held that he had jurisdiction to try the suit and that the purchase by defendant No. 3 was not *benami*, and he passed a decree as prayed.

Defendants Nos. 1 and 2 preferred this second appeal.

Defendant No. 3 was *ex parte* throughout.

Pattabhirama Ayyar for appellant.

Subramanya Ayyar for respondent.

JUDGMENT.—As far as the facts are concerned, we expressed our opinion at the hearing that we saw no reason to differ from the finding of the Subordinate Judge. It was, however, contended that the case was one which the District Munsif had jurisdiction to try, inasmuch as the value of the share sought to be recovered, and not the value of the entire property, should be taken to be the value for the purpose of determining jurisdiction. The value of the share would admittedly bring the case within the jurisdiction of the District Munsif. Following the cases cited, viz., *Khansa Bibi v. Syed Abba*(1) and *Venkatarama v. Meera Labai*(2), we must uphold this contention, for here, as in those cases, the plaintiff and the defendant do not stand in the relation of coparceners to each other.

The question was then raised on behalf of the respondents whether, notwithstanding that the District Munsif had jurisdiction to try the case, the Subordinate Judge had not concurrent jurisdiction, the case did not come within the provisions of the Suits Valuation Act. With regard to the first of these points

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

(2) I.L.R., 13 Mad., 275.

there is authority in favour of the plaintiff, it having been held as well in Calcutta as in the North-West Provinces(1) that, although as a matter of procedure suits below a certain value ought to be instituted in the Court of the District Munsif, the Subordinate Judge still has jurisdiction to try them. In our opinion there is great force in the arguments in support of this view. But in the present case it is unnecessary for us to decide the point, because, assuming that the Subordinate Judge had no jurisdiction, we think that section 11 of the Suits Valuation Act is applicable, and we certainly do not think that the over-valuation of the suit has prejudicially affected the disposal of the suit. It is argued that the section is intended to apply only in cases where the over-valuation or under-valuation is due to a mistake in estimating the value of the subject-matter, and does not apply to cases like the present in which there has been a mistake in principle. But what the section provides for is the "over-valuation or under-valuation of a suit or appeal," and there is nothing to show that any distinction should be made according as the mistake was made in one way or another. The present case is certainly within the mischief of the Act, and we see no reason for holding that its provisions are not applicable. It is competent, therefore, to us to dispose of the appeal as if there had been no defect of jurisdiction in the Lower Court, and accordingly, having considered the case on its merits, we dismiss the appeal with costs.

(1) See *Matra Mondal v. Hari Mohun Mullick*, I.L.R., 17 Cal., 155, and *Nidhi Lal v. Mazhar Husain*, I.L.R., 7 All., 230 [Reporter's note].

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar, Mr. Justice Best, and
Mr. Justice Weir.

SUBBAYYA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KRISHNA (DEFENDANT), RESPONDENT.*

*Civil Procedure Code, ss. 539, 575—Removal of trustee—Jurisdiction of District Court
—Composition of Bench on hearing referred appeal.*

In a suit under Civil Procedure Code, s. 539, in the District Court to remove the hereditary trustee of a public trust for breach of trust the District Judge held that he had no jurisdiction to pass the decree prayed for.

The plaintiff appealed and the appeal came on before two Judges who differed in opinion. The appeal was thereupon referred under Civil Procedure Code, s. 575, and was heard by a Bench of three Judges including the Judges who first heard the appeal.

Held, by Best and Weir, JJ. (*Muttusami Ayyar*, J., dissentiente), that the District Judge had jurisdiction to remove the trustee hostilely for breach of trust in a suit under Civil Procedure Code, s. 539, *Narasimha v. Ayyan* (I.L.R., 12 Mad., 157) considered :

APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in original suit No. 3 of 1888.

The plaint set out that about 1820 certain land was conveyed to an ancestor of the plaintiffs and the defendant by the then Maharajah of Tanjore on trust to apply the income "for the charitable purpose of maintaining a permanent watershed on the road to Rameswaram;" that the charity was conducted by the original grantee and afterwards by the father (since deceased) of the plaintiff No. 2 and the defendant; that the management of the charity, subject to the control of the other members of the family, passed to the defendant, and that he had for the last seventeen years neglected to maintain the watershed in question and misappropriated the income of the land to his own use and had failed to keep and render due accounts thereof. The plaint further stated

* Appeal No. 70 of 1889.

In *Paruvagal Krishnasami Mudali v. Balakrishna Naidu* (Original Side, Appeal No. 4 of 1891), heard by the Chief Justice and Parker, J., on 7th April 1891, the decision of the majority of the Judges in this Appeal was approved and followed.

that the suit had been sanctioned by the Collector of Tanjore under the terms of section 539 of the Civil Procedure Code, and the prayer of the plaint was "that the Court may be pleased to pass a decree removing the defendant from the management of the trust, appointing other proper trustee or trustees, and granting such further or other reliefs as the nature of the case may require."

The defendant denied the breach of trust, but took no objection to the jurisdiction of the Court to grant the relief sought. But at the final hearing an issue was framed by the District Judge, which was as follows :—

"Whether the plaintiffs are entitled to sue under section 539 of the Code of Civil Procedure." Upon this issue the District Judge held, with reference to the decision in *Narasimha v. Ayyan*(1), that he had no jurisdiction under section 539 of the Civil Procedure Code to remove defendant from the trust and dismissed the suit.

The plaintiffs preferred this appeal on the following grounds :

- i. The Lower Court erred in holding that it had no jurisdiction to hear the suit.
- ii. The Lower Court erred in dismissing the suit on a ground not taken by the defendant in his written statement.
- iii. Even granting that the Lower Court had no jurisdiction to hear the suit, it ought not to have dismissed the suit, but should have returned it for presentation to the proper Court.

Pattabhirama Ayyar for appellants.

Rama Rau for respondent.

The appeal came on for hearing on 28th March 1890 before Muttusami Ayyar and Best, JJ., and their Lordships delivered the following judgments :

MUTTUSAMI AYYAR, J.—The appellants are parties interested in the due administration of an endowed public charity in Tanjore, and the respondent is its present trustee by right of inheritance. The former charged the latter with negligence and misconduct and instituted this suit in the District Court of Tanjore to remove him from the office of trustee and to have another appointed in

(1) I.L.R., 12 Mad., 157.

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KRISHNA. his place. The Judge held that he had no jurisdiction to entertain the suit under section 539 of the Code of Civil Procedure, and, relying on the decision in *Narasimha v. Ayyan*(1), dismissed the claim with costs.

The contention in appeal is that the Judge has jurisdiction, and if he has no jurisdiction, he ought to have returned the plaint to be presented to a Court of competent jurisdiction. It is urged that since *Narasimha v. Ayyan*(1) was decided, section 539 has been amended, and that, as pointed out in *Chimpa v. Pattabhirama*(2), the procedure under Sir Samuel Romilly's Act (52 Geo. III, Cap. 101) was by petition and summary order, whereas a regular suit is prescribed by section 539 of the Code of Civil Procedure.

The decision in *Narasimha v. Ayyan*(1) rests on two grounds, viz., that the plaintiff in that case had no direct interest in the trust, and that it was not clear that a suit to remove a trustee hostilely could be brought under section 539. As Act VII of 1888 amended that section by substituting the words "two or more persons having an interest in the trust" for the words "two or more persons having a direct interest in the trust," the question in this appeal is whether a suit to remove a hereditary trustee for misconduct will lie under section 539, though the trustee denies the misconduct imputed to him and is willing to act as trustee. It is not denied that under Sir Samuel Romilly's Act a trustee could not be removed hostilely, but our attention is drawn to the Trustee Act, 13 and 14 Vic., Cap. 60, s. 50. Even under this statute, the Courts refused to remove a trustee by an order and otherwise than by a suit—(see the cases cited in Lewin on Trusts, 8th edition, p. 1028). A reference, therefore, to the English Statutes does not carry the case further than that section 539 is taken from them, but that a suit has to be instituted under it whilst the procedure prescribed by the former was summary. The decision in *Chimpa v. Pattabhirama*(2) simply pointed out this distinction, and the question has, therefore, to be determined with reference to the language of section 539 and the construction suggested by it. It is to be observed that the dismissal or removal of a trustee is not specified among the descriptions of relief to be awarded under

(1) I.L.R., 12 Mad., 157.

(2) Appeal No. 199 of 1887 not reported.

section 539, and the proviso for such further relief as the nature of the case may require presupposes, as explained in *Narasimha v. Ayyan*(1) some matter incidental to the relief expressly authorized to be granted. This appears to warrant the construction placed upon it that it was intended not to include cases in which a hereditary trustee has to be hostilely removed, but to limit it to the classes of cases dealt with by orders under the English Statutes. The decision of the Judge is right. As regards, however, the contention that the plaint ought to have been returned for want of jurisdiction, I think it is well founded, as no other question has been decided in this case.

I would, therefore, modify the decree by ordering the plaint to be returned and confirm it in other respects.

BEST, J.—The District Judge has dismissed the suit on the ground that the plaintiffs are not entitled to sue under section 539 of the Code of Civil Procedure, quoting, as his authority, the decision of this Court in *Narasimha v. Ayyan*(1).

The suit was held in that case to be non-maintainable, because "the plaintiffs had not a direct interest in the trust within the terms of section 539 of the Civil Procedure Code." That section has, however, been amended by Act VII of 1888 (section 14) by removal of the word "direct," and the section, as it now stands, is applicable to suits in which persons have "an interest in the trust."

The question remains whether section 539 is applicable to a suit to remove a trustee. This is not one of the reliefs specifically mentioned in the section, but the last clause of the section provides for the "granting of such further or other relief as the nature of the case may require." In the case above referred to, the opinion is expressed that such "grounds of relief would be some matter consequent on the relief which the section enables to be granted." The section says "further or other relief," and if a new trustee can be appointed under the section in place of an existing trustee, the removal of the latter would be a "further or other relief required by the nature of the case." This is, I imagine, the reason why the removal of a trustee is not specifically mentioned in section 539.

(1) I.L.R., 12 Mad., 157.

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It does not seem to me that the decisions under Sir Samuel Romilly's Act can be of use in deciding the question.

As pointed out by the learned Judges who decided *Narasimha v. Ayyan*(1) its object was to "enable trusts of certain classes to be carried out by summary procedure and not by suit;" whereas section 539 of the Code of Civil Procedure contemplates a suit, not merely a petition. Such being the case, I do not see why the construction of the section should be limited so as to exclude cases in which there is "hostility." The opening words of section 539—"in case of any alleged breach of any express or constructive trust"—seem to imply the existence of a trustee who is alleged to have been guilty of such breach; and the power subsequently given by the same section to appoint new trustees must imply, I think, also power in the Court to remove the old trustees (or trustee), if such removal is found to be necessary and justifiable as a result of the suit.

I would, therefore, set aside the Lower Court's decree and remand the suit for replacement on the file and disposal according to law, and direct that the costs hitherto incurred be costs in the suit to be provided for in the decree to be passed by the District Judge.

In consequence of the difference of opinion between their Lordships the appeal was referred to Mr. Justice Weir under the provisions of section 575 of the Civil Procedure Code on the 11th October 1890.

When the appeal came on for hearing before Mr. Justice Weir on 23rd October 1890, *Pattabhirama Ayyar* for the appellant took the objection that it was not competent to Mr. Justice Weir to hear the appeal alone and sitting apart from the two Judges who originally heard the appeal, and relied upon the Full Bench decision of the Allahabad High Court in *Rohilkhand Kumaon Bank (Limited) v. Row*(2).

Rama Rau for respondent supported the contention that the appeal should be heard by the three Judges.

WEIR, J.—Appeal suit No. 70 of 1889 was referred by the Chief Justice to me by order dated 11th October 1890.

(1) I.L.R., 12 Mad., 157.

(2) I.L.R., 6 All., 468.

On this case being called on, objection is taken by the Pleaders of both parties that it is not competent to a single Judge sitting by himself and apart from the Judges who have first heard the appeal to hear an appeal referred under section 575, Civil Procedure Code. The language of section 575, Civil Procedure Code, itself, and the construction put upon that section by a Full Bench of the Allahabad High Court in *Rohilkhand Kumaon Bank (Limited) v. Row*(1) are relied on in support of this argument.

The language of the section does not appear to me to imply that the appeal must necessarily be heard again at the reference by the two Judges who first heard it and differed; but there is authority in support of the opposite view, and as the Pleaders of both parties concur in supporting the objection, it would be inadvisable on my part to press them to proceed with their argument.

The question raised is one of great importance and the narrow construction placed on the scope of Civil Procedure Code, section 539, by the decision in *Narasimha v. Ayyan*(2) is likely, it is said, to affect prejudicially numerous endowments in the mofussil.

On this ground the Pleaders suggest that the case is one which it may be desirable to refer to a Full Bench. The great importance of the question involved, I think, justifies the suggestion. On the other hand, it may be considered that there is no such conflict of opinion as renders a reference to a Full Bench necessary. Excepting in the instance of Mr. Justice Best's opinion now recorded there has been no dissent from the view stated in *Narasimha v. Ayyan*(2). I myself followed the latter decision in a suit tried on the Original Side in September last—*Krishnasami v. Balakrishna*(3), but as a single Judge I of course considered myself bound by the reported decision of a Bench of two Judges. The question was also, I see, raised in an appeal before the Chief Justice and Parker, J., in *Chimpa v. Pattabirama*(4), but was not gone into as the objection had not been stated in the grounds of appeal. With these remarks I refer the objection for the orders of the Chief Justice.

[The appeal came on again for hearing before *Muttusami Ayyar, Best and Weir, JJ.*, on 27th October 1890.]

(1) I.L.R., 6 All., 468.

(2) I.L.R., 12 Mad., 157.

(3) Civil suit No. 167 of 1889, not reported. (4) Appeal No. 199 of 1887 not reported.

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Pattabhirama Ayyar for appellants.

The District Judge erred in holding that the decision in *Narasimha v. Ayyan*(1) is authority for the contention that the suit for removal of a trustee does not lie under section 539 of the Civil Procedure Code. The only point decided in it was that the plaintiffs had not a direct interest within the terms of section 539, and the Legislature has now substituted the words "having an interest" for the words "having a direct interest." See section 44 of Act VII of 1888. The other point as to the removal of a trustee was no doubt considered, but there is no opinion expressed about it. It is not even an *obiter dictum*; it is only a *quære*. Besides the observations of the learned Judges are not strictly accurate. The provisions of Romilly's Act were confused with those of another Act, the Trustee Act (13 and 14 Vic., Cap. 60). The appointment of new trustees is referred to only in section 32 of the latter Act.

This question as to the removal of trustees was also considered in *Chimpa v. Pattabhirama*(2), which was heard before the Chief Justice and Mr. Justice Parker, and although it was unnecessary to decide the point, their Lordships pointed out that the procedure described by Romilly's Act was by petition, whereas a suit was permitted to be brought under section 539. There is also a decision by Weir, J., in *Krishnasami v. Balakrishna*(3), but his Lordship there considered himself bound as a single Judge by the decision in *Narasimha v. Ayyan*(1). Then as to the construction of section 539, it is true that it contains no special clause as to the removal of a trustee, but the removal of a trustee is only auxiliary to the real relief, *i.e.*, the proper administration of the trust. See Story's Equity Jurisprudence, §§ 1287 to 1289 and the case of *Letterstedt v. Broers*(4). The fact that the removal of the trustee is only an auxiliary relief accounts for its not being specially mentioned in section 539. The power to appoint new trustees under clause (a) must be held to include the power to remove, if necessary, the old trustee, who has committed a breach of trust. Even apart from clause (a) the Court has power to grant such further or other relief as the nature of the case may require, and in certain instances of breach of trust, the nature of the case may

(1) I.L.R., 12 Mad., 157.

(2) Appeal No. 199 of 1887 not reported.

(3) Civil suit No. 167 of 1889 not reported. (4) L.R., 9 App. Ca., 371.

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require the removal of the trustee. See also illustration (e) to section 60 of the Indian Trusts Act.

The argument advanced on the other side would have weight if the section could be considered as contemplating only a summary proceeding and not a regular suit. But the section is the sole section in chapter XL of the Code, the heading of which is "suits relating to public charities." The side note to the section refers to *suits*. The section clearly refers to suits and to decrees passed on such suits. The distinction between petitions and suits and between orders and decrees is well recognised by the Legislature. See the Minors Act and the Succession Certificate Act. Similarly the distinction is recognised in the Trusts Act, see sections 34 and 74.

Section 539 was, for the first time, enacted in Act X of 1877. Then it was modified by Act XII of 1879, Act XIV of 1882, and Act VII of 1888, and the changes that have been from time to time introduced have extended the scope and usefulness of the section and show that the section ought to be liberally construed.

In Romilly's Act 52, Geo. III, cap. 101, the procedure was summary—not by suit, but by petition. The leading case upon the construction of this Act is *Corporation of Ludlow v. Greenhouse*(1)—(see especially pages 49, 52, 66, 81 and 88 of the report); see also *re Phillipott's Charity*(2), (especially page 389 of the report) and *re West Retford Church Lands*(3), (especially page 111 of the report) and in *re Hall's Charity*(4), and the footnote in which all the cases are summarised. The Indian Legislature knowing the difficulties which arose in working Romilly's Act have carefully avoided them in framing section 539, and the procedure under the Trustee Act of 1850 (13 and 14 Vic., Cap. 60), is also of a summary character, see sections 40–43. Section 32 of the Trustee Act of 1850 was considered in *re Blanchard*(5). See also *re Hodson's Settlement*(6), (especially page 121 of the report) and *re Hadley*(7), (especially page 70 of the report).

The language of section 539 is thus materially different from the language used in Romilly's Act and in the Trustee Act of 1850, though the Legislature has, in framing the section, kept certain provisions of the two enactments in view.

(1) 1 Bligh. N.S., p. 17.

(2) 8 Simon, 381.

(3) 10 Simon, 101.

(4) 14 Beav., 118.

(5) 3 De G., F. & J., 131.

(6) 9 Hare, 118.

(7) 5 De G. & Sm., 97.

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The construction of section 539, contended for by the other side, will cause considerable difficulty. If the District Court is not competent to remove a trustee under section 539, the suit to remove a trustee will have to be instituted elsewhere, and after the trustee is removed, a suit to appoint a new trustee will have to be instituted in the District Court—*vide* clause (a) of section 539. In this connection the provisions of section 43 of the Code have also to be kept in view. If a suit is brought in the Munsif's Court to remove a trustee, the District Court in appeal will have power to pass such decree as it thinks fit; but, according to the construction contended for on the other side, it will have no power to entertain the suit if it is instituted in the first instance in the District Court itself.

Rama Rau for respondent.

The removal of a trustee is not specially mentioned in section 539. The words at the ending of the section "further or other relief" ought not to be construed widely. The section finds its place in Chapter XL, which is one of the four chapters in Part V of the Civil Procedure Code treating of special proceedings. Though the special proceedings are termed suits, and the decisions arrived at in them are called decrees, yet the Legislature did not contemplate such a lengthy and exhaustive enquiry as takes place in an ordinary contentious proceeding. Section 539 contemplates only a summary proceeding, and that is the reason why the removal of a trustee hostilely is not mentioned. To remove the trustee hostilely a regular suit must be instituted.

The power to entertain suits to remove trustees always existed in the Civil Courts in the mofussil—see *Ponnambala Mudaliyar v. Varaguna Rama Pandia Chinnatambiar*(1). Section 539 is enacted to confer an additional remedy to suitors in cases falling within its scope. See also the observations of Whitley Stokes in page 429 of Volume II of the Anglo-Indian Codes. Under section 14 of Act XX of 1863 the District Court has power to remove trustees, and the omission of the relief in section 539 is significant.

Pattabhirama Ayyar in reply.

If the object of the Legislature in enacting section 539 was to provide for the granting of comparatively easy and unim-

(1) 7 M.H.C.R., 117.

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portant reliefs, why should the section require, as an essential preliminary, the institution of the suit by at least two persons interested in the trust and the sanction of the Advocate-General to the institution of the suit—see *Panchcourie Mull v. Chumroolall*(1). It is true that removal of a trustee is mentioned in section 14 of Act XX of 1863, but if it is held that the District Court has no power to remove a trustee under section 539, this anomaly will result that the District Court has jurisdiction to remove trustees of religious endowments, but not of charitable endowments.

MUTTUSAMI AYYAR, J.—This was a suit relating to a public charity called Vastad Chavadi near Tanjore. The appellants, alleging that the hereditary trustee for the time being was bound to manage the charity subject to their control, charged the respondent with breach of trust and misappropriation of trust property and prayed for his removal from the management of the trust and the appointment of other proper trustee or trustees, and for such further or other reliefs as the nature of the case might require. The respondent denied the charge and insisted on his right to continue in management of the charity. The suit was brought in the District Court of Tanjore under section 539; but the Judge, relying on the decision of this Court in *Narasimha v. Ayyan*(2) held that he had no jurisdiction to entertain the suit under that section. Hence this appeal.

The appeal was first heard by Mr. Justice Best and myself. I considered that the construction of section 539 suggested in *Narasimha v. Ayyan*(2) was correct, but my learned colleague held that the District Court had jurisdiction. The appeal was, therefore, referred to a third Judge, Mr. Justice Weir, and argued again before him and ourselves. The point for determination is whether a suit can be maintained under section 539 to dismiss a trustee for misconduct hostilely, that is to say, when he denies the misconduct imputed to him and claims to continue in the office.

Narasimha v. Ayyan(2) was heard by Mr. Justice Kernan and Mr. Justice Wilkinson, and the learned Judges rested their decision therein on two grounds. The first was that the plaintiffs there had not a direct interest in the trust within the terms of

(1) I.L.R., 3 Cal., 563.

(2) I.L.R., 12 Mad., 157.

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section 539 as it then stood. As a second reason they observed as follows :—

“Section 539, in most parts of it, follows the provisions of Romilly’s Act which enabled trusts of certain classes to be carried out by summary procedure and not by suit ; among the objects of the Act, one was to appoint a new trustee, and it was held under the Act that a trustee could not be removed hostilely. No doubt section 539 provides that a suit may be brought to appoint the trustee and for other purposes, and it contains a proviso that further relief may be given according as the nature of the case required. Such grounds of relief would be some matter consequent on the relief which the section enables to be granted.”

Except *Narasimha v. Ayyan*(1), we are referred to no other decision in which the question was considered and determined. Nor was its determination necessary even in *Narasimha v. Ayyan*(1), inasmuch as the absence of a direct interest in the trust was of itself sufficient for the disposal of that case. In this sense the opinion expressed in *Narasimha v. Ayyan*(1) is only an *obiter dictum*, although it was followed by the District Judge in this case and also in another case heard on the original side by a single Judge. I must add that there are also several cases in which the question was not raised, and which were decided on the assumption that the District Court had jurisdiction. There was, indeed, an attempt made to raise the question for determination in *Chimpa v. Pattabhirama*(2) before another Divisional Bench, but the learned Judges who heard that case observed that the proceeding prescribed by Romilly’s Act was by petition, whereas, a suit was permitted to be brought by section 539, and with that observation they declined to consider the question for the reason that it was not one of the grounds of appeal. In this state of authority, I think that the question is *res integra*, and, as the District Judge relied in support of his judgment on the *dictum* in *Narasimha v. Ayyan*(1), it becomes necessary to decide whether we should adopt or overrule it.

This case has been argued twice, and, on this occasion, with considerable learning and ability by the Pleaders on both sides. After carefully reconsidering the question, I do not see my way to alter the opinion which I expressed at the former hearing.

(1) I.L.R., 12 Mad., 157.

(2) Appeal No. 199 of 1887 not reported.

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Among the reliefs specified in section 539, the removal of the existing trustee for misconduct and the relief which may be granted against him on such removal are not mentioned. The omission appears to me to be intentional when regard is had to the language of section 14 of Act XX of 1863 and to the fact, that it is the relief usually asked in an ordinary suit. If it was intended that whatever relief a Court of Equity might grant upon information might be granted under section 539, there was no necessity for specifying only some reliefs or for any specification at all. According to the recognized rules of construction, the general words at the end of the section, viz., “granting such further or other relief as the nature of the case may require” must be taken, as observed in *Narasimha v. Ayyan*(1) to refer to what precedes them and to some matter consequent on the relief which the section authorizes to be granted. Again, the Civil Courts in the Mofussil were at liberty to entertain suits for removing a trustee from the management of charitable trusts on the ground of malversation from before the date of Regulation VII of 1817 as pointed out by this Court in *Ponnambalu Mudaliyar v. Varaguna Rama Pandia Chinna-tambiar*(2). Thus, as Courts of Equity, they always exercised jurisdiction in an ordinary suit to remove old trustees for misconduct and appoint new ones in cases requiring such a remedy on the principle mentioned in *Letterstedt v. Broers*(3). As regards such suit, no limitation is prescribed in Part I of the Civil Procedure Code as in Part V, s. 539, either to the effect that two or more persons ought to be plaintiffs, or that the sanction of the Advocate-General is necessary. It is not clear then why the pre-existing remedy by an ordinary suit is restricted by section 539 if it includes the hostile removal of existing trustees. Again, District Munsifs and Subordinate Judges have always had jurisdiction to entertain such suits. Why is their jurisdiction taken away when the same relief is claimed under section 539, and why is a concurrent jurisdiction given to the High Court so as to authorize the institution of a suit before that tribunal for the dismissal of the trustee of a petty village temple in remote parts of the Presidency? Moreover, section 539 is inserted in the Civil Procedure Code, Part V, among what is designated, in contradistinction to ordinary suits, “Special Proceedings” and as one of the

(1) I.L.R., 12 Mad. 157. (2) 7 M.H.C.R., 117. (3) L.R., 9 App. Ca., 371.

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four kinds of special proceedings. Its position in the Code and its designation as a special proceeding appear to me to be significant when I consider the nature of the special proceedings which are grouped together in Part V. The first special proceeding is a reference to arbitration, Chapter XXXVII, and its special character consists in excluding lengthy investigation by the Court of intricate questions of fact raised in a contentious suit and in adopting the award of arbitrators subject to certain conditions as the judgment of the Court. The second is the special proceeding on agreement of parties, and its special character lies also in excluding such protracted investigation as to facts as is often necessary in an ordinary suit and accepting the statements contained in the agreement as facts which the parties concerned are not at liberty to deny (see section 530). It must be noted here that for purposes of future litigation, the proceeding is regarded as a suit and the decree passed on the award or the agreement is declared to have the same force as a decree passed in an ordinary suit. The third special proceeding is what is called the summary procedure on Negotiable Instruments.

Here, again, the special character consists in avoiding an intricate investigation of disputed facts indispensable in an ordinary suit by declaring it incumbent on the defendant to obtain special leave to appear and defend and empowering the Court to grant such leave subject to certain conditions. It will be observed that this proceeding is termed a summary suit, and yet the decree which the plaintiff obtains when leave to defend is refused has the force of a decree in a regular suit unless it is set aside in the mode prescribed by section 534, Chapter XXXIX. It is also to be observed that the exercise of the power to refuse leave, which, if abused, would amount to a denial of justice, is constituted by section 538 into a case of special jurisdiction vesting in the particular Courts mentioned therein, and in such other Court having ordinary Civil Jurisdiction as the Local Government may specially select.

What then is the peculiar characteristic of the so-called Special Proceedings in general? Why are they still termed suits, and why are decisions arrived at in such proceedings termed decrees though in some cases the procedure is expressly stated by the Legislature to be summary?

As already explained, the special character consists in avoid-

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ing the protracted investigation necessary in a contentious ordinary suit either by authorizing a reference to arbitration or insisting on an agreement or constituting a special leave to defend a condition subject to which the defendant is to be permitted to defend, and making the power of granting or withholding of such leave, a matter of special jurisdiction to be exercised by particular Courts. The result is that in the cases to which they apply the decision is final as in an ordinary suit with this difference that a lengthy and expensive inquiry inevitable in contentious proceedings, and the delay consequent on the institution of an appeal and of a second appeal are avoided. This appears to me to be the scheme of the Code so far as it relates to Special Proceedings.

The insertion of section 539 among such proceedings and as of the fourth kind indicates a unity of design in regard to them all and the avoidance of a protracted inquiry consequent on an ordinary hostile suit as their common special feature.

Reading the section, as I think we ought to do, with reference to the nature of the special proceedings which precede it, the omission to include the removal of the existing trustee hostilely and the relief to be had against him on such removal among the reliefs specified in that section, appears to me to be significant as well as intentional, and neither the designating of the special proceeding as a suit, nor of the decision therein as a decree seems to make a difference or to imply plenary jurisdiction.

This view, I think, receives further confirmation when the law regarding public charities as administered in India prior to 1877 is considered together with the modification made by the introduction of section 539 into Act X of 1877. That the removal of a trustee from the management of charitable trusts on the ground of malversation was a remedy always available in the Mofussil Courts as Courts of Equity is clear, as already observed, from the decision in *Ponnambala Mudaliyar v. Varaguna Rama Pandia Chinnatambiar*(1). But I am aware of no case nor was any cited at the hearing in which the equitable doctrine of *cy-près* was applied in relation to public charities in the Mofussil and a scheme framed on such application. There was also a doubt as to what ought to be done with the accumulations called the pagoda surplus

(1) 7 M.H.C.R., 117.

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funds and similar accumulations from charitable funds. That branch of equitable jurisdiction was, however, exercised in the Presidency towns, by the late Supreme Courts under the charter and as a notable instance, the establishment of the Patchayappa's High School at Madras on a firm basis is the outcome of the scheme framed in 1845 under the direction of the late Supreme Court based on the *cy-près* principle. When the High Courts in the Presidency towns displaced the late Supreme Courts, the former inherited this branch of equitable jurisdiction from the latter. I may here refer to the *Mayor of Lyons v. Advocate-General of Bengal*(1) and to *Longbottom v. Satoor*(2) as instances in which the High Courts of Calcutta and Madras exercised such equitable jurisdiction on petition. The non-existence in the Provinces of this special equitable jurisdiction in regard to public charities presumed from its non-exercise by the Provincial Courts or from the doubt felt regarding it, is the defect in the prior law which section 539 was probably framed to remedy. I may here allude to the remarks of Mr. Whitley Stokes in his edition of the Anglo-Indian Codes, Vol. II, p. 431 :—"The Supreme Courts in the Presidency "Towns" says, the learned editor, "had an equitable jurisdiction "over charities. This jurisdiction the present High Courts inherited, but the Provincial Courts had no such jurisdiction." Hence it is that the section gives this special jurisdiction to the High Court which it always possessed concurrently with the District Court and limits it to the District Courts in the Provinces. Hence it is that it does not prohibit private suits for dismissal of trustees for misconduct without the consent of the Advocate-General because such suits were ordinarily entertained by the Provincial Courts and not touched by the creation of a special jurisdiction as to certain other reliefs or classes of trusts regarding which they exercised no jurisdiction. As it was an additional branch of equitable jurisdiction that the section conferred it was safeguarded by requiring that two or more beneficiaries should join in the suit and by prescribing as a condition precedent the consent of the Advocate-General in the Presidency town and that of the Collector or other officer outside the Presidency town. As a reason for limiting the jurisdiction in the Provinces to the District Courts, I may say that this special equity

(1) I.L.R., 1 Cal., 303.

(2) 1 M.H.C.R., 429.

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was administered in the Presidency towns by Her Majesty's Judges and in England by the Lord Chancellor or by the Master of the Rolls. I may also refer to the cases already mentioned as instances of the exercise of this branch of equitable jurisdiction by the High Courts at Calcutta and Madras, and state that a reference to them would show that very difficult questions regarding construction of Wills and regarding the nature of the *cy-près* doctrine, and the extent of its application in particular cases might arise as between rival charities on the one hand and as between them and the residuary legatee on the other. I may here add that the practice of leaving a vacancy in the office of trustee open for years was a defect common in this country, as well in the management of public as of temple charities, and the section was framed also to provide an effective remedy in this respect, as was done by Act XX of 1863, s. 5, in regard to Hindu temples.

Furthermore, the source from which a selection was made of the reliefs to be granted in the exercise of this branch of equitable jurisdiction corroborates the view expressed as to the probable intention of the Legislature.

Romilly's Act (52 Geo. III., Cap. 101), declared that "in every case of a breach of any trust created for charitable purposes or whenever the direction or order of a Court of Equity is deemed necessary for the administration of any trust for charitable purposes, it should be lawful for any two or more persons to present a petition to the Lord Chancellor, Master of the Rolls or the Court of Exchequer praying for such relief as the nature of the case might require." It was held with reference to these general words as to the nature of the relief that the Court might settle or alter a scheme of the charities or appoint new trustees or apportion the charities among the districts where parishes have been divided or direct a sale of the charity property in a proper case, and, in short, exercise as between the trustees and the beneficiaries a discretion in putting in operation the power conferred by the Act with benefit to the charity. It was also held that when the question to be discussed was whether a trustee ought to be adversely dismissed for malversation as he might be upon information, the Act did not apply. (See Lewin on Trusts, 8th edition, pp. 928, 929, and the cases therein cited.) When the Act was put into operation, two important defects were often pointed out by the

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eminent Judges who worked it. One of them was the difficulty felt in putting a construction upon the Act by reason of the vague language used in describing the relief to be granted and the other was the prescribed procedure by petition which only tended to pave the way for fresh litigation, whilst the statute was avowedly framed to ensure speedy and cheap justice to beneficiaries of public charities.

Now compare and contrast section 539 with the English Statute. The cases premised are the same with this difference, viz., that constructive trusts are included in section 539, whilst they were held not to be included in the English Statute. Two or more persons having an interest are required by section 539 to institute the suit as was the case under Romilly's Act with the difference that the words "having an interest" are taken not from the Act itself, but from a case decided under it, the *Corporation of Ludlow v. Greenhouse* decided in 1827(1). The sanction of the Advocate-General or other officer is prescribed by analogy to the provision in Romilly's Act that every petition presented under it must be allowed by Her Majesty's Attorney or Solicitor-General. The theory as stated by the Lord Chancellor is this. The Sovereign as *parens patriæ* interferes through his representative to protect his subjects who have an interest in the trust, and who from their situation cannot themselves interfere in cases of public charities and sanctions the institution of proceedings by such beneficiaries.

Passing on to the reliefs, the English Act directed such relief as the nature of the case might require; and the interpretation placed on those words in *re Manchester New College*(2) decided in 1853 was that the Court had a discretion to put the powers conferred by the Act into motion with benefit to the charity as between the trustees and the beneficiaries, and that decided cases cut down the Act to questions arising between them and precluded interference where third parties were concerned. The plan adopted by the Indian Legislature consisted first in omitting the removal of a trustee adversely on the ground of malversation as a relief available under section 539. The English Statute did not authorize it because the procedure was by petition and summary, and because a lengthy inquiry in a hostile suit was incompatible with such procedure

(1) 1 Bligh, N.S., 91.

(2) 16 Beav., 610.

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and section 539 was not intended to include it because such inquiry would impede the course of speedy justice which the section was framed to secure. The next step consisted in adopting with a slight addition or modification the reliefs granted under Romilly's Act in specific cases, such as, *re The Royston Free Grammar School*(1) decided in 1839 (settling a scheme), *Biguold v. Springfield*(2) decided in 1837 (appointing a new trustee) and *re West Ham Charities*(3) decided in 1848 declaring the mode in which the charity is to be apportioned, and placing the general words at the end so as to render them only auxiliary to what precedes them, and thereby adopt the result of cases decided under the English Statute in lieu of the description of relief contained in the statute itself. I do not see how the general words at the end of section 539 "further or other relief" are, even when considered without reference to the rules of construction, wider than the discretion which the Court had under Romilly's Act to put the powers created by the Act into motion with benefit to the charity between the trustee and beneficiaries. Almost all the reliefs are taken either from Romilly's Act, (52 Geo. III., Cap. 101) or from the cases decided under it in which it was held a trustee could not be removed hostilely. The Trustee Act of 1850 (13 and 14 Vic., Cap. 60) formulated, *inter alia*, into rules of law the principles of several classes of cases decided under Romilly's Act. Hence clause (a), it may also be said, was taken from section 32 of the Trustee Act of 1850, clause (b) was borrowed from section 34, clause (c) was taken from *re Hall's Charity*(4) and the general words from Romilly's Act. The specification of particular reliefs in section 539 is substantially a mere classification of the reliefs granted under Romilly's Act and the posting of the general words at the end of the section was designed to subordinate their effect to the ordinary rule of construction and thereby to avoid the difficulty in the construction pointed out by the Lord Chancellor in *re Manchester New College*(5). The conclusion I come to is that no suit to remove a trustee for misconduct hostilely lies or was intended to lie under section 539 and that while it creates a special and new jurisdiction in respect of the reliefs mentioned therein, it leaves unimpaired or unlimited in any way in the interest of the

(1) 2 Beav., 228.

(2) 7 Clark & F., 71.

(3) 2 De G. & Sm., 218.

(4) 14 Beav., 115.

(5) 16 Beav., 610.

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charities the ordinary equitable jurisdiction exercised in an ordinary suit for the purpose of removing a trustee for misconduct and obtaining such relief against him as is consequent on such removal. The jurisdiction created by Romilly's Act was called in England when it came into operation the "new jurisdiction" by reason of the several reliefs expeditiously granted under it, but the mischief of it was that the procedure being by petition, further litigation was not avoided. The Indian Legislature so framed section 539 as to retain the benefit and to eliminate the mischief by excluding from its operation ordinary suits for the hostile removal of trustees as under the English Statute and by substituting for the procedure by petition a procedure by a special suit and thereby giving finality to the decision.

I now proceed to consider the objections urged by the learned Pleader for the appellants in support of this appeal. The first objection is that under Romilly's Act the proceedings commenced with a petition, whereas, section 539 permits a suit though it is called a special proceeding. The remarks already made in regard to special proceedings mentioned in Part V and their common special character and as to how they differ from ordinary suits contain a sufficient answer to this objection. It may well be that what was a proceeding by petition was altered into a proceeding by a special suit to obviate the mischief felt in England in working Romilly's Act. The jurisdiction may still be new as under the English Act, because it introduced new reliefs for the benefit of public charities which were not granted before in the mofussil.

It is next urged that the jurisdiction conferred by Romilly's Act and the Statute of 1850 was exercised in a summary way by Courts which had plenary jurisdiction upon information and that the jurisdiction conferred by section 539 ought to be taken to be plenary because a suit (corresponding to information) was thereby permitted. The answer is that section 539 was framed to give the District Courts a special branch of equitable jurisdiction which it was considered they never exercised before. The state of things in England when Romilly's Act was passed and in the provinces when this branch of jurisdiction was created was not similar; hence a distinction is made by the Indian Legislature between an ordinary suit and special proceedings by investing the latter with a special character limiting their scope. I am therefore unable to attach weight to this objection either.

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It is next argued that the removal of a trustee hostilely is not specified in section 539, because it is in itself no positive benefit but only a step towards claiming the other relief specified in that section. It must be observed that when section 539 was framed, the Legislature must have been aware that the dismissal of a trustee for misconduct and the appointment of another in his place was a remedy usually claimed in an ordinary suit and that they would have mentioned it if they had intended to make the jurisdiction plenary as was done in Act XX of 1863. The learned Pleader for the appellants overlooks the fact that as consequent upon such dismissal, a positive benefit on which he lays so much stress may also be claimed such as damages or the transfer of some specific property in the trustee's possession on the ground that it was acquired from misuse of the funds of the charity. (See also section 14 of Act XX of 1863.)

Another objection urged is that the words premised by section 539, "in case of any alleged breach of trust" and "appointing new trustees under the trust" imply when considered as cause and effect a power to dismiss a trustee *hostilely*. There may, however, be cases in which there may be a breach of trust and the beneficiary may not deem it necessary to ask for the removal of the trustee. The Judicial Committee also say in *Letterstedt v. Broers*(1), after pointing out that it is the duty of Courts of Equity to see that the trusts are properly executed, that "this duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases."

Another objection is that the three expressions (1) "in case of an alleged breach of trust express or constructive," (2) "appointing new trustees under the trust," and (3) "such further or other relief as the nature of the case may require" imply and include the hostile removal of the existing trustee for misconduct.

As regards the last expression, the general effect claimed for it cannot be recognized under the rules of construction, the word "further besides other relief" being only explanatory and as such referable to some relief consequent on or incidental to the relief specified and the words under the English Statute were much wider as shown already when read in the light of cases decided under it.

As regards the words "in the case of any alleged breach of

(1) L.R., 9 App., 371.

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trust," they do not necessarily imply a jurisdiction to remove a trustee hostilely. Unless there is a breach of trust in some form, there would be no occasion for the beneficiaries to interfere with the existing management nor to ask for directions. It is hardly necessary for me to add that when the breach of trust is only constructive or venial, or when the beneficiaries ask only for a direction to prevent its recurrence, an ignominious dismissal of the existing trustee would be undesirable in the interests of the charity itself; while such dismissal can always be secured when the breach of trust is corrupt or fraudulent by an ordinary suit, without retarding by a protracted investigation the exercise of a special jurisdiction beneficial to the charity. The words are also to be found in the English Statute which did not permit a trustee to be removed in a hostile proceeding except upon information.

Another objection is that all public charitable institutions are under the superintendence of the Crown as *parens patrie*, and it is reasonable to hold that the section which recognizes the right of the Crown does not exclude suits for dismissal of the existing trustee for mismanagement. It must be remembered here that so far as the Crown's right to interfere is concerned, Regulation VII of 1817 recognized it and enabled it to interfere even without the necessity of instituting a suit. So far as private individuals are concerned, there was always a right of suit in respect of the dismissal of a trustee for misconduct. Section 539 was not needed unless it was the intention, which it has been held that it was not, to restrict this right. That it does not, is clear from the fact that substantially the same language was used in the English Statutes which did not include the hostile removal of a trustee.

In this connection, our attention is drawn to the Indian Trusts Act, Act II of 1882, s. 73, where a procedure by petition is prescribed as it is said by analogy to the English statute along with a right of suit. Section 1 declares the Act inapplicable to public charities, and, as regards these, the beneficiaries may be many, whilst in private suits they are few. May not the answer be this? The special proceeding when limited in the sense indicated already combines in it, with regard to certain classes of reliefs, the speedy justice which a procedure by petition is likely to ensure and the finality of decision, the absence of which led to the observation of Lord Redesdale that "the farthest way about was often the nearest way home." It will be noted here that section 539

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applies also to the High Court, where the prior procedure, it must have been known to the Legislature, was by petition.

In conclusion, I am unable to accede to the contention for the appellants, because I have to introduce in section 539, first, words which I do not find there, and, secondly, to add to the reliefs specified, a relief not specified in it, viz., such relief as may be had consequent on the dismissal of a trustee, thirdly, to give to the general words at the end of the section "further or other relief," a wider meaning than is warranted by the rules of construction, and, fourthly, to ignore the presumable unity of design common to Chapter XL and Chapters XXXVII to XXXIX and the distinction contemplated between ordinary suits and special proceedings. I have further to let in two anomalies, viz., to suppose that the pre-existing jurisdiction by an ordinary suit for removing a corrupt trustee which is unrestricted by Chapter I is restricted by Chapter XL, and that a concurrent jurisdiction is given to the High Court and District Courts as regards such removal when there was no apparent necessity for it.

I have again to vary the result of grammatical interpretation, not to remove an apparent error or incongruity, not to execute the declared intention of the Legislature, but to introduce a theory of consolidation which does not fit into the frame of the section.

On the other hand, the contention for the respondent steers clear of these difficulties and suggests a simple solution as the one adopted by the Legislature, viz., adopt the principle of Romilly's Act as regards the reliefs granted under it, change the procedure by petition into a procedure by a special proceeding or suit in contradistinction to an ordinary suit for removing a trustee for misconduct and such relief as is consequent on it, and leave the latter which the Privy Council characterized in *Letterstedt v. Broers*(1) as the exercise of a very delicate jurisdiction as unfettered as before, or as if section 539 were not introduced into the Code of Civil Procedure, and thus secure to the public charities the benefit of prompt and speedy justice done under Romilly's Act, and, at the same time, avoid the difficulty and mischief felt during its practical operation by substituting a special suit for petition and by a special classification of the reliefs or particular trusts falling under the section.

(1) L.R., 9 App. Ca., 371.

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For these reasons I do not see my way to hold that the opinion expressed in *Narasimha v. Ayyan*(1) is not sound in law though it is only an *obiter dictum*.

BEST, J.—The arguments of the Vakils on either side, at the further hearing of this appeal, have been sufficiently stated in the judgment of my learned colleague Weir, J., and, as the conclusions of my learned colleague on the points at issue are in accordance with my opinion already expressed in the case, I do not think it necessary to say much more than that the result of the further hearing has been to confirm me in the opinion already expressed.

Section 539 of the Code of Civil Procedure is taken not from Romilly's Act, as appears to have been supposed by the learned Judges who took part in the case of *Narasimha v. Ayyan*(1), but from the English Trustee Act of 1850; but the Legislature in wording section 539 has taken care to remove all words which might have supported the contention that the procedure under the section should be summary, being by petition and order thereon as in the English Acts, and has expressly provided that it shall be by suit which is to result in a decree. Such being the case, there is no reason for holding that only non-contentious cases can be disposed of under section 539.

As to the non-mention in the section of the removal of trustees as one of the remedies that can be given thereunder—as has been contended on behalf of the appellant, where the removal of a trustee is merely auxiliary to the appointment of another in his place, the mere fact of such auxiliary relief not being mentioned in the section is no reason for holding that it is beyond the Court's jurisdiction.

The ordinary Courts of this country administer equity as well as law, and there is no doubt that Courts of Equity can remove old trustees and appoint new ones in cases requiring such a remedy. See Story's Equity Jurisprudence, § 1287, also § 1269 where it is said that “in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust.” Such being the case, when, in a suit brought before a District Court under section 539 of the Code of Civil Procedure, such Court has power to appoint a new trustee, it

(1) I.L.R., 12 Mad., 157.

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must also be held to have power to remove, if necessary, the old trustee whose misconduct justifies the suit and consequent decree for the appointment of a new trustee.

It is contended on behalf of the respondent that Courts other than District Courts possessed prior to 1877, when section 539 was first introduced into the Code of Civil Procedure, jurisdiction to entertain suits for removal of trustees, and that the result of holding that such suits can be brought under section 539 in the District Court would be to abrogate that jurisdiction. The answer to this seems to be that section 539 relates only to suits being brought by a few of the public interested in an endowment, and is an exception to the rule that all persons interested in a suit should join in bringing it, or that, when one or a few only sue on behalf of many, sanction should be obtained and notice issued under section 30 of the Code of Civil Procedure—the cost of issuing these notices being often very heavy and therefore likely to deter persons from coming forward as public benefactors. In order, however, that the procedure intended for the public benefit should not be available to any ill-disposed person wishing to harm a trustee, the section requires the previous sanction to such suit of the Advocate-General or other officer appointed by Government to give such sanction. When all parties interested join in suing, or sanction is obtained under section 30, the jurisdiction of the ordinary Courts as to suits for the removal of trustees still exists, I imagine. It is only in suits brought by a few of the persons interested with the sanction required by section 539 that the District Court has exclusive jurisdiction—just as in similar suits under Act XX of 1863—and when a suit is brought under section 539 with the necessary sanction the mere fact of a trustee having to be removed as an auxiliary relief is not sufficient to oust the jurisdiction of the District Court.

I would therefore set aside the decree of the Lower Court and remand the case for disposal as previously suggested by me.

WEIR, J.—This is an appeal from the decree of the District Court of Tanjore dismissing a suit brought under the provisions of section 539 of the Civil Procedure Code for the removal of a trustee of a charitable endowment and for certain other reliefs.

The plaint set out that the endowment was granted to an ancestor of the plaintiffs and of the defendant by a former Maharajah of Tanjore for the charitable purpose of maintaining a

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permanent watershed on the road to Rameswaram, &c; that the charity was conducted by the original grantee, and afterwards by the father of plaintiff No. 2 and of the defendant; that the management of the charity, subject to the control of the other members of the family passed to the defendant, and that the latter had for the last 17 years neglected to maintain the charity, and had misappropriated the incomes to his own use, and had failed to keep and submit accounts. The plaint also set out that the sanction of the Collector had been obtained for the institution of the suit under section 539, Civil Procedure Code, and prayed for a decree removing the defendant from the management of the trust, appointing other proper trustees and granting such further or other relief as the nature of the case might require.

The defendant filed a written statement resisting the suit on various grounds which need not here be adverted to; but it may be noted that he took no objection that the suit to remove him from the trusteeship would not lie under section 539, Civil Procedure Code. The District Judge, however, framed an issue as to whether the plaintiffs were entitled to sue under section 539 of the Code of Civil Procedure, and being of opinion that the judgment of the High Court in *Narasimha v. Ayyan*(1) was authority for the proposition that a suit will not lie under section 539, Civil Procedure Code, for the removal of a trustee, he dismissed the suit on that ground. Against this decision the plaintiffs appealed, and the appeal came on for hearing before a Bench consisting of Mr. Justice Muttusami Ayyar and Mr. Justice Best, and the learned Judges having differed in opinion as to the construction to be put on section 539 of the Code of Civil Procedure, the case has been referred to a third Judge, as provided in Civil Procedure Code, s. 575, and has been very fully and ably argued before a special Bench, including the learned Judges who first heard it.

On behalf of the appellant it was urged in the preliminary portion of the argument that the District Judge was in error in holding that the decision in *Narasimha v. Ayyan*(1) is authority for the proposition that a suit for the removal of a trustee will not lie under section 539.

The decision in *Narasimha v. Ayyan*(1) proceeded, it was pointed out distinctly, on the ground that "the plaintiffs had not

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a direct interest in the trust within the terms of section 539 of the Civil Procedure Code, and the suit was not *therefore* maintainable." The Court, however, went on to remark as follows:—
"Again we think it is not at all clear that a suit to remove a trustee can be maintained under section 539, of the Civil Procedure Code. It has been pointed out by Mr. Pattabhirama Ayyar that section 539, in most parts of it, follows the provisions of Romilly's Act which enabled trusts of certain classes to be carried out by summary procedure and not by suit. Amongst the objects of that Act one was to appoint a new trustee, and it was held that, under the Act, a trustee could not be removed hostilely. No doubt section 539 provides that a suit may be brought to appoint the trustee and for other purposes and it contains a proviso that further relief may be given according as the nature of the case required. Such grounds of relief would be some matter consequent on the relief which the section enables to be granted."

These observations, although no doubt entitled to great weight, are not, it must be admitted, necessary to the decision which proceeded, as has been seen, on the special ground already stated that the plaintiffs in the suit had not such a direct interest in the trust as is required by section 539 of the Code.

The argument of the learned Pleader for the appellants that the decision in *Narasimha v. Ayyan*(1) is not a binding authority to the extent supposed by the District Judge may then be conceded. Nevertheless, as already stated, the observations of the learned Judges, who were parties to that decision, are entitled to great weight, and the doubts suggested by them having been adopted by the District Judge as the ground of the decision now under appeal, the whole question has now to be considered and determined on the materials available for decision.

The next argument advanced on behalf of the appellant was that there was some apparent inaccuracy in the argument, as reported, of the learned Judges in the passage cited, the provisions of Romilly's Act having been confounded with those of another and distinct Act, viz., the Trustee Act (13 and 14 Vic., Cap. 60), and the power conferred in section 32 of the latter Act in regard to the appointment of trustees having been assumed to be exercis-

(1) I.L.R., 12 Mad., 157.

(1) I.L.R., 12 Mad., 157.

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able under the former Act. The last-mentioned Statute in section 32 provides that "whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or trustees either in substitution for or in addition to any existing trustee or trustees." Although it has been held that the Court has power under Romilly's Act in certain circumstances to appoint new trustees (see *Bignold v. Springfield*)(1), it was with reference to this provision in the Trustee Act and not with reference to any provision in Romilly's Act that it was held, by the Court of Chancery in England that that Court had not jurisdiction under the 32nd section to remove hostilely a trustee who was desirous of continuing in the trust. (In *the matter of Hodson's Settlement*(2)). This decision was followed in the later case of *the matter of Richard Blanchard*(3), and in other cases cited in Lewin on Trusts, page 1028.

In this connection it was also pointed out by the learned Pleader for the appellants that of the reliefs specified in section 539 of the Code of Civil Procedure, those set out in clauses (a) and (b) were apparently founded upon sections 32 and 34 of the Trustee Act, 1850 (13 and 14 Vict., Cap. 60); that set out in clause (c) was a relief which it was held could be granted under Romilly's Act in *re Hall's Charity*(4) while the reliefs set out in clauses (d) and (e) of the section were equitable reliefs which, provided the cases were simple cases, could also, for the most part, be granted under Romilly's Act (see Lewin on Trusts, 8th edition, p. 929, also cases summarized in *re Hall's Charity*(4)).

It appears to follow from the above that the decision in *Narasimha v. Ayyan*(5) in so far as it is founded—if it is founded on the view that a trustee could not be removed hostilely under Romilly's Act—is not sound.

No doubt he could not be removed hostilely as has been seen under section 32 of the Trustee Act, and it may be—especially as it is now stated that both the enactments were referred to at

(1) 7 Clark & Fin., 71.

(4) 14 Beav., 115.

(2) 9 Hare, 118.

(3) 3 De G., F. & J., 131.

(5) I.L.R., 12 Mad., 167.

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the argument—that the learned Judges, although they do not expressly refer to the Trustee Act, had that enactment in mind.

The similarity already noticed between the provisions of sections 32 and 34 of the Trustee Act and the provisions of clauses (a) and (b) of section 539 may be thought to some extent to favor the conclusion that the relief given in the Code is subject to the same restrictions as that given in the English Statute.

The determination of this question will, however, depend on wider considerations than the mere similarity of the provisions.

These considerations will be dealt with hereafter. It may, however, here be pointed out that, while section 32 of the Trustee Act speaks of appointing new trustees in substitution for, or in addition to any existing trustee or trustees, the Civil Procedure Code in clause (a) speaks merely of appointing new trustees under the trust. The difference of language can scarcely have been unintentional.

Before leaving this portion of the case it may also be as well to notice that the procedure under the Trustee Act was a summary procedure. The procedure is prescribed in sections 40 to 43. Under section 40 of the Act the party might apply by petition for an order of the Court of Chancery, and might give evidence by affidavit, and the matter was to be disposed of by an order of the Court (section 43 of the Act). In this respect also, as will be seen hereafter, the language of section 539 of the Civil Procedure Code is materially different from that of the Trustee Act.

Proceeding now to Romilly's Act, 52 Geo. III., Cap. 101, its provisions, so far as they are material, are as follows:—

"Whereas it is expedient to provide a more summary remedy
"in cases of breaches of trusts created for charitable purposes, as
"well as for the just and upright administration of the same.
"Be it therefore enacted in every case of a breach of any trust or
"supposed breach of any trust created for charitable purposes
"or whenever the direction or order of a Court of Equity shall
"be deemed necessary for the administration of any trust for
"charitable purposes, it shall be lawful for any two or more
"persons to present a petition to the Lord Chancellor, Lord
"Keeper or Lords Commissioners for the custody of the Great
"Seal or Master of the Rolls for the time being, or to the Court
"of Exchequer stating such complaint and praying such relief

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"as the nature of the case may require, and it shall be lawful
 "for the Lord Chancellor, Lord Keeper and Commissioners for
 "the custody of the Great Seal and for the Master of the Rolls
 "and the Court of Exchequer, and they are hereby required to
 "hear such petition in a summary way and upon affidavits or
 "such other evidence as shall be produced upon such hearing to
 "determine the same and to make such order therein and with
 "respect to the costs of such applications as to him or them shall
 "seem just; and such order shall be final and conclusive unless
 "the party or parties who shall think himself or themselves
 "aggrieved thereby shall, within two years from the time when
 "such order shall have been passed and entered by the proper
 "officer, have preferred an appeal from such decision to the
 "House of Lords, to whom it is hereby enacted and declared that
 "an appeal shall lie from such order."

The material portions are that in every case of a breach of any trust or supposed breach of trust created for charitable purposes, or whenever the direction or order of a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes, any two or more persons may present a petition to the Court of Chancery or to the Court of Exchequer stating such complaint and praying such relief as the nature of the case may require and the Court shall make such order thereon as shall seem just.

Prior to this enactment the only mode of proceeding in such breaches of trust had been by information of the Attorney-General and the new procedure was welcomed as giving a more speedy and less costly remedy—(see Lewin on Trusts, Chapter XXX, s. IV, and Story's Equity Jurisprudence, Chapter XXXII). In its practical operation, however, the Act is said to have disappointed the expectations that were entertained of it, and the construction put upon the Act confined to comparatively narrow limits, the reliefs which could be granted under it—(see Lewin on Trusts, Chapter XXX, s. IV, clause 4, and the observations of Lord Redesdale on the *Corporation of Ludlow v. Greenhouse*(1). The decisions on the point are summarized in a note, which will be found in *re Hall's Charity*(2). It is unnecessary to go through the decisions there cited, but speaking generally, although the

(1) 1 Bligh, N.S., 49.

(2) 14 Beav. 121.

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Court exercised wide powers under the Act in the absence of adverse claims, or where third persons were not interested, the Act was held to be confined in its operation to simple cases of abuse of a clear trust and it was also held not to apply to cases of constructive trusts.

It has been argued on behalf of the appellants that the Indian Legislature, when framing section 539 of the Code of Civil Procedure, had the advantage of the experience derived from the practical operation of Romilly's Act, and was therefore careful to frame this newly introduced provision of the Code in such a way as to avoid the difficulties which had arisen on a construction of the English Statute. This argument is one which from the nature of the case cannot well be supported otherwise than on the inferences derivable from certain considerations which will now be discussed, and the first of these matters for consideration is the language and the apparent scope, as defined by that language, of the provisions of the section under consideration.

Romilly's Act, has been seen, was intended to provide a more summary remedy than that thitherto existing. The procedure was to be by petition which was to pray for such relief as the nature of the case might require, and the Court was to make such order thereon as should seem just.

Two or more persons were empowered under the Act to put the Court in motion and the Act applied in every case of a breach of any trust or supposed breach of trust created for charitable purposes, or whenever the direction or order of a Court of Equity should be deemed necessary for the administration of any trust for charitable purposes. Comparing the language of section 539 of our Indian Code, the provisions of Romilly's Act last cited would appear at first sight to be very closely reproduced in the opening lines of section 539, viz.: "In case of any alleged breach of any
 "express or constructive trusts created for public, charitable or
 "religious purposes, or whenever the direction of the Court is
 "deemed necessary for the administration of any such trust." Even, however, in these lines, there are these material differences, that the provision in the Indian Code applies to constructive trusts while Romilly's Act was held not to apply to them in *ex parte Brown*(1), and the words the "direction of the Court" are substi-

(1) Cooper, 295.

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tuted in the Civil Procedure Code for the words "the direction or order of the Court" in the English Act. It is unnecessary for our present purpose to notice that the provision in the Code applies also to trusts for religious purposes.

Proceeding next to the reliefs which can be given under the two enactments, we find that while the Court under Romilly's Act was to make such order as shall seem just on the prayer for relief as the nature of the case might require, under the Code of Civil Procedure, the Court is empowered, besides the specific reliefs already noticed, to grant such further or other relief as the nature of the case may require.

These specific reliefs include, as has been seen in clauses (a) and (b), reliefs which were specifically provided for subsequently to Romilly's Act by a different enactment (the Trustee Act) and other reliefs, as to some of which it is, at least, doubtful whether they could be given under Romilly's Act.

The language of the section in regard to relief especially in the words 'such further or other relief as the nature of the case may require' appears to me wider than the language of Romilly's Act, and in respect of relief the section in its entirety appears to me to travel beyond the limits laid down by the express terms of the English Statute, as well as by the construction put upon the terms of that statute by the English Courts.

Lastly, as to procedure, the procedure throughout under Romilly's Act is clearly expressed to be a summary procedure, and one of the points most debated at the argument in this case has been whether the procedure, under section 539 of the Indian Code, is to be held to be a summary procedure or in the nature of a summary procedure.

In favor of the view that the procedure is not of a summary character, there is, it is argued in the first place, the heading of Chapter XL itself 'of suits relating to public charities,' and there is the provision in the section itself that the parties may institute a suit to obtain a decree. Under Romilly's Act and under the Trustees' Act, the adjudication which the parties were entitled to obtain was to be an order and without in any way relying on the clear distinction by definition in our Indian Code between 'decree' and 'order,' it seems reasonable to infer from the use of the terms 'petition' and 'order' in the English Statute that the adjudica-

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tion under the English Statute was one of a less formal and more summary character than that contemplated under the Indian Code.

The distinction between summary procedure resulting in a determination by order is one which is well known to the Indian Courts (see, for example, the Minors Act and the Succession Certificate Act), and the Legislature would not have used in section 539, Civil Procedure Code, the words "suit" and "decree," it may fairly be contended, if they had intended to introduce merely a summary procedure.

This view is strengthened by a reference to the Indian Trusts Act—Act II of 1882, which Act is declared in section I not to apply to public or private religious or charitable endowments. This Act in section 72 and in section 74 (in the latter section following the English Statute) provides a summary procedure by petition and "*without instituting a suit*" for the reliefs therein specified, that contemplated in section 74 being the appointment of new trustees. This Act, viz., Act II of 1882, was passed in 1882 at a time when section 539 of the Civil Procedure Code was amended and made applicable to religious endowments, and the preservation by express terms of a summary procedure under the Indian Trusts Act, when contrasted with the provision in section 539 of the Civil Procedure Code, that the procedure shall be by suit is, it may be said, peculiarly significant.

On the other hand it is argued for the respondent that the peculiar position of chapter XL in the scheme of the Civil Procedure Code under Part V, Special Proceedings, and following immediately on the chapters relating to "Reference to arbitration," "Proceedings on agreement of parties," and "Summary Procedure on Negotiable Instruments," warrants the view that suits other than suits of the character of regular suits were contemplated in section 539 of the Code of Civil Procedure.

An observation of Mr. Whitley Stokes, the learned Editor of the Anglo-Indian codes, and an undoubted authority, vol. II of the *Anglo Indian Codes*, page 429, is cited in support of this view.

In this connection, it may, perhaps, be observed that Chapter XL of the Code would appear to have been interpolated, if it may be so said, into the Civil Procedure Code of 1877, at the last moment. The provision does not appear in the latest edition of the Bill sent to this Court under date 16th October 1876, and the

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Act received the sanction of the Governor-General on the 31st March 1877. In the Bill of 10th October 1876, Chapter XXXIX, was as now "On summary procedure on Negotiable Instruments," while Chapter XL related to "Appeals from Original Decrees."

I am not, however, able to see that the position of Chapter XL in the Code of Civil Procedure, or the other argument cited affords any valid ground, in the face of the express language of the section and in view of the strong contrast between that language and the language of the English Statutes, for the opinion that the procedure under section 539 of the Civil Procedure Code is intended to be of a summary character.

Moreover, if regard be had to the importance of the subject-matter of the suit, there is no reason why the suit should be of a summary character. On the contrary, there are very strong reasons why it should not be such.

It appears to me, therefore, that section 539, Civil Procedure Code, differs materially both as respects the nature of the relief that can be granted and the procedure which has to be followed from the English Statutes on which the Court proceeded in arriving at the decision in *Narasimha v. Ayyan*(1), and that those statutes and the construction put upon them can, therefore, be no safe guide in determining the construction of the provision in section 539 of our Indian Civil Procedure Code. I arrive at this opinion on a construction of the section itself and an examination of the English Statutes.

Having arrived at this conclusion for the reasons stated, it may now more appropriately than could hitherto have been done be pointed out that the inconvenience, which must manifestly arise from the construction that the reliefs contemplated in section 539 do not extend to the removal of a trustee, would be very great. If the view that a trustee cannot be removed under the section is correct, it would appear to result that, while a suit for the appointment of new trustees can be instituted only in the District Court, and after obtaining the required sanction, a suit for the removal of a trustee, which must in most cases be a necessary preliminary, will ordinarily have to be instituted elsewhere.

Under the rules relating to the valuation of suits and jurisdiction, the latter suit would generally be instituted in a District

(1) I.L.R., 12 Mad., 157.

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Munsif's Court, and another suit arising out of the same cause of action would have to be brought in the District Court. Assuming the cause of action in both suits to be the same—an assumption which in the conditions stated may not unreasonably be made—the splitting of the suits would be opposed to the provisions of section 43 of the Code of Civil Procedure. It may also, I think, fairly be conceded, as was maintained at the argument, that the object of the section would be in great part defeated if the Court had not power in a suit framed under the section to remove a defaulting trustee. The object of the section is to take cognizance of breaches of trust of the special class stated and to give direction for the administration of the trust in furtherance of the object of the trust. How, it may be asked, is the object to be effected if the hands of the Court are tied in regard to the removal of the trustee? The new trustees to be appointed under the section are not, as is the case in regard to the trustees under section 32 of the English Trustee Act, expressed to be appointed in substitution for, or in addition to, the existing trustees. The power is apparently unrestricted and the basis of the suit being an alleged breach of trust, the Court is presumably not to act unless the alleged breach of trust is ascertained after trial to be well founded. As it is not every breach of trust which of necessity renders it obligatory to remove a trustee, the section may, it seems to me, not unreasonably, be read as if it contained the words "in case of a trustee being found to have committed a breach of trust which renders his removal necessary, the Court may appoint new trustees."

If the Court cannot, on such a result being arrived at, remove the defaulting trustee, the power to appoint a new trustee seems uncalled for and the remedy futile and illusory.

The words of the section relating to relief, viz., "such further or other relief as the nature of the case may require," are, certainly in my opinion, wide enough to render such a futile result a far from necessary construction. The omission, however, from the section of any words directly importing a power to remove a trustee has been much pressed on the side of the respondent, and an inference against the existence of a power to remove a trustee has been said to be derivable from section 14 of Act XX of 1863, in which power is expressly given to Courts to remove a trustee of a mosque or temple. For the reasons already stated, however,

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I am of opinion that the omission of any express provision conferring a power to remove has not the significance sought to be given to it.

In connection with this portion of the case, the argument has also extended to a brief examination of the state of the law on the subject of the removal of trustees of such charitable or religious institutions as are described in section 539 anterior to the enactment of that section, it having at one portion of the argument been asserted that no suit for the removal of a trustee presumably lay before section 539 found a place in the Civil Procedure Code.

The provision now enacted as section 539, Code of Civil Procedure, made its appearance for the first time, as already noticed in the Civil Procedure Code, Act X of 1877. It found no place in the first Civil Procedure Code, Act VIII of 1859.

Apart from authority on the subject, there can however be no question that a suit would, at any period of our administration, have lain for the removal of a trustee on the ground of his having committed a breach of trust. That the Supreme Court possessed the jurisdiction scarcely requires to be stated. The Courts administering justice outside the Presidency town also clearly possessed it. From their first establishment these Courts were vested with an equitable jurisdiction (*vide* Regulation II of 1802, section 17), and the power to remove defaulting trustees is a power which the Courts of Equity in England have indisputably exercised in a long series of cases (*vide* Story's Equity, §§ 1287, 1288, 1289 and the cases there cited). There is, however, express authority on the subject in our own High Court Reports, viz., in *Pon-nambala Mudaliyar v. Varaguna Rama Pandia Chinnatambiar*(1). In that case, a District Judge had dismissed a suit for the removal of a trustee of certain charitable trust who was charged with malversation, on the ground that in his opinion Regulation VII of 1817 required that application should first be made in such cases to the Board of Revenue. The High Court observed that the decision of the District Judge was wrong:—

"The Courts had unquestionably jurisdiction in such cases prior to the enactment of Regulation VII of 1817, and there is nothing in the Regulation to deprive the Courts of their jurisdiction, while it gives the Board of Revenue the power

(1) 7 M.H.C.R., 117.

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"and imposes upon it the duty of interfering whenever it appears necessary to do so for the protection of charitable endowments. The Regulation is clearly intended to be supplementary of existing remedies. This was held by the late Sudr Court in the decision in *Kassiyassy Kristna Putter v. Vangala Shangaranat Jösser*(1) which was followed in *Narasimma Charry v. Tundree Comara Tata Charry*(2)."

Besides the case cited, there appear to be no other reported decisions on the matter. The power of supervision conferred by the Regulation and exercised by the Board of Revenue may not unreasonably, perhaps, be taken to account for the apparent paucity of suits relating to such trusts. The case of the *Attorney-General v. Brodie*(3) was also referred to, but it merely decides that the then Supreme Court of Madras had an equitable jurisdiction similar to and corresponding with the equitable jurisdiction exercised by the Court of Chancery in England over charities.

The power then to remove a trustee for breach of his trust undoubtedly existed prior to the enactment of section 539 in the Code of 1877.

What then, it may be asked, was the intention of the Legislature according to reasonable presumption in enacting the provision which first appeared in the Code as section 539 of Act X of 1877.

On behalf of the respondent it has been urged that it was the intention of the Legislature to confer a special privilege by enabling two or more persons to sue in the case supposed for certain specified reliefs only, but in the case of the relief being for the removal of the trustee, to leave the persons having the same interest to their ordinary remedy by suit after obtaining, if necessary, the permission of the Court as provided in section 30 of the Code for one or more to sue on behalf of all, and it was also argued that the section was confined to non-contentious cases.

In India non-contentious suits of this class are, it may be remarked, as far as my experience enables me to speak, comparatively few, whatever may be the case in England.

In my opinion this argument does not give a reasonable view of the intention of the Legislature. The object aimed at was, it appears to me, to consolidate and embody in one definite provision

• (1) *Sudder Decisions* of 1858, p. 39. (2) *Sudder Decisions* of 1858, p. 141.
(3) 4 M.I.A., 190.

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the procedure to be followed in British India in suits relating to public charitable and religious endowments other than the limited classes of such endowments which fall to be dealt with under Act XX of 1863. It cannot reasonably be contended that the intention of the Legislature was to take away any existing remedies, but if such was not their intention, and if the intention was not to embody the law of procedure in one single provision, then we are landed on the anomalies and difficulties already noticed of the party moving the Courts having to split up his suit and seek for one relief in respect of the dismissal of a trustee in a Court subordinate to the District Court and for the other specified reliefs in the District Court itself.

Such a state of affairs could not, I think, it may reasonably be concluded, have been the intention of the Legislature.

For the reasons stated, therefore, I arrive at the conclusion that the opinion expressed in the case of *Narasimha v. Ayyan*(1) that section 559 of the Code of Civil Procedure is subject to the restriction imposed by the construction placed by the English Courts on Romilly's Act and on the Trustee Act, 1850, is not well founded, and that, although the power to remove a trustee is not in express terms given by section 539 of the Code of Civil Procedure, it is a power which, from the nature of the case, may reasonably be held to have been given under the wide words 'such further or other relief as the nature of the case may require.'

For the reasons stated, I would allow the appeal, and reversing the decree of the District Judge, I would remand the suit for trial on the merits. The costs of this appeal, and in the Lower Court, will abide and follow the result of the retrial.

(1) I.L.R., 12 Mad., 157.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

SUKA SINGH AND ANOTHER.*

City of Madras Police Act (Act III of 1888, Madras), s. 71, cls. xi and xv—Crowd collected by music—Obstruction of street—Music performed in private place.

Members of the Salvation Army were found by the Magistrate to have played tambourines and sung "at the angle" of a street in Madras, and thereby collected a crowd which thronged the street, and they were convicted of offences under the City of Madras Police Act, s. 71, cls. xi and xv.

Held on revision, that, since the intention of the accused was to collect a crowd in the street, the conviction under cl. xi was right, whether or not the place, where the accused played and sang, was a private place; but that, if it was a private place, the conviction under cl. xv was wrong.

PETITION under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the finding and sentence of Sultan Moidin, Presidency Magistrate, Black Town, Madras, in calendar case No. 10975 of 1890.

The accused were convicted of committing offences against the City of Madras Police Act, s. 71, cls. xi and xv, under circumstances which appear sufficiently from the judgment of the High Court.

The provisions of the section in question are as follows:—

"Whoever, in any public street, road, thoroughfare, or place of public resort, commits any of the following offences shall be liable, on conviction, to a fine not exceeding 50 rupees, or to imprisonment, which may extend to one month:—

"xi. Whoever causes any vehicle to remain or stand longer than may be necessary for loading or unloading, except at places appointed for the purpose by the Commissioner, or fastens any horse or other animal so as to cause obstruction, or in any way wilfully obstructs or causes obstruction to the free passage of any thoroughfare.

* Criminal Revision Petition No. 167 of 1890.

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"xv. Whoever beats a drum or tom-tom or blow a horn or trumpet, or beats or sounds any brass or other instrument or utensil, or plays any music except at such times and places as shall be, from time to time, allowed by the Commissioner."

Mr. R. F. Grant for petitioners.

The Crown Prosecutor (Mr. W. Grant) for the Crown.

JUDGMENT.—The petitioners, who are members of a body known as the Salvation Army, have been convicted under section 71, clauses xi and xv of the Madras City Police Act, and have been sentenced to pay fines. The case was tried summarily by the Magistrate, and there has been, so far as we can see, no evidence recorded in the case.

The Magistrate was not bound, under sections 263 and 362 of the Code of Criminal Procedure, to record the evidence, but, as the case was one of some public importance, we think it is to be regretted that he did not do so, more especially as the learned counsel for the accused maintains that the judgment is misleading, or at least ambiguous as to certain features of the case.

The proceedings came, however, before us in revision, and we are bound to take the facts to be as stated in the Magistrate's judgment, and we have no power to consider any facts other than those stated in the Magistrate's judgment.

As regards so much of the conviction as is under clause xv of section 71, it is argued, on behalf of the accused, that the conviction is not sustainable, inasmuch as there was no evidence that the accused played music in the public streets. In connection with this argument, we have to observe that the Magistrate's judgment states that one witness deposed that the accused played music along Errabauloo Chetti street, after being warned against it by the Police.

It was sought to be argued by the counsel for the accused that this incident occurred after the termination of the transaction, in respect of which the charge now under trial was laid; but the observation of the Magistrate in his judgment does not show that this was so, and, as already observed, we are bound, in the absence of any record, to take a statement made in the judgment to mean what it appears to mean.

So taking it, it would appear that the accused did play music in the public street, and, this being found as a fact, the accused were undoubtedly liable under clause xv of the section.

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We may, however, on this part of the case, intimate our opinion that, if the accused had not, as a matter of fact, been found to have played in a public street, but on private property, the conviction, on this head, for merely playing music, except at such times and places as may be allowed by the Commissioner, could not have been sustained.

The provision in clause xv is, we consider, governed by the words at the head of section 71, viz., "whoever in any public street, road or thoroughfare, or place of public resort," that is to say, by virtue of the words at the beginning of the section, playing of music at times or places other than those allowed by the Commissioner must be the playing of music in a public street, road, thoroughfare, or place of public resort, and it follows, therefore, that the playing of music, where there is no wilful obstruction of a thoroughfare caused thereby, is not in itself punishable, when such playing takes place on private property.

The next ground of objection urged has been that the language of clause xi, "whoever in any way wilfully obstructs or causes obstruction to the free passage of any thoroughfare," when read along with the words in the heading of section 71, already referred to, must be held to mean that, whoever being at the time in any public street, road, thoroughfare, or place of public resort in any way wilfully obstructs or causes obstruction shall be liable, and that inasmuch as the accused were at the time, in respect of which the offence is charged, not in a public street &c., but on a piece of private ground, they are not liable under the section.

As to this argument it has, in the first instance, to be observed that the Magistrate's judgment describes the accused as being at an angle of the street at the time of the alleged obstruction. This expression is somewhat ambiguous and may mean that the accused were actually in or on the street, or that they were at some spot or corner closely abutting on the street. Taking it, however, to have the latter meaning, it has to be considered whether the argument put forward, on behalf of the accused, is one which can reasonably be admitted.

It appears to us, on consideration, that it cannot have been the intention of the Legislature that the person causing the obstruction should actually be on or in the street at the time of the alleged obstruction. The words of the clause are very wide,

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viz., "whoever in any way wilfully obstructs or causes obstruction, &c.," and it is clear that it was the intention of the Legislature to confer very extensive powers on the City Police for the control and regulation of street traffic.

A narrow construction of the terms of the section, such as is contended for on behalf of the petitioners, would obviously restrict very much the powers of the Police in respect of street traffic, and, in so far as it did so, would defeat the object aimed at by the Act, and it appears to us that a person or body of persons, who, although not actually in the street, are on a piece of ground or in a house immediately abutting on or adjoining a street have, under such conditions as were found to exist in this case, as much power of obstructing the traffic by collecting a crowd as if they were actually standing on the street. It is not disputed that the accused played music and sang on the spot where they were, immediately adjoining a street, and the effect of the music and singing, the natural and ordinary effect, and, we think, we may add the intended effect and object (the players and singers being members of the Salvation Army) was to collect a large crowd, which crowd obstructed the free passage of the public road.

Such being, in our view, the natural and ordinary result, as also the intended result of the action of the petitioners, we think, it must be concluded that the accused wilfully, i.e., intentionally brought about that result, and, as the result was undoubtedly an obstruction to the traffic, we think, they were liable under clause xi of the section, and that the conviction under this clause, as well as under clause xv of the section, must be sustained.

We must, therefore, refuse to interfere in revision.

APPELLATE CIVIL.

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

VENKATA (PETITIONER), APPELLANT,

v.

SAMA AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code, s. 306—Court sale—Material irregularity.

Per cur.—We do not consider that the commencement of a Court sale, prior to the expiry of the thirtieth day or any delay in making the deposit required by s. 306 or the adjournment of the sale from time to time without sufficient ground, is more than a mere irregularity.

PETITION under Civil Procedure Code, s. 622, praying the High Court to revise the order of S. Subba Rau, District Munsif of Chittur, dated 29th April 1889, and appeal against the same.

The petitioner was a judgment-debtor whose property had been attached and sold in execution of a decree, and the prayer of the petition was that the sale be set aside by reason of various alleged irregularities, the nature of which appears sufficiently from the judgment of the High Court.

The District Munsif referred to *Arunachellam v. Arunachellam*(1), *Goopee Nath Debey v. Roy Luchmееput Singh Bahadur*(2), *Mohunt Megh Lall Pooree v. Shib Pershad Madi*(3), *Bandy Ali v. Madhule Chunder Nay*(4), *Macnaghten v. Mahabir Pershad Singh*(5), *Bhim Singh v. Sarwan Singh*(6), *Intizam Ali v. Narain Singh*(7), and *Lakshmi v. Krishnabhat*(8), and dismissed the petition saying "on the whole I am satisfied that no substantial injury has been proved by the petitioner, although, it has come to light, there have been certain irregularities in publishing and conducting the sale as described above."

The petitioner preferred this petition and appeal.

Mr. Ramasami Raju and Ramasami Mudaliar for appellant.

Mr. Subramanyam for respondents.

* Appeal against Appellate Order No. 13 of 1890.

(1) I.L.R., 12 Mad., 19.

(3) I.L.R., 7 Cal., 34.

(5) I.L.R., 9 Cal., 656.

(7) I.L.R., 5 All., 316.

(2) I.L.R., 3 Cal., 542.

(4) I.L.R., 8 Cal., 932.

(6) I.L.R., 16 Cal., 33.

(8) I.L.R., 8 Bom., 424.

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JUDGMENT.—It is admitted that the appeal cannot be maintained. It must therefore be dismissed.

As to the petition under section 622, it is urged that the sale was not merely irregular, but was wholly void *ab initio* and that therefore the Courts below exceeded their jurisdiction. Seeing that it was the present petitioner, the judgment-debtor, who put the Court in motion by applying under section 311, we are unable to see how the petitioner can be heard to say that the Court had no jurisdiction.

As the case was put by the judgment-debtor, the Court clearly had jurisdiction. Apart from this, we do not consider that either the commencement of the sale prior to the expiry of the thirtieth day, or any delay in making the deposit required by section 306, or the adjournment of the sale from time to time without sufficient ground is more than a mere irregularity.

Although we are referred to the decisions of the Allahabad High Court in *Bakshi Nand Kishore v. Malak Chand*(1), *Jasoda v. Mathura Das*(2), *Ganga Prasad v. Jag Lal Rai*(3), this Court has held that the omission to make the deposit immediately, or the fact of the sale taking place before the expiration of thirty days, is not fatal to the sale, unless substantial injury is proved.

The view taken by this Court is also in accordance with the decision of the High Court of Bombay in *Lakshmi v. Krishnabhat*(4).

The petition is dismissed with costs.

(1) I.L.R., 7 All., 289.

(3) I.L.R., 11 All., 333.

(2) I.L.R., 9 All., 511.

(4) I.L.R., 8 Bom., 424.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

VENKATASAMI.*

1890.
October 17.
November 13.

Post Office Act (Act XIV of 1866), s. 48—Secreting and fraudulently appropriating letters—Theft—Dishonest misappropriation—Penal Code (Act XLV of 1860), ss. 378, 403.

The accused, being in the employ of Government in the Post Office Department, while assisting in the sorting of letters, secreted two letters with the intention of handing them to the delivery peon, and sharing with him certain moneys payable upon them. He was charged under the Indian Post Office Act, s. 48:

Held, (1) that since the intention of the accused was not to prevent the delivery of the letters to the addressees, he was not guilty of the offence of secreted them within the meaning of that section;

(2) that he was guilty of the offence of stealing and of fraudulently misappropriating the letters within the meaning of that section, and of the offence of theft and of attempt to commit dishonest misappropriation of property within the meaning of the Penal Code.

CASE referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by E. C. Johnson, District Magistrate of Ganjam.

The case was stated as follows:—

"The accused, in this case, a postal peon, was charged with theft in respect of two letters. The Senior Assistant Magistrate has discharged him under section 253, Criminal Procedure Code.

"The facts of the case, as proved, are as follows:—The accused was assisting the head clerk to sort letters. While so doing, he was observed to secrete two letters in his cloth. The head clerk called the Postmaster, and accused was searched, two bearing letters being found in his cloth. When questioned, he said that he intended to give them to the delivery peon, and to share with him the bearing postage, which he would collect.

"The Senior Assistant Magistrate observes:—'The accused did not intend to fraudulently appropriate the letters, nor did he wilfully secrete them, the words implying, as I understand, wilful intention to keep them out of the possession of the addressees and not covering the action of the accused in this case. The accused was originally charged with theft, but, as there was no intention to take

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"away the letters and thereby cause gain to himself, the accused was not guilty of this offence."

"This reading of the law, as it appears to me, is clearly wrong. The letters were in charge of the Postal Department for a double purpose—(1) for delivery to the addressee, (2) for the recovery of the bearing postage due to Government thereon. The act of the accused frustrated the second of these purposes, and was in so much a 'fraudulent appropriation' of the letters; thus constituting an offence under section 48 of the Post Office Act. Moreover, as long as the letters were in the possession of accused with an honest intent, they were in the constructive possession of the Postmaster. As soon as he concealed them with a dishonest intent (an intent to defraud Government of the bearing postage), they ceased to be any longer in the Postmaster's possession; and the act of the accused amounted either to theft, or criminal misappropriation."

"This being so, the accused has, I consider, been improperly discharged; and, if the Judges of the High Court are of the same opinion, I request that the order of discharge may be set aside and that the Senior Assistant Magistrate be directed to replace the case on his file, and to frame a charge against the accused, and dispose of the case in accordance with a correct view of the law."

Counsel were not instructed.

JUDGMENT.—The accused, in this case, was in the employ of the Post Office at Berhampore, and the facts found are that, on the arrival of the mail, he assisted the sorting clerk in sorting letters, and that, while so doing, he was observed to secrete two letters in his cloth. The head clerk called the Postmaster and accused was searched. Two bearing letters were found in his cloth. When questioned, he said that he intended to give them to the delivery peon, and to share with him the bearing postage, which the latter would collect. The Senior Assistant Magistrate, before whom the accused was charged, was of opinion that the accused did not intend to fraudulently appropriate the letters, nor did he wilfully secrete them, the words implying, in the Magistrate's opinion, wilful intention to keep the letters out of the possession of the addressees and not covering the action of the accused.

The Magistrate observed also that the accused was originally charged with theft, but, as there was no intention to take away the letters and thereby cause gain to himself, the accused was not guilty of this offence.

The Magistrate accordingly discharged the accused under section 253, Criminal Procedure Code.

The District Magistrate submits that the order of the Senior Assistant Magistrate, discharging the accused, is erroneous in law.

The prosecution, we observe, was brought under section 48 of

the Indian Post Office Act, the material words of which, in so far as we are concerned with the section in this case, are as follows:

"Whoever, being in the employ of the Government, in the Post Office Department, shall steal, fraudulently appropriate, or wilfully secrete, destroy or throw away any letter or other article sent by post, &c., shall be punished with imprisonment of either description for a term not exceeding seven years and shall also be liable to fine."

We are of opinion that the view of the Magistrate that the accused did not intend to wilfully secrete the letters within the meaning of the section is correct on the facts found. The words in question appears to us to be directed to such a secreting or concealment of letters as would frustrate or tend to frustrate their delivery to the addressees.

We are of opinion, however, that the accused was otherwise liable under the section, and that the discharge is erroneous for the following reasons:—

The intention of the accused was admittedly a dishonest intention, viz., that of causing wrongful gain to himself and wrongful loss to the Post Office. To carry out that intention, he, for the time being, took the letters into his own personal possession and out of the possession of the Post Office, or, in other words, he appropriated the letters. The letters were, until delivery, property to the possession of which the Post Office was entitled and should have been handed over in the ordinary course to the delivery peon, whose possession would, of course, in point of law, have continued to be that of the Post Office until such time as the letters were delivered. The accused, by taking possession of the letters with the dishonest intention which he admitted was guilty, we consider, of the offence of stealing and of fraudulently appropriating the letters within the meaning of the section, and also of the offence of theft and of attempt to commit dishonest misappropriation of property within the meaning of the Penal Code.

For these reasons, we are of opinion that the discharge of the accused was erroneous in law, and we accordingly set aside the order of discharge and direct that the accused be retried by the Senior Assistant Magistrate.

Ordered accordingly.

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APPELLATE CIVIL.

Before Mr. Justice Handley and Mr. Justice Weir.

RAMAYYA (PLAINTIFF), APPELLANT,

v.

GURUVA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (Act IV of 1882), ss. 58(d), 67—Usufructuary mortgage with a personal covenant—Suit by mortgagee for sale.

In a suit for sale by a mortgagee, it appeared that the mortgage comprised a covenant by the mortgagor for payment of the mortgage amount, but otherwise answered the definition of an usufructuary mortgage contained in Transfer of Property Act, s. 58(d):

Held, that the mortgagee was not precluded by Transfer of Property Act, s. 67, from bringing the property to sale under the mortgage.

SECOND APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Cocanada, in appeal suit No. 414 of 1888, reversing the decree of V. Kristnamurti, Acting District Munsif of Amalapuram, in original suit No. 173 of 1888.

Suit by a mortgagee to recover the mortgage money and in default of payment to bring the mortgage premises to sale. The mortgage instrument was as follows:—

“Usufructuary mortgage bond in respect of inam land executed on the 27th June 1884, corresponding to the 5th Ashada Sudda of the year Tharana, to Vissannavudhanulu Garu, son of Dokka Abbavudhanulu Garu, Brahman, Inamdar, residing in Vakkalanka Agraharam, by us both jointly Ravi Muttanna Garu's son, Guruvanadhanulu and his undivided son, Chenulu, Brahmans, Inamdars, residing in Durivari Mukkamala. The amount of loan received from you this day on account of our urgent necessity is Rs. 300 (three hundred rupees). The amount agreed to be paid to you for the interest hereof is Rs. 30 (thirty rupees). For the discharge of the said interest amount, 5 acres of land with fruit trees thereon, which goes by the name of Mamidethota Pampu, which is situated to the south of Madugu (water-course) and which is owned by us in the village of Munipanavalle, attached to the Sub-Registration District of Kottapeta, Amalapuram taluk, Godavari district, have been made over to your possession this very day (for being enjoyed) for 4 (four) years from this year up to the year Sarvajithu. It is settled that we should pay the principal amount to you in three instalments within this period. In default of payment of the principal amount within the 30th Palguna Bahula of the year Sarvajithu, it is settled that you should continue to enjoy the same, for interest in the afore-

* Second Appeal No. 1125 of 1889.

“said manner from the year Sadvadari, and if the principal money be paid in the 30th Palguna Bahula of any year make over to our possession the said land with trees in the same year. It is settled that out of the mango, palmyra, banyan and other trees standing on the said land belonging to my junior paternal uncle and in the enjoyment of Dokka Narasanna Garu, deducting the half-share belonging to my junior paternal uncle and in the enjoyment of Dokka Narasanna Garu, the remaining half appertaining to my share should be enjoyed by you according to mamool hitherto. It is settled that we ourselves should pay the quit-rent and other taxes due on the said land hitherto.

“Boundaries of the said land. Plot 1.—East, inam of Upathiyala Ayyanna and others; south, boundary lane; west, inam belonging to our junior paternal uncle and in the enjoyment of Dokka Narasanna Garu; north, ditto, consisting of 3 acres with the aforesaid boundaries.

“Plot 1.—East Kodamartivar's inam; south, inam belonging to my junior paternal uncle's share and in the enjoyment of Dokka Narasanna Garu; west, Nemanivaru's inam; north, Kummaraabunda consisting of 2 acres with the aforesaid boundaries. Total 2 plots consisting of about 5 acres of land with trees have now been put in your possession this day. This is the usufructuary mortgage bond in respect of inam land executed with consent.”

The District Munsif passed a decree as prayed, but this decree was reversed, on appeal, by the Subordinate Judge, who dismissed the suit throughout.

The plaintiff preferred this second appeal.

S. Subramanya Ayyar and P. Subramanya Ayyar for appellant.

Parthasaradhi Ayyangar for respondents.

JUDGMENT.—The question to be determined in this second appeal is whether the plaintiff is entitled to a decree for recovery of the amount due to him under his mortgage by sale of the mortgaged property. The Court of First Instance held he was so entitled and gave him a decree, but the Lower Appellate Court held he was not, and dismissed his suit. The mortgage was executed after the Transfer of Property Act came into force, and, therefore, the rights of the mortgagee are those declared by that Act. Section 67 gives the mortgagee the right to obtain from the Court a decree for sale “in the absence of a contract to the contrary,” but with the proviso that nothing in that section shall be deemed (a) (*inter alia*) to authorize a usufructuary mortgagee as such to institute a suit for foreclosure or sale. The term usufructuary mortgage is defined by section 58 (d) to be “when the mortgagor delivers possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage money and to receive the rents and profits accruing

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"from the property and to appropriate them in lieu of interest or in payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage money." No doubt the incidents here enumerated occur in the present case and the mortgage would therefore be a usufructuary mortgage within this definition, but for the fact that the mortgage deed contains a covenant for payment of the principal by a certain date. *Chathu v. Kunjam*(1) is an authority for the position that a mortgage is not a usufructuary mortgage within the meaning of the Transfer of Property Act if there is a covenant to pay the mortgage debt.

The Subordinate Judge holds that the mortgage is of the kind defined as "anomalous" by the Transfer of Property Act and therefore to be governed by the contract of the parties and that by the contract in this case the mortgagee is precluded from suing for sale of the mortgaged property by the provision in the mortgage deed that, in default of payment within the prescribed time, the mortgagee shall continue to enjoy the mortgaged property for interest as before. This provision is one in favour of the mortgagee, extending his security beyond the prescribed period, and does not, in our opinion, take away his right, arising out of the covenant to pay, to sue for sale of the mortgaged property.

We reverse the decree of the Lower Appellate Court and restore that of the Munsif. The plaintiff is entitled to his costs in this and the Lower Appellate Court.

(1) I.L.R., 12 Mad., 109.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

AGRA BANK (PLAINTIFF),

v.

HAMLIN (DEFENDANT) No. 1.*

Civil Procedure Code, s. 290—Court-auction—Withdrawal of bid.

It is competent to a bidder at a Court auction-sale to withdraw his bid.

1890.
September 4.
October 8.

CASE referred for the opinion of the High Court, under Civil Procedure Code, s. 617, by W. E. T. Clarke, Subordinate Judge of the Nilgiris, in the matter of execution petition No. 39 of 1889 in original suit No. 1 of 1889 on his file.

The case was stated as follows :—

"On 20th January 1890, two estates known as 'Chembali' and 'Burnside,' respectively, were put up for sale by Court auction, being the property of the judgment-debtor in original suit No. 1 of 1889 on the file of this Court. At such sale, Mr. David, on behalf of plaintiff (who had permission to purchase), bid Rs. 10,005 for 'Chembali' and Rs. 3,005 for 'Burnside,' but, on 21st January, Mr. David intimated to the nazir that he wished to withdraw these bids, and, on 22nd January, informed the Court of his wish to withdraw. In these circumstances, the Court adjourned the sale of these properties for two months from 22nd January 1890.

"As no definite rules have been laid down by the High Court as to the power of bidders at Court sales to withdraw their bids, and as I entertain a reasonable doubt whether such a practice is permissible, and the matter being one of importance and general interest, it seems to me it would be as well to have it settled authoritatively and finally now the point has been raised. I accordingly refer for the decision of the Honourable the Judges of the High Court the following question :—Is it permissible for bidders at Court sales to withdraw their bids?

"In my own opinion, unless it be deemed that Court sales stand on a different footing from ordinary auction sales, the Court has no power to prevent a bid being withdrawn at Court auctions, for, apparently, a bid is not finally accepted at an auction until the hammer falls, and until such acceptance is complete, a buyer may withdraw his offer (sections 5, 7 and 122, Indian Contract Act, (1872)). To allow this practice to obtain, however, at Court sales, may be productive of much mischief, and, certainly, in many cases, will cause sales to be protracted to an indefinite period; thus *bona-fide* buyers may be discouraged, business be hindered, and the Court and its officials put to great trouble and inconvenience. I believe it is often the practice to insert a clause in conditions of sale that bidders may not withdraw their bids, and, should the High Court be of opinion

AGRA BANK v. HAMLIN. "that at Court auctions a bidder cannot otherwise be prevented from withdrawing his bid at any time before the hammer falls, I would crave permission to insert a prohibition clause of the nature alluded to in auction sales by this Court."

Barelay and Morgan for plaintiff.

Defendant was not represented.

MUTTUSAMI AYYAR, J.—On the 20th January 1890, two estates known as "Chembali" and "Burnside" were put up for sale in execution of the decree in original suit No. 1 of 1889, on the file of the Subordinate Court at Ootacamund. Mr. David bid, on behalf of the plaintiff, Rs. 10,005 for "Chembali" and Rs. 3,005 for "Burnside;" but he intimated his wish to withdraw these bids to the nazir on the 21st January and to the Subordinate Judge on the 22nd. The Subordinate Judge refers to this Court the question whether it is permissible for bidders at Court sales to withdraw their bids.

I am of opinion that the answer must be in the affirmative. Until the lot is knocked down and the sale is concluded, the Court may, in its discretion, adjourn the sale under section 290, Civil Procedure Code, and it is bound to stop the sale of the judgment-debtor satisfies the decree before the lot is knocked down. It is clear then that, until the lot is knocked down, the Court has a *locus penitentie* and it follows, in the absence of some specific provision to the contrary, that bidders are intended to be placed in a similar position. It appears that, in the case under reference, it was not one of the conditions of sale that bidders were not at liberty to withdraw their bids. For these reasons, I answer the question in the affirmative.

BEST, J.—The question submitted for consideration is whether it is permissible for bidders at Court sales to withdraw their bids? I agree in answering this question in the affirmative. An offer to buy or sell may be retracted at any time before it is unconditionally and completely accepted, by words or conduct; and a bidding at an auction is a mere offer which may be retracted before the hammer is down. Such is the rule with regard to auctions in general, and the same must be held to be applicable also to Court auctions, in the absence of any law or rule to the contrary.

PRIVY COUNCIL.

SRI RAJA SATRUCHARLA JAGANNADHA RAZU, ZAMINDAR
OF MERANGI (DEFENDANT),

AND

SRI RAJA SATRUCHARLA RAMABHADRA RAZU AND
OTHERS (PLAINTIFFS).*

P.C.
1890.
November 21.
1891.
January 31.

[On appeal from the High Court at Madras.]

Present partibility of a zamindari originally existing before 1759—Grant by Government in 1802, and again in 1835 of the same zamindari—Absence of intention to grant it as impartible—Sanad-i-milkiyat-i-istimrari.

Although it might be taken that the Mirangi zamindari was formerly held on a military tenure under a raj, and that it continued to be held on the same tenure after it had been incorporated in another zamindari, and, subsequently, when, by conquest, it became part of the Vizianagram zamindari, which was dismembered in 1795. And, even if impartibility was the rule then applicable to the estate, yet the subsequent dealings with the zamindari, the nature and terms of the grants under which it was held after 1802, and the absence of proof of its having been impartible during the present century; also the character of the estate, which was in no way distinguishable from that of an ordinary zamindari assessed to the revenue, all led to the conclusion that the zamindari was now partible.

It was clear from the kabuliyat, or instrument of assent to the sanad-i-milkiyat-i-istimrari of 26th April 1804, that the latter was in the ordinary form of such grants, and there was no ground for inferring that the Government intended to create an impartible zamindari, or to restore an old one with impartibility attached.

In 1835, there was, for a second time, such a dealing with the estate by the Government, in granting it again by sanad, as showed that there was no intention to the effect above mentioned.

The case of the *Hansapur Zamindari*(1) situate in Behar, as to which their Lordships in 1867 held that it must be taken to retain its previous old quality of impartibility, after having been granted in 1790, was distinguished.

APPEAL from a decree (13th March 1888) of the High Court(2), affirming a decree (14th December 1885) of the District Judge of Ganjam.

The suit out of which this appeal arose was brought by three uncles of the minor Zamindar of Merangi to obtain a decree against him, he being entered in the revenue records as sole proprietor, for partition of that estate with mesne profits from the

* *Present*: LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, SIR R. COUCH, and MR. SHAND (LORD SHAND).

(1) *Baboo Beer Portab Sahoe v. Maharajah Rajender Portab Sahoe*, 12 M.I.A., 1.

(2) *Jaganatha v. Ramabhadra*, I.L.R., 11 Mad., 380.

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year 1873, when they were excluded from possession. The plaint (1884) stated that the istimrar was issued at the permanent settlement in the name of Sri Ganga Razu Garu, who was one of the sons of Venkata Pathi Razu, manager for the family. The sanad was not produced, but only the kabuliyat, dated 25th April 1804. After his death, and in the time of his son, who succeeded him, the zamindari was, on 20th June 1833, sold and was purchased by the Government. In 1835, it was restored with a new sanad, dated 22nd September 1835 to Jagannadha, son of the last preceding zamindar. He died in 1864 leaving four sons, of whom the eldest was recorded as zamindar in the revenue papers, but, as the plaintiffs' case asserted, managed the estate for them, and their minor brothers, who were now made parties defendant.

The eldest son, Chandrasekhara, died in September 1869, and, his son being a minor, the zamindari was taken under the management of the Court of Wards (Regulation V of 1804). As manager and agent, the Collector in 1872 refused to divide the zamindari.

The defence, which was filed by him, as Agent of the Court of Wards on behalf of the minor, set forth that Merangi was originally an impartible estate appertaining to a raj; and that not only from the character of the original tenure, and by immemorial usage and custom, but also by the terms of the sanad of 1804, it descended to the eldest male heir.

There being an historical account of the Merangi family among those of the ancient zamindari families and estates, given by Mr. D. F. Carmichael in the Vizagapatam Manual, at pages 301, 303, both parties accepted it as correct. This also was set forth in the judgment below, to the effect that "this hunda" came into the possession of the present family in the time of one of the rajas of Jeypore, in whose reign the zamindar of that time tried to make himself independent. He was, in the end, put to death, and Merangi was made over to Jaganath Raz, "a principal Jeyporean," who was called Satrucharla (destroyer of the enemy), a title still borne by his successors. About the year 1759, Merangi was incorporated with the neighbouring zamindari of Kurupam by a chieftain, who was afterwards overthrown, and both estates continued under Vizianagram till its dismemberment in 1795, when they were restored to the old families, Satrucharla Ganga Raz getting Merangi. He was a descendant of the Jaganath Raz upon whom the title was first bestowed. The admitted pedigree

which also is set forth in *Jaganatha v. Ramabhadra*(1) does not go further back than Tammirazu, the grandfather of Ganga Raz, with whom the settlement of Merangi was made, after Venkata Raz had been deprived of it for taking arms against the Government. As to this, and as to the restoration of the zamindari to the Satrucharla family, the Commissioners appointed to carry out the permanent settlement stated as follows, in their report to Government, dated 22nd September 1803:—

"On Mr. Webb taking charge of the district in 1795 Venkata Raz, the representative of the younger branch of the family "formerly in possession of the Merangi zamindari, was in arms "against the Company, and his defection induced the Collector to recommend Ganga Raz being appointed zamindar as well "on account of his better pretensions than those of Venkata Raz, as that he was descended from the elder branch of the family. This preference, it would appear, confirmed Venkata Raz in his opposition to the Company's Government, and, on "the breaking out of the disturbances in Kimedi, he joined the "party of Jaggernath Deo. To detach him from this rebel, Mr. Webb considered it expedient to promote a settlement for his "son Jagannath Raz in the Merangi zamindari, by granting him "a portion of the country. In this he has so firmly established "himself that it is known by the name of China Merangi, and, "as he makes all his payments directly to the treasury of the Collector, he appears to consider himself as joint zamindar with his "relation Ganga Raz, holding immediately from the Company, "though, on being required to set forth his pretensions, he did not "attempt to prove more than his being a son of the younger "brother of Ganga Razu's father, which, of course, established no "right of participation. He must, therefore, be considered as holding the share he now possesses through the favour of his cousin, "Ganga Raz. Consequently, he cannot advance a claim to partake "of any addition that may be made to the zamindari either by "the resumption of alienations or otherwise. If the tenure of "Jagannath Raz be viewed in this light, Mr. Alexander conceives "that the permanent settlement need not be retarded, but that, on "its taking place, an engagement may be entered into by Ganga "Raz with his relation for the temporary, or permanent, lease of

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"the country at present held by him adverting to the amount of
"the total jumma fixed on the whole zamindari. We concur in
"opinion with Mr. Alexander that an arrangement of this nature
"was desirable as tending to preserve the peace of the country
"which might otherwise be disturbed by Jagannath Raz; yet as
"his claim originating only in the concession of the late Collector
"Mr. Webb, yielding to the pressure of temporary circumstances,
"without the authority or even knowledge of Government, we do
"not think that any reference should be had to him in forming
"the permanent settlement, which we would recommend to be
"made exclusively with the acknowledged Zamindar Ganga Raz,
"who will be at liberty to make what arrangement he pleases
"with Jagannath Raz."

The Government concurred with the Commissioners in their opinion that the permanent settlement "should be concluded
"with the rightful proprietor Ganga Raz." He, however, died before the sanad was delivered to him, and Chandrasekhara, his son, received it on the 25th April 1804. The latter fell into money difficulties, and his estate was sold under a decree of the Civil Court to pay his debts. It was purchased by the Government for Rs. 500 on the 20th June 1833. At this time a rebellion was going on in Palcondah. The Dewan of the late Zamindar of Merangi suppressed it, with the help of his retainers. They were offered a reward, but entreated that instead of granting it to them, "the Government would be pleased to restore Merangi to the ancient family." This request was supported by the Special Commissioner, Mr. Russell, and agreed to by the Government, and accordingly a new sanad was granted, on the 22nd September 1835, to the minor son of the late Zamindar, Jagannadha. This sanad was in the usual form of such documents, except that it contained a special recital, stating the circumstances under which the estate had been lost to Chandrasekhara and restored to Jagannadha. This new zamindar was succeeded in 1864 by his son, also named Chandrasekhara, during whose life no attempt at a partition was made by his brothers, the present plaintiffs. In 1869, Chandrasekhara's son, the present defendant, Satrucharla Jagannadha Razu, succeeded his father. No attempt was made to oppose the entry of his name in the collectorate record as sole zamindar. In 1872, however, a claim was made by the present plaintiffs to have a general partition of all the property

including the zamindari. But the claim was conceded only as regarded the moveable property, the division of which was referred to a panchayet. They made their award on the 7th October 1874.

In June 1883 a formal notice demanding a partition of the zamindari was served upon the minor Jagannadha, then under the guardianship of the Court of Wards, and, on the refusal which followed, the plaintiffs commenced the present suit.

The District Judge decreed in favour of the plaintiffs for a partition of the zamindari with mesne profits for three years, but without costs. In his judgment, he stated that the zamindari was originally held on a military service tenure from the Raja of Jeypore. He then traced its history down to 1821, and, after noticing the scantiness of evidence as to the devolution of the estate, and expressing his opinion that it could not be regarded as a principality or raj, he proceeded as follows:—"As to immemorial family usage, it appears that the estate had never been divided before English rule, and, in ordinary cases, where property descends to one member of a family, the presumption would be in favour of primogeniture, but any such presumption would be much weakened in the present case when we regard the military nature of the tenure and the unsettled character of the Government in the last century, and would be quite insufficient to establish a family custom which must be proved by clear and positive evidence. Further, even assuming that the family custom of primogeniture formerly governed the descent, there was a breach of continuity in the custom for nearly half a century, and the old custom would not attach to the estate, restored under new conditions, unless the family subsequently showed their intention to adopt it."

Finally, he stated that there was nothing, at the time of the permanent settlement, to indicate that the Government intended to create an impartible estate for the first time and his opinion was that there was nothing in the terms of the new sanad to constitute the zamindari impartible. From this decree the defendant appealed on the merits, and the plaintiffs for costs.

The High Court confirmed the decree of the first Court, except as to costs, which it disallowed altogether.

The judgment of the High Court is given at length in the report of *Jaganatha v. Ramabhadra*(1). It was delivered by

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Kernan, J., who commented on the break in the possession of the family from 1760 up to 1795, and said that after 1795 the zamindari was certainly not held on military tenure. He considered that from 1795, Ganga Raz was merely in possession on sufferance for seven years, and that there was no reasonable ground for presuming that it was the intention of the Government to create an impartible zamindari. He thought that the terms of section 6 of the sanad, as to the right of transfer, was inconsistent with the idea that the zamindari was impartible, and was to remain so. As to the sanad of 1835, he considered that it only conferred on the grantee an estate of the same kind that his father had held, subject to the ordinary incidents.

The plaintiffs having appealed, Mr. *J. D. Mayne* and Mr. *R. B. Michell* appeared for the appellants.

The decree of the High Court should be reversed, and the suit dismissed, the impartibility of the zamindari having been established. For impartibility to attach, the estate need not be traced to a ruling raj, but it was sufficient that the zamindari had been found to have originated in a military tenure, before the establishment of British rule. The zamindari was an ancient one, and no evidence had been given that it had lost the quality characteristic of the tenures to which it originally belonged. There had been three periods in its existence, and, as to the first, the High Court should have held that down to 1795 the estate having been a military tenure was impartible, and also by family custom. As to the second period, the circumstances under which in 1803 the zamindari was granted to Ganga Raz, and permanently settled with his son showed that the Government did not intend to create a new zamindari, but to restore an ancient one. The restoration of the old title carried with it all those incidents of impartibility, and primogeniture, which were formerly believed always to attach to such estates. The terms of the sanad, represented in section 6 of the kabuliyat, were not inconsistent with there having been an intention to restore an old tenure; to create no new estate, but to select another holder in the old line, and that a single person. The terms of the sanad were, in effect, neutral upon the question that now had to be decided, but with reference to the reasons actuating the Government, as especially shown by the report of 22nd September 1803 by the Commissioners, and other documentary evidence, it seemed to have considered that the peace of the country would be better secured by the grant to a single zamindar.

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If, moreover, nothing was shown, but a grant to a zamindar and his heirs, the presumption was that the estate accorded with the law, or the custom, of his race in devolving upon successors. The sanad, in effect, carried little beyond that an arrangement had been made for revenue purposes, and here the estate had virtually, if not formally, been already granted, the sanad only fixing the permanent revenue payable. Here the estate was impartible already when the Government took it in hand to grant it, and the same authority, having the power to withhold or to grant, selected a member of the old family, restoring it to him. Thereupon, as in the *Hansapur case*(1), the estate was granted with its customary rule of descent, and not to be held as an ordinary zamindari. In that case it was held that there was nothing to show that the quality of the estate was altered by the grant or that the intention of the Government in making it was to render the estate partible. The same principle was applicable here. The regulation giving the law of the partibility of zamindaries in Bengal (Regulation XI of 1793) had never been enacted for Madras. The judgment in the *Hansapur case* said:—"There was nothing to show that the quality of the estate was altered by the grant," and again "the zamindari must be taken to possess its old quality of impartibility." So also in the second *Shivagunga case*, *Muttu Vaduganadha Tevar v. Dora Singha Tevar*(2), it was held that the evidence of impartibility must receive effect, unless it could be avoided by showing some dealing with the zamindari transmitting its ancient quality. The *Nuzvid case*, *Raja Venkata Rao v. The Court of Wards*(3) was distinguishable from this, because, in that case, the zamindari could not be identified with any ancient one existing before the sanad of 1802 put into the same class with other zamindaries. The general observations in the judgment in the *Devarakota case*, *Mallikarjuna v. Durga*(4) were referred to as supporting the appellant's case.

The subsequent conduct of the junior members of the family showed a belief to exist that the custom of impartibility was binding upon them. A suit was brought by a relation against Chundrasekhara in 1805, but it did not seem to have occurred to any one that partition was claimable. In 1859, when Somaraz,

• (1) 12 M.I.A., 1. (2) L.R., 3 Mad. 290; L.R., 8 I.A., 99.
(3) I.L.R., 2 Mad. 128; L.R., 7 I.A., 38. (4) I.L.R., 13 Mad. 406.

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another claimant, was referred by the authorities to a regular suit, he did not sue. The documentary evidence supporting the view that the family regarded the estate as impartible was referred to. The re-grant of the zamindari by sanad in 1835 was a restoration of the ancient title, and in no way was it the creation of a new estate.

The respondents did not appear. On the 31st January, their Lordships' judgment was delivered by

Mr. SHAND.—The matter for determination in this case, which arises on a question of disputed succession between the parties, is whether the zamindari of Merangi is partible or impartible. The appellant, the present registered zamindar of Merangi, maintains that the estate, which is described on the record as consisting of 86 villages with their hamlets, situated below the ghauts, and adjoining the zamindari of Jeypore, is impartible; and he complains of the decisions of the District Court of Ganjam, and of the High Court at Madras, in both of which Courts the judgments have been to the effect that the zamindari is partible, and, consequently, divisible between him and the respondents, for whom no appearance was made at the hearing of this appeal.

Their Lordships are of opinion that the judgments of the Courts of First and Second Instance are right. It is unnecessary to recapitulate the facts, which are fully stated in the judgments complained of. For the purpose of this decision, it may be assumed, as it was by the Subordinate Judge (the High Court say there is no evidence of it) that the zamindari was at one time held under military tenure from the Rajah of Jeypore, when it was granted to an ancestor of the present appellant. It may further be assumed, though there is little, if any evidence to warrant the assumption, that the tenure continued to be the same after the estate had been taken by force and incorporated in Kurupam zamindari, and, subsequently, when, by conquest, it again became part of the Vizianagrum zamindari, which was dismembered in 1795. Taking it, in accordance with the argument of the appellant's counsel, that impartibility was the rule then applicable to the estate, their Lordships are clearly of opinion that the subsequent dealings with the estate, the nature and terms of the grants under which it has been held throughout the present century, the absence of proof of any usage or practice of impar-

tibility in the succession to the estate, contrary to the ordinary Hindu law of succession, and the character of the estate, which is in no way distinguishable from an ordinary zamindari subject to the payment of a fixed assessment of revenue, all clearly lead to the conclusion that the zamindari is now a partible estate in a question of succession.

The grant of 1803 by the Government does not appear amongst the documents on the record; but it is clear from the *kabuliyat* that the *sanad-i-milkiyat-i-istimrari* was in the ordinary terms of such grants. There is nothing in the circumstances under which this grant was made to lead to the inference that the Government had in view, in making this new grant, the creation of an impartible zamindari as an exception to the ordinary rule of succession of the Hindu law. The single circumstance that the property was given to a representative of an elder branch of the family formerly in possession, in preference to the representative of a younger branch, who had been in arms against the Government, is of very little weight; and, accordingly, even at this early date, in the beginning of the century, it appears to their Lordships that the zamindari of Merangi, if impartible before, became partible in question of succession, as it became also subject to the disposition of the zamindar by deed of transfer on sale or gift of the whole or part of the property.

What occurred in 1835, however, makes the determination of the case perhaps even more clear. The estate had again come into the possession of the Government. It had been exposed to public sale for payment of debt due by the zamindar, and might have been bought by any third party as purchaser. The Government, however, bought it, and held it for some time. During this time the Dewan of the former zamindar, and certain of the *Doratanams*, performed an important service to the Government, who had offered a considerable pecuniary reward for the capture or putting down of certain rebels who had caused much disturbance in the district. They succeeded in putting down the rebellion. Instead of the pecuniary reward to which they became entitled, they begged that a new grant of the zamindari might be given to the son of the former zamindar (then still in life), who was a boy of only nine years of age, and the grant was accordingly made to this boy in the usual terms of a *sanad-i-milkiyat-i-istimrari*, and his heirs, with the ordinary power of sale or disposal

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of the property in whole or in part, and concluding with the words:—Article 14. “Continuing to perform the above stipulations, and to perform the duties of obedience to the British Government, its laws and regulations, you are hereby authorized “and empowered to hold in perpetuity to your heirs, successors, “and assigns, at the permanent assessment herein named, the “zamindari of Merangi.” It appears to their Lordships that here again, for a second time, there was such a dealing with the estate, as in the circumstances, and having regard to the terms of the grant, clearly shows that there was no intention to create an impartible estate, assuming there was power to do so, or to restore an estate previously impartible. The circumstances were entirely different from those which occurred in the Hansapur case, where an estate, in itself an important raj or principality, was simply confiscated to the Government and again given out to the nearest heir of the next line. As was observed in the judgment, “the “transaction was not so much the creation of a new tenure as “the change of the tenant.” In the present instance, the grant followed on a purchase of the property by the Government. It was given, on the solicitation of persons who had a claim against the Government, to one who, though no doubt the son of the former zamindar, might have had no such grant, but for the intervention of those persons who were attached to him; and there is nothing in the terms of the grant to support the contention of the appellant,—on whom the onus lies of proving that this is the exceptional case of a zamindari impartible in its nature,—and nothing to prove a usage or custom of succession, throughout the operation of the grants of 1803 or 1835, contrary to the ordinary rule of the Hindu law.

Their Lordships, therefore, will humbly advise Her Majesty that the decree of the High Court ought to be affirmed and the appeal dismissed. The appeal having been heard *ex parte*, their Lordships make no order as to the costs of it.

The costs of an application for leave to be heard, which was made, after the conclusion of the hearing of the appeal, by certain of the respondents, and which was opposed by the appellant, must be paid by those respondents.

Appeal dismissed.

Solicitors for the appellant:—Messrs. Burton, Yeates, Hart and Burton.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

QUEEN-EMPRESS

v.

JANGAM REDDI AND OTHERS.*

Forest Act, (Act V of 1882, Madras), ss. 2, 3, 4, 6, 8, 9, 50.

The accused, who were servants of the shrotriendar of an agharam, destroyed a cairn erected by the Forest Department on the shrotriemand land along the boundary line of a proposed forest reserve. No notice under Forest Act, s. 6, was proved to have been served on the shrotriendar, and it did not appear whether the land in question was comprised in the boundaries specified in the notification published under s. 4. The accused were convicted under s. 50 (d):

Held, (1) that the provisions of the Act did not apply to the shrotriemand land;
(2) that the right of a forest officer to enter upon and demarcate land under s. 9 is limited to the purpose of the inquiry directed by s. 8;
(3) that the conviction was wrong.

PETITION under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the proceedings of T. Rama Raw, Sub-Divisional Magistrate of Cuddapah, Sidhout division, held in criminal appeal No. 18 of 1889, confirming the finding and sentence of R. Narayana Raw, Second-class Magistrate of Chitwail, in calendar case No. 48 of 1889.

The facts of the case and the arguments adduced on this revision petition appear sufficiently for the purposes of this report from the judgment of the High Court.

Mr. Wedderburn for petitioners.

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

JUDGMENT.—The petitioners, 3 in number, have been found guilty of removing a cairn erected by officers of the Forest Department in the Cuddapah district as marking the southern boundary of the Salivendula Gattimanikona reserve, and sentenced under section 50 (d) of the Forest Act, Madras, as follows:—First petitioner to pay a fine of Rs. 40, or, in default, to be rigorously imprisoned for six weeks, and the other two petitioners to pay each a fine of Rs. 20, or, in default, to be rigorously imprisoned for one month.

* Criminal Revision Petition No. 33 of 1890.

It is urged on their behalf (1) that the Forest Act is not applicable to the place where the cairn was erected, and (2) that the Lower Courts were wrong in declining to consider what are the limits of the Maharajapuram agharam.

Section 3 of the Act gives the Governor in Council power to constitute, as a reserved forest, "any land at the disposal of Government."

"Land at the disposal of Government" is defined in section 2 as including "all unoccupied land, whether assessed or unassessed, but does not include land, the property of landholders, as defined by section 1 of Act VIII of 1865, Madras," among whom shrotriendars are expressly mentioned.

Section 4 is as follows:—"Whenever it is proposed to constitute any land as reserved forest, the Governor in Council shall publish a notification in the Fort St. George Gazette and in the official gazette of the district—

- "(a) Specifying, as nearly as possible, the situation and limits of such land;
- "(b) Declaring that it is proposed to constitute such land a reserved forest;
- "(c) Appointing an officer (hereinafter called the Forest Settlement Officer) to inquire into and determine the existence, nature and extent, of any rights claimed by, or alleged to exist in favour of, any person in or over any land comprised within such limits, or to any forest produce of such land and to deal with the same as provided in this chapter."

The next thing to be done is contained in section 6, which is as follows:—

"When a notification has been issued under section 4, the Forest Settlement Officer shall publish in the official gazette of the district and at the head-quarters of each taluk in which any portion of the land included in such notification is situate, and in every town and village in the neighbourhood of such lands a proclamation—

- "(a) Specifying, as nearly as possible, the situation and limits of the lands proposed to be included within the reserved forest.

* * * *

- "(b) Fixing a period of not less than three months from the date of publishing such proclamation in the official gazette of the district and requiring every person claiming any right referred to in section 4 either to present to such office, within such period, a written notice specifying, or to appear before him within such period, and to state the nature of such right, and, in either case, to produce all documents in support thereof."

The section further directs that the Forest Settlement Officer "shall also serve a notice to the same effect on every known or reputed owner or occupier of any land included in or adjoining the land proposed to be constituted a reserved forest, or on his recognized agent or manager."

Section 8 next directs that the Forest Settlement Officer "shall take down in writing all statements made under section 6 and shall inquire into all claims made under that section" and section 9 gives to the Forest Settlement Officer power, "for the purpose of such inquiry" to enter, by himself or any officer authorized by him for the purpose, upon any land "and to survey, demarcate and make a map of the same."

The only other section of the Act that need be noticed for the purposes of this case is that under which the petitioners have been convicted, i.e., section 50, which provides for the punishment of any one who, with intent to cause damage or injury to the public or to any person, or to cause wrongful gain as defined in the Indian Penal Code (*inter alia*) "alters, moves, destroys or defaces any boundary mark of any forest or any land to which the provisions of this Act apply."

The contention on behalf of the petitioners is that the place where the cairn in question was erected was not "land to which the provisions of the Act applied," in that it is not included within the boundaries specified in the notification published under sections 4 and 6; and it is further objected that the shrotriendard of Maharajapuram, whose servants the petitioners are, was not served with any notice as required by the latter part of section 6.

The Deputy Magistrate, who was required to take evidence and submit his findings on these two points, now reports (1) that he "cannot find that the required notice under section 6 of the Madras Forest Act was served upon the shrotriendard," and (2)

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that he has "not been able to obtain satisfactory evidence" on the other point.

The only evidence forthcoming on this "other point," *i.e.*, the question of boundary is given by Mr. Higgins who was the Forest Settlement Officer by whom the boundary in question is alleged to have been fixed. He states that the western and southern boundaries of the Gattimanikona reserve, as notified under section 4 of the Forest Act, were not adhered to in the demarcation that he ordered, and explains that, finding it would be more convenient for all parties, he made an alteration of the western boundary, which "involved the cutting off of a corresponding portion of the southern boundary." However, all that he did with regard to the southern boundary was to fix the western point from which it should commence. He says "the question of what the actual boundary of Maharajapuram might be was left to be threshed out when the southern boundary of the Gattimanikona reserve, which was not dealt with in my instructions, came to be cut," and adds—"It will be noticed that, in my instructions, I stated that no work is required on the southern boundary or eastern boundary at present, showing, I think, that no question had then arisen as to what was the authorized boundary of Maharajapuram." He does not remember any dispute having arisen about the matter before he left the district and concludes as follows:—"Whatever I did or said on the 14th May 1887, or said afterwards in my instructions, cannot, I think, be construed into an authoritative determination of the location of the Maharajapuram boundary."

It is thus seen that there was no decision as to the southern boundary by Mr. Higgins; and there is no evidence of any subsequent determination of that boundary by any authorized officer. Further, it is clear that the cairn in question was erected at a point south of the river which (as appears from the arbitrator's award, confirmed by the Deputy Director of Revenue Settlement in March 1874) is the northern boundary of the Maharajapuram shrotriem village, and, consequently, the southern boundary of the proposed forest reserved as notified under section 4 of the Act.

It is contended by the Government Pleader that even then the petitioners have been rightly convicted under section 50 of the Forest Act, because section 9 gives the Forest Settlement Officer power "to enter, by himself or any officer authorized by him for the purpose, upon any land and to survey, demarcate and make a

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map of the same." But as appears from the first words of section 9, which are "for the purpose of such inquiry," the power conferred under that section is not unlimited. It is limited to the purpose of the inquiry directed by section 8, *i.e.*, as to "claims made under section 6," namely claims to "any right referred to in section 4;" and the rights "referred to in section 4" are rights claimed or alleged to exist on or over any land comprised within the limits specified in the notification published under that section. The site in question being found to be beyond those limits, section 9 is inapplicable even if the demarcation in question was being made for the purpose of any future inquiry, instead of, as appears to have been the case, for the purpose of being a permanent mark of a finally decided boundary.

Section 50 makes punishable the destruction of a boundary mark only in case of its being done "with intent to cause damage or injury to the public or to any person; or to cause wrongful gain as defined in the Indian Penal Code." The section is therefore inapplicable to a case in which any of the acts therein specified is done in good faith in the exercise of a valid right, which appears to have been the case in the present instance. Further, the acts punishable under clause (d) of section 50, the clause under which the petitioners have been convicted, is expressly limited to boundary marks of any forest lands "to which any provisions of this Act apply." In the definition of "land at the disposal of Government" in section 2, shrotriendars are expressly mentioned as landlords whose land is excluded from the definition. Consequently, the land on which the cairn was erected being shrotriem land, was not land to which the provisions of the Act could apply, it being only lands at the disposal of Government that can be constituted reserved forests under section 3 of the Act.

The conviction of the petitioners is therefore bad. It must be set aside, and the fines levied ordered to be refunded.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

RAMASAMI (PETITIONER),

v.

ANDA PILLAI (COUNTER-PETITIONER).*

Civil Procedure Code, ss. 231, 232, 623—Joint decree-holders—Assignment by operation of law of a share in a decree—Application for execution—Review, grounds of—Limitation Act (Act XV of 1877), sched. II., art. 179, cl. 4.

A Hindu obtained in 1878 a decree for partition of certain property, and he now applied in 1888 to have it executed. He relied in bar of limitation on an application for execution made by his son, who had obtained a decree against him in 1881 in a partition suit, whereby his right was established to one-fifth of whatever should be acquired by the father by virtue of the decree of 1878.

The father's application for execution in 1888 was held to be barred by limitation in *Ramasami v. Anda Pillai*(1).

On review it appeared that the son had applied for execution of the whole decree, stating that his father would not join him in such application, and that notice was given to the father:

Held, (1) that the son was an assignee by operation of law of one-fifth of the judgment-debt in the suit of 1878;

(2) that his application accordingly kept the decree alive under Limitation Act, 1877, sched. II., art. 179, cl. 4, and the father's application in 1888 was not barred by limitation.

APPLICATION under Civil Procedure Code, s. 623, for review of the judgment pronounced in *Ramasami v. Anda Pillai*(1), in the report of which case the facts are fully stated.

The head-note to that report is as follows:—

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.

The appellant preferred this petition for review on the following grounds:—

- (1) That the petitioner's son, Saranatha Ayyangar, got a declaration that he is entitled to one-fifth of petitioner's properties in the decree in original suit No. 29 of 1881 on the file of the Subordinate Court at Kumbakonam.
- (2) This decree only declared a pre-existing right as petitioner and the said son were members of a joint Hindu family.
- (3) That in virtue of that decree petitioner's son became entitled to a portion of the decree in original suit No. 245 of 1878 on the file of the District Munsif's Court at Kumbakonam, and as such became a joint decree-holder in the said decree.
- (4) That joint decree-holders are bound to apply for execution of the whole decree, and petitioner's son did apply for execution of the whole decree in his application, dated 13th December 1884.
- (5) That that application clearly saved petitioner from the operation of the statute of limitation (see article 179).
- (6) That explanation I, as to several decrees, does not apply in this case to this decree, because—
 - (a) it does not distinguish portions of the subject-matter;
 - (b) it was not passed severally;
 - (c) petitioner's son would be entitled only to one-fifth of the realizations on the whole decree;
 - (d) the wording of the explanation clearly refers to the decree itself, distinguishing portions of the subject-matter as payable or deliverable to each.
- (7) The decision of their Lordships of the Privy Council in 16 W.R., 29 has not been given due effect to.

Mr. Wedderburn for petitioner.

JUDGMENT.—At the hearing of the appeal, our attention was not drawn to the facts that the son applied for execution of the whole decree, stating that his father would not join him in such application, and that notice was given to the father.

* Civil Miscellaneous Petition No. 786 of 1890.

(1) I.L.R., 13 Mad., 347.

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These facts alter the position considerably.

The effect of the decree in the partition suit was to make the son, by operation of law, an assignee of one-fifth of the judgment-debt in the suit brought by his father.

Such an assignee has a right, if the original decree-holder and other assignees, if any, do not consent to join him in applying for execution, to apply himself for execution of the whole decree making them counter-petitioners by giving them notice. Otherwise, he would have no means of obtaining his right under his assignment, but by a separate suit, and there seems no reason why he should be driven to such a circuitous course, when, by applying for execution, the right of all parties can be properly determined by the Court.

In this view, no question arises as to the effect of explanation I to article 179 of schedule 2 of the Limitation Act. The decree was passed, not in favour of more persons than one, whether jointly or severally, but in favour of one person, viz., the father, and the explanation has, therefore, no application to the case; and the application for execution by the son as transferee of part of the decree having been an application in accordance with law, is sufficient to keep the decree alive under article 179, clause 4 of schedule 2 to the Limitation Act.

We allow the review and set aside our former order and the order of Mr. Justice Wilkinson, and restore the order of the District Court. Counter-petitioner will pay the costs of petitioner of the appeal before Mr. Justice Wilkinson. There will be no costs of the appeal under the Letters Patent or of this application for review.

APPELLATE CIVIL—FULL BENCH.

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

REFERENCE UNDER STAMP ACT, s. 46.*

Stamp Act—Act I of 1879, ss. 17, 33, 37(b)—Act XXXVI of 1860, s. 13—Act X of 1862, s. 15—Unstamped document executed in 1862 out of British India—Penalty.

A document comprising an assignment of the executant's interest under a will, and also a power-of-attorney, was executed on 26th May 1862 in Australia. It was sought in 1890 to use the document in Madras, but it was not stamped:

Held, that no penalty could be levied upon it under the Stamp Act of 1879.

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

The case was stated as follows:—

“Messrs. Barclay and Morgan submitted to the Collector of Madras, under the provisions of section 37 of Act I of 1879, an unstamped instrument, dated 26th May 1862, for adjudication of stamp duty payable on it. The instrument was executed in South Australia on the 26th May 1862 when the Stamp Act XXXVI of 1860 was in force in British India, and was received in Madras on the 22nd June 1862 when the Stamp Act X of 1862 was in force. The adjudication of stamp duty on the document is now applied for under Act I of 1879. The document falls under articles 21 and 50 of schedule I of the Stamp Act I of 1879.

“The Board in its Proceedings, dated 12th July 1881, No. 1354, held that ‘in the case of documents unstamped or insufficiently stamped at the time repealed Acts were in force, the duty should be calculated with reference to the requirements of the law at the time of execution, but the penalty under Act I of 1879.’ The High Court also concurred in this opinion—*vide* Referred Case No. 2 of 1882; also *Narayanan Ohetli v. Karuppathan*(1).

“The Stamp Acts XXXVI of 1860 and X of 1862 contained no provision for stamping documents executed out of British

* Referred Case No. 9 of 1890.

(1) I.L.R., 3 Mad., 251.

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"India, except bills of exchange. Section 24, clause (c) of Act XVIII of 1869 for the first time provided that every instrument chargeable with duty executed out of British India, and not being a bill of exchange, cheque, or promissory note, may be stamped within three months after it has been first received in British India.

"As the Stamp Act which was in force at the time when the document under reference was received in Madras did not provide for the stamping of such documents, the Board doubts whether it can be impounded and the amount of duty and penalty certified as requested by Messrs. Barclay and Morgan."

The letter of Messrs. Barclay and Morgan above referred to, submitting the document for adjudication and a certificate as to stamp duty, stated the circumstances connected with the document as follows:—

"We forward herewith an assignment, dated 26th May 1862, from Daniel Henry Schreyvogel of Adelaide, South Australia, to Edward Winstanley Brettingham of the same place, of the former's interest in a sum of Rs. 2,500 and all other his interest under the will of his father, the Rev. Daniel Schreyvogel.

"The facts connected with this instrument are shortly as follows:—By his will, dated 1st January 1840, the Rev. D. Schreyvogel directed that a certain sum of money should be invested in Government securities and the interest thereof paid to his wife so long as she remained a widow, and that, on her death, the money should be considered as part of his estate, or, if his estate should have been already divided, that such money should be divided between his two children, the above named Daniel Henry Schreyvogel and a daughter, in equal shares. The testator gave the residue of his estate in equal shares to his son Daniel Henry Schreyvogel and his (testator's) daughter, the son's share to be paid to him on his coming of age and the daughter's to be held on certain trusts. The testator's estate, with the exception of the sum set apart for the benefit of his widow, was many years ago divided between his son D. H. Schreyvogel and the daughter's children, she having died.

"D. H. Schreyvogel went to Australia, and on the 26th May 1862 he executed the enclosed assignment in consideration of a sum of Rs. 13 advanced to him by Mr. Brettingham. From the deed it appears that Mr. Brettingham was to have

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"advanced D. H. Schreyvogel further sums; but we are instructed that he never did so, and on the 8th April 1864 Brettingham was declared by the Insolvent Court of Adelaide an insolvent.

"In a letter dated 26th May 1862, Mr. W. Vernon Herford, who acted as Mr. Brettingham's solicitor, forwarded to Messrs. Binny and Co. of this place the enclosed assignment. At this time Mrs. Ann Schreyvogel, the testator's widow, was alive, and as the estate of the testator had already been divided with the exception of the sum set apart for the benefit of his widow, there was at that time nothing payable under the assignment in favor of Mr. Brettingham. Mrs. Ann Schreyvogel, the testator's widow, died on the 16th December 1888.

"Mr. Herford's letter of 26th May 1862, with the assignment, was received here on the 22nd June 1862.

"More than one year having expired since the date of execution of the assignment, we cannot proceed under section 38 of the Stamp Act, and the only alternative is to ask you to proceed under sections 33 and 37 (b) of the Act and to impound the assignment in the first instance and then require payment of the proper duty and the penalty, if you think this is a case in which a penalty should be inflicted. The circumstances of the case are somewhat peculiar. Mr. Brettingham in whose favor the assignment is made, being in Australia, could not get the assignment stamped, and Messrs. Binny and Co., to whom the assignment was sent in 1862, had, of course, no interest in having the deed stamped. By Mr. Brettingham's insolvency his interest under the assignment passed to the Official Receiver of the Insolvent Court of Adelaide, and that officer, who had never heard of the assignment until we communicated with him, now claims from the administrator of the Rev. D. Schreyvogel's estate the share of D. H. Schreyvogel in the sum set apart for the benefit of his mother under the testator's will. Mr. J. A. Boyson, of Messrs. Binny and Co., who in 1884 became the administrator of the estate of the late Rev. D. Schreyvogel, declines to recognize the claim of the Official Receiver, unless he can produce the assignment to Mr. Brettingham duly stamped, as otherwise Mr. Boyson would have no document he could put in evidence to justify the payment of the Official Receiver's claim."

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

REFERENCE
UNDER STAMP
ACT, s. 46.

JUDGMENT.—We are of opinion that the unstamped instrument executed in Australia and dated 26th May 1862 is not chargeable either under Act XXXVI of 1860 or Act X of 1862 with stamp duty. Consequently no penalty can be levied under Act I of 1879.

PRIVY COUNCIL.

P.C.*
1891.
January
21, 31.

TANJORE RAMACHENDRA RAU AND OTHERS (PLAINTIFFS),
and
VELLAYANADAN PONNUSAMI AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Madras.]

Contract to pay interest—Construction.

In reference to a debt carrying interest at a certain rate, the debtor gave to the creditor, on the approach of the date when the debt would have been barred by limitation, an acknowledgment to prevent that from occurring:

Held, that the acknowledgment, being intended only for the purpose of eliding the law of limitation, had not, by any novation of the contract, given to the creditor a right, in the absence of special stipulation to the contrary, to claim interest at a rate higher than that which the debt had borne down to the date when the acknowledgment was made.

APPEAL from a decree (12th February 1885) of the High Court, varying a decree (25th January 1884) of the High Court in its original jurisdiction.

The defendants, of whom the first and second were brothers, and the three last were minor sons of the first, carried on business through the latter, as managing member. They had, for many years, dealings with the plaintiffs' firm, having been in the habit of borrowing money from the latter, and also Government promissory notes, for which, ordinarily, 12 per cent. interest was allowed, on both sides, in current account. The plaintiffs had interests as partners with the defendants in abkari contracts, taken by the latter from Government, in several districts of Madras. Tuljaram Rao, the fourth plaintiff, was the managing member for his family. The plaint (25th March 1881) claimed Rs. 2,06,213, or such

* Present: Lords WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, and Sir RICHARD COUCH.

other amount as should, on an account being taken, be found due to the plaintiffs in respect of advances, and in respect of partnerships' interests in abkari contracts, in which they claimed to be interested as partners, and to be entitled to share profits.

There were questions of fact, on this appeal, as to the transactions and relations between the parties regarding the abkari contracts, and their shares in the profits. A question of construction also had arisen, as to the rate at which the plaintiffs were entitled to claim interest on an admitted debt(1).

At the hearing of this appeal, the first matter contested was as to the result of an agreement in 1875, between Tuljaram and the first defendant, that the plaintiffs should have an interest in an abkari contract for the district of Trichinopoly, obtained from Government, for three years, from the 1st July of the above year, and terminating on the 30th June 1878. The profits of that contract were stated at over Rs. 44,000. The plaintiffs claimed a half share, while the defendants alleged that they were only entitled to one quarter of the profits. There was also a defence that the plaintiffs had by a contract in a letter of 16th September 1880 agreed to give up all claim to share the profits of this contract, as well as the profits of others; and, in lieu, to take the interest on Government promissory notes, which the plaintiffs had deposited in several Collectorates, as security for the performance of the abkari contracts, as well as interest, at a stated rate, on advances.

The first Court (Turner, C.J.) decided that the plaintiffs were entitled to one-half of the profits of the Trichinopoly contract of 1875. In this the Appellate Court did not concur. And, on the next question, as to the fact of a partnership in abkari contracts, taken from the Government in the name of the fourth plaintiff, which were by agreement of the present parties to be managed by the first defendant, there was also a difference of opinion between the first and the Appellate Court. The latter held that the evidence did not establish a general agreement for partnership, but only agreements for partnership in particular transactions.

The third question was the one to which this report mainly relates, viz., as to the rate of interest to which the plaintiffs were entitled in respect of a loan of Government paper for Rs. 55,000,

(1) Act XXXII of 1839 (Madras).

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made over by the plaintiffs to the first defendant on the 23rd April 1877, the latter giving to the former his promissory note, payable on demand, for Rs. 55,000, with interest payable at $4\frac{1}{2}$ per cent. per annum.

The matters connected with the acknowledgment of this debt on the 20th April 1880, and the contents of the letter of acknowledgment, are stated in their Lordships' judgment.

The first Court held that the plaintiffs were entitled in respect of the note signed by the first defendant on 23rd April 1877 for Rs. 55,000, to interest at $4\frac{1}{2}$ per cent. only, down to the 23rd April 1880; in other words, till the expiration of the two months mentioned in the defendants' letter of the 20th April 1880; and that they were entitled to interest after that date at such rate as the Court might give them, which would be, in regard to the course of dealing between the parties, at 12 per cent. on the sum of Rs. 62,425, "in the nature of damages for the failure to fulfil the promise."

The Appellate Court (Kernan and Muttusami Aiyar, JJ.) on the evidence was of opinion that the transaction was not, as to the interest, governed by the general dealing between the parties; and that, as to this matter, the plaintiffs' right was to interest at $4\frac{1}{2}$ per cent. per annum on the principal sum from the 23rd April 1877, until paid, and also to interest at 12 per cent. on such interest.

On the plaintiffs' appeal,

Mr. J. D. Mayne and Mr. J. H. A. Branson, for the appellants, argued that the first Court had rightly found the facts as to the shares of the profits. On the question of interest on the loan, they contended that the failure by the respondents to pay on the due date the amount of the debt acknowledged to be payable was ground for the claim to interest at the usual rate of 12 per cent. per annum. The effect of the acknowledgment, of 20th April 1880, was to give the appellants a legal claim to interest at that rate, upon Rs. 62,425, the principal and interest down to due date, when upon due date failure occurred.

Mr. J. Graham, Q.C., and Mr. R. V. Dayne, for the respondents, were not called upon.

Their Lordships' judgment was delivered by

LORD WATSON.—This is a suit between two undivided Hindu families, who may be conveniently described as the "plaintiffs"

and the "defendants," because, whilst some of the transactions to which it relates are denied, it is not disputed that the individual members, who are alleged to have entered into those transactions, had authority which would have enabled them to bind their respective families. As originally framed, the plaint concluded for repayment of specific advances with interest; but, before the adjustment of issues, it was amended, so as to cover a claim for a partnership accounting in regard to all abkari contracts taken up by them and the defendants during the period of three years, commencing from 9th March 1878.

The plaintiffs, who are the present appellants, complain of a judgment of the High Court of Madras, reversing an order passed by Sir Charles Turner, C.J., in the exercise of the original civil jurisdiction of the Court, in so far only as the reversal concerns (1) the rate of interest payable by the defendants upon an admitted loan of Rs. 55,000, (2) the right of the plaintiffs to participate in certain abkari contracts effected in their own name by the defendants, and (3) the validity and effect of a writing, bearing date the 16th September 1880, signed by the managing member of the plaintiffs' family. The argument at the bar has been confined to these points, which will be noticed in the order in which they have been stated.

On the 23rd of April 1877, the plaintiffs advanced in loan to the defendants the sum of Rs. 55,000, in Government bonds bearing $4\frac{1}{2}$ per cent. interest, and received from them, of same date, a promissory note for the amount, payable on demand, with interest at $4\frac{1}{2}$ per cent. per annum. The loan was not called up, and on the 19th April 1880, the triennial period of limitation being about to expire, the plaintiffs wrote to the first defendant, suggesting that, if they had no mind to renew the note, they should send a letter undertaking to pay the principal and interest within two months. The defendant replied by a letter, dated the 20th April 1880, admitting their liability under the promissory note, stating that the interest due upon the unpaid principal of Rs. 55,000 until the 22nd of the month was Rs. 7,425, and containing these obligatory words,—“With regard to these Rs. 62,425, I will settle the accounts, and pay the amount which may be due within two months, though the note might be barred by the Statute of Limitations.” After the receipt of that letter, no demand for payment appears to have been made.

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by the plaintiffs until the present suit was brought in March 1881, when they claimed interest at the rate of 12 per cent. per annum.

The plaintiffs now maintain that the undertaking given by the defendants operated as a complete novation of the debt: that it transmuted the loan of Rs. 55,000, bearing $4\frac{1}{2}$ per cent. interest into a legal claim for the principal sum of Rs. 62,425, upon which, in the absence of any stipulated rate, interest became due *ex lege* from the time of payment. That construction of the letter of the 20th April appears to their Lordships to ignore the express obligation which it imposes upon the defendants to "settle accounts" and to pay the amount "which may be due" within the two months allowed for payment. These expressions plainly import that the sum specified in the letter merely represented the amount of their liability calculated to the 22nd April, and did not represent the sum payable by them at the date of actual settlement, which was to be ascertained by taking accounts, or, in other words, by making a new calculation so as to include interest accruing up to that date. The letter was applied for, and was given solely with the view of eliding the Statute of Limitations; and, in the opinion of their Lordships, it had as little effect in altering the quality of the debt constituted by the promissory note as would have been produced by a notice of the same date from the plaintiffs requiring payment within two months.

The next point taken by the plaintiffs raises a question of fact. They allege that, on the 9th March 1878, one of their number entered into a verbal contract with a representative of the defendant family, to the effect that all abkari contracts made by the plaintiffs or defendants within three years from that time, whether with or without previous consultation and arrangement, should be shared by both families, in the proportions of one quarter to the plaintiffs and three quarters to the defendants. The defendants do not dispute that certain abkari contracts, taken by the plaintiffs in their own name during the period in question, were shared by the two families in these proportions; but they deny the existence of the antecedent general agreement alleged by the plaintiffs, and maintain that the subsequent participation of the two families in these contracts was due to special arrangements made at the time with reference to each contract. It is a matter of admission that, during the same period, the defend-

ants took up in their own name several abkari contracts which it is unnecessary to enumerate; and the plaintiffs consider themselves aggrieved by the finding of the High Court that they are not entitled to claim a share of these contracts or of the profits arising from them. They have neither alleged nor attempted to prove that a special agreement was made in relation to each of these contracts, so that they cannot successfully impeach the decision of the Court below, unless they establish the general agreement of the 9th March 1878.

The direct evidence bearing upon that agreement, which is of the most meagre description, is to be found in the oral testimony on the one side of the first defendant, Thavasimuttoo Nadan, and on the other of Tuljaram Rao, the fourth plaintiff, and of three other witnesses who, according to his evidence, were present at the time when it was concluded.

The evidence of the fourth plaintiff is contained in these words:—"In 1878 a verbal agreement was made that in all abkari contracts taken between March 1878 and 30th June 1881, by me or by first or second defendants, I should have a quarter share." That is contradicted by the first defendant, who admits that "there may have been conversation" about sharing contracts taken during that period, but denies that any general agreement was made with respect to such contracts at any time, and states that all agreements to share were specially made at the dates when the contract was taken and also that when made they were reduced to writing. The three witnesses, who are said to have been present when a general agreement was concluded, are intimately connected with the plaintiffs. Viramuttu Mudaly, their partner in a printing firm, says, "I was present when first defendant agreed with plaintiffs that contracts should be taken in the names of fourth plaintiff and defendants 1 and 2, and that fourth plaintiff should be interested to the extent of one-fourth." Lazarus Cashart, a clerk in the employment of the same firm, says,—"I was present when the first defendant agreed with fourth plaintiff that he should obtain a quarter share in the profits of any contract taken in the name of the first defendant, or second defendant, or fourth plaintiff, in any taluk." The third of these witnesses, Vencatasami Iyer, who is a gomashta in the employment of the plaintiffs, and had, according to the fourth plaintiff, the same opportunity of hearing what passed, does not

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corroborate the plaintiffs' case. He does not state, and was not invited by them to state, what passed on the occasion of the alleged agreement; but he was examined as to communications which took place between the parties in relation to abkari contracts for which the defendants had tendered in the beginning of April 1878. If the case made by the plaintiffs is true, they were bound to share as partners in these contracts; but according to this witness they declaimed to aid in making the deposit necessary in order to obtain them. He says, "there had been a proposal to 'give plaintiff a fourth share;' and he adds,—“at that time no 'complete agreement was made that plaintiffs should have a 'share.'"

It appears to their Lordships as the result of that evidence to be highly probable, if not certain, that, in or about the month of March 1878, a conversation or conversations took place between the fourth plaintiff and first defendant with regard to their families becoming jointly interested in future contracts. Whether these communings were in such terms as to constitute a binding engagement to share in all contracts which either of them might choose to enter into, or merely amounted to a provisional arrangement that they would divide in the proportion of one quarter and three quarters such contracts taken by one or other of them as they might mutually approve of and agree to hold as partners, appears to be the real controversy which their Lordships have to determine. In that view, the evidence adduced by the plaintiffs is vague and unsatisfactory. It is the plain duty of every litigant who endeavours to set up a verbal contract to lay before the Court, not the mere impressions of the witnesses who heard the communings, but in so far as possible the particulars of what was said or done, so as to enable the Court to form its own conclusions upon the question whether these did or did not import a binding agreement in the terms alleged. The plaintiffs have carefully abstained from making any attempt to fulfil that duty, and have contented themselves with eliciting the conclusions derived by the witnesses from what they heard or supposed that they heard. It is not even clear that the witnesses are speaking of the same occasion, because the fourth plaintiff fixes it on the 9th of March, whereas his partner, Viramuttu, says it was some time in the month of April 1878. Besides, the evidence of Viramuttu does not fully bear out that of the fourth plaintiff; it only implies

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that some contracts were to be taken in which the parties were to share, and tends rather to support than to exclude the inference that the selection of the particular contracts which were to come within the arrangement then made was to be matter of future agreement. The plaintiffs' oral evidence, standing by itself, would form a very shadowy foundation for a contract; but it is directly contradicted by the first defendant, and it is quite inconsistent with the testimony given by their own servant and witness, Venkatasami Iyer, whose veracity they did not attempt to impugn.

Their Lordships have had no difficulty in coming to the conclusion that the parole proof which they have adduced fails to establish the partnership agreement which the plaintiffs allege. There are in evidence written and also verbal communications between the parties with respect to abkari contracts, taken by the plaintiffs during the currency of the alleged agreement, in which the defendants had admittedly a quarter share. But none of these communications countenance the suggestion that the defendants took their shares by virtue of an antecedent general agreement, or otherwise than by a specific agreement made with reference to each contract at the time when it was taken up by the plaintiffs; and, save in one instance (to be noticed presently), no allusion is made in them to abkari contracts taken up by the defendants. It is, in their Lordships' opinion, unnecessary to consider the arguments addressed to them for the plaintiffs with regard to the probabilities of the defendants having entered into the agreement of the 9th March 1878, which were nothing more than a series of speculations having no foundation in the evidence.

In their argument upon this appeal, the plaintiffs, for the first time, maintained that, irrespective of the general agreement, there is evidence to show that they acquired right as partners to three-quarters of an abkari contract for Salem taluk, which was obtained by the defendants in June 1878, and that they ought accordingly to have an accounting for their share of profits. No such claim is made in their plaint; and it appears from a passage in the judgment of the High Court that it was repudiated by them, and that they only sought to use the evidence upon which it was preferred here as proof in aid of the existence of a general agreement of partnership. These facts would afford sufficient reason for refusing to entertain the claim now. But their Lordships

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think it right to observe that the fourth plaintiff's letter of the 25th August 1878, and the second defendant's reply, dated the 27th August, when read together, do not necessarily imply that the plaintiffs were partners in the Salem contract. That part of the correspondence in which mention is made of Salem has exclusive reference to management; it does show that the parties were arranging that a certain individual should reside in Salem and superintend several abkari contracts, but it does not *per se* show that these contracts were all joint. The letters contain a distinct acknowledgment by both parties of their partnership in contracts other than Salem, and that in terms which seem to negative the existence of any general agreement.

The last point submitted to us had reference to the validity, and also (assuming it to be valid) to the effect of a writing dated the 16th September 1880, signed by the fourth plaintiff, which bears, *inter alia*, that he agreed, upon the conditions therein stated, to surrender the whole interest of the plaintiffs in the joint abkari contracts standing in their name to the defendants, who were to take over all profits and losses. The plaintiffs pleaded that the document was not a completed contract, and was never acted upon. A complete answer to the first part of the plea is to be found in the evidence of the fourth plaintiff, who states that it was written in his presence to the dictation of the defendants, and was then signed by him and delivered to the defendants; whilst the allegation that the writing was never acted upon is explained by the fact that the plaintiffs subsequently refused to settle accounts in accordance with its provisions. The question raised as to the legal effect of the document has ceased to be of practical importance, in consequence of the failure of the plaintiffs to prove any joint abkari contracts other than those standing in their own name. Their Lordships are of opinion that the plaintiffs were right in maintaining that the document contains no stipulation referring to abkari contracts standing in the name of the defendants; but that circumstance, coupled with the statement in the fourth plaintiff's evidence, to the effect that he signed it because he was "anxious to get rid of the matter anyhow," appears to them to confirm their conclusion that there never was any general agreement binding the defendants to give the plaintiffs an interest in their contracts.

Their Lordships will therefore humbly advise Her Majesty

that the judgment appealed from ought to be affirmed. The appellants must pay to the respondents their costs of this appeal.

Appeal dismissed.

Solicitors for the appellants—Messrs. Keen, Rogers & Co.

Solicitors for the respondents—Messrs. Lawford, Waterhouse, & Lawford.

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APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Handley.

BIKUTTI (DEFENDANT No. 3), APPELLANT,

v.

KALENDAN AND OTHERS (PLAINTIFFS Nos. 1 TO 7 AND
DEFENDANTS Nos. 1 AND 2), RESPONDENTS.*

Declaratory decree—Withdrawing portion of claim—Specific Relief Act, s. 42.

Plaintiffs, members of a Malabar tarwad, sued (1) for the cancellation of a deed of gift of certain immovable property alleged to belong to their tarwad, (2) for restoration of the property the subject of gift, either to plaintiff No. 1, or defendant No. 1, the present karnavan, on behalf of the tarwad. The Munsif dismissed plaintiff's suit on the merits. On appeal, the Subordinate Judge allowed plaintiffs, who were unable to pay the Court fees for recovery of the property, to withdraw that portion of the claim, and decreed for plaintiff as to the remaining portion, viz., for cancellation of the document.

On second appeal it was held, reversing the decree below, that the prayer for restoration of the property being in the circumstances of the case maintainable, it was not competent to plaintiffs to restrict themselves to the other kind of relief sought, and that the maintenance of the suit in its maimed form would be an evasion of section 42 of the Specific Relief Act.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 362 of 1889, modifying the decree of S. Subramanya Ayyar, District Munsif of Cannanore, in original suit No. 212 of 1888.

The facts of this case appear from the following judgment.

Sankaran Nayar for appellant.

Subramanya Ayyar for respondents.

JUDGMENT.—This is a suit brought by the junior members of a Malabar tarwad in respect of land alleged to have been alienated to some of the defendants. The plaint states that after the death

* Second Appeal No. 131 of 1890.

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of the late Karnavan Cheria Kunhammad, defendants Nos. 1 and 2, executed a deed of gift in favour of the other defendants including the name of the late karnavan as an executant. It charges that defendants Nos. 1 and 2, of whom one is the present karnavan, are not authorized to make such a gift and concludes with a prayer for the cancellation of the deed of gift and the surrender of the land given to the plaintiffs or to defendant No. 1 on behalf of the tarwad.

The District Munsif who tried the suit dismissed it on the merits, and the plaintiff appealed. On the appeal, in order to save Court-fee stamp, he abandoned the prayer for possession, but insisted on his right to have the other relief prayed for in the plaint; and it is against the decree accordingly made in his favour by the Subordinate Judge that defendant No. 3 now appeals. In the opinion of the Subordinate Judge, it was competent to him to grant such a decree, because the relief prayed for was not of a declaratory nature and because the plaintiff being an anandravan was not entitled to maintain a suit for possession.

At the hearing before us, it was argued that a suit for possession would not lie under the circumstances and that therefore whether or not the relief claimed was of a declaratory nature the suit was maintainable. We are unable to accede to this contention. The prayer is for the surrender of the land to the plaintiff or to defendant No. 1 on behalf of the tarwad. According to the case of the plaintiff the land being in the hands of strangers, it was clearly the right of the plaintiff as of other members of the tarwad to have the land restored to the possession of the tarwad. Obviously this right could not be enforced by defendant No. 1 in the face of his own deed, and therefore the objection which may generally be raised to a suit for possession by an anandravan was not applicable. Except at the suit of a junior member the tarwad's right could not be asserted and enforced. Under these circumstances, we are of opinion that it was competent to the plaintiff to maintain the suit for possession as framed in his plaint. The question then arises whether it being open to the plaintiff to sue for possession, he was at liberty to restrict himself to the other kind of relief claimed in the plaint. We agree with the Subordinate Judge that the plaint does not ask for a declaration though we must observe that the Subordinate Judge has framed the decree as if that had been the nature of the prayer of the plaint. But

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are the circumstances stated in the plaint such as to justify a prayer for the cancellation of the instrument of gift? It was argued that the alleged forgery of the late karnavan's signature necessitated a cancellation of the instrument and that the case was therefore distinguishable from that in which a declaration has been sought for by anandravans impeaching the alienations of their karnavans. In our judgment, however, it is clear that the *factum* of the gift is admitted and the alleged forgery is not the ground on which relief is sought. The substantial charge made in the plaint is that defendants Nos. 1 and 2 have, without authority, made a gift of tarwad property and, if that charge is made out, it is a declaration of the tarwad's right and not a cancellation of the instrument of gift that should be granted.

This being so, it must follow that the suit, as framed by the plaintiff on the appeal, is not maintainable. The relief in the shape of cancellation of the deed could only have been granted in the form of a declaration, in the form indeed in which it has been granted, and as such ancillary to the principal relief by way of delivery of possession. It would be a mere evasion of the provision of section 42 of the Specific Relief Act to allow the suit in its maimed form to be maintained. We must, therefore, reverse the decree of the Subordinate Judge, and restore that of the District Munsif. Respondents to pay costs here and in the Lower Appellate Court.

APPELLATE CIVIL.

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

ACHAYYA, PLAINTIFF (APPELLANT),

v.

HANUMANTRAYUDU AND ANOTHER, DEFENDANTS
(RESPONDENTS).*

Lessee—Power to bring ejectment suit.

A lessee is entitled to maintain a suit for ejectment against the party in possession, notwithstanding the fact that, at the date of the lease, his lessor was not in possession of the property. *Prankrishna Dey v. Biswambhar Sen* (2 B.L.R., 207) and *Tiery v. Kristo Mohun Bose* (L.R., 1 I.A., 76) referred to.

* Second Appeal No. 683 of 1890.

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SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 329 of 1889, reversing the decree of M. Ramayya Pantulu, District Munsif of Bapatla, in original suit No. 449 of 1888.

Plaintiff sought to recover certain land leased to him by defendant No. 1 under a registered cowle, dated the 15th May 1887. It was admitted that defendant No. 1, an aghaharamdar, was the owner of the land.

Defendant No. 2, who was actually in possession, pleaded that he had permanent occupancy rights in the land, the subject of suit. Both the Court of First Instance and the Lower Appellate Court found against the occupancy rights thus set up. But the Lower Appellate Court held that plaintiff was not entitled to sue, he being a mere lessee, and his lessor, defendant No. 1, not having been in possession at the date of the lease.

Plaintiff preferred this second appeal.

Mr. Subramanyam and Panchapakesa Sastri for appellant.

Ananda Charlu and Ramasawmi Mudaliar for respondent No. 2.

Sundaram Sastri for respondent No. 1.

JUDGMENT.—Both Courts concur in finding that no occupancy right has been established. It is urged by the appellant's pleader that it lay on the plaintiff to show that second defendant was liable to be ejected, and that the second defendant ought not to have been called on in the first instance to prove his occupancy right. We are unable to assent to this view. It is not denied that the land belongs to the aghaharamdar, and that the plaintiff obtained a lease from him. There was also evidence in the case to show that the second defendant's possession commenced about 1843. There is no apparent foundation for the presumption that his enjoyment was immemorial.

We cannot therefore say that the Courts below were in error in holding that the *onus* of proving occupancy right rested on second defendant in this case. The District Judge, however, decided against the plaintiff on the ground that as a mere lessee he was not entitled to sue to eject the second defendant, his lessor not having been in possession at the date of the lease.

We are of opinion that the dismissal of the suit on this ground cannot be supported. The aghaharamdar is clearly entitled to eject the second defendant on proof of title, unless the latter proved his occupancy right. This being so, we do not see why

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the lessee claiming under him should be debarred from recovering possession on proof of such title and his own lease. That he could do so has been held in several decisions. We may refer to *Prankrishna Dey v. Biswambhar Sein*(1). Nor has the Privy Council, as observed by the Judge, decided to the contrary in *Tiery v. Kristo Mohun Bose*(2).

We must reverse the decree of the Lower Appellate Court and restore that of the District Munsif. Appellant is entitled to his costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

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

RATNASABHAPATHI (PLAINTIFF), APPELLANT,

v.

VENKATACHALAM (DEFENDANT), RESPONDENT.*

1891.
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Lease deed—Compulsory registration.

Where a lease deed contained a clause whereby the tenancy thereunder was absolutely determinable at any moment at the option of the lessor,

It was held, that such deed was not compulsorily registrable, notwithstanding that it also contained provisions for an "annual rental," and for payment of "rent in advance each year," provisions, which, had they stood alone, would have raised a presumption that a tenancy exceeding a year was contemplated.

Jaggivandas Javherdas v. Narayan (I.L.R., 8 Bom., 493), *Morton v. Woods* (L.R., 3 Q.B., 658), and *Hend v. Hall* (L.R., 2 Ex. D., 855), referred to and approved.

SECOND APPEAL against the decree of T. Ramaswami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 25 of 1889, confirming the decree of V. Narayana Rau, District Munsif of Negapatam, in original suit No. 356 of 1887.

In this case the Chairman of the Negapatam Municipality, as plaintiff, sought to recover a small piece of ground, being the "alody" site in front of the defendant's house, No. 61, in the Perumal Cevil Street, Nagoor, and to remove defendant's encroachment thereon.

(1) 2 B.L.R., 207.

(2) L.R., 1 I.A., 76.

* Second Appeal No. 25 of 1890.

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CHALAM.

The following allegations appear in the plaint as amended. The lane in dispute belongs to the Municipal Councillors, being a portion of a public street. In March 1884, defendant encroached upon the street to the extent of 5½ feet. The matter having been brought to the notice of the Town Councillors and proceedings taken thereon, a demand for rent was made upon the defendant, and rent was paid by him. In February 1885, the defendant executed a rent deed to the Municipality, but did not register it. In April 1887, the Councillors passed a resolution to the effect that defendant should execute a rent deed to the Municipality within two weeks, and that in default the Municipality would take possession. On the 3rd May 1887, due notice of the same was given to the defendant, but he failed to execute a lease.

The defendant pleaded to the merits, that the piece of ground in dispute had been the property of his forefathers for seventy or eighty years, that plaintiff's suit was time barred, that the rent deed of February 1885 was executed by him under coercion, and that it was not valid and did not bind him.

The Subordinate Judge, endorsing the Munsif's finding, held that the defendant had acquired a prescriptive right to possession by lapse of time. He held, however, that the ground in dispute was originally a portion of the street.

Upon the lease and rent question his finding was as follows:

"The second question is whether defendant rented the land from the Municipality, and I find he did not. The rent deed executed not being registered, it is ineffectual for the purpose of proving the lease; inasmuch as there can be no lease, under section 107 of the Transfer of Property Act, except by a registered instrument. Defendant has not, of course, established that the lease deed was obtained from him by coercion; but it is unnecessary to consider that point there being no lease in the legal sense of the term. The evidence shows that rent for two years was recovered from defendant by the attachment and sale of his moveables; but, had there been proper lease, the recovery of rent by legal process will have the same effect as if it was voluntarily paid. There being no lease, the recovery of rent by the sale of defendant's moveables will not make the defendant a tenant of the Municipality."

Pattabhirama Ayyar for appellant.

Tiruvengadasami Pillai and *Subbayya Chetti* for respondent.

JUDGMENT.—The Subordinate Judge finds that the ground was originally part of the public street, and, as such, the property of the Municipality, but he decided against the plaintiff on the ground that the defendant had been in possession for forty years and had thereby acquired a title by prescription. He found further that, though the rent deed was genuine, it was not shown to have been obtained under coercion; yet he held that it was a lease for more than one year, and was legally inoperative as it was not registered. It is urged on appeal that, upon the true construction of document A, the tenancy created by it was determinable at any moment at the option of the lessor, and that it was not therefore subject to compulsory registration.

In support of this contention reliance was placed on *Apu Budgavda v. Narhari Annajee*(1), *Jaggivandas Javherdas v. Narayan*(2) *Morton v. Woods*(3), and on *Hand v. Hall*(4). On referring to those cases, we consider that the contention is well founded. No doubt, the words "enjoy the same at an annual rental of Rs. 4-6-5" and "pay the rent in advance each year" might, if they stood alone, raise a presumption that the tenancy contemplated was, at all events, for more than one year, but the clause "I shall give up possession of the land without raising an objection and without claiming any compensation when the Commissioners ask for the same" appear to us to rebut the presumption and to bring the case within the principle of the decisions mentioned above.

This being so, the rent deed cannot be treated as inoperative. We observe that rent was levied for two years under it, and these facts amount to a clear acknowledgment by defendant of the plaintiff's title within a short time before the suit.

As the land has also been found to be the property of the Municipality, we are of opinion that plaintiff is entitled to succeed.

The decrees of the Courts below must be reversed, and there must be a decree that plaintiff recover the ground site sued for, but with liberty to defendant to remove the structure thereon, if any, within a month of the receipt of this decree in the Lower Appellate Court.

The plaintiff is entitled to his costs throughout.

(1) I.L.R., 3 Bom., 21.
(3) L.R., 3 Q.B., 1658.

(2) I.L.R., 8 Bom., 493.
(4) L.R., 2 Ex. D., 355.

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APPELLATE CIVIL.

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

NUNNU MEAH (DEFENDANT), APPELLANT,

v.

KRISHNASAWMI (PLAINTIFF), RESPONDENT.*

Hindu widow—Interest in immoveable property—Power of alienation.

A Hindu testator, leaving a grandson by adoption him surviving, besides certain moveable property, bequeathed to his wife T. a house "on account of her maintenance."

Held, confirming the decision below, that though it was competent to testator by apt language to clothe his widow with a power of alienation, yet in the absence of such words, regard being had to the surrounding circumstances and to the ideas which Hindus have regarding the interest ordinarily enjoyed by women in immoveable property, it must be presumed that testator only meant to bequeath a life-interest:

Held, also, that the heir-at-law was not liable to make good moneys expended on the premises by one holding under the widow with knowledge of the contents of the will.

APPEAL from the judgment of Mr. Justice Shephard sitting on the Original Side of the High Court in civil suit No. 106 of 1888.

Gerray Parthasaradi Chetti, son of Gerray Veerasawmi Chetti, died on the 16th May 1842, his father being then alive. Gerray Parthasaradi Chetti had in his lifetime given his widow, Rookmani Ammal, authority to adopt a son. The widow in due course adopted the plaintiff in the present suit, and this adoption was consented to by Veerasawmi Chetti. Gerray Veerasawmi Chetti died on or about the 20th February 1846, leaving Gerray Thayammal, his widow, him surviving.

On the 6th February, previous to his death, Veerasawmi Chetti made a will in favour of his wife and grandson by adoption, the plaintiff Krishnasawmi. The portion of the will material for the elucidation of the matter in dispute ran as follows:—

"As I have now married a third wife (Thayammal) and have
"no sons by her, and my said wife should bear sons, such boys and

"my grandson by name of Krishnasawmi who is hereinafter mentioned shall apportion the remainder estate in equal shares after that which shall have been spent.

"If my third wife does not bear sons give to her and send away on the 15th day after my death property in all amounting to Rs. 7,500, such as jewels for my said wife named Thayyar (thereby meaning the said Thayammal) amounting to Rs. 3,860 cloths, &c., and brass household utensils amounting to Rs. 350, also the aforesaid house No. 6047 of Rs. 3,290 situate on the south side of Pondicherry Appasawmi Pillai's house in Varada Mutheappen's street on account of her maintenance."

Thayammal, Veerasawmi's widow, remained in possession of the premises demised till November 1886, when she sold and delivered possession thereof to the defendant Salar Nunnu Meah Sahib. Thayammal died on or about the 6th February 1888, leaving plaintiff, as he contended, entitled as reversioner to the said premises amongst other property.

The most important question as to which the parties were at issue was regarding the construction of the portion of Veerasawmi's will already set out. The plaintiff, Krishnasawmi, asserted that Thayammal, Veerasawmi's widow, took only a life-estate; the defendant on the contrary contended that the will contained an absolute bequest to her. The defendant further contended that, even if Thayammal took only a life-estate, he had a valid lien on the premises for certain expenditure incurred thereon.

Shephard, J., decreed for plaintiff with costs.

Defendant appealed.

Mr. Norton and Mr. R. F. Grant for appellant.

The Advocate-General (Hon. Mr. Spring Branson) for respondent.

JUDGMENT.—The only two questions argued before us on the hearing of this appeal were (1) whether defendant's vendor, Thayammal, took under the will of her husband, G. Veerasawmi Chetti, an absolute estate in the house in question in this suit or only a widow's estate; and (2) whether plaintiff is bound to make good to defendant any and what sum for repairs and improvements alleged to have been made to the house by defendant.

As to (1) it is argued by the learned Counsel for appellant that the restriction upon the power of alienation by a Hindu wife of immoveable property given to her by her husband as stridhanam

1890.
April 16.
May 9.

* O.S. Appeal No. 8 of 1889.

APPELLATE CIVIL.

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

NUNNU MEAH (DEFENDANT), APPELLANT,

v.

KRISHNASAWMI (PLAINTIFF), RESPONDENT.*

Hindu widow—Interest in immoveable property—Power of alienation.

A Hindu testator, leaving a grandson by adoption him surviving, besides certain moveable property, bequeathed to his wife T. a house "on account of her maintenance."

Held, confirming the decision below, that though it was competent to testator by apt language to clothe his widow with a power of alienation, yet in the absence of such words, regard being had to the surrounding circumstances and to the ideas which Hindus have regarding the interest ordinarily enjoyed by women in immoveable property, it must be presumed that testator only meant to bequeath a life-interest:

Held, also, that the heir-at-law was not liable to make good moneys expended on the premises by one holding under the widow with knowledge of the contents of the will.

APPEAL from the judgment of Mr. Justice Shephard sitting on the Original Side of the High Court in civil suit No. 106 of 1888.

Gerray Parthasaradi Chetti, son of Gerray Veerasawmi Chetti, died on the 16th May 1842, his father being then alive. Gerray Parthasaradi Chetti had in his lifetime given his widow, Rookmani Ammal, authority to adopt a son. The widow in due course adopted the plaintiff in the present suit, and this adoption was consented to by Veerasawmi Chetti. Gerray Veerasawmi Chetti died on or about the 20th February 1846, leaving Gerray Thayammal, his widow, him surviving.

On the 6th February, previous to his death, Veerasawmi Chetti made a will in favour of his wife and grandson by adoption, the plaintiff Krishnasawmi. The portion of the will material for the elucidation of the matter in dispute ran as follows:—

"As I have now married a third wife (Thayammal) and have
"no sons by her, and my said wife should bear sons, such boys and

"my grandson by name of Krishnasawmi who is hereinafter mentioned shall apportion the remainder estate in equal shares after that which shall have been spent.

"If my third wife does not bear sons give to her and send away on the 15th day after my death property in all amounting to Rs. 7,500, such as jewels for my said wife named Thayyar (thereby meaning the said Thayammal) amounting to Rs. 3,860 cloths, &c., and brass household utensils amounting to Rs. 350, also the aforesaid house No. 6047 of Rs. 3,290 situate on the south side of Pondicherry Appasawmi Pillai's house in Varada Mutheappen's street on account of her maintenance."

Thayammal, Veerasawmi's widow, remained in possession of the premises demised till November 1886, when she sold and delivered possession thereof to the defendant Salar Nunnu Meah Sahib. Thayammal died on or about the 6th February 1888, leaving plaintiff, as he contended, entitled as reversioner to the said premises amongst other property.

The most important question as to which the parties were at issue was regarding the construction of the portion of Veerasawmi's will already set out. The plaintiff, Krishnasawmi, asserted that Thayammal, Veerasawmi's widow, took only a life-estate; the defendant on the contrary contended that the will contained an absolute bequest to her. The defendant further contended that, even if Thayammal took only a life-estate, he had a valid lien on the premises for certain expenditure incurred thereon.

Shephard, J., decreed for plaintiff with costs.

Defendant appealed.

Mr. Norton and Mr. R. F. Grant for appellant.

The Advocate-General (Hon. Mr. Spring Branson) for respondent.

JUDGMENT.—The only two questions argued before us on the hearing of this appeal were (1) whether defendant's vendor, Thayammal, took under the will of her husband, G. Veerasawmi Chetti, an absolute estate in the house in question in this suit or only a widow's estate; and (2) whether plaintiff is bound to make good to defendant any and what sum for repairs and improvements alleged to have been made to the house by defendant.

As to (1) it is argued by the learned Counsel for appellant that the restriction upon the power of alienation by a Hindu wife of immoveable property given to her by her husband as stridhanam

* O.S. Appeal No. 8 of 1889.

NUNNU MEAH v. KRISHNA-SAWMI. has no application to gifts to a widow by will, that in the case of a gift by will, therefore, unless there are express words of limitation, the widow takes an absolute estate, and that in this case there were no words limiting the gift, and, therefore, Thayammal took an absolute estate. In support of the distinction contended for between a gift by a husband to his wife *inter vivos* and a gift to his widow by will, we are not referred to any express authority, and we observe that it is opposed to the decision in *Koonjbehari Dhur v. Premchand Dutt*(1), but we think that we are not called upon to determine the question in this case. It was assumed by the learned Judge in the Court below that the testator could have given his widow an absolute estate with full power of alienation, but it was held that on the proper construction of the will he had not done so, and upon a careful consideration of the words of the will, read by the light of the surrounding circumstances, we are of opinion that the learned Judge was right in the construction he put upon it as to the house in question.

We are not concerned now with the moveable property bequeathed to the widow by the will. All we have to decide is what was the intention of the testator in giving her this house "on account of her maintenance," and we entertain no doubt that in so doing he did not contemplate her selling or otherwise alienating the house, but intended that she should either live in it, or take the rents and profits for her maintenance, and that after her death it should still form part of his estate. It was competent to him, no doubt, to use the words of the judgment in *Bhujanga v. Ramayamma*(2) "by apt language to clothe her with a power of alienation," and words conferring such power frequently find a place in Hindu wills and deeds of gift. In the absence of any such words, and taking into consideration the ideas which a Hindu would have as to the nature of the interest to which a woman is ordinarily entitled in immoveable property, it seems to us a fair presumption that testator in this case did not intend his widow to have any power of alienation over the house except of course such as she would have had if the property had come to her as his widow. And we agree with the learned Judge in the Court below that the endorsement by the testator on the Collector's certificate of the house does not show any other intention.

(1) I.L.R., 5 Cal., 694.

(2) I.L.R., 7 Mad., 387.

The words of the endorsement are merely "according to the will, &c., my wife after my death should enjoy."

As to the second question we also agree with the decision of the Court below. This is not a case of a man standing by and allowing another in ignorance of his rights to add to the value of his property. The plaintiff, as the reversioner, could not, as long as the widow was alive do anything to interfere with what she, or the defendant by her permission, chose to do with the property, and the defendant seems to have known perfectly well the nature of the widow's title and the provisions of the will. If he took a mistaken view of the extent of her interest under that will, it was his own fault, and the plaintiff is not to blame for it. He did warn defendant as soon as he knew of the sale to him, but apparently without any effect. Even if the money in question was *bonâ fide* advanced by the defendant for the repairs and improvement of the house, as to which there seems to be reason for considerable doubt, we agree with the Court below that the defendant has no legal claim for its repayment.

The appeal fails and is dismissed with costs.

Branson & Branson, attorneys for plaintiff.

Champion & Short, attorneys for defendant.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

GURUSAMI (DEFENDANT No. 3), APPELLANT,

v.

VENKATSAMI AND OTHERS (DEFENDANTS NOS. 1 AND 2, PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, ss. 276, 305.

Section 305 of the Civil Procedure Code contemplates a mortgage or lease or private sale only where "the amount of the decree" can be thus provided for. A Court executing a decree can neither grant a certificate under this section, nor confirm a mortgage or other alienation of property, unless it appears that by such alienation the decree will be satisfied in full. It is not sufficient that after grant of certificate, a mortgage by the judgment-debtor is, as between him and his

1890.
Sept. 8, 9.
Nov. 13.

* Second Appeal No. 1323 of 1889.

GURUSAMI mortgagee, *bonâ fide*, nor can it affect the lien acquired by the judgment-creditor
 v. under s. 276.
 VENKATSAMI.

SECOND APPEAL against the decree of H. T. Ross, Acting District Judge of Madura, in appeal suit No. 428 of 1888, confirming the decree of C. Venkobachariyar, Subordinate Judge of Madura (West), in original suit No. 31 of 1887.

The facts, out of which this second appeal arose, appears sufficiently for the purposes of this report in the following judgments.

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

Mahadeva Ayyar for respondents.

BEST, J.—The appellant (who was the third defendant in the Court of First Instance) is the holder of the decree in original suit No. 57 of 1880 on the file of the Subordinate Court of Madura, (West). He is a minor under the guardianship of his mother Lingammal.

The property of the judgment-debtors was attached and about to be sold in execution of the decree when they put in a petition (No. 636 of 1886), asking for postponement of the sale and a certificate under section 305 of the Code of Civil Procedure, and, on 11th December 1886, they were granted the certificate (exhibit E) authorizing them to raise the balance of the decree amount by private sale, mortgage, &c., of the properties under attachment within the 20th December 1886. On the 22nd December 1886, the first defendant was granted a second certificate (exhibit D) in the same words, but extending the time to "within two months from this date."

Exhibit B is the petition of first defendant (dated 22nd December 1886) in compliance with the request contained in which the second certificate was granted. From B it is seen that Rs. 4,000 were then produced as obtained from the present third and fourth respondents (plaintiffs in the Court of First Instance) with whom, it is stated, "a contract has been negotiated requiring them to pay the balance and satisfy the decree in full." Hence the certificate E.

The time allowed by this certificate expired on 22nd February 1887, but no further payment was made into Court till 7th September 1887, when the petition (exhibit A) was filed by the pleader of the third and fourth respondents, stating that the judge-

ment-debtors had executed to the plaintiffs a document mortgaging the attached property for a sum of Rs. 5,000 (including the Rs. 4,000 already paid) and tendering the balance Rs. 1,000 with a prayer for an order that this sum of Rs. 1,000 be received and the mortgage-deed accepted and for stay of the sale, which was fixed for the 26th of that month.

On the same day that A (dated 3rd September 1887) was filed by the plaintiffs, the petition C (dated 6th idem) was also filed by defendant No. 1 (judgment-debtor) objecting that the mortgage bond had been obtained by the plaintiffs fraudulently—the Rs. 4,000 first paid being, in fact, the money of the judgment-debtors themselves and not of the alleged mortgagees, and praying that the bond be not accepted.

These two petitions were disposed of by the order at the foot of exhibit A, rejecting the mortgage for the reasons (1) that the judgment-debtors objected to it as having been fraudulently obtained, (2) because "the petitioners have not complied with the provisions of section 305," and (3) "as neither the balance nor the deed itself was produced within the time limited by the certificate."

Hence the suit out of which this second appeal has arisen, (a) for cancellation of the order last referred to, and (b) for a declaration that the mortgage (filed as exhibit F) executed by defendant No. 1 (who is also the guardian of defendant No. 2, a minor) is true and valid. Both the Lower Courts have decreed in favour of the plaintiffs.

The present appeal is by the third defendant, the decree-holder, who contends (*inter alia*) that the Lower Appellate Court "did not sufficiently distinguish between the case of the first defendant and that of the third defendant."

This is, I think, a valid objection to the decree not only of the Lower Appellate Court, but also to that of the Court of First Instance, for, it by no means follows that because the mortgage is found to be good and valid as against defendants Nos. 1 and 2, the judgment-debtors, it must therefore, be held to be good *in toto*, also as against the decree-holder, defendant No. 3. I say *in toto*, because in the circumstances of this case, the mortgage to plaintiffs must, I think, be upheld even as against defendant No. 3, in so far as it gives the plaintiffs a lien on the property for the Rs. 4,000 found to have been paid by them and which has been

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accepted as part satisfaction of the decree. To this extent, plaintiffs are, I think, entitled to a declaration that they have a lien upon the property, and, that the Rs. 4,000 paid by them in satisfaction of the third defendant's decree is a first charge on the property. But this is, I think, the utmost relief to which the plaintiffs are entitled as against defendant No. 3. Section 305 expressly states that "no mortgage, lease or sale under this section shall become absolute, until it has been confirmed by the Court;" and it is quite clear that the Court could not confirm under the section any mortgage lease or sale, unless it satisfied the decree *in full*. It is only if there is reason to believe that the "amount of the decree," may be raised by mortgage or lease or private sale that the Court is authorized to give time and grant a certificate under section 305, and, as a matter of fact, both the certificates granted in this case (D and E) expressly state that it is for paying the "balance of the decree amount" by the sale, mortgage, &c., of the property attached that sanction for a private arrangement is thereby granted. It has been held that in acting under section 305 of the Code of Civil Procedure, the Court should exercise a reasonable discretion and should not postpone the sale, unless the judgment-debtor can show that the creditor will not suffer—*Ram Ruttun Neogy v. Land Mortgage Bank of India*(1), and even then the postponement should be only for a reasonable period—*Rednum Atehutaramayya v. Dada Sahib*(2). Three or six months have been held to be reasonable, but a year has been held to be unreasonable—see *Fyzooddeen v. Giraudh Singh*(3). Such being the case, the arrangement under exhibit F, by which, after only partly satisfying the judgment-debt, the mortgagees are given the property to possess it for ten years must certainly be held to be far beyond the limits of what is a reasonable time. The District Judge is in error in thinking that defendant No. 3 "stood and looked on at all that was being done in the matter of the mortgage." It is seen from the Sub-Judge's order in exhibit IV that her Vakil "strongly opposed" the application of defendant No. 1 (dated 6th December 1886) on which the certificate E was granted; and by her petition (exhibit V), dated 9th April 1887, she prayed that, before any arrangement of the kind was sanctioned, notice should be given to her. I see no reason for allowing the appellant's

(1) 17 W.R., 193. (2) 5 Mad. H.C.R., 272. (3) 2 N.W.P., 1.

contention that the suit brought by plaintiff for a declaration was not maintainable. GURUSAMI v. VENKATSAMI.

The issues of fact as against the judgment-debtors (now respondents Nos. 1 and 2) have been found in favour of the plaintiffs (respondents Nos. 3 and 4) and are neither objected to by them, nor do I think they are open to objection; but the case of the judgment-creditor, the appellant, is not identical with that of the judgment-debtors. Against the latter, the mortgage bond F may be held to be binding as a whole, but as against the appellant it can be held to be good only in so far as it makes the Rs. 4,000, paid by plaintiffs in satisfaction of the appellant's own decree, a charge and a first charge on the land mortgaged. But only to this extent can it be held to affect the appellant's right to proceed against the said property in execution of her decree.

I would, therefore, modify the Lower Court's decrees as above, and direct the respondents Nos. 3 and 4 (plaintiffs) to pay the appellant's costs throughout. Defendants Nos. 1 and 2 must pay the plaintiffs' costs in the two Lower Courts and bear their own costs in both those Courts and also in this Court.

MUTTUSAWMI AYYAR, J.—The appellant is the decree-holder and respondents Nos. 1 and 2 are the judgment-debtors in original suit No. 57 of 1880, and the question of law arising for decision upon the facts found by the Courts below is whether the mortgage executed by the latter in favour of respondents Nos. 3 and 4 for Rs. 5,000 on 24th January 1887 can be upheld as against the former. Both the Lower Courts have found that the mortgage was true, that the consideration money was paid, and that it was a *bonâ fide* transaction. Upon those findings, the mortgage would no doubt be valid as between the mortgagors and the mortgagees, but they are clearly not sufficient to support the transaction as against the appellant who was no party to it and who was proceeding in execution against the mortgaged property. It must appear further that the mortgage was concluded in strict conformity to the provisions of section 305; that the property in question was attached by the appellant in execution of his decree so early as 1881; that the attachment continued in force when the mortgage was concluded, and that the decree debt remained to be paid to the extent of more than Rs. 10,000, are facts about which there is no dispute. The substantial question for decision was whether the Court authorized the mortgage which was actually concluded

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under section 305, and whether the order of the 7th September 1887 refusing to confirm the mortgage was in contravention of the authority previously granted by the Court. Section 305 ought to be read together with section 276 of the Civil Procedure Code, and, when so read, it is clear that when property is attached in execution, any private alienation of the same is void against any claim enforceable under the attachment, unless such alienation is specially authorized under section 305. It must be remembered that under section 276, the decree-holder has a lien on the property under attachment in respect of the whole of the decree-debt and *not* simply of a part of it. It is therefore provided by section 305 that when there is reason to believe that the amount of the decree may be raised by private alienation of the property advertized for sale, or of some part thereof, or of any other immoveable property of the judgment-debtor, the Court may postpone the sale of the property comprised in the order for sale in view to enable the judgment-debtor to raise the amount. In such a case, the section proceeds to direct the Court to grant the certificate authorizing the judgment-debtor to make the proposed mortgage, and to provide that no such mortgage shall become absolute until it has been confirmed by the Court.

The intention is to prevent the sale of the attached property when the whole decree can be satisfied within a reasonable period by private alienation, and, at the same time, to protect the lien which the judgment-creditor has under section 276 by prescribing two conditions, viz., that the mortgage actually concluded must be previously proposed to, and authorized by, the Court, and that the mortgage must be confirmed after it is concluded. The real question was whether the facts of this case show that the mortgage concluded was the mortgage proposed to, and authorized by, the Court under section 305. The first certificate granted by the Subordinate Court is exhibit E, dated 11th December 1886. It recites that there is reason to believe the balance of the decree amount might be raised by private alienation and then purports to authorize the judgment-debtor to make the proposed alienation within 20th December 1886 to raise the said amount. The second certificate granted on the 22nd December 1886 is exhibit D. It is in the same terms as exhibit E with this difference, viz., that two months' time was granted from that date, the mortgage authorized being still a mortgage of the attached properties, whereby

there was reason to believe that the balance of the decree amount might be raised. Again, exhibit B is the petition upon which the certificate D was granted. It was in these terms:—"A contract was entered into with Subba Naik, Ramasami Naik and Guruvappa Naik, sons of Velappa Naik, residing at Naik-karapatti, to mortgage defendant's immoveable properties mentioned in the sale notice, in accordance with the certificate granted by the Court, and Rs. 4,000 has now with difficulty been produced through them.

"A contract has been negotiated with the said persons requiring them to pay the balance and satisfy the decree in full; and they, consenting to the same, and making their properties security therefor, have undertaken to make the necessary arrangements.

"This defendant intends to mortgage his immoveable properties, after appropriating the produce now raised on the properties under attachment and the summer produce thereof.

"An order is therefore prayed for directing that the Rs. 4,000 now deposited be accepted; that payment be entered in the decree; that a time be prescribed for paying the balance of the decree amount, and that a certificate be granted giving permission to make private alienations of properties referred to in the sale notice within the prescribed time."

It is clear that the representation made to the Court was that negotiations were in progress whereby the whole balance of the decree debt would be paid up if time was granted.

What was the transaction since concluded and what was its result? The mortgage which the Court was asked to confirm was a mortgage for Rs. 5,000, which was considerably below the balance due under the decree and no other arrangements were made for satisfying the decree in full, it being represented on one side that no larger amount could be raised on the properties attached, and on the other that the mortgage was fraudulent. It appears to me to be open to no doubt that permission to raise money by mortgage was asked for with the representation that the balance of the decree debt would be paid in full either by means of the mortgage or by it and other arrangements in progress and that permission was granted to make the mortgage on the assurance that the whole decree debt would be satisfied.

* The order therefore refusing to confirm the mortgage is per-

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fectly correct for the simple reason that the condition subject to which the certificate was granted, viz., satisfaction of the decree in full was not complied with either by the mortgage or otherwise as represented to the Court. The question of the validity of the mortgage is not one of *bonâ fides* between the mortgagor and mortgagee but one of statutory authority sufficient to take away the prior lien which the appellant had.

For these reasons, I am also of opinion that the mortgage cannot be upheld as against the appellant.

I am further of opinion that the plaintiffs must be declared to be entitled to have a charge upon the property in dispute for Rs. 4,000 paid into Court on account of the appellant's decree between the date of their application for a certificate under section 305 and the order of the 7th September 1887. This declaration is necessary to restore the parties to their original position, and the appellant can only set aside the mortgage and make the property available for his decree subject to that charge.

I agree, therefore, to the decree proposed by my learned colleague.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

In Appeal No. 187 of 1888.

GOVINDA AND OTHERS (DEFENDANTS NOS. 1, 3 AND 4, AND FIRST
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MANA VIKRAMAN (PLAINTIFF), RESPONDENT.*

In Appeal No. 188 of 1888.

MANA VIKRAMAN (PLAINTIFF), APPELLANT,

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GOVINDA AND OTHERS (DEFENDANTS), RESPONDENTS.

Joinder of causes of action—Civil Procedure Code, ss. 44, 45—Res judicata.

A suit for recovery of a mortgage debt, with an alternative prayer for sale of the mortgaged property, is not a suit for the recovery of immoveable property within the meaning of s. 44 of the Civil Procedure Code.

* Appeals Nos. 187 and 188 of 1888.

A suit seeking to enforce liability for a mortgage debt on a Malabar tarwad is not barred by a previous personal decree obtained against certain members of the tarwad for the same debt.

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APPEALS against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 17 of 1887.

Defendants were members of a Marumakkatayam tarwad. In 1881 their karnavans executed to plaintiff a mortgage of certain property as security for a loan. A portion of the property mortgaged, viz., items 1 to 16, was at the same time leased by the plaintiff to the mortgagors. No rent having been paid, the plaintiff sued the mortgagors in original suit No. 232 of 1883 and obtained a decree. In execution thereof he attached certain moveable property of the tarwad. The defendants resisted, denying the liability of their tarwad for the debt, and, failing in their attempt, brought original suit No. 71 of 1884. The final result of this suit, on appeal, was that the former decree was declared to be merely personal against the karnavans. The plaintiff now sued to recover his mortgage debt together with arrears of rent.

The defendants, among other defences, pleaded that there was a misjoinder of causes of action, viz., of a claim to recover a mortgage debt with one for arrears of rent. They also pleaded that the claim for rent was *res judicata* by a decree obtained by plaintiff in original suit No. 232 of 1883 for arrears of rent against Raman Menon and Kannan Menon, the original mortgagors, members of defendants' tarwad.

Sankara Menon for appellants in appeal No. 187 and for respondents in No. 188 of 1888.

Sankaran Nayar for appellants in appeal No. 188 of 1888 and for respondents in appeal No. 187 of 1888.

JUDGMENT.—This was a suit to recover a debt together with arrears of rent due by the defendants upon a mortgage deed and a lease, dated the 31st August 1881. The documents in question were executed by two persons, named Raman Menon and Kannan Menon, on behalf of the defendants' tarwad and as its representatives. The instrument of mortgage (exhibit A) purports to mortgage 29 items of land for a debt of Rs. 5,000, and to transfer, in lieu of interest due upon it, possession of items 1 to 16 yielding an annual rent of 750 paras of paddy. The lease purports to be a lease of those 16 items by the mortgagee to the mortgagor for the above rent payable at the end of each year. Out of the mort-

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gage debt a sum of Rs. 300 was left with the mortgagee to be applied in discharge of an encumbrance on items 1 to 13, and it was admitted by the plaintiff in the Court below that he did not so apply the amount. No rent having been paid according to the terms of the lease, the plaintiff obtained a decree against Raman Menon and Kannan Menon in original suit No. 232 of 1883 for arrears of rent due until April 1883, amounting to Rs. 721-12-1, and attached in its execution certain moveable properties belonging to the defendants' tarwad. The defendants, however, repudiated the liability of the tarwad, preferred a claim, and prayed for the attachment being cancelled. Their claim being disallowed, they brought original suit No. 71 of 1884 in which it was finally decided by the Appellate Court that the attachment must be raised on the ground that the decree was personal to Raman Menon and Kannan Menon. The mortgagors being dead, the plaintiff's case was that the mortgage debt was a tarwad debt, and that the defendants were liable to pay it and the arrears proportionate to Rs. 4,700 actually advanced by him. The Subordinate Judge decreed the claim, but directed that in default of payment, items 1 to 16 be sold on account of Rs. 2,300 out of the mortgage debt and proportionate rent, and items 17 to 29 on account of the balance. To this decree both the plaintiff and the defendants' object—the former in appeal No. 188 and the latter in appeal No. 187.

Appeal No. 187.—Four preliminary objections are urged in support of this appeal. As regards the first, viz., the alleged misjoinder of a claim to recover the mortgage debt and a claim to recover arrears of rent, we are of opinion that the Subordinate Judge properly disallowed it. It was open to the respondent under section 45 of the Civil Procedure Code to unite in one suit several causes of action against the same defendants jointly, and we do not think that the alternative relief claimed in the plaint, viz., the sale of the mortgaged property in default of payment renders this a suit for the recovery of immoveable property within the meaning of section 44.

As regards the second objection, viz., that the suit is not maintainable so far as it relates to items 1 to 16 under section 67 of the Transfer of Property Act, we consider that it is also untenable. Act IV of 1882 came into force in July 1882, whilst the usufructuary mortgage sued upon was concluded on the 31st

August 1884, and even if the Act applied, which it does not, there is an express covenant to repay the debt in the instrument of mortgage—*Chathu v. Kunjan* (1).

The next objection, viz., that the claim is *res judicata* so far as it has reference to rent due from 31st August 1881 to 11th July 1883, is also one which cannot be supported. The present suit is instituted against the defendants' tarwad, whilst original suit No. 232 of 1883 was brought against Raman Menon and Kannan Menon, and the liability now litigated is that of the tarwad, whilst the liability decreed on the previous occasion was, as urged by these very defendants and as held by the Appellate Court in appeal suit No. 622 of 1884, the personal liability of the two individuals who executed the original lease.

It is next argued by the appellants' pleader that the plaintiff ought to have joined all the members of their tarwad in original suit No. 232 of 1883 and that his omission to do so precludes him from instituting a second suit in respect of the same claim of rent. We are not prepared to accede to this contention either. The decree in original suit No. 232 of 1883 was not satisfied, and its execution against tarwad property was obstructed by the defendants, and it failed on the ground that the decree was personal to Raman Menon and Kannan Menon. If the usufructuary mortgage is really binding on the tarwad, we see no reason why the plaintiff should not be permitted to sue the tarwad in respect of rent also which is not barred, as the pattam chit was a registered document as appears from exhibit XV, and consequently the limitation period is six years under article 116 of schedule II of Act XV of 1877,—see *Vythilinga Pillai v. Thetchanamurti Pillai* (2) and *Umesh Chunder Mundul v. Adarnoni Dasi* (3).

Passing on to the merits, it was first contended for the appellants that the mortgage was concluded neither for tarwad necessity nor for its benefit; and, secondly, that by reason of a family karar, Raman Menon and Kannan Menon were not competent to execute the mortgage otherwise than in conjunction with the other members of their tarwad. As regards the second question, it is dealt with by the Subordinate Judge in paragraph 10 of his judgment, and we concur in his opinion that the karar

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(1) I.L.R., 12 Mad., 109.

(2) I.L.R., 3 Mad., 76.

(3) I.L.R., 15 Cal., 221.

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was not acted upon, but was finally cancelled by the appellants' family. The evidence referred to by him sufficiently warrants the conclusion at which he has arrived. As to the first question, as already observed, Rs. 300 were not advanced by the respondent, and the Subordinate Judge has upheld his claim only to the extent of Rs. 4,700. The appellants' case was that Rs. 2,300 were paid in cash, and that Rs. 2,400 were credited towards the purchase money due to the respondent by Raman Menon for the sale of items 17 to 29 under exhibits E and Q.

It appears from the evidence that the purchase was made by Raman Menon for the benefit of defendant No. 3, Narayani Amma, the female member of the appellants' tarwad, on the assurance of her husband that he would make good the purchase money for her benefit; but the assurance proved ineffectual owing to his death. Thus, the purchase was made for the benefit of the female representative of the tarwad, and the property purchased is still in its possession. The vendor has clearly a lien for the unpaid purchase money at least on the property sold. As to the remaining Rs. 2,300, it is conceded by the appellants' pleader that the decree debt evidenced by exhibit B is binding on the tarwad, and that it was satisfied out of the money advanced by the plaintiff. The payment on account of that debt amounts to Rs. 1,261-3-11 and there remains a balance of Rs. 1,038-12-1.

As regards the decree debt due to Ramakrishna Putter, the respondents' case was that he advanced the money *bonâ fide* to prevent the impending sale of property purchased by Raman Menon as the karnavan of the tarwad. The appellants' contention was that the property was actually sold in execution, and that the payment alleged by the respondent was really not made. The Subordinate Judge found that the advance was really made, and that the creditor was not responsible for the misapplication by the karnavan of the borrowed money. Two witnesses deposed that the money was advanced, and the Subordinate Judge has accepted their evidence, which we see no reason to discredit. Moreover, there is no evidence for the appellants to show that the sale under exhibit IX was not subsequent to exhibit A, or to indicate collusion between the respondent and Ramakrishna Putter. It is true that they did not go into the witness-box; but it was open to the appellants to have cited them as witnesses, and they have not done so. Upon the evidence in the case we cannot say that the

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Subordinate Judge has not come to a correct conclusion. The remaining portion of the mortgage debt for which no tarwad necessity is distinctly proved is small; and there is no ground for the suggestion that the plaintiff did not lend it *bonâ fide*. For these reasons, we think that this appeal cannot be supported and must be dismissed with costs.

Appeal No. 188.—It is contended in this appeal that the Subordinate Judge was in error in charging Rs. 2,400 and proportionate rent only on items 17 to 29. As observed they were purchased for the benefit of defendant No. 3 on the assurance by her husband that he would pay the purchase money; but the assurance proved ineffectual in consequence of his death. The property was acquired by the senior female through whom the other members of the tarwad derive their title to the tarwad property, and they are in possession also of the property thus acquired. There is therefore no reason why the whole tarwad property should not be made liable for this debt.

In allowance therefore of this appeal of the plaintiff, the Lower Court's decree will be modified by directing the defendants to pay this amount and its proportionate rent and interest as a tarwad debt, and defendants will also pay plaintiff's costs in the Lower Court on this amount, as also plaintiff's costs of this appeal.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SANKU AND OTHERS (DEFENDANTS NOS. 1 TO 4), APPELLANTS,

v.

PUTTAMMA AND ANOTHER (PLAINTIFF AND DEFENDANT NO. 5),
RESPONDENTS.*

1890.
Sept. 29, 30.
Oct. 6, 7, 8, 9.
Dec. 5.

Aliyasantana Law—Inheritance—Uncongenital insanity—Suit by an unadjudged lunatic by the Agent of the Court of Wards as guardian—Authority of the Court of Wards—Regulation V of 1804—Estates of Lunatics subject to Mufassal Courts—Act XXXV of 1858—Code of Civil Procedure, s. 464.

A Jain, who was subject to the Aliyasantana law, made a will, whereby he disposed of the property of his family in favour of certain persons, and died. The

* Appeal No. 86 of 1887.

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plaintiff, a female, was the sole surviving member of the testator's family, but it was admitted that she was, and for more than fifty years had been, a lunatic, though she had not been declared to be so under Act XXXV of 1858; it appeared that her lunacy was not congenital. She sued by the Collector of South Canara, the agent for the Court of Wards:

Held, (1) that the plaintiff was not excluded from inheritance by reason of lunacy under Aliyasantana law, and the will, in favour of the defendants, was invalid;

(2) that the Court of Wards had power to take cognizance of the plaintiff's case under Regulation V of 1804;

(3) that although the Court of Wards should ordinarily obtain a declaration under Act XXXV of 1858 in cases where the lunacy of a ward is open to question their failure to do so in the present case was not fatal to the suit;

(4) that Civil Procedure Code, section 464, was accordingly applicable to the case;

(5) that the appointment of the Collector, as guardian to the plaintiff, was legal and valid.

In deciding what was the extent of the property which the plaintiff was entitled to inherit under the above rulings, certain documents adduced as evidencing partition of the family property were held to evidence merely arrangements for separate enjoyment.

APPEAL against the decree of C. Venkobachariyar, Subordinate Judge of South Canara, in original suit No. 20 of 1885.

The plaintiff, Puttamma, was sole surviving member of a wealthy Jain family known as the Konda family, governed by the Aliyasantana law. The last member of the family, who had possession and management of the family properties, was one Manjappa Shetti *alias* Mallanna Shetti, who died on the 18th November 1882. A few days before his death he made a will bequeathing all the properties in his possession to his wife and children. Sanku, defendant No. 1, was Mallanna's widow, and defendants Nos. 2 to 4 were his children, defendant No. 2 being a son by a former wife, and defendants Nos. 3 and 4, his daughter and minor son by defendant No. 1. Defendant No. 2 was enjoined by the will to protect the plaintiff who was therein described as a person of unsound mind.

The present suit was brought by the Collector of South Canara as agent of the Court of Wards, on behalf of the plaintiff who was admitted by all parties to have been a lunatic for many years past and who still was of unsound mind. It appeared that, in May 1883, the Collector petitioned the District Court to make an inventory of the effects of which Mallanna died possessed and to transfer them to his control, but no order for transferring possession to the Collector was passed. The plaint alleged that

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the property bequeathed to the defendants was vested solely in the plaintiff, that the deceased had merely a right of maintenance therein, and that he was incapable of transferring the same by will. The suit was for recovery of this property.

The defendants pleaded that as plaintiff, who had long been, and continued to be, a lunatic, had not been adjudged a lunatic by the District Court in accordance with the provisions of Act XXXV of 1858, the Court of Wards' Regulation did not apply to her case; that, since the passing of the above Act, it was not competent for the Court of Wards or any person to bring a suit on behalf of a lunatic, until the question of lunacy had been adjudicated upon, and the Court of Wards or such other person had been appointed manager under the Act; that the question of plaintiff's lunacy had not been so adjudicated on, nor had the Collector been appointed agent or manager in conformity with the provisions of the Regulation. It was further pleaded that as plaintiff had been a lunatic for a period of 50 years, she was under a disability which debarred her right to the estate or to the possession thereof, and that consequently Mallanna Shetti had the right, as last surviving member of the family, to dispose of the property by will. It was also alleged that a division had taken place in the family in 1844 and again in 1866, whereby the interests of plaintiff's branch were severed from those of the branch represented by Mallanna Shetti. It was further contended that only a portion of the plaint property belonged to the Konda (plaintiff's) family, a considerable portion being the self-acquisition of Mallanna. The parties were, lastly, at issue on minor questions regarding the ownership of some of the items of property claimed in the plaint which are not of importance for the purposes of this report.

The Subordinate Judge passed a decree for the plaintiff.

Defendants Nos. 1 to 4 preferred this appeal.

Mr. Johnstone, Bashyam Ayyangar and Narayana Rau for appellants.

The *Advocate-General* (Honorable Mr. Spring Branson), Sankaran Nayar, Krishnasawmi Ayyar and Gopala Rau for respondents.

JUDGMENT.—This is an appeal by defendants Nos. 1 to 4 from the decree of the Subordinate Judge of South Canara awarding

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to plaintiff possession of extensive properties, moveable and immoveable, to which the Subordinate Judge has found that plaintiff is entitled as sole owner, she being the last surviving member of an Aliyasantana family.

The appellants are the wife and children of one Manjappa alias Mallanna Shetti, the last surviving male member of plaintiff's Aliyasantana family, who died in 1882.

Plaintiff is a lunatic whose estate has been taken charge of by the Court of Wards under the orders of Government, and the suit was brought on her behalf by the Collector of South Canara as Agent of the Court of Wards.

The first objection taken by the appellants is that "the Court of Wards' Regulation V of 1804 is inapplicable to the plaintiff's case, the sections relating to lunatics therein not being in force." This objection rests on the fact of sections 6 and 7 of Regulation V of 1804, so far as they related to lunatics and idiots, having been repealed by Act XXXV of 1858, which prescribes the procedure to be adopted for ascertaining whether a person alleged to be a lunatic is such or not. Section 2 of Regulation V of 1804, which gives the Court of Wards "full power and authority to take cognizance of all cases of property devolving to heirs incapacitated by minority, sex or natural infirmity" from administering their own affairs, has not been repealed. That the phrase "natural infirmity," as used in the Regulation includes also lunacy and idiotism, is apparent from section 5, which declares incompetent to manage on their own behalf persons "incapacitated by lunacy, idiotism or other natural infirmity." Moreover section 9 of Act XXXV of 1858 expressly recognizes the authority of the Court of Wards to take charge of the estate of a lunatic.

In ordinary cases, where the lunacy might be open to question, the Court of Wards ought no doubt, in the first instance, to get a declaration under Act XXXV of 1858. But where, as in this case, it is admitted on all hands that plaintiff is a lunatic, their not having done so cannot be held to be fatal to the suit.

The next objection taken by the appellants is that "the reason alleged in the plaint for making the provisions of the Regulation applicable to the plaintiff, viz., that she is disqualified to manage her own affairs *by reason of her sex*, is inconsistent with the allegation that she is governed by Aliyasantana Law." As to this, it is to be observed that though the mere fact of plaintiff being a female

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would not be sufficient for holding her to be disqualified to manage her affairs; at the same time, the mere fact of a woman being governed by Aliyasantana Law is no reason for holding that she might not be disqualified by sex alone within the meaning of the Regulation. It must depend in each case on the capacity to manage.

If an Aliyasantana woman is not possessed of sufficient capacity to manage her estate, the estate can be taken under the management of the Court of Wards on the simple ground of incapacity by sex. In the present case, however, there is admittedly incapacity by lunacy; and this circumstance is sufficient, as has been held above, to give the Court of Wards power to assume management of the estate with the sanction of Government. The second objection need not, therefore, be further considered.

It is next contended that "plaintiff who is admittedly a lunatic not having been adjudged so under Act XXXV of 1858, she cannot sue," and, it is added, "section 464 of the Code of Civil Procedure has no application." It has already been held above that as plaintiff "is admittedly a lunatic," the mere absence of a formal adjudication to that effect need not, in the circumstances of this case, be held to invalidate the charge assumed by the Court of Wards with the sanction of Government; and section 464 of the Code of Civil Procedure expressly excludes from the operation of sections 440 to 462, and consequently also of section 463 "any minor or person of unsound mind, for whose person or property a guardian or manager has been appointed by the Court of Wards,"—and the Collector by whom the present suit is brought on behalf of the lunatic plaintiff is the guardian so appointed.

It is, however, next objected on behalf of defendants that "the appointment of the Collector as guardian is not legal and valid, and the plaintiff not being properly represented, her suit is not maintainable."

We see no reason for holding that the appointment of the Collector as guardian of the lunatic plaintiff is not legal and valid. A similar objection seems to have been taken before Parker, J., in *Beresford v. Ramasubba*(1), and was overruled for reasons to be found at page 199 of the report. This objection must, therefore, also be disallowed.

(1) I.L.R., 13 Mad., 197.

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The next objection is that as plaintiff has been "of unsound mind" for more than fifty years before the date of the suit, she has lost all her right to inheritance, or to the possession of the plaint properties, or to succeed to their management.

There is no question here of the plaintiff's right to manage the properties. She is admittedly incapacitated for that. The only question is whether the property is hers, and such as should be managed on her behalf by the Court of Wards. Her right to the property of the Aliyasantana family, of which she and the deceased Mallanna Shetti were both members, accrued at the time of her birth.

Her insanity is admittedly not congenital. Consequently no question arises as to whether she is disentitled to the property in consequence of having been born a lunatic. It having once vested in her, she cannot be held to have been divested of it by her subsequent lunacy.

This disposes of all the preliminary objections.

We now have to consider what is the family property to which plaintiff is entitled.

And the first question is, do exhibits I and M evidence final and absolute divisions of the family property between plaintiff's branch and that of Mallanna Shetti? The earliest of these in date is exhibit I (7th September 1844). It is divided into two parts marked respectively exhibits Ia and Ib. The former showing how the debts due to the family were divided, and the latter the immoveable property, namely, into three shares, one share being allotted to be enjoyed by Manjappa Shetti, another by his nephew Nema Shetti, and the third by his sister Chandappamma. The circumstance of Manjappa Shetti, a brother, being given a share, is of itself favourable to the supposition that the division was for peaceful and separate enjoyment merely, and not a final and absolute partition of the property. However, this is further apparent from the stipulations in exhibit Ib against any of the sharers wasting the property "under any circumstances," and that, should any sharer sell such properties, he shall make up for the same by buying other properties; and that in case of any of the properties held in mortgage being redeemed, other suitable property shall be acquired with the redemption money. Moreover, it is expressly provided in exhibit Ib "that the property enjoyed by Manjappa Shetti or property enjoyed by Nema

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Shetti shall be enjoyed together, after the male descendants of both, by the descendants of the female Chandappamma." It is pointed out on behalf of appellants that the present plaintiff, Puttamma, is not even mentioned in exhibit Ib and was in fact excluded, because only the male members of the two branches are mentioned as entitled to possession of the shares allotted to Nema Shetti's branch just as is done in the case of Manjappa Shetti's share. It must here be noticed that the Manjappa Shetti referred to in exhibit I was the grand-uncle of the lately-deceased Manjappa *alias* Mallanna Shetti, who will hereafter always be spoken of in this judgment as Mallanna Shetti;—also that plaintiff Puttamma is a niece of the Nema Shetti mentioned in exhibit I. It is no doubt true that no mention is made of the plaintiff in exhibit I, and her very existence is ignored in so far as she might have been an obstacle to Chandappamma's branch's right to possession of the share allotted to be enjoyed by Nema Shetti is concerned. But plaintiff was not, and, being a lunatic, could not be a party to the document in question. It is not denied that she has all along been maintained as a member of the family. Consequently her not being mentioned in exhibit I is of no consequence one way or the other. Exhibit I was held by this Court in 1865 (see exhibit A) to be "plainly an agreement simply for the separate management by each of the three contracting parties of a separate portion of the family property," and, as was then remarked, "the provisions in the agreement against waste and alienation, for the postponement of the succession of Chandappamma's issue until the decease of the males, and the right of survivorship reserved to them, show with abundant clearness that there was no division." The above was the finding of this Court in an appeal preferred by the deceased Mallanna Shetti from an order of the Civil Court of South Canara granting to Nemaya Shetti (a party to exhibit I and uncle of the above Mallanna Shetti) the certificate under Act XXVII of 1860 for collection of debts due to Dodda Manjappa Shetti, who was also a party to exhibit I. The decision of this Court in exhibit A was that the grant of the certificate to Nemaya Shetti was right, "the two opposing claimants being members of an undivided family."

* Exhibit M is the other document on which defendants rely as evidencing partition. It is dated 16th December 1866. The

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parties to it are the abovementioned Nema Shetti and his nephews Brahmaya Shetti and Nemaya Shetti on the one part, and Chandappamma's daughter Devappamma and the latter's sons Manjappa Shetti (*i.e.*, Mallanna Shetti now deceased) and Aparajita Shetti on the other part. It refers to the prior agreement exhibit I and to the disputes that had arisen and the death of the senior Manjappa Shetti (see exhibit A above noticed), and then says "after Manjappa Shetti one of us, Nema Shetti, is now *Yajaman of the family*" and entitled to manage all the religious ceremonies, keeping in his possession the lands set apart for that purpose in the former Tahanama (agreement). It then divides between the two contracting parties "the lands, which were in the enjoyment and under the management of the deceased Dodda Manjappa Shetti at the time of his death," providing, however, that "the kudtala for the assessment of all these lands shall be in the name of the Yajaman Nema Shetti" though each party is to pay to the Government separately the assessment of the lands in the possession of each. It next provides that "in case of alienating under urgent necessity" either the lands then dealt with "or any of the lands existing at present in the family, except lands alienated and given upon redemption from mortgage out of the family lands mentioned in the former Tahanama (exhibit Ib), all should join and make the alienations." It is then stipulated that each branch shall separately enjoy the lands now divided, as also "those previously" divided, and awarded to each, and that "during the lifetime of the members of one branch there shall be no obstruction from the members of the other branch;" but in case of lands held on mortgage being redeemed from either branch, it is provided just as in exhibit Ib that "from the mortgage amount recovered" other land shall be acquired, and that if any of the muli lands are sold "in conformity with the above Tahanama," other land proportionate in extent shall be acquired; "but these amounts shall not be wasted;" and, finally, there is a provision for all the members of the two branches joining together in making an adoption for the purpose of continuing the family in case an adoption should be found necessary for the purpose. No doubt paragraph 5 of exhibit M reserves to the members the exclusive right of disposing of its self-acquired properties; and such "self-acquisitions" are also referred to in paragraph 6. But it is clear that the properties divided under exhibit M, viz., the properties

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of which Dodda Manjappa Shetti was possessed at the time of his death, were dealt with, and were intended to be retained, as family property; and plaintiff, the now sole surviving member of the family, is entitled to all the properties divided under exhibits Ib and M, and also to any properties that may have been since acquired in lieu of such of those lands that may have been sold under urgent necessity or with money received in redemption of any such lands which may have been held in mortgage.

Before leaving exhibit M, it must here be noticed that it expressly provides (paragraph 8) for the present plaintiff, Puttamma, being maintained by Nema Shetti and his nephews "who are her brothers."

The same paragraph of exhibit M also provides that Arakamma, the younger sister of Chandappamma, should be maintained by her niece Devapamma and the latter's children. This Arakamma is also not mentioned in the earlier tahanama, exhibit Ib. It is not alleged that she was a lunatic. Consequently there is no reason for holding non-mention in exhibit Ib to mean exclusion as has been suggested with regard to plaintiff. Exhibit M, like exhibit I, is evidence merely of an arrangement for separate enjoyment, and not a final partition.

The next question for consideration is whether any, and if so, which of the properties specified in the schedules attached to the plaint are "self-acquisitions" either of Nema Shetti or of defendants Nos. 1 to 4, to which these appellants are entitled.

The items of debt and property, respectively, claimed by defendant No. 2 as his own self-acquisitions are dealt with by the Subordinate Judge in paragraphs 23 and 24 of his judgment.

Of the debts, item No. 47 is found to have been part of assets due to plaintiff's branch of the family to which Mallanna succeeded on the death of plaintiff's brother. Debt item No. 54 and property item No. 122 were acquired by defendant No. 2, after his father's death, and when he was in possession of the family property; and defendant No. 2 has not proved that the money paid was his own. The above items, as also Nos. 23, 28, 33, 35, 46, 47, 55, 68 and 104 of the debts, have not been pressed at the hearing of this appeal; and as to the remaining items, both of debts and properties, the Subordinate Judge has given sufficient reasons for his finding that the documents were in fact

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obtained by Mallanna in his son's name, the money being that of Mallanna's family.

Item No. 1 of the debts is a sum of Rs. 39,999 due "under exhibit CCLXI." This amount is claimed by defendant No. 1, in whose name the document stands. But it is seen from the document itself that no less than Rs. 24,478, of the Rs. 39,999, constituted a pre-existing debt due to first defendant's husband, Manjappa Shetti *alias* Mallanna. There is, as observed by the Subordinate Judge, no evidence of the amount having been paid by defendant No. 1 to her husband; and as to the remaining Rs. 15,521, which is alleged to have been paid in cash, the Subordinate Judge is justified in his finding that it must also have been the first defendant's husband's money, as first defendant's story of her having obtained this money from her mother is not at all entitled to credit.

The next question is whether any, and, if so, which of the plaint items were the self-acquisitions and separate property of Mallanna? And in this connection, it has first to be considered whether it is a fact, as contended by defendants, that even subsequent to the karar of 1844, and till his death in 1860, Dodda Manjappa Shetti continued in management of the share allotted to his sister Chandappamma. The question has been discussed at length in the Subordinate Judge's judgment, and we see no reason for differing from the conclusion arrived at by him, viz., that it was not Dodda Manjappa Shetti, but Mallanna who managed on behalf of Chandappamma. It is admitted that Mallanna was the manager from 1860. The burden of proving that property acquired by Mallanna subsequent to 1844 was acquired independently of funds belonging to the family on behalf of whom he was managing is, therefore, doubtless on the defendants. As to Mallanna's having been possessed of capital of his own, being the sale-proceeds of a gold ornament worth about Rs. 1,000 given to him by his father, as observed by the Subordinate Judge, there is only one witness who deposed to this effect, and good grounds are stated for disbelieving his evidence. The only other indication of Mallanna's being possessed of money prior to 1844 is to be found in exhibit CXXX, which is the judgment in a suit brought by the said Mallanna in 1848 to recover from one Matterjiga a sum of Rs. 90-2-0 as due under a bond dated 1841. The defendant in that suit denied the debt. However, a decree was passed against

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him. As far as the evidence goes, this is the only transaction in money had by Mallanna prior to 1844; and as he did not obtain his decree till some five or six years after he began to manage the property of his branch of the family; and as there is no evidence that that money even if realized (as to which also there is no evidence), was applied to the purpose of acquiring any of the plaint properties; and also considering the smallness of the amount, the evidence afforded by CXXX proves nothing; and the Subordinate Judge is justified, therefore, in holding that none of the property or outstanding debts alleged by defendants to be Mallanna's self-acquisition is proved to have been acquired by him by means other than what he was possessed of as manager of his branch of the family.

It is next contended on behalf of the defendants that the lands Nos. 100, 123, 126, 128, 130, 132, 135 and 139 to 144 in schedule I being self-acquisitions of Dodda Manjappa Shetti and lands Nos. 1, 2, 9, 10, 13, 14, 25, 28, 29, 43, 47, 49, 51, 55, 56, 63, 81 to 86, 88, 94, 106, 107 and 112 being the self-acquisition of Dodda Nema Shetti and his nephews, the plaintiff, who was admittedly a lunatic when succession opened out to her with respect to all these properties, has no right whatever to them. No authority has been shown in support of the contention that a lunatic is excluded from inheritance under the Aliyasantana Law. Even under the Hindu Law there is a difference of opinion as to whether in order to exclude from inheritance lunacy must not be congenital. In any case, the test in such cases under the Hindu Law is whether the defect is such as would be sufficient to prevent the claimant from offering the proper funeral oblations. Right of succession under the Aliyasantana Law is in no way dependent on capacity to offer funeral oblations. This objection must therefore be held to be invalid. For the same reason the contention that Mallanna's will ought to be upheld on the ground that he was sole owner of the properties dealt with thereunder must fail; for plaintiff's lunacy not being a disqualification for inheritance, Mallanna was not sole owner, and had consequently no power to dispose of the family property by will.

The next objection to the decree is as to Rs. 1,000 directed to be paid by defendants on account of moveables alleged to have come into their possession. The appellants contend that there is no evidence of their being in possession of these moveables. This

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contention appears to be well founded. This part of the Lower Court's decree must be set aside.

The arrangement evidenced by exhibit CCLXII is open to all the objections stated in paragraphs 72 and 73 of the Subordinate Judge's judgment. Moreover it cannot be binding on plaintiff who was not a party to it.

The objections taken in paragraphs 12 and 16 of the memorandum of appeal are withdrawn as no longer existent, the decree having been corrected in the Lower Court. Those mentioned in paragraphs 14 and 16 are not pressed at the hearing. There then only remains the objection as to costs, appellants contending that they ought to have been allowed their costs on the portion of the plaintiff's claim which was disallowed. No reason has been given for disallowing these defendants the costs now claimed, to which they seem to be entitled. The Lower Court's decree must be altered accordingly.

As to the additional grounds of appeal, the first is disposed of by the finding alone that Mallanna's acquisitions were made when he was manager on behalf of the family; and the other, as to the calculation of costs, was not pressed at the hearing.

This disposes of the appeal.

There remains for consideration the objection taken by the respondent under section 561 of the Code of Civil Procedure to that part of the decree which disallows plaintiff's claim to lands Nos. 104, 105, 125, 127, 131 and 138 in schedule I. These lands were, it appears, acquired by Mallanna's younger brother, Sajip Nema Shetti, a junior member living apart from the family. The mere fact of Dodda Manjappa's land being at the time under the management of this Nema Shetti is not sufficient to justify our holding that these lands were acquired with family funds. It is quite as likely that the acquisitions were made out of the allowances made to him by Dodda Manjappa, as remuneration for his management of his property. The burden of proof is clearly on the plaintiff and we agree with the Subordinate Judge in finding that she has failed to make out a case entitling her to these lands.

Being Sajip Nema Shetti's self-acquisitions, they became on his death the property of his branch of the family; and Mallanna, as the last member of that branch, could make a valid disposal of the same. This objection of the respondents must therefore be disallowed.

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The Lower Court's decree must be modified by striking out the part which directs defendants to make over to plaintiff moveable properties to the value of Rs. 1,000; and also by awarding to defendants their costs on the amount of the claim that has been disallowed (including these Rs. 1,000), and directing these costs to be paid out of the estate in dispute. It will be confirmed in other respects.

Each party must pay the other's costs of this appeal proportionate to the amounts now allowed and disallowed and plaintiff must pay defendant's costs of opposing the objections taken under section 561.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Muttusani Ayyar, Mr. Justice Parker and
Mr. Justice Wilkinson.*

KRISHNAN (PLAINTIFF), APPELLANT,

v.

VELOO AND OTHERS (DEFENDANTS NOS. 1 to 3),
RESPONDENTS.*

1888.
December 19.
1889.
January 10.
1891.
March 13.

Civil Procedure Code, s. 13—Res judicata—Mortgage—Transfer of interest—Appointment of a creditor as agent to collect rents and appropriate part towards the debt.

In a suit to redeem a kanom on certain land, the jenm of a devasom in Malabar, it appeared that the plaintiff held a melkanom in respect of the same land executed to him (subsequently to the date of the kanom sought to be redeemed) by defendant No. 3, the samudayam of the devasom. Defendant No. 3 represented one Chitam-baram, in whose favour the Uralers had, in 1741, executed a document appointing him samudayam and stating that they had received from him a kanom of 18,000 fanams on the devasom properties and providing that he should appropriate part of the rents towards the loan. It appeared that in a suit to eject tenants, the Uralers had sued as co-plaintiffs with the samudayam: in subsequent suits, however, two of the Uralers had sued other tenants for rent and the samudayam for an account; both of these suits were dismissed on second appeal, and in the judgments of the High Court the samudayam was described as a mortgagee in possession:

Held, (1) on its appearing that no opinion was expressed in the former suits as to the construction of the document of 1741 that the former decisions had not the force of *res judicata*;

* Second Appeal No. 40 of 1888.

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(2) in view of the conduct of the parties and on the terms of the document of 1741 that the samudayam was not thereby constituted a mortgagee in possession and that the melkanom set up by the plaintiff was invalid.

SECOND APPEAL against the decree of V. P. de Rozario, Subordinate Judge of South Malabar, in appeal suit No. 563 of 1887, reversing the decree of V. Kelu Eradi, District Munsif of Nedunganad.

Suit to redeem a kanom on certain land, the jenm of a devasom, in Malabar. The kanom was dated 21st Karkitagom 1023 (A.D. 1848) and was executed on behalf of the devasom by one Chitambara Patter, deceased, to the predecessors in title of defendants Nos. 1 and 2. The plaintiff claimed title under a melkanom deed in respect of the same land dated 2nd July 1885 (20th Mithunam 1060) and executed to him by defendant No. 3, the brother and representative of Chitambara Patter.

Chitambara Patter and defendant No. 3 were successively samudayams of the devasom, and it was claimed that they had power to create the melkanom now sued on by virtue of an instrument dated 916 (A.D. 1741) and therein described as a "teet granted by the Uralers to Chitambara Patter." In this instrument, the terms of which are set out in the second paragraph of the following order of reference, Chitambara Patter was stated to be appointed samudayam of the devasom and a loan by him to the Uralers "on the devasom properties" was recited, and it was provided that part of the rents of the properties should be appropriated by him towards the interest on the loan.

The plaintiff contended that the above instrument constituted Chitambara Patter a mortgagee with possession of the lands in question, and relied in support of this contention upon certain judgments of the High Court [(summarized by their Lordships as appears below), in which the samudayam was so described. In the cases then before the Court the Uralers were the plaintiffs, and in the one certain tenants and in the other Chitambara Patter's successor were the defendants, but no opinion was therein expressed upon the construction of the instrument of 916 (A.D. 1741).

The defendants contended that the instrument in question did not create any mortgage lien in favour of Chitambaram, and gave him no power either to execute a valid kanom over the devasom properties nor to eject tenants. It appeared that in 1839, when

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it was sought to obtain a decree to eject a tenant, the Uralers and the samudayam sued as co-plaintiffs.

The District Munsif passed a decree as prayed, which was reversed on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Desikacharyar* for appellant.

Mr. *Wedderburn* for respondents.

This second appeal having come on for hearing before *Kernan* and *Wilkinson*, JJ., their Lordships made the following order of reference to the Full Bench:—

Order of Reference to the Full Bench.—The plaintiff (appellant) alleges that a melkanom in respect of certain lands was granted to him by defendant No. 3 on the 2nd July 1885, exhibit A, and seeks to redeem an alleged prior kanom of the same lands dated Karkitagom 1023, (A.D. 1848) vested in respondents Nos. 1 and 2, granted by Chitambara Patter, on behalf of the Puthukulangarai devasom.

The lands are the jenm of the devasom. In 916 (A.D. 1741) the Uralers of the devasom borrowed 18,000 fanams from Chitambara Patter, and executed to him a document in the following terms:—

"Teet granted by the Uralers to Chitambara Patter. You are appointed samudayam of Puthukulangarai devasom and we have received from you a kanom of 18,000 fanams on the devasom properties; you are to appropriate from the rents 1,800 paras for interest on the money due to you, and after deducting the amount and the interest of 400 paras allowed to tenants for their kanom amount (8,000 fanams) from the gross rent of 2,850 paras of paddy due to devasom, with the balance defray the expenses of the devasom and keep the accounts." After the execution of that document Chitambara Patter acted as samudayam until his death, and as the debt of 18,000 fanams has not been redeemed, the interest of Chitambaram is now claimed by respondent No. 3, who represents Chitambaram's estate.

The respondents Nos. 1 and 2 contend that the document of 916 (A.D. 1741) was not a kanom, that is a mortgage, and gave no power to Chitambaram to execute a kanom on the lands over which he was appointed samudayam nor any power to eject tenants, and that under it Chitambaram had only power to receive

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rents and apply them to pay the expenses of the devasom, and to apply the surplus to pay his debt, fanams 18,000 and interest.

The document is not in the form of an ordinary kanom. It does not purport to grant or convey any lands or estate in land to Chitambaram. The Uralers apparently reserved the estate and only gave Chitambaram power to receive and apply the rents. No doubt Chitambaram's representative has a right to retain the receipt of the rents as long as his debt is not fully paid off. There is even no hypothecation of the lands and there being no grant of the lands or of any estate in them, the question is, had defendant No. 3 any power to grant a melkanom to the plaintiff, and thus enable him to evict the tenant in possession and to substitute a new tenant? It is contended by the appellant (plaintiff) that the effect of the document of 916 (A.D. 1741) was that Chitambaram was thereby made mortgagee in possession. If such was the effect of the document, then apparently respondent No. 3 would have had power to grant the melkanom to the plaintiff. In two cases decided by the High Court on second appeal, the samudayam, claiming under the document of 916, (A.D. 1741) was treated as mortgagee in possession. But it is necessary to state shortly the facts of each case and see what was really intended to be decided.

The first case was *Muppil Nayar v. Shathanatha Patter*(1). There two of the Uralers were plaintiffs and stated a demise in 1028 to two persons, defendants, of certain lands (not those now sought possession of, but others) and to recover rent and possession of the lands. Defendants Nos. 1 and 2 in that suit were the tenants. Defendant No. 5 there was the son of Narayana representing the interest in the document of 916 (A.D. 1471). Defendants Nos. 1 and 2 set up title under Chitambaram. Defendant No. 5 set up a title as the mortgagee under the document of 916 (A.D. 1741). The Munsif having held that Chitambaram was only entitled to recover the rents, made a decree for payment of rent to defendant No. 5, samudayam, and for possession to be given to the plaintiff and defendant No. 5 jointly. On appeal the District Judge on the 23rd of August 1880 dismissed the suit holding that Chitambaram was entitled to continue in the receipt of rents until his debt was paid. In *Muppil Nayar v. Shathanatha Patter*(1) this Court

(1) Second Appeal No. 816 of 1880, unreported.

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in giving judgment said that the position of defendant No. 5, as proprietary samudayam, did not oust the right of the Uralers to redeem the kanom demise to defendants Nos. 1 and 2 in that suit but that defendant No. 5 is found to be mortgagee in possession under the document of 916 (A.D. 1741), and the plaintiffs, Uralers, would not be entitled until that mortgage was redeemed to grant tenancies or mortgages with possession on the same properties and added:—Defendant No. 5 as mortgagee in possession would be alone entitled to exercise the right of a landlord upon the property. On this ground they say the contention raised is unsound. The appeal was dismissed.

It may be questioned whether this Court was right in deciding that Chitambaram had been found to be mortgagee in possession or that he was so in law or fact. It is also open to question whether such decision was necessary in the case as Chitambaram was clearly entitled to retain possession until his debt was paid.

The next case is *Muppil Nayar v. Shathanatha Patter*(1). In that case, original suit No. 47 of 1884, two Uralers of the devasom sued defendant No. 3 in this case and two others of his family for an account of the receipt of rents under the document of 916 (A.D. 1741). The defendants then set up the decision in *Muppil Nayar v. Shathanatha Patter*(2) that they were mortgagees in possession and that this debt was not paid and they were entitled to retain possession until paid. The Subordinate Judge and District Judge on appeal dismissed the suit on the ground that though the plaintiffs were entitled to redeem, they should have sued for that relief and not merely for account and injunction. Both Courts treated the document of 916 (A.D. 1741) as a mortgage, probably acting on the judgment in *Muppil Nayar v. Shathanatha Patter*(2). In *Muppil Nayar v. Shathanatha Patter*(1), the Court gave judgment as follows, 5th August 1886:—

“The main ground of contention is that the District Judge “has treated the matter as *res judicata* that defendants are mortgagees in possession and that such is not the case. The plaintiffs “say that no mortgage was created by exhibit I and that defendants are not mortgagees in possession, but agents bound to “render an account of their trust.”

(1) Second Appeal No. 239 of 1886, unreported.

(2) Second Appeal No. 816 of 1880, unreported.

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"We do not find that the District Judge has treated the matter as *res judicata*, but he has found as a fact upon the evidence that defendants are mortgagees in possession and this we think he was entitled to do. On reading the judgments of the District Munsif and District Judge which gave rise to *Muppil Nayar v. Shathanatha Patter*(1), we find that it was never really denied by the plaintiffs that defendant No. 5 was mortgagee in possession. On the contrary they brought evidence to show that the mortgage amount had been satisfied and that defendant No. 5 had resigned the samudayamship and his rights under exhibit I, supporting these pleas by documents which the Court found to be forgeries. It is not open to them now to come into Court and say defendants are merely agents bound to render accounts of their trust, tracing back defendants' title to exhibit I.

"We think the decision of the Courts below was right and dismiss this second appeal with costs."

In this judgment also it is open to question whether this Court was right in deciding that the Judge found the defendants are mortgagees in possession, and if he did, whether this Court was right in holding that the District Judge was entitled so to do, and likewise it may be doubted whether such decision was necessary on the facts, as it was clear that the Uralers were not entitled to sustain the suit for account alone without offering to redeem.

In neither of the above cases does it appear that the attention of this Court was brought to another decision of this Court in *Satta Nathan Patter v. Kunhunni*(2), dated 7th March 1873. That was an appeal in original suit No. 131 of 1872, in which the plaintiff therein stated that his deceased brother, Chitambaram, demised to certain of the defendants on kanom certain lands, that the samudayamship was hereditary in the family, and that he had managed the business and he sued to recover rents and possession of the lands demised. The tenant, defendant, denied the plaintiff's right to eject upon the ground that the original document only constituted Chitambaram a collector of the rents. Both the Lower Courts decided on the terms of the document of 916 (A.D. 1741), that the plaintiff, the successor of Chitambaram, was not

(1) Second Appeal No. 816 of 1880, unreported.
(2) Second Appeal No. 806 of 1872, unreported.

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entitled to evict a tenant, but was only entitled to recover the rent. The plaintiff in that suit appealed to this Court in *Satta Nathan Patter v. Kunhunni*(1), but that appeal was dismissed on the 7th of March 1873.

The question for the Full Bench is whether respondent No. 8 the samudayam, had power, under the instrument of 916 (A.D. 1741), to create the alleged melkanom of the 2nd July 1885 sued on in this suit.

This case having come on for hearing before a Full Bench (The Honorable Mr. Justice Muttusami Aiyar, the Honorable Mr. Justice Parker and the Honorable Mr. Justice Wilkinson) the Court delivered judgment as follows:—

JUDGMENT.—The question for the Full Bench is whether the third respondent, the samudayam of Puthukulangarai devasom, had power under the instrument of 916 or A.D. 1741 to create the melkanom of the 2nd July 1885 upon which this suit was brought. The appellant (plaintiff) sued to recover from the first and second respondents ten items of lands together with arrears of rent. The lands in question belong to a Hindu temple called Puthukulangarai Bhagavathi devasom in the Nedunganad taluk of South Malabar. In 1741 the Uralers or trustees of the institution executed in favour of the third respondent's predecessor a "teet" or document in respect of devasom properties and their management, and in July 1885 the third respondent granted a melkanom to the appellant. The first and second defendants are the parties in possession of the lands in dispute which have been demised to them on kanom on behalf of the devasom. Unless the document of 1741 created a mortgage with possession, the third respondent, it is conceded, would not be competent to grant a melkanom which always pre-supposes a kanom. The point therefore for consideration is whether the document of 1741 created a kanom or a mortgage with possession. It is in these terms:—

"Teet granted by the Uralers to Chitambaram Patter: You are appointed samudayam of Puthukulangarai devasom and we have received from you a kanom of 18,000 fanams on the devasom properties. From the gross rent of 2,850 paras of paddy due to the devasom, you are to appropriate 1,800 paras to

(1) Second Appeal No. 806 of 1872, unreported.

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interest on the money due to you and after deducting the amount and 400 paras of paddy allowed to tenants for interest on their kanom amount, 8,000 fanams, you are to defray the expenses of the devasom with the remainder and keep accounts."

The document is not framed like an ordinary kanom document and there are no words of demise on kanom and there is no indication of any intention to transfer property or right of possession. It refers first to Chitambara Patter's appointment as samudayam, and as such it was his duty to collect the rent due to the devasom, to pay such charges as the Uralers might direct him to pay, to appropriate the balance to the requirements of the devasom and to keep accounts. The document proceeds to authorise him only to do those things which a samudayam may do and is bound to do. It refers next to receipt of a kanom of 18,000 fanams on devasom properties and thereby certainly shows an intention to create a charge for the amount in favour of the samudayam. But the word kanom signifies, in its primary sense, only an advance made to a proprietor of land as security for rent or patom, and it is only when the context shows that it is used as a word of tenure in connection with demise of land, that it is accepted, according to local usage to denote, in its secondary sense, an intention to create a mortgage with possession at least for a term of twelve years. The material words in the document are "received a kanom of 18,000 fanams on devasom properties" and they do not show that the term kanom is used as a word of tenure. The document does not authorise the samudayam to grant, renew or redeem kanoms or to eject tenants in his own right, nor does it attach to the transaction any other recognised incident of a demise on kanom.

A samudayam may become a creditor of the devasom and his debt may also be secured on devasom properties. If the loan were subsequent to his appointment as samudayam, his right to collect rent, and even his possession as samudayam, could not be referred to his position as creditor so as to improve it into that of a mortgagee with possession. In the absence, then, of a clear indication of an intention to grant a kanom, it could make no difference that the loan and the appointment as samudayam were simultaneous, the test being always the true intention of the parties so far as it could be ascertained from the language of the instrument and the nature of its provisions.

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Apart from his interest as samudayam, the only beneficial interest which Chitambara Patter acquired by virtue of his loan consisted in its being charged on devasom properties and in the constitution of the rent which he was required to collect as samudayam into a fund from which he might pay himself the interest accruing due every year on the money lent by him. This may place the Uralers under an obligation to repay the debt before determining Chitambara Patter's power to collect the rent due to the devasom; but it is by no means sufficient to create between them the legal relation of mortgagor and mortgagee with possession.

In connection with the interpretation of ancient documents, it is usual to look at the conduct of the parties concerned under them when there was no disagreement between them. In this view it is not unimportant to refer to the allusion made by the Subordinate Judge to both the Uralers and the samudayam having jointly instituted a suit, so early as 1839, to eject a tenant.

As to the observations of the Court in the second appeals mentioned in the Order of Reference, the decision in *Satta Nathan Patter v. Kunhunni*(1) is in accordance with the construction which we put on the document of 1741. In that case both the Lower Courts held that on the terms of that document, the successor of Chitambaram was not entitled to eject a tenant, but was only entitled to collect the rent, and the High Court affirming their decisions, dismissed the second appeal.

As to *Muppil Nayar v. Shathanatha Patter*(2) it arose from a suit instituted by two of the Uralers to recover rent from certain tenants and possession of the devasom land cultivated by them. The ground of claim was that as Uralers, they were entitled to collect rent and to eject tenants on behalf of the devasom. The Court of first instance held that under the document of 1741, the right to collect rent vested exclusively in Chitambara Patter and his successors, whilst the right to eject tenants vested jointly in the Uralers and Chitambara Patter. The Lower Appellate Court placed the same construction on the document adding, however, that equity would certainly require that before the samudayam

(1) Second Appeal No. 806 of 1872, unreported.

(2) Second Appeal No. 816 of 1880, unreported.

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was ousted from his office, he should be repaid the advance made by him. But on second appeal, this Court observed that defendant No. 5 (samudayam) was found to be a mortgagee with possession under the document of 1741, and that he alone would be entitled as mortgagee in possession to exercise the right of a landlord and on that ground it dismissed the second appeal. In his judgment the District Judge referred to the suit of 1872 and advertent to the decision therein that the samudayam could not himself eject the tenants of the devasom under the document of 1741, remarked that it did not follow that the Uralers alone had that right. The remarks of this Court which adopted the finding of the District Judge went beyond its scope in describing the samudayam as a mortgagee in possession with the right of a landlord over the devasom property. The District Judge, as far as it can be gathered from his judgment, only found that the status of Chitambara Patter's successor was substantially that of a samudayam with power as such to collect rent united to an equitable claim to be repaid his advance before that power was taken away from him. Nor was it necessary to say more for the requirements of that case.

As regards *Muppil Nayar v. Shathanatha Patter*(1) it arose from a suit instituted by two of the Uralers against Chitambara's successor for an account of receipt of rents under the document of 1741 and for an injunction restraining the defendant from further interference with the management of devasom property. The suit was dismissed by the High Court and by the Lower Courts on the ground that as the Uralers were entitled to redeem, they should have sued for redemption and not simply for an account and for an injunction. The contention in the High Court was that the District Judge treated the matter as *res judicata*, that the then defendants, Chitambara's representatives, were mortgagees in possession whilst in reality they were mere samudayams bound to render an account to Uralers, and not mortgagees in possession under the document of 1741. This Court overruled the contention on three grounds, viz., (1) that the District Judge did not treat the matter as *res judicata*; (2) that he found as a fact upon the evidence that the defendants were mortgagees in possession,

(1) Second Appeal No. 239 of 1886, unreported.

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and (3) that after bringing evidence to show, in the suit which gave rise to *Muppil Nayar v. Shathanatha Patter*(1), that the mortgage had been satisfied, that defendant No. 5, Chitambara's legal representative, had resigned his samudayamship and his rights under the document of 1741, and after supporting those pleas by documents which were found to be forgeries, it was not open to the Uralers to come into Court and say again that the then defendants were merely agents bound to render accounts of their trust, tracing back their title to exhibit I (the document of 1741). Now, none of the three grounds touches the question of construction which is at present under our consideration; indeed no opinion was expressed upon it in that case. As regards the first, this Court only held that the matter was not declared to be *res judicata* by reason of the decision in *Muppil Nayar v. Shathanatha Patter*(1), and as to the third ground, it decided in substance that after the false averments referred to, the Uralers were not at liberty to get behind the prior decision and insist on the liability to account without repaying the amount advanced. With reference to the second ground, the finding of the District Judge was arrived at in advertence to the observations of the High Court in *Muppil Nayar v. Shathanatha Patter*(1) which, as already stated, went beyond the scope of the District Court's finding which it was intended to adopt in second appeal. As none of the prior decisions has the force of *res judicata* or is conclusive on the question of construction, we consider that the question referred for our opinion must be answered in the negative.

[This second appeal having come on for final disposal, the Court held *melkanom* to be invalid and dismissed this second appeal with costs.]

(1) Second Appeal No. 816 of 1880, unreported.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1890.
Aug. 26, 27.

RAMAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SHATHANATHAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 13—Res judicata—Limitation—Creditor of a devasom placed in possession as samudayam.

In a suit brought by the Uralers of a devasom in Malabar to recover certain land in the possession of the defendant, it appeared that the defendant held under an instrument, dated 1741, whereby his predecessor in title was appointed samudayam and was authorised to appropriate part of the rents of the devasom properties to the interest on a loan made by him to the Uralers. Two of these Uralers had brought a previous suit against the defendant for an account of the rents received by him and for an injunction: that suit was dismissed on second appeal when the High Court described the defendant as a mortgagee in possession, but the question whether or not he was a mortgagee with or without possession was not then directly and substantially in issue:

Held, (1) that the status of the defendant was not *res judicata*, by reason of the judgment in the previous suit;

(2) that the Court having held, following *Krishnan v. Veloo*(1), that the defendant was not a mortgagee in possession under the instrument of 1741, the suit was not barred by limitation.

APPEAL against the decree of V. P. de Rozario, Subordinate Judge of South Malabar, in original suit No. 33 of 1887.

The plaintiff sued to recover, on behalf of himself and the defendant No. 52, as Uralers of the Puthukulangara Bhagavati devasom, certain lands the property of the devasom. He alleged that in M.E. 916 (A.D. 1741) the ancestors of plaintiffs and defendant No. 52 received from Chidambara Patter, the ancestor of the defendants Nos. 1 and 2, 18,000 fanams, that they appointed the said Chidambara Patter samudayam of the aforesaid devasom, with power to collect rents and pay himself interest on the advance, that the said Chidambara Patter was appointed to perform the devasom ceremonies, and to keep and render accounts, that accounts were actually rendered up to M.E. 1012 (A.D. 1837), but that, the affairs of the devasom being no longer

* Appeal No. 14 of 1889.

(1) *Ante*, p. 301.

properly managed, and the defendants refusing to render accounts, the plaintiffs were entitled to recover the property.

Defendant No. 1, amongst other defences, pleaded that the suit was barred by limitation, he being not only a samudayam but also a mortgagee under an instrument executed by the Uralers in favour of his predecessor in 1741.

The terms of this instrument of 1741, the construction of which was in question in *Krishnan v. Veloo*(1) were as follows:—

“You are appointed samudayam of Puthukulangara devasom, “and we have received from you a kanom of 18,000 fanams on the “devasom properties. You are to appropriate from the rents “18,000 paras for interest on the money due to you, and after “deducting the amount and the interest of 400 paras allowed to “tenants for their kanom amount (8,000 fanams) from the gross “rent of 2,850 paras of paddy due to the devasom with the “balance defray the expenses of the devasom and keep the “accounts.”

It was also contended for the defendant that his status as mortgagee in possession was *res judicata*, by reason of the judgment of the High Court in *Muppil Nayar v. Sathanatha Patter*(2), in which he was so described. In that case two of the Uralers sued him for an account of rents received by him under the document of 1741 and for an injunction restraining him from further interference with the management of the devasom properties: that suit was dismissed, no opinion being expressed as to the construction of the abovementioned document.

The other defendants were in possession of the land as tenants.

The Subordinate Judge dismissed the suit holding that it was barred by limitation. The portion of his judgment, which is material in this connection, was as follows:—

“If this be treated as a suit falling under Article 148 of the “second schedule of the Limitation Act ‘against a mortgagee to “redeem or to recover possession of immoveable property mort- “gaged’ the suit is barred by Limitation as more than 60 years “have elapsed since the date of the mortgage and there has been “no written acknowledgment of the mortgage within this period. “But it is contended that the mortgagee is also a samudayam or

(1) See *ante*, p. 301.

(2) S.A. No. 239 of 1886, unreported.

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"agent, and that the suit therefore is really a suit by the Uralers of temple to recover the temple property from their agent who holds a mortgage on the property, that such a suit falls under Article 144 of the Limitation Act 'for possession of immoveable property or any interest thereon not hereby otherwise specially provided for,' and time begins to run when the possession of the defendant became adverse to the plaintiff, and that the possession of the agent with a subsisting lien on the property was not hostile as long as the lien lasted and became hostile only when the amount of the lien was tendered and refused at the time of the suit, that to treat first defendant as a mere mortgagee is to ignore his liabilities as samudayam, that as mortgagee, he is not liable to surrender, 60 years having elapsed, as samudayam he is bound to surrender though twice 60 years and more have elapsed, that the samudayamship has not become merged or absorbed by the mortgage, that Article 148 of the Limitation Act therefore does not apply to this suit against defendant who is not merely a mortgagee but is also a samudayam, and that, as there is no special provision in the Limitation Act for a suit for recovery of immoveable property from a defendant who is a mortgagee as well as an agent, Article 144 applies and the suit is not barred.

"I am unable to assent to this argument; first defendant is a samudayam who holds a kanom on the devasom property. If there were no bar by Limitation his liability to surrender in either capacity or both would be undoubted. But by the laches of the Uralers and the operation of the statute first defendant's liability to surrender the properties which he held on mortgage ceased long ago. I can see no reason for saying that the fact that first defendant is a samudayam deprives him of his full rights as mortgagee. He is in the same position as any other mortgagee of devasom property who has been in possession for more than 60 years. I am of opinion that plaintiff's claim to recover the devasom properties is barred. If plaintiff's claim to recover the property is barred, his claim to recover the income is equally barred. On the well known maxim, that the accessory follows the principal."

The plaintiff preferred this appeal.

Sankaran Nayar for appellants.

Bhashyam Ayyangar and Sundara Ayyar for respondents.

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JUDGMENT.—It is argued for the appellant that the suit is not barred by Limitation as found by the Subordinate Judge, and that exhibit I did not create a mortgage with possession. In this connection our attention is also drawn to the decision of the Full Bench of this Court in *Krishnan v. Veloo*(1).

As regards the construction of exhibit I we follow the decision of the Full Bench and hold that it did not create the relation of mortgagor and mortgagee with possession. Although the present plaintiffs—the Uralers—were not parties to that case, the reasons assigned in support of the opinion apply with equal force to the present case. The intention of exhibit I clearly was, while appointing the first and second defendant's grandfather as samudayi and authorizing him as such samudayi to collect the rent due to the devasom, to permit him to pay himself the interest due on the money borrowed from him. Under these circumstances no question of Limitation arises. Compare judgment of Morgan, C.J., in *Valia Tamburatti v. Vira Rayan*(2).

It is contended for the respondents that it has been decided in *Muppil Nayar v. Sathanatha Patter*(3) that first and second defendants are mortgagees with possession, and that consequently the question of construction is *res judicata*. This point was considered both by the Division Bench and Full Bench in the case above referred to and it was held that the matter directly and substantially in issue in the former suit was merely whether, on the facts there found, the then plaintiffs were entitled to eject defendants and ask for an account, without offering to pay the money due to the latter, and not whether they were mortgagees with or without possession. It was not then disputed that defendants Nos. 1 and 2 were samudayis. Their contention was that they were not mere samudayis, but that they also had a kanom right. It could not have been intended by the decision in that case to determine the status of samudayis, but only to concede to them the right of continuing to apply a portion of the rent received by them as such in payment of the amount due to them. See also *Parthasaradi v. Chinnakrishna*(4). We find therefore that the suit is not barred by Limitation.

As regards the account to be taken between the parties we have not been referred to any evidence which would justify us in

(1) See *ante*, p. 301.

(3) S.A. No. 239 of 1886, unreported.

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

(4) I.L.R., 5 Mad., 304.

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disturbing the Subordinate Judge's finding on the 12th and 15th issues. The omission of the plaintiffs for so long a period to ask for an account supports the Subordinate Judge's finding.

We set aside the Lower Courts' decree and direct that on payment by plaintiffs to defendants Nos. 1 and 2 of the sum of Rs. 5,142-13-9, the latter do surrender the plaint property. We modify the Lower Courts' decree as above and confirm it in other respects except as to costs.

Under the circumstances of the case each party is directed to bear his own costs throughout.

APPELLATE CIVIL.

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

VENKATACHARYULU (PLAINTIFF), APPELLANT,

v.

RANGACHARYULU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Marriage—A Brahman bride given in marriage by her mother without her father's consent.

A Vaishnava Brahman girl was given to the plaintiff in marriage by her mother without the consent of her father who subsequently repudiated the marriage. It appeared that the mother falsely informed the Brahman, who solemnized the marriage, that the father had consented to it:

Held, that the plaintiff was entitled to a declaration that the marriage was valid and to an injunction restraining the parents from marrying the bride to any one else.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 169 of 1889, reversing the decree of M. Ramayya, District Munsif of Bapatla, in original suit No. 376 of 1888.

The plaintiff alleged that the defendants' daughter was his wife and sued for an injunction restraining the defendants from marrying her to any one else.

The parties to this suit were Vaishnava Brahmans, and it appeared that defendant No. 2, who was the wife of defendant No. 1, had, without her husband's permission, bestowed their daughter in marriage on the plaintiff; the marriage ceremony

* Second Appeal No. 1596 of 1889.

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was duly performed in a temple, the Brahman who officiated having been falsely informed by the mother that the father had consented to the marriage. The father since repudiated the marriage. It was found that the mother acted *bonâ fide* in the interest of her daughter and as her natural guardian desiring to provide her with a suitable husband.

The District Munsif passed a decree for the plaintiff as follows:—

"This Court doth hereby order and decree that plaintiff is not entitled to have the present custody of his legally-married wife, the minor Venkatarangamma, till she attains her puberty; that she must now be under the charge and care of her parents, the defendants; that defendants be restrained from re-marrying her to any other person; and that each party do bear his or their own costs."

This decree was reversed on appeal by the District Judge who held that the marriage was void as being fraudulent by reason of the false statement made by the mother to the officiating Brahman.

The plaintiff preferred this second appeal.

Pattabhirama Ayyar for appellant.

Mr. Ramasami Raju and *Krishnasami Ayyar* for respondents.

JUDGMENT.—This is a second appeal from the decree of the District Judge of Kistna who dismissed the appellant's suit for an injunction restraining the respondents from marrying their daughter Venkatarangamma to any one else. The second respondent is the first respondent's wife, and their daughter Venkatarangamma is a child aged now nine years. In June 1884 the mother bestowed the girl in marriage on the appellant and the marriage ceremony was duly solemnized in Narasimhasvami temple at Mangalagiri. The father, however, was not present during the marriage nor had the mother his permission to marry their daughter to the appellant. There was an averment in his plaint that such permission was granted, but both the Lower Courts have found that it is not proved. There was also some evidence in the case to show that the father was present when the girl first proceeded to the appellant's house after the marriage and what is commonly known as the grihapravesam ceremony was performed, but the District Munsif discredited the evidence and the Judge apparently concurred in his opinion. The respondents

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reside in the village of Srirangapuram and it appears that the father went on a visit to his disciples about June 1884 when the mother took the child to Mangalagiri and there married her to the appellant as stated above. The District Munsif considered that she acted as she did because she was probably not willing that the girl should be married to the boy named by her father's mother and that the appellant was a more suitable husband, and on this ground, he was of opinion that the marriage was not fraudulent. But the Judge referred to the evidence that the mother represented falsely to the officiating Brahman at Mangalagiri that she had her husband's permission and concluded from it that the marriage was a fraud upon the father. Upon these facts the question arising for decision is whether the marriage is one which ought to be recognised under the Hindu Law.

There can be no doubt that a Hindu marriage is a religious ceremony. According to all the texts it is a *samskaram* or sacrament, the only one prescribed for a woman and one of the principal religious rites prescribed for purification of the soul. It is binding for life because the marriage rite completed by *saptapadi* or the walking of seven steps before the consecrated fire creates a religious tie, and a religious tie, when once created, cannot be untied. It is not a mere contract in which a consenting mind is indispensable. The person married may be a minor or even of unsound mind, and yet, if the marriage rite is duly solemnized, there is a valid marriage.

In *Sundaramayya v. Bapirazu*(1) a divisional Bench of this Court observed:—"The Subordinate Judge has found that the marriage was valid according to the rites of the class to which the parties belonged, and though it is urged before us that the asura form of marriage is forbidden, we are referred to no authority for holding that a marriage once performed can be set aside on the ground that there was a contract to pay a price for the girl." It was also held by the High Courts at Calcutta and Bombay that when the marriage rite was duly solemnized and there was no fraud or force, the doctrine of *factum valet* applied and the marriage was irrevocable—*Brindabun Chandra Kurmoker v. Chundra Kurmoker*(2) and *Khushalchand Lalchand v. Bai Mani*(3).

(1) Second Appeal No. 566 of 1889, unreported.

(2) I.L.R., 12 Cal., 140.

(3) I.L.R., 11 Bom., 247.

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That such is the Hindu Law is not denied for the respondents. It is indeed conceded for them that the marriage in the case before us could not be annulled if the girl were given away either by her father or with his consent, and the substantial question then for determination is whether a gift of the bride by the father or her proper legal guardian is of the essence of a Hindu marriage as a religious ceremony.

As a religious ceremony it becomes complete when the *saptapadi* is performed, and there are several *Smritis* to that effect.

Manu says:—

"The relation of wife is created by the texts pronounced when the girl is taken by the hand. Be it known that those texts end, according to the learned, with the texts prescribed for walking seven steps"(a).

Vasishtha says:—

"In connection with the formation of the relation of husband and wife, agreement is first prescribed. Then taking by the hand is prescribed. It is said that mere agreement is defective, and that of the two, taking by the hand is indispensable."

Yama says:—

"Not by the pouring of water nor by the words of gift is the relation of husband and wife formed, but it is formed by the rite of taking the bride by the hand and when they walk together the seventh step."

We may here mention that the marriage ritual prescribed for Brahmans and now in general use amongst them is what is known as the *Brahma* marriage, and this is the form customarily adopted even where the father accepts a price for the girl and the marriage is in substance of the "asura" kind. The ritual, so far as it extends to *saptapadi*, may be divided into three parts—(1) the *vagdanam* or the promise to give; (2) the actual gift of the bride or *kanyakadanam*, and (3) the marriage rite which commences with taking the bride by the hand (*panigrahanam*) and ends with the seventh step taken around the consecrated fire (*saptapadi*). For our present purpose the *vagdanam* and the *kanyakadanam*

(a) See Chap. VIII, 229.

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may be treated as forming one essential part and the marriage rite as the other. It must be remembered that the ritual is prescribed for a minor or a child, for, according to Hindu Law and custom, a Brahman girl must be married before she attains her maturity, and, therefore, at a time when she is not in a position to choose a suitable husband for herself. Two principles, therefore, form together the groundwork of the marriage ceremony—(1) a natural or legal guardian acting in the interest of the girl with due regard to her welfare should choose a suitable husband for her, and (2) the choice should be consecrated by the marriage rite and thereby unalterably fixed.

Hence, two propositions of law may be taken to be established beyond controversy, viz., (1) where there is a gift by a legal guardian and the marriage rite is duly solemnized, the marriage is irrevocable, and (2) where the girl is abducted by fraud or force and married, and there is no gift either by a natural or legal guardian there is a fraud upon the policy of the religious ceremony and there is therefore no valid religious ceremony. In support of the second proposition we may refer to the *dictum* of Norman, J., in *Aunjona Dasi v. Prahlad Chandra Ghose*(1). In that case the plaintiff, the mother of the girl, sought to set aside her marriage alleging that when the girl visited her sister and was staying with her, the defendant, the sister's husband, forcibly carried the girl away from his house and married her without the mother's consent and without gift from any one. It may also be suggested in support of the *dictum* that what the public law stigmatizes as a crime cannot be accepted as the source of a legal relation. The third proposition of law which is material to the case before us is that when the mother of the girl acting as her natural guardian in view to her welfare and without fraud or force gives away the girl in marriage and the marriage rite is duly solemnized, the marriage is not to be set aside. This view is supported by authority and is sound in principle. As authority in its favor we may refer to several decided cases. The first case is that of *Bai Ruliyat v. Jeychand Rewal*(2). In that case the marriage was contracted by the mother irregularly without the consent of the father, but it was held that the marriage was duly solemnized with the ceremonies of *vagdan* and *saptapadi* and, therefore, not liable to be

(1) 6 B.L.R., 243.

(2) 1 Morley's Digest, N.S., 181.

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set aside. It appears that the question was referred to the Sastries of Surat and of the Sudder Court and decided in accordance with their opinion.

The second case is that *Modhoosoodin Mookerjee v. Jadub Chunder Banerjee*(1) decided in 1865. The mother gave the girl in marriage during the father's absence to an inferior Brahman on receipt of Rs. 200 and the Court relying on the *Vyavastha* of a Pandit declined to set aside the marriage. Though the father was a Kulin Brahman, and had, as such, numerous wives and the mother had a greater control over her children than is ordinarily the case, yet the ground of decision was that though the consent of the legal guardian should doubtless have been obtained, yet its absence would not invalidate a marriage otherwise unobjectionable.

The third case is that of *Brindaban Chandra Kurmohar v. Chundra Kurmohar*(2) decided in 1886 by the High Court at Calcutta. In that case the legal guardian was the paternal uncle and it was admitted that he had a right to dispose of the girl in marriage in preference to the mother. A suit for the custody of the girl was pending and an injunction restraining the mother from marrying the girl was also in force. Yet the mother gave away the girl in marriage and the marriage rite was duly solemnized. It was held by Norris and Ghose, JJ., that the marriage rite being duly performed by the mother and natural guardian and there being no fraud nor force, the doctrine of *factum valet* prevailed and the absence of the legal guardian's consent did not invalidate the marriage.

The fourth case is that of *Khushalchand Lalchand v. Bai Mani*(3) decided in 1886 by the Bombay High Court. In that case also the mother celebrated her daughter's marriage without the father's consent, though a suit instituted by the father was pending and though an injunction issued by the Court was in force. It appeared, however, that for about eight years prior to the marriage, the father had ceased to live with the mother and the daughter and neglected to take steps to see the girl married though she was 11 years old, that the mother informed him of her intention to marry the girl, and that the father instituted the suit rather to spite the mother than in the interest of the girl. The

(1) 3 W.R., 194.

(2) I.L.R., 12 Cal., 140.

(3) I.L.R., 11 Bom., 247.

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Court upheld the marriage, the learned Chief Justice reviewing all the authorities bearing on the subject and observing that what is ordinarily called a father's right to give, is rather a duty to be performed under the Hindu Law in the interests of the girl.

The fifth case is *Sundaramayya v. Bapirazu*(1) decided by this Court. It is an authority for the position that a marriage once performed cannot be set aside. It differs, however, from the case before us in that the father had prior to the marriage approved of the then plaintiff as a husband for his daughter, the disagreement between him and the mother consisting in that the latter accepted Rs. 400 as a price for the girl whilst the father demanded Rs. 600. It recognizes the principle that what Courts of Justice should consider is not so much whether the father gave the girl away as her legal guardian at the marriage as whether the mother's action was *bona fide* and substantially in the interests of the minor.

Moreover, several Smruti writers prescribe the gift of the daughter in marriage before maturity as the father's duty and not as his right. So Brahaspati enjoins the father to give the daughter in marriage before she menstruates and declares that, if he fails to do so, he is guilty of causing abortion. Narada and Yajñvalkyā pronounce him guilty of child murder. Samvarta declares that a disgusting punishment is prescribed in the next world for this dereliction of duty on the part of the father. As regards the doctrine that a marriage rite once duly solemnized is not liable to be set aside, Narada says:—"Once is a partition ordained, once is a girl given in marriage, and once does a man say 'I give' "(a). The author of the Smruti Chandrika forbids a second *samskaram* or marriage, for the *kaliyug*(b). The theory is that when a legal relation is once consecrated and confirmed by mantra or Vedic texts, it is permanently fixed. Hence it is when a boy is invested with the sacrificial thread and consecrated by Vedic texts as belonging to his father's gotram, he is not eligible for adoption into a different gotram.

There is also another reason why, when the marriage rite is once duly solemnized, the marriage should not be set aside except on clear proof of fraud. The religious theory is that when an adoption or a marriage which is forbidden is consecrated by a

(1) Second Appeal No. 566 of 1889, not reported.

(a) See Chap. XII, 28 Jolly's Trans., p. 83.

(b) See Chap. III, 18 Krishnasami Iyer's Trans., p. 45.

Vedic text and the religious ceremony is thereby defiled a servile state supervenes, and not that the prior *status* remains untainted.

As regards adoption, the author of the *Dattakamimansa* says in Section IV, Sloka 40, "Should one be adopted on whom the ceremony of tonsure and other rites have been performed, a servile state ensues, not that of a son" (see also Sloka 46)(a). It has however been held by this Court that when an adoption cannot be upheld owing to a legal defect, the adopted boy does not forfeit his *status* as son in his natural family, and in the same way, it might be held that when a marriage rite is set aside on the ground that it is forbidden by the very law which prescribes the rite, the girl's prior legal *status* remains without taint, the rite being defiled and being inefficacious on that ground. But the religious theory mentioned above and the social difficulty which may arise from the marriage being set aside is a legitimate ground for recognizing the doctrine of *factum valet* except in cases of clear fraud or force when the religious ceremony may be presumed to be defiled by fraud upon its policy.

Applying the foregoing principles to the case before us, we think the Judge is in error in setting aside the marriage on the ground that the mother falsely stated to the officiating Brahman that she had the father's permission and thereby committed a fraud upon him. The Judge acted probably on the policy of Lord Hardwicke's Act in England which was passed in a great measure to prevent the marriage of minors without the consent of their parents or guardians and which declares that the marriage of persons wilfully intermarried without license from a person having authority to grant the same (the grant of which is forbidden to minors without the consent of parents and guardians) is null and void. The officiating Brahman under Hindu Law is hired for the occasion and is not a person clothed with a statutory authority to be exercised subject to the guardian's consent, and there is no analogy between the English Statute and the Hindu Law. Moreover, it has already been shown that the giving of a daughter in marriage is more a duty than a right, and in the case before us the District Munsif has found that the mother acted *bona fide* in the interest of her daughter and as her natural guardian desiring to provide her with a suitable husband. This finding, from which

(a) Stokes's Hindu Law Books, p. 580.

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the District Judge does not apparently dissent, is, in our opinion, sufficient to validate the marriage.

We may add that the mother is also among the legal guardians, although her place is after the paternal kinsmen, and it has been held that she is entitled to be consulted by the paternal kinsmen in the choice of a bridegroom. During the marriage ceremony the mother pours water into the father's hand when he formally gives away his daughter in marriage. Thus, in religious theory, the gift of the girl is the joint act of both parents, and in this sense the mother's position is higher than that of other legal guardians.

We must reverse the decree of the District Judge and restore that of the District Munsif. The respondents must pay the appellant's costs here and in the Lower Appellate Court.

APPELLATE CIVIL.

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

CHANDU (PLAINTIFF), APPELLANT,

v.

KUNHAMED (DEFENDANT No. 2), RESPONDENT.*

Civil Procedure Code, s. 13, explanation V—Res judicata—Suit for possession of a share in the property of a Muhammadan family.

In a suit in 1882 between the members of a family following the Muhammadan law of inheritance, in which the plaintiffs sued as sharers for the recovery of their share in certain property, one of the defendants pleaded that a paramba, part of the property in dispute, was not subject to division, but this plea was unsuccessful, and a decree was passed for the plaintiffs.

The present suit was brought by a mortgagee from one of the defendants in the former suit (who had been ex-parte) to recover his share of the above-mentioned paramba, the subject-matter of his mortgage; the mortgagor was joined as defendant, among others, including the defendant who had raised the plea above stated. This plea was repeated by the same person:

Held, (1) distinguishing *Venkatarama v. Labai Meera* (I.L.R., 13 Mad., 275), on the ground that the parties were governed by the Muhammadan law of inheritance, that the suit was maintainable;

* Second Appeal No. 529 of 1890.

(2) that the claim that the paramba was not subject to division was *res judicata* by virtue of Civil Procedure Code, s. 13, explanation V.

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SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 451 of 1889, reversing the decree of O. Chathu Nambiar, District Munsif of Nadapuram, in original suit No. 425 of 1888.

Suit by the mortgagee of the share of defendant No. 1 in a paramba for possession of that share.

The paramba in question had been the property of the father of defendant No. 1 and maternal greatgrandfather of defendants Nos. 2 and 3. The defendants were governed by the Muhammadan law of inheritance, but the paramba had not been divided, and defendant No. 2 claimed that it was the separate property of his maternal grandmother and after her death that of his mother, and consequently that defendant No. 1 had no share in it.

It appeared that defendant No. 2 had made these allegations by way of defence to original suit No. 521 of 1882 in which certain other persons sued as sharers for the possession of *inter alia* the paramba now in question, but it was then found that the paramba was liable to be divided and a decree was passed for the plaintiffs. The first defendant in this suit was a defendant in that suit, but he was ex-parte in both.

The District Munsif passed a decree for the plaintiff, but this decree was reversed on appeal by the Subordinate Judge, who held on a consideration of *Parbati Churn Deb v. Ain-ud-deen*(1), *Bepin Behari Moduck v. Lal Mohun Ohattopadhyaya*(2), *Haridas Sanyal v. Pran Nath Sanyal*(3), that the suit was in substance a suit for partition and accordingly not maintainable in its present form.

The plaintiff preferred this second appeal.

Sankaran Nayar for appellant.

Ryra Nambiar for respondent.

JUDGMENT.—As to the first question decided against the appellant by the Subordinate Court, whether the suit is maintainable, we think the Lower Appellate Court was in error. The case appears to have been treated in the Lower Court as one of partition amongst members of a family governed by Hindu Law. But it was stated by the appellant's vakil before us and not

(1) I.L.R., 7 Cal., 577. (2) I.L.R., 12 Cal., 209. (3) I.L.R., 12 Cal., 566.

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denied on behalf of the respondent that defendants Nos. 1, 2 and 3 are governed by the Muhammadan law of succession, and that this is so further appears from the nature of the claim in the former suit, original suit No. 521 of 1882. This being so, the principle laid down in *Venkatarama v. Meera Labai*(1), and the cases there followed have no application to the present case. A sharer by Muhammadan law has a right to a specific share in each item of property left by the person from whom he inherits and can sue to recover that share from any person in possession of the property. No doubt there might be cases in which a Muhammadan sharer would not be allowed to sue for his share in a particular item of property when he could in the same suit sue for his share in the whole property of the person under whom he inherits. But that is on a different ground to avoid multiplicity of actions. In the present case no other persons but plaintiff, and his mortgagor, defendant No. 1, on the one side and defendants Nos. 2 and 3 on the other, have any interest in the paramba in dispute, and therefore a division of the properties as yet undivided between defendants Nos. 1, 2 and 3 and their co-sharers could not be made in this suit, the plaintiff having no concern with it. We think, therefore, the suit is not open to the objection that it relates to the first defendant's share in one only of the properties inherited by him and his co-sharers from Kunhamed. On the merits, the second defendant's contention in this case is that the paramba in dispute was not part of the property of Kunhamed divisible amongst the first defendant and his co-sharers, but was originally the separate property, called *stridhanam* with that misuse of Hindu Law terms common among Muhammadans on the West coast, of his the second defendant's maternal grandmother and through her became the separate property of his mother on her marriage. He appears to have raised the same defence in original suit No. 521 of 1882 which was brought by other sharers for recovery of their shares in this paramba and other properties. An issue (the fifth) was raised in that suit whether this paramba was partible or not, and decided against present defendant No. 2 who was defendant No. 6 in that suit. In this judgment the Munsif observed:—"The witnesses examined for the plaintiffs swear that the property No.

(1) I.L.R., 13 Mad., 275.

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25 (the paramba now in dispute) in the plaint is in the possession of defendant No. 1. Defendant No. 6, who claims these properties adversely to the plaintiffs, has not offered any evidence. I therefore find the third to fifth issues for the plaintiffs." There can be no doubt therefore that the title now set up by defendant No. 2 was decided against him in that suit, and the only question is, was it a judgment *inter partes*, and therefore conclusive as between the plaintiff and defendant No. 2 in this suit. Defendant No. 1 under whom the plaintiff claims was a party, first defendant, to the former suit, but he was *ex-parte*, and, therefore, the title of defendant No. 2 cannot be said to have been actively contested between the present defendants, Nos. 1 and 2, in that suit so as to bring the case within the decision in *Venkayya v. Narasamma*(1). But the contest in that suit as to this particular paramba was between the plaintiffs in that suit asserting that it was property in which they and present defendant No. 1 and their other co-sharers were entitled to share, and present defendant No. 2 denying the same and claiming it as his own property, and therefore present defendant No. 1 and the other co-sharers may be said to claim under the plaintiffs in that suit by explanation V of section 13 of the Code of Civil Procedure. We think, therefore, the decision in that suit adverse to the second defendant's title is *res judicata* and conclusive against him in this suit, and on this ground the plaintiff is entitled to succeed in this suit.

We set aside the decree of the Lower Appellate Court and restore that of the Court of First Instance. Defendant No. 2 must pay the plaintiff's costs in this and the Lower Appellate Court.

(1) I.L.R., 11 Mad., 204.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

RAMABHADRA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

JAGANNATHA (DEFENDANT), RESPONDENT.*

Civil Procedure Code, ss. 13, 211, 214—Res judicata—Claim as to which judgment is silent—Mesne profits subsequent to suit.

In a suit for the partition of a zamindari, the plaintiffs asked, *inter alia*, for "ten years' past profits and for subsequent profits." The Judge passed a decree for partition in which mesne profits for three years prior to the suit were decreed to the plaintiffs, but his judgment and decree were silent with regard to the subsequent profits claimed in the plaint.

The defendant appealed against this decree, and the plaintiffs preferred a memorandum of objections against part of it, but did not object to it so far as it omitted to provide for subsequent mesne profits. The plaintiffs instituted the present suit to recover from the defendant mesne profits from the date of the above suit:

Held, that the plaintiffs' claim so far as concerned mesne profits accrued since the decree in the former suit was not *res judicata*, and the suit to that extent was not precluded by Civil Procedure Code, s. 13.

APPEAL against the decree of J. Kelsall, District Judge of Vizagapatam, in original suit No. 37 of 1888.

Suit for mesne profits for the years 1883–1888 on the plaintiffs' share of a zamindari. The facts of the case and the arguments adduced on this appeal, which was preferred by the plaintiffs, appear sufficiently for the purposes of this report from the following judgment.

The *Advocate-General* (Hon. Mr. Spring Branson) for appellants.

Mr. K. Brown and P. Subramanya Ayyar for respondent.

JUDGMENT.—The respondent is the Zamindar of Merangi, and the appellants are his paternal uncles. The latter brought a suit against the former in September 1883 for partition of the zamindari and obtained a decree in December 1885 from the District Court of Ganjam for a half-share in the estate. The Zamindar then appealed to the High Court, but the original decree was

confirmed in March 1888. At his instance an appeal to Her Majesty's Privy Council from the decision of the High Court was admitted under section 603 of the Code of Civil Procedure, and it is still pending. In February 1889 execution of the decree under appeal to the Privy Council was stayed as regards the partition of the zamindari upon security being given by the Zamindar for the appellants' share of two years' mesne profits.

The contest in the present suit is as to five years' mesne profits claimed by the appellants from the date of the partition suit. In their plaint in that suit they asked for ten years' past profits and for subsequent profits, and the seventh issue recorded therein by the District Court was in these terms:—"Are the plaintiffs entitled to mesne profits for ten years or for what period?" The District Court decreed mesne profits for three years prior to the suit, but said nothing in its judgment or decree about the subsequent profits claimed in the plaint. Though the appellants now before us objected to the decree of the District Court so far as it refused them their costs, they did not object to it in so far as it omitted to provide for subsequent mesne profits. On appeal the High Court dealt with the question of costs and said nothing about subsequent mesne profits. In December 1888 the appellants instituted the present suit to recover mesne profits for five years from 1883 to 1888, together with interest thereon, amounting on the whole, to Rs. 61,275 and with costs and subsequent interest. The plaint stated that the District Court "made no adjudication" in the partition suit in regard to mesne profits subsequent to the suit, and that the cause of action arose in respect of them on the 14th December 1885 when that Court recognized their right to a half-share and decreed partition and possession of such share.

The respondent resisted the claim on four grounds:—

- (i) that the mesne profits now claimed must be taken as having been refused by the decree in the partition suit within the meaning of section 13, explanation 3, of the Code of Civil Procedure;
- (ii) that in any case, no mesne profits for more than three years prior to the present suit, could be awarded;
- (iii) that no interest was due thereon;
- (iv) that the amounts paid to appellants and others for their maintenance during the five years mentioned

* Appeal No. 139 of 1889.

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in the plaint should be set off against the amounts claimed.

Thereupon the Judge recorded the following issues for determination :—

- (i) "Is it a fact that in the first suit the plaintiffs asked for profits that might accrue subsequent to the institution of that suit? Was that claim refused or not granted? If so, does that estop plaintiffs from now claiming them?"
- (ii) "Is so much of the claim as relates to faslis 1293, 1294 and 1295 barred by limitation?"
- (iii) "Are plaintiffs entitled to interest on arrears?"
- (iv) "What amounts have been paid to plaintiffs from estate funds in these five years?"

On the first issue the District Judge found that the claim to subsequent mesne profits was substantially and directly in issue in the partition suit; that it was not granted, and, therefore, refused; and that the present suit was barred. On the second issue, he held that article 109 of the second schedule of the Limitation Act governed the case, and that, if the appellants were entitled to mesne profits at all, they would be entitled to such profits only for three years before the suit. As regards the third issue, he was of opinion that reasonable interest should be allowed on arrears of mesne profits. As to the fourth issue, he did not consider it necessary to decide it and in the result, he dismissed the appellants' suit with costs on the ground that it was barred by section 13, explanation 3. Hence this appeal.

The question which we have to determine is whether the appellants' claim must be taken to have been disallowed under explanation 3, section 13, Code of Civil Procedure, and, if so, to what extent. A second suit is clearly barred by section 13 in respect of any matter directly and substantially in issue between the same parties and heard and finally decided in a previous suit by a Court of competent jurisdiction. Explanation 3 states that any relief claimed in the plaint, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. The plaint in the partition suit prayed for a decree for subsequent profits as part of the relief to which the appellants were entitled by virtue of their right to insist on the partition of the zamindari. It was competent to the District

Court under section 211, Code of Civil Procedure, to have provided in its decree in the former suit for payment of mesne profits from the institution of that suit until partition and delivery of possession to appellants of their half-share. But in fact the decree in the partition suit did admittedly not grant subsequent profits though we are not in a position to say for what reason. It is clear that if subsequent mesne profits were expressly refused by that decree, the claim in respect of them up to date of that decree, would clearly be *res judicata*, the parties and the title under which the claim is made being the same in both suits. The legal effect then of explanation 3 is that of treating the omission to grant the relief asked for in the plaint as equivalent to an express refusal and the claim thereto in a fresh suit as *res judicata*. The obvious intention is to prevent parties who once submit their claim for subsequent profits to adjudication in a suit for possession of immoveable property based on title, from harrassing their opponents with a second suit in respect of the same claim. If the District Court failed to adjudicate upon it, the appellants' remedy lay in rectifying the error by appeal but not in relying on it as the basis of a second suit. It is then said that the cause of action as to subsequent mesne profits had not arisen at the date of the previous suit, and that the appellants were not bound to insist upon an adjudication thereon. It may be that they were not bound to claim an adjudication in their plaint, and the last clause of section 244 lends support to that view, but when they once elect to claim an adjudication under section 211, and by such election make it part of the subject matter of the suit, they must either withdraw the claim with the express permission of the Court to institute a fresh suit, or be bound by the result of that suit.

As regards the last clause in section 244, it can only bear the construction that that section does not of itself bar a fresh suit, but not that it contracts or does away either with section 13 or with explanation 3 which is part of that section. The learned Advocate-General drew our attention at the hearing to the order of this Court staying execution of the decree so far as it relates to partition of the zamindari pending the decision of the appeal to Her Majesty's Privy Council on condition that the Zamindar furnished security for two years' mesne profits, and argued that it implied a recognition of the appellants' title to

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JAGANNATHA. subsequent profits. But the order in question was made under section 608 of the Code of Civil Procedure, and it has no reference to the period for which mesne profits are now claimed. The principle on which it rests is that under the decree appealed against, the appellants are entitled to immediate execution and possession, and if the Court interferes with the exercise of their legal right from sufficient cause until the decision of the appeal, it will only do so after seeing that by its action, they are not likely to be damnified if the appeal happens to fail. Neither the language of section 608 nor the principle underlying it has a bearing on the claim now before us. At the hearing, the learned Advocate-General laid stress on the fact that the seventh issue in the partition suit related only to past profits, and that there was no issue as to subsequent profits. The words in explanation 3, section 13, are, however, "Any relief claimed in the plaint," and it is immaterial whether there was a specific issue or not, inasmuch as it is competent to the Court to direct an inquiry regarding subsequent profits in execution. The decision of the Judge is, therefore, right, so far as it treats the decree in the partition suit on a construction of explanation 3, section 13, as if it expressly refused subsequent mesne profits.

The further question then arises whether section 13 affects the claim to mesne profits which accrued due from and after the date of decree in the partition suit. The point for consideration is whether the mesne profits constructively disallowed were those which had accrued up to date of decree, or include also mesne profits which thereafter accrued before actual partition and transfer of possession in execution of the decree.

The material portion of the original decree in the partition suit is in these terms—"It is ordered that the Zamindari of Merangi and other property mentioned in the plaint schedule be divided into four shares, of which one share be given to each of the plaintiffs, together with mesne profits for three years amounting to Rs. 14,250 on account of the share of each of the plaintiffs." The plaint in that suit prayed for a decree for dividing the zamindari and other property, and giving the plaintiffs their share of four shares, for payment of Rs. 95,000 as the amount of mesne profits for ten years from 1873, and for "subsequent profits," and costs with interest. Insert in the decree, with reference to section 13, explanation 3, the words

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As regards the construction of the decree, we are of opinion that it would be a contradiction in terms to say "We decree to you immediate partition and possession, but we take away from you the remedy which you may have for obtaining the fruits of such possession." Again, the withholding of possession after decree was wrongful on the part of the respondent and the construction suggested for him would enable him to gain by his own wrong. Turning to section 211, Civil Procedure Code, it cannot, we think, be maintained that the section is to be taken to be conclusive as to the object-matter of a plea of *res judicata* founded on explanation 3, section 13, of the Code of Civil Procedure. The section is in our opinion only an enabling section and it would be neither unreasonable nor illegal to refuse subsequent profits up to date of decree and decree immediate possession, leaving the party in whose favour the decree is made to his remedy by a regular suit if immediate possession is not had. We are therefore of opinion that the claim is barred by section 13 only so far as it relates to mesne profits up to date of the decree in the partition suit, viz., 14th December 1885.

As regards the second issue we agree with the Judge that the claim for mesne profits for more than three years before suit is barred by limitation. As observed by him, article 109 clearly governs the case, and the learned Advocate-General did not press upon us the seventh ground of appeal.

As to the third issue, we also think that the appellants are entitled to interest on arrears of mesne profits, the claim being reasonable and consistent with section 211, Code of Civil Procedure, explanation. The Judge should, however, be requested

RAMABHADRA to state what he considers to be the reasonable rate at which
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The Judge has not recorded a finding on the fourth issue, nor has he taken an account as to the amount of mesne profits actually realized by the respondent.

We shall therefore ask the Judge to take an account of mesne profits which accrued during the three years before suit or from 7th December 1888 and of the sums which ought to be deducted from it, and ascertain the half-share payable to the appellants and the interest to be awarded upon it. The finding will be submitted to this Court within six weeks from the date of the receipt of the order by the Lower Court, when seven days after the posting of the finding in this Court will be allowed for filing objections.

APPELLATE CRIMINAL—FULL BENCH.

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

1890.
Oct. 17.
1891.
March 17, 25.

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v.

BALASINNATAMBI AND OTHERS.*

Criminal Procedure Code, s. 437.—“Further enquiry”—Revisional jurisdiction.

It is competent to a Sessions Judge acting under Criminal Procedure Code, s. 437, to direct further enquiry to be held where additional evidence is not forthcoming.

CASE referred for the orders of the High Court under Criminal Procedure Code, section 438, by R. S. Benson, Sessions Judge of South Arcot.

The facts of this case appear sufficiently for the purposes of this report from the judgment of Muttusami Ayyar, J.

Mr. Parthasaradhi Ayyangar for the Crown.

Rama Rau for the accused.

This case having come on for hearing before Collins, C.J.,

* Criminal Revision Case No. 358 of 1890.

and Weir, J., their Lordships referred the following question to the Full Bench:—

“Whether under section 437, Criminal Procedure Code, it is competent to a District Magistrate, Sessions Court or High Court or any of them to direct further enquiry or a re-trial to be held where additional evidence is not forthcoming.”

See *Queen-Empress v. Amir Khan*(1), *Queen-Empress v. Dorabji Hormasji*(2), *Queen-Empress v. Chotu*(3), *Hari Dass Sanyal v. Saritulla*(4).

This case came on for hearing before the Full Bench consisting of Collins, C.J., Muttusami Ayyar, Parker and Shephard, JJ., who delivered the following judgments:—

MUTTUSAMI AYYAR, J.—This reference arises out of Calendar Case No. 133 of 1890 on the file of the Second-class Magistrate of Cuddalore taluk in the district of South Arcot. There is a place of worship called Muniyanar Kovil in the midst of a jungle in the village of Perumathoor in that taluk. One Arunachela Gounden, who was its pujari, died about 19 months ago, and upon his death, a dispute arose between his widow and the second accused as to the right of succession to the office of pujari. There is no temple at the place of worship, but the property of the shrine was secured in a building adjacent to the house of the late pujari's widow, the first witness for the prosecution. Her complaint was that the building was in her possession, and that on the 14th April last, the ten accused assembled together in order to take forcible possession of the property, committed a riot, broke into the building, and breaking open a box containing jewels carried them off. Several witnesses gave evidence in support of her complaint, and the first and second accused produced the property alleged to have been carried away by them and others. The police charged the accused with offences punishable under sections 454, 380 and 147, Indian Penal Code. After recording the evidence for the prosecution, the Magistrate discharged the accused on the ground that the evidence was, in his opinion, worthless. The Sessions Judge after examining the record under section 385, Criminal Procedure Code, came to the conclusion that though very possibly there was no dishonest intention, and if so, there was no theft, yet there was a

(1) I.L.R., 8 Mad., 336.
(3) I.L.R., 9 All., 52.

(2) I.L.R., 10 Bom., 181.
(4) I.L.R., 15 Cal., 608.

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large body of evidence given by seven witnesses for the prosecution which was materially corroborated by facts not denied, and was in accordance with the probabilities of the case, and that the Subordinate Magistrate had not properly shifted the evidence. The Magistrate having, however, recorded the whole of the evidence available for the prosecution, the Sessions Judge has referred for the decision of this Court the question whether under section 437, Criminal Procedure Code, it is competent to a District Magistrate or a Sessions Court or the High Court to order further enquiry or a re-trial when additional evidence is not forthcoming.

On this question, there is, as observed by the Judge, a conflict of decisions. In *Queen-Empress v. Amir Khan*(1), a Divisional Bench of this Court held that section 437 authorized further enquiry only in those cases in which other evidence was available or the evidence already taken had not been properly taken. In more recent decisions, however, the High Courts at Bombay and Allahabad and the majority of Judges at Calcutta have held that such enquiry may be ordered though no fresh evidence is forthcoming—*Queen-Empress v. Dorabji Hormasji*(2), *Queen-Empress v. Ohotu*(3), *Hari Dass Sanyal v. Saritulla*(4). I do not think that the decision in *Queen-Empress v. Amirkhan* can be supported. The term "enquiry" is not in its ordinary acceptance restricted to the mere taking of evidence, but it includes also a consideration of its effect in relation to the complaint forming the subject of the enquiry. This being so, it is not clear why the expression "further enquiry" should not signify as well a fresh consideration of the effect of the evidence already recorded as a supplemental enquiry upon fresh evidence.

Again, section 437 premises a possible miscarriage of the previous enquiry resulting in the discharge of the accused and creates a revisional power to set right what has miscarried. Such being the intention, there is no reason where a perverse finding or a finding which is in all probability wrong or manifestly at variance with the recorded evidence, should not be liable to revision on considerations overlooked by the subordinate Magistrate and indicated by the revising tribunal. It is also to be

(1) I.L.R., 8 Mad., 336.

(3) I.L.R., 9 All., 52.

(2) I.L.R., 10 Bom., 131.

(4) I.L.R., 15 Cal., 608.

observed that the order which is the subject of the revision under section 437 is an order of discharge and not of acquittal and that there has been no final adjudication on the guilt or innocence of the accused.

This view receives support from section 435 which mentions "the correctness of any finding" as one of the matters to be considered whilst examining the record of the Subordinate Court.

It may further be noted that a revisional power is conferred by section 437 in the case of an order of discharge in the same terms upon the High Court, the Court of Session, and the District Magistrate, while section 439, which relates exclusively to the High Court, declares its revisional powers to be the same as the powers of an Appellate Court, which include a power to set aside a finding on a question of fact.

Furthermore, it is clear from sections 378 and 380 that there may be further enquiry without additional evidence. It is true that section 436, which refers to cases triable exclusively by the Court of Session, empowers that Court or the District Magistrate to order the accused to be committed for trial instead of directing a "fresh enquiry." In this class of cases, three contingencies may possibly arise; either the evidence already recorded by the Magistrate may warrant a commitment upon the matter in respect of which the accused has been discharged, or some further evidence may be available, or the evidence may prove some other offence if not the offence as to which the accused has been discharged. In the first case the order of discharge has to be set aside and a commitment ordered; in the second case a supplemental enquiry has to be made; and in the third case, enquiry has to be directed in regard to a new offence. The words "fresh enquiry" were perhaps considered appropriate as words of reference to the second and third contingencies contemplated by the section. However this may be, there is a clear indication of an intention not to give finality to an order of discharge which has *prima facie* miscarried, and I am therefore inclined to adopt the view of Mr. Justice Wilson that no substantial distinction is intended to be denoted by the words "fresh enquiry" and "further enquiry."

It is no doubt true that section 437 of the present Code goes beyond section 298 of the Code of 1872 under which it was often held that neither the Court of Session nor the District Magistrate

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was competent to order further enquiry except upon fresh evidence in cases in which the accused has been improperly discharged. On comparing, however, section 435 of the present Code which formulates the grounds of revisional jurisdiction with the corresponding section 295 of the Code of 1872, it will be observed that the present Code gives a power to the Sessions Court and the District Magistrate to examine into the correctness of a finding on a question of fact, whilst the Code of 1872 conferred upon them no such power.

The intention seems to be to give a revisional jurisdiction to the Sessions Court and the District Magistrate in cases of improper discharge concurrently with that of the High Court and to include an incorrect finding among the matters liable to revision, and thereby to obviate the expense and inconvenience which the necessity to resort to the High Court might in such cases entail. Though the power thus conferred is wide, yet it must be remembered that it is a discretionary power confided only to the two principal tribunals in each district and that the discretion is a judicial discretion to be exercised subject to the supervision and control of the High Court.

Again, the general scheme of revision embodied in sections 435 to 439 includes within its scope a reconsideration of the evidence already recorded in cases in which the accused is improperly discharged. An incorrect finding is specified by section 435 as one of the matters to be examined into on revision. It is again contemplated by section 436 as the basis of an order for commitment in cases triable exclusively by the Court of Session. The power to order further enquiry in cases in which the accused is improperly discharged is conferred by section 437 upon the Court of Session and the District Magistrate in common with the High Court, while section 439 gives to the High Court as a Court of Revision all the powers of an Appellate Court. Section 438 gives to the Court of Session and the District Magistrate power to recommend to the High Court that a sentence improperly passed be reversed. The true construction appears to me to consist first in reading sections 435 and 439 together as indicating the grounds of revisional jurisdiction and the tribunal competent to interfere in all cases, and in reading section 438 as subsidiary to them, secondly in reading sections 436 and 437 as contemplating two classes of cases in which a concurrent jurish-

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diction is given by way of special exceptions on the ground that when an enquiry resulting in the improper discharge of the accused has miscarried, the Court of Session and the District Magistrate should be enabled to correct the error.

I would, therefore, answer the question referred to us in the affirmative and intimate to the Sessions Judge that it is competent to him to order further enquiry under section 437 in the case reported for orders.

COLLINS, C.J.—I concur.

PARKER, J.—I concur.

SHEPARD, J.—The section mentioned in the question referred to the Full Bench is one of the four which prescribe what action may be taken on an examination of the record under the provisions of section 435. The first of the four sections, section 436 deals with cases exclusively triable by a Court of Session. It gives the Court of Session or District Magistrate power, in cases an accused person having been improperly discharged, to order him to be committed for trial. Section 437 is not restricted to any particular class of offences. It refers to the case of a complaint dismissed under section 203 or an accused discharged under section 209 or section 253 and authorizes the High Court or Court of Session to direct a further enquiry. The last of the four sections gives to the High Court exclusively far wider powers in dealing with cases including those in which there has been conviction or acquittal called up by itself or reported for orders under the preceding section. As in examining the record the Court is to have regard as well to the correctness as to the legality of the finding under consideration, it seems clear that in the absence of limiting words in the four succeeding sections, action may be taken under any one of those four sections, on its appearing that the finding on the evidence is erroneous in point of fact. Thus on its appearing that a Magistrate has owing to a misappreciation of the evidence wrongly discharged a person accused of an offence triable by the Court of Session only, the District Magistrate may take action under section 436. He may order the committal of the accused "instead of directing a fresh enquiry." In a similar case it is clear from the terms of this section he may take the alternative course of directing a fresh enquiry. Except for cases mentioned in clause (b) of section 436 there is no provision for this fresh enquiry other than that

which is found in the next section. There is the change of expression "further" being substituted for "fresh"; but otherwise there is no apparent reason why the enquiry, which may be thought requisite for a case coming under section 436, should differ in its nature from that which may be directed under section 437 in the case of offences triable by a Magistrate. If it is expedient that the Sessions Judge should have power to re-open the enquiry respecting an offence triable by himself only, it is equally expedient that he should have that power with regard to an offence which may or may not be tried by him. In neither of the cases supposed has there been any final judgment which can be pleaded in bar to fresh proceedings and therefore it is not necessary to set aside the order of discharge.

The only argument in favour of a distinction between the enquiry provided for in section 437 and that mentioned in section 436 is derived from the change of expression, the epithet "further" being substituted for "fresh." It is said that a further enquiry presupposes additional evidence, whereas a fresh enquiry may mean nothing more than a reconsideration of the original evidence. This construction of section 437 would practically go far to limit the application of it to cases in which the officer or Court calling for, and examining, the record was set in motion by some party interested in the proceeding and did not act *motu suo*, for usually the record itself would not disclose the possibility of further evidence being adduced. In all other cases, however, gross might be the misappreciation of the evidence, although the inferior Magistrate might have failed to draw obvious inferences of fact, the revising officer could do nothing but report the case for orders to the High Court.

In my opinion the two epithets may be used indifferently to denote the same sort of enquiry, and it is reasonable to suppose that some more distinctive expression would have been used if it had been intended to limit the scope of section 437 in the way suggested. We cannot lose sight of the fact that the Legislature, in disregard of the rule which enjoins adherence to the same word unless a change in the sense is intended, frequently change the expression without any intention of changing the meaning, their object as observed by a learned Judge being as would seem "to improve the graces of style and to avoid using the same words over and over again." With regard to the authorities

on the question, the only one adverse to the view above taken that needs to be considered is *Amir Khan's case*(1). In that case Turner, C.J., draws a distinction between the expressions "further enquiry" and "fresh enquiry" and justifies his conclusion by reference to the cases cited by Prinsep under section 253 of the Criminal Procedure Code, cases decided with reference to the Code of 1872.

There is, however, a noticeable difference in the language of the present Code as compared with that of 1872. In sections 294 and 295 of the latter, there is not, as there is in section 435 of the present Code, any mention of the correctness of the finding in section 296, which in a measure corresponds to section 436 and section 438 of the present Code, it is only when the judgment or order is contrary to law or the punishment too severe or inadequate, that a case may be reported for orders of the High Court. It was only in the case of dismissals of complaints under section 147 (corresponding to the present section 203) that power to direct an enquiry or a further enquiry as it is called in the section as amended was given. It was held upon this Code that in cases not coming within section 296, *i.e.*, cases exclusively triable by a Sessions Court, the District Magistrate could not order a fresh enquiry except in cases in which further evidence was forthcoming.

Considering the altered language of the present Code, I think that the inference rather is that it was intended to alter the law and give more latitude to the Sessions Court and District Magistrate in dealing with cases of improper discharge of accused persons. I agree that the term "further enquiry" means "an enquiry in addition what which has already been held," but I do not understand why it should necessarily involve the taking of additional evidence; for an enquiry means more than the taking of evidence. It means also the consideration of the evidence taken. I would adopt what Wilson, J., says with regard to the expression in *Hari Dass Sanyal v. Saritulla*(2). As is pointed out in the judgment in *Queen-Empress v. Dorabji Hormasji*(3) the Code itself shows that there might be a further enquiry without additional evidence (see sections 375 and 380).

For these reasons I would answer the question referred in the affirmative.

(1) I.L.R., 8 Mad., 336. (2) I.L.R., 15 Cal., 608. (3) I.L.R., 10 Bom., 131.

APPELLATE CRIMINAL—FULL BENCH.

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

QUEEN-EMPRESS

v.

FISCHER.*

1891.
Jan. 15, 16.
March 3.

Marriage—Indian Christian Marriage Act—Act XV of 1872, ss. 5, 68—Marriage solemnised by an unauthorised person—"knowingly"—Presence of a Marriage Registrar.

The lay trustee of a Church in which the banns of marriage between Christians had been published, solemnised a marriage between them according to the rites of the Church of England. The Marriage Registrar attended the ceremony in a private and unofficial capacity. The person who solemnised the marriage was not of any of the classes of persons authorised to solemnise a marriage in the absence of a Marriage Registrar and he was convicted of an offence under Act XV of 1872, s. 68:

Held, that the conviction was right.

APPEAL against the conviction and sentence of J. Twigg, Acting Sessions Judge of Madura, in sessions case No. 80 of 1890.

The appellant was convicted of committing an offence under Indian Christian Marriage Act, 1872, s. 68. The material circumstances of the case were stated by the Sessions Judge as follows:—

"The Rev. Mr. Wansbrough, the incumbent, was away on duty at Kodaikanal in April and May last. In his absence the Native Pastor published the banns of the marriage, but left Madura three days before the marriage was to take place, in spite of urgent requests that he should stay and perform the ceremony. In this emergency recourse was had to Mr. Fischer, who, as Lay Trustee, was taking the services in Mr. Wansbrough's absence.

"Mr. Fischer had doubts whether he was competent to celebrate a marriage, but thinking that since laymen could christen and bury, they might also, in emergencies, marry, and being fortified in this opinion by Mr. Johnson, who had been for

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"17 or 18 years Marriage Registrar for the town of Madura, "he came to the conclusion that he was competent to officiate "and consented to do so. He wrote at once, however, to "Mr. Wansbrough, detailing the circumstances, and giving his "reasons for consenting to perform the marriage. The letter "reached Mr. Wansbrough, in due course, at midday on 7th May "in time for him, had he wished, to have stopped the marriage "by telegraph. He did not telegraph, however, as he was "himself uncertain of the law on the subject.

"At 5 P.M. on the 7th May Mr. Fischer solemnised the "marriage in St. George's Church according to the Church of "England ritual. Mr. Johnson was present, not as Marriage "Registrar, but as uncle of the bride to give her away."

Mr. Wedderburn for the appellant.

There is little or no dispute about the facts in this case, and the only question is whether they establish that an offence was committed under Act XV of 1872, s. 68. The section is obscure, and, if the punctuation is preserved, the result is absurd; for the Act having, in section 5, authorised marriages "in the presence of the Marriage Registrar" by any one the parties may select, then says, in section 68, whoever solemnises such a marriage not being a minister, &c., who can solemnise in the absence of the Registrar, i.e., those mentioned in section 5, (1), (2), (3), (5), is liable to ten years' imprisonment and fine. The Sessions Judge, therefore, altered the punctuation. If he was wrong in so doing the error must be taken against the Crown—*Proctor v. Manwaring*(1), and the section is a *brutum fulmen*. See as to the importance to be attached to punctuation and marginal notes—*Maxwell on Statutes*, p. 52. *Claydon v. Green*(2), *Attorney-General v. Great Eastern Railway Company*(3), and *contra* in *re Venour's Settled Estates*(4).

The next difficulty in the section is to ascertain to whom the section applies. Are Ministers exempted from the penal clause even if they do not observe the rites of their Church as required by section 5; or, are they liable if they solemnise contrary to the rules of their Church? In other words does this section profess to deal with all unauthorised marriages or

(1) 3 B. & A., 145.
(3) L.R., 11 Ch.D., 485.

(2) L.R., 3 C.P., 521.
(4) L.R., 2 Ch.D., 525.

* Criminal Appeal No. 472 of 1890.

only those performed by laymen, *i.e.*, marriages purporting to be solemnised under clause 4 of section 5? A Clergyman of the Church of England is authorised to solemnise a marriage in the absence of the Marriage Registrar, provided he observes the rites, &c., of his Church. Suppose he disregards the rubric and does not read the exhortation, is the marriage good or bad?

In the first penal enactment introduced into India (Act V of 1852, s. 14), a person performing a registry marriage, knowingly and wilfully in the absence of the Marriage Registrar, was punishable with the same penalties as appear in section 68. This suggests that section 68 may be only a clumsy edition of Act V of 1852, s. 14, on this point, *i.e.*, that section 68 was intended only to apply to a registry marriage.

The case in 6 M.H.C.R., App. 20(1), in which the corresponding section was held to be a general one was not argued, and the Court was not at one. Moreover the original draft of the Bill of 1862 shows that clergymen were meant to be excluded altogether from the operation of the penal section corresponding to section 68. If the statement of objects and reasons published in 1862 is regarded, it is quite clear that the intention was not to punish priests who did not conform, but persons who falsely pretended to have authority to marry knowing that they had not such authority.

The next difficulty in the Act is this: section 4 requires marriages to be solemnised in accordance with the provisions of section 5 only, and section 5 says a marriage may be performed (by any one) in the presence of the Marriage Registrar without requiring any formality whatever. The marriage here complied literally with sections 4 and 5. Now, according to English Common Law, a priest was not necessary for the solemnisation of a valid marriage. His presence was desirable as a witness and also perhaps to prevent persons marrying who were not competent to marry—*Beamish v. Beamish*(2). A priest is not necessary in Scotland or generally in Western Christendom (Wharton Private International Law, 172), and was not necessary in India until 1864—*Maclean v. Cristall*(3). The Marriage Registrar did

not go to the place, as such, in the present case, but he was there and was a very good witness and signed the register in the Church.

Then a difficulty arises as to why the words "in the absence of the Marriage Registrar" appear in section 68 at all. They are out of place in a section penalising all unauthorised marriages. If the section is a general section, of what use are they? They have no significance, except in one form of marriage, *viz.*, the registry marriage. The section of the Act of 1852 seems to have been copied into the Act of 1864 without the necessary alterations. The Judge says the words are wanted to exclude the case of a layman solemnising a valid registry marriage from the operation of section 68. But that is an authorised marriage, therefore he is excluded already by the previous words, "whoever not being authorised by the Act." The layman in question is as much authorised as the priest.

The next difficulty is to understand what is meant by "knowingly" solemnising. A man cannot well perform the marriage service without knowing what he is doing: it was remarked in *Ellis v. Kelly*(1) "a man cannot call himself a doctor accidentally." The charge there was that the defendant wilfully and falsely called himself a doctor contrary to the statute thereto provided and it was held that wilful falsity was intended. When people intermarried without due publication of banns contrary to an English statute it was never doubted that "knowingly" meant knowing they were breaking the law.

Again the severity of the punishment shows that the offence was considered equivalent to felony which it is called in the Act of 1852. The mental element of most crimes is marked by such words as knowingly, &c.

The Judge says that if the word "wilful" had not been omitted from the section in the present Act (it was in the section from 1852 to 1872) he would have acquitted. "Wilful" is a term not known to the Penal Code and was probably omitted as surplusage as "knowingly" implies intention as a rule. Considering all these ambiguities the rule to be adopted in construing section 68 is the rule in *Heydon's Case* (see *Queen v. Castro*(2)).

In determining what is the right construction of the section the following questions arise:—What was the common law.

(1) Proceedings, dated 21st March 1871.

(2) 9 H.L. Ca., 274.

(3) Perry's Oriental Cases, 75.

(1) 30 L.J.M.C., 35.

(2) L.R., 9 Q.B., 360.

before the first penal section, on which section 68 is based, was enacted? What was the defect for which the common law did not provide? What remedy did the Legislature provide to cure the defect?

The law prior to 1850 is laid down by Sir Erskine Perry in *Maclean v. Cristall*(1). Priests were never necessary in the days of the Company. They could not be had, and Collectors and Judges acted as their substitutes. To understand the Indian Statute law it is necessary to see how the law stood in England prior to 1852. Opinions are divided as to whether a priest was ever necessary under the common law of England. In 1753 Lord Hardwicke's Act 26, Geo. II., c. 33, contained certain penal clauses against clandestine marriages. In 1823, Geo. IV., c. 76, and in 1837, Lord John Russell's Act were passed. Would Mr. Fischer's act have been punishable under any of the English Statutes? Apparently not. See Stephen's Digest of Criminal Law, p. 199; Stephen's Commentaries, Vol. II., p. 245.

14 & 15 Vic., c. 40, introduced the registry marriage of 1837 into India; it contained no penal clause at all about solemnising in the absence of the Registrar. That was introduced by Act V of 1852, s. 14. The offence was a felony. Act XXV of 1864 began life as a bill in 1862. In that year 14 & 15 Vic., c. 40, could, for the first time, be repealed by the Government of India. The statement of objects and reasons and the debates in the Council show, as clearly as possible, that a particular evil was intended to be met by the penal section, corresponding to section 68 of the Act of 1872. The Court here has ruled against the right of Counsel to refer to such proceedings, but in *Moothora Kant Shaw v. The India General Steam Navigation Company*(2), *Queen-Empress v. Kartick Chunder Das*(3), and in *Hebbert v. Purchas*(4), *Ridsdale v. Clifton*(5) this was done by the Court. The preamble to an English statute can always be read and the statement of objects and reasons, at any rate, is analogous. The history of the Bill in Council shows that there never was any intention to alter the original draft. The section originated in a particular case: a schoolmaster at Buckergunge pretended he had authority to marry people and the Government found the penal

(1) Perry's Oriental Cases, 75. (2) I.L.R., 10 Cal., 193. (3) I.L.R., 14 Cal., 728.
(4) L.R., 3 P.C., 648. (5) L.R., 2 P.D., 323.

law could not reach him. The original section was intended to punish people who married others under a false pretence of authority. (Statement of objects and reasons by Mr. Ritchie, 1862). It is hardly likely that a new and grave departure from existing English law would be adopted without a trace being found in the debates. The report of the Select Committee is silent as to any change in the section. Drafting Acts of Parliament is apparently not an easy task, per *Bramwell*, L.J., in *Coverdale v. Charlton*(1). The Act of 1872 was only intended to consolidate not to alter the law. In the English Acts a clear distinction is drawn between penal Acts and Acts which render the marriage void. Here assuming the marriage to be void, it does not follow that the parties are liable to punishment. To enact that marriages not conforming to the Act shall be void is surely enough to put a stop to them, and so thought the authors of the Act of 1864. If an English Clergyman married parties according to the Roman Catholic ritual the marriage might be void, but it is doubtful if he could be punished under section 68. The original words of the section were "whoever not being a priest, &c.," and "whoever not being authorised" are apparently only intended to convey the same meaning, but in labouring to be brief the draftsman has become obscure. If the offence aimed at was the offence of falsely pretending to be authorised, then the English law has a parallel provision, for persons who pretend to be priests and marry others commit a felony. It is a presumption that the Legislature does not intend to alter the law beyond what it expressly declares. *Wear Commissioners v. Adamson*(2), *River Wear Commissioners v. Adamson*(3), and Maxwell on the Interpretation of Statutes, page 107. The section should be restricted so as to make punishable false pretenders only. The nature of the punishment is inconsistent with the theory that the section was intended to punish an innocent mistake. *Mens rea* should be an ingredient of the act. *Ellis v. Kelly*(4), *Gompertz v. Kensit*(5), *Taylor v. Newman*(6), *Mcirelles v. Banning*(7). Penal statutes must always be construed strictly and the degree varies with the severity—Maxwell on Statutes, pp. 319-321. *The Queen v. Tolson*(8), *Henlerson v. Sherborne*(9),

(1) L.R., 4 Q.B.D., 115. (2) L.R., 1 Q.B.D., 543. (3) L.R., 2 App. Ca., 743.
(4) 30 L.J.M.C., 35. (5) L.R., 13 Eq., 379. (6) 32 L.J.M.C., 186.
(7) 2 B. & A., 909. (8) L.R., 23 Q.B.D., 174. (9) 2 M. & W., 236.

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Elliott v. Majendie(1). The more reasonable construction of this section is to confine it to cases of intentional breach of the law, to acts done *felonice*.

If the mischief aimed at is the false pretence of authority then it is plain only all priests should be, and in the draft were, excluded from the section. It is submitted that the ruling in 6 M.H.C.R., App. 21(2) is wrong, and that is why a Full Bench was asked for in this case.

To hold that section 68 makes punishable all persons who marry others with authority but not in accordance with the rites, &c., of their church was not only never intended by Mr. Ritchie who introduced the Bill but was never even hinted at in any subsequent debate, bill or proceeding of the Legislative Council.

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

The arguments adduced in support of the conviction appear sufficiently for the purpose of this report from the judgments.

COLLINS, C.J.—This is an appeal by Mr. Robert Fischer, a Barrister-at-Law, who has been convicted under section 68 of the Indian Christian Marriage Act of 1872.

The facts of the case appear to be as follows:—Mr. Robert Fischer is a Lay Trustee of St. George's Church, Madura, and in April and May last the Native Pastor of that Church published the banns of marriage between Samuel Louis Ormsby and Miss Bibiana Elizabeth O'Connor, both of whom profess the Christian religion. A day was appointed for the marriage ceremony to take place; but the incumbent of the Church was away on duty at Kodaikanal and the Native Pastor left Madura apparently on some private business three days before the marriage was to take place in spite of urgent requests that he would stay and perform the ceremony. Mr. Fischer was then asked to perform the ceremony, as he was a Lay Trustee of the Church. Mr. Fischer sent a letter to Mr. Wansbrough, the Incumbent, informing that gentleman that he intended to perform the marriage ceremony and gave as a reason that Mr. Johnson, the Marriage Registrar, had told him that there were precedents for such a course, and further, that the mother of the bride had gone to considerable expense in making preparations, and great inconvenience would ensue if the service did not take

(1) L.R., 7 Q.B., 429.

(2) Proceedings, dated 21st March 1871.

place on the day appointed. Mr. Johnson, the Marriage Registrar, in his evidence says, that Mr. Fischer asked him on 5th May 1890 whether laymen could marry people, and that he replied he thought they could, and gave as an instance the marriage of his grandmother. On the 7th May 1890, Mr. Fischer solemnised a marriage between Mr. Ormsby and Miss O'Connor according to the rites of the Church of England, and the question to be decided is, has Mr. Fischer committed an offence against the provisions of Act XV of 1872, s. 68. The section is as follows:—"Whoever, not being authorised under this Act to solemnise a marriage in the absence of a Marriage Registrar of the district in which such marriage is solemnised, knowingly solemnises a marriage between persons one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to ten years or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years and not exceeding ten years, or, if the offender be an European or American, with penal servitude according to the provisions of Act No. XXIV of 1855 (*to substitute penal servitude for the punishment of transportation in respect of European and American convicts, and to amend the law relating to the removal of such convicts*), and shall also be liable to fine."

It was contended on behalf of the appellant that no offence has been committed—

- (1) because section 68 can only refer to marriages that were intended to be solemnised by or in the presence of a Marriage Registrar—sub-section 4 of section 5;
- (2) because the Registrar was, in fact, present when the ceremony was performed;
- (3) because there was no proof that the accused knowingly committed a wrongful act and the section requires such proof.

Act V of 1852 refers solely to civil marriages and contains sections similar to those found in the Act of William IV., which first allowed a marriage before a registrar and made it an offence to solemnise a marriage under the Act without the presence of a Marriage Registrar.

• The next Act of importance (Act XXV of 1864 was repealed by Act V of 1865) was Act V of 1865: the preamble of that Act

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states that it is expedient to provide further for the solemnisation of marriages in India of persons professing the Christian religion and applies to all marriages of Christians whether solemnised by a minister of religion or a Marriage Registrar. The sixth section of the Act enacts who are authorized to solemnise a marriage and section 56 provides a penalty against unauthorised persons performing such ceremony in these words:—

“Whoever, not being authorised under the sixth section to solemnise a marriage shall, from and after the commencement of this Act, in the absence of a Marriage Registrar of the district in which such marriage is solemnised, knowingly and wilfully solemnise a marriage between persons, one or both of whom shall profess the Christian religion, shall be punished with imprisonment of either description, as defined in the Indian Penal Code, which may extend to ten years, and shall also be liable to fine; or in lieu of a sentence of imprisonment for seven years or upwards, to transportation for a term of not less than seven years and not exceeding ten years; or if the offender be an European or American, to penal servitude according to the provisions of Act XXIV of 1855 (*to substitute penal servitude for the punishment of transportation in respect of European and American convicts, and to amend the law relating to the removal of such convicts*).”

In 1872 Act XV was passed to consolidate and amend the law relating to the solemnisation in India of the marriages of the persons professing the Christian religion. It repeals so much of the Act of 1852 as had not already been repealed and with an unimportant exception, the Act V of 1865, and section 5 of the Act of 1872 provides who may solemnise marriages in India between Christians, and sections 66 to 76 enact penalties against those persons who commit any offence against the provision of the Act.

It appears to me therefore that these sections apply to all persons, who are not authorised to do so, solemnising a marriage between Christians and do not apply simply to marriages that are to take place before a Marriage Registrar.

With regard to the contention that no offence has been committed, because a Marriage Registrar was, in fact, present, it is clear that the Act means that the Registrar must be present *quâ*

Registrar and sections 38 to 59 provide that certain notices, publication of notices and other formalities shall take place before a marriage can be solemnised either by or in the presence of a Marriage Registrar. It is not pretended that any of these provisions were complied with. Mr. Johnson did not attend as Registrar, but was in attendance merely as a relation of the bride for the purpose of giving her away; it is impossible to believe that under these circumstances the marriage has taken place in accordance with sub-section 4, section 5 of this Act.

The third objection was the one most strenuously urged by the learned Counsel. He contended that there was an entire absence of proof that Mr. Fischer had any guilty intention or knowledge that he was doing wrong when he solemnised this marriage; that he thought he was authorised to perform a marriage under the circumstances being a Lay Trustee of the Church; that he was utterly unaware of the provision of Act XV of 1872 and it is necessary for the prosecution to prove that he knew he was not authorised to perform a marriage, and that his statement made before the Committing Magistrate is true, wherein he says he believed he was authorised by law to perform the marriage, and that, as Lay Trustee, acting for Mr. Wansbrough, it was his duty to do so. I regret to say that I cannot accept this statement—it is impossible for me to believe that a Barrister of many years standing thought that it was his duty to solemnise a marriage in a Church according to the rites of the Church of England, because he happened to be a Lay Trustee of that Church and the incumbent happened to be away. In his letter, dated 11th July 1890, to the Registrar of the Diocese (exhibit C), he says he told the mother of the bride, that he thought he had no power to marry, but that the Registrar had said he had known of instances where Lay Trustees had performed the ceremony; that he advised the bride and bridegroom to go through the ceremony again when the incumbent returned or to get married before the Registrar, and that it was the urgency of the case and the earnest entreaty of Mr. Johnson and Mrs. O'Connor that induced him to perform the ceremony, though unwillingly. I am of opinion, therefore, that Mr. Fischer did not believe he was only performing a duty or that he was authorised by law to celebrate such a marriage. I believe he acted with great recklessness, and, as stated by the Sessions Judge, with a

culpable want of care and caution in performing this marriage not knowing that he was authorised to do so. The appellant, if he had looked at Act XV of 1872, s. 5, would have seen at once that he was not one of the persons authorised to perform a marriage ceremony; and Mr. Fischer's assumed or real ignorance of the law cannot avail him and I must hold Mr. Fischer liable for his act. It may well be that he was not aware he was committing so grave an offence carrying with it such a severe penalty as is provided in section 68. In some exceptional cases ignorance of the law may be pleaded as in the cases of *Ellis v. Kelly*(1) and *Taylor v. Newman*(2), cited by Mr. Wedderburn; but those cases were decided upon the words of particular statutes and do not apply to this case. In *Reg. v. Prince*(3), the law as to guilty knowledge is very fully discussed and supports the view I take. In the case of *Reg. v. Bishop*(4), the defendant was tried before Mr. Justice Stephen for receiving more than two lunatics into a house not duly licensed, upon an indictment on 8 and 9 Vic., cap. 100, s. 44. It was proved that the defendant did receive more than two persons whom the Jury found to be lunatics into his house believing honestly and on reasonable grounds that they were not lunatics. The Judge held that this was immaterial having regard to the scope of the Act and the object for which it was apparently passed, and the Court upheld that ruling. I am further of opinion that the only facts necessary to support a conviction under section 68 are these—first, it must be proved that the accused was *not* authorised under the Act to solemnise a marriage in the absence of a Marriage Registrar, and secondly, that he knowingly solemnised a marriage in the absence of such Registrar between persons one or both of whom was a Christian or Christians. Both these points have been proved by the prosecution in this case.

The Act XV of 1872 is, as stated by both the learned Counsel who appeared in the case and that statement is acquiesced in by the Judges, very badly and clumsily drawn; but I am of opinion that the word "knowingly" only applies to the fact that the person so solemnising the marriage is aware that he is solemnising a marriage and that the person or persons he is professing to marry is or are a Christian or Christians.

(1) 30 L.J.M.C., 35.
(2) L.R., 2 C.C.B., 154.

(3) 32 L.J.M.C., 186.
(4) L.R., 5 Q.B.D., 259.

I am of opinion, therefore, that the conviction of the appellant was right, and I would dismiss this appeal.

MUTTUSAMI AYYAR, J.—The appellant, Mr. Robert Fischer, has been convicted under section 68 of Act XV of 1872. As to the facts of the case, there is no dispute. On the 5th May 1890, Mr. Fischer solemnised a marriage between two Christians in St. George's Church at Madura according to the rites of the Church of England. At that time Mr. Fischer was a Lay Trustee of the Church, and Mr. Johnson, a Marriage Registrar of the district, was present on the occasion, not in his official capacity as Marriage Registrar but as a relative of the bride. It is clear that Mr. Fischer is not one of the four classes of persons mentioned in clauses 1, 2, 3 and 5 of section 5 of the Act. Nor was the marriage a civil marriage solemnised in the presence of the Marriage Registrar within the meaning of the Act. According to section 4, a marriage between persons one or both of whom is or are a Christian or Christians is void if it is not solemnised in accordance with the provisions of section 5. It is provided by section 68 that "whoever, not being authorised under this Act to solemnise a marriage in the absence of a Marriage Registrar of the district in which such marriage is solemnised, knowingly solemnises a marriage between persons one or both of whom is or are a Christian or Christians shall be punished with imprisonment which may extend to ten years or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years and not exceeding ten years." The question for decision is whether Mr. Fischer has been properly convicted under section 68. It is first urged that section 68 applies only to marriages performed by the Marriage Registrar, but this contention appears to me to be obviously untenable. Section 68 ought to be read together with sections 4 and 5, and when it is so read, there appears no reason for limiting the scope of section 68 to civil marriages. The words "in the absence of a Marriage Registrar" have to be read together with clause 4, section 5, and far from being words of limitation, they appear to me to be intended to include unauthorised civil marriages. The history of previous legislation which is set out by Mr. Justice Shephard in his judgment, the nature of the Act of 1872 as a consolidating Act, and the intention suggested by section 4, section 5 and section 68 when

they are read together, lead me to the conclusion that section 68 is of general application.

Another contention is that the presence of Mr. Johnson at the marriage takes this case out of section 68. The proper construction of the words, "in the absence of the Marriage Registrar" is that in order that there may be a valid defence, he should be present in the exercise of his statutory authority as Marriage Registrar, and that they do not include a case in which he is present as a mere spectator or as a relative of the bride. It is clear in the case before us that the marriage solemnised was not intended to be solemnised as a civil marriage; nor was the procedure prescribed by the Act in connection with such marriage either followed or intended to be followed. Those words ought to be construed as well in the light thrown upon them by Part V as by section 5.

The substantial question for decision is what effect is to be given to the word "knowingly" used in section 68 and how far it is necessary to prove in order to support a conviction under this section that the offender knew *in fact* that he was doing an unauthorised act. The Judge finds, upon the evidence, that Mr. Fischer had not guilty knowledge, but that the absence of such knowledge was due to gross negligence or carelessness on his part. The absence of such knowledge is due in the case before us to his omission to refer to the Act of the Legislature of which section 4 and section 5 are as plain as any provision of law can be, as to a marriage being void if solemnised otherwise than by persons enumerated in section 5, or by or in the presence in his official capacity of a Marriage Registrar. It is true that there must be "a mind at fault before there can be a crime." But in applying this principle, it must be remembered that every man is presumed to be cognizant of the statute law of the country and construe it aright; that if any individual should infringe it through ignorance or carelessness, he must abide by the consequence of his error; that it is not competent to him to aver in a Court of Justice that he was ignorant of the Criminal Law of the land, and that no Court of Justice is at liberty to receive such a plea. There may be some important ingredient of a particular offence independently of the mere ignorance of law, such as dishonest intention in the case of theft, which may be shown not to exist owing to an error in applying the law to the facts of a particular

case. But in the case before us, we are asked to presume that the very knowledge of the existence of the statute law must be proved as a matter of fact and to assume that the Legislature framed section 68 on that view. I do not think that I can accede to such a suggestion. Starting then with the presumption that Mr. Fischer must be presumed to have been aware of the law, I am unable to refer the word "knowingly" to a knowledge of the existence of the law. I can only refer it to the other fact mentioned in section 68 as constituting the offence, viz., the status of the parties or one of them being a Christian or Christians. Neither the Post Office case (*Meirelles v. Banning*(1)) nor *Ellis v. Kelly*(2), nor the Pigeon Shooting case (*Taylor v. Newman*(3)), goes further than to show that a person may be mistaken as to the application of a known rule of law to certain special circumstances and as to the manner in which such erroneous application affected him in the particular case. They do not warrant the contention that ignorance of the existence of a penal provision of law is pleadable as a good defence.

I agree with the learned Chief Justice in holding that it is sufficient to support the conviction under section 68 to show that Mr. Fischer was not authorised by the Act to solemnise the marriage, and that he solemnised the marriage in the absence of the Marriage Registrar in his official capacity, knowing that the parties between whom he solemnised the marriage were Christians. I am also of opinion that the conviction must be upheld and the appeal dismissed.

SHEPARD, J.—The appellant has been found guilty of doing an act which renders him liable to punishment under section 68 of the Indian Christian Marriage Act. It is proved, and not denied by him, that he, not being a member of the classes of persons authorised to solemnise marriages under section 5, clauses (1), (2), (3) and (5) of the same Act, did solemnise a marriage between two Christians in an English Church and according to the rites of the Church of England. At the marriage, Mr. Johnson, an uncle of the bride, who happens to be Marriage Registrar, appointed under the Act, was present, and he attested the marriage register. It is clear that he did not attend the marriage in any official capacity.

(1) 2 B. & A., 909.

(2) 30 L.J.M.C., 35.

(3) 32 L.J.M.C., 186.

It was contended on behalf of the appellant that the act done by him did not amount to an offence within the meaning of the section.—

- (1) because the section was only intended to apply to marriages performed by the registrar;
- (2) because the section requires proof of knowledge on the part of the accused that he was committing an unauthorised and wrongful act, and that such proof was wanting, and
- (3) because the absence of the registrar is an element of the offence, and, in point of fact, the registrar was present.

This last point may shortly be disposed of by the remark that the presence of the registrar can only be material when he appears in his official capacity and that it cannot be intended that his mere physical, and perhaps accidental, presence in the Church can save from penal consequences the act of one who is otherwise guilty of an offence under the section.

The argument on the first point was based on the history of the Act of 1872. Previously to 1852 there was no statute law relating to Christian marriages in this country. In that year was passed on the authority of the Statute 14 & 15 Vic., c. 10, the Act V of 1852. This Act refers solely to civil marriages and does not touch marriages solemnised in English Churches or by ministers of religion. It contains a section similar to that found in the Statute of William IV., which introduced the registrar's marriage, making it penal for any person knowingly and wilfully to solemnise a marriage under the provisions of the Act of Parliament in the absence of a registrar of the district. In 1862 a Bill was introduced with the object of making further provision for the solemnisation of marriages between Christians. This Bill became law under the title of Act XXV of 1864 for which in the next year was substituted Act V of 1865. This Act was intended to cover the whole field, not already covered by the Act of 1852. It provided for licenses to solemnise marriages being granted to ministers of religion, not being persons episcopally ordained or Clergymen of the Church of Scotland, and for the granting of licenses to grant certificates in the case of Native Christians. It prescribed rules for the solemnisation of marriages by ministers of religion and rules as to

the time when such marriage or marriages performed by ordained Clergymen or Clergymen of the Church of Scotland might be solemnised, and it also prescribed rules as to the registration of all marriages except those solemnised under the statute and the Act of 1852.

In the chapter relating to penalties was a section (the 56th), running as follows:—

“Whoever, not being authorised under section 6 to solemnise a marriage shall, from and after the commencement of this Act, in the absence of a Marriage Registrar of the district, in which such marriage is solemnised, knowingly and wilfully solemnise a marriage between persons, one or both of whom shall profess the Christian religion, shall be punished with imprisonment of either description, as defined in the Indian Penal Code, which may extend to ten years, and shall also be liable to fine; or in lieu of a sentence of imprisonment for seven years or upwards, to transportation for a term of not less than seven years and not exceeding ten years; or, if the offender be an European or American, to penal servitude according to the provisions of Act XXIV of 1855.”

Looking to the scope of this Act and to the fact that concurrently with this section there was in force the abovementioned section of the unrepealed Act of 1852 making it penal for any person knowingly and wilfully to solemnise a marriage under the provisions of the Act of Parliament in the absence of the registrar of the district, I think there can be no doubt that the 56th section of the Act of 1865 was not intended to refer exclusively to marriages which might be solemnised by or in the presence of a Marriage Registrar. The object of the section clearly was to make the solemnisation of a marriage by an unauthorised person a punishable offence, and, at the same time, to except from its operation the case of marriages solemnised in the presence of a registrar; that this was the view with which the section was framed is confirmed by the statement of objects and reasons to which Mr. Wedderburn called our attention. In 1872 the Act now in force was passed; it is a consolidating Act—it repeals the statute 14 & 15 Vic., c. 10, and the Acts V of 1852 and V of 1865, which, up to that time, had been concurrently in force. In this Act, in the chapter relating to penalties, the 68th section takes the place occupied by the 56th section in

the Act of 1865; and, as the latter section must be construed as applicable to marriages other than those which might have been solemnised under the statute, so the section now in force must have a similar construction put upon it. Its operation cannot be restricted to the case of civil marriages.

Assuming then that section 68 is aimed at the case of a person who, like the appellant, not being authorised to solemnise a marriage does solemnise a marriage in a Christian Church and according to the rites of the Church of England, it has to be seen whether in other respects the facts necessary to constitute an offence under the section have been proved. There was a great deal of discussion as to the construction of the section. It was said that as the section is punctuated, it would notwithstanding the presence of the registrar, render punishable any person who, not belonging to any of the four classes denoted by the first, second, third, or fifth clauses of section 5 solemnised a marriage of the kind described in Part V of the Act. Obviously this cannot have been intended, for an ordinary layman is under the provisions of Part V at liberty to solemnise a marriage in the presence of the registrar. In order, therefore, to make the section applicable to the case of a marriage of that class, it must be supposed that the absence of the registrar was intended to be an ingredient of the offence. In other words the section must be read, as if there were a comma in the first line after "marriage." It was thus that the punctuation stood in the section of the Act of 1865 of which the present section is a reproduction. In the present case it is not necessary to pursue this discussion, because, on the literal reading of the section, the appellant is clearly a person not authorised under the Act to solemnise a marriage in the absence of the registrar, and, on the other hand, if by an altered punctuation the absence of the registrar is made an ingredient of the offence, the registrar in his official capacity was absent.

The more important and difficult question remains to be considered, viz., what is the effect to be given to the word "knowingly." It was contended on behalf of the appellant that in construing the section, regard should be had to the fact that in the original section, as framed in the Act of 1852, the act for which punishment was prescribed was stigmatised as a felony, and that, in the present section, the punishment is

extremely severe. It was said that it could not have been intended to make an act a felony or prescribe imprisonment for ten years unless it were shown that the offender had acted with a consciousness of doing wrong. Reference was made to the objects and reasons published on the introduction of the Bill of 1861 as showing that it was cases of false pretence which it was sought to render punishable by legislation. With regard to the grammatical construction of the section, it was insisted that the word "knowingly" should be read as relating to the antecedent words, and that, in order to constitute an offence, there should be on the offender's part knowledge as well of the absence of authority as of the fact that the parties are Christians. If this construction were adopted and the finding of the Sessions Judge that Mr. Fischer did not know that he was not authorised or that he was doing wrong is accepted as correct, Mr. Fischer would be entitled to an acquittal.

To ascertain what effect must be given to the word "knowingly" we must examine first the language of the section itself, and regard must also be had to the use of the word in other sections of the same Act or of other penal enactments. There can be little doubt that if the word had been omitted in the section under discussion, the inference would have been that it was intended to make the mere act of solemnisation penal independently of proof that the offender did not know that he was not authorised or that the parties were Christians. It may be that an honest belief on the offender's part that he was, as a matter of fact, authorised, or that the parties were not Christians would have afforded him a good defence; but it is at least clear that the burden of proving this defence would have been on the accused person. The effect of the introduction of the word "knowingly" would then be to throw the burden of proof, so far as relates to the matter referred to by that adverb, on the prosecution (see observations of Brett, J., in *Reg. v. Prince*(1)). Is it then correct to say that the word relates back to the antecedent sentence? Reading the section by itself I should say that that was not the meaning. The section makes it an offence for a person, not belonging to certain classes, knowingly to do a certain act. Surely it is in respect of the doing of the act that

(1) L.R., 2 C.C.R., 154.

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solemnised otherwise than in accordance with section 6, section 68 was enacted, having, as it appears to me for its object, to make the act of solemnising a marriage in defiance of the enacted law an offence. This object would be defeated if it were held that the section applied only to persons who had read the Act or had otherwise become aware of its provisions, and I do not think the language is such as to justify our placing such a construction upon the section.

In my opinion the Judge, on the facts found by him, rightly convicted the appellant, and I would dismiss the appeal.

Ordered accordingly.

APPELLATE CIVIL.

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

MICHAEL (PLAINTIFF),

v.

BRIGGS AND ANOTHER (DEFENDANTS).*

Club—Goods supplied to a member—Suit on behalf of club—Parties.

An action to recover the price of goods supplied to a member of a non-proprietary club, or on his responsibility cannot be brought in the name of the secretary of the club.

CASE referred under Civil Procedure Code, s. 617, by G. Ramachandra Rau, District Munsif of Masulipatam.

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

Counsel were not instructed.

JUDGMENT.—The question is whether an action to recover the price of goods supplied to the member of a club or on his responsibility can be brought in the name of the secretary of the club. The club is not a proprietary club such as was in question in *Raggett v. Musgrave*(1) and *Raggett v. Bishop*(2), but a mere association of gentlemen for social purposes, managing its affairs by a committee and a secretary. The goods, the price of which it is sought to recover, belonged to the club, and not to the secretary; and therefore it is not to him that the price is due.

* Referred case No. 3 of 1890. (1) 2 C. & P., 556. (2) 2 C. & P., 343.

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It may be convenient that the secretary should collect the moneys due to the club, and he may have authority to do so, but, if the money is not due on a contract made with him, an arrangement that he should sue cannot be recognized as giving him a right of action. (See *Evans v. Hooper*(1) and *Gray v. Pearson*(2).

We are of opinion that the question above stated must be answered in the negative.

APPELLATE CRIMINAL.

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

THANDAVAN (COMPLAINANT) PETITIONER,

v.

PERIANNA (ACCUSED), COUNTER-PETITIONER.*

Criminal Procedure Code, ss. 435, 439, 440—Petition to revise a judgment of acquittal.

An appeal against an acquittal by way of revision is not contemplated by the Code, and it should, on public grounds, be discouraged.

PETITION under Criminal Procedure Code, ss. 435 and 439, praying the High Court to revise the proceedings of L. A. Campbell, Sessions Judge of Coimbatore, in calendar case No. 1 of 1890, acquitting Perianna Asari on the charge of perjury.

Mr. Wedderburn for petitioner.

Mr. W. Grant for accused.

JUDGMENT:—This is a petition to revise the judgment of the Sessions Court of Coimbatore acquitting a person accused of an offence under section 471 of the Penal Code. In cases of acquittal by a Sessions Court, the law allows an appeal on behalf of the Government and the reason for such a provision is obvious. The present is, however, the case of a private prosecutor seeking to put the Court in motion to revise an acquittal deliberately arrived at by the Sessions Judge concurring with the assessors. An appeal against an acquittal by way of revision is, in our opinion, not

(1) L.R., 1 Q.B.D., 45.

(2) L.R., 5 C.P., 568.

* Criminal Revision Petition No. 121 of 1890.

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contemplated by the Code, and it should, we think, on public grounds, be discouraged.

Acting, therefore, under the discretionary power given in section 410, Criminal Procedure Code, we decline to hear the learned Counsel who appears to support the petition, and we dismiss the application.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

THANDAVARAYUDU.*

Penal Code—Act XLV of 1860, ss. 109, 209—Nuisance—Keeping a gaming house—Abetment.

The lessee of a house, who permitted disorderly people to use it for gambling and thereby caused annoyance to the public, was convicted of an offence under Penal Code, s. 290; it appeared, however, that the accused had not engaged the house with the object of letting it out as a gaming-house:

Held, that the conviction was right.

PETITION under Criminal Procedure Code, ss. 435 and 439, praying the High Court to revise the proceedings of the Acting Head Assistant Magistrate of Godavari, in appeal case No. 11 of 1890, confirming the sentence of the Second-class Magistrate of Ellore, in calendar case No. 421 of 1889.

Venkataramayya Chetti for the petitioner.

The Government Pleader and Public Prosecutor (Mr. Powell) for the Crown.

JUDGMENT.—The petitioner has been found guilty of abetting a public nuisance (sections 290 and 109 of the Penal Code) in that he was the lessee of a house, which he permitted to be used as a common gaming house; whereby nuisance, danger, and annoyance have been caused to the residents in the neighbourhood.

The mere act of gambling in a private house is not *per se* a public nuisance (see Weir, page 146), but that is not the offence

* Criminal Revision Case No. 442 of 1890.

charged or found. The evidence for the prosecution, which both the Lower Courts considered reliable, went to show that the neighbours have been greatly annoyed by the noise which the gamblers frequenting petitioner's house make, that the gamblers throw the ends of cherpots upon the houses, quarrel and fight in the public street, and that people are afraid to go out at night or to pass the house for fear of being assaulted.

Although there is no evidence, that the petitioner did, as the Sub-Magistrate states, engage the house for the purpose of letting it out as a gambling house, the evidence does warrant the finding that petitioner has permitted crowds of disorderly persons to make use of the house, both by day and night, for gambling, and that his doing so has caused considerable annoyance to the public. It is a significant fact that the gambling and annoyance caused as soon as the present prosecution was instituted.

The absence of the petitioner from the town on a certain date will not exonerate him, as the nuisance is shown to have been continuous for some three months.

The conviction must be upheld and the petition dismissed.

APPELLATE CIVIL.

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

MAHADEVI AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

VIKRAMA (PLAINTIFF'S REPRESENTATIVE), RESPONDENT.*

Act XXIV of 1839, appeal under—Limitation—Civil Procedure Code, ss. 13, 43—Res judicata—Landlord and tenant—Service-tenure with rent—Enhancement of rent—Resumption.

In a suit brought in 1886 by a zamindar to recover an estate granted by his predecessor to the predecessor of the defendant on a service tenure, a small money rent being also reserved, it appeared that in 1864 the right of the plaintiff's predecessor to rent had been established by suit, but there was no evidence that the service was then dispensed with, but that in 1885, it was intimated to the defendant

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THANDAVA-
RAYUDU.

1891.
January.
19, 23, 28.
February 24.

* Appeal No. 108 of 1889.

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that the service was dispensed with, and a notice to quit was given to him; the option of holding the estate at an enhanced rent was however given to him at the same time:

Held, (1) that the suit was not barred by limitation, nor precluded by Civil Procedure Code, s. 13 or s. 43;

(2) that the plaintiff was not precluded by any implied contract from increasing the rent;

(3) that the burden of proving the plea that the plaintiff was not entitled to eject lay on the defendants, and had not been discharged.

In computing the time for an appeal to his Excellency the Governor in Council, under the rules made by virtue of Act XXIV of 1839 against a decree passed by the Agent to the Governor, the time necessary for procuring copies of decree and judgment appealed against may be deducted.

APPEAL against the decree of H. G. Turner, Agent to the Governor of Fort Saint George at Vizagapatam, in original suit No. 2 of 1886, referred to the High Court by His Excellency the Governor in Council in the order, dated 12th August 1889, No. 1385, Judicial, under Rule XXII of the revised rules, framed under Act XXIV of 1839.

Suit to recover possession of the estate of Kalyana Singapore together with arrears of rent and mesne profits.

The plaintiff, who was the Maharaja of Jeypore, alleged that the above estate formed part of the jeroyati lands in his zamindari; that it was granted by his predecessor in title on the condition of service tenure and the payment of rent to the father-in-law of defendant No. 1, Mukunda Dev, after whose death it passed into the possession of the husband of defendant No. 1, Krishna Dev; that Krishna Dev refused to acknowledge the title of the plaintiff who accordingly sued him in original suit No. 22 of 1864 on the file of the Court of the Agent to the Governor, Vizagapatam, and obtained a decree establishing his title to the estate and to receive rent from the defendant at the rate of Rs. 5,000 per annum; that Krishna Dev paid rent as above from the date of the decree till his death in February 1884; that the estate passed on the death of Krishna Dev into the possession of defendant No. 1, who had paid no rent; and that, on 29th July 1885, defendant No. 1 was informed that her service was not required and notice to quit in six months was given to her, but it was, at the same time, intimated to her that, on application made, a lease of the estate would be granted to her for the following fasli at the rent of Rs. 20,000; and that defendant No. 1 neither quitted the estate nor paid the enhanced rent.

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Defendant No. 1 set up hereditary right to the permanent occupancy of the estate, and denied that it had been granted on service tenure, and pleaded that the suit was precluded by Civil Procedure Code, ss. 13, 43 by reason of the proceedings in original suit No. 22 of 1864, and further that the notice to quit was bad.

Defendant No. 2 was the adoptive son of defendant No. 1.

The decree in original suit No. 22 of 1864 was affirmed on appeal by the High Court in appeal suit No. 57 of 1864, and the decision of the High Court was upheld in the following judgment of the Judicial Committee of the Privy Council on 25th July 1870.

The respondent is the Zamindar of Jeypore, apparently a very large estate, in the nature of a principality, situated in the Northern Circars, which was permanently settled with his grandfather, Ramachandra Dev, in 1803, under Regulation XXV of 1802 of the Madras Code. The deed of permanent property, which is dated the 21st of October 1803, by which the property in the zamindari was then assured to Ramachandra Dev subject to the revenue permanently assessed upon it, is one of the exhibits in the cause. It shows, on the face of it, that the zamindari then included Pergunnah Singapuram, and the original statement of the respondent, at page 2, seems to admit that a specific sum of money was then assessed upon that pergunnah as part of the Government revenue payable in respect of the whole zamindari.

The appellant is the holder of six taluks, constituting or forming part of Pergunnah Singapuram, and the suit has been brought by the appellant, as zamindar, against the respondent, treating him as under-tenant, to enhance the rent of those taluks.

The first decision of the Governor's Agent, who appears to exercise judicial functions in the district where the property is situated, was in favour of the respondent. Against this the appellant appealed to the High Court of Madras (1) and, on the 6th of November 1865, that Court remanded the case for re-trial upon the issues stated at page 6 of the record, directing the Governor's Agent to return to the Court his findings upon those issues with the evidence upon which they were founded, the Court, in the meantime, reserving its final judgment upon the appeal.

The issues are the following:—(1) "Has the family of defendant held these six taluks under a claim of ownership, and consequently by a possession hostile to the family of plaintiff ever since the permanent settlement? (2) Were the taluks, at the period of the permanent settlement, in possession of the defendant's family on such claim of right? (3) What rights of ownership have the plaintiff's family exercised over the taluks? (4) Has the possession of defendant been for any, and, if so, for what period, adverse?"

It seems to have been assumed that the burden of establishing the affirmative of at least the first, second and fourth of these issues lay upon the appellant; and their Lordships conceive that that assumption was correct, because, after it appeared that

(1) Krishna Devaguru v. Zamindar of Jeypore, 3 M.H.C.R., 152.

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the zamindari included the pergunnah amongst its *mal* assets, or revenue-paying lands, it lay upon the appellant, as defendant in the suit, to establish the grounds on which he disputed the zamindar's claim to an enhanced rent.

The appellant accordingly filed an additional statement on the 20th of February 1866, to which, on the following day, the respondent put in his answer, both of which documents are at page 8 of the record.

The appellant's case was that he and his ancestors had enjoyed the Singapuram Pergunnah as a mahaul separated from the rest of the zamindari, and as lakhiraj from a period anterior to the permanent settlement; that his great-grandfather, Lala Krishna Dev, being Raja both of Singapuram and Jeypore, had bestowed the whole of his possessions, with the exception of Pergunnah Singapuram, upon his younger brother Vikrama Dev, the grandfather of the respondent; that the appellant and his ancestors, for four generations, had since enjoyed Singapuram without disturbance; and that, therefore, the respondent was not at liberty to bring such a suit for the possessions enjoyed by a member of his family.

The respondent's case was that, before and since the permanent settlement, Pergunnah Singapuram had been enjoyed by the respondent and his ancestors as part of the zamindari; that the appellant's title to the taluks originated with his father, Mukunda Dev, to whom, about forty years before, the then Maharaja Vikrama (the respondent's father) had granted them to be held partly on a money rent, partly on service; that Mukunda had paid rent for them; that on his death his widow and his son, the appellant, being in distress, were allowed, for some time, to discontinue the payment of rent, but that in 1860 the appellant himself had acknowledged the respondent's title, and made some payment in recognition of it. The nature of the payment it will be more convenient afterwards to consider.

Both parties went into evidence. The Governor-General's Agent found all the issues in favour of the respondent, and there was then an appeal to the High Court, which Court adopted, after argument, the findings which were sent up. It then proceeded to consider the original appeal, and dismissed that, confirming the original decree in the respondent's favour.

It lies on the appellant to satisfy their Lordships that these decisions are erroneous, and I need not repeat what has been so often stated at this board, that their Lordships will not take upon themselves to disturb the concurrent findings of two Indian Courts upon issues of fact, unless they are clearly satisfied that there has been some very grave miscarriage, either in the trial of the cause, or in the appreciation of the evidence.

In the present case, the appellant labors under the additional disadvantage of having set up and undertaken to prove a case which it is almost impossible to reconcile with the uncontroverted and incontrovertible facts of the settlement of 1803. His case is that, when his ancestor made over the rest of the zamindari to his younger brother, he retained Singapuram as the separate property of his (the elder) branch of the family, by which it has ever since been enjoyed rent free.

Now it may be admitted that both the appellant and the respondent descend from a common ancestor, and that the appellant belongs to the elder branch of the family. It may be further admitted, for that fact seems to have been found by the Governor's Agent, that, at one period, the whole of the zamindari was in the appellant's ancestor, Lala Krishna Dev, but there is not the slightest proof of the alleged transfer by Lala Krishna Dev, or of the alleged retention (when the whole zamindari

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dari passed from one branch to the other) of Pergunnah Singapuram, whilst, on the other hand, the deed of permanent settlement (a document which is clearly above suspicion) establishes that the settlement was made with and the property confirmed to the plaintiffs' grandfather, as the person then in possession of the whole zamindari, and that the zamindari then included Pergunnah Singapuram. It is also found by the Governor's Agent, who can hardly be mistaken upon such a fact, and it is indeed admitted by the appellant, in his first written statement, that the permanent revenue of Rs. 1,060 per annum, or upwards, was assessed specifically on Singapuram on the occasion of the settlement.

From these facts there arises the strongest presumption against the truth of the appellant's case; for if, as he says, Singapuram was held in 1802 by Sundara Dev as a distinct separate property, that person would presumably have settled for it with Government, and would have taken a deed of permanent property, assuring to him that separate estate. Such would have been the natural course of things, unless the whole pergunnah were, as between the possessor of the land and Government, lakhiraj. But this it certainly was not, since we find it clearly proved that it was treated as *malguzari* land, and Government revenue assessed upon it.

On the other hand, there is also a strong presumption that the zamindar of Jeypore would not have settled for this land, as he did, unless he had been in the receipt of the collections from it, or of some rent payable in respect of it.

To these very strong presumptions, what does the appellant oppose? He may be taken to have proved two copper grants of small parcels of land, one in 1747, another in 1786; but these, if treated as acts of ownership by the owner of the zamindari, or the owner of the pergunnah, really prove nothing with reference to the present contention, because they bear date at a time when the whole zamindari may have belonged to Lala Krishna Dev, or the other party by whom the grant purports to have been made, both being anterior to the date of the settlement at which time we find the respondent's ancestor, the undisputed possessor of the zamindari. The Governor's Agent has also treated the second grant as of little importance, even if it were inconsistent with respondent's case, because, where small grants of land like this are made to Brahmans of repute, the alienees are generally undisturbed.

Then the learned Counsel, for the appellant, have referred into several of the letters and documents which, they say, are inconsistent with the respondent's case. Amongst them are the two letters, out of which this suit is said to have originated, the letter of the respondent to the appellant, and the letter of the Governor's Agent; but really these establish no such inconsistency. The case now made by the respondent is that the tenure granted to Mukunda was granted on a small money-rent, and a considerable service-rent, the latter consisting of the obligation to keep up a number of *paiks*, or armed men. This correspondence only shows that the circumstances of the country had altered in two particulars; that the Government, for some reason or another, had prevented the zamindar from levying certain cesses or taxes which he seems theretofore to have levied; that his revenues had been thereby diminished, and that he had found it necessary to enforce his right of enhancement against under-tenants. There is no inconsistency in that with the case made, because, if the circumstances of the country no longer required those armed men to be kept up, the zamindar would naturally say to his tenant—"If you are relieved from that service, I have a right to enhance my money-rent, and I come into Court for that purpose."

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Again the letter at page 57, upon which a good deal of comment has been made, seems to their Lordships to be in no degree inconsistent with the respondent's case. It is a letter written to the Governor's Agent after the death of Mukunda Dev, and it describes Mukunda Dev as "the Mokkasadar of Singapuram attached to my zamindari," clearly treating him as a tenant upon some terms of the zamindar. It alludes to the interference of another woman, Srikondaamma Dev, the widow of another member of the elder branch, with the rights of his son and widow; and it seems to their Lordships to be just such a letter as the superior and the head of the family might, under the circumstances described, write to the Governor's Agent. It is certainly more consistent with the existence of a sub-tenure granted by the zamindar to Mukunda Dev, than it is with the case now set up by the appellant.

Then a good deal has been said as to the insufficiency of the evidence; but, with the exception of the copper grants, the Governor's Agent has discredited the whole of the evidence for the appellant, and has given particular reasons for discrediting some of his witnesses. On the other hand, he has given credit to the witnesses for the respondent, witnesses who, although they do not prove perhaps very satisfactorily or in detail the terms of the grant, do prove the general fact that Mukunda Dev obtained possession of this pergunnah as an act of favour from the zamindar, and that generally rent and service were paid upon that footing.

There are two witnesses who prove distinctly the payment in 1860. They treat it as a payment of rent. It is entered in the accounts, which are clearly admissible, as constructive evidence, as a payment of rent. The Governor's Agent finds that it was a payment of rent. Their Lordships do not find in the record any trace of any particular complaint against that finding, on the ground that it is inconsistent with the description given in the statement of the respondent, and that the payment was rather in the nature of a nuzzur or free-will offering, than of a payment on account of rent reserved.

Their Lordships think that it would be improper for them now to open this question on this alleged inconsistency. They also think that, where the Governor's Agent has discredited certain witnesses and given credit to certain other witnesses, it would be contrary to the practice of this Committee and to sound reason to say that he ought to have believed the one and disbelieved the other, unless there were far stronger grounds than any that have been here shown for the conclusion that he was wrong.

Again, with respect to the reception of evidence, their Lordships do not find that any objection was formally taken in the Court below to the reception of the accounts; and they think it would be mischievous if they were now to allow that exception to be taken in the final Court of Appeal. There was, no doubt, some question raised in the High Court, and the High Court seems also to have taken this view. Their Lordships are further of opinion that, looking to the burden of proof which lay on the appellant to make out his exemption from this increased rent, looking to the case that he made, and his utter failure to establish that case, the decision may be clearly supported without falling back upon or calling in aid these accounts.

Upon the whole case, their Lordships are of opinion not only that no sufficient ground has been made for saying that the decisions below are wrong, but that upon the evidence in this record those decisions were right. They must, accordingly, advise Her Majesty to dismiss the appeal. The respondent has not appeared. Therefore it is not necessary to say anything about costs.

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The Agent to the Governor, on 18th March 1889, passed a decree for the plaintiff against which the defendants, on 26th June 1889, preferred this appeal, which was referred to the High Court as above. It appeared that, if the time necessary for obtaining copies of the decree and judgment of the agent was deducted, the appeal was presented within three months of the Agent's decision.

Rama Rau and *Mahadeva Ayyar* for appellants.

The Government Pleader (Mr. Powell) and Mr. J. G. Smith for respondent.

JUDGMENT.—The plaintiff is the Maharajah of Jeypore in the Vizagapatam district. He instituted the present suit to recover possession of the Kalyana Singapore Pergunnah with arrears of rent. The plaint set forth that the pergunnah was granted by the plaintiff's ancestors to the father-in-law of the first defendant on condition of service tenure, and the payment of rent; that in consequence of the denial of the plaintiff's title by the first defendant's husband, the plaintiff instituted original suit No. 22 of 1864 to establish his right to the pergunnah, and to recover rent at the rate of Rs. 5,000 *per annum*, that the suit was decided in his favour, and that Rs. 5,000 were paid annually until the death of the first defendant's husband in 1884; that in July 1885 the plaintiff gave notice to the first defendant that her services were no longer required, and that she should either execute an agreement to take the pergunnah on lease for the annual sum of Rs. 20,000, or give up possession, and that the defendant had neglected and taken no notice of the said notice. The first defendant (the second defendant is her adopted son and a minor) pleaded *inter alia* that the plaintiff was only entitled to recover Rs. 5,000 *per annum* by executing the decree in original suit No. 22 of 1864; that the pergunnah was not held on service tenure, but on a permanent lease, and that the plaintiff had no right to eject.

The Lower Court gave the plaintiff a decree for possession and *mesne* profits at the rate of Rs. 20,000 *per annum* from fasli 1295 to date of possession.

The defendants appealed to the Governor-in-Council who has, under Rule XXII of the revised rules, framed by Government under Act XXIV of 1839, referred the appeal for the decision of this Court.

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The learned Government Pleader, on behalf of the minor plaintiff (the original plaintiff having died during the course of the suit), who is represented by his guardian, the Collector of Vizagapatam, raises the preliminary objection that the appeal is out of time. His argument is that the time allowed for an appeal being three months, and there being no provision in the rules for the deduction of the time requisite for obtaining a copy of the decree and judgment (a copy of the judgment not being in fact necessary for an appeal) this appeal is out of time. The argument proceeds on the assumption that Rules XXI and XXII must be read together and that the proviso in Rule XXI applies also to Rule XXII, it being unreasonable, it is argued, to suppose that no limit would be fixed for the presentation of an appeal to the Governor-in-Council, when a limit is prescribed for the presentation of an appeal to this Court. On the other side, it is contended that the Governor-in-Council having admitted the appeal, and referred it to this Court for decision, the question as to whether the appeal is in time, does not arise, that there is no time fixed by Rule XXII within which an appeal must be presented to the Governor-in-Council, and that, even if it be held that the appeal must be preferred within three months after the Agent's decision the general provisions of the Limitation Act apply, and the time necessary for obtaining copies of decree and judgment must be deducted. The decree bears date 18th March 1889. The copy was applied for on the same date, and was furnished on the 28th March. The appeal was presented to Government in the usual way in which petitions are presented on the 26th June 1889. If the time occupied in obtaining copy be deducted, the appeal was presented within three months after the Agent's decision.

As remarked in *Kullayappa v. Lakshmipathi*(1) "it has been several times decided that the general sections of the Limitation Act from 5 to 25 are applicable to suits for which periods of limitation are prescribed other than those described in the second schedule to the Limitation Act," and, if the period in this case is three months, we are of opinion that, under section 12 of the Limitation Act, the time requisite for obtaining a copy of the decree must be excluded.

But, in our judgment, no time is fixed within which an appeal

must be preferred to the Governor-in-Council. Rules XXI and XXII of the rules above referred to are as follow :—

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Rule XXI.—"From all decrees upon original suits passed by the Agent (with the single exception specified in the next following rule), an appeal shall lie to the Sadr Court to be disposed of as provided in section 6, Act XXIV of 1839; provided such appeal is preferred either to the Agent or the Sadr Court within three months after the Agent's decision; or after that period, if sufficient cause can be assigned to the Sadr Court for any delay which may have occurred by petition on the prescribed stamp, and subject to the other rules required in other appeals to the Sadr Court, as provided in the Madras Code and Acts applicable to that Presidency."

Rule XXII.—"From decrees of Agents in suits wherein the landed possession of a zamindar, bissoye, or other feudal hill chief may have formed the subject of litigation, an appeal will lie to the Governor-in-Council alone, who may refer any such appeal for the decision of the Sadr Court, provided that the decree of the latter Court shall not be carried into execution without the permission of the Governor-in-Council."

A distinction is clearly drawn between suits in which the landed possession of zamindar forms the subject of litigation, and other suits cognizable by the Agent. In the former the appeal lies to the Governor-in-Council, in the latter to this Court. Appeals to this Court will not lie unless presented within three months after the Agent's decision. But there is no such proviso with reference to appeals to the Governor-in-Council. We can see no reason why the proviso to Rule XXI should be held applicable to Rule XXII. It is not denied that in this suit the landed possession of the zamindar forms the subject of litigation. Government, in the exercise of the power conferred on them in Rule XXII, have admitted the appeal and referred it to this Court for decision.

The preliminary objection must be overruled.

On behalf of the appellants it is argued that the Agent was in error in holding that the defendants' appellants are "yearly tenants at will." There appears to have been some slight confusion in the mind of the Judge as to the nature of the defendants' tenure.

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In the former suit between the parties (original suit No. 22 of 1864), it was found by the Agent that there had been no hostile possession on the part of the defendants, who had made payments in acknowledgment of tenancy, and that "the plaintiff's father granted the pergunnah to the defendant's father, partly for the grantee's maintenance, and partly on rent; that the grant was further conditioned for service, and that such service was, from the circumstances of the country, a *bonâ fide* requirement." On appeal, the High Court concurred in the view taken by the Agent of the evidence, and considered that there was satisfactory proof of a holding as tenant under the plaintiff. The case then went on appeal to the Privy Council, who held that it was proved that the grantee obtained possession as an act of favour from the zamindar, and that rent and service were paid upon that footing. It follows, therefore, that the defendants' tenure is not that of a "yearly tenant at will," but has been rightly described in the plaint as one granted on condition of service and payment of rent. This, it appears clearly from the judgment of the Privy Council (page 16 of the printed papers), was the plaintiff's case in the former suit, and there the Privy Council held that "after it appeared that the zamindari included the pergunnah among its revenue-paying lands, it lay upon defendant to establish the grounds on which he disputed the zamindar's claim to an enhanced rent." Enhancement of rent was not claimed in that suit on the ground that service was dispensed with, but because the revenues of the zamindar had been diminished in consequence of Government having prevented him from levying certain cesses or taxes. In this Court it has been advanced that no service was rendered by first defendant's husband; but, although it was denied in the written statement that the pergunnah was held on service tenure, no issue was recorded, nor was any evidence let in on that point. It has been suggested by the appellant's pleader that in the previous case the Privy Council decided that plaintiff was entitled to enhance his money rent, because he had relieved the defendant from service. We do not think that the Privy Council did so decide. They put, as a hypothetical case, what has now actually occurred. The plaintiff has dispensed with the defendants' obligation to keep up a number of paiks or armed men, and claims, in consequence, to raise the rent. It lay upon

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the defendants to prove that service had been dispensed with in 1864, or that the increased rent paid between 1864 and the date of this suit was paid in place of service. No such evidence has been adduced.

Then it is argued that if the grant was a grant for maintenance, it is not resumable. It is true that in the former suit the Agent regarded the grant as made "partly for the grantee's maintenance," but this view was not supported by the judgment of this Court, nor was it the view taken by the Privy Council. The grant was one for service and payment of rent. It may be that in fixing the rent the relationship of the grantee was taken into account and a more favorable rent fixed than would have been the case had the grant been to a stranger, but there is no evidence on the record to support the contention that the grant was made with a view to maintenance. On the other hand everything points to the conclusion that the grant was one for payment of a low rent on the condition of certain service being rendered. Now it is admitted, on behalf of the appellants, that, if the land was held on service tenure, it is resumable at the will of the zamindar for the time being in possession *Unide Rajaha Raje Bommarauze Bahadur v. Pemmasamy Venkatadry Naidoo*(1), *Sitaramarazu v. Ramachendrarazu*(2), *Sanniyasi v. Salur Zamindar*(3). It was alleged in the plaint that the respondent was entitled to determine the tenure when he dispensed with the appellant's services. The appellants, in their written statement, denied that the land was held on service tenure and the ninth issue ran as follows:—"Whether the plaintiff has the right to recover the pergunnah." It was incumbent upon the appellants to adduce evidence in support of their plea, but they failed to do so, and we are therefore of opinion (though not for the reasons assigned by the Lower Court) that the Lower Court was right in holding that the respondent was entitled to resume. The appellants were offered the option of holding the pergunnah as tenants paying an enhanced rent in lieu of services which were dispensed with, but that offer the appellants rejected.

It is then contended that the suit is barred by limitation, the appellants' possession being adverse to respondent for more than twelve years, because in 1864 and since the appellants have

(1) 7 M.I.A., 128.

(2) I.L.R., 3 Mad., 367.

(3) I.L.R., 7 Mad., 268.

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asserted a right to hold on payment of rent free from the liability to be ejected. We cannot see that any question of limitation arises. The first appellant has paid rent regularly as a tenant in accordance with the decision in the former suit. There is nothing to show that the first appellant or her predecessors in title ever set up a right to hold on permanent tenure until the institution of the present suit. In the former suit, the first appellant's proprietary right was negatived and her position as tenant affirmed, and as tenant rent has been paid ever since.

It is then contended that, as the plaintiff has acquiesced in the decision in the former suit and collected Rs. 5,000 *per annum* from that date, there is an implied contract that plaintiff would collect that sum and no more, and that therefore there is no cause of action for the present suit, plaintiff not claiming increased rent in consequence of improvements effected by himself.

The cause of action in the present suit arises from the respondents having dispensed with the appellants' services, and having given notice to the appellants either to take a lease at an enhanced rent or to give up possession. The respondent received rent at the rate of Rs. 5,000 *per annum* from the date of the decree in the former suit, because that was the amount of rent claimed and decreed; but the receipt of rent at a certain rate for so many years cannot be construed to imply a contract always to receive rent at the same rate, or a contract not to raise the rent under altered circumstances.

Finally, it is contended that the Judge was in error in finding that the present income of the estate is Rs. 40,000, and that he should have found that the annual income did not exceed Rs. 20,000 and that the increase was due to improvements effected by appellants' predecessor. The Agent relied on the evidence of the plaintiff's first witness, V. Sitaramayya, a Government servant, who has been manager of the pergunnah for nineteen months, corroborated, as it was, by the evidence of the plaintiff's second witness, who had been dewan of the estate for five years during the first appellant's husband's lifetime, of the plaintiff's third witness who had been a gumastah in the estate for about fifteen years, and by the demand accounts, exhibits G—J, of which exhibit G, the demand account for 1884-85 was written by the defendants' third witness, an accountant of the

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estate. From the oral and documentary evidence, it appears that the total demand in money and kind amounts to about Rs. 37,000. There is, however, no evidence as to the collections, the plaintiff's first witness stating that no collection accounts are forthcoming. Against the demand has to be set off the expenses which appear to amount to about Rs. 10,000. This would only leave a margin of Rs. 7,000, supposing the whole demand were collected and the defendant's rent raised to Rs. 20,000. Better evidence should have been forthcoming as to the actual income and charges of the estate, but, from the evidence on record, we think, the rent demanded was too high and would reduce the mesne profits awarded from Rs. 20,000 to Rs. 15,000 *per annum*. In other respects we would confirm the decree of the Agent. The plaintiff will get proportionate costs on the sum allowed and the defendants on the sum disallowed.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

VENKATARAMANNA AND OTHERS (PLAINTIFFS),

v.

VENKAYYA (DEFENDANT).*

1890.
April 14.

Succession Certificate Act—Act VII of 1889, s. 4—Suit by undivided son of deceased creditor.

A Hindu is not entitled to sue on a bond executed in favour of his undivided father, deceased, without the production of a certificate under Act VII of 1889, unless it appears on the face of the bond that the debt claimed was due to the joint family, consisting of the father and the son.

CASE referred, for the opinion of the High Court, under Civil Procedure Code, s. 617, by J. L. Narayana Rau, District Munsif, Rajahmundry. The case was stated as follows:—

“Plaintiff in this case seeks to recover a debt due upon a bond executed by the defendant to his undivided father, who is now dead.

* Referred Case No. 23 of 1889.

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"The defendant pleads, *inter alia*, that this Court cannot proceed with the case until the plaintiff can produce an heirship certificate as provided by section 4 of the Indian Succession Act VII of 1889.

"The question, which I beg to refer for the authoritative opinion of the High Court, is whether the plaintiff, who is admittedly an undivided son of the deceased creditor, is bound to produce the succession certificate before he can proceed with the case?

"In my opinion, however, such certificate is not necessary in case of an undivided coparcener where the right of survivorship prevails.

* * * * *

"No doubt the head of the family, whether in his capacity as father or as manager, must necessarily have a large control over the estate, so that his actions in just cases may bind those under his management. But, after the death of that manager, the survivors take the estate in entirety subject to the result of the just liabilities created by the manager, and the deceased coparcener loses all interest in the joint estate and leaves nothing behind him to be claimed by the others.

"The plaintiff in this case does not therefore claim anything left by the deceased father, but claims the money to which he was entitled by right of his birth even during the lifetime of his father, and which devolved upon him by right of survivorship upon the death of the manager. He is not, therefore, required to produce a succession certificate under section 4 of Act VII of 1889.

"That section applies to cases in which the property was held in severalty either as being a share of a divided member or as being the separate acquisition of one who was still living in the 'state of union.'"

Counsel were not instructed.

JUDGMENT.—It appears that the suit was brought upon a bond executed by defendant to plaintiff's father, who is now dead, and there is nothing to show that on the face of the bond the debt is described as being a debt due to the joint family consisting of the father and the son. It may be that the money was advanced from the father's private funds. A son is *prima facie* taken to succeed to a debt due to his father by right of inherit-

ance, unless his succession by survivorship is indicated on the face of the bond creating the debt. Though Act VII of 1889 applies only to cases of succession, it states in the preamble that it is intended to afford protection to parties paying debts to the representatives of deceased persons. It would naturally impair the protection intended to be afforded by the statute to throw in every case on the debtor the obligation of making an inquiry at the time of payment, whether the person claiming to recover the debt claims by right of survivorship or of inheritance. Our answer, therefore, to the question referred to us is that defendant is entitled to insist on the production of a certificate under Act VII of 1889, unless it appears on the face of the bond that the debt claimed was due to the joint family consisting of the father and the son.

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VENKAYYA.

APPELLATE CRIMINAL.

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

CHELLAM NAIDU (ACCUSED) PETITIONER,

v.

RAMASAMI (COMPLAINANT).*

*Criminal Procedure Code—Act X of 1882, ss. 198, 345—Defamation of a wife—
Complaint by husband.*

When a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved, upon whose complaint the Magistrate may take cognizance of a complaint under Criminal Procedure Code, s. 198.

CASE referred, for the opinion of the High Court, under section 432 of the Criminal Procedure Code, by J. M. Maskell, a Presidency Magistrate, Black Town, in his letter, dated 24th November 1890, No. 219.

The case was stated as follows:—

"The complaint in this case was laid by one Varanasi Ramasami Naidu. He charges the accused, who is the printer and publisher of a vernacular paper called the *Ayurveda Bhaskara*

1891.
January 22.
February 3.

* Criminal Revision Case No. 586 of 1890.

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"with having defamed his (complainant's) wife Rukmani Ammah
"by printing and publishing concerning her in the issue of the
"above paper of the 1st October last a paragraph, of which the
"following translation is given in the complaint:—

" 'Shameful news—That M, an officer living in Madras, had
"for a long time been on criminal intimacy with the wife of N,
"another officer, is a fact too well known to all persons of that
"street. A young girl, the wife of another officer, V, living in
"the same house, who was daily witnessing the lovers thus
"being in criminal intimacy for a long time, with a desire to
"possess the gallant and acquire kappu (bracelets), kammal (ear
"ornaments) and other jewels that she wanted, wrote a letter to
"that gallant to which he agreed, &c., &c.

" 'Brammahadeva,

" 'Wellwisher of Poli Street.'

"Complainant alleges in his complaint that the initials V and
"N mentioned above refer, respectively, to himself and to one
"Numberumal Naidu, both of whom with their wives lived at
"36, Kappal Poli Chetti Street, and that the initial M refers to
"Manavaloo Naidu, who lived elsewhere in the same street and
"who used to visit Numberumal Naidu. Complainant further
"alleges that the statement in the paragraph in question as to
"the existence of a criminal intimacy between V's wife and M
"was pointed at, and intended to apply to complainant's said
"wife Rukmani Ammah and the said Manavaloo Naidu.

"A summons was granted on the above complaint by the
"Junior Magistrate of this Court, and the case came on for
"hearing before me on the 19th instant, when Mr. M. O. Partha-
"saradhi Ayyangar instructed by Mr. Biligiri Ayyangar appeared
"for the complainant and Mr. Jagga Row for the accused. Mr.
"Jagga Row raised the preliminary objection that the Court was
"precluded from taking cognizance of the offence by reason of
"section 198 of the Criminal Procedure Code, which enacts, *inter*
"*alia*, that no Court shall take cognizance of an offence falling
"under Chapter XXI of the Indian Penal Code except upon a
"complaint made by some person aggrieved by such offence.
"He urged that in a prosecution for defamation, where the
"imputation was defamatory of the wife, the wife alone and not
"the husband was competent to complain. On the other side,

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"it was contended that the reputation of a husband is so inti-
"mately connected with that of his wife, that he is as much
"aggrieved by a defamatory imputation against his wife as
"though his own reputation had been assailed, and that he is
"consequently a competent person to initiate the prosecution.
"As the matter appears to be *res integra*, the authorities cited
"on both sides having really no bearing on the point at issue,
"I beg to submit the following question for the opinion of the
"High Court:—

"When an imputation, which is defamatory under section
"499 of the Indian Penal Code, is made against a married
"woman, imputing unchastity to her as V's wife, but not
"referring otherwise to V himself, whether V is competent to
"institute a prosecution as 'some person aggrieved by such
"offence' within the meaning of section 198 of the Criminal
"Procedure Code?"

Mr. Parthasaradhi Ayyangar for the complainant.

The Crown Prosecutor (Mr. W. Grant) for the Crown.

MUTTUSAMI AYYAR, J.—The question referred, for our opinion,
is whether in cases in which a married woman is defamed by
the imputation of unchastity, her husband is a person aggrieved
by the defamation, upon whose complaint the Magistrate may
take cognizance of the offence under section 198 of the Code of
Criminal Procedure. I am of opinion that our answer must be
in the affirmative. The words, "some person aggrieved by such
offence," include the husband in their ordinary meaning, and his
reputation is so intimately connected with that of his wife that it
would be unreasonable to hold that the defamation would ordi-
narily not be as hurtful to his feelings as it is to those of his
wife. It is true that under section 345 the wife may, without
the consent of the husband, and even contrary to his wish,
compound the offence as "the person defamed," thereby render-
ing the complaint made by the latter liable to be dismissed. But
it must be observed that generally the husband and the wife will
act in concert, and that the difference in the language used in
section 345 and section 198 is, therefore, not a sufficient ground
for putting a narrower construction on section 198. I answer
the question in the affirmative.

WILKINSON, J.—I am of the same opinion, and would only
add that in this case it was charged that the article had been

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published with the intention of injuring the reputation of the husband as well as of his wife. He was entitled to a finding on the charge of defamation against himself, and that charge no one but himself could compound.

APPELLATE CIVIL.

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

PERIANAYAKAM (PETITIONER),

v.

POTTUKANNI AND ANOTHER (RESPONDENTS).*

Native Christian—Hindu convert to Christianity—Divorce Act—Act IV of 1869.

A pariah, who had been converted to Christianity, presented a petition of divorce under Act IV of 1869 on the ground of adultery committed by his wife before his conversion:

Held, that the Court had no jurisdiction to entertain the petition.

CASE referred under Act IV of 1869, s. 9, by R. S. Benson, District Judge of South Arcot, in his letter, dated 22nd September 1890, No. 90, in the matter of original suit No. 7 of 1890, on his file.

The case was stated as follows:—

“The petitioner, Perianayakam, was married to the respondent, Pottukanni, eleven years ago, according to the ritual usual among pariahs, to which class both then belonged. Petitioner alleges that the respondent, in December 1888, committed adultery with the co-respondent, Murthi Naik, and has since been living under his protection and has borne a child to him. Subsequent to the adultery, petitioner became a Christian, and for about a year past has professed that religion according to the Roman Catholic form. He now petitions under Act IV of 1869 for a divorce from respondent on account of her adultery, and for damages from the co-respondent.

“The question on which I ask for a ruling of the High Court is whether, under such circumstances, the suit is maintainable? In other words, does the petitioner’s conversion to Christianity

“give this Court jurisdiction to dissolve his marriage entered into before he was a Christian and in accordance with non-Christian ritual, on account of adultery committed by his wife before his conversion?

“I am of opinion that these questions must be answered in the negative, but as they have, I believe, never been decided and are not free from difficulty, I think it best to ask for an authoritative ruling.

“It is argued for the petitioner that he is now a Christian and, therefore, entitled to the relief available to Christians in the event of a wife’s adultery. It is argued that, as a Christian, he cannot marry another wife unless he is divorced from his present wife, and that if this Act does not apply to him he is unable to obtain a divorce, while the fact of his Christianity bars his marrying another wife, a remedy which, although not complete, was still substantial and was available to him as long as he remained a Hindu. It is argued that the Legislature could not have intended to place a Hindu convert at such a disadvantage, and that there is no ground in reason why the Act should not apply to his case. Such a dissolution of marriage in the present case would affect not only the husband but the wife, who continues to be a Hindu and who did not, when the marriage was effected, contemplate (either personally or through her guardians, if, as is probably the case, she was then a minor,) that her marriage and its incidents would ever be governed by any but the Hindu law to which she was then subject. In this view it may, I think, be doubted whether the petitioner, having elected to be a Christian, should not be left to bear the inconveniences which may flow from his resolve, rather than that he should be relieved from them by the application of a law not contemplated by either party as applicable at the time of the marriage. Prior to 1869 the remedy provided by the Act did not exist even for persons who were married as Christians and continued so up to the time of proceedings (*Devasagayam Pitchamathoo v. Naiyagam*(1)) and it is not impossible that the Legislature, in providing relief for such persons, may have omitted to extend such relief to persons converted to Christianity subsequent to the marriage sought

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1890.
October 24.

* Referred Case No. 23 of 1890.

(1) 7 M.H.C.R., 284.

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"to be dissolved. It seems to me that such was the intention of the Legislature. The preamble to the Act says, 'Whereas it is expedient to amend the law relating to the divorce of persons professing the Christian religion.' Strictly speaking these words, as they stand, imply that both the persons to be divorced should be, at the time of the proceedings, persons professing the Christian religion, but that the scope of the Act is not thus limited is clear from section 2, clause (c), which contemplates the case of the husband having been perverted from Christianity prior to the proceedings. The fact that the Act expressly contemplates such a case but omits all reference to the converse case suggests that the omission was deliberate and that the Legislature did not intend the Act to apply to any but marriages entered into between Christians.

"This conclusion derived from the terms of the Act appears to be also in accordance with the only reported ruling which, so far as I am aware, bears on the question. That is the case of *Zuburdust Khan v. His wife*(1). In that case a Muhammadan convert to Christianity sued under the Act for a dissolution of his marriage contracted before conversion on account of his wife's adultery after their conversion and the learned Judges described the matter for decision as one which presented features of extraordinary difficulty. I think that the case might have been decided on the very simple ground that as apostacy, under Muhammadan law, *ipso facto*, dissolved the marriage, there was no marriage subsisting between the parties when the adultery took place, and consequently no matrimonial injury whereon to found the suit, nor any marriage in existence by the dissolution of which the Court could give relief. In the case of a Hindu, however, conversion to Christianity does not operate as a dissolution of the union—see *Administrator-General of Madras v. Ananda Chari*(2), and I take it that the same rule applies to pariahs, like the present parties, since they are, for the most part, governed by Hindu law and have no special custom by which marriage is dissolved by a change of religion. The above ground would, therefore, have no application to the present case. The learned Judges, who gave the ruling in the case of *Zuburdust Khan v. His wife*(1) proceeded on wider grounds than

(1) 2 N.W.P., 370.

(2) I.L.R., 9 Mad., 466.

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"those I have ventured to suggest above as sufficient for the decision of that case, and I think, that those grounds apply, though not in their entirety, to the present case. It cannot be said that the marriage of a Hindu is 'a polygamous contract' in the sense that a Muhammadan marriage is so. The Hindu idea of marriage approaches more nearly to the Christian idea. It has in it a sacramental and religious element, and cannot be dissolved for any cause whatever according to the best authorities, and certainly not at the mere will of the husband, as can a Muhammadan marriage. Still it permits of polygamy, and therein differs vitally and essentially from the Christian marriage. It gives the wife no remedy for matrimonial wrongs against which she would in Christian courts be relieved. If the marriage of a Hindu is, on his conversion to Christianity, to become subject to the matrimonial jurisdiction of Christian courts, what is the course to be pursued when the Hindu has a number of legal wives, a state of things which could not exist in the case of a Christian and for which the Christian law, therefore, makes no provision? Section 7 of the Act requires the Court to act and give relief on principles and rules which are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England acts and gives relief. In the case of *Hyde v. Hyde*(1) the English Court refused to deal with a marriage between Mormons on the ground that the law administered in that Court was wholly inapplicable to polygamous marriages. The reasoning in that case was approved and followed in *Zuburdust Khan's*(2) case as applicable to Muhammadan marriages. I think it is also applicable to the marriages of Hindus.

"I would, therefore, dismiss the present suit on the ground that my Court has no jurisdiction to entertain it."

Mahadeva Ayyar for petitioner.

Krishnasami Ayyar for respondent.

Mr. Subramanyam for co-respondent.

JUDGMENT.—We see no reason to doubt that the Act only applies to Christian marriages. The Judge has discussed the question at considerable length, and we agree with the conclusion at which he arrives.

(1) 35 L.J., P. & M., 57.

(2) 2 N.W.P., 370.

APPELLATE CIVIL.

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

EALLES (PLAINTIFF),

v.

MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS
(DEFENDANTS).*

*City of Madras Municipal Act—Act I of 1884 (Madras), s. 433—Statement
of cause of action—Address of intending plaintiff.*

In a suit against the Municipal Commissioners of the city of Madras for damages sustained by the plaintiff by reason of an accident occasioned to his horses through the ill-repair of a road within the limits of the Municipality, it appeared that at the close of a correspondence between the plaintiff and the President of the Municipality, the plaintiff, in a letter headed "Madras," stated that he had directed auctioneers to sell the horses, and that he would "proceed against you by law to recover such loss or damage as I may have sustained," and added "kindly consider this as notice of claim under section 433 of Municipal Act No. I of 1884," and that the plaintiff's attorneys, in a subsequent letter, demanded payment of Rs. 1,000, "being the damages sustained by our client by reason of the neglect to keep in proper repair that portion of the road, &c.," and stated that if the sum claimed were not paid, the plaintiff would be "compelled to have recourse to law to recover the same without further notice":

Held (1), that the two letters should be read together;

(2), that the cause of action was stated sufficiently in the second of the above letters;

(3), that the plaintiff's address was sufficiently given in the first of the above letters.

CASE referred under section 69 of Act XV of 1882 by P. D. Shaw, Acting Chief Judge of the Small Cause Court, Madras, in suit No. 19529 of 1889.

The case was stated as follows:—

"The plaintiff claims damages to the extent of Rs. 1,000 sustained by reason of the negligence of the defendants in failing and neglecting to keep in proper repair a certain road in Madras, whereby the plaintiff's horses fell and were injured without fault or negligence on the part of the plaintiff.

* Referred Case No. 50 of 1889.

"Among other pleas put forward by the defendants is one that the plaintiff has not given sufficient and legal notice of action according to the provisions of section 433 of Madras Act I of 1884.

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"The deficiency in the notice is contended to be that it does not show the name and place of abode of the intended plaintiff and his attorney.

"The defendants contend that exhibit G is the notice which purports to be given within the terms of the said section, while the plaintiff says that exhibits G and J together, if not separately, constitute a good and valid notice.

"The facts of the case admitted for the purpose of deciding this plea are these, that plaintiff's horses fell while being driven along a road under the care of the defendants on the 28th April 1889; and that on 8th May 1889 (exhibit A) the plaintiff brought the fact to the notice of Col. Moore, the President of the Municipality, stating he had no desire to enter into litigation, and suggesting that Col. Moore should depute some one to inspect the road with the plaintiff, with the view to assessing any damage he (Col. Moore) might decide to offer. This letter is written upon paper, on which is printed in the top of the lefthand corner 'W. J. Eales and Co.', and below it 'address for telegrams Eales, Madras.' In the top of the right-hand corner is printed the word 'Madras,' and the date, 8th May 1889, is filled up in writing.

"Correspondence then passed between Col. Moore and plaintiff (exhibits B, B, C, D and E) with reference to inspection of the locality.

"On the 22nd May 1889 (exhibit F), Col. Moore officially, as President of the Municipality, informed the plaintiff that the Municipality can accept no responsibility for the injuries sustained by your horses."

"Exhibit G, dated 28th May 1889, and written on paper bearing the same headings as exhibit A, commences by referring to exhibit A and other correspondence, and also to exhibit F, and gives notice that plaintiff had sent his horses to be sold by auction for account of whom it might concern, and that, after their sale, 'I shall proceed against you by law to recover any or such loss as I may have sustained.' A postscript to it is

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" ' kindly consider this as notice of claim under section 433 of
" Municipal Act I of 1884.'

" On 7th June 1889, Messrs. Champion and Short, attorneys
" for the plaintiff, write on paper headed ' 27 and 28, Second Line
" Beach, Madras, 7th June 1889,' to the President, Municipal
" Commission, referring to, and conforming the, correspondence
" between plaintiff and Col. Moore and the notice of claim of
" 28th May 1889, and claiming Rs. 1,000 as damages for the
" injuries sustained by plaintiff's horses and set out the negligence
" attributed to the defendants and give notice that if the amount
" claimed is not paid, plaintiff will have recourse to law to
" recover the same.

" The defendants have not raised any question as to the
" sufficiency of the statement of the cause of action in the alleged
" notice, their contention is that neither in exhibit G or any
" other exhibit is the place of abode of the intended plaintiff and
" his attorney explicitly stated. They say, through their Counsel,
" that the headings of exhibit G show the address of Eales and
" Co. to be Madras, and that the place of abode of W. J. Eales
" does not appear therein, but that even if it does it is not expli-
" citly described, in other words, that ' Madras ' is not sufficient.
" It seems to me that exhibit G, which is signed by W. J. Eales
" (the plaintiff) and not by W. J. Eales & Co. does show ' Madras '
" to be his place of abode; exhibit A on which the correspond-
" ence between Col. Moore and plaintiff took place is headed
" exactly the same, and the correspondence shows that for all
" practical purposes the defendants knew where to communicate
" with plaintiff (exhibit F). As to the sufficiency of ' Madras '
" alone without giving any street or house number, I think
" the case of *Osborn v. Gough*(1) where an attorney's address
" was given as ' Birmingham ' is an authority for saying that
" ' Madras ' is sufficiently explicit as the place of the abode of
" the intended plaintiff.

" There is also no doubt that plaintiff's attorneys' place of
" abode is explicitly stated in exhibit J.

" I hold therefore that the defendants' plea fails; that exhi-
" bit G by itself or G and J constitute a valid notice of action

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" within the provisions of section 433, Madras Act I of 1884,
" and that plaintiff's suit is maintainable.

" I have been required by the defendant's Counsel to refer
" to the High Court the question of law :—

" Whether upon the facts above stated and the exhibits A
" to G and J, the plaintiff can be held to have given a valid
" notice of action to the defendants within the meaning of
" section 433, Madras Act I of 1884.

" My opinion is that he has done so for the reasons above set
" out."

The letters referred to as exhibits G and J were as fol-
lows :—

Exhibit G.

W. J. EALLES & Co.

MADRAS, 28th May 1889.

Address for Telegrams

Eales,

Madras.

COLONEL G. M. J. MOORE,

*President, Municipal Commission,
Madras.*

SIR,

" Referring to my letter of 8th and 13th instant, and your final decision dis-
" avowing all responsibility, I hereby give you notice that the Madras Stable
" Company (Limited) have been authorised, as per enclosed copy, to sell at their
" auction on Saturday, 1st proximo, without reserve, and for account of whom it
" may concern the pair of chestnut *Waler horses*, and I shall, after such sale, proceed
" against you by law to recover any or such loss as I may have sustained."

I am, Sir,

Your obedient servant,

(Signed) W. J. EALLES.

" Kindly consider this as notice of claim under section 433 of Municipal Act
" No. I of 1884."

(Initialled) W. J. E.

Exhibit J.

CHAMPION & SHORT,

Solicitors.

27 & 28, SECOND LINE BEACH,
MADRAS, 7th June 1889.

To

COLONEL G. M. J. MOORE,

*President, Municipal Commission,
Madras.*

SIR,

" Referring to the correspondence between you and Mr. W. J. Eales, and to
" the notice of claim, dated the 28th ultimo, which we hereby confirm, we are

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"now instructed to demand payment of the sum of Rs. 1,000, being the damages sustained by our client by reason of the neglect to keep in proper repairs that portion where Harris' Road is intersected by Lubbai Street, and by reason whereof, and without any fault or negligence on the part of our client, or his coachman, our client's horses while being driven along the said road on the 28th April last stumbled and fell in the way described in our client's letter to you of the 8th May 1889. Unless the said sum of Rs. 1,000 and Rs. 3-8-0 our charges are paid forthwith, our client will be reluctantly compelled to have recourse to law to recover same without further notice."

Yours faithfully,
(Signed) CHAMPION & SHORT.

Mr. W. Grant for plaintiff.

Mr. K. Brown for defendants.

JUDGMENT.—In answer to the question referred by the Chief Judge of the Small Cause Court, we are of opinion that a sufficient notice within the meaning of section 483 of Act I of 1884 has been given.

Two objections have been taken to the notice which is said to be conveyed by two letters marked G and J, the first objection being that the cause of action was not explicitly stated and the second that the abode of the plaintiff was not sufficiently described. With regard to the first objection, we have felt no doubt that it was not maintainable for the cause of action is stated with sufficient clearness in the second of the two letters.

The other objection presents more difficulty, for the only address given in Mr. Eales' letter is "Madras," and it is only by reading his letter with the letter of his solicitors that any complete notice stating the plaintiff's abode is made out.

The latter letter refers to Mr. Eales' letter, and we think that they must be read together. It was argued that, inasmuch as the Act is a local one, and it is required that the abode of the intending plaintiff should be given, it must be intended that something more than "Madras" should be mentioned, and it was urged that there was a distinction between local and general Acts in this matter. For this supposed distinction, we find no authority. The clear intention of the Legislature was to give the defendants notice of the threatened action and afford them an opportunity of making amends. If, under the circumstances, the notice sufficiently intimates to the defendants the place where the plaintiff is to be found, the intention of the Act is so far fulfilled. Adopting the language of Pollock, C.B., we must import a little common sense into notices of this kind—*Jones v.*

Nicholls(1). We may also refer to the observations of the Judges in *Osborn v. Gough*(2) which is a strong case, because the defendant was a Magistrate, and no address beyond "Birmingham" was given. Having regard to the two objections raised, we are of opinion that the Chief Judge of the Small Cause Court was right in his ruling.

Champion & Short, attorneys for plaintiff.

Barclay & Morgan, attorneys for defendants.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

RANGASAYI (PETITIONER),

v.

MAHALAKSHMAMMA (RESPONDENT).*

1890.
Sept. 4.
Oct. 2.

Civil Procedure Code, ss. 600, 602—Appeal to Privy Council—Enlargement of time for making deposit.

The Court may enlarge the time for making the deposit required by Civil Procedure Code, s. 602, for cogent reasons under the rule in *Burjore and Bhawani Pershad v. Musamat Bhagana*(3), but those reasons must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from doing so not owing to absence and the difficulty of getting funds, but owing to some circumstances accidental or otherwise over which he had no control or owing to mistake which the Court would consider not unreasonable or caused by negligence.

APPLICATION for the admission of Civil Miscellaneous Petition No. 314 of 1890, which prayed for an extension of the period of six weeks within which the petitioner had been directed to make the deposit prescribed in Civil Procedure Code, s. 602, in the matter of an appeal sought to be preferred by him against the decree of the High Court in Appeal Suit No. 38 of 1887, and for an order that the officer of the Court do receive the deposit.

The facts of the case appear sufficiently for the purposes of this report from the following judgments.

* Civil Miscellaneous Petitions Nos. 314 and 611 of 1890.
(1) 13 M. & W., 263.
(2) 3 B. & P., 550.
(3) L.R., 11 I.A., 7; s.c., I.L.R., 10 Cal., 557.

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Rama Rau for petitioner.

Mr. Subramanyam for respondent.

MUTTUSAMI AYYAR, J.—I took part in both the decisions to which my learned colleague refers in his judgment, and the observations made in *Venkatachalam v. Mahalakshamma*(1)

(1) *Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.*

VENKATACHALAM v. MAHALAKSHMAMMA.

JUDGMENT.—“The plaintiff in this suit, the petitioner, applies to have an appeal to the Privy Council admitted, under section 603, Civil Procedure Code.

“On the 20th of July 1888 petitioner obtained a certificate after notice to the respondent under section 600, and had six weeks' time, expiring on the 31st of August to perform the requisition of section 602, amongst other things to deposit Rs. 4,500. On the 31st August 1888, petitioner tendered at the Registrar's office Rs. 2,000, but was informed such sum could not be received as the proper sum was Rs. 4,500. On the 31st of August the petitioner applied to the Court to extend the time for making the deposit, offering security on the property of one Buchchirazu for the amount, but he was not then prepared with a mortgage on that property. On the 11th September, the Court, however, allowed petitioner (as he lived in Vizagapatam) three weeks' time to file affidavits explaining the delay. Afterwards the Court allowed a further period of three weeks to file such affidavits. Affidavits and a petition were filed on the 19th of October 1888. In his affidavit the petitioner says that on the 4th of August he was made aware by letter from his Counsel that Rs. 4,500 should be deposited by the 31st of August, but he says he was unwell from the 15th July to the 15th of August, and he could not go to Vizagapatam to get help from his friend Sankaraya who helped him in the suit, until he became better. He says that on the 18th August he got to Vizagapatam and then found that Sankaraya had gone to his village a long way off where there was no Post office, and he applied to persons, whom he names, for assistance, but they said they could do nothing without the security of Sankaraya, that he was told by first grade pleaders, whom he names, that as he had already deposited Rs. 2,500 for security for defendant's costs he need only deposit Rs. 2,500 more. He states that he raised Rs. 2,000 on jewels of some of his relatives and started for Madras on the 24th of August and brought Buchchirazu, a rich man, with him to stand security for any other sum required, but that the money already tendered was refused and he started for Vizagapatam and got the additional money from Sankaraya, and on the 7th September he produced Rs. 4,500 to the Registrar who refused it, but the Court allowed the Registrar to receive the money pending his furnishing affidavit to explain the delay.

“Rajanna and Ramajogi say they agreed to lend Rs. 2,500 to the plaintiff, but refused to do so except on the security of Sankaraya, and ultimately on the 6th September, gave that sum to petitioner.

“Sankaraya says he has assisted the petitioner with money and advice in this suit, and that he was absent from Vizagapatam at his village from the 12th of July until the end of August, and that when he got there he found petitioner had gone to Madras, and that in September he became security for the petitioner and got him the loan of Rs. 2,500.

were made with reference to the length to which the decided cases had proceeded. The period for making the deposit is prescribed by the Legislature with reference to all cases, and it is

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“The plaintiff states that he was suffering from an ulcer until about the 12th of August, but in his first petition to this Court on the 31st of August he did not mention the fact that he had been ill.

“Section 602 provides that within six months from the date of the decree complained of or within six weeks from the grant of the certificate, the appellant should deposit the amount required to defray the expenses of translating, &c., and that time expired on the 31st of August. It has been held by the Privy Council in *Burjore and Bhawani Pershad v. Bhagana*(1) that the provision in section 602 is directory, and it was held there that when the money was brought within time to be deposited but owing to wrong information the money was brought to a District Court instead of to the Court of the Commissioner, the time was rightly extended so as to enable the appellant to have deposited the money in the Court of the Commissioner.

“This case was pressed, as showing that as the petitioner acted as to the amount in error, owing to the wrong information given by the Vakils in Vizagapatam, the same principle should be applied in this case as in the case in the Privy Council. But in the case in the Privy Council the appellant was prepared with his deposit before the last day, and would have lodged it, and went to a Court to lodge it in due time. It was merely owing to an error in respect of the right court that the money was not deposited. Even suits brought in Courts erroneously but *bona fide* when there is no jurisdiction are excluded from limitation in certain cases.

“The Privy Council agreed with the decision in *re Soorjमुखी Koer*(2) that discretion was allowed but to be exercised only for cogent reasons. Cogent reasons referred by the Privy Council must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from making his deposit, not owing to absence or difficulty of getting funds, but owing to some circumstance accidental or otherwise over which he had no control, or owing to mistake which the Court would consider not unreasonable or caused by negligence.

“Here the petitioner probably made some enquiries before the certificate to enable him to raise money and may then have been promised help if he gives security. But although he was aware on the 4th of August that Rs. 4,500 should be deposited, he did not, owing as he says to illness, take any active step to get the money until the 14th or 15th of August. Although he may have been unwell he could have written to his friends or some of them and made preparation to get money when he went to Vizagapatam. It is not alleged, though suggested, that his letter would not probably reach Sankaraya if written immediately after the 4th of August. When he arrived at Vizagapatam the appellant found that he could not get money without Sankaraya's security. He acted on the advice of Vakils who told him that only Rs. 2,000 was required, but this was contrary to the advice of his own Counsel in Madras. He got Rs. 2,000 in time and

(1) I.L.R. 10 Cal., 557; S.C. L.R., 11 I.A., 7.

(2) I.L.R., 2 Cal., 272.

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at all events necessary for the petitioner to show "that he was diligent in due time to be prepared to lodge the deposit within the limited period." But the affidavit before us does not show that he used due diligence for procuring the necessary funds before the 25th March last.

Though it was urged at the hearing that he had letters in his possession from certain persons who promised to lend if he waited till the jaggery season in the local market, yet no affidavits were filed by them. Nor is there anything to show that he had applied to them for loans in sufficient time before the expiration of the prescribed period. It does not appear to me that a promise by the petitioner's friends to lend on the arrival of a particular season in the local market is a sufficient cause for extending the prescribed time or cogent reason within the meaning of the Privy Council decision, especially when regard is had to the facts of the case with reference to which the Lords of the Judicial Committee used the expression.

It is true that the petitioner was permitted to sue in the Original Court and to appeal to the High Court *in forma pauperis*, but the prescribed period of six months from the date of the appellate decree and of six weeks from the date of the certificate is ordinarily sufficient for raising funds on credit. This is not a case in which any arrangement made within the prescribed time for obtaining a loan proved infructuous from some unforeseen cause.

I am therefore of opinion that no sufficient cause or cogent reason is shown for granting the application. I would refuse the application.

"brought with him, he says, a rich friend who would help him to raise money, and so far was to some extent diligent, but was not in due time, for when he got to Madras he had not the full amount and could not then get the residue. No doubt Vizagapatam is a very great distance from Madras, and it is suggested that people of his class are generally dilatory and perhaps careless of the activity necessary to comply with rules prescribing times for complying with Court rules. But the provision contained in the Civil Procedure Code cannot be departed from to meet such circumstances. We feel we cannot, upon the ground stated in the petition and affidavits, consider the time should have been extended beyond the 31st of August.

"The result is the appeal is not admitted. The appellant is to pay the respondent's costs of this petition. The Registrar will return the money to the petitioner."

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BEST, J.—Petitioner was on the 12th February 1890 granted a certificate under section 600 of the Code of Civil Procedure to enable him to appeal to the Privy Council, and had under section 602 of the Code to give security and make a deposit of money for costs incidental to the appeal within six weeks from the above date (*i.e.*) by the 26th March. On the 25th March he put in the petition No. 314 asking that the time for giving the security and making the deposit might be extended two months on the ground that he is "poor and unable to procure the necessary funds within the time prescribed." This petition came before a single Judge on the 25th April, and was then ordered to be posted before a Bench of two Judges. The vacation began on the 12th May and nothing more was done in the matter till petitioner filed his second petition No. 611 on the 14th August, in which he explains that he had "employed as his Vakil the late Mr. T. Subba Rao, and proceeded to his native place to collect the necessary funds to furnish the necessary security in this Honorable Court, and also to prosecute the appeal before the Privy Council," that he "did not receive any information from his said Vakil, and upon enquiry learned that Mr. T. Subba Rao had died." He, therefore, requests that, under the circumstances, orders may be issued to the Registrar to receive the sum of Rs. 4,500 which he has now produced. That petitioner is a poor man is apparent from the fact of his having been allowed to prosecute the suit throughout *in forma pauperis*, and there is no difficulty in believing the truth of his statement that he was unable to raise this sum of Rs. 4,500 within the six weeks mentioned in section 602. It has been held by the Privy Council that the time may be extended, but not without cogent reason.—See *Burjore and Bhawani Pershad v. Mussumat Bhagana*(1). I should certainly have held the reasons alleged by the petitioner to be sufficiently cogent had it not been for the decision of this Court in *Venkatachalam v. Mahalakshamma*(2) in which it was held that the "cogent reasons referred to by the Privy Council must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from making his deposit not owing to absence or difficulty of getting funds, but

(1) L.R., 11 L.A., 7; s.c. I.L.R., 10 Cal., 657.

(2) *Ante*, p. 392.

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LAKSHMAMMA. owing to some circumstances accidental or otherwise over which he had no control, or owing to mistake which the Court would consider not unreasonable or caused by negligence. This decision of a Division Bench of this Court was followed in a subsequent case *Subha v. Ramasami*(1). It seems to me that absence of funds or difficulty in raising the same, if true, is very cogent reason for granting an application such as the present one for extending the time and accepting the money now brought into Court; but the decisions above referred to are binding on me. I must therefore defer to the opinion of my learned colleague.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Weir.

KAVERI (PETITIONER), APPELLANT,

v.

VENKAMMA (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 179, cl. 6—Decree for periodical payments.

If it can be gathered from a decree that payments are directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree the requirements of Limitation Act, sched. II, art. 179, cl. 6, are satisfied.

APPEAL under Letters Patent, section 15, against the judgment of Shephard, J., on appeal against Appellate Order No. 59 of 1889.

The above appeal was preferred against an order of J. W. Best, District Judge of South Canara, on Civil Miscellaneous Petition No. 13 of 1889, confirming the order of M. Mundappa Bangara, District Munsif of Mangalore, on Civil Miscellaneous Petition No. 28 of 1889. In this petition one Kaveri Amma, the representative of the defendant in Original Suit No. 349 of 1855, on the file of the Munsiff's Court at Mulki, prayed that the application of Venkamma, the plaintiff for the execution of the

decree therein, be dismissed as being barred by limitation. The material portion of the decree was as follows:—

“That the defendant now, and that afterwards, the plaintiff's husband's son Ramachendra, who is under defendant's guardianship on attaining his majority, do pay plaintiff the balance of Rs. 28-8-0 mentioned in the plaint due to her on account of maintenance till the 10th Bhadrapada of Rakshesa year (5th October 1855), and at the rate of Rs. 3 per mensem from the date of filing of the plaint till the marriage of plaintiff's daughter, and after her marriage till the lifetime of plaintiff at the rate of Rs. 2 per mensem, on the responsibility of the aforesaid properties admitted by defendant to belong to plaintiff's husband; that the said Ramachendraya, who is under defendant's guardianship, immediately on attaining his majority do give plaintiff's daughter in marriage spending to the extent of Rs. 50 on it, and that in the event of her failing to do so, and on the girl attaining 8 years of age, the plaintiff do cause her marriage to be celebrated spending Rs. 50 on it by taking out execution, on the responsibility of the said property. And it is further ordered and decreed that the defendant do pay plaintiff's costs and bear his own.”

Venkammal the plaintiff in the above petition now claimed under that decree her maintenance from 6th November 1885 to 5th September 1888.

The petition was dismissed by the District Munsif on the authority of *Lakshmibai Bapuji Oka v. Madhavrao Bapuji Oka*(1), and his order was upheld on appeal by the District Judge. The appeal against the order of the District Judge came on before Shephard, J., who delivered judgment as follows:—

“It is contended that no certain date has been fixed within the meaning of article 179 (6) of the Limitation Act. I am not convinced that this contention is sound. The payments were directed to be made at the rate of Rs. 3 from the date of filing the plaint, and at the reduced rate of Rs. 2 from the date of the plaintiff's marriage. If there is a doubt as to whether the first payment was to be made on the day of filing of the plaint or at the end of a month from that day, there can be no doubt as to the day on which all subsequent payments

(1) C.M.P., No. 623 of 1889, unreported.

* Letters Patent Appeal No. 13 of 1890.

(1) I.L.R., 12 Bom., 65.

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VENKAMMA. "where to be made, and the reduction of the amount in marriage
" makes no difference in this respect. My view of the decree is
" supported by the decision of Parker, J., in *Suppalu v. Gopala*
" *Krishnayyan*(1). I dismiss the appeal with costs."

The petitioner presented this appeal under Letters Patent, section 15, from the above judgment of Shephard, J.

Mr. *Subramanyam* for appellant.

Respondent was not represented.

JUDGMENT.—From the reported cases *Sabhanatha v. Lakshmi*(2), *Yusuf v. Sirdar*(3) it appears to us that what has to be determined is whether the sum is payable by an ascertained date. This is a question purely of construction. Although a decree may not in express terms fix a specified date, yet if it can be gathered from the decree as a whole that payment is directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree, the requirements of article 179, clause 6 of the schedule to the Limitation Act are satisfied.

In this view we see no ground for admitting the appeal, and we accordingly reject it.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Handley.

RAMAYEE *in re*.*

Criminal Procedure Code—Act X of 1882, s. 489—Maintenance.

A Magistrate has no power under Criminal Procedure Code, s. 489, to make an order for maintenance at a progressively increasing rate, but the fact that the child has grown older might constitute a change in the circumstances calling for a variation in the rate.

CASE reported for the orders of the High Court by J. A. Davies, Sessions Judge of Tanjore.

The facts of the case were stated as follows:—

"The petitioner, the concubine of the defendant, applied for
" maintenance for herself and her female child about six months

(1) C.M.S.A., 6 of 1889, unreported.

(2) I.L.R., 7 Mad., 80.

(3) I.L.R., 7 Mad., 83.

* Criminal Revision Case No. 343 of 1890.

"old under section 488 of the Code of Criminal Procedure.
"The defendant admitted that he was the father of the child,
"and the Magistrate, finding that he neglected to maintain it,
"awarded a sum of Re. 1 per mensem for its maintenance till it
"attains the age of five years, and a sum of Re. 1-8 from and after
"that date, until the child is old enough to leave her mother."

Counsel were not instructed.

JUDGMENT.—We think that the ruling in *Upendra Nath Dhal v. Soudamini Dasi*(1) is right, and that the rate of maintenance must be fixed, subject only to any possible alteration under the provisions of section 489. With regard to that section, we think that the fact that the child has grown older would no less constitute "a change in the circumstances of the person receiving the allowance," than would the death of the child or the birth of another, and therefore the rate can be varied from time to time on application being made as the child gets older. We think the order ought to be modified by setting aside that part of it which directs a prospective increase of the rate.

RAMAYEE
in re.

APPELLATE CRIMINAL.

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

THAMAN CHETTI (PETITIONER),

v.

ALAGIRI CHETTI (RESPONDENT).*

1890.
December 9.

Criminal Procedure Code—Act X of 1882, ss. 17, 528.

A Magistrate, who is subordinate to Sub-Division Magistrate, is also subordinate to the District Magistrate within the meaning of Criminal Procedure Code, s. 528.

PETITION under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of the District Magistrate of Madura of the 7th October 1890, whereby a case pending against the petitioner on the file of the Taluk Magistrate of Periaiculam was transferred to that of the Sub-Magistrate of Kodaikanal.

(1) I.L.R., 12 Cal., 535.

* Criminal Revision Case No. 519 of 1890.

THAMAN
CHETTI
v.
ALAGIRI
CHETTI.

The facts of the case appear sufficiently from the following judgment:—

Mr. Wedderburn for petitioner.

The Government Pleader and Public Prosecutor (Mr. Powell) contra.

JUDGMENT.—In this case the Acting Joint Magistrate of Madura transferred a complaint of a coffee theft from the Second-class Magistrate of Kodaikanal to the Taluk Magistrate of Periaculam. But the Acting District Magistrate being of opinion that there were no sufficient grounds for the transfer, but that on the contrary there were very good grounds against it, withdrew the case from the file of the Taluk Magistrate and transferred it back to that of the Kodaikanal Sub-Magistrate. It is contended that the District Magistrate had no jurisdiction to order the retransfer under section 528, Criminal Procedure Code.

We are, however, of opinion that a Magistrate, who is subordinate to a Sub-Division Magistrate, is also subordinate to the District Magistrate within the meaning of section 528. Neither section 17, which declares such Magistrate to be subject only to the general control of the District Magistrate, nor schedule III which specifies the ordinary powers of a District Magistrate, can be so construed as to take away the special power conferred by section 528. We decline to interfere and dismiss this petition.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

SAMINATHA.*

Penal Code, s. 214—Screening an offender.

The accused agreed to give Rs. 10 to Saminatha Pillai in consideration of his not giving evidence against Kolundavelu, who was charged with the offences of house-breaking by night and theft in a building. Saminatha Pillai gave evidence against

Kolundavelu who was, however, acquitted. The accused was charged under Penal Code, s. 214, but was acquitted:

Held, that the acquittal was right.

QUEEN-
EMPRESS
v.
SAMINATHA.

CASE of which the records were called for by the High Court in the exercise of its powers of revision.

The facts of the case appear from the following judgment of the Sessions Judge:—

"It has been found against the appellant in this case that he agreed to give one Saminatha Pillai, a namesake of his, Rs. 10 in consideration of the said Saminatha Pillai not giving evidence against one Kolundavelu, who was charged with house-breaking by night and theft in a building. The Magistrate has held that the offence thereby constituted was one under section 214 of the Penal Code, the object being to screen the said Kolundavelu from legal punishment for the commission of the offences of house-breaking and theft. He has convicted the appellant accordingly and sentenced him to three months' imprisonment.

"In appeal the correctness of the finding of the Magistrate on the question of fact is first disputed. But I am quite satisfied that the appellant committed the act attributed to him. It was so fully proved that the appellant deposited his own finger-ring with the said Saminatha Pillai, as (according to the evidence for the prosecution) a guarantee for the performance of his promise of a present of Rs. 10, that the appellant himself could not deny the fact of the deposit, but urged in defence an absurd story that the ring was given to the witness as a token that he was being sent upon a certain errand by the appellant, although, as a matter of fact, he never went. Now the Magistrate has found that there was no reason to send Saminatha Pillai upon this errand, because, in the first place, another man had already been sent upon it, and there was no immediate hurry for despatching another messenger, and, in the second place, that, if a second messenger had been required, Saminatha Pillai was the last man to be pitched upon because he was then waiting as a witness in attendance at the Magistrate's Court. The ring having admittedly been given to the said Saminatha Pillai, the whole question for determination was whether Saminatha Pillai's version of how he came by it or that of the appellant was the true one. And I entirely

* Criminal Revision Case No. 499 of 1890.

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"agree with the Magistrate's finding in favour of the case for the prosecution.

"But on the other ground of appeal, as to the legality of the conviction, I am unable to find that the facts found against the appellant constitute an offence under section 214 or any other section of the Penal Code. Section 214 seems to me clearly to imply that an offence has either been committed by, or established against, the person who is to be screened from legal punishment therefor. Now, in this case, the Kolundavelu, whom the charge says it was intended to screen from legal punishment, was found to have committed no offence, for he was acquitted of the house-breaking and theft by this very same Magistrate prior to his enquiry into the present charge, in spite of Saminatha Pillai having given evidence against him without succumbing to the temptation of the bribe. Further, assuming that Saminatha Pillai had, at the instigation of the appellant, falsely withheld his evidence against Kolundavelu, and that Kolundavelu had, in consequence, been acquitted, even then I would hold that the offence committed by the appellant would have been the abetment of giving false evidence—subornation of perjury—and would not constitute the offence under section 214 of screening a person from legal punishment for an offence. What is contemplated by that section I consider to be the rendering of some material assistance to a person to enable him to escape from legal punishment inflicted or about to be inflicted upon him. I do not think it refers to a case of false-swearing whereby the offender escapes conviction, for the giving of false evidence is punishable otherwise. If it were to be held that section 214 was applicable to such a case, the result would be that every venal false witness for a defendant would be liable under this section to punishment if the accused were in consequence of such false evidence to be acquitted: so that on these two grounds—first, that there must be an offence before a screening, and, secondly, that the giving of false evidence is not such a screening as is contemplated, I hold that section 214, under which the appellant has been convicted, is not applicable to his case.

"Nevertheless, I think, the appellant might appropriately be convicted of the abetment of giving false evidence, provided it was established that the evidence that Saminatha Pillai gave

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"against Kolundavelu was true, because, in that case, the appellant instigated him to give false evidence, and it is immaterial whether the offence was committed or not according to explanation 2, section 108 of the Penal Code. It is no offence to bribe a man to refrain from giving false evidence which is what leads me to say it is essential to find that the evidence Saminatha Pillai gave against Kolundavelu was true. There is nothing on the record, however, to prove its truth, while, on the contrary, it was found untrustworthy, and hence Kolundavelu's acquittal. At the best, it is doubtful whether it is true or not: so that in the absence of proof of its truth, it cannot be said that the appellant instigated the giving of false evidence. As this appears to me the only other possible offence the appellant could have committed, and as that will not stand, I must, in reversal of the Lower Court's conviction, direct his acquittal, and immediate release from jail. Ordered accordingly."

Subramanya Ayyar for accused.

The Government Pleader and Public Prosecutor (Mr. Powell)

contra.

Besides the cases mentioned in the judgment, the following authorities were referred to in the argument:—*Queen v. Bhohisan Mahatoon*(1); *Queen v. Hurdut Surma*(2); *Empress v. Amiruddeen*(3); *Stephen's Digest of Criminal Law*, art. 142 (b), p. 100; 1 *Hawkins' Pleas of the Crown*, p. 64; 1 *Russell on Crimes*, p. 265.

JUDGMENT.—We consider that the accused was properly acquitted. It is not denied that Kolundavelu Pillai was acquitted of the offences of house-breaking and theft, and that he was not liable to legal punishment. But it is contended that it is not necessary that an offence should be actually committed, or that the person charged should be really liable to be punished for such offence. We do not, however, think that it was the intention of the legislature to punish the giving of gratifications, under a delusion that an offence had been committed or that a person was guilty of such offence. The words "concealing an offence" and "screening any person from legal punishment for any offence" appear to us to presuppose the actual commission of an offence, or the guilt of the person screened from punishment.

• (1) W.R., 1864, Cr. Rul., 4. (2) 8 W.R., Cr. Rul., 68. (3) 1 L.R., 3 Cal., 412.

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The cases cited by Mr. Mayne under sections 213 and 214, Indian Penal Code (*Regina v. Best* (1)), *Rex v. Richard Gotley* (2) were decided under 18, Elizabeth, chapter V, s. 4, in which the words "upon colour or pretence of any matter of offence" were used. We are of opinion that the decision *Empress of India v. Abdul Kadir* (3), *Queen-Empress v. Fateh Singh* (4), and *Matuki Misser v. Queen-Empress* (5), which have reference to the construction to be placed upon similar words in section 201 apply to this section also. The Public Prosecutor draws our attention to *Queen v. Hurdut Surma* (6) wherein the same expression was differently construed with reference to section 218 of the Indian Penal Code, but that section has reference to public servants who disobey a direction of law.

As pointed out by Jackson, J., in *Queen v. Joynarain Patro* (7), we think the intention was to discourage malpractices, when offences have really been committed, or when persons really guilty are screened, and not to ensure general veracity on the part of the public in regard to imaginary offences or offenders. We therefore decline to interfere.

APPELLATE CIVIL.

Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

ABDOOL AND OTHERS (CREDITORS), APPELLANTS,

v.

MAHAMED (INSOLVENT), RESPONDENT.*

Insolvent Act—11 & 12 Vict., cap. 21, ss. 72 and 73—Appeal—Limitation—Evidence.

Certain creditors of an insolvent appealed against an order declaring him entitled to his personal discharge. The appeal time expired during the vacation of the Court and the appeal petition was presented on the day when the Court re-opened. During the insolvency proceedings evidence was not recorded under section 72, and the appellant sought on appeal to use the Commissioner's notes of evidence:

- (1) 2 Moody, C.C., 124. (2) Russ & R., 84. (3) I.L.R., 3 All., 279.
(4) I.L.R., 12 All., 432. (5) I.L.R., 11 Cal., 619. (6) 8 W.R., Cr. Rul., 68.
(7) 20 W.R., Cr. Rul., 66. * Original Side Appeal No. 24 of 1890.

Held, (1) that the appeal was not barred by limitation;
(2) that it was not competent to the Court to refer to the Commissioner's notes.

ABDOOL
v.
MAHAMED.

APPEAL against the order of Sir Arthur J. H. Collins, Chief Justice, dated 14th April 1890, made in the Court for the relief of Insolvent Debtors at Madras, in case No. 88 of 1888.

Sundara Ayyar for appellants.

Mr. Johnstone for respondent.

JUDGMENT.—Two preliminary objections are taken.

As to limitation we observe that the appeal time expired during the annual vacation of the High Court, and the appeal petition was presented on the first day the Court re-opened. It is, therefore, in time—*Reference under Forest Act V of 1882* (1).

The next objection is that no evidence was recorded under section 72 of the Insolvent Act, and under section 73 we are not at liberty to refer to the notes of evidence taken by the learned Commissioner.

It has been so held in several cases—by this Court in *Best & Co. v. Kalliana Chetti* (2), and by the High Court of Calcutta in *re Ajudhia Prasad* (3), and by the Bombay High Court in *re Lakshmidas Hanraj* (4), and *Kallindas Kirparam v. Trikamlal Gulabrai* (5).

The second objection must be allowed.

The appellants' vakil admits that unless he is permitted to refer to the notes of evidence, he cannot support the appeal. The appeal, therefore, fails, and we must dismiss it with costs.

Wilson & King attorneys for respondent.

- (1) I.L.R., 10 Mad., 210.
(3) 7 B.L.R., 74.
(5) 9 Bom. H.C.R., 307.

- (2) Appeal No. 36 of 1880, unreported.
(4) 5 Bom. H.C.R., 63.

APPELLATE CIVIL.

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

VANANGAMUDI (PLAINTIFF), APPELLANT,

v.

RAMASAMI (DEFENDANT), RESPONDENT.*

Letters Patent, s. 15—Judgment—Civil Procedure Code, s. 622—Landlord and tenant—Suit for rent.

In a suit in a small cause Court for rent due in respect of two pieces of land, the Court passed a decree in favour of the plaintiff. The defendant preferred a petition to the High Court under Civil Procedure Code, s. 622, which came on for hearing before one Judge. He held that the small cause Court had failed to give effect to a former decree between the parties in respect of one piece of land, and made an order reversing the decree as to that, and calling for a report of what was due on the other piece of land. The plaintiff preferred an appeal under Letters Patent, s. 15:

Held, (1) the abovementioned order was subject to appeal as being a judgment;

(2) even if the Subordinate Judge had failed to give effect to the previous decree, the error was not such as to give the Court jurisdiction to revise his proceedings under Civil Procedure Code, s. 622.

APPEAL under Letters Patent, section 15, against the judgment of Shephard, J., in civil revision petition No. 218 of 1888.

The above-mentioned petition was preferred under Civil Procedure Code, s. 622, against the decree of T. Kanagasabai Mudaliar, Subordinate Judge of Tanjore, in small cause suit No. 379 of 1887, in which the plaintiff sought to recover Rs. 449-0-3 from the defendant for the rent of certain lands. The Subordinate Judge passed a decree in favour of the plaintiff, whose claim he found to be in accordance with previous decrees between the parties. The defendant's petition proceeded on the grounds that he had no jurisdiction to entertain the suit as a small cause suit; that he was wrong in holding that the nature of the correct patta was determined in a former suit between the parties.

The civil revision petition came on before Shephard, J., who, on the 1st November 1889, made the following order:—

"It now appears that in the suits under the Rent Act, the terms of the patta as to the village of Pulithivayal were determined and therefore as to it the decree can be sustained. As to

"Koonur, there was no suit under the Act, and I cannot think that the decree in the civil suit No. 331 settled all questions as to the terms of the patta. The Subordinate Judge must be asked to report what is the amount due in respect of Pulithivayal. So far as regards the rent due for the other village, the decree must be reversed. Proportionate costs throughout."

The plaintiff preferred this appeal.

Mr. K. Brown for appellant.

Subramanya Ayyar and Sundara Ayyar for respondent.

JUDGMENT:—It is contended for the respondent that the order appealed against is not a final order and that no appeal lies under section 15 of the Letters Patent. We do not consider that this contention can be supported. The effect to be given to the word "Judgment" in section 15 was considered by Mr. Justice Bittleston in *Desouza v. Coles*(1), and it was held that the word has the general meaning of any decision or determination, whether final or preliminary, affecting the rights or the interest of any suitor or applicant. It was also pointed out that that meaning is suggested by the language of the Charter in clauses 15, 39 and 40. Though the order now before us called for a report from the Subordinate Judge, yet it contained the preliminary adjudication that the appellant was not entitled to recover any rent for the village of Koonur, and that the decree of the Subordinate Judge must be reversed so far as it related to that village.

On the merits, we are unable to support the order of the learned Judge. We find on the record a decision of the Deputy Collector in summary suit No. 34 of 1888, settling the terms of the patta to which the respondent was entitled for fasli 1298 under Act VIII of 1865. This being so, the Subordinate Judge has jurisdiction to decree the claim for rent, and, even assuming that the decree in original suit No. 331 declared that the appellant was entitled only to a money rent in respect of two items of land and not to varum, and that the Subordinate Judge had failed to give due effect to it, the error, if any, is not one by reason of which he assumed a jurisdiction which he did not possess. We are of opinion that it was not competent to the learned Judge to revise the decree of the Subordinate Judge under section 622 of the Code of Civil Procedure.

* Letters Patent Appeal No. 1 of 1890.

(1) 3 M.H.C.R., 386.

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v.
RAMASAMI. We set aside the order appealed against, and restore the decree of the Subordinate Judge. The respondent will pay the appellant's costs in this Court and of the proceedings in the Court below under section 622.

APPELLATE CIVIL—FULL BENCH.

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

RANGASAMI (PLAINTIFF). APPELLANT,

v.

KRISHNAYYAN AND OTHERS (DEFENDANTS). RESPONDENTS.*

1890.
March 17.
April 21.
1891.
Jan. 26.
April 2, 14.

*Hindu Law—Suit by the purchaser of an undivided share of family property—
Time when the share is ascertained.*

The purchaser from a member of a joint Hindu family of his share of a house which belonged to the family, sued for the partition and delivery of possession of the share purchased by him. The number of persons entitled as coparceners to the property of the family had increased between the date of the purchase and that of the suit. It did not appear whether the house constituted the whole or only part of the property of the family, and no question was raised as to the competency of the plaintiff to sue for a partial partition :

Held, by the Full Bench, that the share to be awarded to the plaintiff should be computed with reference to the state of the joint family at the date of the suit; by the Divisional Bench, that the decree appealed against, by which the plaintiff was to recover the value of the share of the house computed as above and not the share itself, was right.

SECOND APPEAL against the decree of K. R. Krishna Menon, Subordinate Judge of Tanjore, in appeal suit No. 397 of 1888, varying the decree of W. Gopalachariar, District Munsif of Tiruvadi, in original suit No. 425 of 1887.

Suit for partition and possession of a one-third share in a house belonging to the undivided Hindu family, of which the defendants were members, claimed by the plaintiff under a sale-deed in respect of it executed to him by defendant No. 2 in 1875. As the date of the suit, defendant No. 2 would have been entitled on partition to a one-tenth share only of the house, and the District Munsif held that the plaintiff could enforce his purchase

* Second Appeal No. 678 of 1889.

to that extent only and decreed accordingly. On appeal, the Subordinate Judge varied this decree of the District Munsif by awarding to the plaintiff the money value of this share.

The plaintiff preferred this second appeal.

Sankara Menon for appellant.

Mr. Johnstone for respondents.

This second appeal having come on for hearing before Handley and Weir, JJ., their Lordships made the following order of reference to the Full Bench :—

Order of reference to Full Bench.—“This is a suit to recover one-third share of a house and ground, the property of an undivided Hindu family consisting at present of a father (defendant No. 1), four sons (defendants Nos. 2, 3, 4 and 5), and a grandson (defendant No. 6), son of defendant No. 2. The share is claimed under a sale made by defendant No. 2 before the birth of defendants Nos. 4, 5 and 6. The only questions raised in second appeal are to what share of the house is the plaintiff entitled, and is the Lower Appellate Court right in giving him the money value of the share instead of the share itself. Both the Lower Courts found the plaintiff entitled only to one-tenth of the house and ground, that being the share to which his vendor (defendant No. 2) would now be entitled if he were seeking partition, and the Lower Appellate Court has awarded him Rs. 21, being one-tenth of the value he himself put upon the property. It does not appear from the record whether the property in question is the whole of the family property, but no question has been raised in this suit as to the competency of the plaintiff to sue for a partial partition.

The main question is does a purchaser of the undivided share of a Hindu in the family property acquire the share of his vendor as it is at the time of the sale or as it is at the time when he seeks to enforce his purchase. The point has not been expressly decided by any of the other High Courts, as far as we can discover, and Mr. Mayne in his work on Hindu law (4th Edition, § 336) treats it as an open question. We were disposed to hold upon the principles which have been laid down by this Court, as regulating alienations by members of an undivided family of their shares in the family property, that the Lower Courts were right in holding that the share to be taken by the plaintiff under his purchase from defendant No. 2 is the share to which his vendor would now be entitled on partition. The case is not governed

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by section 44 of the Transfer of Property Act, because the sale was made before the Act came into operation, though we think it would have made no difference if that section had applied, for it does not, in our opinion, purport to enlarge the right of alienation previously possessed by a member of an undivided family, and, if it did do so, its operation in that direction would be restricted by section 2, clause (d) of the Act, which saves any rules of Hindu law from being affected by it. The extent to which alienation by a member of an undivided family has been allowed in Madras, we understand to be that he cannot alienate any specific item of the family property, though less in value than his own share in the whole property, nor can he detach any portion of the family property and hand it over to his alienee; but he can, for valuable consideration, transfer his interest in the whole or in any part of the family property, and thereby he puts his transferee in the same place as himself, *i.e.*, gives him a right to immediate enjoyment jointly with the other coparceners of each item of the family property, and a right to demand partition at any time—*Virasvami Gramini v. Ayyasvami Gramini*(1), *Venkatachella Pillay v. Chinnaiya Mudaliar*(2), *Vitta Butten v. Yamenamma*(3). He cannot put his alienee in a better position than himself, and thereby prejudice his coparceners, and the alienee, therefore, must be liable, until he obtains partition, to the same fluctuations in the amount and value of the share caused by changes in the number and circumstances of the family, as his alienor would have been liable to had the alienation not taken place. It was pressed upon us in argument that if this be so, the purchaser might in some cases take nothing, for his vendor might die before anything was done to enforce the purchase, and also that if the purchaser is to be liable to have what he has purchased diminished by changes in the family he must also have the benefit if such changes should increase the share of his vendor. It seems to us that both these consequences logically follow from the legal position which the alienee occupies, and we do not see that they involve any absurdity. He who purchases the interest of a member of an undivided family in the family property purchases that which is from its nature uncertain, and the purchase must always partake of the nature of a speculative transaction; but

(1) 1 M.H.C.R., 471.

(2) 5 M.H.C.R., 166.

(3) 8 M.H.C.R., 6.

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he knows perfectly well what he is buying, and is not to be pitied if he gets less than he hoped for, any more than he is to be blamed if he gets more. The cases as to attachment of the share of a member of an undivided Hindu family in execution of a mortgage decree against him, seem to show that the Courts have recognized the liability of an alienee of such a share to be defeated by the death of his alienor before the alienation is enforced—*Suraj Bansi Koer v. Sheo Proshad Singh*(1), *Krishna Rau v. Lakshmana Shanbhogue*(2).

In the first of these cases, which was a case of a mortgage by a father, a sale in execution was allowed to the extent of the father's share, on the ground that the proceedings in execution had gone so far as to constitute in favor of the judgment-creditor a valid charge on the land to the extent of the father's share, which could not be defeated by his death before the actual sale, implying that but for such proceedings it would have been so defeated. In the last case, their Lordships of the Judicial Committee, say that they are not disposed to extend the powers of alienation of an undivided share in ancestral estate beyond the decided cases, which rest not on an admitted principle of Hindu law but on an exceptional doctrine established by modern jurisprudence. It was argued before us, on behalf of plaintiff that even assuming that the principle adopted by the Lower Courts in ascertaining what share plaintiff is entitled to was right, they have wrongly applied it. They hold that if a partition were now made, defendant No. 2 would only be entitled to one-tenth, because he has a son (defendant No. 6), who became by birth equally interested with him in the family property, and whose rights could not be affected by the sale by defendant No. 2, which is not shown to have been for family necessities. To this it is objected that defendant No. 6 was not born at the time of the sale by his father, and therefore cannot question that sale; that he acquired by birth only an interest in such part of his ancestral property as his father had not alienated before his birth, and therefore that he acquired no interest in his father's share in this particular property, and plaintiff is therefore entitled to one-fifth of the property in question.

In our opinion the principle contended for in this argument

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

(2) I.L.R., 4 Mad., 302.

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is inconsistent with those which, as we have stated above, we consider are to be deduced from the decisions of this Court as to alienations for value by a member of an undivided family of his share in the family property. It appears to us upon these principles that defendant No. 2 could not put the purchaser in a better position than he was in himself, and, therefore, that, as his share was liable to be diminished by the birth of a son before partition, the interest, which the purchaser took, must be equally so liable.

We should, therefore, have held, upon the principles above discussed, that the Lower Courts were right in declaring that plaintiff was only entitled to one-tenth share in the property in question.

We were, however, referred in the course of the argument to the judgment in *Srinivasa v. Gurumurti*(1). In that case a hypothecation by an undivided father was declared to be enforceable after his death against the family property to the extent of his share at the time of the hypothecation. The judgment is short and does not quote any authorities, and it appears to us to be in conflict with the principles which, as stated above, we think are to be deduced from previous decisions of this Court.

We think, therefore, that this case should be referred for the decision of a Full Bench.

The question which we would refer to the Full Bench is,—

To what share in the property in question is plaintiff entitled?

The case came on for hearing before a Full Bench, consisting of Collins, C.J., Muttusami Ayyar, Parker and Shephard, JJ.

Sankara Menon for appellant.

Mayne in § 336 expresses his views on the question, referring to *Vitla Butten v. Yamenamma*(2), in which it was alluded to incidentally only—see end of page 11 of the Report. I submit that the moment when an alienation takes place, the joint tenancy is severed and the purchaser becomes a tenant in common. This view is supported by *Vasudev Bhat v. Venkatesh Shanbhav*(3), where the question was whether an undivided coparcener is

entitled to alienate his share: compare also the opinion of Colbrook there cited, and see *Mahabalaya Bin Parmaya v. Timaya Bin Appaya*(1).

[*Muttusami Ayyar, J.*—The question there raised is settled now. The coparcener's interest is a vested and so an alienable interest. Here the question is whether the purchaser took the property as it stood.]

Ballabh Das v. Sunder Das(2) decided that a purchaser is not a coparcener; that was in the case of an auction purchase which it was held broke up the family. The sale-deed says "my one-third share"—*Pandurang Anandray v. Bhaskar Shadashiv*(3).

[*Muttusami Ayyar, J.*—If a father loses his sons and sells all his property, but the next day a son is born?]

The son could do nothing, the coparcener's interest vests only on his birth—See Mayne, § 316—*Girdharee Lall v. Kantoo Lall*(4).

[*Muttusami Ayyar, J.*—If here all the three coparceners sold all the family property, and the purchaser did not sue till more people were born?

Collins, C.J.—The Privy Council case was under the Dayasaga Law.

[*Muttusami Ayyar, J.*—Have you any Mitakshara case?]

Yes. *Virasvami Gramini v. Ayyasvami Gramini*(5), *Palani-velappa Kaundun v. Mannaru Nuikan*(6), *Rayachartu v. Venkataramaniah*(7) approved of in *Suraj Bansi Koer v. Sheo Proshad Singh* at page 101(8).

[*Collins, C.J.*—Why was the property sold, for a debt or what?]

It seems to have been for cash in hand, he says "for my expenses."

[*Muttusami Ayyar, J.*—There are two texts in Mitakshara as to a coparcener taking on his birth, and a quotation from Vyasa as to the accrual of a right of maintenance—*Deendyal Lal v. Jugdeop Narain Singh*(9) indicates doubt as to whether the latter text is not a total bar to alienation.]

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(1) Second Appeal No. 49 of 1888 unreported.

(2) 8 M.H.C.R., 6.

(3) 10 Bom. H.C.R., 139.

(1) 12 Bom. H.C.R., 138.

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

(7) 4 M.H.C.R., 60.

(2) I.L.R., 1 All., 423.

(5) 1 M.H.C.R., 471.

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

(3) 11 Bom. H.C.R., 72.

(6) 2 M.H.C.R., 418.

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

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But *Yekeyamian v. Agniswarian*(1), says it is only a moral precept, only directory, see page 309 of the Report.

[*Collins, C.J.*—Is there any ruling by the Privy Council that son can set aside a sale made by his father before his conception?]

I know of none. To revert to *Mahabalaya Bin Parmaya v. Timaya Bin Appaya*(2) the Court approved the principle laid down in *Vasudev Bhat v. Venkatesh Shanbhav*(3) as to the ascertainment of shares.

[*Collins, C.J.*—Referred to *Venkatachella Pillay v. Chinaiya Mudaliar*(4).]

The Bengal and Allahabad Courts take a different view on the question from those of Madras and Bombay, yet in order to protect the equities of the purchaser, they come to much the same conclusion.

[*Shephard, J.*—Was there other property besides the house?]

It does not appear. The price paid (Rs. 70) indicates it was one-third actually he was going to buy. Even the Bengal Court makes the price an equitable charge—*Mahabeer Persad v. Ramayad Singh*(5) approved in *Mudho Parshad v. Mehrban Singh*(6). Again, if we take period of suit, supposing members of the family die, the alienee would take a greater share than he bargained for, but it would be absurd for me to claim more than the one-third.

[*Muttusami Ayyar, J.*—Did he bargain for and buy a certain or an uncertain share? *Vitla Butten v. Yamenamma*(7) says the coparcenary interest is uncertain and fluctuating; what if a purchaser is foolish enough to buy from one coparcener a certain fixed share?]

The new members cannot object, because there is a severing of the coparcenary interest on the sale according to the Bombay cases.

[*Collins, C.J.*—You say they all become tenants in common of all the property.]

Yes.

[*Collins, C.J.*—If a son is born, is he a tenant in common or a joint tenant?]

(1) 4 M.H.C.R., 307. (2) 12 Bom. H.C.R., 188. (3) 10 Bom. H.C.R., 147.
(4) 5 Mad. H.C.R., 166. (5) 12 B.L.R., 90. (6) L.R., 17 I.A., 194.
(7) 8 M.H.C.R., 6.

On the one hand there are the members of the family, and on the other hand the purchaser—the new man.

[*Collins, C.J.*—You are limiting your proposition.]

The members of the family are joint *inter se*, but not so *quoad* the new purchaser.

[*Parker, J.*—His share cannot be reduced, though the share of members of the family can by subsequent births you say.]

Yes. The Bombay cases go to that.

[*Muttusami Ayyar, J.*—A family consists of three, one sells a third to a stranger—are these three tenants in common?]

The answer is given in *Vasudev Bhat v. Venkatesh Shanbhav*(1). I do not go beyond that.

[*Collins, C.J.*—The Chief Justice there says only a *sort of tenant in common* and explains his meaning.

Muttusami Ayyar, J.—Suppose a coparcener sells and re-buys, can he claim more than his ordinary share on partition?]

No. Another principle would come in then. The coparcener might have brought his suit for partition at any time; if he waits he must bear the risk.

[*Muttusami Ayyar, J.*—Does the purchaser stand in a better position than the vendor?]

The position of the vendor changes. *Ballabh Das v. Sunder Das*(2) shows the stranger cannot stand in the same position as his vendor in the coparcenary.

[*Muttusami Ayyar, J.*—There are two principles—(1) A purchaser gets his vendor's right to a partition *quoad* the thing bought; (2) if he buys an exact share, he cannot get more. I think these principles must govern the case.]

Subject to the principles laid down in the Bombay cases, where, however, it does not appear whether any new members were born. In any case the money I paid will be a charge on the rest.

Mr. Johnstone for respondents.

The plaintiff did nothing for twelve years, meanwhile the other members of the family were born. Moreover, there is other family property, so he would not be entitled to partition in the family house anyhow.

As to the purchaser's right to partition, see *Sadabart Prasad*

(1) 10 Bom. H.C.R., 147.

(2) I.L.R., 1 All., 429.

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Sahu v. Foolbush Koer(1), where the meaning of partition is given and explained with reference to *Appovier v. Rama Subba Aiyar*(2) and see page 44 of the Report per Peacock, C.J., as to the nature of the tenancy, whether common or joint.

[*Collins, C.J.*—Is that in accord with *Vitla Butten v. Yamenamma*(3) ?]

The reasoning substantially approved there as far as necessary for me, though the decisions are not the same. One member of the family cannot alienate any specific part of the property until it is ascertained. As to *Vasudev Bhat v. Venkatesh Shanbhav*(4), and *Mahabalaya Bin Parmaya v. Timaya Bin Appaya*(5) neither is applicable. The observations quoted from *Ballabh Das v. Sunder Das*(6) were unnecessary and *Pandurang Anandray v. Bhaskar Shadashiv*(7)—see note on page 75 of the Report affecting the authority of *Vasudev Bhat v. Venkatesh Shanbhav*(4) bears out my proposition that a share must be ascertained before it is alienable.

[*Shephard, J.*—If three members constituted a family, and one conveyed away his one-third share and afterwards others are born ?]

The ascertainment still could only take on partition, and on partition the new members could share. If they agreed together by selling by one deed, &c., the agreement would be tantamount to partition.

[*Shephard, J.*—One man might successively buy three-thirds, would he not be entitled to the whole ?]

No, because that would not be the agreement—see *Madho Parshad v. Mehrban Singh*(8) as to power of a coparcener to alienate.

The case having stood over for consideration, COLLINS, C.J., read the following judgment which he said was the judgment of himself and MUTTUSAMI AYYAR, J.

COLLINS, C.J.—As purchaser of the second defendant's coparcenary interest in a house and ground belonging to his joint family, the appellant (plaintiff) claimed a third share therein as the allotment due to him by right of purchase. At the time of the sale, the joint family consisted of the vendor (defendant

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No. 2) and of his father and brother (defendants Nos. 1 and 3), but at the date of the suit defendant No. 1 had two more sons (defendants Nos. 4 and 5), and defendant No. 2 had a son, viz., defendant No. 6 in the suit. If the vendor claimed partition immediately before the sale, his allotment would be a third share, but if he claimed partition at the date of the suit, it would be reduced to a tenth share. The question referred for the opinion of the Full Bench is whether the share to be awarded to the purchaser ought to be computed with reference to the number of coparceners constituting the joint family at the time of the purchase or at the time of the suit.

In *Veeraswami Gramini v. Ayyaswami Gramini*(1), it was held, in 1863 by Sir Colley Scotland, C.J., and Mr. Justice Bittleston that, according to Hindu law current in Madras, the member of an undivided family may alien the share of the family property to which, if a partition took place, he would be individually entitled. That decision was followed by another Division Bench in 1870 in *Venkatachella Pillay v. Chinnaiya Mudaliar*(2). The principle on which these decisions rest is that the vendor could confer a valid title not to "any specific portion of the joint family property, but only to his beneficial estate as an undivided coparcener with the incidental right of partition." Again in *Vitla Butten v. Yamenamma*(3) decided in 1874 the same principle was recognized as settled by a long course of decisions, but it was held to be subject to this limitation, viz., that when the alienation is by will, the will is of no effect, and the right of survivorship being in conflict at the moment of death with the right by devise, the former, as the prior title, prevails against the latter. In *Appovier's case*(4) the Privy Council observed that according to the true notion of a joint Hindu family, no individual member of that family, while it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. Again in *Deendyal Lal v. Jugdeep Narain Singh*(5), the Judicial Committee held that the right of a purchaser at an execution sale of a coparcener's interest must be limited to that of compelling the partition which his debtor might have compelled, had he been so

(1) 3 B.L.R., F.B., 41.

(2) 11 M.I.A., 75.

(3) 8 M.H.C.R., 6.

(4) 10 Bom. H.C.R., 147.

(5) 12 Bom. H.C.R., 138.

(6) I.L.R., 1 All., 429.

(7) 11 Bom. H.C.R., 72.

(8) L.R., 17 I.A., 194.

(1) 1 M.H.C.R., 471.

(2) 5 M.H.C.R., 166.

(3) 8 M.H.C.R., 6

(4) 11 M. I.A., 75.

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minded, before the alienation of his share took place. They observed that the partner of a firm could not himself have sold his share so as to introduce a stranger into the firm without the consent of his copartners, but the purchaser, at the execution sale, acquires the interest sold with the right to have the partnership account taken in order to ascertain and realize its value. Their Lordships observed that the same principle ought to be applied to shares in a joint and undivided Hindu estate, but that it ought to be applied without unduly interfering with the peculiar status and rights of the coparceners in such an estate. Moreover, the definition of partition contained in Chapter II, Section I, Verse 4 of the Mitakshara throws light on the nature of a coparcener's estate both prior and subsequent to partition. Partition or Vibhaga, says the Commentator, is the adjustment of diverse rights regarding the whole (of the joint estate) by distributing them on particular portions of the aggregate. According to the Mitakshara law then, by which the vendor's family in the case under reference is governed, each coparcener acquired by birth a joint interest in family property, and while it may be alienated for value, the specific allotment into which it is to be converted, is liable to variation according as existing coparceners die or new coparceners are born, until it is adjusted by partition and a specific allotment is severed from the joint estate and converted into specific individual property. Such being the case, the purchaser, who can only take what can be lawfully sold, must be taken to purchase an uncertain and fluctuating interest with the right of converting it at any moment after the purchase by partition into definite separate property. In the case before us, the delay in suing for partition is imputable to the purchaser, and as new coparceners have meanwhile come into existence, the share to be awarded to him must diminish *pro tanto* on the simple ground that what he could lawfully purchase was an uncertain interest to be computed into a definite share with reference to the coparcenary law at the time of partition. As to the question that if the interest purchased is liable to diminution by changes in the family subsequent to the sale and prior to partition, it must be taken to increase when there is a diminution in the number of coparceners, it is not necessary to determine it for the purpose of this reference. In the case before us the coparceners increased and did not diminish

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in number. If they diminished in number, and if it appeared that what was bargained and paid for by the purchaser was a specific share or quantum of interest, and not the vendor's coparcenary interest, such as it might be when partition was effected, it may be open to the vendor to say that the purchaser could not claim more than what he intended to buy and actually bought. As regards the contention that, if the vendor dies before the purchaser effects a partition, the purchaser will take nothing, it is also one which does not arise on the facts of the case before us. If it is necessary to notice it as an objection to the rule of decision indicated above, the answer is that the interests carved out by the sale vest in the purchaser at once and that the vendor being competent to sell, his subsequent death is an event which cannot divest the interest which has once vested; and for the purpose of giving effect to his contract of sale, the purchase must be dealt with as if the seller were alive when the purchaser demands partition. We answer the question referred to us by saying that the share to be awarded to the purchaser is to be computed with reference to the state of the joint family at the date of the present suit.

PARKER, J.—I concur.

SHEPHARD, J.—I concur.

This second appeal having come on before the Divisional Bench, after the determination of the above reference by the Full Bench, the Court delivered judgment as follows.

Mr. Subramanyam for appellant.

Mr. Johnstone for respondent.

JUDGMENT.—The decision of the Full Bench is that plaintiff is entitled only to one-tenth share of the house. It is argued that what was the actual share was not the question before the Full Bench, but we observe that the Division Court, which referred the case, distinctly held that one-tenth and not one-fifth was the share to which plaintiff was entitled, and this was expressly stated in the order of reference, and must have been considered by the Full Bench.

We refuse to interfere with the decree of the Subordinate Judge, giving Rs. 21, the value of the tenth share of the house, to plaintiff and not the share of the house itself.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

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

PRICE (PLAINTIFF), PETITIONER,

v.

BROWNE (DEFENDANT), RESPONDENT.*

Custom of trade—Notoriety and definiteness of custom—Requirements of a binding custom of trade.

Suit for damages for breach of a contract to let horses on hire. The plaintiff hired a pair of horses at Ootacamund from the defendant for a period of six months, and on one occasion drove them beyond the Municipal limits of the station; on their return the defendant took away the horses from the plaintiff, which was the breach complained of. The defendant pleaded that the plaintiff's user of the horses as above was contrary to the local custom of the trade:

Held, that since the alleged custom was not shown to be either certain or invariable or so notorious that persons should be held to enter into agreements with reference to it, it formed no defence to the action.

PETITION under Provincial Small Cause Court's Act, section 25, praying the High Court to revise the decree of W. E. T. Clarke, Subordinate Judge, Nilgiris, in small cause suit No. 226 of 1890.

Suit to recover Rs. 102-8-0 as damages for breach of contract. The plaintiff, by his wife, hired a pair of horses from the defendant, a Livery Stable-keeper, for a period of six months from 1st April 1890. On 7th May the defendant took away the horses from the plaintiff, which was the breach complained of. The defendant admitted the contract, but alleged that by a local custom of trade a condition was imported into it to the effect that the horses were not to be driven beyond the local and municipal limits of the station, and that the plaintiff had driven the horses in question beyond such limits on 6th May, and that he had, on that account, removed the horses.

The Subordinate Judge found that the custom alleged by the defendant was established by the evidence, but that it was not shown that the plaintiff or his agent had direct notice of the condition alleged to be imported thereby into the contract. He held that the second of these findings did not avail the

* Civil Revision Petition No. 406 of 1890.

plaintiff on the authority of *Juggomohun Ghose v. Manickchand*(1) and ruled that the defendant was justified in removing the horses, although apart from the custom there was nothing improper and unreasonable in the plaintiff's user of the horses, and accordingly dismissed the suit.

The plaintiff preferred this petition.

Mr. *Michell* for petitioner.—The Subordinate Judge finds that the use of the horses by the plaintiff on the occasion in question was a reasonable use; therefore on this finding alone he should have decreed for the plaintiff, for the defendant himself, in his written statement, says the horses could, by the contract, "only be used within local or other reasonable limits." It is true he adds "and not for journeys," but it is not shown by any evidence what distance amounts to a "journey" and what not, and the only limit which can be reasonably taken is a reasonable distance. The defendant's wife herself says it was permissible to drive to the Lawrence Asylum, which is a long way outside the Municipal limits, and back. Then where is the line to be drawn? How is the hirer to know what drive will be considered of a permissible distance, and what not so? Surely the only line which can be drawn is that which separates a reasonable from an unreasonable distance. If not, however, then the custom, which formed the alleged implied condition of the hiring, was an unreasonable custom, and also a vague custom, and therefore void: *The case of Tanistry*(2), *Raitt v. Mitchell*(3), *Nelson v. Dahl*(4). Further, a custom, to be binding, must be well known, or, as was said in *Nelson v. Dahl*(4), "notorious." The evidence for the defendant fails to show this, and plaintiff's witnesses deny that there was any such custom as that set up, when horses were hired for a month or longer, whatever might be the case when the hiring was for the day. The defendant's allegation that he always sends with horses, when hired, a card of rules by which driving outside Municipal limits is prohibited, is against him, for it tends to show that the alleged custom was not notorious. Moreover, the plaintiff was not a permanent resident, but a visitor at the place, and when it is sought to bind such a person by a local custom,

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(1) 7 M.I.A., 263.
(3) 4 Camp., 146.

(2) Davies Irish Rep., 78.
(4) L.R., 12 Ch. D., 568.

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knowledge of the existence of the custom must be brought home to him, which has not been done in this case: *Ex parte Powell*, *In re Matthews*(1), *In re Hill*(2), *Kirchner v. Venus*(3), *Stewart v. Cauty*(4), *Bartlett v. Pentland* (5), *Scott v. Irving*(6), *Easton v. London Joint Stock Bank*(7).

Mr. Johnstone for respondent.—The evidence proves the existence of the local custom alleged by the defendant. The Subordinate Judge sitting as a Small Cause Court has found that it exists, and his finding on the fact is conclusive. There is nothing unreasonable in such a custom. The limits fixed by the custom are not indefinite. They do not include long drives outside Ootacamund. Wellington is clearly beyond those limits. Plaintiff must be presumed to have known of the existence of the custom, but even if he did not know of it, he was bound by it: *Wigglesworth v. Dallison*(8), *Sutton v. Tatham*(9).

JUDGMENT.—The facts of the case are as follows: the plaintiff hired from the defendant at Ootacamund a pair of carriage horses for six months from the 1st of April 1890. On May 6th the horses were driven to Wellington and back. On May 7th the defendant took away the horses from the plaintiff's stables, on the ground that the plaintiff had broken the conditions of the contract of hiring by driving the horses beyond local and Municipal limits. The plaintiff denies that there was any such condition in the contract and sues for damages on account of the trouble and expense caused to him by the defendant taking away the horses.

The Subordinate Judge found that it was not proved that the plaintiff had any express notice of the condition set up by the defendant at the time the contract was made, and also that the drive to Wellington and back was not under the circumstances an unreasonable distance to take the defendant's horses; but he held that the defendant had established by evidence a valid trade custom as prevailing at Ootacamund by which it was generally understood that horses hired by the day or month could not be used beyond the local and Municipal limits of the station, and that this condition was impliedly imported into the contract between the plaintiff and the defendant. On this ground he dis-

(1) L.R., 1 Ch. D., 501. (2) L.R., 1 Ch. D., 503. (3) 12 Moore's P.C., 399.
(4) 8 M. & W., 160. (5) 10 B. & C., 760. (6) 1 B. & Ad., 605.
(7) L.R., 34 Ch. D., 95. (8) Sm.L.C. (8th ed.), p. 594. (9) 10 Ad. & E., 27.

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missed plaintiff's claim for damages and awarded to the defendant Rs. 25-13-4 as due to him by the plaintiff for having taken the horses to Wellington.

The points before us are (1) Whether there is legal evidence of a valid custom? And (2) whether, if so, the contract is affected by the custom?

On the facts as found by the Subordinate Judge, the defence must fail unless the special custom is established. Now, to quote the words of Jessel, M. R., in *Nelson v. Dahl*(1), the existence of a special custom is a question of fact and the custom must be strictly proved. It must be so notorious that every body in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable and it must have quite as much certainty as the written contract itself. In *Kirchner v. Venus*(2) the Privy Council observed that when evidence of the usage of a particular place is admitted to add to or in any manner affect the construction of a written contract, it is admitted on the ground that the parties who made the contract are both cognizant of the usage and must be presumed to have made their agreement with reference to it, and no such presumption can arise when one of the parties is ignorant of the usage. We may take it therefore as well established and settled law that the legal requisites of a valid custom are, first, that it should be certain; secondly, that it should be invariable; thirdly, that it should be reasonable; and lastly, that the circumstances of the case must be such as to render it fair and reasonable to presume that the party, whom it is sought to affect by the custom, had knowledge of it as affecting the particular agreement made by him and that he made the agreement with reference to it.

Applying these principles to the present case, we find that the evidence adduced to establish the alleged custom or usage of trade in Ootacamund consists of the testimony of other Livery Stable-keepers (in addition to the defendant himself, his wife and son) and of only two gentlemen who have been long residents in the station. The defendant stated that the hiring was always local and added that customers, as a rule, knew his rules, but admitted he had to tell some. His wife considered that the difference between 'town' hiring and 'journey' hiring was well understood. Another

(1) L.R., 12 Ch. D., 568.

(2) 12 Moore's P.C., 361.

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witness, Murray, had lived 22 or 23 years in Ootacamund, and 20 years ago had been managing proprietor of a Carrying Company. Speaking of the usage as to the local hiring, he admitted that it is more honored in the breach than in the observance, thus showing that the usage was not invariable. Two other Livery Stable-keepers were called, Clarke and Bernard. The former stated that horses hired for local use should be used in the station, but admitted that if any one hired for six months, he would let him know that the horses should only be used locally, thus making it a special condition in a long contract. The other witness stated he never mentioned the condition about local limits to his customers as he thought the rule was well understood.

The only two residents examined, Messrs. Schmidt and Begbie, spoke to a general understanding that horses should be only used in Municipal limits, but it is evident that these gentlemen spoke merely of daily hiring. The first admitted he had never hired for a fixed period and the latter asserted that there were no fixed Municipal limits, adding that he should not consider it unreasonable with a good pair of horses to take them to Wellington and back if they had good rest and food.

This is all the evidence in support of the defendant's case. On the other hand witnesses were called to prove that persons in Ootacamund were in the habit of taking their horses to Wellington and back in the course of the same day, and that it was generally understood that persons who hired horses by the month might use them within any reasonable distance and were not confined to the limits of the Municipality.

The Subordinate Judge has, however, found that the use was not unreasonable provided the use was not excluded by the custom. As to this we are constrained to hold that the evidence adduced by the defendant does not establish the conditions we have enumerated above, and which are the legal requisites of a valid and binding custom. The alleged custom is not shown to be either certain or invariable. The restriction is not found to be reasonable when applied to this particular class of contracts of hiring for a specific number of months; nor is it shown to be so notorious that all persons so hiring can be held to enter into the contract with knowledge and notice of the custom.

We may further observe that even if the evidence had established a local custom as to hiring by the day or month, it

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is by no means clear that the contract in this particular case could be held to have been made with reference to such custom. The general rule of law is that where the term to be implied from the usage of trade is either inconsistent with or expressly excluded by the contract it cannot be implied. The defendant's wife stated in her evidence that the agreement was for six months certain and that, contrary to the usual practice, the horses were not to come back at night to the livery stables, but were to be kept by the hirer who promised to look after them as her own. It is evident that such an arrangement must give the hirer a very full control over the horses, and if the promise to 'treat them as her own' implies reasonable use as well as physical care, the plaintiff will be entitled to as full a reasonable use as he would have over his own horses, and the Subordinate Judge has found that the use was not unreasonable.

We must therefore set aside the decree and remand the suit for a determination of the second issue as to the amount of compensation to which the plaintiff is entitled. The petitioner is entitled to his costs in this Court and the costs of the Subordinate Court will abide and follow the result.

Barclay, Morgan and Orr, Attorneys for petitioner.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

APPU AND OTHERS (DEFENDANTS NOS. 5, 6 AND 8), APPELLANTS,

v.

RAMAN AND OTHERS (PLAINTIFFS NOS. 1 TO 5), RESPONDENTS.*

Malabar Law—Specific Relief Act—Act I of 1877, s. 58 (b)—Suit by junior members of a tarwad—Injunction restraining execution of a decree obtained in a suit against plaintiffs' karnavan.

In a suit brought in a Subordinate Court by the junior members of a Malabar tarwad against their karnavan and others, the plaintiffs prayed for a declaration of the uraima right of their tarwad in a certain devasom, and for an injunction to restrain the defendants, other than the members of the plaintiffs' tarwad, from executing a decree of a District Court, passed on appeal from a Munsif's Court, whereby certain lands of the devasom were decreed to be surrendered to them in

* Appeal No. 20 of 1890.

1891.
July 15, 18,
28.

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the character of uralers; it appeared (1) that plaintiffs' karnavan was a party to the suit in which the abovementioned decree was passed, (2) that the plaintiffs' tarwad was otherwise entitled to the uraima right by adverse possession, if not immemorial title:

Held, (1) that the plaintiffs were entitled to maintain the suit without proof of fraud and collusion on the part of their karnavan in the previous suit;

(2) that the injunction sought was not precluded by Specific Relief Act, s. 56 (b);

(3) that the plaintiffs were entitled to the decree as prayed.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 19 of 1888.

The plaintiffs sued, with the permission of the Court, obtained under Civil Procedure Code, s. 30, as representing all the junior members of their tarwad, of which defendant No. 2 was karnavan and defendant No. 3 was a member. Defendants Nos. 1 and 4 were members of another tarwad, which, however, originally formed one tarwad with that of the plaintiffs. It was alleged that these two tarwads possessed a common uraima right over the Parakoth devasom, and that the actual management of the devasom had always been in the hands of one or both of their karnavans. Defendants Nos. 5, 6 and 7 belonged to other tarwads, representatives of which had been joined as defendants in a suit brought against the karnavan of the plaintiffs' tarwad in 1854, and had then denied the uraima right of the plaintiffs' tarwad abovementioned. That suit was dismissed. In 1887 these defendants obtained a decree in appeal suit No. 215 of 1887 on the file of the District Court of North Malabar, to which defendants Nos. 1 and 2 were parties, for the restoration of certain lands of the devasom to them in the character of uralers. The plaintiffs now alleged that that decree was obtained "owing to the first defendant's incapacity and collusion, and the second defendant's culpable negligence."

The prayers of the plaint in the present suit were for a declaration that neither defendants Nos. 5, 6 and 7 nor their tarwad had any uraima right to the devasom in question and for a perpetual injunction restraining them from executing the last-mentioned decree.

The Subordinate Judge passed a decree as prayed. Defendants Nos. 5, 6 and 7 preferred this appeal.

Ramasami Mudaliar and Govinda Menon for appellants.

Sankaran Nayar and Ryru Nambiar for respondents.

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JUDGMENT.—The plaintiffs (respondents) are junior members of the Payyan Puthen Vittil tarwad, of which defendant No. 2 is the karnavan. Defendant No. 3 is also a member of this tarwad. Defendants Nos. 1 and 4 are members of Payyen Kandan Chirakal tarwad. All these were originally members of one tarwad, but at present there is only Ataladakkam right between the members of these two tarwads. Defendants Nos. 5, 6 and 7 (the appellants) are members of distinct tarwads who have obtained a decree awarding to them as uralers of the Parakoth devasom, the right to recover possession of certain devasom lands. The plaintiffs ask for a declaration that neither defendants Nos. 5 to 7 nor their tarwads have any uraima right in the Parakoth devasom, and that, if they ever had such right, they have lost it by lapse of time. They also seek a perpetual injunction to prohibit defendants Nos. 5 to 7 from executing the decree they have obtained.

The Subordinate Judge found that defendants Nos. 5 to 7 had not made out their uraima right, that if they ever had any such right, they have lost it by non-user for about 100 years, and that plaintiffs' family have had hostile possession since 1857. He, therefore, gave plaintiffs the declaration and injunction sought.

It will tend to elucidate matters if we first review the different suits between the parties. Admittedly, the management of the devasom has, for the last century or more, vested in the tarwad, of which plaintiffs and defendants Nos. 1 to 4 were members. The earliest suit was original suit No. 181 of 1854, which was filed by one Kamaran Nambiar to recover from the then karnavan of the plaintiffs' tarwad certain wet land which had been demised to a third party (the second defendant in the suit). The present defendant No. 1 and defendants Nos. 5 and 6 or their representatives came in as supplemental defendants. The karnavan of the plaintiffs' tarwad pleaded that the land was the jenm of the Parakoth devasom. The representatives of defendants Nos. 5 and 6 alleged that the land was the jenm of the devasom, but that defendant No. 1 (plaintiffs' karnavan) was not an uralan but a samudayom. The Court found that the land was the jenm of the devasom, dismissed the suit and referred the parties who disputed the uraima right to a civil suit. This was in March 1857. The next suit was original suit No. 663 of 1855 instituted by one Krishnan Nambudri to recover land demised to the

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devasom. Among the defendants were the representatives of all the parties to this suit, who were impleaded as uralers of the devasom. The representative of the present fifth defendant's tarwad denied the uraima right of the present plaintiffs' representative, and pleaded that the property was the jeam of the devasom. Plaintiffs' representative relying on the decree in the former suit (which had been passed before he put in his written statement) denied the uraima right of the present defendants Nos. 5, 6 and 7. The representative of the present sixth defendant also denied the uraima right of the plaintiffs' representative and asserted that the only uralers of the devasom were defendants Nos. 1, 5, 6 and 7. The Court found that the property sued for was the jeam of the then plaintiff; that the present plaintiffs' representative was the chief uralan of the devasom; that he managed the affairs and performed the ceremonies of the temple, and directed payment of the kanom amount to the plaintiffs' representative, and to the present first defendant as his direct karnavan. The other claimants, i.e., the present defendants Nos. 5, 6 and 7 were referred to a suit to establish their uraima right.

In 1882 the present defendants Nos. 1, 5, 6 and 7 instituted a suit (original suit No. 387) against the present second defendant for an account of the monies due to the devasom for the years during which he had been in management under the present first defendant. The defendant (second defendant here) denied that the plaintiffs were uralers and asserted that he was the sole and absolute uralan. It was held both by the Court of First Instance and by the Appellate Court (exhibits XLII and XLIV) that the present first, fifth, sixth and seventh defendants were uralers, and that the defendant (present second defendant) was a junior member of the present first defendant's tarwad and liable to account.

In 1886 defendants No. 5, 6 and 7 brought a suit (original suit No. 499, exhibit XLI) to recover certain devasom lands and arrears of rent. The present first defendant was, along with the tenant, a defendant. There was an issue whether the plaintiffs were uralers of the devasom, and it was found by both Courts that they were, and they obtained a decree for possession and rent.

It is first argued that the plaintiffs cannot maintain a suit for a declaration; that they cannot assert an uraima right unless

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they can prove fraud and collusion on the part of defendants Nos. 1 and 2, who were parties to original suit No. 387 of 1882, and reliance is placed on the decision in *Kelu v. Paidel*(1). That case however is not on all fours with the present. There, a suit had been brought by a third party against all the uralers of the devasom, and property of the devasom had been sold. Certain anandravers of the uralers then brought a suit to set aside the sale, and the Court held that the decree was binding on all future representatives of the devasom unless set aside on the ground of fraud or collusion. That is a very different case from the present. The ground of decision in that case was that the property of the devasom is vested in the uralers. The question in the present suit is not as to the property of the devasom, but as to the real status of the respondents. It is stated in the plaint that, owing to the first defendant's incapacity and collusion and to the culpable negligence of the second defendant, who failed to set forth a true plea, a decree was passed in favour of the respondents as uralers. It seems to us that the interests of the respondents, as reversioners, are sufficient to enable them to maintain the suit without proof of fraud or collusion on the part of defendants Nos. 1 and 2.

It is then argued that the decree of the Lower Court is contrary to law, inasmuch as it grants an injunction to stay proceedings in a Court not subordinate to the Court of the Subordinate Judge (Specific Relief Act, s. 56 (b)). By the decree of the Lower Court, the appellants are prohibited from executing the decree in appeal suit No. 215 of 1887 on the file of the District Court. We do not consider that this can be held to be an injunction to stay proceedings in the Court of the District Judge. Clause (b) of section 56 is apparently taken from section 24 (5) of the English Judicature Act of 1873 which was as follows:—"No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal shall be restrained by prohibition or injunction." The object of the enactment appears to have been to do away with the use of injunctions as a means for controlling proceedings in other Courts, and it has been adopted in Act I of 1877 to prevent in the Courts of this country the use of any such jurisdiction. But the

(1) I.L.R., 9 Mad., 478.

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effect of the injunction granted by the Lower Court is to prevent the appellants from applying to the Court to execute its decree. No application for execution has yet been made, and so long as the injunction is in force none can be made, and therefore no pending proceeding of a Court is restrained by the injunction.

With reference to the merits, we are of opinion that the Subordinate Judge has rightly decided (1) that the appellants have not made out their uraima right, and (2) that the possession of plaintiffs' tarwad as uralers since 1857 has been adverse to the appellants.

No reliance can be placed on the temple pymash of 1818 (exhibit XLIII), in which, moreover, only the representative of the fifth defendant's tarwad is to be found. This pymash is not signed by any responsible officer, nor is there anything to show by whose orders or in what manner it was prepared.

Now, this is the only document relied on by the appellants prior in date to the decree in original suit No. 663 of 1855, in which their claim to be recognized as uralers was not acknowledged. We have, however, been referred to a number of documents executed subsequent to the decree in the above suit as showing that one or other of the appellants has exercised uraima right by paying the wages of a drummer of the devasom, (exhibits XVI, XVII and XXV) and by dealing with land belonging to the devasom (exhibits XIII, XXIV and XL). Admittedly, there is no evidence to connect the lands referred to in these exhibits with the devasom, and in the fifth defendant's written statement they are referred to as "tarwad properties set apart for the devasom." It is not shown that Puthen Vittil tarwad has ever acknowledged the right of the appellants to deal with devasom lands, or to remunerate temple servants. The sole management has admittedly been from time immemorial in the Puthen Vittil tarwad, so that it is difficult to see what reliance can be placed on a few isolated transactions such as these, all of which took place after the alleged right of the appellants had been openly repudiated. Moreover, the evidence of the defendants' eleventh witness whose elder brother executed exhibit XXIV and of the twelfth witness whose brother executed exhibit XL shows clearly that these documents were not *bonâ fide* transactions. Defendant No. 6, who was examined as plaintiffs' sixth witness, admits that he has no documents to show

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that the lands which he asserts are held by him as uralan are devasom lands, or are held by him as such.

As to the performance of certain ceremonies, we concur with the Subordinate Judge that there is no reliable evidence to connect the performance of Kaliattom ceremonies with the rights of an uralan. There is evidence to show that such ceremonies are performed by many who have no claim whatever to the uraima right.

But even if it be admitted for the sake of argument that the tarwads of defendants Nos. 5, 6 and 7 once had the right claimed, it is clear that the plaintiffs' tarwad had been in adverse possession for more than 12 years, when original suit No. 387 of 1882 was instituted. Had exhibits A and B (the judgments in original suit No. 181 of 1854 and original suit No. 663 of 1855) been filed in that suit by the present first or second defendants, the Court would have seen that the appellants' claim to be regarded as uralers had been openly repudiated by the only managing uralan nearly 30 years before and that the respondents were in no sense agents of the appellants.

The decree of the Lower Court must be confirmed, and this appeal dismissed with costs.

APPELLATE CIVIL.

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

KARUNAKARA MENON (PLAINTIFF), APPELLANT,

v.

SECRETARY OF STATE FOR INDIA (DEFENDANT),
RESPONDENT.*

Inam Commission—Regulation IV of 1831 (Madras)—Act IV of 1862 (Madras)—Resumption of inam—East India Company's jaghire—Act of State—Menkaval lands—Mirasi rights, evidence of—Secondary evidence of lost grant by Government.

In a suit to declare the plaintiff's title to a shrotriem village which was included in the jaghire granted in 1763 by the Nabob of the Carnatic to the East India Company, it appeared that the village in question had been previously

* Appeal No. 94 of 1887.

1890.
Nov. 18.
1891.
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granted by the Nabob free of assessment to the Kazi of Madras as an endowment for his office, and afterwards to the son of the first grantee personally, without condition of service. In 1779 the British Government confirmed the village in perpetuity to the second grantee on account of the office of Kazi which he filled, and to his direct heirs who should be fit for that office. In 1862 on failure of the direct male line, the grantee's grandson by a daughter was nominated to the office of Kazi with the approval of Government, who directed he should hold the village, adding that it had been assigned as an endowment for that office. In the same year the Inam Commissioner confirmed it as a personal inam, enfranchised it and granted a title-deed to the holder. In 1866 Government ordered that the village should be registered as an endowment of the Kaziship and the title-deed cancelled, and in 1868 notified in the Gazette that the title-deed which was not produced was cancelled. Between the dates of the above order and notification the Kazi transferred the village to the plaintiff under a deed of perpetual lease and placed him in possession. But in 1873 Government resumed the village and subsequently directed that the whole of its net revenue be paid to the Kazi. The Kazi, from whom the plaintiff claimed, died in 1868. An inam of certain Menkaval lands, which had formerly been allotted to the village watchman as inam, had been granted to the Kazi in 1802-3; they were cultivated by raiyats who paid varam to the inamdar. The order of resumption in 1873 had no reference to these lands, but in 1877 Government issued pattas to the raiyats:

Held, (1) that the grant of 1779, the original document not having been produced by the plaintiff, was sufficiently proved by a translation produced from official custody and certified by the Collector in 1838 to be correct and attested by the Persian Translator to Government;

(2) that it was competent for the Government in 1779 to alter the nature of the grant of 1761 as an act of State;

(3) that on the right construction of Regulation IV of 1831 and Act IV of 1862, and in view of the facts that the plaintiff must have been aware of the nature of the tenure and of the contents of the grant of 1779 and the cancellation of the inam title-deed, the Government was not acting *ultra vires* in cancelling the enfranchisement, &c.;

(4) that the Kazi through whom the plaintiff claimed having died in 1868 there was no reason to question the resumption in 1873;

(5) that the plaintiff was entitled to possession of the menkaval lands, the action of Government in issuing pattas to the raiyats being *ultra vires*.

Issues first framed on appeal as to the plaintiff's claim to mirasi rights and menkaval lands. Evidence of mirasi rights considered.

APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in original suit No. 10 of 1885.

Suit for the declaration of the plaintiff's right to and for possession of a certain village being "an enfranchised inam village including menkaval maniem lands" and "all rights and privileges attached to the inam and mirasi rights aforesaid."

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

The District Judge dismissed the suit and the plaintiff preferred this appeal.

Mr. Nelson, Bhashyam Ayyangar and Sankaran Nayar for appellant.

The Government Pleader (Mr. Powell) for respondent.

JUDGMENT.—This was a suit brought by the appellant to establish his title as against the Crown to the shrotriem village of Coromandel in the District of Chingleput. The village was included in what was originally called the late East India Company's jaghire which was ceded by His Highness the Nabob Wallajah to the British Government in 1763. In 1760 the Nabob granted the village free of assessment and with all sources of revenue to one Fakruddin Mohamed Abubakar, Kazi of Madras, as an endowment for his office. In 1761 the Nabob re-granted it to the said Kazi's son, Mohidin Abubakar, for his personal benefit and that of his descendants without the condition of service. In 1779 the British Government, referring to the first grant, confirmed the village in perpetuity to Mohidin Mohamed Abubakar and such of his direct heirs of suitable qualification and fitness on account of the office which he filled. Mohidin Mohamed Abubakar since held the office of Kazi and died in 1808, and his son Mohamed Abubakar then succeeded to the office and to the inam village. Mohamed Abubakar died in 1862 and left no direct male heirs. There were then several claimants for the office and the Government approved of the nomination of one Abdul Kadir, a daughter's son of the original grantee, and directed that he should hold the village, adding that it was originally assigned as an endowment for the support of the Kaziship (exhibit I). In November 1862 the inam inquiry was extended to the village and the Inam Commissioner considered that the grant was apparently for the personal benefit of the holder, and confirming it accordingly as a personal inam in ignorance of the previous orders of Government on the subject, enfranchised it and issued a title-deed (exhibits F and G). In 1865 the matter came to the notice of Government and after calling for a report, the Government held that the right of the Kazi to the village depended on the British parvana or grant of 1779, and on 20th February 1866 directed that the title-deed, issued by the Inam Commissioner, be cancelled, and that the village be registered as an endowment of the Madras Kaziship (exhibit IV). In September 1867 the new

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Kazi transferred the village to the appellant under an instrument of perpetual lease and a deed of sale and placed him in possession. The title-deed, which the Government directed to be cancelled not being produced, it was notified in the *Fort St. George Gazette* of the 27th May 1868 that it had been cancelled. In 1872 the appellant claimed the wrecks within the limits of the village of Coromandel under the parvana or grant of 1760, and rejected certain terms offered by the Government in settlement of his claim on the ground that there was no law to compel him to accept them. On the 3rd April 1873 the Government referred to the perpetual lease granted by the late Kazi, as unauthorized and as nullifying to a considerable degree the intention of Government in continuing the gift of the late Nabob, and observing that there will always be a liability of the same thing happening so long as the endowment consists of an interest in land, resolved to resume the grant and to pay the Kazi, for the time being, a monthly allowance equivalent to the net income derivable by the inamdar of the village per annum. The village was accordingly resumed in April 1873, and in October 1876 the Government directed that the whole of its net revenue be paid to the then Kazi.

The appellant's case was that the tenure on which the village was held was personal, that the Inam Commissioner was right in enfranchising it as a personal inam, and that even if he was in error, it was not competent for the Government to cancel the title-deed once issued by him and to resume the village. He denied that the British Government issued any parvana in 1779 superseding that of 1761, and pleaded that even if it did, it was not competent for it to do so. On the other hand it was contended for the Crown that the British parvana of 1779 was genuine, that it superseded that of 1761, that the village was thus confirmed only as an endowment for the Kaziship of Madras on service tenure, that it was upon that grant the Kazi's right to the village depended, that its alienation to the appellant was improper and tended to defeat the purpose with which the grant was made, and that the village was therefore lawfully resumed on the 3rd April 1873, the net income derived from it being thenceforward paid to the Kazi of Madras for services rendered. The Counsel for the Crown suggested also in the Court below that the resumption of the village was an act of State and applied for a

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separate issue in regard to it; but the Judge considered that the question was embraced in the second issue, viz., whether the resumption of the inam by the Government is invalid and *ultra vires*. The Judge upheld the contention for the Crown and dismissed the suit with costs. Hence this appeal.

It will be observed that three parvanas are referred to in connection with the original grant of the village, but none of them is now forthcoming; and as they were issued more than 100 years ago it might be presumed, as alleged, that they had been lost. The finding of the Judge is that all the three parvanas were genuine, that they were issued in 1760, 1761 and in 1779; that by the first the Nabob Wallajah granted the village on service tenure; that by the second he granted it as personal inam, and that by the third the British Government confirmed the village subject to the terms of the first grant, viz., on the condition of the grantee and his heirs performing the duties of Kazi in the town of Madras. So far as the first two grants are concerned, the finding is not questioned in appeal and it is also sufficiently supported by exhibits C, D, E and IV, of which the substance is accurately stated by the Judge in his judgment. The contest in appeal is restricted to the British parvana of 1779. But that a British parvana did once exist and that it was relied on and accepted as the basis of title to the village there can be no doubt. The recital in exhibit B, which evidences the perpetual lease granted to the appellant by the Kazi of 1867 is that "the village was granted as inam to my ancestors by Nabob Wallajah in the year 1760 to be enjoyed by them hereditarily by sons and grandsons and confirmed by the Madras Government in the year 1779." Again, in 1838, the then Kazi claimed compensation for certain sources of revenue in the inam village of which the collection had been resumed by the Government, and actually produced the British parvana, among other documents, in support of his claim. The correspondence which took place on that occasion between the Collector, the Board of Revenue and Government shows, beyond doubt, that the then Kazi produced the British parvana of 1779, relied upon it as authentic and alleged that he once pledged it with one Sabapathy Mudali and since redeemed it, that at the instance of the Government the Collector then forwarded it for inspection, that from 1838 to 1840 it remained with the Government, and

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that in January 1841 it was returned to the Collector for delivery to the then Kazi (exhibits XI, XIII, XIV to XVII).

Another point which is urged upon us is that it was not competent for the Madras Government in 1779 to alter the nature of the grant made by the Nabob Wallajah in 1761, two years prior to the cession of the Jaghire and that the position of the East India Company was at that time that of a mere Jaghirdar. An ordinary Jaghirdar has no sovereign power and it is not correct to liken his status to that of the East India Company in 1779. The relation between the Company and the Nabob Wallajah was of a political character regulated by sannads issued by him, and any act done by them by virtue of that relation was clearly an act of State and governed by the principle laid down by the Privy Council in the case of the *East India Company v. Syed Ally*.⁽¹⁾

As regards the contention that the resumption of the village in 1873 was an act of State, we consider it sufficient to state for the purposes of this appeal that the alienation by the appellant's vendor of the endowment of his office cannot be upheld at all events beyond his life-time. As he died in 1868 we see no reason to question the resumption in 1873.

The only point which remains for us to consider is the claim set up by the appellant to certain Mirasi rights and Menkaval lands in the village. No issue has been framed and no information is to be had from the original judgment on the subject. Exhibit A purports to convey to the appellant for value "the single crop village Miras" with all its income whilst exhibit B evidences a perpetual lease of the Melvaram right and the income appertaining to it. And exhibit B, which is a copy of the order whereby Government resumed the village, directed that it be struck out of the Inam Register and classed under Jirayati, adding however that under that order there was to be no disturbance of the occupancy rights of any landholder, that the full assessment payable was to be levied and credited to Government and that that was all. Whilst thus the apparent intention was to levy the full assessment and not to interfere with any occupancy right, there is the averment in the written statement that the village has been in the defendant's possession since the

(1) 7 M.I.A., 555.

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date of the resumption. It is by no means clear whether under exhibits A and B, the appellant is entitled to any and what Mirasi rights and Menkaval lands and if so, whether his claim thereto is good as against the Crown and whether the Crown in any way interfered with it. We are unable to dispose of this part of the case without further inquiry and we shall direct the Judge to try the following issue and return a finding within one month from the date of the receipt of this order. Both parties are at liberty to adduce fresh evidence if so advised. Seven days after the date of the posting of the finding in this Court will be allowed for filing objections.

Issue.—Whether the plaintiff has any and what Mirasi rights and Menkaval lands in the village of Coramandel—and, if so,

Whether he has any cause of action as against the defendant and whether he is entitled to any and what decree in respect of such Mirasi right and Menkaval lands.

[The District Judge having returned findings on the above issues, the appeal came on for hearing again and the Court delivered judgment as follows.]

JUDGMENT.—On the issues sent down the Judge has returned the following finding (1) that a certain mirasi perquisite known as Reddi Merai did attach to the Inam and was collected by former Inamdars; but that such miras formed part of the Inam and was liable to resumption, and that plaintiff has no cause of action in respect of such mirasi perquisite; and (2) that certain Menkaval lands do exist, separate and distinct from the Inam lands, and that plaintiff has a right to recover them from the defendant.

The plaintiff-appellant has put in a Memorandum of Objections to the finding as to the Mirasi rights, and the defendant-respondent takes objection to the finding as to the Menkaval lands.

With reference to the Menkaval lands it appears from the record that 47-11-0 cawnies of land were formerly allotted as an Inam for the Head watchman of the village, that in Fasli 1212 the said Inam was resumed and made over to the Inamdar, the Kazi for the time being of the mosque, a quit-rent of Rs. 213-11-8 per annum being fixed thereon. This quit-rent was paid by the Kazi for the time being and by the plaintiff up to the year 1873 when Government resumed the grant of the village. The

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Melvaram of the said Menkaval lands was paid by the cultivators first to the Kazi and then to his assignee, the present plaintiff. The defendant's 4th witness was karnam of the village of Coramandel from 1877 to 1886. He deposes that before the resumption of the village the raiyats who cultivated the Menkaval lands paid varam to the Inamdar, that the Inamdar paid to Government a fixed amount for the Menkaval lands, whether the lands were cultivated or not, the Government having nothing to do with the raiyats who cultivated the said lands before 1877 when they issued pattas to them. The order of resumption makes no reference to the Menkaval lands, but directs the resumption of the village which was originally granted as the endowment of the Kazi and the payment to the Kazi of a monthly allowance equivalent to the net annual income of the village.

The grant of the Menkaval Inam to the Kazi in Fasli 1212 was an act entirely distinct from the grant of the village as an endowment of the Kazi and appears to have been an act of grace by the then Government. That grant never having been resumed or cancelled the issue of pattas to the raiyats was *ultra vires*. Government are entitled to the sum of Rs. 213-11-8 per annum from the plaintiff who alone can deal with the cultivators of the Menkaval lands.

With reference to the plaintiff's claim that the village is a Mirasi village and that he has a right of occupancy in the whole village, we observe that there is no satisfactory evidence of the exercise of any Mirasi right by any of the plaintiff's predecessors in title. We have been referred to exhibits G, VIII and XX as showing that the Kazi exercised Mirasi rights. Exhibit G is an extract from the Inam Register, 1862, and contains a remark made by the Inam Deputy Collector that the Shrotriendars are the Sub-Mirasidars of the village. What the meaning of this statement is not apparent, but it is a mere expression of opinion and is of no value as a piece of evidence. Exhibit VIII is an extract from the Minutes of Consultation of the Madras Government, dated 26th September 1854, and shows that Government repudiated the right of the Kazi to dispose by sale of any of the lands included in the Inam village of Coramandel, on the ground that the grant was a service and not a personal grant. Exhibit XX is the report of the Tahsildar to the Collector in February 1874. In that report he states that the Inamdar and the Izaradar had

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received Reddi Merai at the rate of 2 measures per kalam and that as the Inamdar appears to have sold land, which he could not have done, if he were entitled to Melvaram alone; the Tahsildar concludes that the Inamdar possessed the Kudivaram right also. We cannot attach any weight to this vague expression of opinion in the face of the strong oral evidence adduced by the defendant to show that the village is not a Mirasi village and that the Inamdar possessed no Mirasi rights.

The plaintiff will be entitled to a decree for possession of the Menkaval lands. In other respects the decree of the Lower Court is confirmed and the appeal dismissed with costs.

PRIVY COUNCIL.

SRIMANTU RAJA YARLAGADDU DURGA, PETITIONER,

P. C. *
1891.

AND

SRIMANTU MALLIKARJUNA, DECREE-HOLDER.

1891.
February 28.

On petition relating to an appeal from the High Court at Madras.

Privy Council—Practice—Refusal of rehearing—"res noviter."

The judgment of the Judicial Committee reported to and confirmed by Her Majesty in Council cannot be re-opened only for the reason that new evidence is forthcoming.

In re *Appa Rao*(1) referred to.

PETITION for rehearing an appeal from a decree (18th August 1885) of the High Court.

In *Srimantu Raja Yarlagaddu Mallikarjuna v. Srimanta Raja Yarlagadda Durga*(2) on the question of the partibility or impartibility of a raj estate, the judgment of the High Court was reversed on appeal to Her Majesty in Council in March 1890.

The District Judge of Kistna dismissed the suit which the present petitioner brought in 1880 to have the Devarakota Zamindari declared partible. That was the principal matter; but he also, as to a money claim declared the right of the plaintiff

* Present: Lords WATSON, HOBHOUSE, MACNAGHTEN, and MORRIS and Sir R. COUCH.

(1) I.L.R., 10 Mad., 73.

(2) I.L.R., 18 Mad., 406.

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to a third share, amounting to Rs. 1,806. The High Court reversed his decision holding the ordinary law to be applicable to the zamindari. As to the money the parties by consent accepted on the appeal a decree for Rs. 2,210 instead of the above. On the appeal to Her Majesty in Council, the judgment of the High Court was reversed, and the estate was declared to be impartible, the decree of the Subordinate Judge being restored in its entirety.

Mr. J. Rigby, Q.C. (with whom was Mr. J. H. A. Branson) supported the petition on notice to the decree-holder for a rehearing of the appeal on the ground that since the decision, documents affecting the merits had been found to be in the custody of the Board of Revenue at Madras. It was also added that the effect was that the part of the decree of the High Court made by consent, viz., as to the Rs. 2,210, had been set aside, and the amount decreed by the first Court, viz., Rs. 1,806, had been substituted.

LORD WATSON referred to the refusal to rehear the Nazvid case in *re Appa Rao*(1), and said that a judgment of their Lordships reported to and confirmed by Her Majesty in Council could not be re-opened merely because new evidence was forthcoming. A rehearing of an appeal decided by the Judicial Committee and followed by the order of Her Majesty in Council could only be granted in the cases referred to in the above decision, and in the event of some misprision having occurred, as for instance, the terms of the decree adjudicating something which had not been in the view of their Lordships' Board, or which they had not had the means of deciding, or where the decree did not carry out the terms of the judgment. In this case nothing of that kind had arisen, and as the litigation had been going on for years, it seemed hardly credible that documents of great moment in the custody of a public office could only have been discovered after three judgments.

Counsel said that it had been stated in an affidavit that his clients did not know of the existence of these documents until September last; and they seemed to disclose new matter. He referred to *Agnew v. Dunlop*(2) in which, in the year 1822, after a decision of the House of Lords, the suit was remitted to the

(1) I.L.R., 10 Mad., 73.

(2) House of Lords' Journals, A., 1822, 3 Geo. IV, vol. 55, p. 475.

Court of Session in Scotland for inquiries to be made upon evidence.

LORD WATSON said that the second ground in the petition, as to a variation between the amount in the decree consented to, and that in the decree which had been restored, involved only about £30; far less than what the costs would be.

Mr. J. D. MAYNE for the decree-holder was not called upon.

LORD WATSON in giving judgment said that their Lordships had come to the conclusion that, so far as the petition referred to the production of new evidence and a rehearing of the case on the merits, the application was altogether incompetent. So far as regarded the other point there was a difference; but, looking to the small amount involved, they would not be warranted in recommending Her Majesty in Council to remit this case for a rehearing. Under the circumstances they would make no order as to costs.

Solicitors for the petitioners: Messrs. Richardson and Sadleir.

Solicitors for the decree-holders: Messrs. R. and T. Tasker.

SRIMANTU
RAJA
YARLAGADDU
DURGA
v.
SRIMANTU
MALLI-
KARJUNA.

APPELLATE CIVIL—FULL BENCH.

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

RAMAYYAR (DEFENDANT), APPELLANT,

v.

VEDAOHALLA (PLAINTIFF), RESPONDENT.*

Rent Recovery Act—Act VIII of 1865 (Madras), ss. 3, 4, 7, 8, 9, 87—Suit to enforce exchange of patta and muchalka—Amendment of patta.

Held by Collins, G.J., Muttusami Ayyar and Parker, J.J., (Shephard, J., diss.) that an ordinary Civil Court has jurisdiction to entertain a suit to enforce acceptance of a patta and execution of a muchalka. Held further that if the patta which has been tendered is found not to be a proper one, such a Court cannot amend it and direct the tenant to execute a muchalka corresponding with it as amended, but can, in a suit properly framed for that purpose, pass a decree declaring what is a proper patta.

SECOND APPEAL against the decrees of S. T. McCarthy, District Judge of Chingleput, in appeal suit No. 33 of 1869, confirming

* Second Appeal No. 1632 of 1869.

RAMAYYAR v. VEDACHALLA. the decree of C. Sury Ayyar, District Munsif of Chingleput, in original suit No. 510 of 1887.

Suit by a landlord against his tenant to enforce the acceptance of a patta tendered by him or any patta which the Court may deem proper and the execution by the defendant of a corresponding muchalka. The defendant admitted tender of a patta, but pleaded that it was not such a patta as he was bound to accept. The District Munsif directed that the patta should be amended and decreed that the defendant should accept it as amended, &c. The District Judge on appeal confirmed this decree. The defendant preferred this second appeal.

This second appeal having come on for hearing before Collins, C.J. and Best, J., their Lordships made the following order of reference to the Full Bench :—

ORDER OF REFERENCE TO FULL BENCH.—It is objected, on behalf of the appellant, that the suit should have been dismissed on its being found that the patta tendered was not a proper one and that the District Munsif had no power to amend the patta.

This contention is in accordance with the dictum in *Narasimha v. Suryanarayana*(1), where, in remanding a suit (for enforcement of acceptance of patta and execution of a corresponding muchalka) for disposal afresh after amendment of the plaint by the addition of a prayer for a declaration of the plaintiff's title, it is said that plaintiff can only be entitled to such declaration "if he succeeds in proving that he has before suit tendered a patta in the form in which the defendant was bound to accept it," and it is added "it is not competent to the Court trying this question to exercise the power of amending the patta which the Collector has under section 20 of the Act," i.e., Madras Act VIII of 1865.

On the other hand, in *Easwara Doss v. Pungavana Chari*(2), it has been held that a Civil Court has jurisdiction to modify a patta when it is found improper, and to enforce the execution of a corresponding muchalka. The former case was considered in the latter and held to be reconcilable with the decision in the latter, on the ground that the observation in the former 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," and

(1) I.L.R., 12 Mad., 481.

(2) I.L.R., 13 Mad., 361.

it is added "we also find that *Karim v. Muhammad Kadar*(1) was not cited and overruled in *Narasimha v. Suryanarayana*(2)." RAMAYYAR v. VEDACHALLA.

Karim v. Muhammad Kadar(1) merely decided that a suit to enforce acceptance of a patta is maintainable in the ordinary Civil Courts. The further question whether the Civil Courts can amend the patta sought to be enforced was not then under consideration. Further, it does not seem to us that the observation in *Narasimha v. Suryanarayana*(2) as to the competency of the ordinary Civil Courts to amend a patta can be given the restricted meaning assigned to it by the learned Judges who disposed of the subsequent case. *Easwara Doss v. Pungavana Chari*(3). There is thus, in our opinion, a conflict of decisions which requires a reference to a Full Bench of the question "whether an ordinary Civil Court has power to amend a patta." We think it would be as well to refer to the Full Bench at the same time the question "whether an ordinary Civil Court has jurisdiction to entertain a suit for acceptance of patta and execution of muchalka"—as to which a doubt has been expressed in *Narasimha v. Suryanarayana*(2), and the correctness of the decision on the point in *Karim v. Muhammad Kadar*(1) is not free from doubt.

This second appeal came on for hearing before the Full Bench consisting of Collins, C.J., Muttusami Ayyar, Parker, and Shephard, JJ.

Parthasaradhi Ayyangar for appellant.

Srirangachariar for respondent.

MUTTUSAMI AYYAR, J.—The first question referred for our decision is whether a suit to enforce the acceptance of a patta can be maintained in a Civil Court, and I think it should be answered in the affirmative. So early as 1879, it was held by a Division Bench of this Court in *Karim v. Muhammad Kadar*(1) that the suit is cognizable by a Civil Court. In 1889, however, another Divisional Bench expressed a doubt in *Narasimha v. Suryanarayana*(2) as whether the suit would lie in a Civil Court inasmuch as the duty of accepting a patta and giving a muchalka was one imposed by statute and a special remedy for enforcing it was prescribed by the same statute. It was, however, observed that the object of Act VIII of 1865 in requiring the exchange

(1) I.L.R., 2 Mad., 89. (2) I.L.R., 12 Mad., 481. (3) I.L.R., 13 Mad., 361.

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of patta and muchalka was to insure the existence of evidence of the terms of the holding, and as a landlord could, on a proper occasion arising, certainly maintain a declaratory suit, so, in such suit, he might obtain by way of consequential relief, the delivery of a muchalka corresponding to the patta tendered by him.

The ground of this reference is the doubt expressed as stated above.

In the recent case of *Vallance v. Falle*(1), it was pointed out by the Court of Queen's Bench that the question to be considered in cases of this description is whether the provisions and the object of the particular enactment under consideration disclose an intention to create a general right, which may form the subject of an action or to create a duty protected by a particular remedy. *Beckford v. Hood*(2) stated the general rule to be this—where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of evidence of a contrary intention, be resorted to; but where a statute is confirmatory of a pre-existing right, the new remedy is presumed as cumulative or alternative, unless an intention to the contrary appears from some other part of the statute. The learned Judges, who decided the case *Karim v. Muhammad Kadar*(3), appear to me to have kept in view the foregoing principles. After referring to section 3 of Act VIII of 1865 and to the value of a patta as the pre-appointed evidence of a tenancy and its terms, they say that, when the action of the tenant precludes the landlord from doing what the law enjoins upon him, and without which he is disabled from making use of any of the summary remedies under the Act, he will have his right of action to compel the tenant to do that which will enable the landlord to conform to the law, unless such right of action is taken away by the other provisions of the law.

Again section 7 of Act VIII of 1865, which was held to be of general application by a Full Bench in *Gopalasawmy Mudelly v. Mukkee Gopalier*(4), constitutes the acceptance of a patta by the tenant or the tender by the landlord of a proper patta into a condition precedent to the right to enforce the terms of a tenancy. Thus, the right which the section deals with is the

(1) 13 Q.B.D., 109.
(3) I.L.R., 2 Mad., 89.

(2) 7 T.R., 620.
(4) 7 M.H.C.R., 312.

ordinary civil right to recover rent or to enforce the other terms of the tenancy, and the jural relation of which the contents are to be evidenced by the patta is that of landlord and tenant. Both the right and the jural relation are not created by Act VIII of 1865, but are a pre-existing civil right, and a legal relation over which the Civil Courts have always exercised jurisdiction. Again, the duty to exchange patta and muchalka was not first created by Act VIII of 1865, but it was created in 1802 by Regulation XXX of 1802. Nor is the relation of that duty as a pre-requisite of the right to recover rent, the creature of the Rent Act, inasmuch as section 9 of Regulation V of 1822, directed that suits for arrears of rent be dismissed where no patta had been granted.

The question then before us is one of an act of the Legislature dealing with a pre-existing civil right and confirming it together with a pre-requisite of the right of action by which that right is protected. It is therefore governed by the general rule that, when a statute confirms a pre-existing right, the new remedy is to be considered as an alternative one in the absence of a provision of law to the contrary.

Turning again to the nature, the object and the provisions of Act VIII of 1865 there are distinct traces of an intention to create a cumulative remedy only. It will be noted that both sections 8 and 9, which prescribe suits to be instituted before Collectors, declare them to be *summary* suits. Seeing that by Regulation V of 1822 summary jurisdiction was conferred upon Collectors without taking away the jurisdiction exercised by the Zillah Courts, and seeing also that Act VIII of 1865 purports to consolidate and improve the pre-existing rent law, the inference is that the word 'summary' negatives an intention to take away the jurisdiction, which the Civil Courts had theretofore exercised and denotes on the contrary an intention to create an alternative or expeditious remedy. There is another reason which appears to me to confirm this view. Section 7, which is of general application, makes the exchange of patta and muchalka, a condition precedent not only to the landlord pursuing the special remedies available under the Act, but also to his instituting suits for arrears of rent and for rates of rent which are declared by section 87 to be cognizable by Civil Courts. If the view that sections 8 and 9 create an exclusive jurisdiction in Collectors over suits to enforce the accept-

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ance of a patta were to prevail, it would contravene the ordinary rule that, when a Civil Court has jurisdiction in respect of a civil right, a suit to enforce a condition precedent for the purpose of preserving that right is as much a suit of a civil nature as a suit to recover the produce of that right, or to recover compensation for its infringement after it has become actionable. As regards the suggestion that Collectors may have been considered to possess a special aptitude for dealing with rent suits and determining rates of rent with reference to the provisions of section 11, I do not attach weight to it, first, because appeals are declared by the Act to lie from the decisions of Collectors to the District Courts; and secondly, because section 87 expressly saves the right of the landlord to sue in the Civil Courts for arrears of rent and for settling rates of rent. The strongest reason in support of the view that the remedy is cumulative is the history of rent law in this Presidency prior to the enactment of 1865. In *Gopalasawmy Mudelly v. Mukkee Gopalier*(1), which is a Full Bench decision, the learned Judges discussed at length the relation of Act VIII of 1865 to the prior state of law on the subject, and all the Judges agreed in the opinion that Act VIII of 1865 created only an alternative remedy and did not oust the regular jurisdiction of the Civil Courts. Mr. Justice Holloway observed that the key to the construction of Act VIII of 1865 is the existence of two coincident processes, one called summary and the other regular. Again Mr. Justice Innes, who took part in the Full Bench case, said in *Karim v. Muhammad Kadar*(2) that the language of section 9 appeared to be merely permissive of the right of the landlord to adopt the summary remedy and not to shut him out from the remedy by regular suit, and that the remedy by summary suit was originally given as an alternative, and that there is nothing in Act VIII of 1865 to show that the landlord is debarred the remedy by regular suit.

The improvement introduced by the Act consists only in allowing appeals from the decisions of Collectors and thereby giving a finality to such decisions instead of allowing them, as was previously the case, to be reversed in regular suits, thus converting, what was under the prior law, a summary remedy in its strict sense into an alternative remedy.

(1) 7 M.H.C.R., 312.

(2) I.L.R., 2 Mad., 89.

Furthermore, it is incumbent on a Civil Court whenever the landlord sues to recover rent to ascertain by reason of section 7 that the landlord has tendered a proper patta and to decree rent or dismiss the claim according as it finds that the patta tendered is or is not a proper one. This being so, it is not clear why the landlord cannot sue to have it declared that the patta tendered is a proper one and to claim the execution of a muchalka, as the only consequential relief which he is at the time of suit in a position to demand.

Again it was open to the landlord under the Regulation of 1802 to eject a tenant for non-acceptance of a patta and to the tenant to claim damages for non-tender of a patta, and this shows that the observation in *Narasimha v. Suryanarayana*(1) that it was Act VIII of 1865 that created a duty to accept a patta and execute a muchalka can be supported only to the extent that it recognized a pre-existing duty and provided summary suits as alternative remedies available for its enforcement. The conclusion to which I come is that the exchange of patta and muchalka is a statutory prerequisite of the right to enforce the terms of a tenancy, that the duty to effect such exchange is an incident of the relation of landlord and tenant, that the suits prescribed by sections 8 and 9 of Act VIII of 1865 are declared summary in the sense that they do not oust the ordinary jurisdiction of Civil Courts, and that these tribunals are competent to entertain suits for the acceptance of a patta on the ground that it is a specific relief necessary to keep alive the landlord's ordinary civil right to enforce the terms of the tenancy.

The second question referred for our decision is whether the Civil Courts are competent to amend the patta tendered when it is not a proper patta. The ground of reference is the conflict between *Narasimha v. Suryanarayana*(1) and *Baswara Doss v. Pungavana Chari*(2). The only form in which Civil Courts can award specific relief under the general law is by passing a declaratory decree when no consequential relief can be demanded. Under section 7 of Act VIII of 1865, it is competent to ask for a declaration that the patta tendered is a proper one as part of a decree for arrears of rent. Under the concluding

(1) I.L.R., 12 Mad., 481.

(2) I.L.R., 13 Mad., 361.

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VENDACHALLA. part of section 87 of the same Act, suits may be instituted in Civil Courts regarding rates of rent. It is also competent to a landlord to institute a suit to have it declared that a patta tendered is a proper one under section 42 of the Specific Relief Act. In suits in which it has to be decided whether a patta tendered is a proper one, it is often necessary to come to a finding as to what a proper patta is. If the plaint asks for a declaration that the patta tendered is a proper one, and if not what a proper patta is, there is no apparent reason why the Court should not make the alternative declaration if necessary. But it is only by making a declaration that the Civil Courts can indicate the necessary amendment, although they are not at liberty to direct under the general law that the patta be amended in a particular manner and that the tenant do execute a muchalka corresponding to the amended patta. Under the general law, the tenant is under no obligation to execute a muchalka until a proper patta has been tendered, and the power to substitute for the patta actually tendered a proper patta and thereupon to direct the execution of a muchalka corresponding to it, is a statutory power conferred only on Collectors as a matter of procedure prescribed by section 10.

I would therefore answer the second question by saying that a Civil Court can declare what a proper patta is in a suit properly framed for that purpose, but cannot amend the patta and direct the tenants to execute a muchalka corresponding to the amended patta.

COLLINS, C.J.—I concur in the above opinion of Mr. Justice Muttusami Ayyar.

PARKER, J.—The questions referred to the Full Bench are:—

- (1) Whether an ordinary Civil Court has jurisdiction to entertain a suit for acceptance of patta and execution of muchalka?
- (2) Whether an ordinary Civil Court has power to amend a patta?

The reference has become necessary in consequence of the decision in *Narasimha v. Suryanarayana*(1) that a Civil Court had not the same power to amend a patta, as a Collector has under section 10, Madras Act VIII of 1865,—which appears to be in conflict with the course of decisions in this Presidency. The

duty of exchanging pattas and muchalkas was not first imposed by the Act of 1865, but was a statutory obligation first imposed on landholders by Regulation XXV of 1802, s. 14, such landlords being by that section rendered liable to suit in the adawlut for failure to comply with the obligation. Regulation XXX of 1802 authorized a prosecution in the Court for refusal to deliver a patta. Regulation XXVIII of 1802 dealt with recovery of arrears of rent by summary process, and powers of summary inquiry and by regular suit were vested in the Zillah Courts. Regulation V of 1822 enabled Collectors for the first time to take primary cognizance of summary suits cognizable by Zillah Courts and made the tender of a proper patta, a pre-requisite of the right to recover rent, but the jurisdiction of the Zillah Courts was not taken away. These Regulations were repealed by Madras Act VIII of 1865, the preamble of which states that it is expedient to “*consolidate and simplify*” various laws which have been passed relative to landholders and their tenants, and to provide a uniform process for the recovery of rent. There is no section in the Act which expressly takes away the jurisdiction hitherto vesting in the Civil Courts, and section 87 expressly reserves the right to sue in the Civil Courts for arrears of rent or revenue. The concluding part of the section, moreover, clearly indicates that there is another class of suits (other than suits for arrears of rent or revenue), which will still remain cognizable by the Civil Courts, viz. :—suits regarding rates of rent, and it is difficult to see what class of suits can be here referred to, unless it be suits to settle or declare the terms of a tenancy, in other words to decide on the correctness and propriety of a patta.

The whole history of the rent laws in this Presidency seems to me to show the intention of the Legislature has been to provide alternative remedies—summary and by regular suit; and it is difficult to suppose that if the Legislature in 1865 intended to take away a remedy which had been in existence for half a century, it would not have done so in express terms instead of leaving the matter obscure and to be gathered by mere inference and implication. The purport of the Act was merely to consolidate and simplify existing laws and to provide a uniform process for the recovery of rent. The providing of a uniform process to recover rent was clearly regarded as consistent with the alternative remedy of suits for rent in a Civil Court (section 87).

(1) I.L.R., 12 Mad., 481.

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I can see no reason to dissent from the principles laid down by the Full Bench of this Court in 1874, *Gopalasawmy Mudelly v. Mukkee Gopalier*(1), and since followed in *Karim v. Muhammad Kadar* (2), which decisions do not appear to have been brought to the notice of the learned Judges who decided *Narasimha v. Suryanarayana* (3). I would answer the first question referred in the affirmative.

Upon the second question I agree with Muttusami Ayyar, J., that if the patta which has been tendered is found not to be a proper one, a Civil Court cannot decree that the landlord shall tender an amended patta, but should simply pass a declaratory decree.

SHEPARD, J.—The questions raised by this reference turn on the construction to be placed on the Act VIII of 1865 and the Regulations superseded by that Act. By sections 3 and 4 of the Act of 1865 the duty is imposed on the zamindar on the one hand and the tenant on the other of exchanging written engagements in the shape of pattas and muchalkas. Sections 8 and 9 indicate the remedy available to the tenant in case of the landlord's default and to the landlord in case of the tenant's default, the remedy in either case being by summary suit before the Collector. The following section declares the course to be adopted by the Collector in dealing with such suits. The three sections taken together show that the aggrieved party is to have his remedy by way of specific relief. If the patta or muchalka tendered by the aggrieved party is not a proper one, there is to be an inquiry in the manner prescribed in the 11th section, according to which in the absence of evidence of express or implied contract or of usage the Collector is, in setting the terms of the holding, to have regard "to the rates established or paid for neighbouring lands of similar description and quality." The patta thus settled by the Collector, the defaulting party is to be directed to accept. Considering the Act by itself and without reference to previous legislation, I think there can be no doubt that the specific relief provided for by the sections just mentioned was intended to be sought only in the Court of the Collector. In view of the peculiar nature of the inquiry (*Mahasingavastha Ayyar v. Gopala Ayyan*(4)) which may include the

question what, under the circumstances of the case, is a fair and just rate of rent, one can well understand that the duty of entering upon it should be cast upon the Collector and not upon a Civil Court. In *Gopalasawmy Mudelly v. Mukkee Gopalier*(1), where the applicability of section 7 of the Act to suits for rent in a Civil Court was considered, there was in favour of the view adopted by the majority of the Court the strong circumstances that, in the section itself, there were no words indicating an intention to restrict the operation of the section, and on the contrary section 87 expressly saves the jurisdiction of the Civil Courts in the case of suits for rent. In the present case it is otherwise, for the Collector is named in each one of the sections mentioned and there is no such saving clause. It is to be remembered that it is not the ordinary remedy for the breach of a statutory duty that is in question. It may well be that a landlord has his action for damages on the tenant's refusal to accept a proper patta and that for that purpose the Civil Court is open to him, while it is only the Collector that can be called upon to adjudicate on the questions which may be raised under section 11 of the Act and make certain between the parties the terms of the holding, which terms may previously have been utterly indefinite. The cases turning on the construction of statutes, prescribing a penalty for the breach of some duty imposed thereby, have not therefore much bearing on the case. The previous legislation is contained in the Regulations XXVIII and XXX of 1802 and V of 1822, all of them repealed by the Act of 1865, which Act, according to the preamble, was passed in order to consolidate and simplify various laws which have been passed relative to landholders and their tenants.

The Regulations XXVIII and XXX of 1802 were passed on the same day, and the object of the latter was the protection of the tenants. For that purpose it was provided by section 2, as it is in section 3 of the present Act, that zamindars and their tenants should exchange pattas and muchalkas. In the case of the tenant refusing to perform this duty, it was provided that the proprietor should be entitled to grant the land to other persons (section 10). In the case of default on the part of the

(1) 7 M.H.C.R., 312.

(1) 7 M.H.C.R., 312.

(3) I.L.R., 12 Mad., 481.

(2) I.L.R., 2 Mad., 89.

(4) 6 M.H.C.R., 239.

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landlords, provision was made in section 8 that they shall "be liable to prosecution in the Court and shall, on proof of such refusal or delay, be also liable to pay such damages, &c."

The next section provides a rule for the settlement of disputes about rent, similar to that now provided in section 11. The Court named in the Regulation was the Adawlut of the Zillah, the only Court of Original Jurisdiction then in existence. There is nothing to show that the form of action, or the remedy contemplated by section 10, was any other than the ordinary remedy of an action for damages, similar to that mentioned in other sections of the two Regulations of 1802 (see sections 17, 29, 40 of Regulation XXVIII and section 14 of Regulation XXX). The action was not of a summary nature, such as that provided in section 34 of Regulation XXVIII. There was no corresponding provision for an action for damages against the tenant.

By 1822 it was found that the Regulation of 1802 was insufficient for the due protection of the raiyats, inasmuch as the powers they vest in landholders are prompt and summary, while efficient redress for the abuse of those powers must frequently be sought by the institution of a regular suit, to the expense of which the means of raiyats in general are inadequate; and it was deemed expedient to invest Collectors with authority to take primary cognizance of all cases which, under the provisions of those Regulations, were cognizable by summary suits in the Courts of Adawlut. By this Regulation a clear distinction is made between the jurisdiction of the Zillah Court and the Collector, and an appeal to the Judge from the decision of the Collector passed under the Regulation is granted. By section 2, Collectors were authorized to take primary cognizance by summary process of all cases, which, under the Regulation of 1802, were summarily cognizable by the Zillah Courts. Except in section 8, there is no provision for an inquiry into the rates of rent and under that section the inquiry is to be conducted by the Collector. There was no such provision in the Regulation of 1802, nor was there any absolute necessity for a suit having for its object the ascertainment of the terms of the tenant's holding, because the landlord had his remedy by ejectment and the tenant his remedy in damages, and under those Regulations the exchange of patta and muchalka was not made a condition precedent to the maintenance

of a suit for rent. If, then, it is the case, as I think it is that the particular proceeding indicated by sections 8 and 9 of the present Act originated only with the Regulation of 1822, it may be said that the Legislature has been consistent throughout in making the Collector the tribunal, before which such proceedings are to be conducted. If this is not the case, I would still say that the evident intention of the Legislature has been to give the Collector exclusive cognizance in proceedings having for their object the ascertainment of the terms of the tenant's holding. It may be said that this intention was not effectively carried out by section 2 of the Regulation of 1822, because it does not appear that any of the suits mentioned in Regulation XXX were summary suits, and because the language used in section 2 does not positively take away pre-existing jurisdiction. With regard to this latter point there is in favour of the view that the Collector was intended to have exclusive jurisdiction in summary suits the circumstance that, while section 2 expressly gives him primary cognizance of the suits that were theretofore cognizable by the Zillah Courts, a later section gives to the latter an appeal from his decision. It is hardly to be supposed that the Zillah Court, not then any longer the only Court of Original Jurisdiction, should have been intended to retain the primary cognizance of suits, in respect of which when tried by a Collector an appeal lay to it. With regard to the question as to what suits it was intended to transfer to the Collector under section 2 of the Regulation of 1822, it is not necessary in my opinion to consider it. In framing the consolidating Act of 1865, it would appear that the Legislature either assumed that the Collector had hitherto had jurisdiction in the suits mentioned in sections 8 and 9 of the Act, or designed to give the Collector such jurisdiction. In either view I think it is clear that it was intended that the jurisdiction should be exclusive.

I have already referred to the significant provision made by section 87 of the Act saving the jurisdiction of the Civil Courts in suits for arrears of rent or revenue only. In my opinion a consideration of the previous enactments strengthen the view, which I should have taken on a perusal of the Act of 1865 taken by itself.

By the question "whether an ordinary Civil Court has jurisdiction to entertain a suit for acceptance of patta and execution

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of muchalka," I understand that it is asked whether the suit provided for in section 8 or section 9 of the Act can be entertained by a Civil Court. That question, I think, for the reasons given, should be answered in the negative.

APPELLATE CIVIL.

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

JANAKI (PLAINTIFF), APPELLANT,

v.

DHANU LALL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

*Succession Act—Act X of 1865, s. 187—Hindu Wills Act—Act XXI of 1870,
s. 2—Estate of deceased Hindu—Legal representative.*

A Hindu, who was one of the defendants in a suit, died leaving a will. The executors appointed by the will did not take out probate; and the property of the deceased came into the possession of his divided brothers, who were thereupon brought on to the record of the suit as the representatives of the deceased defendant. A decree was passed for the plaintiff by consent. The mother of the deceased who would, apart from the will, have been his legal representative, now sued to set aside the above decree, having previously obtained a declaration that she was entitled to the property of the deceased in a suit against his brothers above referred to:

Held, that the plaintiff was not entitled to maintain the suit.

APPEAL against the judgment of Best, J., in civil suit No. 188 of 1889, on the file of the High Court, Original Side.

The plaintiff was the mother of one Ghulab Singh deceased, to whom certain houses had been allotted on a partition between him and his half-brother. At the time of Ghulab Singh's death a suit (civil suit No. 226 of 1887 on the file of the High Court) was pending, in which Dhanu Lal, the present defendant No. 1, sued Ghulab Singh and his half brother Muni Singh upon a promissory note. On the death of Ghulab Singh, who died childless, it appeared that he left a will appointing Muni Singh and three others to be his executors. None of them, however, took out probate, and Muni Singh and one Govindh Singh, who had come

* Appeal No. 25 of 1890.

into possession of his property, were brought on to the record as his legal representatives. The plaintiff obtained a decree by consent, and in execution brought to sale the above-mentioned houses, of which defendant No. 2 became the purchaser. The present suit was brought by the plaintiff, as legal representative of Ghulab Singh, to set aside the above decree as fraudulent and recover the houses, &c.; and one of the issues raised the question whether the plaintiff was entitled to maintain the suit. She had already obtained a decree against Muni Singh and Govindh Singh in civil suit No. 195 of 1888, by which she was declared to be entitled to the property of Ghulab Singh.

Best, J., delivered judgment dismissing the suit on the grounds stated in the judgment of the Divisional Court.

The plaintiff preferred this appeal.

Subramanya Ayyar for appellant.

Mr. R. F. Grant for respondent No. 1.

Visvanadha Ayyar for respondent No. 2.

JUDGMENT.—The plaintiff sues to set aside a decree obtained by defendant No. 1 in civil suit No. 226 of 1887 on the Original Side of this Court as having been obtained by fraud. In that suit, the defendant No. 1 had sued (1) Muni Singh and (2) his half-brother, Ghulab Singh, upon a promissory note jointly executed by them. Ghulab Singh died on January 25th, 1888, while the suit was pending, after which his half-brothers, the above-mentioned Muni Singh and Govindh Singh, were brought on the record as his personal representatives and a decree passed against them accordingly. It appears that Ghulab Singh was reported to have left a will, and, in February 1888, the solicitors of defendant No. 1 endeavoured to ascertain from the four executors named therein whether they intended to apply for probate. Nothing was done, however, to prove the will. Two of the executors were unwilling to come forward and one died; the brother Muni Singh took no steps. The result was that the two half-brothers were brought in as personal representatives and a decree by consent passed against them. The effect of this procedure was to ignore the plaintiff, the mother of deceased, altogether, and, as Ghulab died unmarried and was divided from his half-brothers, his mother was his proper personal representative in the absence of a will. The decree was passed on August 2nd, 1888.

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The plaintiff then sued Muni Singh and Govindh Singh in September 1888 (civil suit No. 195 of 1888) to establish that she was entitled to the property of her late son. Her step-sons replied setting up the will, but allowed the suit to be decided *ex parte* against them on trial. This decree was passed on 11th January 1889.

The plaintiff then, on 27th July 1889, brought this present suit to set aside the decree obtained by defendant No. 1 in civil suit No. 226 of 1887. The defendants (defendant No. 2 being the purchaser of some of the property in execution) resisted the claim on the ground that, in consequence of Ghulab having left a will, plaintiff is not his personal representative, and, therefore, cannot sue, and, further, that there had been no fraud or collusion in obtaining the decree. The learned Judge held that it was proved Ghulab had left a will, though no probate had been taken thereof, and hence that plaintiff, not being an executrix, had lost her position of legal representative. He further held that there had been no fraud or collusion in obtaining the decree, and that plaintiff had had knowledge of the proceedings in that suit (civil suit No. 226 of 1887). Against this decree the plaintiff appeals.

The first point argued in appeal before us is that defendant No. 1 is precluded by the terms of section 187 of the Succession Act from proving the existence of the alleged will, since no probate has been taken thereof. By section 2 of the Hindu Wills Act (XXI of 1870) the provisions of section 187 have been made applicable to the wills of Hindus in the town of Madras, see *Shaik Moosa v. Shaik Essa*(1), and it is contended that, until probate has been granted to some one, the alleged existence of the will should be ignored. The decree has only been obtained against the brothers of the deceased as his personal representatives and not as executors, and since plaintiff has established her rights as against them, it is contended she can claim to have the compromise entered into by them set aside.

It is admitted that, assuming the existence of a will, the decree has not been obtained against the right persons as legal representatives. The question, however, is whether the plaintiff can claim to have that decree set aside.

(1) I.L.R., 8 Bom., 241.

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v.
DHANU LALL.

In the case before us Muni Singh applied for probate in October 1888, but has not prosecuted his application. The plaintiff denied that any will was executed at all, and practically no one is seeking probate. It was urged that the defendant No. 1, as a creditor, could have asked for letters of administration with the will annexed, and should have done so; but this is a mistake since section 206 of the Indian Succession Act has not been extended by the Hindu Wills Act to the town of Madras. Had the estate been that of a European British subject, the case would have been different. If, therefore, the creditor is precluded from bringing in any one as the personal representative of the deceased, until some one has proved his will, his just claims would be liable to be defeated by the simple expedient of refusing to apply for probate until the debt had become barred. This certainly cannot have been the intention of the law. It appears to us that, though the executors can establish no right without taking probate, the existence of the will cannot be ignored for all purposes whatsoever.

We are of opinion that the decision in *Prosunno Chunder Bhattacharjee v. Kristo Ohytunno Pal*(1) is applicable, and that the persons, who took possession of Ghulab's estate upon his death, were liable to be treated by the creditor (first defendant) as his representatives even though themselves liable to be dispossessed by the executors on taking out probate. That Muni Singh and Govindh Singh were in possession of deceased's estate is evident from plaintiff's own suit No. 195 of 1888, and, since first defendant's decree is not a nullity, it is open to him to prove that Ghulab left a will, and, therefore, that plaintiff is not a person who can claim to set that decree aside.

As regards the execution of the will by Ghulab, we are of opinion that the finding of the learned Judge is right. The fact has been proved by the writer and one attesting witness, and we see no reason to doubt the evidence of defendant No. 2, that he heard of the existence of the will from plaintiff herself, who procured for him the copy, exhibit II. That first defendant was willing to help plaintiff in a suit against her step-sons, provided his own debt was discharged seems to us to prove nothing. All the executors refused to prove, and the first defendant was

(1) I.L.R., 4 Cal., 342.

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naturally willing to accept payment from any member of the family who would pay him. All the circumstances of the case tend to indicate that the plaintiff and her step-sons have since colluded to deprive him of the fruits of his decree.

On these grounds we confirm the decree and dismiss the appeal with costs.

APPELLATE CIVIL.

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

RAMA RAU AND ANOTHER (APPELLANTS),

v.

CHELLAYAMMA (RESPONDENT).*

Succession Certificate Act—Act VII of 1889, s. 4 (b)—Application for execution.

Act VII of 1889, s. 4, cl. (b) does not apply to applications to execute decrees which were pending at the date of the passing of the Act, but it refers to applications made after the Act came into force.

APPEAL against the order of C. A. Bird, District Judge of Godavari, passed on miscellaneous petition No. 416 of 1889 in the matter of execution petition No. 9 of 1888.

The petitioner applied to execute a decree obtained by her husband in original suit No. 5 of 1875 on the file of the District Court of Godavari. The petitioner had already been admitted as the representative of the decree-holder, but it was objected that she could not proceed without producing a certificate under Act VII of 1889. The District Judge overruled this objection. The petitioner preferred this appeal under Civil Procedure Code, ss. 2 and 244.

Bhashyam Ayyangar for appellants.

S. Subramanya Ayyar and *P. Subramanya Ayyar* for respondents.

JUDGMENT.—We are of opinion that section 4, clause (b), Act VII of 1889 does not apply to applications to execute decrees which were pending at the date of the passing of the Act, but refers to applications made after the Act came into force.

Under section 6 of the General Clauses Act *prima facie*, the

* Appeal against order No. 29 of 1890.

RAMA RAU
v.
CHELLA-
YAMMA.

Act cannot affect pending proceedings. If the Legislature, intended to give retrospective effect to the section, the language would have clearly indicated it.

The same view has been taken by the Bombay High Court in *Balubhai Dayabhai v. Nasar Bin Abdul Habib Fazly* (1).

We dismiss the appeal with costs.

APPELLATE CIVIL.

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

VIRAYYA (PLAINTIFF), APPELLANT,

v.

HANUMANTA AND OTHERS (DEFENDANTS NOS. 1 TO 9 AND 11),
RESPONDENTS.*

*Hindu law—Adoption—Niyoga—Gift—Specific Relief Act—Act I of 1877
s. 18 (a)—Transfer of Property Act—Act IV of 1882, s. 43.*

A member of an undivided Hindu family, consisting of himself, his adoptive son and his uncle, sold certain land belonging to the family to the plaintiff. In a suit by the plaintiff for a declaration of his title to, and for possession of the land, it appeared that the sale was not justified by any circumstances of family necessity, and that the above-mentioned adoptive son was the son of the paternal uncle of the adoptive father. During the pendency of the suit the undivided uncle died, having made a gift of his property to his daughter-in-law :
Held, (1) that the adoption was not invalid by reason of the above-mentioned circumstance ;

(2) that the gift by the undivided uncle to his daughter-in-law was invalid as against the plaintiff ;

(3) that the plaintiff was entitled to a moiety of the land sold to him.

SECOND appeal against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 218 of 1888, confirming the decree of V. Suryanarayana Pantulu, District Munsif of Guntur, in original suit No. 302 of 1886.

Suit for the declaration of the plaintiff's title to, and for possession of, certain land. The plaintiff alleged that he purchased the land in question from defendant No. 1 on 14th February 1885. Defendants Nos. 3—10 were tenants in possession,

(1) I.L.R., 15 Bom., 79.

* Second Appeal No. 4 of 1889.

1890.
October 17.
1891.
May 4.

VIRAYYA
v.
HANUMANTA.

to whom defendant No. 2 had granted leases subsequent to the date of the alleged sale to the plaintiff. Defendant No. 2 pleaded that he was the adoptive son of defendant No. 1, with whom and defendant No. 10 (the undivided paternal uncle of defendant No. 1) he was in joint enjoyment of the land and its income, and that the alleged sale was justified by no circumstances of necessity and was invalid and not binding on him. Defendant No. 10 died during the pendency of the suit, having made a gift of his property to his daughter-in-law who was joined as defendant No. 11.

Defendant No. 1 was unmarried at the time when he adopted defendant No. 2, who was the son of his paternal uncle, but the District Munsif held, on the authority of *Chandrasekharudu v. Bramhanna*(1), that the adoption, (the fact of which was established), was not invalid on that account. He also held that the sale set up by the plaintiff was proved, but that it was not binding on defendants Nos. 2 and 10, as there was no evidence of any circumstances of necessity justifying the sale. He accordingly passed a decree declaring the plaintiff's right to a one-fourth share of the land; in other respects he dismissed the suit reserving leave to the plaintiff to bring another suit for partition.

The District Judge, on appeal, confirmed the decree of the District Munsif.

The plaintiff preferred this second appeal.

Subramanya Ayyar for appellant.

Narayana Rau for respondents.

JUDGMENT.—The judgment of the District Judge is not so full as might be desired, but there is a clear finding by the District Munsif in favour of the adoption and the District Judge accepts the finding. It is then argued that the adoption is not valid, because defendant No. 2 was the father's brother's son of defendant No. 1, and that, under the law of *Niyoga*, the nephew could not be appointed to beget issue on his paternal aunt. Our attention is drawn in this connection to the cases of *Sriramulu v. Ramayya*(2) and *Minakshi v. Ramanada*(3). In these cases the law of appointment was referred to to explain and account for the existing usage and law in regard to adoption. But in the case before us no exception was taken to the adoption in either of the

Courts below on the ground that it was contrary to the usage obtaining among the people, nor was any evidence recorded on the point. Having regard to the observation of the Privy Council in *Collector of Madura v. Mootoo Ramalinga Sathupathy*(1) we are not at liberty to refer to the ancient practice of *Niyoga*, which is obsolete, or to engraft a rule on the Hindu law as evidenced by the usage of the people. We cannot, therefore, allow the contention to prevail. Another contention is that defendant No. 10 died pending the suit, and that therefore the plaintiff became entitled to a moiety instead quarter only of the property. But we observe no additional issue was recorded after the tenth defendant's death as to whether the instrument of gift set up by defendant No. 11 was valid, and if not, whether with reference to section 43 of the Transfer of Property Act, a moiety would pass to the plaintiff under the instrument of sale sued on. The District Judge must be called upon to return a finding within six weeks from the date of the receipt of this order, and seven days will be allowed, after the posting of the finding in this Court, for filing a memorandum of objections.

In compliance with the above order, the District Judge returned a finding as follows:—

“The High Court call for a finding upon the issue whether an instrument of gift set up by defendant No. 11 was valid, and, if not, whether, with reference to section 43 of the Transfer of Property Act, a moiety would pass to plaintiff under the instrument of sale sued on.

“In this suit it is not alleged by the plaintiff that the instrument of gift set up by defendant No. 11 is not genuine. The defendant No. 10 filed his answer in this suit in November 1886, and he filed the deed of settlement giving his share to defendant No. 11, which was dated in March 1886. It is therefore not contended that the document is fabricated. The only question is whether it is valid.

“The findings in the suit show that defendant No. 10 was a co-parcener with defendant No. 1 in a united Hindu family. He alienated his share to his daughter, not for value, but in consideration of natural affection. Bearing in mind the Full Bench decision in *Baba v. Timma*(2) and its application in *Ponnusami v.*

(1) 4 M.H.C.R., 270. (2) I.L.R., 8 Mad., 15. (3) I.L.R., 11 Mad., 49.

(1) 12 M.I.A., 397.

(2) I.L.R., 7 Mad., 357.

VIRAYYA
v.
HANUMANTA.

Thatha(1) to a gift made to daughter's children, I am compelled to find that this alienation is invalid.

"The effect of section 18 (a) of the Specific Relief Act and section 43 of the Transfer of Property Act is that this moiety claimed by defendant No. 11 must pass to defendants Nos. 1 and 2, and that the plaintiff is entitled to recover one-half of the property instead of one-fourth which was given him by the decree of the District Munsif."

This second appeal coming on again for final hearing, the Court delivered judgment as follows:—

JUDGMENT.—It is urged that the respondent had no notice of the day on which the further hearing should take place. But it is not alleged that notice of the day was not affixed to the notice board in the ordinary way. He had notice of the order referring the case. We accept the finding, and must modify the decrees of the Courts below by substituting one-half for one-quarter of the lands mentioned. Proportionate costs in this and in the Courts below.

APPELLATE CIVIL.

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

KUNHIKUTTI AND ANOTHER (DEFENDANTS NOS. 9 AND 19),
APPELLANTS,

v.

ACHOTTI AND OTHERS (PLAINTIFFS AND DEFENDANT NO. 1),
RESPONDENTS.*

Civil Courts Act—Act III of 1873 (Madras), s. 13 (2)—Appeal from a Subordinate Court—Proceeding to be adopted when a District Court erroneously returns an appeal petition for presentation in High Court—Civil Procedure Code, s. 57.

Certain members of a Moplah family sued the others in a Subordinate Court to recover their distributive share under Muhammadan law. The property to be divided was more than Rs. 5,000 in value, but the share claimed by the plaintiffs was less. The Subordinate Judge passed a decree, against which an appeal was preferred to the District Court, but the District Judge returned the appeal for presentation in the High Court. The appellants preferred a second appeal

(1) I.L.R., 9 Mad., 278. * Appeal against Appellate Order No. 122 of 1889.

to the High Court against the decision of the District Judge, and also presented a petition praying for the revision of his proceedings under Civil Procedure Code, s. 622:

Held, (1), that the District Court had jurisdiction to entertain the appeal;

(2) that neither a second appeal nor a petition under Civil Procedure Code, s. 622, was the appropriate proceeding to be adopted by the appellants, but an appeal as from an order made under Civil Procedure Code, ss. 57, 582.

The error of the appellants being one of form merely, the Court amended the second appeal as an appeal from an order of the District Court and directed the District Judge to receive and dispose of the appeal from the Subordinate Court.

PETITION under Civil Procedure Code, s. 622, praying the High Court to revise the proceedings of the District Judge of North Malabar whereby he erroneously returned a petition of appeal for presentation in the High Court as being beyond his jurisdiction, and petition of second appeal against the same.

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

Sankara Menon for appellants.

Ryru Nambiar for respondents, Nos. 1 and 2.

Respondent No. 3 was not represented.

JUDGMENT.—As members of a Moplah family in North Malabar the plaintiffs claimed, with subsequent mesne profits, a moiety of certain items of property which, as they alleged, belonged to the joint family. The ninth and nineteenth defendants claimed, *inter alia*, item No. 40 under a koyi panom settlement of 1832. The value of the share claimed by plaintiffs was below Rs. 5,000, though the family property to be divided was of more than Rs. 5,000 value. The Subordinate Judge held that a koyi panom settlement of family property was subject to any arrangement which might be made at a future division and declined to exclude it from partible property. From this decision the ninth and nineteenth defendants appealed to the District Court, but the Acting District Judge returned the appeal for presentation to the High Court on the ground that the value of the subject matter of the suit exceeded Rs. 5,000. From this order, the ninth and nineteenth defendants have preferred this second appeal, and have also presented civil revision petition No. 406 of 1889 under section 622 of the Code of Civil Procedure. Two questions arise for decision, viz. (i) whether the District Court had jurisdiction to entertain the appeal; and (ii) whether, if so,

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KUNHIKUTTI v. ACHOTTI. a second appeal, or a civil revision petition will lie to this Court under the Code of Civil Procedure.

As to the first question, we are of opinion that the District Court had jurisdiction to entertain the appeal. This was not a partition suit by the member of a joint Hindu family in which a general partition might be decreed among all the co-parceners, but it was a suit by certain members of a Moplah family to recover their distributive share under the Muhammadan law. As observed by this Court in *Mahammad v. Bivi Umma*(1), it is the value of the share claimed and not the value of the property from which that share has to be set out, that is the value of the subject matter of the suit within the meaning of clause 2, section 13, Act III of 1873. On the merits the District Judge must be directed to receive the appeal and deal with it in accordance with law.

As regards the second question, we consider that neither a second appeal nor a civil revision petition is the proper legal proceeding to be instituted against the order of the District Judge. The order returning the petition of appeal for presentation to the proper tribunal is an order made with reference to the provisions of sections 57 and 582 of the Code of Civil Procedure, and, when such order is passed by a Court in the exercise of its appellate jurisdiction, an appeal will lie to the High Court under section 588, clause (c) and section 589. No second appeal will lie, because there is no appellate decree from which it can be preferred under section 584. Nor can this Court interfere under section 622, for an appeal will lie against the order of the District Court under section 589. This second appeal must be amended as an appeal from an order, and the civil revision petition must be rejected.

The error being merely one of form, we amend the second appeal as an appeal from an order of the District Court, and direct the Judge to receive the appeal presented by ninth and nineteenth defendants and to dispose of it in accordance with law.

Each party will pay his own costs in this Court.

(1) Appeal No. 67 of 1888 unreported.

APPELLATE CIVIL.

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

RANGA REDDI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

CHINNA REDDI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, arts. 64, 116—Suit between partners—Registered partnership deed.

The plaintiffs and the defendants entered into a partnership agreement, which was registered, whereby it was, among other things, provided expressly that each partner should bear the loss, if any, incurred in the business in proportion to his share. The plaintiffs, alleging that loss had been incurred and borne by them, sued to recover the defendants' share of the loss:

Held, that since the partnership agreement was registered, the suit was governed by Limitation Act, sched. II, art. 116.

APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in original suit No. 25 of 1887.

The plaintiffs and defendants entered in 1878 into partnership as abkari contractors under an agreement which was registered. The agreement contained express provision that parties should, according to their shares, pay the losses incurred in the business. The abkari contract with Government expired on 30th June 1881. The plaint stated that in November 1881 "the accounts . . . were cast, and it was found that a loss of Rs. 45,600 was sustained," and the plaintiffs sued to recover the defendants' share of that loss, which had been borne by the plaintiffs. There was no prayer for dissolution of the partnership, or for taking the accounts of the partnership business. The District Judge held that the suit was barred by limitation, more than three years having elapsed since the expiry of the abkari contract.

The plaintiffs preferred this appeal.

S. Subramanya Ayyar and *P. Subramanya Ayyar* for appellants.

S. Subramanya Ayyar for respondents.

* Appeal No. 84 of 1889.

1890.
August 8.
October 15.
1891.
July 23.

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CHINNA
REDDI.

JUDGMENT.—We are of opinion that the proper article of the schedule to the Limitation Act to apply to this suit was article 116. The suit is founded on a settlement of accounts made between plaintiffs and their partner, the plaintiffs seeking to recover the defendants' share of the loss, which was the result of the partnership business. The contract of partnership contains an express stipulation that the parties should, according to their shares, pay the loss, and thus the origin of the obligation now in suit was a registered contract. The account stated had reference to the registered contract and did not constitute in itself an independent contract. It was argued that article 64, the article relating to suits on accounts stated, should be applied. That would be so, if the partnership contract had not been registered, but that circumstance renders article 116 applicable, as in the case of the suit against an agent it was held that the general articles 88 and 89 would not govern the suit, because the agreement with the agent was registered (*Harender Kishore Singh v. The Administrator-General of Bengal*(1). It was also held in *Vythilinga Pillai v. Thetchanamurti Pillai*(2) that in a suit for rent founded on a registered agreement the same article 116 and not article 64 should be applied. The intention was to extend the period in favour of suit to enforce obligations based on registered instruments.

We must reverse the decree and remand the suit. Costs are to abide and follow the result and to be provided for in the revised decree.

(1) I.L.R., 12 Cal., 357.

(2) I.L.R., 3 Mad., 76.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Weir.

PURUSHOTTAMA (PLAINTIFF), APPELLANT,

v.

MUNICIPAL COUNCIL OF BELLARY (DEFENDANTS),
RESPONDENTS.*

District Municipalities Act—Act IV of 1884 (Madras), ss. 102, 103, 110—Township Improvement Act—Act III of 1871 (Madras), s. 51—Distraint notice.

A Municipal Council under the District Municipalities Act has, under section 110, a power to distrain after due notice, besides that given by section 103, but the property distrained must be that of the defaulter, and the doors of a house cannot be removed in execution of a warrant of distress.

The notice which an owner of property must give in order to entitle himself to a remission of the house-tax is an annual notice.

SECOND APPEAL against the decree of R. Sewell, District Judge of Bellary, in appeal suit No. 123 of 1889, reversing the decree of C. Purushottamayya Garu, District Munsif of Bellary, in original suit No. 72 of 1888.

Suit by the plaintiff against the Municipal Council, Bellary, alleging that the defendant had issued warrants of distress in respect of Rs. 47-4-0, being arrears of assessment claimed to be due by the plaintiff's late father on two bungalows in the Cowle bazaar for the year ending 31st March 1884, that the two bungalows in question had been sold to Messrs. Ibrahim Sait & Co. a year before suit, that "meanwhile no demand was made by the Municipality," and that the defendant, in execution of these warrants had, on 23rd September 1887, seized property of the plaintiff in his house at Brucepetta, including the doors of his house.

District Municipalities Act, ss. 102, 103, 110 are as follows:—

"Section 102.—(1) When any tax is due, the Chairman shall, prior to enforcing the provisions of section 103, cause to be presented to, or served upon, the person liable to the payment thereof a bill or notice stating the sum due; Provided that in

* Second Appeal No. 117 of 1890.

1890.
July 31.
November 17.

"the case of a tax under section 53 or 77 the notice or bill given
"under section 56 or 82, respectively, shall be deemed to be
"the bill or notice required to be presented or served under this
"section.

"(2) Such bill or notice shall contain—

"(i) a statement of the period and a description of the occu-
"pation, property or thing for which the tax is
"charged;

"(ii) a notice of the liability incurred in default of payment;
"and

"(iii) a notice of the time within which an appeal against
"such tax may be preferred.

"Section 103.—If such tax is not paid within fifteen days
"from the presentation or service of such bill or notice, and if
"the person from whom the tax is due does not show cause to
"the satisfaction of the Chairman why the same should not be
"paid, the Chairman may proceed to recover the amount together
"with all costs in any of the following ways :—

"(i) by distress and sale of the moveable property of the
"defaulter, or, if the defaulter be the occupier of any
"building or land in respect of which such tax is
"due, by distress and sale of any property found
"in or on such building or land;

"(ii) if the amount of such tax cannot be recovered by dis-
"tress and sale of the moveable property of the
"defaulter, by prosecuting the defaulter before a
"Magistrate. Nothing in this section shall preclude
"the Municipal Council from suing the defaulter for
"the tax before a Court of competent jurisdiction.

"Section 110.—If the sum due on account of any tax from the
"owner of any building or land remains unpaid after notice
"of demand has been duly served, the Chairman may, provided
"the arrear has not been due for more than one year, demand
"the amount from the occupier for the time being of such building
"or land, and, on non-payment thereof, may recover the same
"by distress and sale of any property found on the premises."

Act III of 1871, s. 51, is as follows :—

"When any sum is due for or on account of any rate or tax
"leviable under sections 41 to 47 of this Act, the Commissioners
"shall cause to be presented to the person liable to the payment

"thereof a bill for the amount. Such bill shall contain a state-
"ment of the period and a description of the property for which
"the charge is made."

Jaga Rau Pillai for appellant.

Mr. Powell for respondent.

JUDGMENT.—Three questions have been raised in this appeal.

It was first contended that under section 110 of Act IV of 1884 the power of distraint could only be exercised in respect of an arrear which had accrued due within one year. We are of opinion, however, that that section should not be read limiting the powers given by section 103 but as giving a further power to distrain property on the premises after notice given to the occupier. Under section 103 it is the property of the defaulter only, that is, the person on whom notice has been served under section 102, that can be distrained and sold.

The next contention had reference to the notice which an owner of property may give in order to entitle himself to remission of the house-tax. The tax is an annual one and the language of section 51 of Act III of 1871 appears to us to show that an annual notice was intended.

The case stood over for the decision of a Division Bench (Chief Justice and Weir, J.) on the question whether the Municipal authorities can legally distrain the doors of a house of a defaulter under the first portion of clause (1) of section 103 of the Madras District Municipalities Act IV of 1884. The Division Bench have found this question in the negative (vide *Queen-Empress v. Shaik Ibrahim*(1)). We concur in the conclusion and in the reasons for the conclusion in that case, and we must accordingly allow this appeal, and reversing the decree of the District Court, we restore the decree of the District Munsif's Court.

Appellant will receive his costs in this Court and in the Lower Appellate Court.

(1) I.L.R., 18 Mad., 518.

APPELLATE CIVIL.

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

SHANMUGAM (DEFENDANT), PETITIONER,

v.

CHINNASAMI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Negotiable Instruments Act—Act XXVI of 1881, s. 61—Hundi—Presentment—Notice of dishonour—Indemnity bond.

In a suit on an indemnity bond executed by way of collateral security by the maker of six hundies, it appeared that three of the hundies were paid and when three which were unpaid were presented to the maker, he did not at once insist upon want of notice of dishonour or on non-presentment as a ground of discharge:

Held, that since the defendant did not prove that the drawee had effects of his to meet the hundies on presentment, or that he had sustained damage by reason of the want of notice of dishonour, the plaintiff was entitled to a decree.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of V. Srinivasachari, Subordinate Judge of Kumbakonam, in small cause suit No. 811 of 1889.

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

The indemnity bond sued on was as follows:—

“Deed of indemnity executed on 10th of August 1886 to Chi. Chinnasami Naidu Avargal, residing within the Tranquebar fort, of Mayavaram taluk, by Shanmugam Chettiar, son of Kuttappa Chettiar, residing in Tillaiyadi of the said taluk. That passengers may sail in the steamer called ‘Taif’ sailing from Tranquebar to Mauritius, through the Agency of Negapatam Mau. Ganapatia Pillai and Co., I this day drew hundies payable at sight for payment of the total sum of Rs. 579-13-0, for this sum of Rupees five hundred and seventy-nine and annas thirteen being passage money for them, (to wit) a hundi on A. Arumuga Chettiar of Mahebourg, Mauritius, for payment of Rs. 96-10-0 being the passage money of two passengers, Govinda Pillai and one Kuppamuttu Pillai. . . . As I have given

* Civil Revision Petition No. 173 of 1890.

“you, this day, hundies payable at sight, if money were not paid there; and if they come back here I shall pay interest at one per cent. per mensem, for the amount of the said hundi, Rs. 579-13-0, and pay the accrued interest, and principal, on demand by the owner, paying the sum out of my own property.”

The Subordinate Judge passed a decree as prayed and the plaintiff preferred this petition.

Mr. K. Brown and R. Subramanya Ayyar for petitioner.

The decision in *Moti Lal v. Moti Lal*(1) is an authority for the proposition that the law as to notice of dishonour comprised in the Negotiable Instruments Act, is applicable to hundis in the vernacular, and in the present case it cannot be said that such notice, if given at all, was given within a reasonable time. Moreover the same case shows that it lies on the plaintiff to establish that the want of such notice has not damnified the maker of the hundi. Again the plaintiff is not entitled to sue, unless he can prove presentation of the hundis within a reasonable time, see *Mutty Loll v. Chogemull*(2) and compare *Nilkund Anantapa v. Menshi Apuraya*(3) with regard to the want of notice of dishonour; see also *Pigue v. Golab Ram*(4) and *Byles on Bills*, pp. 241, 292, and cases there cited.

Pattabhirama Ayyar for respondent.

JUDGMENT.—This is a revision petition filed under section 25 of Act IX of 1887. The petitioner is defendant and the counter-petitioners are plaintiffs in small cause suit No. 811 of 1889 on the file of the Subordinate Judge of Kumbakonam. The suit was brought on a bond executed by defendant in plaintiffs' favour in August 1886 for passage money due by certain emigrants who then proceeded from Tranquebar to Mauritius by the plaintiffs' steamer. The bond was given as a collateral security for six hundies, payable on demand, which the defendant drew on certain persons living at Mauritius in favour of the plaintiffs' steamer agent. The plaintiffs' case was that the hundies were presented for payment but not paid, and that, therefore, the amount of the bond became due by the defendant. The defendant contended that the hundies were not presented for payment; that he had no notice of their dishonour, and that he was not liable under the

(1) I.L.R., 6 All., 78.
(3) I.L.R., 10 Bom., 346.

(2) I.L.R., 11 Cal., 344.
(4) 1 W.R., 75.

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bond. As regards the presentment of the hundies the Subordinate Judge found that though there was no direct evidence, it was presumable from the plaintiffs' conduct, and the evidence of his witnesses that the hundies were presented for payment but dishonoured. As regards notice of dishonour, he held that no notice was given within a reasonable time. The hundies were drawn in August 1886 and returned to this country unpaid only in June 1889. Adverting to the delay the Subordinate Judge observed that when payment was demanded, defendant did not complain, and that, moreover, he had no evidence to show that he drew the hundies upon his debtors and that he sustained any damage by reason of the delay. In the result he decreed the plaintiffs' claim.

It is urged for the petitioner that the finding that the hundies were presented for payment is a mere surmise. But it is in evidence that six hundies were given, that three were paid, and that the others were not paid. Both the witnesses for plaintiffs deposed that when payment was demanded the defendant did not at once repudiate his liability on the ground that he had had no notice of dishonour. The first witness stated that when he demanded payment the defendant took him to one Sundaram Pillai who promised to pay as soon as he heard of the dishonour. The second witness also deposed that payment was demanded on several occasions and that it was put off on some pretext or another. The fact that three out of six hundies given for the passage money were paid at Mauritius suggests to some extent the inference that all the six were presented, and we cannot say that there is no evidence at all as to presentment. Nor can we say that there is no evidence to show that want of notice of dishonour was at once insisted on as a ground of discharge. We observe, further, that the suit is brought on a deed of indemnity whereby the defendant undertook to pay in case the hundies, or any of them, were returned all unpaid to this country. It has been held that mere neglect to present for payment does not discharge one who guarantees payment of a bill or note unless it is shown that if it had been presented it would have been duly paid (see Byles on Bills, 14th edition, 292). It is also found by the Subordinate Judge that the defendant has no evidence to show that he has been damnified in any way by want of notice of dishonour. The action being one based on an indemnity bond it

is clearly for the defendant to prove that he has sustained damage, especially as the fact whether the drawee has had any effects of the drawer in his hands, and whether the latter has not been able to withdraw or otherwise utilize them by reason of plaintiff's neglect is one peculiarly within his knowledge.

As regards the objection that the claim is barred by limitation it is to be observed that under the terms of document A the debt became due only when the hundies were returned unpaid. We are also unable to hold that interest was not chargeable under the bond in default of payment from date of its execution.

We dismiss this petition with costs.

APPELLATE CIVIL.

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

MAYAN (DEFENDANT No. 2 IN S.A. No. 1104 OF 1889 AND
DEFENDANT IN S.A. No. 1105 OF 1889), APPELLANT,

v.

CHATHAPPAN (PLAINTIFF), RESPONDENT.*

Act XXVII of 1860, s. 5—Security bond—Suit by the heir of the deceased.

On the issue to defendant No. 1 of a certificate under Act XXVII of 1860, defendant No. 2 executed to the District Court a security bond. The plaintiff, who had established his right to the monies collected under the certificate, now brought his suit on the security bond to recover the amount so collected:

Held, that the plaintiff not having obtained an assignment of the indemnity bond from the District Court was not entitled to sue the surety.

SECOND APPEALS against the decrees of C. Gopalan Nayar, Subordinate Judge of South Malabar, in appeal suits Nos. 54 and 55 of 1889, modifying the decrees of S. Subramanya Ayyar, District Munsif of Cannanore, in original suits Nos. 442 and 443 of 1887.

The plaintiff's Karnavan Kunkan Menon died in 1882 and the present first defendant, Paidel Nayar, claiming to be his

Second Appeals Nos. 1104 and 1105 of 1889.

1891.
April 17, 30.

MAYAN
v.
CHATHAPPAN.

legal representative applied to the District Court of North Malabar under Act XXVII of 1860 for a certificate of heirship to collect outstanding debts due to his estate to the extent of Rs. 17,000. This application was opposed by the present plaintiff Chathappan Nayar on the ground that Paidel Nayar was only a distant relation of Kunkan Menon and that he himself was his nephew and legal representative. The District Court ordered the certificate to be issued to Paidel Nayar, but, on the plaintiff's appeal to the High Court, it was ordered that such certificate should only be granted on Paidel Nayar's furnishing security to the extent of Rs. 17,000 under section 5 of the Act. The present second defendant, Karuvanta Valappil Mayan, on 5th September 1883, executed a bond as Paidel Nayar's surety, in the following terms:—

"To

THE DISTRICT COURT OF NORTH MALABAR.

"Security bond executed and presented by Karuvanta Valappil Cherie Mayan of Punnat Deshom, Veliampra Amshom, Kottayam Taluk."

In the matter of the application of Erota Parkum Manikoth Paidel Nayar, as per M.P. No. 251 of 1882 of this Court, and its appeal No. 190 of 1882, praying for the issue to him of a certificate under Act XXVII of 1860, authorising him to collect the outstandings due to Manikoth Kunkan Menon *alias* Kunkan Nayar who died in *Metom* 1057 [April-May 1882], the Appellate Court has recorded proceedings to the effect that such certificate will be granted to Paidel Nayar on his furnishing security to the extent of Rs. 17,000. In accordance with the said proceedings, I stand surety to the amount of Rs. 17,000 and undertake to make good to any person adjudged by a Court of Justice to be the lawful heir of the deceased, any amount collected by the said petitioner, Erota Manikoth Paidel Nayar, and any loss sustained by his want of diligence in collecting the same. The said Paidel Nayar will pay into Court any amount not exceeding Rs. 17,000 when required to do so by the Court. If he does not so pay, I hereby bind myself to pay up that amount in cash myself, and, as security for the same, I hereby hypothecate the following properties, the boundaries and measurements of which are set out herein below and the jenm right over which I

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acquired by purchase with my own private funds. If the amount be not paid as above, the properties herein below specified are to be sold as if in execution of decrees, without any suit, and making the said properties, myself and my heirs hereby liable for the satisfaction of the claim, I affix my signature to the security bond in the presence of witnesses whose names are written below.

Dated 5th September 1883.

Witnesses.

1. Muttari Kunhi Kutti Nayar.
2. Chowakaren Orkattary Moidin Kutti.

The certificate was then issued to Paidel Nayar, and he collected debts to the extent of Rs. 1,092-3-3 payable to Kunkan Menon's estate. The plaintiff thereupon brought original suit No. 141 of 1884 on the file of the Tellicherry Munsif to recover that amount, and the Court found that the plaintiff and not Paidel Nayar was Kunkan Menon's legal representative and passed a decree as prayed. The defendants having failed to pay the amount of the decree the plaintiff filed original suit No. 443 of 1887 on the file of the District Munsif of Cannanore to recover from the second defendant, Mayan, under the terms of his security bond, a sum of Rs. 1,869-9-3 being the amount of principal, interest and cost decreed in original suit No. 141 of 1884 on the file of the Tellicherry Munsif and the costs awarded to him on appeal and second appeal. Plaintiff also filed in the same Court on the same day original suit No. 442 of 1887 for recovery from first defendant Paidel Nayar or from his surety second defendant Mayan, of Rs. 2,499-12-5 on account of monies said to have been collected by the first defendant after the institution of original suit No. 141 of 1884 on the file of the Tellicherry Munsif and also on account of debts said to have been time-barred and lost to the estate by his omission to collect them.

The District Munsif passed a decree against defendant No. 1 for Rs. 1,861-15-6 and decreed further that on his default defendant No. 2 should pay to the plaintiff that amount. The Subordinate Judge reduced the amount of the decree to Rs. 1,629-7-10, but otherwise confirmed the decree of the District Munsif.

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CHATHAPPAN.

Defendant No. 2 preferred this second appeal.
Sankaran Nayar and Ryrn Nambiar for appellant.
Bashyam Ayyangar for respondent.

JUDGMENT.—The main question argued in this second appeal is whether the plaintiff is entitled to maintain the suit against the second defendant, the surety. It is contended on the one side that the bond executed under section 5, Act XXVII of 1860, was executed in favour of the District Court of North Malabar and that plaintiff cannot sue the surety unless the Court assign that bond to him. On the other hand, it is argued that the second defendant undertook a liability to any person whom a competent Court declared to be the rightful heir of Kunkan Menon and that he was therefore under an obligation to pay the plaintiff. The decision must depend upon the construction which we put upon section 5. That section authorizes the Court to take security from the person to whom a certificate is granted (1) for rendering an account of debts collected, and (2) for the indemnity of persons who may be found to be entitled to monies received by the certificate holder and whose right to recover the same against the certificate holder is not affected by the Act. On referring to the bond, we observe that it purports to be executed to the District Court of North Malabar and that the appellant undertook in default of payment by Paidel Nayar of any amount ordered by the Court up to and not exceeding Rs. 17,000 to pay the said sum in cash. As further security, he mortgaged certain properties specified in the bond. The natural construction to be put upon the section is that the surety enters into a contract with the District Judge for the time being to guarantee the rendering of an account and to indemnify to the extent of the sum mentioned therein. Although the bond was intended for the benefit of persons like the plaintiff there was no privity of contract between him and the executant and in the absence of any special provision in the act we must hold that the plaintiff was not entitled to maintain this suit without first obtaining an assignment of the bond from the District Court. No case has been cited on either side, but the language of section 5 and the terms of the bond are inconsistent with the contention of the respondent that the obligation was a statutory obligation which the plaintiff was entitled to enforce without reference to the District Court.

Under these circumstances, we reverse the decrees of the

Lower Courts so far as the second defendant (appellant) is concerned and dismissed the suit as against him with costs throughout. MAYAN
v.
CHATHAPPAN.

For the same reasons S.A. No. 1105 is decreed, and the decrees below are reversed and the suit dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

KANNU (PLAINTIFF), APPELLANT,

v.

NATESA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Mortgage—Suit for arrears of interest and sale—Suit before principal sum became due.

A suit for arrears of interest accrued due on a mortgage and for the sale of the property comprised therein was brought before the date fixed for the repayment of the principal. The mortgage provided that, on default of payment of interest on the due date, interest should be chargeable on the arrear, and also that interest at an enhanced rate should be chargeable on the principal:

Held, that the plaintiff was not entitled to sue for the arrears of interest or to bring the mortgage premises to sale before the principal became due.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 843 of 1889, confirming the decree of S. Dorasami Ayyangar, District Munsif of Valangiman, in original suit No. 80 of 1889.

Suit upon a hypothecation bond executed to the plaintiff and dated 2nd July 1886 to secure a principal sum of Rs. 2,005-8-0, whereby it was provided that interest at the rate of 8 per cent. per annum should be paid on 2nd July of each year and that in default interest at 9 per cent. should be paid on account of such interest and also the rate of interest on the principal be enhanced to 9 per cent. and that the principal amount should be paid on 2nd July 1890. Arrears of interest having accrued due, the plaintiff now sued to recover that amount and prayed that the property be sold.

* Second Appeal No. 937 of 1890.

KANNU
P.
NATESA.

The District Munsif dismissed the suit, holding that it was premature, and his decree was affirmed on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Parthasaradhi Ayyangar for appellant.

Respondents were not represented.

JUDGMENT.—The mortgage document provides that, in default of payment of the interest at 8 per cent. on the dates fixed for payment, interest at 9 per cent. shall be charged on the interest in arrears till payment and also the interest on the principal shall be raised from 8 per cent. to 9 per cent. This clearly shows that the true intention of the parties was to postpone the sale of the mortgaged property till the principal becomes due and to give the mortgagee on default of payment of interest only a right to the enhanced rate of interest on principal and on the arrears of interest. We agree with the Lower Courts that plaintiff cannot bring the mortgaged property to sale for arrears of interest until the principal is due, and we think moreover that plaintiff is precluded by the terms of the document from suing for the interest before the principal is due and must content himself with the compensation which the mortgage document gives him for the default in payment of interest.

The second appeal fails and is dismissed.

APPELLATE CIVIL.

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

RAMAN (PLAINTIFF), APPELLANT,

v.

MUPPIL NAYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Civil Procedure Code, s. 244—Execution of decree—Assignee of decree—
Regular suit.*

The assignee of a decree applied for execution; his application was dismissed and he was never brought on to the record as decree-holder. He now sued for

* Second Appeal No. 845 of 1890.

the cancellation of the order refusing execution and for a declaration of his right to execution:

Held, that the suit was not precluded by Civil Procedure Code, s. 244.

SECOND APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 549 of 1889, confirming the decree of P. J. Itteyerah, District Munsif of Kutnad, in original suit No. 557 of 1888.

Defendant No. 3 having obtained a decree against defendants Nos. 1 and 2, in original suit No. 247 of 1885, on the file of the District Munsif of Kutnad, for the recovery of certain properties assigned the decree to the plaintiff. The plaintiff applied for leave to execute the decree, but his application was rejected and he was never brought on to the record as decree-holder. He now sued to set aside the order by which execution was refused to him and prayed for a declaration of his right to execute the decree. The defendants pleaded that the suit was precluded by Civil Procedure Code, s. 244, and that the decree had been already satisfied. The District Munsif held that the first of these pleas was unsustainable, but decided in favour of the defendants on the second and dismissed the suit. On appeal the District Judge affirmed the decree of the District Munsif on the sole ground that the remedy of the plaintiff was by appeal and not by suit under Civil Procedure Code, s. 244.

The plaintiff preferred this second appeal.

Raman Menon for appellant.

Govinda Menon for respondents.

JUDGMENT.—As the plaintiff has never been brought on the record as decree-holder in suit No. 247 of 1885, it is clear that the provisions of section 244 of the Code of Civil Procedure cannot apply to him, *Halodhar Shaha v. Harogobind Das Koiburto*(1). There was no appeal against the order refusing him leave to execute if he had not been brought on the record as transferee plaintiff, *Sambasiva v. Srinivasa*(2).

The decree of the District Judge must be reversed and the appeal remanded to be heard on the merits. The appellant is entitled to the costs of this appeal, and the costs in the Lower Appellate Court will abide and follow the result.

(1) I.L.R., 12 Cal., 105.

(2) I.L.R., 12 Mad., 511.

RAMAN
P.
MUPPIL
NAYAR.1891.
March 20.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice.

REFERENCE UNDER COURT FEES ACT, s. 5.*

1891,
September 5.

Court Fees Act—Act VII of 1870, s. 7—Suit on a mortgage—Institution fee.

In a suit for the redemption of a kanom the institution fee must be computed on the kanom debt as it originally stood.

CASE referred for the orders of the High Court under section 5 of Act VII of 1870, by H. W. Foster, Registrar of the High Court, Appellate Side, Madras.

The case was stated as follows :—

“ A difference has arisen between the officer whose duty it is to see that the stamp duty payable on second appeals under the Court Fees Act is paid, and the pleader by whom the second appeal (S.R. No. 14,509 of 1890) has been presented as to the amount of the fee payable on the said appeal, and as the question appears to be one of general importance, this reference is made to the Chief Justice, under the provisions of section 5 of the Court Fees Act.

“ The second appeal under notice arises out of a suit to redeem a kanom of Rs. 150 and to recover from the mortgagee arrears of rent (or porapad), amounting to Rs. 73-3-4, due on the kanom property. If the suit were merely to redeem the kanom the fee payable on the appeal would be Rs. 11-4-0, calculated in conformity with the provisions of section 7, subsection IX, ‘ according to the principal money expressed to be secured by the instrument of mortgage ’ on Rs. 150. In addition to this fee, however, the appellant has been asked to pay a further fee of Rs. 5-10-0, chargeable on Rs. 73-3-4, the arrears of rent which forms part of his claim. The whole fee thus demanded is Rs. 16-14-0.

“ The appellant, however, contends that against the principal amount secured by the mortgage he is entitled to set off the arrears of rent due to him, and that he is liable to pay

“ stamp duty only of Rs. 6 on Rs. 76-12-8, the difference of the two sums.

“ The question for decision is therefore as follows :—In a suit to redeem a mortgage and to recover arrears of rent due by the mortgagee to the mortgagor on account of the mortgaged property, should the Court-fee to be levied be calculated according to the sum of the principal amount of the mortgage and arrears of rent, or according to the difference of those two items?

“ As authority for his contention, the appellant cites the decision of this Court in C.R.P. No. 387 of 1889. In that case the Court (Muthusami Ayyar and Weir, JJ.), taking the same view as the Subordinate Judge of Palghat and the District Judge of South Malabar, ruled that for the purposes of jurisdiction the valuation of a suit to redeem a mortgage when rent on the property is due to the mortgagor is to be determined by the difference of the two items. The grounds given for the decision are that if arrears of rent are allowed to accumulate the matter becomes one of account between the mortgagor and the mortgagee.

“ It does not follow that the rule which is applicable in questions of (pecuniary) jurisdiction governs the question of stamp duty. This is what the appellant urges. But though this Court held in *Zamorin of Calicut v. Narayana*(1) that the rule under which a suit is valued for the purpose of Court-fees is applicable to determine the Court having jurisdiction over the suit, it does not follow that the converse proposition is true. The jurisdiction of Courts under the Civil Courts Act III of 1873 depends upon the ‘ value of the subject-matter ’ in suit, and the ordinary rule of the Court Fees Act is to levy duty according to such value or the value of the relief sought, which is the same thing. But the case of a suit to redeem a mortgage is an exception to this rule.

“ The value of the relief sought in a suit to redeem a mortgage is either the value of the mortgaged property, or the value less the sum payable for redemption, but the stamp duty is payable on neither of these sums, but on the ‘ principal amount expressed to be secured ’ which amount may vary inde-

REFERENCE
UNDER COURT
FEES ACT,
s. 5.

* Referred Case No. 28 of 1891.

(1) I.L.R., 5 Mad., 284.

REFERENCE
UNDER COURT
FEES ACT,
s. 5.

"pendently of the value of the relief sought, that is to say, the ordinary rule of valuation is departed from, and for convenience sake a purely arbitrary standard of valuation is adopted in this particular case. Stamp duty is levied not on the value of the relief claimed, but on a quite different, though more easily, ascertainable sum.

"If this be admitted, it becomes clear that the appellant's argument is based upon a misconception. He contends that as stamp duty, which is ordinarily chargeable on the value of the relief claimed, is in this case charged on the principal money he has to pay to redeem; the principal money must be regarded as the relief he claims, and because this principal money is liable to reduction on account of other moneys due to him, he is entitled to a corresponding abatement of stamp duty. It is plain that the sum he has to pay is *not* the relief he seeks, though it is on that sum that he pays stamp duty. The relief for which he asks is the recovery of the land, and the payment to him of arrears of rent in addition would be a further relief for which further stamp duty should be paid, notwithstanding that on the main relief asked for stamp duty is not calculated in the ordinary manner.

"The position which the appellant takes up would result in this anomaly that the longer he were to allow rent to accumulate the less he would have to pay on a suit to recover his land, and if the rent exactly equalled the mortgage sum, he could file his suit without payment of duty. Indeed in another appeal (S.R. No. 13463 of 1890) similar to the one under reference, the arrears of rent claimed actually exceeds the mortgage sum, and the appellant still claims to pay on the difference only.

"In the two cases (S.R. Nos. 13463 and 13738 of 1890) when this question of stamp duty was raised by the appellant, Mr. Justice Shephard, sitting in the Admission Court, made an order that the lower rate of duty for which the appellant contends was sufficient, but as the question was not referred by the taxing officer under section 5 of the Court Fees Act, and the taxing officer was not present in Court when the order was made, I apprehend that this question is still an open one."

On the above reference the Chief Justice delivered the following judgment:—

REFERENCE
UNDER COURT
FEES ACT,
s. 5.

JUDGMENT.—The question referred to me by the Registrar is whether in a suit for the redemption of a kanom, institution fee ought to be paid on the kanom debt as it originally stood, or on so much of it as was actually due at the date of the suit after setting off against it arrears of rent. The answer must depend on the construction of sub-section ix, section 7 of the Court Fees Act. The sub-section is in these terms—

"ix.—In suits against a mortgagee for the recovery of the property mortgaged, and in suits by a mortgagee to foreclose the mortgage, or where the mortgage is made by conditional sale, to have the sale declared absolute—

"according to the principal money expressed to be secured by the instrument of mortgage."

The language of the sub-section is clear and unambiguous, and according to it institution fee is payable on the principal money expressed to be secured by the instrument of mortgage. The intention it suggests is to make the principal money so secured the criterion of the value of a suit for redemption. It may be that the legislature did so provide because the amount actually due by the mortgagor to the mortgagee must be a matter of account to be taken in the suit and therefore uncertain at the date of its institution. It is then urged that the original debt may have been considerably reduced by payments made prior to the institution of the suit, and that it is not reasonable to compel the plaintiff to pay institution fee on so much of the debt as has been extinguished by payment.

The Court Fees Act is a fiscal enactment, and when the words are plain, the Courts must give effect to them and are not at liberty to vary the construction with reference to any real or supposed hardship. A similar reference was made to the learned Chief Justice of the High Court at Allahabad in *Pirbhu Narain Singh v. Sita Ram*(1), and in that case the plaintiff alleged that the mortgage had been wholly satisfied by payment. The learned Chief Justice held that so far as the Court-fee on the plaint was concerned, it was immaterial whether the mortgage had in fact

(1) I.L.R., 13 All., 94.

REFERENCE
UNDER COURT
FEES ACT,
s. 5.

been satisfied or whether redemption could only be had on payment of Rs. 2,15,446-15-0. He observed further that, when the relief claimed is a decree for redemption, it is a relief which it is impossible to value, and section 7, sub-section ix, must be applied. I am therefore of opinion that the institution fee must be computed on the kanom debt as it originally stood.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

APPAYYA.*

1891.
Oct. 7, 15.

Penal Code—Act XLV of 1860, ss. 43, 177—"Legally bound."

On 22nd November 1890 the accused, who was a Deputy Tahsildar, submitted to his official superior a false "nil" return of lands in his enjoyment, and also on 5th December 1890 made a false statement to the same effect in a revenue enquiry before the Principal Assistant Collector. He was convicted of an offence under Penal Code, s. 177:

Held, that the conviction was wrong. Virasami Mudali v. The Queen (I.L.R., 4 Mad., 144) dissented from.

APPEAL against the sentence of H. G. Joseph, Acting Sessions Judge of Ganjam, in sessions case No. 16 of 1891.

The *Acting Advocate-General* (Hon. Mr. Wedderburn) for accused.

I do not dispute the fact that the accused who was a Deputy Tahsildar stated in reply to an official question he had no lands in Durghasi which is untrue. He has been convicted under section 177, which is to be read with section 43 as to the meaning of word "illegal." My contention is that it is not "an offence" to furnish such a nil return: it is not prohibited by law; so the only question is whether the act comes under the third head in the section 43, viz., whether it would furnish ground for a civil action.

[COLLINS, C.J.—Could a Collector sue the tahsildar?]

No. What would be the damage?

* Criminal Appeal No. 261 of 1891.

QUEEN-
EMPRESS
v.
APPAYYA.

Moreover the prosecution has not proved that he was legally bound to furnish a return. They do not file the order infringed. There is no proof that it was the duty of the accused to obey the order or that he knew about it. No other High Court applies the section to cases of departmental orders.

[WILKINSON, J.—But there is the authority of proceedings, dated 21st December 1871(1)].

In that case the duty was proved; however the case was not argued and merely followed the previous case. *Virasami Mudali v. The Queen*(2) was a case of wrong entry in a diary kept in pursuance of a departmental order which the accused was bound to obey. But I contend that a ruling that any breach of service amounts to an offence is too wide.

Want of proof of duty was held fatal in the next case. See Weir's Criminal Rulings, p. 66; the Court would not assume village officers as such are bound in the manner there contended for.

The order is not proved here; and Evidence Act, sec. 22, bars an admission of contents of documents. The only order filed related to information to be furnished at a date later than that to which the present charge relates. The prosecution has not shown it would be the ground of a civil action if the relation was contractual, but the contract is not proved or its terms; nor is it a tort. Under section 73 of Contract Act, no one can get nominal damages by waiving the contract and suing on the tort.

[COLLINS, C.J.—Is there any evidence that the accused was told it was his duty to answer these questions?]

The order says it is to be communicated to the Assistant Collector, &c., but the communication not proved.

Marzetti v. Williams(3) and other cases where nominal damages are given rest much upon a sort of legal fiction, Broom's Common Law, p. 88, and they do not accord with the rule in Contract Act, s. 73. Mere breach of duty by a servant will not enable the master to sue unless damage proved.

See also Criminal Revision Petitions, Nos. 377, 361 of 1891.

[COLLINS, C.J.—But there the information was true though it contained a suggestio falsi.]

(1) 6 M.H.C.R., App., 48. (2) I.L.R., 4 Mad., 144. (3) 1 B. & Ad., 415.

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

The case is concluded by authority, see especially *Virasami Mudali v. The Queen*(1) following the other cases.

[WILKINSON, J.—Do you say we are bound if the Judges did not consider the meaning of the words “legally bound.”]

They considered whether he was bound to obey the order, it must be taken to be a legal obligation which was contemplated, as to the earlier cases.

[COLLINS, C.J.—Entertaining great respect for the Judges that decided them if I see that they were not only not argued, but that the present point was not present to the Judges’ minds I shall not consider myself bound by their ruling in a criminal case.

WILKINSON, J.—They go to the length of reading the words “departmental order” into section 177 and make an infringement of it punishable with two years’ imprisonment. Do you rely on the latter part of section 43 ?]

I admit that a civil action will not lie. But if the Deputy Tahsildar was not legally bound to furnish the information, when can he be legally bound to give information ?

[COLLINS, C.J.—Was the order put on the record. ?]

The Board’s Proceedings prove themselves like the Gazette. The order is published in Maclean’s Standing Orders as order 248.

[COLLINS, C.J.—That seems to have been superseded by the new order.]

JUDGMENT.—The appellant, a Deputy Tahsildar named Dwara-rapu Chinna Appayya Naidu, was convicted under section 177 of the Indian Penal Code by the Acting Sessions Judge of Ganjam.

The Acting Advocate-General appeared for the appellant and the Government Pleader in support of the conviction.

The facts are admitted. On the 22nd November 1890, the appellant submitted to his official superior a false “nil” return of lands in his enjoyment, and also on the 5th December 1890 made a false statement to the same effect in a revenue inquiry before the Principal Assistant Collector. It was argued by the Counsel for the appellant that no criminal offence had been

committed, that appellant was not legally bound to furnish the information required of him within the definition of “legally bound” in section 43 of the Indian Penal Code, and further that no order of the Revenue Board directing officers of the status of appellant to furnish such returns has been legally proved to exist. It is also contended that the cases upon this section decided by the High Court and reported in Weir’s Criminal Rulings, pages 64, 65 and 66, are wrong.

The Government Pleader admits that no civil suit would lie against the appellant for his act (section 43), and he is unable to point out any section that makes such an act per se an offence, or any law by which such act is prohibited, but relies on the cases reported in Weir’s Criminal Rulings and contends that the Court is bound by those decisions. It is also admitted that the only orders of the Board of Revenue, which were put in, were orders dated 27th January 1890, which directed that certain returns should be made on 15th January 1891.

The main question which we have to decide is whether the appellant has been guilty of a criminal offence or is merely guilty of breach of departmental rules. It is clear that for a long series of years this High Court has held that section 177 applies to cases not to be distinguished from that of the appellant. In 1862, in High Court Proceedings, 20th November, the Court considered that the terms of section 177 were unrestricted and that they therefore embraced every case in which a subordinate officer may seek to impose false information upon his superior. This decision is not reported in the Madras Reports, and we think for a very good reason, as if the terms of section 177 are really unrestricted, any falsehood which a subordinate officer may tell his superior would be a criminal offence. In Proceedings, dated 21st December 1871(1), the Court, “upon reading a letter from the Sessions Judge of Salem,” ruled that “the defendants were public servants and part of the duties they undertook was to make true returns to their official superior. To make false returns was therefore an offence” under section 177. It is not certain whether these decisions were delivered in Court, and no one appeared to argue the case for the party accused.

(1) 6 M.H.C.R., App., 48.

(1) I.L.R., 4 Mad., 144.

QUEEN-
EMPRESS
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The third, and most important case is *Virasami Mudali v. the Queen*(1) before Kindersley and Muttusami Aiyar, JJ. This case was apparently argued by an Advocate for the accused, although the points of his argument are not given, and the Court said that, "following the Proceedings of the 20th November 1862 and 21st December 1871, we hold that the accused was legally bound to furnish information to his superior officer on the subject on which he furnished false information and that the offence was punishable under section 177." The same point was also decided in the same way in High Court Proceedings, No. 2599 of 1877.

With the very greatest respect to the learned Judges who gave these decisions, we are constrained to differ from them. It is a remarkable fact that no reference is made in any one of these cases to the definition given in section 43 of the words "legally bound," and we are therefore of opinion that the present point has never been decided. Section 43 defines the word "illegal" as follows:—"The word 'illegal' is applicable to everything which is an offence (see section 40 of the Indian Penal Code), or which is prohibited by law, or which furnishes ground for a civil action, and a person is said to be 'legally bound to do' whatever it is illegal in him to omit." Now was it "illegal" as defined by section 43 for the appellant to furnish a false return? It is no offence, it is not prohibited by law, and it furnishes no ground for a civil action. Take for instance this case. An official is bound by the rules of his superior to be at his office at 10 o'clock a.m. and to enter his name in a book kept for that purpose; he falsely enters his arrival at 10 when he in fact arrived at 11 o'clock; can it be said that he has committed an offence? and yet if we are to accept the High Court Proceedings, November 1862, as correct, the above act would be an offence as it is said the terms of section 177 are "unrestricted." In the Proceedings, 1871, the Court thought the question to be—does section 177 apply to a duty arising out of a contract of service, and because the defendants in that case were guilty of a breach of duty, therefore they were, it was held, guilty of an offence; and in *Virasami Mudali v. The Queen*(1) the Judges ground their decision on the fact that because there was

(1) I.L.R., 4 Mad., 144.

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a departmental order which the defendants were bound to obey, a breach of that departmental order was a criminal offence. We are of opinion that the sending in the false "nil" return and the appellant's subsequent falsehood that he held no land does not bring the appellant within the provisions of section 177 of the Indian Penal Code and was not a case contemplated by the Code; he was doubtless guilty of breach of a departmental order, but we consider he was not legally bound to furnish such information within the definition given in section 43 of the Indian Penal Code.

We are also of opinion that there was no evidence before the Court that the appellant was bound to furnish the information found to be false, the Board of Revenue Proceedings (with the exception of those already alluded to which do not affect this case) not having been put in—see High Court Proceedings, 213 of 1880(1).

We set aside the conviction and sentence and direct the appellant to be acquitted.

APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar (Officiating Chief Justice)
and Mr. Justice Shephard.*

PARAMESWARAN (PLAINTIFF), APPELLANT,

v.

SHANGARAN (DEFENDANT No. 1), RESPONDENT.*

Practice—Non-joinder—Malabar law—Suit by one of two co-urals.

In a suit by one of two co-urals of a Malabar devasom to recover land, the property of the devasom, the other uralan being joined as defendant, there was no evidence that the latter had repudiated the right of the plaintiff to sue in conjunction with himself, and it appeared that he had not been consulted as to the institution of the suit:

Held, that the suit was bad for non-joinder of the co-uralan as plaintiff.

SECOND APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 722 of 1889, reversing the

1891.
July 18.

(1) Weir's Cri. Rul., 66.

* Second Appeal No. 638 of 1890.

PARA-
MESWARAN
v.
SHANGARAN.

decree of V. Rama Sastri, District Munsif of Palghat, in original suit No. 19 of 1889.

Suit to recover property of a devasom with arrears of rent.

The plaintiff and defendant No. 1 were co-uralers of a Malabar devasom. The other defendants were in possession of the land in question under a demise of 9th September 1878. There was no evidence that the first defendant had repudiated the authority of the plaintiff to sue in conjunction with himself, and it was admitted that the plaintiff had not called upon defendant No. 1 to join him, or consulted him as to the advisability of suing. The District Munsif passed a decree for the surrender of the property in suit to the plaintiff and defendant No. 1.

This decree, however, was reversed by the District Judge who held on the authority of *Unni Nambiar v. Nilakandan Bhattathiripad*(1) that the suit was bad for non-joinder of defendant No. 1 as plaintiff.

Plaintiff preferred this second appeal.

Sankaran Nayar for appellant.

Sankara Menon for respondent.

JUDGMENT.—It having been alleged in the plaint that defendant No. 1 refused to join the plaintiff in the suit, and that allegation having been traversed in the written statement, an issue on that point ought to have been joined and the plaintiff should have been required to prove his allegation. The defect was, as clearly appears from the order of remand, intended to be cured by the District Judge by remitting for trial the issue whether the plaintiff is entitled to sue. The District Munsif, however, does not seem to have understood the object with which the issue was directed. But it was admitted before the Judge that there was no discussion between the plaintiff and defendant No. 1 as to whether it was advisable to institute the suit and whether defendant No. 1 was prepared to join.

As co-uralan he was entitled to be consulted and to be joined as a plaintiff. It is now argued that in the circumstances of the case defendant No. 1 was not entitled to be consulted, as he had all along asserted an exclusive right to sue, relying on the raze in the previous suit. There is no evidence to show that defendant No. 1 had at any time repudiated the plaintiff's

authority to sue in conjunction with himself. It must be observed that the suit was merely a suit in ejectment and that there was no prayer for the setting aside of the raze. We cannot say, therefore, the District Judge was wrong in dismissing the suit on the ground that the first defendant was not joined as plaintiff and was not consulted beforehand.

We must dismiss the appeal with costs.

PARA-
MESWARAN
v.
SHANGARAN.

APPELLATE CIVIL.

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

KUNHI UMAH (PLAINTIFF), APPELLANT,

v.

AMED AND ANOTHER (DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

1891.
April 29.
May 4.

Transfer of Property Act—Act IV of 1882, s. 52—"Lis pendens."

Of the three owners of certain properties, two executed a mortgage of their interest in December 1872. In 1879 a creditor of the three obtained a money-decree against them, and, in execution, attached, *inter alia*, the properties subject to the mortgage. In July 1880 the mortgagee intervened in execution, and an order having been made directing that the property be sold subject to his mortgage lien, filed a suit upon his mortgage. The property was brought to sale in execution of the money-decree in November 1880, and the defendant became the purchaser. The mortgagee obtained a decree in the following February, and the mortgaged property was sold in execution in March 1884 and was purchased by one who assigned his interest to the plaintiff:

Held, that the defendant's purchase was subject to the doctrine of *lis pendens*.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar at Calicut, in appeal suit No. 325 of 1889, confirming the decree of T. V. Anantan Nayar, District Munsif of Calicut, in original suit No. 99 of 1888.

Suit to recover possession of two-thirds of a certain paramba. The paramba originally belonged as joint property to defendant No. 2, together with his brother and uncle, who mortgaged their two-thirds interest in it and certain other property on the 28th December 1871 under exhibit B. All the land to which exhibit

* Second Appeal No. 1174 of 1890.

(1) I.L.R., 4 Mad., 141.

KUNHI UMAH ^{v.} AMED. B related was attached in execution of a money-decree obtained against the three owners in original suit No. 472 of 1879 on the file of the District Munsif's Court at Calicut. The mortgagee, on the 1st July 1880, put in a claim asserting his mortgage lien and an order was made directing that the property be sold subject to his encumbrance. Subsequently, and in the same month, he filed a suit on the footing of exhibit B, viz., original suit No. 536 of 1880 on the file of the same Court. The property was brought to sale in execution of the money-decree on the 9th November 1880 and defendant No. 1 became the purchaser. The mortgagee, on the 11th February 1881, obtained a decree in his suit upon the mortgage, and the mortgaged property, viz., the two-thirds share of the judgment-debtors was brought to sale in execution on the 11th March 1884. The purchaser at that sale subsequently assigned his interest to the plaintiff, who brought this suit to recover the property as above. The District Munsif held that the plaintiff was not entitled to recover, his purchase having been subsequent in date to that of defendant No. 1. He accordingly dismissed the suit. The Subordinate Judge on appeal affirmed his decree, holding that, since the mortgagee had filed his suit after the order for sale in execution of the money-decree had been made, he should have joined the holder of the money-decree as a defendant, because the equity of redemption still remained available to the unsecured creditors of the judgment-debtors, and an opportunity ought to have been given to them to redeem his encumbrance.

The plaintiff preferred this second appeal.

Sankaran Nayar for appellant.

Sundara Ayyar for respondents.

JUDGMENT.—Both the Courts below are in error in holding that the first defendant's purchase is not governed by the doctrine of *lis pendens*. It was held in *Raj Kishen Mookerjee v. Radha Madhub Holdar*(1), that a purchaser under an execution was bound by *lis pendens*, and the same opinion was expressed by this Court in *Manual Fruval v. Sanagapalli Latchmidevamma*(2), in which the plaintiff made his purchase at an execution sale held by a District Munsif. The result is that the first defendant must be treated as if he were a party to the plaintiff's suit and

(1) 21 W.R., 349.

(2) 7 M.H.C.R., 104.

bound by the decree and the execution proceeding therein. But KUNHI UMAH ^{v.} AMED. it is urged that prior to the date of the plaintiff's suit there was an attachment made by the first defendant, that a claim was preferred by the plaintiff, and that the property under attachment was thereupon ordered to be sold subject to the mortgage. These proceedings created only a power in the judgment-creditor in original suit No. 472 of 1879 to bring the mortgagor's equity of redemption to sale, and the judgment-creditor had, as was held by Mr. Justice Wilson in *Soobhul Chunder Paul v. Nitye-Churn Bysack*(1), no right to redeem as a subsequent incumbrancer. It was by the subsequent purchase that such right was created and the purchase was subject to the doctrine of *lis pendens*. The first defendant ought to have paid the amount under the mortgage decree and prevented the sale in execution in the same way in which the mortgagors might have done. It is no doubt true that the purchaser had reference to the order that the property might be sold subject to the prior mortgage, but the order did not create a right to redeem which came into existence only after the purchase. The fact that the mortgagee knew of the order makes no difference, as he only sought to enforce his mortgage which he was legally entitled to do and no notice of the suit was necessary to the first defendant who is sought to be affected by *lis pendens*—*Manual Fruval v. Sanagapalli Latchmidevamma*(2). We may observe that in the case of *Manual Fruval v. Sanagapalli Latchmidevamma*(2) there was also an attachment and the doctrine of *lis pendens* was nevertheless held applicable.

The decrees of the Courts below are, therefore, set aside and the plaintiff's claim is decreed with costs throughout. The mesne profits claimed will be ascertained in execution and awarded to the plaintiff.

(1) 21 W.R., 349.

(2) 7 M.H.C.R., 104.

APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar (Officiating Chief Justice)
and Mr. Justice Shephard.*

KUNHI MANNAN (DEFENDANT No. 5), APPELLANT,

v.

CHALI VADUVATH AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Malabar law—Court sale—Decree on a mortgage to secure two debts—One debt only binding on tarwad.

In a suit by members of a Malabar tarwad to set aside a sale in execution of a decree, passed on a mortgage which had been executed by their karnavan and senior anandravans in consolidation of two prior mortgages executed, respectively, to secure two debts, it appeared that one of these debts was binding and the other not binding on the tarwad:

Held, that the Court should declare the plaintiffs entitled to the property sold notwithstanding the sale, but subject to the charge created to secure the binding debt.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 509 of 1889, confirming the decree of A. Venkataramana Pai, District Munsif of Tellicherry, in original suit No. 252 of 1888.

Suit by certain members of a Malabar tarwad against their karnavan and three other members of the tarwad and a person who had obtained a decree against the last-named members of the tarwad, in execution of which he had brought to sale and purchased property belonging to the tarwad for a declaration that this sale was not binding on the tarwad.

The decree in question was passed upon a mortgage executed by the karnavan and two senior anandravans in consolidation of two mortgages, one of which (filed in this suit as exhibit I) was executed to secure a debt which was now found to have been contracted for tarwad purposes, and the other of which (filed in this suit as exhibit V), was executed to secure a debt which was now found to have been contracted under no circumstances of justifying necessity.

The District Munsif passed a decree as follows:—

* Second Appeal No. 665 of 1890.

“It is declared that, without prejudice to the mortgage I, the sale of plaint property in execution of the decree in original suit No. 483 of 1887 passed upon the mortgage bond IV be, and the same hereby is, set aside;” and this decree was affirmed on appeal by the Subordinate Judge.

Defendant No. 5 preferred this second appeal.

The *Acting Advocate-General* (Hon. Mr. Wedderburn) for appellant.

Mr. Gantz for respondents.

JUDGMENT.—The only question raised is with regard to the money originally secured by exhibit I. The decree as framed is made without prejudice to that mortgage, but the fact is overlooked that this mortgage is merged in the decree which led to the sale sought to be set aside. The proper decree should be as follows:—“We declare that the plaintiff is entitled to the property notwithstanding the sale but subject to a charge in favour of the fifth defendant on the property sold for so much of the decree amount as relates to the money secured by exhibit I with interest thereon at the rate of 6 per cent. per annum from 22nd October 1887 up to date of payment.” The suit was substantially a suit for a declaration, and the Lower Appellate Court was probably in error in directing the payment of Rs. 32. But we have no power to interfere.

The appeal has substantially failed and therefore the appellant must pay the respondents' costs.

APPELLATE CIVIL.

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

KUTTYASSAN (DEFENDANT No. 2), APPELLANT,

v.

MAYAN AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1),
RESPONDENTS.*

Malabar Law—Will—Gift of a life interest—Limitation.

The karnavan of a Malabar tarwad executed an instrument described as a vasyat whereby he made a gift of a life interest in certain self-acquired property,

* Second Appeal No. 543 of 1890.

KUNHI
MANNAN
v.
CHALI
VADUVATH.

1891.
March 28.
April 16.

KUTTYASSAN
v.
MAYAN.

to come into operation at once. The members of his tarwad acquiesced in this disposition of the property. In a suit by his successor in the office of karnavan to recover the property :

Held, that time began to run for the purposes of limitation from the death of the donee.

Quære, whether the principle laid down in *Alami v. Komu* (I.L.R., 12 Mad., 126) would apply in the case of a will made by a member of a Malabar tarwad having heirs in the tarwad.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 263 of 1889, reversing the decree of S. Raghunathayya, District Munsif of Tellicherry, in original suit No. 613 of 1886.

Suit by the karnavan of a Malabar tarwad to recover possession of certain land.

The plaintiff's case was that the land in question was property of his deceased karnavan, Chathankandi Kunhi Mayan, who was married to one Ummaya, a member of second defendant's tarwad; that under a will (exhibit A), dated the 17th Karkidakam 1029 (31st July 1854), Kunhi Mayan devised the property to his wife Ummaya and his daughter Pathumma for life with reversion to his own tarwad; and that, as Ummaya died in 1057 (1881-82) Pathumma having predeceased her, plaintiff was entitled to the possession of the property. The first defendant was alleged to be in possession as Ummaya's tenant. The defendants denied the will and Kunhi Mayan's right to the paramba, which, they said, was the jenm of second defendant's tarwad, and was now held by the first defendant under a lease (exhibit III) granted to him by Ummaya's brother and the second defendant's karnavan, Kunhamed Musaliar, in August 1876. They denied the plaintiff's claim to be the karnavan of his tarwad, and also pleaded limitation.

The District Munsif found that plaintiff was the karnavan of his tarwad and therefore competent to maintain the suit, and that the land in question was the property of plaintiff's karnavan Kunhi Mayan and did pass to the possession of his wife and daughter on his death under the will in exhibit A; he was nevertheless of opinion that the will was invalid as against the other members of Kunhi Mayan's tarwad under the Malabar Law, but ruled, however, that, as they allowed his widow and daughter and the other members of the second defendant's tarwad to continue in their occupation since Kunhi Mayan's death in

1034 (1858--89), their present claim for possession was barred by limitation. The District Munsif accordingly passed a decree dismissing the suit. The Subordinate Judge on appeal held that the instrument was valid as a will, and that since the person who took under it survived until 1880, the suit was not barred by limitation, and accordingly passed a decree for the plaintiff.

Defendant No. 2 preferred this second appeal.

Sankara Menon for appellant.

Ryru Nambiar for respondent.

JUDGMENT.—The District Munsif found that plaintiff was the karnavan of his tarwad and that the plaintiff property was the self-acquisition of the former karnavan Kunhi Mayan, but that the so-called will (*vasyat*) was not valid since the property lapsed to the tarwad at Kunhi Mayan's death in 1859 (*Kallati Kunju Menon v. Palat Erracha Menon*(1), and hence that the suit was barred.

On appeal the Subordinate Judge concurred with the District Munsif on the first two issues, but held on the authority of *Alami v. Komu*(2), and S.A., No. 395 of 1887, that the will was valid, inasmuch as Kunhi Mayan had a power of disposition by gift *inter vivos*, and secondly, that the family had accepted and recognized the life interest of Ummaya and that limitation could only run against defendants from the date of her death (1880); hence that the suit was not barred.

In the case of *Alami v. Komu*(2) the testator had no heirs of any kind, and the question was between his devisees and the Crown in S.A., No. 395 of 1887, the question was between devisees and Attaladakam heirs only; and in both these cases the will was held valid.

But it is not necessary in the present case to decide whether the principle laid down in *Alami v. Komu*(2) would apply when there were heirs in the tarwad itself, for, on referring to the *vasyat* (exhibit A), we find that it purports to be a deed of gift and not a testamentary disposition, though the gift is limited to a life interest only. It purports, however, to come into effect at once, and thus must be regarded as a gift *inter vivos*, and the Subordinate Judge is fully justified in finding on the evidence that the disposition has been recognized and accepted by the tarwad.

(1) 2 M.H.C.R., 162.

(2) I.L.R., 12 Mad., 126.

KUTTYASSAN
v.
MAYAN.

KUTTYASSAN
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MAYAN.

Time will therefore run from the death of Ummaya in 1880, and, as it is found that defendants only got possession through this lady, the suit is not barred.

The second appeal is dismissed with cost.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Handley.

1891.
May 8.

PARAMASIVA (DEFENDANT), APPELLANT,

v.

KRISHNA (PLAINTIFF), RESPONDENT.*

Practice—Non-joinder—Civil Procedure Code—Act X of 1877, s. 294, amended by Act XII of 1879—Purchase at a Court-sale on behalf of a judgment-creditor without permission of the Court.

Under Civil Procedure Code of 1877, as amended by Act XII of 1879, a purchase made at a Court-sale on behalf of a judgment-creditor was not invalid for want of permission of the Court.

Where a suit is brought by one member of an undivided Hindu family to recover land, the property of the family, and no objection is taken at the hearing on the ground of the non-joinder of the plaintiff's co-parceners, it is not open to an unsuccessful defendant to raise such objection on appeal.

SECOND APPEAL against the decree of W. F. Grahame, District Judge of Tinnevely, in appeal suit No. 256 of 1889, confirming the decree of S. Krishnaswami Ayyar, District Munsif of Srivilliputar, in original suit No. 275 of 1888.

Suit to recover possession of certain land. Vedanta Ayyangar, the undivided brother (deceased) of the plaintiff obtained a decree on a mortgage against the brother and sister of the defendant in original suit No. 47 of 1878 on the file of the District Munsif of Srivilliputar. The mortgaged property was attached and brought to sale in execution on 8th June 1881. The plaintiff became the purchaser of the land for his undivided brother, who subsequently died, and the land became the property of the undivided family. The sale to the plaintiff was confirmed on 11th August 1881, but he did not obtain a sale certificate until 24th September 1886. The same property was attached in

* Second Appeal No. 1041 of 1890.

execution of a money decree obtained in small cause suit No. 307 of 1877 in the same Court by the defendant against his own brother above referred to. The property was brought to sale on 13th June 1881; the sale was confirmed on 15th August 1881. The sale certificate was issued on 6th October 1883 and the purchaser obtained possession from the judgment-debtor.

On 29th October 1887 the District Munsif passed an order on civil miscellaneous petition No. 678 of 1887 directing the delivery of one moiety only of the property purchased by the plaintiff to him. The plaintiff now sued to set aside the above order and to obtain possession of the other moiety from the defendant.

The District Munsif passed a decree as prayed. The defendants preferred an appeal to the District Judge on the ground, among others, that the plaintiff had no right to sue alone, he being a member of an undivided Hindu family consisting of two or more co-parceners as admitted by himself. This defence had not been raised in the District Munsif's Court, where the plea mainly relied on was as follows, viz., that a few days after the sale in execution of the decree in original suit No. 47 of 1878 the judgment-debtor had paid the whole of the decree-amount inclusive of the auction purchase money to the plaintiffs therein and that the auction purchase was privately set aside by the parties, the plaintiff therein promising to certify that fact to the Court and not to seek to obtain a sale certificate. The allegations upon which this plea rested were held by the District Munsif not to have been substantiated and this view was concurred in by the District Judge who proceeded to deal with the other questions in the appeal as follows:—

“Defendant's pleader then argued that under section 294, “Civil Procedure Code, the purchase by plaintiff's brother for plaintiff, the decree-holder, is *ipso facto* void, and I am referred to the decision in *Mahomed Gaze Chowdhry v. Ram Loll Sen*(1). “Under Act X of 1877, a decree-holder could not bid without special permission and a purchase by him was invalid—*vide* “*Rukhinee Bullubh v. Brojonath Sircar*(2) and *Narayan Deshpande v. Anaji Deshpande*(3). But under the provisions of the “present Civil Procedure Code, XIV of 1882, such a purchase is “not necessarily invalid, but may be set aside by the Court under”

(1) I.L.R., 10 Cal., 757. (2) I.L.R., 5 Cal., 808. (3) I.L.R., 5 Bom., 180.

PARAMASIVA
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"clause 3 of section 294 "on the application of the judgment-debtor or any other person interested in the sale." This is also laid down in *Javherbai v. Haribhai*(1) and in *Chintamanrao Natu v. Vitthabai*(2) and in *Mathura Das v. Nathuni Lall Mahta*(3). Therefore, the contention is of no avail to defendant. "Not only was no application made to cancel the sale but the Court actually confirmed it.

"It was then objected that the suit was not sustainable because plaintiff is not the only member of his family who is interested in the suit and that the others ought to have been added to the array of parties. As to this I have merely to remark that section 34, Civil Procedure Code, requires this objection to be raised at the earliest possible stage, and that I cannot consider it in appeal, for it was not raised before the District Munsif—*vide* the remarks of Broughton, J. (page 602), in *Rajnarain Bose v. Universal Life Assurance Company*(4). "This objection ought to be taken before the first hearing, or it will be held to have been waived.

"The result then is (1) that defendant has failed to prove the agreement with plaintiff which he set up, (2) that the objection of others being interested is raised too late, (3) that the purchase by plaintiff for the decree-holder is not invalid, (4) that plaintiff did not as alleged play a fraud upon the Court by seeking to evade the provisions of section 294, Civil Procedure Code, and (5) that since the property before the death of Vedanta Ayyangar became the property of the joint family, of which he was an undivided member and by survivorship has passed to plaintiff and others, the plaintiff certainly can bring the suit. "Therefore, this appeal fails. The decree of the Lower Court is confirmed and this appeal is dismissed with costs."

Defendant preferred this second appeal.

Rangacharyar for appellant.

Parthasaradhi Ayyangar for respondent.

JUDGMENT.—As to the point that plaintiff's purchase being on behalf of the judgment-creditor was invalid being made without the permission of the Court, the last clause of section 294 of the Code of Civil Procedure, Act X of 1877, in force at the time

of the purchase as amended by Act XII of 1879 stood as in the corresponding section of the present Code, and clearly negatives, in our opinion, the view that not obtaining the permission of the Court invalidates the purchase and this opinion is in accordance with the decisions referred to by the District Judge.

The objection that Vedanta Ayyangar's heirs were not made parties to the suit was we think rightly disallowed by the District Judge as taken too late. It is urged that appellant is entitled to compensation for improvements. The District Munsif disallowed the claim, and though it was made a ground of appeal to the District Court, it does not appear to have been urged in that Court, nor do we see any legal foundation for the claim.

The second appeal is dismissed with costs.

PARAMASIVA
v.
KRISHNA.



(1) I.L.R., 5 Bom., 575.

(3) I.L.R., 11 Cal., 731.

(2) I.L.R., 11 Bom., 588.

(4) I.L.R., 7 Cal., 594.