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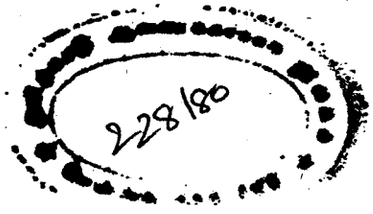

THE INDIAN LAW REPORTS.

MADRAS SERIES,

CONTAINING

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

REPORTED BY

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

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JUDGES OF THE HIGH COURT.

1st January—31st December 1892.

Chief Justice.

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

Puisne Judges.

Hon'ble Sir T. Muttusami Ayyar, K.C.I.E.
,, G. A. Parker.
,, F. Wilkinson.
,, H. H. Shephard.
,, J. W. Handley (*Offg.*).
,, S. Subramanya Ayyar, C.I.E. (*Offg. till* 15*th February*).
,, J. W. Best (*Offg. from* 5*th February*).

Hon'ble J. H. Spring Branson, *Advocate-General.*
,, H. G. Wedderburn (*Offg. till* 9*th February*).

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A zamindar holding lands irrigated by the Kistna anicut, from whom no extra peishcush is on that account levied by Government, is not entitled to impose on his tenants a "wet" rate of rent without the permission of the Collector. The fact that the tenants have paid rent at such a rate for six years is not sufficient to establish an implied covenant to continue to do so. It is allowable for a landlord to insert in his pattas a term to the effect that the tenant shall not fell trees without his consent.

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" XIV:
See CIVIL PROCEDURE CODE.

" XV:
See PRESIDENCY SMALL CAUSE COURTS ACT.

1884, IV (Madras):
See DISTRICT MUNICIPALITIES ACT.

1887, IX:
See PROVINCIAL SMALL CAUSE COURTS ACT.

1889, VII:
See SUCCESSION CERTIFICATE ACT.

ALIYASANTANA LAW—*Specific Relief Act—Act I of* 1877, *s.* 42—*Declaratory relief—Limitation Act—Act XV of* 1877, *sched. II, arts.* 127, 144:

In a suit in which the plaintiffs sought declarations that they were members of an undivided Aliyasantana family with the defendants, that certain property belonged to the family, and that plaintiff No. 1, the senior member of the family, was entitled to have the lands registered in his name, the defendants denied the allegations in the plaint, and pleaded that the suit for declarations only was not maintainable, and that it was barred by limitation. It was found that the plaintiffs had separated themselves from the defendants, and had for more than twelve years been excluded to their own knowledge from the joint family property :—*Held*, that, if, as alleged by the plaintiffs, plaintiff No. 1 was the *de jure* ejaman of the family, he was entitled to the possession and management of the family property, and a suit for a mere declaration of his right would not lie—*Chandu* v. *Chathu Nambiar* (I.L.R., 1 Mad., 381), distinguished. *Per cur.*—"We are of opinion that article 127 applies to this case, and that the plaintiffs, having separated themselves from the defendants, have for more than twelve years been to their own knowledge excluded from the joint family property, and that their suit to enforce a right to share therein is barred"—*Mahalinga* v. *Mariyamma* (I.L.R., 12 Mad., 462), distinguished.

Muttakke v. *Thimmappa* 186

ALTERATION IN DOCUMENTS SUED ON, MATERIALITY OF—*Forged attestation:*

In a suit on a hypothecation bond, dated before the Transfer of Property Act came into operation, and executed in favour of the plaintiff by the father (deceased) of defendant No. 1, it appeared that, after the bond had come into the hands of the plaintiff, the name of defendant No. 1 had been added as that of an attesting witness and that this was a forgery :—*Held*, that the plaintiff was not precluded from recovering by reason of this alteration in the bond sued on.

Ramayyar v. *Shanmugam* 70

BENAMIDAR, SUIT BY—*Civil Procedure Code*, *s.* 13—"Res judicata":

In a suit to recover a parcel of land, the plaintiff's case was that it had been purchased by him *benami* in the name of his brother, who had sued the present defendants to obtain possession in 1887, but had been negligent in the conduct of the suit which was consequently dismissed. It was found that there had been no negligence in the conduct of the suit, and that it

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had been instituted with the plaintiff's knowledge :—*Held*, that the plaintiff was bound by the decree in the former suit, and could not recover on his secret title.

Shangara v. *Krishnan* 267

CIVIL COURTS ACT (MADRAS)—ACT III OF 1873, s. 12—*Declaration of Membership of a tarwad—Valuation for the purposes of jurisdiction:*

The plaintiff, alleging that he was karnavan of the defendant's tarwad, sued in a Subordinate Court for a declaration that he was a member of it, adding no prayer for consequential relief. It appeared that the tarwad property exceeded Rs. 26,000 in value, but that the proportionate share of each member, computed as on an equal division, was less than Rs. 900. The Subordinate Judge held that the suit was within the jurisdiction of a District Munsif and rejected the plaint :—*Held*, that the order was wrong and should be set aside.

Ibrayan Kunhi v. *Komamutti Koya* 501

2. ——————————, **s. 12**—*Jurisdiction—Valuation of relief—Suit for partition:*

In an appeal against a decree of a Subordinate Judge dismissing a suit brought by the members of one Nambudri illom against the members of another for partition and delivery of a moiety of the property of an extinct illom, it appeared that the value of the share claimed was less than Rs. 5,000 :—*Held*, that the appeal lay to the District Court. *Krishnasami* v. *Kanakasabai* (I.L.R., 14 Mad., 183) followed.

Narayanan v. *Narayanan* 69

CIVIL PROCEDURE CODE, s. 11—*Civil suit—Religious usages of Muhammadans—Kutbah:*

Certain Moplahs, described as "the *Moktessor and Jamats*" of a mosque, sued certain other Muhammadans, described as "members of the Pusiar caste," alleging that the custom was for the defendants to attend the plaintiffs' mosque on Friday at the reading of the kutbah, and that the defendants had recently built another mosque a short distance off, and had "for two months been attempting to read the kutbah there." It was further alleged in the plaint that such reading of the kutbah was "quite contrary to the Muhammadan religion" and that the defendants nevertheless proposed to have the kutbah read, "whereby the kutbah or adoration conducted in our mosque will, according to religion, be fruitless." The prayer of the plaint was for an injunction, restraining the defendants from reading the kutbah in their mosque :—*Held*, that the plaint disclosed no cause of action.

Maine Moilar v. *Islam Amanath* 355

2. ——————————, **s. 13**—"Res judicata"—*Court of competent jurisdiction—Hindu law—Power of guardian to alienate land—Compromise of litigation:*

In 1882, the daughter of a deceased Hindu brought a suit in the Court of a District Munsif for a declaration that the defendant was not the adopted son of her father (deceased) as he claimed to be. It was found that the alleged adoption was valid and the suit was dismissed. The then defendant now brought, in 1889, a suit in the same Court to recover possession of land from the then plaintiff, alleging that it had been wrongfully transferred to her by way of gift by his adoptive mother. The defendant denied the adoption and asserted that the transfer was valid as having taken place in accordance with an arrangement made by her father in his life time. It was admitted that the value of the whole property, to which the plaintiff was entitled by virtue of his adoption, if it was a valid adoption, exceeded Rs. 2,500. The Court of First Appeal held that the question of the adoption was not *res judicata*, and observed that the transfer to the defendant was apparently made to induce her to abandon her litigation as to the adoption :—*Held*, (1) that the defendant was not at liberty to question the plaintiff's adoption; (2) that the Court should try whether the transfer was made *bonâ fide* by the plaintiff's mother as his guardian for his benefit.

Venkataraghava v. *Rangamma* 498

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3. ——————, s. 13—"Res judicata"—*Court of competent jurisdiction—Act X of* 1877, *s.* 433—*Suit against a Sovereign Prince :*

A suit for a declaration of the title of the plaintiffs' tarwad to certain land was filed in a District Court against the Maharaja of Cochin and others, including the trustees of a devasom. It appeared that the same land was the subject of a suit instituted in a Subordinate Court on the 6th August 1877, to which the representatives of both the plaintiffs' tarwad and the devasom were parties, and that the land was then found to be the property of the devasom and a decree was passed accordingly. It was contended that the present claim was not *res judicata* by reason of that decree, because, under the provision of Act X of 1877, s. 443, which came into operation during the pendency of that suit, no Sovereign Prince could be sued in any Court subordinate to a District Court, and the Court which passed that decree was not therefore "a Court of jurisdiction competent to try" the present suit within the meaning of Civil Procedure Code, s. 13 :—*Held*, that, although these words must be taken to refer to the jurisdiction of the Court at the time the suit was heard and determined, yet the present claim was *res judicata*, since the title to the land was a matter in issue within the cognizance of the Subordinate Judge and was adjudicated on by him.

Kunji Amma v. *Raman Menon* 494

4. ——————, s. 13—*Malabar Law—Adoption by the last member of a Nambudri illom—Limitation Act—Act XV of* 1877, *sched. II, arts.* 91, 120—"Res judicata" :

In a suit for a declaration that the members of the Numbudri illom to which the plaintiffs belonged were the sole heirs and successors of an illom known as Kiluvapura, of which the natural line had become extinct, and for possession of certain land which had formed part of its property, the defendants were the karnavan and manager of the plaintiffs' illom and the members of another illom. It was found on the evidence that the plaintiffs' karnavan had been adopted unto the Kiluvapura illom, and that subsequently that illom and the plaintiffs' had been amalgamated under a karar executed by, among others, the wife of the last male member of the Kiluvapura illom, and that she had died less than twelve years before this suit. The defendants, other than the karnavan and manager of the plaintiffs' illom, asserted a right to a moiety of the property of the Kiluvapura illom (with which, however, it was now found on the evidence that they were less closely connected than the plaintiffs), and it appeared that that right had been similarly asserted in suits brought after the date of the karar above referred to, by a member of the defendants' illom against the karnavan and manager of the plaintiffs' illom, and that decrees had been passed therein negativing the title now set up by the plaintiffs and that part of the property now claimed was held under one of those decrees. The plaintiffs did not ask that those decrees should be set aside :—*Held*, (1) that the suit was not barred by limitation ; (2) that it was unnecessary for the plaintiffs to prove *mala fides* against their karnavan in respect of his conduct in the former suits or to seek that the decrees passed therein be set aside, and that those decrees did not constitute the present claim *res judicata*, as the karnavan was not then impleaded in his capacity as such ; (3) that the adoption of the plaintiffs' karnavan was valid even assuming that no datta homam was performed, and the last male member of the Kiluvapura illom had died after merely indicating him as his heir and the widow adopted him in the Dwayamushyayana form ; (4) that the plaintiffs were entitled to a decree as prayed.

Shankaran v. *Kesavan* 6

5. ——————, s. 13—"Res judicata"—*Suit by benamidar :*

In a suit to recover a parcel of land, the plaintiff's case was that it had been purchased by him *benami* in the name of his brother, who had sued the present defendants to obtain possession in 1887, but had been negligent in the conduct of the suit which was consequently dismissed. It was found that there had been no negligence in the conduct of the suit, and that it had been instituted with the plaintiff's knowledge :—*Held*, that the plaintiff was bound by the decree in the former suit, and could not recover on his secret title.

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6. ——————, s. 13—"Res judicata" *between defendants :*

The plaintiff, a junior member of a Malabar tarwad, alleged that her karnavan had assigned to her his kuikanom right over certain land, and that she had obtained a fresh demise from the jenmi and placed a tenant in possession. The tenant was dispossessed by the present karnavan, and in 1886 sued him and the plaintiff to recover possession of part of the land. That suit was dismissed on the ground that the above allegations of the plaintiff were unfounded. She now sued the present karnavan for possession of the entire land :—*Held*, that the claim of the plaintiff was *res judicata* as far as it related to the land in question in the former suit, but not as to the rest.

Madhavi v. *Kelu* 264

7. ——————, ss. 13, 43—"Res judicata"—*Registration Act—Act III of* 1887, *ss.* 17, 49—*Instrument affecting movable and immovable property :*

The widow, daughter and divided brother of a deceased Hindu, executed an instrument which provided for the distribution of his property, both movable and immovable, as to which they had disputed. The document was not registered. The widow set up a will made by the deceased in her favour : the brother sued the widow for a declaration that the will was a forgery, but the Court held that it was genuine. He now sued the widow and daughter on the above instrument to recover his agreed share of the movable property of the deceased. The widow set up the will, which the plaintiff averred was invalid according to the custom governing the family :—*Held*, (1) that the plaintiff was not precluded by the decree in the former suit from impugning the validity of the will ; (2) that the unregistered instrument was admissible as evidence in support of the plaintiff's claim for the movable property.

Thandavan v. *Valliamma* 336

8. ——————, ss. 13, 98, 103—"Res judicata"—"*Court of competent jurisdiction*"—*Landlord and tenant—Quiet enjoyment, covenant for—Parties—Suit for damages against lessor, including costs—Joinder of one of two co-lessees as defendant—Suit dismissed against such lessee :*

In 1883, A, the trustee of a certain charity, executed in favour of X and Y an agricultural lease for nine years and delivered over possession of the lands comprised in it, being part of the trust property. The lease contained a provision that it should be cancelled on default being made in payment of the rent and kist, and it contained no express covenant for quiet enjoyment. In 1887 default was made in payment of the rent and kist. A thereupon cancelled the lease and sued X and Y in a Subordinate Court and obtained a decree for the arrear, the total amount of his claim being Rs. 2,807. In that suit X alleged that Y was merely a name-lender for A, who desired to benefit himself at the expense of the charity, and also that certain raiyats setting up a false claim had evicted X from the lands demised at the instigation of A, who had subsequently sought unsuccessfully to obtain further advantages for himself. The Subordinate Judge framed an issue on each of these allegations and recorded findings in the negative. In the same year X filed a suit for damages for breach of contract against A and Y in the High Court, repeating in his plaint the above allegations. When that suit came on for hearing, it was dismissed for default, Y being the only party who appeared. X now sued A again on the same cause of action, making the same allegations. Y was subsequently brought on to the record as being a necessary party to the suit, being joined as second defendant, but he applied to be and was struck off the record on the ground that the dismissal of the former suit in the High Court was final as against him :—*Held*, (1) that the suit was not bad for the non-joinder of the co-lessee as a plaintiff, nor for the reason that the plaintiff could not prosecute the suit against him ; (2) that the matters put in issue in the Subordinate Court were not *res judicata* by reason of the decision of that Court ; (3) that the plaint disclosed a good cause of action against the lessor ; (4) that even if the plaintiff had substantiated his allegations against his lessor, he would not have been entitled to recover the cost of civil and criminal proceedings against the raiyats who had evicted him.

Vithilinga Padayachi v. *Vithilinga Mudali* 111

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9. ——————, ss. 13, 206—"Res judicata"—*Amendment of decree—Subsequent execution :*

In a suit for money against the karnavan and two anandravans of a Malabar tarwad, the judgment directed a "decree for the plaintiffs as prayed," but the decree ordered payment by one anandravan only. Property of the tarwad was attached and sold. The decree was then amended and brought into conformity with the judgment. Other members of the tarwad sought to have the sale set aside, but it was found that the judgment debt had been contracted for proper tarwad purposes, and that suit was dismissed. Application was now made for the attachment of other property of the tarwad in further execution of the amended decree :—*Held*, that the members of the tarwad were not entitled to contend that the decree was not binding on them, that matter being *res judicata*. *Quære.*—Whether the rule in *Sundara* v. *Subbanna* (I.L.R., 9 Mad., 354) as to the amendment of decrees is correct.

Chathappan v. *Pydel* 403

10. ——————, ss. 13, 279, 280, 283—*Party to proceedings in execution—Order in execution—Estoppel*—"Res judicata" :

A claim in execution to a house which had been attached was dismissed, and the claimant now sued the decree-holder to establish her title to it. It appeared that the house had been previously attached in execution of another decree obtained against the same judgment-debtor and his father (since deceased); that the present plaintiff had then perferred a claim, which was allowed; that the judgment-debtor had taken no steps to have the order allowing the claim set aside; and that a suit filed by the decree-holder with that object had been dismissed :—*Held*, that the order allowing the plaintiff's claim in the former suit did not constitute it *res judicata* and created no estoppel in the present suit.

Gnanambal v. *Parvathi* 477

11. ——————, s. 14—*Foreign judgment, suit on—Procedure—Waiver of objection to jurisdiction :*

In a suit upon the judgment of a Court at Bastar, it appeared that in the suit in which the judgment was pronounced, the defendant took no objection as to the jurisdiction of the Court, and that he carried on business by his agent in the Bastar territory, and that a decree was passed for the plaintiff after evidence adduced on both sides in the ordinary way :—*Held*, (1) that the defendant was not entitled to have the case re-heard; (2) that the defendant was not entitled to take objection to the jurisdiction of the Bastar Court.

Fazal Shau Khan v. *Gafar Khan* 82

12. ——————, ss. 15, 539—*Evidence Act*, ss. 57, 87—*Public charitable trust—District Court, jurisdiction of—Books of history :*

A church at Palayur and the property appertaining to it were in the possession of certain of the yogakars or parishioners, who had been elected kaikars or church-wardens, but whose election had since been superseded in favour of three other persons who now sued to recover possession. The plaintiffs were Roman Catholics; and with the three persons above referred to were joined as plaintiffs the Vicar Apostolic, the Vicar appointed to the church by him, and two other persons representing the Roman Catholic yogakars. The defendants were Chaldean Syrian Christians; and with those in possession were joined as defendants the Chor Episcopa, the Vicar appointed to the church by him, and four persons representing the other yogakars. The plaint was framed under Civil Procedure Code, s. 539, and contained, besides a prayer for possession, prayers for a declaration that the church, &c., was held on trust for worship according to the faith and discipline of the Church of Rome, and for injunctions against the defendants. The suit was tried by the District Judge in whose Court it was instituted, although the defendants pleaded that it was within the jurisdiction of the Subordinate Court, s. 539 being inapplicable. He passed a decree as prayed holding that the church, &c., was dedicated to the trust stated in the plaint, although it had been diverted from the purposes of that trust for a time. In coming to

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this conclusion, he referred to a Portuguese work dated 1606, "*India Orientalis Christiana*" published in 1794, and Hough's "*History of Christianity in India*" published in 1839 :—*Held*, (1) that the suit not being one brought by beneficiaries against trustees, or for any of the purposes mentioned in Civil Procedure Code, s. 539, that section had no application; (2) that, although the suit should accordingly have been brought in the Subordinate Court, the District Judge had jurisdiction to try it; (3) that the District Judge was justified in referring to the books above mentioned; (4) that the decree was right, on its appearing that the church, &c., had been held on the above trust from 1599 to 1882 with a doubtful interruption for one year, although the original trust may have been different.

Augustine v. *Medlycott* 241

13. ——————, s. 39—*Pleader retained by a Collector as Agent of Court of Wards—Validity of vakalut after the Collector's death :*

The Collector of a district, who was Agent for the Court of Wards, filed a suit on behalf of a ward of the Court of Wards and executed a vakalatnama to a Pleader whom he retained to conduct it. The Collector died before the suit was determined :—*Held*, that it was not necessary for a new vakalatnama to be executed to enable the pleader to proceed with the conduct of the suit.

Krishna Vijaya Puchaya Naicker v. *Marudanayagam Pillai* 135

14. ——————, s. 43—"Res judicata"—*Omit to sue :*

The plaintiff, having previously obtained against his brother, defendant No. 1, who had been the managing member of their family, a decree for partition of the family property including certain debts scheduled in the plaint, now sued to recover his share of certain other family debts collected by defendant No. 1 without the plaintiff's knowledge :—*Held*, that the claim was not barred by Civil Procedure Code, s. 43.

Mariathodi v. *Appu* 296

15. ——————, s. 53—*Specific Relief Act—Act I of* 1877, *s.* 42—*Declaration—Consequential relief—Amendment of plaint :*

A karar was executed by members of two Malabar tarwads, by which the tarwad of the plaintiffs and defendants Nos. 1 and 2 was amalgamated with that of which defendant No. 3 was a karnavan; part of the property of the plaintiff's branch was in the possession of defendants Nos. 1 and 3, and part of it was held under demises from defendant No. 3. The plaintiffs sued for a declaration of their title to this property and for a declaration that the karar was not binding on them. An issue was framed on the question whether the suit was maintainable for want of a prayer for all relief consequential on these declarations :—*Held*, (1) that the suit was not maintainable for want of a prayer for possession of the lands under demise; (2) that the plaintiffs should not be permitted to amend the plaint on appeal by the addition of such a prayer.

Narayana v. *Shankunni* 255

16. ——————, s. 53—*Specific Relief Act—Act I of* 1877, *ss.* 42, 56—*Consequential relief—Amendment of plaint :*

The plaintiff obtained a decree in a suit in which he averred that he was entitled to the office of Sheik of Kallai and to certain properties attached thereto, and prayed for a declaration that the defendant had no right either to the office of Sheik or to the properties in question, for an injunction restraining him from interfering with the properties or doing anything in any way inconsistent with the plaintiff's right to the office, and for further and other relief. It appeared, on the evidence for the defence, that the defendant was in possession of part of the property, but no issue had been framed as to the maintainability of the suit under the last clause of Specific Relief Act, s. 42 :—*Held, on appeal by the defendant*, that the Court of First Instance should take evidence and try an issue specifically directed to this question. It having appeared on the evidence recorded on that issue that the defendant was substantially in possession of the office of Sheik and of its

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emoluments :—*Held*, that the suit was not maintainable, although an injunction was asked for as relief consequential on the declaration. The plaintiff was permitted to pay additional stamp duty and amend the plaint by adding a prayer for possession.

Abdulkadar v. *Mahomed* 15

17. ——————, s. 111—*Set-off—Character in which claim is made—Court Fees Act—Act VII of* 1870, *ss.* 6, 28—*Levy of stamp due :*

In a suit in which the plaintiff sued, as son of a deceased vakil, to recover the amount of a promissory note and bond executed by the defendant to his deceased father, the defendant alleged in his written statement that the plaintiff's father had collected funds belonging to him, as his vakil, exceeding the amount due on the promissory note and bond and asked for a decree for the difference :—*Held*, (1) that the written statement must be regarded as a plaint in regard to the set-off and should have been stamped accordingly ; (2) that if the plaintiff claimed as the heir and representative of his father the set-off was rightly pleaded ; (3) that when a memorandum of appeal is insufficiently stamped the deficient stamp duty should be levied by the Appellate Court.

Chennappa v. *Raghunatha* 29

18. ——————, s. 111—*Transfer of Property Act—Act IV of* 1882, *ss.* 2, 76—*Waste by mortgagee in possession—Possession after date fixed for payment —Interest :*

In a suit in 1888 to recover principal and interest due on a usufructuary mortgage executed on 15th June 1870, which contained a covenant for repayment of the secured debt on 15th June 1878, the defendant pleaded and proved that the mortgagee had permitted certain buildings on the mortgage premises to fall into a ruinous condition, and it appeared that the mortgagee had remained in possession after June 1878 :—*Held*, (1) that the defendant was entitled to have the amount of the loss occasioned by the plaintiff's failure to make repairs brought into the mortgage accounts under Transfer of Property Act, s. 76, and a separate suit by him for that amount was not necessary ; (2) that the profits derived by the mortgagee after the date fixed for repayment should be regarded as having been enjoyed in lieu of interest.

Shiva Devi v. *Jaru Heggade* 290

19. ——————, ss. 211, 253, 318, 610—*Construction of order giving effect to judgment of Privy Council—Mesne profits—Cost of management—Interest—Sureties for execution of decree :*

Land was put up for sale and purchased in execution of a decree. The sale was confirmed, and the purchaser was put into possession. On appeal against the order confirming the sale, the High Court held that the sale had been vitiated by certain irregularities and set it aside. The purchaser preferred an appeal to the Privy Council against the judgment of the High Court. While the appeal was pending, he was compelled to deliver up possession of the land, but security was furnished under an order of the Court by persons not being parties to the suit for its redelivery to him, and for the payment of mesne profits, in the event of his appeal being successful. Meanwhile, the land in question was placed in charge of a receiver on the motion of other persons holding decrees against the judgment-debtors. On appeal the Privy Council reversed the order of the High Court. The purchaser was accordingly replaced in possession of the land ; and he applied for execution in respect of the mesne profits against the respondents in the Privy Council and the sureties. The Court of First Instance dismissed the application as against the sureties and limited the applicant's claim against the others to the net income of the land, less the cost of management by the receiver, and allowed him no interest :—*Held*, (1) the order must be taken to have been made under Civil Procedure Code, s. 610, and an appeal lay therefrom ; (2) although the appeals to the High Court and the Privy Council related to the order confirming the sale and not to that by which possession was awarded, and the order in Council did not direct payment of mesne profits, yet such payment was within its purview as being a benefit by way of restitution fairly and reasonably consequential upon it. *Rodger* v. *The Comptoir D'Escompte de Paris* (L.R., 3 P.C., 465) followed ; (3) the application was rightly dismissed against the sureties ; (4) the charges involved by the appointment of the receiver should not have been allowed against the petitioner, since they were not necessary in the ordinary course of prudent management ; (5) interest at 6 per cent. should have been allowed to the petitioner on the mesne profits for each year from the end of the year to the date of payment.

Arunachellam v. *Arunachellam* 203

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20. ——————, ss. 223, 295—*Execution—Rateable distribution—Transfer of decree for execution :*

Two decrees were passed against the same defendant in the Court of a District Munsif and on the small cause side of a Subordinate Court in the same district, respectively. The holder of the decree in the small cause suit attached and brought to sale the judgment-debtor's interest in a benefit fund. The other decree-holder applied for rateable distribution, his decree having been transferred for execution to the Subordinate Court directly and not through the District Court :—*Held*, (1) that the direct transfer of the decree of the District Munsif was not illegal ; (2) that the Subordinate Judge had inherent jurisdiction to execute the decree of the District Munsif ; (3) that the order for rateable distribution was right.

Kelu v. *Vikrisha* 345

21. ——————, ss. 231, 258—*Joint decree—Execution, application for—uncertified payment to one decree-holder :*

One of two holders of a joint decree applied for execution of the decree to the full amount. It appeared that the other decree-holder had received a certain sum from the judgment-debtor on account of the decree out of Court, but this payment had not been certified :—*Held*, that the payment was valid only to the extent of the share to which the payee was entitled, and that this share having been ascertained and credit given for it, the decree should be executed in favour of the present applicant for the balance.

Sultan Moideen v *Savalayammal* 343

22. ——————, ss. 234, 368—*Execution of decree—Death of judgment-debtor after attachment and before sale—Representatives not joined :*

A decree-holder attached land of the judgment-debtor in execution of his decree and a sale proclamation was made ; the judgment-debtor died and his legal representatives were not brought on to the record, but the execution proceeded to sale :—*Held*, that the sale should be set aside.

Krishnayya v. *Unnissa Begam* 399

23. ——————, s. 237—*Evidence Act—Act I of* 1872, *s.* 115—*Estoppel—Prior encumbrance—Notice to executing decree-holder :*

A hypothecation bond executed in 1878 by the husband (deceased) of defendant No. 1 to secure a debt due by him to a partner of the plaintiff was assigned to the latter in 1888. In 1882 the plaintiff, who was aware of the existence of this instrument, brought the land comprised in it to sale in execution of a money decree obtained by him against the executant, and defendant No. 3 became the purchaser. At the time of the sale the plaintiff gave no notice of the existence of the encumbrance. In a suit to recover the principal and interest due on the hypothecation bond :—*Held*, that the plaintiff was estopped from recovering the secured debt against the land.

Kasturi v. *Venkatachalapathi* 412

24. ——————, s. 244—"*Parties to the suit*"—*Questions relating to execution—Separate suit :*

A plaintiff, alleging that her husband (deceased) had advanced money on the security of land belonging to a family of four Hindus, sued them to enforce his lien and obtained a decree. The representatives of one of the defendants only appealed, and the decree was reversed as regarded them. The decree was executed as against the other defendants by the attachment and sale of their shares of the land, and the plaintiff became the purchaser. The successful appellants obstructed her in her attempts to obtain possession,

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and she now sued them for partition of the three-quarters share purchased by her:—*Held*, that the suit was not precluded by Civil Procedure Code, s. 244.

Nagamuthu v. *Savarimuthu* 226

25. ——————, **ss. 244, 258**—*Suit for declaration of satisfaction of a decree—Satisfaction of decree out of Court:*

A judgment-debtor, alleging that he had entered into an agreement with the decree-holder in satisfaction of his decree, and that the latter had, in breach of such agreement, procured the issue of a warrant of attachment, now sued for a declaration that the decree had been satisfied, and prayed also for the cancellation of the warrant of attachment:—*Held*, that the suit was not maintainable.

Bairagulu v. *Bapanna* 302

26. ——————, **ss. 292, 311**—*Suit to set aside Court sale—Duty of vakil purchasing at Court sale—Fraud—Parties—Assignment of religious trusteeship:*

A hereditary dharmakarta of a temple, who had assigned his office to a zamindar and consented to a decree being passed on the footing of such assignment, is competent nevertheless to bring a suit to set aside a Court sale of temple lands, treating such assignment as a nullity. A mortgagee, having obtained a decree on her mortgage, brought the mortgage property to sale; and her vakil bid through an agent at the Court sale and became the purchaser. It appeared that the vakil had not informed his client that he intended to bid nor obtained the sanction of the Court, but he had been instructed by his client and had obtained the permission of the Court to bid on her account, and he was found to have acted in an underhand manner towards her. In a suit to set aside the sale, brought by the mortgagor, who had sought unsuccessfully to obtain the same relief by means of a petition under section 311 in which fraud was not alleged against the purchaser:—*Held*, (on its appearing that the vakil had not discharged the burden which lay on him of proving that the transaction was free from suspicion) that the sale should be set aside.

Subbarayudu v. *Kotayya* 389

27. ——————, **ss. 295, 622**—*Rateable distribution—Vesting order in insolvency:*

A debtor against whom several decrees had been passed, filed his petition in the Insolvent Court at Madras, and the usual vesting order was made. One of the decree-holders had already attached property of the insolvent and had obtained an order for sale in a District Court, and now another decree-holder applied to the same Court in execution of his decrees for the attachment of other property, and for rateable distribution of the proceeds of the sale to be held in execution of the attachment already made. The District Judge held that the vesting order was a bar to both of these applications:—*Held*, (1) that the order rejecting the application for fresh attachments was right; (2) that the order rejecting the application for rateable distribution was wrong, and that the High Court had power to set it aside on revision under Civil Procedure Code, s. 622.

Viraraghava v. *Parasurama* 372

28. ——————, **s. 356**—*Insolvency proceedings—Receiver, commission of, how computed:*

A receiver appointed in insolvency proceedings under the Civil Procedure Code is entitled to a lien for the amount of his commission on the net assets remaining after payment of the charges specified in Civil Procedure Code, s. 356 (*b*), (*c*) and (*d*).

Mahadeva v. *Kuppusami* 233

29. ——————, **ss. 373, 647**—*Application for execution struck off for non-payment of process fees—Subsequent application:*

A decree-holder having applied for execution of his decree, notice was issued to the judgment-debtors, and their property was attached, but the applicant failed to pay the process fees, and the application was struck off,

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and no leave to make a fresh application was obtained under Civil Procedure Code, s. 373:—*Held*, that the decree-holder was entitled to apply again for execution of his decree.

Lakshmi Narasimha v. *Atchanna* 240

30. ——————, **ss. 514, 521**—*Enlargement of time for award:*

A suit was referred to an arbitrator, who did not make his award within the period limited for that purpose. After that period had expired, an application was made for its extension, both parties consenting; the application was granted and the award was made within the time so extended, and a decree was passed in its terms:—*Held*, that the order extending the time was not illegal, and the party dissatisfied with the decree was not entitled to have the award and the decree made upon it set aside.

Lakshminarasimham v. *Somasundaram* 384

31. ——————, **s. 522**—*Decree on an award—Appeal:*

After issues had been framed in a suit to wind up a partnership, the matter was referred to an arbitrator, who made his award, and with regard to certain property, not part of the partnership property, he referred the parties to a separate suit. A decree was passed in accordance with the award:—*Held*, that an appeal lies against a decree passed on an award, on the ground that the award was not legal; but that the award was not illegal by reason of its comprising the reference of the parties to a separate suit.

Venkayya v. *Venkatappayya* 348

32. ——————, **s. 525**—*Suit on an award—Alternative claim on original consideration—Withdrawal of claim on award:*

The plaintiff lent money to two of the defendants, who were partners with the third defendant, for the purposes of the partnership and obtained promissory notes from them. Disputes which arose between them were referred to arbitrators, who made an award. An application by the plaintiff to have the award made a rule of Court was opposed by defendant No. 1, and the plaintiff was referred to a regular suit. He now brought his suit in the alternative on the award and on the promissory notes. The award was found to be unenforceable. The plaintiff then declared himself satisfied to withdraw his suit as far as the award was concerned, and the Court passed a decree for plaintiff on the merits. Defendant No. 3 alone having appealed, the Court of first appeal held that the plaintiff must succeed or fail on the award, and that the withdrawal of the prayer for a decree on the award altered the nature of the suit, and finding that there was no evidence of misconduct on the part of the arbitrators, he passed a decree in the terms of the award. On a second appeal preferred by defendant No. 1:—*Held*, that this procedure was right.

Narasayya v. *Ramabadra* 474

33. ——————, **s. 525**—*Suit on award maintainable—Secondary evidence:*

Where an award cannot be filed and a decree obtained upon it under Civil Procedure Code, s. 525, a party is not precluded from suing upon it. Secondary evidence of the contents of the award is admissible on proof of its being lost.

Gopi Reddi v. *Mahanandi Reddi* 99

34. ——————, **s. 559**—*Parties—Joinder of respondents on appeal—Collusive discharge by one of two creditors—Mortgage:*

In 1877 the plaintiff executed a deed of hypothecation to one of two partners to secure a loan obtained from them jointly. In 1881 the plaintiff sold, *inter alia*, the hypothecated property to defendants Nos. 2 to 4, and it was arranged that the secured debt should be paid off by the vendees. They failed to do this, but in 1882 they executed a mortgage for the amount due in favour of the other of the two partners, and he thereupon gave a written discharge to the plaintiff, who was found to have been acting in collusion with him to the disadvantage of his partner, the holder of the hypothecation bond. The latter brought a suit in 1885 upon the hypothecation bond and obtained a personal decree against the present plaintiff who was *ex parte*, the amount of the decree being declared to be charged on the land in the possession of defendants Nos. 2

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to 4. Meanwhile, defendant No. 1, who was the assignee of the mortgage of 1882, had obtained a decree upon it against defendant No. 4. This decree not having been executed, he subsequently sued upon the mortgage again and obtained a decree against defendants Nos. 2 to 4. The plaintiff now sued to have the last-mentioned decree set aside and recover the balance of the purchase-money from defendants Nos. 2 to 4. The Court of First Instance passed a decree for the amount claimed and declared it to be charged on the land. Defendant No. 1 preferred an appeal in which defendants Nos. 2 to 4 were joined by the Court of First Appeal. The decree of this Court dismissed the suit :—*Held*, (1) that defendants Nos. 2 to 4 were rightly joined as respondents by the Court under Civil Procedure Code, s. 559; (2) that plaintiff, having allowed a decree to be passed against him *ex parte* in the suit of the holder of the hypothecation bond, and having obtained a collusive discharge from the other partner, was not entitled to recover against the defendants.

Kanagappa v. *Sokkalinga* 362

35. ——————————, s. 586—*Provincial Small Cause Courts Act—Act IX of* 1887, *s.* 23—*Suit transferred to regular side :*

A suit of a nature cognizable by a Small Cause Court does not cease to be so within the meaning of Civil Procedure Code, s. 586, because the Court in which it was instituted as a small cause suit returned the plaint to be filed on the regular side under Provincial Small Cause Courts Act, s. 23, on the ground that the suit involved questions of title.

Muttukaruppan v. *Sellan* 98

36. ——————————, s. 586—*Provincial Small Cause Courts Act—Act IX of* 1887, *sch. II, cl.* 31—*Suit for profits of land :*

The plaintiff sued on the Small Cause side of a Subordinate Court before the Small Cause Courts Act, 1887, came into operation, to recover with interest from the date of suit Rs. 500, the value of crops alleged to have been illegally carried away by the defendant, while the plaintiff was in possession. The defendant raised a plea to the jurisdiction of the Court, and the Judge, without recording any decision on its validity, directed that the plaint be presented on the regular side of the Court for the reason that it raised questions of complexity. It was so presented after the above Act had come into operation. The plaintiff obtained a decree which was reversed on appeal. A petition of second appeal was presented by the plaintiff. The defendant objected that no second appeal lay under Civil Procedure Code, s. 586 :—*Held*, that the objection should prevail, since the suit was not excepted from the jurisdiction of the Small Cause Court under the Provincial Small Cause Courts Act of 1887.

Annamalai v. *Subramanyan* 298

37. ——————————, s. 588, cl. 17—*Provincial Small Cause Courts Act—Act IX of* 1887, *s.* 24—*Insolvency petition in execution of decree in small cause suit—Appeal :*

In proceedings in execution of the decree passed in a small cause suit by a District Munsif who had been invested with insolvency jurisdiction, the judgment-debtors filed a petition under section 344 of the Civil Procedure Code, praying that they might be declared insolvents. Their petition was dismissed by the District Munsif :—*Held*, an appeal lay to the District Court against the order dismissing the petition.

Vaikunta Prabhu v. *Moidin Saheb* 89

38. ——————————, s. 596—"*Value of the subject-matter of the suit*"—*Civil Courts Act* (*Madras*)—*Act III of* 1873, *s.* 14 :

Civil Courts Act (Madras) III of 1873 does not control the construction of Civil Procedure Code, s. 596, and under that section the real market value of the matter in dispute is the test as to whether or not an appeal lies to the Privy Council.

Pichayee v. *Sivagami* 237

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39 ——————————, s. 598—*Application for certificate for appeal to Privy Council—Limitation Act—Act XV of* 1877, *s.* 12, *sched. II, art.* 177 :

In computing the period of limitation for an application for a certificate admitting an appeal to Her Majesty in Council, the time occupied in obtaining copies of the decree and judgment sought to be appealed against cannot be excluded.

Anderson v. *Periasami* 169

COMPANY :

See INDIAN COMPANIES ACT.

CONTRACT ACT, s. 27—*Restraint of trade:*

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

Sadagopa Ramanjiah v. *Mackenzie* 79

COSTS OF GOVERNMENT SOLICITOR—*Taxation of, against unsuccessful litigant :*

The Government Solicitor, who receives a monthly salary as such, receives no further payment from Government in respect of any costs of litigation to which Government is a party, except "out fees" or actual payments made by him on behalf of Government, and pays no fees when he instructs the Advocate-General; but, under his arrangement with Government, he is entitled to retain the costs decreed to Government, if recovered, and he then pays to the Advocate-General the fees of counsel allowed by the taxing officer :—*Held*, that when a suit against Government is dismissed with costs, costs should be taxed in the usual way, and the taxing officer cannot enquire into the arrangement as to remuneration of its law officers by Government.

Azimulla Saheb v. *Secretary of State for India* 405

COURT FEES ACT—ACT VII OF 1870, ss. 6, 28—*Civil Procedure Code, s.* 111—*Set-off—Character in which claim is made—Levy of stamp due :*

In a suit in which the plaintiff sued, as son of a deceased vakil, to recover the amount of a promissory note and bond executed by the defendant to his deceased father, the defendant alleged in his written statement that the plaintiff's father had collected funds belonging to him, as his vakil, exceeding the amount due on the promissory note and bond and asked for a decree for the difference :—*Held*, (1) that the written statement must be regarded as a plaint in regard to the set-off and should have been stamped accordingly; (2) that if the plaintiff claimed as the heir and representative of his father the set-off was rightly pleaded; (3) that when a memorandum of appeal is insufficiently stamped the deficient stamp duty should be levied by the Appellate Court.

Chennappa v. *Raghunatha* 29

2. ——————————, s. 10, cl. ii; s. 12, cl. ii; sched. II, art. 17, cl. vi—*Order in appeal by defendant for payment of fee by plaintiff—Notice :*

The plaintiffs, having raised a claim to a kanom attached in execution of a decree against their undivided brother, which was allowed in part, now sued for a declaration of their title to four-fifths of the kanom amount, affixing to the plaint a Rs. 10 stamp. The plaintiffs obtained a decree, against which the defendant appealed to the District Court. While the appeal was pending the District Judge, holding that the Court fee paid on the plaint was insufficient, ordered that the plaintiffs should pay the balance due on an *ad valorem* computation of the fee, and, in default, that the suit should stand dismissed. The plaintiffs first became aware of this order on the 26th

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March ; the balance was not paid within the time fixed by the District Judge for the payment to be made, and on the 28th March he accordingly made an order dismissing the suit :—*Held*, that the plaint was sufficiently stamped, and that, in any case, the order dismissing the suit while the appeal was still pending was irregular.

Kammathi v. *Kunhamed* 288

3. ——————————, **s. 10, cl. ii ; s. 12, cl. ii :**

The plaintiff sued four persons to recover, with arrears of rent, possession of three parcels of land and obtained a decree in the Court of a District Munsif. The suit was valued at Rs. 489-8-0. Defendant No. 4, who claimed to be entitled as jenmi to one of the parcels, preferred an appeal. The District Judge held that the suit should have been valued at Rs. 1,164-8-0, and he made an order that additional Court fees should be paid accordingly ; the order not having been complied with, he made an order "original suit rejected." He subsequently referred the appeal for disposal to a Subordinate Judge, who accordingly passed a decree, allowing the appeal of defendant No. 4 with costs. On appeal against the above order and decree :—*Held*, that the order of the District Judge was irregular and the appeal should be restored to the file of the Subordinate Judge to be disposed of according to law.

Kerala Varma v. *Chadayan Kutti* 181

4. ——————————, **sched. I, art. 1**—*Cancellation of an agreement to sell*—Ad valorem *fee :*

The plaintiff had executed an agreement to sell certain property in discharge of mortgages executed on his behalf during his minority. He now brought a suit alleging that the agreement had been extorted from him, and praying for a declaration that the agreement was not binding on him and for any other relief "which the Court considers to be reasonable" :—*Held*, that the plaintiff was bound to pay Court fees upon the value of his interest in the document sought to be invalidated.

Parathayi v. *Sankumani* 294

CRIMINAL PROCEDURE CODE, ss. 1, 195, 480-482—*Penal Code, s.* 228—*Insulting a Magistrate—Village Munsif :*

The accused intentionally insulted a Village Munsif in the discharge of his magisterial duties : the Village Munsif did not prefer a complaint or sanction a prosecution, but a Second-class Magistrate charged the accused under Penal Code, s. 228, on a police report and convicted him :—*Held*, (1) that Criminal Procedure Code, ss. 480-482, do not apply to Village Munsifs ; (2) that the Second-class Magistrate was competent to try the plaint, and the conviction was right.

Queen-Empress v. *Venkatasami* 131

2. ——————————, **s. 40**—*Transfer of a Sub-Registrar invested with powers of a Special Magistrate—Act XXIV of* 1859 (*Madras*), *s.* 48 :

A Sub-Registrar having been invested with magisterial powers with reference to offences under Act XXIV of 1859 was transferred from the place where he was officiating at the time he was so invested to another place, and there took on to his file and tried certain cases. The District Magistrate having reported the cases for the orders of the High Court, the Court declined to quash his proceedings.

Queen-Empress v. *Viranna* 132

3. ——————————, **ss. 193, 287, 288, 339, 349**—*Conditional pardon to prisoner—Approver, trial of—Proof of confessional statements of accused :*

Several persons were charged with dacoity. While the case was pending, two of the accused made confessional statements ; afterwards a conditional pardon was tendered to them, and they were examined as witnesses by the Magistrate and subsequently on behalf of the prosecution in the Sessions Court, to which the other accused were committed for trial. They there denied that they had been taken as approvers, whereupon the Sessions Judge placed them in the dock, called on them to plead, and permitted the

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depositions made by them before the Magistrate, but not their confessional statements, to be read to the jury :—*Held*, that the trial of the two persons, who had not been committed to the Sessions Court, was *ultra vires*. *Per cur :* The Sessions Judge committed an irregularity in refusing to place on the record the confessional statements of persons whom he treated as accused. It is unfair to put an approver, whose conditional pardon has been cancelled on trial, along with other prisoners, in the course of whose trial such approver has given evidence.

Queen-Empress v. *Rama Tevan* 352

4. ——————————, **s. 195**—*Registration Act—Act III of* 1877, *ss.* 72-75—"*Court*"—*Sanction prosecution for perjury :*

A Registrar, acting under Registration Act, ss. 72-75, is a Court for the purposes of Criminal Procedure Code, s. 195.

Atchayya v. *Gangayya* 138

5. ——————————, **ss. 195, 435, 478**—*Forged documents filed in Court—Prosecution ordered by Court :*

Certain documents having been put into Court in a suit pending before a District Munsif, but not given in evidence, the District Munsif made an order for the prosecution of the parties who so put them in, on the ground that the documents were forgeries :—*Held*, (1) that the High Court had power to revise the proceedings of the District Munsif ; (2) that the District Munsif was not competent to go beyond the record ; (3) that the order was wrong and should be set aside.

Abdul Khadar v. *Meera Saheb* 224

6. ——————————, **s. 260**—*Summary procedure—Bias of Magistrate :*

A Deputy Magistrate, being also the Chairman of a Municipality, without issuing process, or making a record of the proceedings, or dismounting from a pony on which he was riding, convicted and fined an inhabitant of the town, who admitted that he had raised the level of a road within the limits of the Municipality which was considered by the Magistrate to amount to the offence of causing an obstruction in a public way :—*Held*, the Magistrate's procedure was illegal, and the conviction should be set aside.

Queen-Empress v. *Erugadu* 83

7. ——————————, **s. 419**—*Petition of appeal, presentation of :*

A petition of appeal sent by post is not presented to the Court within the meaning of Criminal Procedure Code, s. 419.

Queen-Empress v. *Arlappa* 137

8. ——————————**ACT X OF 1882, ss. 436, 437**—*Further inquiry—Power of District Magistrate to suggest a committal :*

A District Magistrate who refers a case to a Sub-Magistrate for further inquiry has no authority to fetter him in the exercise of his judicial discretion as to the question whether the case should or should not be committed to the Court of Sessions.

Queen-Empress v. *Munisami* 39

9. ——————————, **s. 466—ACT X OF 1882, s. 197**—*Government orders as to tribunal for trial of officials :*

In 1890 the Collector of Ganjam reported to the Board of Revenue a charge of bribery, &c., against a Sub-Magistrate and received directions to send the case for trial to some Magistrate other than himself, or the Principal Assistant Magistrate. He accordingly sent it to the Senior Assistant Magistrate of Berhampore ; the accused was convicted, but he appealed to the Sessions Judge, who reversed the conviction on the merits. The Government did not appeal against the acquittal of the accused, but the District Magistrate referred to the High Court the question whether the Magistrate had jurisdiction :—*Held, on the reference*, that it was not a case for the interference of the High Court, because (1) it was not shown that

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the Magistrate had acted without jurisdiction ; (2) Government had not appealed against the acquittal by the Sessions Judge who had tried and determined the question of jurisdiction.

Queen-Empress v. *Ranga Rau* 36

10. ——————, s. 528—*Village Munsif :*

A Village Munsif not being a Magistrate under Criminal Procedure Code, a Joint Magistrate has no power under Criminal Procedure Code, s. 528, to withdraw a case from a Village Munsif and transfer it for disposal to a Second-class Magistrate.

Madavarayachar v. *Subba Rau* 94

DECREE, AMENDMENT OF—*Civil Procedure Code, ss.* 13, 206—"Res judicata"—*Subsequent execution :*

In a suit for money against the karnavan and two anandravans of a Malabar tarwad, the judgment directed "a decree for the plaintiffs as prayed," but the decree ordered payment by one anandravan only. Property of the tarwad was attached and sold. The decree was then amended and brought into conformity with the judgment. Other members of the tarwad sought to have the sale set aside, but it was found that the judgment debt had been contracted for proper tarwad purposes, and that suit was dismissed. Application was now made for the attachment of other property of the tarwad in further execution of the amended decree :—*Held*, that the members of the tarwad were not entitled to contend that the decree was not binding on them that matter being *res judicata. Quære :* Whether the rule in *Sundara* v. *Subbanna* (I.L.R., 9 Mad., 354) as to the amendment of decrees is correct.

Chathappan v. *Pydel* 403

DISTRICT MUNICIPALITIES ACT—ACT IV OF 1884 (MADRAS), ss. 55, 56, 60, 262, cl. (2)—*Profession tax :*

The Bank of Madras carried on business at (among other places) Negapatam and Tellicherry, in both of which places the Madras District Municipalities Act was in force. The Bank paid profession tax under that Act to the Municipality of Negapatam two days before it was due. The Municipality of Tellicherry subsequently, and with knowledge of the above facts, assessed the Bank to the same tax for the same period and levied the amount which was paid under protest :—*Held*, that the Bank was entitled to recover the amount so paid, from the Municipality of Tellicherry. *Semble :* The aggregate income derived by the Bank from the exercise of its business in the separate municipalities would regulate the class under which it would be liable to taxation.

Municipal Council of Tellicherry v. *Bank of Madras* 153

2. ——————, s. 169—*Suit for declaration of title against a Municipality—Parties :*

The plaintiff sued a Municipal Council, under the Madras District Municipalities Act, for a declaration of his title to a certain structure situated in the limits of the Municipality and of his right to put a roof over it. The structure was found to belong to the plaintiff :—*Held*, (1) that the Secretary of State was not a necessary party to the suit ; (2) that the Municipal Council had no discretion under section 169 of the above Act to prevent the plaintiff from dealing with the structure, provided he did not interfere with the convenience of the public or with any sanitary regulation.

Krishnayya v. *The Bellary Municipal Council* 292

3. ——————, s. 222—*Nuisance—Sewage water :*

An occupier of a building who allows sewage water to run into a street within the limits of a Municipality, governed by the District Municipalities Act, Madras, commits an offence under section 222 of that Act, although the Municipality may have supplied no side drains in the street in question.

Queen-Empress v. *Sevudappayyar* 91

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EASEMENTS ACT—ACT V OF 1882, s. 24—*Rights accessory to an easement :*

The plaintiff having in a previous suit obtained a decree declaring his right of having the roof of his house projecting over the defendants' land, and discharging water thereon, now sued for a declaration of his right to go upon the defendants' land for the purpose of repairing the roof :—*Held*, that the plaintiff was entitled to the right claimed as being accessory to the easement already established, but that it should be exercised only once a year and after notice to the defendants.

Hayagreeva v. *Sami* 286

ENFRANCHISEMENT OF ENDOWMENT :

See KARNAM.

EVIDENCE ACT—ACT I OF 1872, s. 35—*Malabar Law—Customary Law of Mapillas—Multifariousness—Suit by karnavan—Limitation—Evidence—Petition and order :*

The plaintiff sued as the karnavan of a Mapilla tarwad to recover lands in the possession of the defendants who were a donee from and the descendants of a previous karnavan and their tenants. It appeared that the alleged previous karnavan had died less than twelve years before the suit was filed, but more than twelve years before the joinder, as supplemental defendant, of one to whom he had conveyed certain property by way of gift five years before his death. An issue was raised as to whether the rights of the parties were governed by Makkatayom or Marumakkatayom law, and an order of a District Munsif reciting a petition to which the alleged previous karnavan was a party, was put in evidence to show that he had in a particular instance acted in the capacity of karnavan of a Marumakkatayom tarwad. The rough draft of a plaint which had been filed by the alleged previous karnavan was put in evidence to show that he admitted having alienated property in a manner which would be adverse to the claim of his tarwad :—*Held*, (1) that on the allegations in the plaint the plaintiff was entitled to maintain the suit alone, and that the suit was not bad for multifariousness ; (2) that the order and draft plaint were admissible in evidence for the abovementioned purposes ; (3) *on the evidence*, that the plaintiff had succeeded in office the previous karnavan as alleged, and that the previous karnavan had followed the Marumakkatayom rule, although it was shown that other members of the family had dealt with property, described as self-acquired, under the precepts of Muhammadan law ; (4) that the suit was barred by limitation as against the donee above referred to, her possession having been adverse to the tarwad since the date of the gift. Observations as to documents marked as exhibits without proof.

Byathamma v. *Avulla* 19

2. ——————, s. 35—*Recital in a judgment—Admission of jenmi's title :*

In a suit by a melkanomdar to redeem a kanom, the kanom document was proved to have been lost ; it appeared that a previous suit had been brought by the jenmi to redeem the same kanom, and the judgment in that suit, in which it was stated that the defendants admitted their position as kanomdars, was tendered in evidence to prove the jenmi's title :—*Held*, that the judgment was admissible in evidence.

Thama v. *Kondan* 378

3. ——————, s. 35—"Res inter alios acta"—*Title-deeds—Petition of plaintiff's predecessor asserting title—Judgment obtained by plaintiff's predecessor recognising title :*

In a suit to establish the plaintiff's title to certain land, he put in evidence (1) a conveyance in favour of his father ; (2) a sale certificate issued to his father's vendor ; (3) an order made in certain execution proceedings in which was recited a petition by his father asserting his title ; (4) a judgment obtained by his father in which his title was recognised. Neither the defendants nor their predecessors were parties to any of these instruments or proceedings :—*Held*, that all these documents were relevant.

Venkatasami v. *Venkatreddi* 12

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4. ——————————, ss. 57, 87—*Civil Procedure Code, ss.* 15, 539—*Public charitable trust—District Court, jurisdiction of—Books of history :*

A church at Palayur and the property appertaining to it were in the possession of certain of the yogakars or parishioners, who had been elected kaikars or church-wardens, but whose election had since been superseded in favour of three other persons who now sued to recover possession. The plaintiffs were Roman Catholics; and with the three persons above referred to were joined as plaintiffs the Vicar Apostolic, the Vicar appointed to the church by him, and two other persons representing the Roman Catholic yogakars. The defendants were Chaldean Syrian Christians, and with those in possession were joined as defendants the Chor Episcopa, the Vicar appointed to the church by him, and four persons representing the other yogakars. The plaint was framed under Civil Procedure Code, s. 539, and contained, besides a prayer for possession, prayers for a declaration that the church, &c., was held on trust for worship according to the faith and discipline of the Church of Rome, and for injunctions against the defendants. The suit was tried by the District Judge in whose Court it was instituted, although the defendants pleaded that it was within the jurisdiction of the Subordinate Court, s. 539, being inapplicable. He passed a decree as prayed, holding that the church, &c., was dedicated to the trust stated in the plaint, although it had been diverted from the purposes of that trust for a time. In coming to this conclusion, he referred to a Portuguese work dated 1606, "*India Orientalis Christiana*" published in 1794, and Hough's "*History of Christianity in India*" published in 1839:—*Held*, (1) that the suit not being one brought by beneficiaries against trustees, or for any of the purposes mentioned in Civil Procedure Code, s. 539, that section had no application; (2) that, although the suit should accordingly have been brought in the Subordinate Court, the District Judge had jurisdiction to try it; (3) that the District Judge was justified in referring to the books abovementioned; (4) that the decree was right, on its appearing that the church, &c., had been held on the above trust from 1599 to 1882 with a doubtful interruption for one year, although the original trust may have been different.

Augustine v. *Medlycott* 241

5. ——————————, ss. 65, 91—*Limitation Act—Act XV of* 1877, *s.* 19—*Acknowledgment in writing—Secondary evidence :*

Limitation Act, s. 19, must be read with Evidence Act, ss. 65 and 91, and does not exclude secondary evidence in cases where such would be admissible under section 65.

Chathu v. *Virarayan* 491

6. ——————————, ss. 80, 132—*Self-incriminating statements of witness—Proof and admissibility of depositions containing such statements in proceedings against the witness :*

A revenue official was charged with the offence of attempting to receive a bribe from certain raiyats who gave evidence for the prosecution, and he was convicted. He subsequently charged the raiyats with having conspired to bribe him, and in their trial their depositions in the previous case were tendered in evidence for the prosecution:—*Held*, that the depositions should have been admitted in evidence.

Queen-Empress v. *Samiappa* 63

7. ——————————, s. 115—*Estoppel by conduct—Hindu Law—Adoption :*

A Hindu widow, professing to have authority from her husband to do so, took the second defendant in adoption, brought him up as her adopted son, and permitted him to perform the funeral ceremonies of her husband. Land to which she otherwise would have been entitled was attached in execution of a decree against defendant No. 2. She now sued to release the attachment, alleging the adoption was bad, as having been unauthorised:—*Held*, that the plaintiff was estopped from raising this contention.

Kannammal v. *Virasami* 486

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8. ——————————, s. 115—*Estoppel—Civil Procedure Code—Act XIV of* 1882, *s.* 237—*Prior encumbrance—Notice to executing decree-holder :*

A hypothecation bond executed in 1878 by the husband (deceased) of defendant No. 1 to secure a debt due by him to a partner of the plaintiff was assigned to the latter in 1888. In 1882 the plaintiff, who was aware of the existence of this instrument, brought the land comprised in it to sale in execution of a money decree obtained by him against the executant, and defendant No. 3 became the purchaser. At the time of the sale the plaintiff gave no notice of the existence of the encumbrance. In a suit to recover the principal and interest due on the hypothecation bond:—*Held*, that the plaintiff was estopped from recovering the secured debt against the land.

Kasturi v. *Venkatachalapathi* 412

9. ——————————, s. 115—*Estoppel—Execution-purchaser without notice of mortgage :*

The plaintiff sued to realise his security under a mortgage executed to him by defendant No. 1, by sale of the mortgage premises which were in the possession of defendants Nos. 2 and 3. It appeared that the plaintiff had previously attached and brought to sale the mortgage premises in execution of a decree against defendant No. 1, and that the other defendants had purchased at the Court sale, without notice of the plaintiff's mortgage, which was not referred to in the attachment lists or sale certificates:—*Held*, that the plaintiff was estopped from setting up his present claim.

Jagannatha v. *Gangi Reddi* 303

EXECUTOR, ASSENT OF:

See PERPETUITIES, RULE AGAINST.

FOREST ACT—ACT V OF 1882 (MADRAS), s. 6—*Burden of proof—Long possession—Presumption of title :*

Certain land was notified under Madras Forest Act, 1882, to be constituted a reserved forest. One, alleging that the jenm title had been in his family for six or seven centuries, claimed to be the owner of the land. His claim was contested by Government on the allegation that the land had belonged to another family and had been escheated. The claimant admitted that he had not been in possession for six years before the date of the notification, Government having objected to his interfering with the land. It was found that his family had been in possession for the previous sixty years at least, and that the alleged escheat was not proved:—*Held*, that the claim should be allowed. Observations on the burden of proof and on the presumption of title arising out of possession.

Secretary of State for India v. *Bavotti Haji* 315

2. ——————————, s. 21 (d)—*Grazing cattle in a forest reserve :*

The owner of cattle found grazing in a forest reserve cannot be convicted under Madras Forest Act, s. 21 (*d*), in the absence of evidence that he either pastured the cattle or permitted them to trespass in the reserve.

Queen-Empress v. *Krishnayyan* 156

HINDU LAW—*Appellant not allowed to raise in appeal a contention inconsistent with the case relied upon in the Courts below :*

An appeal cannot be maintained upon a ground inconsistent with the case insisted on in the Courts below, notwithstanding that the new ground may be one that might have been brought forward, in the first instance, as an alternative. In a suit between the widows of two brothers deceased, the plaintiff's title rested on this, that her and the defendant's late husbands, respectively, having been the sons of the same father, had, therefore, been sapindas to each other; so that the plaintiff as the widow of the one would be the heir of the other, expectant on the death of his widow. In this character she sued to have set aside an adoption made by the defendant. The Courts, however, found that the plaintiff's husband was an illegitimate son, and not a sapinda, and the suit was dismissed. The plaintiff, now

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appellant, on findings of fact that both the sons were illegitimate, urged that, though they could not inherit from their father, they yet could succeed to the estate of one another :—*Held*, that this contention was so inconsistent with the case made below that it was now inadmissible. *Sreemutty Dossee* v. *Ranee Lalunmonee* referred to and followed. Also, the opinion had been expressed by the High Court that, by the law prevailing in Madras, a widow is not in the line of succession to her husband's male collateral relations.

Gajapathi Radhika v. *Vasudeva Santa Singaro* 503

2. ———, *Civil Procedure Code, s.* 13—"Res judicata"—*Court of competent jurisdiction—Power of guardian to alienate land—Compromise of litigation :*

In 1882, the daughter of a deceased Hindu brought a suit in the Court of a District Munsif for a declaration that the defendant was not the adopted son of her father (deceased) as he claimed to be. It was found that the alleged adoption was valid and the suit was dismissed. The then defendant now brought, in 1889, a suit in the same Court to recover possession of land from the then plaintiff, alleging that it had been wrongfully transferred to her by way of gift by his adoptive mother. The defendant denied the adoption and asserted that the transfer was valid as having taken place in accordance with an arrangement made by her father in his life time. It was admitted that the value of the whole property, to which the plaintiff was entitled by virtue of his adoption, if it was a valid adoption, exceeded Rs. 2,500. The Court of first appeal held that the question of the adoption was not *res judicata*, and observed that the transfer to the defendant was apparently made to induce her to abandon her litigation as to the adoption : —*Held*, (1) that the defendant was not at liberty to question the plaintiff's adoption; (2) that the Court should try whether the transfer was made *bonâ fide* by the plaintiff's mother as his guardian for his benefit.

Venkataraghava v. *Rangamma* 498

3. ———, *Inheritance—Paternal aunt—Maternal grandfather :*

Under the Hindu law obtaining in the Madras Presidency, the maternal grandfather of a deceased Hindu succeeds to him in preference to his paternal aunt.

Chinnammal v. *Venkatachala* 421

4. ———, *Inheritance—Step-sister's son :*

A step-sister's son is entitled to inherit under the Hindu law in force in the Madras Presidency.

Subbaraya v. *Kylasa* 300

5. ———, *Karnam, hereditary office of—Enfranchisement of endowment—Devolution of land enfranchised :*

The holder of a hereditary office of karnam had two undivided sons, in favour of one of whom he resigned his office. Subsequently a revision of the village establishment took place, the new karnam was removed from the office, and the lands which constituted its endowment having been enfranchised by the Inam Commissioner, a title-deed in respect of them was issued to him. After his death without issue his nephews sued to establish their right to the land :—*Held*, that the land passed to the grantee personally and not to his family, and, consequently, devolved, on his death, as private property.

Venkatarayadu v. *Venkataramayya* 284

6. ———, *Law of inheritance—Custom—Illegitimate son of a Sudra—Specific Relief Act—Act I of* 1877, *s.* 42—*Further relief :*

The widows of a shrotriemdar, who was a Sudra, brought a suit for a declaration of their title by inheritance to his lands against his illegitimate son, who had been registered as shrotriemdar in lieu of his deceased father, and to whom certain of the raiyats had attorned. The defendant claimed to be legitimate according to the customary law governing the family, although his parents might not have been married at the time of his birth, by reason of his parents having performed the ceremony of *pariyam* before his birth :—*Held*, (1) that the suit was not precluded by Specific Relief Act, s. 42, *proviso ;*

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(2) that the defendant was illegitimate and that the plaintiffs were accordingly entitled to one-half of the lands in question, and the defendant was entitled to the other half. Observations on the allegation and proof of a custom in derogation of the general Hindu law of inheritance.

Chinnammal v. *Varadarajulu* 307

7. ———*Partition—Mortgagor and mortgagee—Redemption—Successive mortgages on family property—Assignment of equity of redemption :*

Two brothers constituted an undivided Hindu family. The eldest mortgaged half of certain family lands to P and the other half to the father (since deceased) of the contending defendants, and placed the mortgagees respectively in possession. Neither mortgage was binding on the younger brother who mortgaged his share of the same land to the plaintiff. The plaintiff obtained a decree on his mortgage and attached and brought to sale in execution and himself purchased the half share of his mortgagor, and having afterwards purchased the share of the elder brother and came to a settlement with P, now brought a suit for a moiety of the land in the possession of the contending defendants as forming part of the half share of his mortgagor :—*Held*, (1) that the contest being between strangers to the family, and the plaintiff having purchased the entire rights of the family in the land in question, the plaint was not defective for want of a prayer for the partition of the whole property of the family ; (2) that the plaintiff being the assignee of the elder brother could not deprive his mortgagees of a portion of their security without asking for an account and offering to pay whatever might be due on the footing of the mortgage.

Subbarazu v. *Venkataratnam* 234

8. ———*Suit by reversioner to establish invalidity of a sale by a widow—Daughter of last male holder not joined :*

Under the Hindu law obtaining in the Madras Presidency a reversioner is entitled to sue to establish the invalidity of a sale by the widow of the last male holder, notwithstanding the fact that he left a daughter, who was alive at the date of suit, but was not joined as a party.

Raghupati v. *Tirumalai* 422

INDIAN COMPANIES ACT—ACT VI OF 1882, s. 177—*Voluntary liquidation—Liability to be sued :*

Where a Company has gone into a voluntary liquidation it can still be sued for debts due by it incurred prior to liquidation, although the fact that there are liquidators may be material if execution of the decree is sought.

Kothandapani v. *Somasundram* 97

INSOLVENCY—11 & 12 VIC., Cap. 21, ss. 9, 92—*Petitioning creditors' debt—Joint debt :*

A trader in Madras made a promissory note in the joint names of two merchants, trading together as members of an undivided Hindu family, on which Rs. 527 were due. On a petition by the holders of the note to have the maker adjudicated an insolvent :—*Held*, that the petitioning creditors' debt was sufficient to support the petition.

Ragavaloo Chetti (*ex parte*) In re *Rangiah Chetti* 356

INTEREST—CIVIL PROCEDURE CODE, s. 111—*Transfer of Property Act—Act IV of* 1882, *ss.* 2, 76—*Waste by mortgagee in possession—Possession after date fixed for payment :*

In a suit in 1888 to recover principal and interest due on a usufructuary mortgage executed on 15th June 1870, which contained a covenant for repayment of the secured debt on 15th June 1878, the defendant pleaded and proved that the mortgagee had permitted certain buildings on the mortgage premises to fall into a ruinous condition and it appeared that the mortgagee had remained in possession after June 1878 :—*Held*, (1) that the defendant was entitled to have the amount of the loss occasioned by the plaintiff's failure to make repairs brought into the mortgage account under Transfer of Property

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Act, s. 76, and a separate suit by him for that amount was not necessary; (2) that the profits derived by the mortgagee after the date fixed for repayment should be regarded as having been enjoyed in lieu of interest.

Shiva Devi v. *Jaru Heggade* 290

KARNAM, HEREDITARY OFFICE OF—*Hindu Law—Enfranchisement of endowment—Devolution of land enfranchised:*

The holder of a hereditary office of karnam had two undivided sons, in favour of one of whom he resigned his office. Subsequently a revision of the village establishment took place, the new karnam was removed from the office, and the lands, which constituted its endowment, having been enfranchised by the Inam Commissioner, a title-deed in respect of them was issued to him. After his death without issue his nephews sued to establish their right to the land:—*Held*, that the land passed to the grantee personally and not to his family, and, consequently, devolved, on his death, as private property.

Venkatarayadu v. *Venkataramayya* 284

LANDLORD AND TENANT—*Civil Procedure Code, ss.* 13, 98, 103—"Res judicata"—"*Court of competent jurisdiction*"—*Quiet enjoyment, covenant for—Parties—Suit for damages against lessor, including costs—Joinder of one of two co-lessees as defendant—Suit dismissed against such lessee:*

In 1883, A, the trustee of a certain charity, executed in favour of X and Y an agricultural lease for nine years and delivered over possession of the lands comprised in it, being part of the trust property. The lease contained a provision that it should be cancelled on default being made in payment of the rent and kist, and it contained no express covenant for quiet enjoyment. In 1887 default was made in payment of the rent and kist. A thereupon cancelled the lease and sued X and Y in a Subordinate Court and obtained a decree for the arrear, the total amount of his claim being Rs. 2,807. In that suit X alleged that Y was merely a name-lender for A, who desired to benefit himself at the expense of the charity, and also that certain raiyats setting up a false claim had evicted X from the lands demised at the instigation of A, who had subsequently sought unsuccessfully to obtain further advantages for himself. The Subordinate Judge framed an issue on each of these allegations and recorded findings in the negative. In the same year X filed a suit for damages for breach of contract against A and Y in the High Court, repeating in his plaint the above allegations. When that suit came on for hearing, it was dismissed for default, Y being the only party who appeared. X now sued A again on the same cause of action, making the same allegations. Y was subsequently brought on to the record as being a necessary party to the suit, being joined as second defendant, but he applied to be and was struck off the record on the ground that the dismissal of the former suit in the High Court was final as against him:—*Held*, (1) that the suit was not bad for the non-joinder of the co-lessee as a plaintiff, nor for the reason that the plaintiff could not prosecute the suit against him; (2) that the matters put in issue in the Subordinate Court were not *res judicata* by reason of the decision of that Court; (3) that the plaint disclosed a good cause of action against the lessor; (4) that even if the plaintiff had substantiated his allegations against his lessor, he would not have been entitled to recover the cost of civil and criminal proceedings against the raiyats who had evicted him.

Vithilinga Padayachi v. *Vithilinga Mudali* 111

2. ——————— *Construction of lease—Word of inheritance:*

A fixed permanent ijara patta confers no rights on the heirs of the demisee.

Rajaram v. *Narasinga* 199

3. ——————— *Forfeiture for non-payment of rent—Transfer of reversion—Transfer of Property Act—Act IV of* 1882, *s.* 6, *cl.* (*b*):

A condition in a lease providing that the landlord may re-enter on non-payment of rent is penal and will be relieved against, apart from the provisions of the Transfer of Property Act. *Semble:* The transfer of the

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reversion based on a clause for forfeiture is not invalid by reason of Transfer of Property Act, s. 6, cl. (*b*).

Vaguran v. *Rangayyangar* 125

4. ——————— *Malabar law—Anubhavom tenure—Forfeiture by alienation—Denial of landlord's title in pleadings—Limitation:*

Lands in Malabar were demised on anubhavom tenure. Some of them were alienated by the tenant, but the landlord subsequently accepted rent. More than twelve years after the alienation, the landlord sued to eject the tenant on the ground that the tenure was thereby forfeited. The tenant for the first time in his written statement denied the landlord's title:—*Held*, (1) that the cause of action alleged in the plaint was barred by limitation; (2) that the plaintiff could not recover in this suit on the ground of the denial of his title in the written statement.

Madavan v. *Athi Nangiyar* 123

5. ——————— *Suit for ejectment—Burden of proof:*

In an ejectment suit by a landlord against his tenant the plaintiff cannot succeed unless he shows that under the terms of the tenancy and in the circumstances that exist he has a right to eject the defendant, although the latter may allege and fail to establish a right of permanent occupancy.

Venkatacharlu v. *Kandappa* 95

6. ——————— *Surrender—Limitation—Adverse possession—Malabar law—Karnavan, powers of—Perpetual lease:*

The karnavan of a Malabar kovilagom executed a kuikanom lease of certain land, the jenm of the kovilagom, in 1846, and in 1861 his successor demised the same land to the same tenants in perpetuity. The present karnavan sued in 1889 to recover possession of the land:—*Held*, (1) that the perpetual lease, as being of an improvident character, was *ultra vires* and void; (2) that the original lease was not surrendered; (3) that the suit was not barred by limitation, the possession of the defendants never having been adverse to the plaintiff's kovilagom.

Ramunni v. *Keralavarma Valia Raja* 166

LIMITATION—INDIAN PENAL CODE—ACT XLV OF 1860, s. 499—*Defamation—Privilege of party—Appeal from the Resident's Court, Bangalore:*

A person who was being defended by counsel on a criminal charge interfered in the examination of a witness and made a defamatory statement with regard to his character. He was now charged with defamation and convicted in the Resident's Court at Bangalore. On an appeal to the High Court, preferred more than sixty days after the conviction:—*Held*, (1) that the appeal should be admitted; (2) that the occasion was not privileged and the words complained of were uttered maliciously and the conviction was right.

Hayes v. *Christian* 414

2. ——————— *Landlord and tenant—Surrender—Adverse possession—Malabar law—Karnavan, powers of—Perpetual lease:*

The karnavan of a Malabar kovilagom executed a kuikanom lease of certain land, the jenm of the kovilagom, in 1846, and in 1861 his successor demised the same land to the same tenants in perpetuity. The present karnavan sued in 1889 to recover possession of the land:—*Held*, (1) that the perpetual lease, as being of an improvident character, was *ultra vires* and void; (2) that the original lease was not surrendered; (3) that the suit was not barred by limitation, the possession of the defendants never having been adverse to the plaintiff's kovilagom.

Ramunni v. *Kerala Varma Valia Raja* 166

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3. ——————— *Malabar law—Anubhavom tenure—Forfeiture by alienation—Landlord and tenant—Denial of landlord's title in pleadings :*

Lands in Malabar were demised on anubhavom tenure. Some of them were alienated by the tenant, but the landlord subsequently accepted rent. More than twelve years after the alienation, the landlord sued to eject the tenant on the ground that the tenure was thereby forfeited. The tenant for the first time in his written statement denied the landlord's title :—*Held*, (1) that the cause of action alleged in the plaint was barred by limitation; (2) that the plaintiff could not recover in this suit on the ground of the denial of his title in the written statement.

Madavan v. *Athi Nangiyar* 123

4. ——————— *Malabar law—Customary law of Mapillas—Multifariousness—Suit by karnavan—Evidence—Evidence Act—Act I of* 1872, *s.* 35—*Petition and order :*

The plaintiff sued as the karnavan of a Mapilla tarwad to recover lands in the possession of the defendants who were a donee from and the descendants of a previous karnavan and their tenants. It appeared that the alleged previous karnavan had died less than twelve years before the suit was filed, but more than twelve years before the joinder, as a supplemental defendant, of one to whom he had conveyed certain property by way of gift five years before his death. An issue was raised as to whether the rights of the parties were governed by Makkatayom or Marumakkatayom law, and an order of a District Munsif reciting a petition to which the alleged previous karnavan was a party, was put in evidence to show that he had in a particular instance acted in the capacity of karnavan of a Marumakkatayom tarwad. The rough draft of a plaint which had been filed by the alleged previous karnavan was put in evidence to show that he admitted having alienated property in a manner which would be adverse to the claim of his tarwad :—*Held*, (1) that on the allegations in the plaint the plaintiff was entitled to maintain the suit alone, and that the suit was not bad for multifariousness ; (2) that the order and draft plaint were admissible in evidence for the abovementioned purposes ; (3) *on the evidence*, that the plaintiff had succeeded in office the previous karnavan as alleged, and that the previous karnavan had followed the Marumakkatayom rule, although it was shown that other members of the family had dealt with property, described as self-acquired, under the precepts of Muhammadan law ; (4) that the suit was barred by limitation as against the donee above referred to, her possession having been adverse to the tarwad since the date of the gift. Observations as to documents marked as exhibits without proof.

Byathamma v. *Avulla* 19

LIMITATION ACT—ACT XV OF 1877, s. 4—*Unstamped memorandum of appeal—Stamp affixed after expiry of time of limitation :*

Where a petition of appeal was presented unstamped within the period of limitation and the stamp was ultimately affixed after the appeal would have been barred by limitation :—*Held*, following *Skinner* v. *Orde* (L.R., 6 I.A., 126) that the appeal was in time.

Patcha Saheb v. *Sub-Collector of North Arcot* 78

2. ——————————, **s. 12, sched. II, art. 177**—*Civil Procedure Code, s.* 598—*Application for certificate for appeal to Privy Council :*

In computing the period of limitation for an application for a certificate admitting an appeal to Her Majesty in Council, the time occupied in obtaining copies of the decree and judgment sought to be appealed against cannot be excluded.

Anderson v. *Periasami* 169

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3. ——————————, **s. 19**—*Acknowledgment in writing—Evidence Act—Act I of* 1872, *ss.* 65, 91—*Secondary evidence :*

Limitation Act, s. 19, must be read with Evidence Act, ss. 65 and 91, and does not exclude secondary evidence in cases where such would be admissible under section 65.

Chathu v. *Virarayan* 491

4. ——————————, **s. 19, sched. II, arts. 57, 115**—*Date when money becomes due—Acknowledgment in holograph will unsigned :*

In a suit against the legal representative of a deceased debtor to recover the amount of the debt, it appeared that the debt was contracted more than three years, but was payable less than three years before suit. In bar of limitation the plaintiff relied upon an admission of the debt in a draft will, written by the testator, in the first line of which his name appeared :—*Held*, per *Weir*, J., that the admission in the will did not constitute an acknowledgment under Limitation Act, s. 19 ; per *Muttusami Ayyar and Parker*, JJ., that the period of limitation should be computed from the date when the debt was due and the suit was not barred.

Ramasami v. *Muttusami* 380

5. ——————————, **s. 22**—*Amendment of plaint :*

The creditor of a deceased trustee of a temple sued two persons, as his successors in office, to recover the amount of the debt. One of the defendants died ; the other, who was the brother of the deceased, pleaded that other persons were joint trustees with him, and should have been impleaded with him, he also alleged that the debt in question was a private debt, and had not been incurred by the deceased as a trustee. The persons named were joined as defendants, and they repeated the above allegation. The plaintiff, thereupon, amended the plaint and prayed for a personal decree against the original surviving defendant, and the others were removed from the record. The amendment took place more than three years after the date when the debt was payable, but the suit had been instituted within that period :—*Held*, that the claim was not barred by limitation.

Saminatha v. *Muthayya* 417

6. ——————————, **sched. II, arts. 49, 118**—*Suit to recover title-deeds left with a mortgagee after redemption—Demand and refusal :*

After the redemption of a mortgage, the title-deeds of the mortgage premises were left with the mortgagee, who refused to return them on demand made by the mortgagor. The mortgagor now sued to recover possession of them :—*Held*, the Limitation Act, sched. II, art. 49, was applicable to the case and that time began to run from the date of the mortgagee's refusal.

Subbakka v. *Murupakkala* 157

7. ——————————, **sched. II, arts. 62, 120**—*Money received for plaintiff's use—Suit for which no period prescribed—Transfer of Property Act—Act IV of* 1882, *ss.* 2, 135 :

A obtained a money decree against B and attached certain land in execution. C intervened in execution successfully. A then brought a suit to establish that the land was liable to be sold in execution, and obtained a decree. Meanwhile the land was taken up by Government under the Land Acquisition Act, and the compensation money was paid to C. A attached this sum as a debt due to B and sold it in execution, and it was purchased by the plaintiff. The plaintiff now sued C to recover the amount of the debt :—*Held*, that the suit was governed by Limitation Act, sched. II, art. 120, and not by art. 62, and that the plaintiff was entitled to recover without regard to the terms of Transfer of Property Act, s. 135.

Krishnan v. *Perachan* 382

8. ——————————, **sched. II, arts. 91, 120**—*Malabar law—Adoption by the last member of a Nambudri illom—Civil Procedure Code, s.* 13—"Res judicata" :

In a suit for a declaration that the members of the Nambudri illom to which the plaintiffs belonged were the sole heirs and successors of an illom

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known as Kiluvapura, of which the natural line had become extinct, and for possession of certain land which had formed part of its property, the defendants were the karnavan and manager of the plaintiffs' illom and the members of another illom. It was found on the evidence that the plaintiffs' karnavan had been adopted unto the Kiluvapura illom, and that subsequently that illom and the plaintiffs' had been amalgamated under a karar executed by, among others, the wife of the last male member of the Kiluvapura illom, and that she had died less than twelve years before this suit. The defendants, other than the karnavan and manager of the Plaintiffs' illom, asserted a right to a moiety of the property of the Kiluvapura illom (with which, however, it was now found on the evidence that they were less closely connected than the plaintiffs), and it appeared that that right had been similarly asserted in suits brought after the date of the karar above referred to, by a member of the defendants' illom against the karnavan and manager of the plaintiffs' illom, and that decrees had been passed therein negativing the title now set up by the plaintiffs and that part of the property now claimed was held under one of those decrees. The plaintiffs did not ask that those decrees should be set aside :—*Held*, (1) that the suit was not barred by limitation ; (2) that it was unnecessary for the plaintiffs to prove *mala fides* against their karavan in respect of his conduct in the former suits or to seek that the decrees passed therein be set aside, and that those decrees did not constitute the present claim *res judicata*, as the karnavan was not then impleaded in his capacity as such ; (3) that the adoption of the plaintiffs' karnavan was valid even assuming that no datta homam was performed, and the last male member of the Kiluvapura illom had died after merely indicating him as his heir and the widow adopted him in the Dwayamushyayana form ; (4) that the plaintiffs were entitled to a decree as prayed.

Shankaran v. *Kesavan* .. ..

9. ——————————, **sched. II, arts. 99, 132**—*Payment of entire rent by a co-tenant—Suit for contribution :*

One of two persons, having a joint holding from a mittadar, paid the whole of the mittadar's dues for one year, and more than three years after the date of payment he sued the other for contribution :—*Held*, the payment did not create a charge on the land, and the suit was consequently barred by limitation.

Thanikachella v. *Shudachella :* 258

10. ——————————, **sched. II, art. 120**—*Suit for the apportionment of assessment on land :*

In a suit by the holder of one share against the holders of other shares in inam land, included in a single patta and assessed in an entire sum, for apportionment of the assessment, it appeared that the plaintiff had asked for the apportionment to be made more than six years before suit :—*Held*, that the suit was not barred by limitation.

Anandarazu v. *Viyyanna* 492

11. ——————————, **sched. II, arts. 123, 127, 144**—*Suit by a Mapilla widow for her share in her husband's property :*

The widow of a Mapilla, who had died intestate more than fourteen years before suit, sued to recover a one-sixteenth share of the property left by him and his brother :—*Held*, that although the parties were Mapillas the suit was governed by art. 123 of the Limitation Act and was accordingly barred.

Kasmi v. *Ayishamma* 60

11. ——————————, **sched. II, art. 127**—*Joint famiy property—Suit by Muhammadan heir for his share in an undistributed estate :*

The words "joint family property" in Limitation Act, 1877, sched. II, art. 127, are interded to refer to joint family property in the Hindu sense of the term. A Muhammadan sued, as heir in 1888, to recover his share in the property of his grandfather, which had been enjoyed jointly by his descendants from his death, which occurred in 1840, up to a recent date. It did not appear that the family was governed by any special custom :—*Held*, that

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the suit was not governed by Limitation Act, 1877, sched. II, art. 127, and was barred by limitation.

Patcha v. *Mohidin* 57

13. ——————————, **sched. II, arts. 127, 144**—*Aliyasantana Law—Specific Relief Act—Act I of* 1877, *s.* 42—*Declaratory relief :*

In a suit in which the plaintiffs sought declarations that they were members of an undivided Aliyasantana family with the defendants, that certain property belonged to the family, and that plaintiff No. 1, the senior member of the family, was entitled to have the lands registered in his name, the defendants denied the allegations in the plaint, and pleaded that the suit for declarations only was not maintainable, and that it was barred by limitation. It was found that the plaintiffs had separated themselves from the defendants, and had for more than twelve years, been excluded to their own knowledge from the joint family property :—*Held*, that, if as alleged by the plaintiffs, plaintiff No. 1 was the *de jure* ejaman of the family, he was entitled to the possession and management of the family property, and a suit for a mere declaration of his right would not lie—*Chandu* v. *Chathu Nambiar* (I.L.R., 1 Mad., 581), distinguished. *Per cur :* "We are of opinion that article 127 applies to this case, and that the plaintiffs having separated themselves from the defendants have, for more than twelve years, been to their own knowledge excluded from the joint family property, and that their suit to enforce a right to share therein is barred" —*Mahalinga* v. *Mariyamma* (I.L.R., 12 Mad., 462), distinguished.

Muttakke v. *Thimmappa* 186

14. ——————————, **sched. II, arts. 131, 132, 140**—*Kattubadi—Recurring right—Rent Recovery Act—Act VIII of* 1865 (*Madras*), *s.* 7 :

In a suit by a zamindar against the grantee of an inam to recover arrears of kattubadi, it appeared that no payment had been made in respect of kattubadi for a period of twelve years before suit. The suit was dismissed in the Court of first appeal on the findings (1) that no exchange of patta and muchalka had been proved, (2) that the plaintiff had not proved his right to the kattubadi, and (3) that his right to it, if any, was barred by limitation. On second appeal by the plaintiff :—*Held*, that the second and third of the above findings should be accepted and the second appeal dismissed *Alubi* v. *Kunhi Bi* (I.L.R., 10 Mad., 115) distinguished. *Per cur:* We do not think it necessary to consider whether if there had been a grant subject to kattubadi, patta and muchalka ought to have been exchanged.

Ramachandra v. *Jaganmohana* 161

15. ——————————, **sched. II, arts. 136, 138** :

Limitation Act, 1877, sched. II, art. 138, is applicable to a suit brought by the assignee of a purchaser of land at a Court sale to obtain possession of the land.

Arumuga v. *Chockalingam* 331

16. —————————— *Suit for mutation of names in register—Parties :*

The Collector of the district is a necessary party to a suit by a purchaser against his vendor to compel mutation of names in the register. Such a suit is not barred by limitation unless the Collector has refused without qualification to effect such mutation, negativing the plaintiff's right to the land in question.

Virasami v. *Rama Doss* 350

MALABAR LAW—*Adoption by the last member of a Nambudri illom—Limitation Act—Act XV of* 1877, *sched. II, arts.* 91, 120—*Civil Procedure Code, s.* 13—"Res judicata" :

In a suit for a declaration that the members of the Nambudri illom to which the plaintiffs belonged were the sole heirs and successors of an illom known as Kiluvapura, of which the natural line had become extinct, and for

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possession of certain land which had formed part of its property, the defendants were the karnavan and manager of the plaintiffs' illom and the members of another illom. It was found on the evidence that the plaintiff's karnavan had been adopted unto the Kiluvapura illom, and that subsequently that illom and the plaintiffs' had been amalgamated under a karar executed by, among others, the wife of the last male member of the Kiluvapura illom, and that she had died less than twelve years before this suit. The defendants, other than the karnavan and manager of the plaintiffs' illom, asserted a right to a moiety of the property of the Kiluvapura illom (with which, however, it was now found on the evidence that they were less closely connected than the plaintiffs), and it appeared that that right had been similarly asserted in suits brought after the date of the karar above referred to, by a member of the defendants' illom against the karnavan and manager of the plaintiffs' illom, and that decrees had been passed therein negativing the title now set up by the plaintiffs and that part of the property now claimed was held under one of those decrees. The plaintiffs did not ask that those decrees should be set aside :—*Held*, (1) that the suit was not barred by limitation ; (2) that it was unnecessary for the plaintiffs to prove *mala fides* against their karnavan in respect of his conduct in the former suits or to seek that the decrees passed therein be set aside, and that those decrees did not constitute the present claim *res judicata*, as the karnavan was not then implead , in his capacity as such ; (3) that the adoption of the plaintiffs' karnavan was valid even assuming that no datta homam was performed, and the last male member of the Kiluvapura illom had died after merely indicating him as his heir, and the widow adopted him in the Dwayamushyayana form ; (4) that the plaintiffs were entitled to a decree as prayed.

Shankaran v. *Kesavan* 6

2. ——————*Anubhavom tenure—Forfeiture by alienation—Landlord and tenant—Denial of landlord's title in pleadings—Limitation :*

Lands in Malabar were demised on anubhavom tenure. Some of them were alienated by the tenant, the landlord subsequently accepted rent. More than twelve years after the alienation, the landlord sued to eject the tenant on the ground that the tenure was thereby forfeited. The tenant for the first time, in his written statement, denied the landlord's title :—*Held*, (1) that the cause of action alleged in the plaint was barred by limitation ; (2) that the plaintiff could not recover in this suit on the ground of the denial of his title in the written statement.

Madavan v. *Athi Nangiyar* 123

3. ——————, *Customary Law of Mapillas—Multifariousness—Suit by Karnavan—Limitation—Evidence—Evidence Act—Act I of* 1872, *s.* 35—*Petition and order :*

The plaintiff sued as the karnavan of a Mapilla tarwad to recover lands in the possession of the defendants who were a donee from and the descendants of a previous karnavan and their tenants. It appeared that the alleged previous karnavan had died less than twelve years before the suit was filed, but more than twelve years before the joinder, as a supplemental defendant, of one to whom he had conveyed certain property by way of gift five years before his death. An issue was raised as to whether the rights of the parties were governed by Makkatayom or Marumakkatayom law, and an order of a District Munsif reciting a petition to which the alleged previous karnavan was a party, was put in evidence to show that he had in a particular instance acted in the capacity of karnavan of a Marumakkatayom tarwad. The rough draft of a plaint which had been filed by the alleged previous karnavan was put in evidence to show that he admitted having alienated property in a manner which would be adverse to the claim of his tarwad :—*Held*, (1) that on the allegations in the plaint the plaintiff was entitled to maintain the suit alone, and that the suit was not bad for multifariousness ; (2) that the order and draft plaint were admissible in evidence for the abovementioned purposes ; (3) *on the evidence*, that the plaintiff had succeeded in office the previous karnavan as alleged, and that the previous karnavan had followed the Marumakkatayom rule, although it was shown that other members of the family had dealt with property, described as self-acquired, under the precepts of Muhammadan law ; (4) that the suit was barred by limitation as against the

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donee above referred to, her possession having been adverse to the tarwad since the date of the gift. Observations as to documents marked as exhibits without proof.

Byathamma v. *Avulla* 19

4. ——————*Karnavan, disqualification for office of—Blindness :*

A blind man sued, as the karnavan of a Malabar tarwad, to recover certain land. One of the defendants, who claimed but was not admitted to be a member of the tarwad, and who asserted a right as kanomdar to the land in question, pleaded that the plaintiff was not competent to act as karnavan, or consequently to maintain the suit by reason of his blindness :—*Held*, that the defendant was not entitled to raise this plea.

Ukkandan v. *Kunhunni* 483

5. ——————*Landlord and tenant—Surrender—Limitation—Adverse possession—Karnavan, powers of—Perpetual lease :*

The karnavan of a Malabar kovilagom executed a kuikanom lease of certain land, the jenm of the kovilagom, in 1846, and in 1861 his successor demised the same land to the same tenants in perpetuity. The present karnavan sued in 1889 to recover possession of the land :—*Held*, (1) that the perpetual lease, as being of an improvident character, was *ultra vires* and void ; (2) that the original lease was not surrendered ; (3) that the suit was not barred by limitation, the possession of the defendants never having been adverse to the plaintiff's kovilagom.

Ramunni v. *Kerala Varma Valia Raja* 166

6. ——————*Makkatayam rule of inheritance—Custom of Tiyars in South Malabar :*

A community, following the Makkatayam rule, must not be taken to be necessarily governed by the Hindu law of inheritance with all its incidents :—Accordingly, when a member of the Tiyar community in Calicut following that rule, alleged and proved a custom that brothers succeeded to self-acquired property in preference to widows, it was held that the Court should give effect to it.

Rarichan v. *Parachi* 281

7. ——————*Nambudri—Karnavan, decree against—Sale in execution :*

A junior member of a Nambudri illom, of which he was held out as the manager and *de facto* karnavan, contracted a debt for the purposes of the illom The creditor sued him on the debt, but did not implead him as karnavan, and, having obtained a personal decree, attached and brought to sale in execution property belonging to the illom. A son of the judgment-debtor now sued to set aside the sale :—*Held*, that the sale should be set aside.

Govinda v. *Krishnan* 333

8. ——————*Ottidar's right of pre-emption—Suit to redeem kanom :*

In a suit to redeem kanom of 1874, it was found that the plaintiff's predecessor in title had purchased the jenm title to the land in question at a sale, held in execution of a decree which was binding on the jenmi's tarwad ; but it appeared that the defendant (the kanomdar) held an otti on the land, dated 1870, and had not waived his right of pre-emption as ottidar. A decree was passed providing for payment by the defendant of the purchase money to the plaintiff, and the execution by the latter of a conveyance, and in default for redemption by the plaintiff on his paying to defendant the amount of the otti :—*Held*, that the decree was right.

Ukku v. *Kutti* 401

9. ——————*Ottidar, right of pre-emption of — Waiver — Election not to purchase :*

An ottidar in Malabar loses his right of pre-emption if he refuses to bid at a Court-sale of the land comprised in his otti, held in execution of a decree against the karnavan and senior anandravan of the tarwad, in which the

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jenm right is vested, after having been specially invited to attend and exercise that right, and makes no offer to take the property for a long time after the Court-sale.

Ammotti Haji v. *Kunhayen Kutti* 480

MASTER AND SERVANT—*Liability of master for servant's act—Offer of money by defendant to avoid litigation :*

The servant of the defendant, who was staying in the plaintiff's hotel, broke a filter, the property of the plaintiff. In a suit by the plaintiff for damages it appeared that the servant, when he broke the filter, was not acting within the scope of his employment, nor on the defendant's business, or for his benefit. The defendant offered to the plaintiff as compensation Rs. 30 (which was refused), but without acknowledging any liability :—*Held*, (1) that the defendant was not liable for the act of his servant ; (2) that the plaintiff was not entitled to a decree for Rs. 30.

Gray v. *Fiddian* 73

MORTGAGE—*Civil Procedure Code, s.* 559—*Parties—Joinder of respondents on appeal —Collusive discharge by one of two creditors :*

In 1877 the plaintiff executed a deed of hypothecation to one of two partners to secure a loan obtained from them jointly. In 1881 the plaintiff sold *inter alia*, the hypothecated property to defendants Nos. 2 to 4, and it was arranged that the secured debt should be paid off by the vendees. They failed to do this, but in 1882 they executed a mortgage for the amount due in favour of the other of the two partners, and he thereupon gave a written discharge to the paintiff, who was found to have been acting in collusion with him to the disadvantage of his partner, the holder of the hypothecation bond. The latter brought a suit in 1885 upon the hypothecation bond and obtained a personal decree against the present plaintiff who was *ex parte*, the amount of the decree being declared to be charged on the land in the possession of defendants Nos. 2 to 4. Meanwhile, defendant No. 1, who was the assignee of the mortgage of 1882, had obtained a decree upon it against defendant No. 4. This decree not having been executed, he subsequently sued upon the mortgage again and obtained a decree against defendants Nos. 2 to 4. The plaintiff now sued to have the last mentioned decree set aside and recover the balance of the purchase-money from defendants Nos. 2 to 4. The Court of First Instance passed a decree for the amount claimed and declared it to be charged on the land. Defendant No. 1 preferred an appeal, in which defendants Nos. 2 to 4 were joined by the Court of First Appeal. The decree of this Court dismissed the suit :—*Held*, (1) that defendants Nos. 2 to 4 were rightly joined as respondents by the Court under Civil Procedure Code, s. 559 ; (2) that plaintiff, having allowed a decree to be passed against him *ex parte* in the suit of the holder of the hypothecation bond, and having obtained a collusive discharge from the other partner, was not entitled to recover against the defendants.

Kanagappa v. *Sokkalinga* 362

MORTGAGOR AND MORTGAGEE—*Hindu law—Partition—Redemption—Successive mortgages on family property—Assignment of equity of redemption :*

Two brothers constituted an undivided Hindu family. The eldest mortgaged half of certain family lands to P and the other half to the father (since deceased) of the contending defendants, and placed the mortgagees respectively in possession. Neither mortgage was binding on the younger brother who mortgaged his share of the same land to the plaintiff. The plaintiff obtained a decree on his mortgage and attached and brought to sale in execution and himself purchased the half share of his mortgagor, and having afterwards purchased the share of the elder brother and come to a settlement with P, now brought a suit for a moiety of the land in the possession of the contending defendants as forming part of the half share of his mortgagor :—*Held*, (1) that the contest being between strangers to the family, and the plaintiff having purchased the entire rights of the family in the land in question, the plaint was not defective for want of a prayer for the partition of the whole property of the family ; (2) that the plaintiff being the assignee

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of the elder brother could not deprive his mortgagees of a portion of their security without asking for an account and offering to pay whatever might be due on the footing of the mortgage.

Subbarazu v. *Venkataratnam* 234

2. ——————————*Mortgage by conditional sale before Transfer of Property Act—Redemption :*

Suit, in 1889, to redeem a mortgage of 1880, which contained a provision that, if the mortgage money was not paid in March 1882, the mortgage premises should become the absolute property of the mortgagee :—*Held*, that the plaintiff was entitled to redeem. *Ramasami Sastrigal* v. *Samiyappanayakan* (I.L.R., 4 Mad., 179) explained and followed.

Venkatasubbayya v. *Venkayya* 230

MUTT—*Relation between the founder's representative and the Mahant—Agreement by the Mahant on his appointment—Power of dismissal :*

In the absence of a deed of endowment the obligations of the head of a mutt to the representative of the founder can only be deduced from the usage of the institution. In a suit by the representative of the founder to remove the defendant from the headship of a mutt, it appeared that the usage was for the head of the institution for the time being to nominate his successor, and for the representative of the founder to sanction the nomination and invest the nominee with a *sade* on his installation, and that the defendant had asked the plaintiff to appoint him and had undertaken on his appointment to furnish to him accounts of the income and expenditure of the mutt :—*Held*, that the plaintiff was not entitled to remove the defendant from office on the ground of his refusal to furnish accounts.

Gajapati v. *Bhagavan Doss* 44

OMIT TO SUE—*Civil Procedure Code, s.* 43—"Res judicata" :

The plaintiff, having previously obtained against his brother, defendant No. 1, who had been the managing member of their family, a decree for partition of the family property including certain debts scheduled in the plaint therein, now sued to recover his share of certain other family debts collected by defendant No. 1 without the plaintiff's knowledge :—*Held*, that the claim was not barred by Civil Procedure Code, s. 43.

Mariathodi v. *Appu* 296

PANCHAYET—*Regulation XXXII of* 1802 (*Madras*)—*Regulation XII of* 1816 (*Madras*)—*Cases in which a District Panchayet may be appointed—Finality of award—Notice of nomination of Panchayetdars :*

The applicability of the procedure provided in Regulation XII of 1816 is not limited to cases in which a breach of the peace has taken place or is apprehended. When a District Panchayet, appointed under that regulation, has come to a decision, that decision is final and conclusive between the parties and cannot be impeached or set aside, except in the manner prescribed by the regulation. Such decision is not invalid, because only one party consented to the reference of the matter in dispute to a panchayet, or because the other party, who protested against the proceedings, had not notice of the time when the nomination of the Panchayetdars was to take place.

Narayana v. *Chandra* 1

PARTIES—*Civil Procedure Code, ss.* 13, 98, 103—"Res judicata"—"*Court of competent jurisdiction*"—*Landlord and tenant—Quiet enjoyment, covenant for—Suit for damages against lessor, including costs—Joinder of one of two co-lessees as defendant—Suit dismissed against such lessee :*

In 1883, A, the trustee of a certain charity, executed in favour of X and Y an agricultural lease for nine years and delivered over possession of the lands comprised in it, being part of the trust property. The lease contained a provision that it should be cancelled on default being made in payment of the rent and kist and it contained no express covenant for quiet enjoyment. In 1887 default was made in payment of the rent and kist. A thereupon

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cancelled the lease and sued X and Y in a Subordinate Court and obtained a decree for the arrear, the total amount of his claim being Rs. 2,807. In that suit X alleged that Y was merely a name-lender for A, who desired to benefit himself at the expense of the charity, and also that certain raiyats setting up a false claim had evicted X from the lands demised at the instigation of A, who had subsequently sought unsuccessfully to obtain further advantages for himself. The Subordinate Judge framed an issue on each of these allegations and recorded findings in the negative. In the same year X filed a suit for damages for breach of contract against A and Y in the High Court, repeating in his plaint the above allegations. When that suit came on for hearing, it was dismissed for default, Y being the only party who appeared. X now sued A again on the same cause of action, making the same allegations. Y was subsequently brought on to the record as being a necessary party to the suit, being joined as second defendant, but he applied to be and was struck off the record on the ground that the dismissal of the former suit in the High Court was final as against him :—*Held*, (1) that the suit was not bad for the non-joinder of the co-lessee as a plaintiff, nor for the reason that the plaintiff could not prosecute the suit against him ; (2) that the matters put in issue in the Subordinate Court were not *res judicata* by reason of the decision of that Court ; (3) that the plaint disclosed a good cause of action against the lessor ; (4) that even if the plaintiff had substantiated his allegations against his lessor, he would not have been entitled to recover the cost of civil and criminal proceedings against the raiyats who had evicted him.

Vithilinga Padayachi v. *Vithilinga Mudali* 111

2. ——— *District Municipalities Act (Madras)—Act IV of* 1884, *s.* 169—*Suit for declaration of title against a Municipality :*

The plaintiff sued a Municipal Council, under the Madras District Municipalities Act, for a declaration of title to a certain structure situated in the limits of the Municipality and of his right to put a roof over it. The structure was found to belong to the plaintiff :—*Held*, (1) that the Secretary of State was not a necessary party to the suit ; (2) that the Municipal Council had no discretion under section 169 of the above Act to prevent the plaintiff from dealing with the structure, provided he did not interfere with the convenience of the public or with any sanitary regulation.

Krishnayya v. *The Bellary Municipal Council* 292

3. ——— *Limitation Act—Suit for mutation of names in register :*

The Collector of the district is a necessary party to a suit by a purchaser against his vendor to compel mutation of names in the register. Such a suit is not barred by limitation unless the Collector has refused without qualification to effect such mutation, negativing the plaintiff's right to the land in question.

Virasami v. *Rama Doss* 350

PENAL CODE—ACT XLV OF 1860, s. 166—*Public servant—Regulation XXIX of* 1802 (*Madras*), *s.* 12—*Duties of zamindari karnam :*

Per cur : A zamindari karnam is a public servant and is bound by law to produce accounts to the proprietor or farmer of a zamindari.

Subramanya v. *Somasundara* 127

2. ———, **ss. 183, 186**—" *Voluntarily* " :

A District Judge ordered that the house of the defendant in a suit pending before him be searched and certain property brought to the Court, and appointed a commissioner to carry out this order. The commissioner went to the house, but the defendant shut the doors and would not admit him. A crowd collected, and the commissioner felt it would be unsafe to proceed to carry out the order by force, and was unable to do so otherwise. The defendant was prosecuted and sentenced under Penal Code, s. 186 :—*Held*, that the facts disclosed no offence under that section.

Queen-Empress v. *Sommanna* 221

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3. ———, **s. 186**—*Obstructing a public servant—Public vaccinator.*

To spread a false report and thereby prevent persons from bringing their children for vaccination to the public vaccinator is not an offence under Penal Code, s. 186.

Queen-Empress v. *Thimmachi* 93

4. ———, **s. 228**—*Insulting a Magistrate—Criminal Procedure Code, ss.* 1, 195, 480-482—*Village Munsif :*

The accused intentionally insulted a Village Munsif in the discharge of his magisterial duties ; the Village Munsif did not prefer a complaint or sanction a prosecution, but a Second-class Magistrate charged the accused under Penal Code, s. 228, on a police report and convicted him :—*Held*, (1) that Criminal Procedure Code, ss. 480-482 do not apply to Village Munsifs ; (2) that the Second-class Magistrate was competent to try the complaint, and the conviction was right.

Queen-Empress v. *Venkatasami* 131

5. ———, **s. 372**—*Disposal of a minor—Dedication of a girl in a temple.*

The accused dedicated his minor daughter as a Basivi by a form of marriage with an idol. It appeared that a Basivi is incapable of contracting a lawful marriage, and ordinarily practises promiscuous intercourse with men, and that her sons succeed to her father's property :—*Held*, the accused had committed an offence under Penal Code, s. 372.

Queen-Empress v. *Basava* 75

6. ———, **s. 372**—*Illegal disposal of a minor :*

A dancing woman of a temple applied to the manager of the temple for the appointment of a minor girl, whom she falsely described as her daughter, to her " kothu " miras ; the manager ordered that the girl be placed on the pay abstract like other dancing girls, and she was employed about the temple, though the ceremony of tying the bottu (after which the girl could not be married) did not take place :—*Held*, that the above facts constituted *primâ facie* evidence that an offence under Penal Code, s. 372, had been committed by the dancing woman, the manager above named, and the parents of the girl.

Srinivasa v. *Annasami* 41

7. ———, **s. 372**—*Illegal disposal of a minor—Revision :*

A dancing woman (fourth accused) of a temple applied to the manager (first accused) of the temple for the appointment of a girl under the age of sixteen, whom she had adopted as her daughter, to her "kothu" mirasi office to which duties more or less connected with the preparation of provisions of the temple were attached. The manager, before whom the girl had sung and danced, ordered that she be placed on the pay abstract like other dancing girls and she was employed in the abovementioned duties about the temple for about five months. It appeared that the dancing women of the temple lived partly at least by prostitution, and there was evidence that the girl sang and danced in the temple, received wages and wore a pottu (an emblem of marriage). The Magistrate, upon these facts, refused to frame a charge against the manager of the temple and the adoptive mother of the minor under Penal Code, s. 372 :—*Held, per Collins*, C. J. (*Parker*, J., *diss.*), that the Magistrate should have framed a charge. On a petition under Criminal Procedure Code, ss. 435, 439, preferred by the complainant, who was a dismissed servant of the temple, after the prosecution had been pending for two years, it appeared that the girl had suffered no harm :—*Held*, that whether or not the Magistrate should have framed a charge, the High Court was not bound to send the case for retrial.

Srinivasa v. *Annasami* 328

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8. ——————————, s. 499, exc. X—*Defamation—Privilege—Mala fides—Privilege exceeded :*

The complainant, a Brahman who had been put out of caste, was re-admitted by the executive committee of the caste after performing expiatory ceremonies. This re-admission was not approved of by the accused, who formed a faction of the caste; and they, after an interval of six months, distributed in the bazaar to all classes of the public printed papers in which the complainant was described as a "doshi" or sinner, which signified that he was a person unfit to be associated with. The accused were charged with the offence of defamation. They pleaded privilege, and it was admitted that they had acted without malice:—*Held*, that the accused had not acted in good faith, and that the publication was not under the circumstances privileged and protected by Penal Code, s. 499, exc. X, and that the accused were accordingly guilty of defamation.

Thiagaraya v. *Krishnasami* 214

9. ——————————, s. 499—*Defamation—Privilege of party—Appeal from the Resident's Court, Bangalore—Limitation :*

A person who was being defended by counsel on a criminal charge interfered in the examination of a witness and made a defamatory statement with regard to his character. He was now charged with defamation and convicted in the Resident's Court at Bangalore. On an appeal to the High Court, preferred more than sixty days after the conviction:—*Held*, (1) that the appeal should be admitted; (2) that the occasion was not privileged and the words complained of were uttered maliciously and the conviction was right.

Hayes v. *Christian* 414

PERPETUITIES, RULE AGAINST—*Superstitious uses—Trust for masses—Executor, assent of—Vesting of bequest :*

An Armenian died in Madras in 1836, leaving a will whereby she appointed executors and bequeathed a certain sum "that the income thereof be given for perpetual masses for the benefit of my soul and for the souls in purgatory," and she also bequeathed, *inter alia*, Rs. 42,000 to her grand-daughter for life and provided that in the event of her marrying and having children she could bequeath to them the said Rs. 42,000, but in the event of her dying without issue, Rs. 14,000, out of the said Rs. 42,000, should be subtracted and given to her husband, and the remaining Rs. 28,000 should be added to the first-mentioned bequest and the income thereof be similarly given for masses. The executor with probate gave effect to the first-mentioned legacy. By a settlement made in contemplation of the marriage of the grand-daughter, the subject of the second legacy was settled as provided in the will except as to the Rs. 14,000, as to which it was declared that in the event of there being no issue of the marriage, and of the wife surviving the husband and dying without marrying again, it should be divided between the residuary legatees of the testatrix. The husband was a party to the settlement, as also was the executor of the testatrix who was one of the trustees of the settlement. The marriage having taken place, a suit was brought by the husband and wife against the trustees, and a decree was passed under which the trustees were relieved of their office, and the trust funds paid into Court with the direction that interest accruing thereon be paid to the wife until further order. The husband died without issue and subsequently in 1890 the wife died not having re-married. The Administrator-General of Madras took out letters of administration to administer the estate left unadministered of the testatrix, and the Rs. 42,000 above referred to were paid over to him:—*Held by Shephard*, J., that the sum of Rs. 14,000 by reason of the settlement, but not otherwise, fell into the residue of the estate of the testatrix:—*Held, by Collins*, C.J., *and Handley*, J., *affirming Shephard*, J. (1) that the sum of Rs. 28,000 formed unadministered assets of the estate of the testatrix; (2) that the bequest for masses was void as infringing the rule against perpetuities.

Colgan v. *The Administrator-General of Madras* 424

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PRACTICE—*Appellant not allowed to raise in appeal a contention inconsistent with the case relied upon in the Courts below :*

An appeal cannot be maintained upon a ground inconsistent with the case insisted on in the Courts below, notwithstanding that the new ground may be one that might have been brought forward, in the first instance, as an alternative. In a suit between the widows of two brothers deceased, the plaintiff's title rested on this, that her and the defendant's late husbands, respectively, having been the sons of the same father, had, therefore, been sapindas to each other; so that the plaintiff as the widow of the one would be the heir of the other expectant on the death of his widow. In this character she sued to have set aside an adoption made by the defendant. The Courts, however, found that the plaintiff's husband was an illegitimate son, and not a sapinda, and the suit was dismissed. The plaintiff, now appellant, on findings of fact that both the sons were illegitimate, urged that, though they could not inherit from their father, they yet could succeed to the estate of one another:—*Held*, that this contention was so inconsistent with the case made below that it was now inadmissible. *Sreemutty Dossee* v. *Ranee Lalunmonee*, referred to and followed. Also, the opinion had been expressed by the High Court that, by the law prevailing in Madras, a widow is not in the line of succession to her husband's male collateral relations.

Gajapathi Radhika v. *Vasudeva Santa Singaro* 503

2. ——————*Civil Procedure Code, s. 525—Suit on an award—Alternative claim on original consideration—Withdrawal of claim on award :*

The plaintiff lent money to two of the defendants, who were partners with the third defendant, for the purposes of the partnership and obtained promissory notes from them. Disputes which arose between them were referred to arbitrators, who made an award. An application by the plaintiff to have the award made a rule of Court was opposed by defendant No. 1, and the plaintiff was referred to a regular suit. He now brought his suit in the alternative on the award and on the promissory notes. The award was found to be unenforceable. The plaintiff then declared himself satisfied to withdraw his suit as far as the award was concerned, and the Court passed a decree for plaintiff on the merits. Defendant No. 3 alone having appealed, the Court of First Appeal held that the plaintiff must succeed or fail on the award, and that the withdrawal of the prayer for a decree on the award altered the nature of the suit, and finding that there was no evidence of misconduct on the part of the arbitrators, he passed a decree in the terms of the award. On a second appeal preferred by defendant No. 1:—*Held*, that this procedure was right.

Narasayya v. *Ramabadra* 474

3. ——————*Variance between pleadings and proof—Relief not asked for :*

The plaintiff, alleging that a certain lane was his property and that he had been obstructed by the defendants from building a door upon it, sued for an injunction and for damages. The Court held that the plaintiff's title to the land was not established, but passed a decree declaring that both the plaintiff and the defendants were entitled to use the lane by right of easement:—*Held*, that this declaration, which had not been asked for, should not have been made, and that the suit should have been dismissed for want of proof of the title alleged by the plaintiff.

Sambayya v. *Gopalakrishnamma* 489

PRE-EMPTION, RIGHT OF—*Malabar Law—Ottidar—Waiver—Election not to purchase :*

An ottidar in Malabar loses his right of pre-emption if he refuses to bid at a Court-sale of the land comprised in his otti, held in execution of a decree against the karnavan and senior anandravan of the tarwad, in which the jenm right is vested, after having been specially invited to attend and exercise that right, and makes no offer to take the property for a long time after the Court-sale.

Ammotti Haji v. *Kunhayen Kutti* 480

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PRESIDENCY SMALL CAUSE COURTS ACT—ACT XV OF 1882, ss. 37, 69— *Application to Full Bench for retrial—Case stated :*

The Full Bench of a Presidency Court of Small Causes cannot state a case for the opinion of the High Court on an application for a new trial made under Act XV of 1882, s. 37.

Oakshott v. *The British India Steam Navigation Company* 179

PROOF OF A ZAMINDAR'S TITLE TO A TRACT OF HILL AND FOREST— *Construction of istemrar sanad of* 1803 *as to lands granted—Specification of villages—Effect of proved acts of possession by zamindar :*

Where the proprietary right in a tract of land had been constantly asserted all questions between the disputants as to the amount of the use of the tract by the claimant, and as to the sufficiency of such use to establish his possession over the whole extent, were *held* to be questions of fact. A zamindar claimed from the Government the proprietary possession of a tract of hill and forest, in virtue of an istemrar sanad of the year 1803, conferring upon the grantee his heirs and successors a permanent property in the zamindari as then possessed. To the sanad, which was aptly worded to include the subject of this claim, the acts of the zamindar had been ascribed. But it did not contain any description of the lands which it was intended to carry, a marginal note only specifying three villages then comprising the zamindari: —*Held*, that the grant was not confined to the villages so named, and to an area in their immediate vicinity, but that the whole tract of hill and forest was claimable on its being shown, by direct evidence, or reasonable inference, that it was in the possession of the zamindar when he obtained a permanent title from the Government. As to part of the tract, the zamindar's acts of possession, such as grazing cattle, cutting timber, and collecting forest produce, had been exclusive of the exercise of such rights by any other persons; but as to another part of the tract, his acts of that character had been concurrent with a similar user of hill and forest by raiyats of neighbouring villages, not part of the zamindari, and belonging to the Government:—*Held*, as to both parts, that the acts of possession, which had been found by both the Courts below to have been done by the zamindar, did not fall short of proving his proprietary possession, and that the user by the villagers, not having taken place in the assertion of conflicting proprietary right, and whether or not they were sufficient to establish rights of easement, were neither in amount nor quality sufficient to displace the zamindar's proprietary title. The decision of the first Court that the exercise of the above-mentioned rights by the zamindar was evidence only of the right on his part to use the land of another for the purposes indicated, had been rightly reversed by the High Court.

The Secretary of State for India in Council v. *Nellakutti Siva Subramania Tevar* 101

PROVINCIAL SMALL CAUSE COURTS ACT—ACT IX OF 1887, s. 15, sched. II, art. 41 :

The plaintiff sued to recover from the defendant Rs. 227, being his share of the cost of repairing a channel, which was the property of the plaintiff and defendant:—*Held*, the suit was cognizable by a Court of Small Causes.

Fisher v. *Collector of Madura* 155

2. ——————————————————, s. 23—*Civil Procedure Code, s.* 586—*Suit transferred to regular side :*

A suit of a nature cognizable by a Small Cause Court does not cease to be so within the meaning of Civil Procedure Code, s. 586, because the Court in which it was instituted as a small cause suit returned the plaint to be filed on the regular side under Provincial Small Cause Courts Act, s. 23, on the ground that the suit involved questions of title.

Muttukaruppan v. *Sellan* 98

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3. ——————————————————, s. 24—*Civil Procedure Code, s.* 588, *cl.* 17—*Insolvency petition in execution of decree in small cause suit—Appeal :*

In proceedings in execution of the decree passed in a small cause suit by a District Munsif who had been invested with insolvency jurisdiction, the judgment-debtors filed a petition under section 344 of the Civil Procedure Code praying that they might be declared insolvents. Their petition was dismissed by the District Munsif:—*Held*, an appeal lay to the District Court against the order dismissing the petition.

Vaikunta Prabhu v. *Moidin Saheb* 89

4. ——————————————————, sched. II, cl. 31—*Suit for profits of land—Civil Procedure Code, s.* 586 :

The plaintiff sued on the Small Cause side of a Subordinate Court before the Small Cause Courts Act, 1887, came into operation, to recover with interest from the date of suit Rs. 500, the value of crops alleged to have been illegally carried away by the defendant, while the plaintiff was in possession. The defendant raised a plea to the jurisdiction of the Court, and the Judge, without recording any decision on its validity, directed that the plaint be presented on the regular side of the Court for the reason that it raised questions of complexity. It was so presented after the above Act had come into operation. The plaintiff obtained a decree which was reversed on appeal. A petition of second appeal was presented by the plaintiff. The defendant objected that no second appeal lay under Civil Procedure Code, s. 586:—*Held*, that the objection should prevail since the suit was not excepted from the jurisdiction of the Small Cause Court under the Provincial Small Cause Courts Act of 1887.

Annamalai v. *Subramanya* 298

REGISTRATION ACT—ACT III OF 1877, ss. 17 (d), 48— *Transfer of Property Act—Act IV of* 1882, *ss.* 3, 78, 101—*Priority of mortgages—Gross negligence—Extinguishment of charges—Notice by registration :*

In a suit for the declaration of the priorities of mortgages and for foreclosure, it appeared that the mortgage premises had been purchased by the mortgagor from the second defendant and others in 1878, under a conveyance containing a covenant that they were free from incumbrances, and the mortgagor then received, *inter alia*, a Collector's certificate which was recited in another title-deed also handed over to her. The premises were mortgaged to defendant No. 2, who was an experienced sowcar in 1879 and to the plaintiff company in 1883 and again in 1884 and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff company on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff company and defendant No. 2 had no notice at the respective dates of their mortgages and conveyance of any previous incumbrance. The plaintiff company received the title-deeds of the estate from the mortgagor (but not the Collector's certificate) on the execution of the mortgage of 1883; the second defendant alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that before the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody:—*Held*, (1) that the plaintiff company were not affected with constructive notice of the mortgage of the second defendant by reason of its registration or of their failure to search the registry or to inquire after the Collector's certificate; (2) that the second defendant not having given a reasonable explanation of his conduct in leaving the title-deeds with the mortgagor four years after his mortgage, lost his priority by reason of his gross neglect under Transfer of Property Act, s. 78, apart from the circumstances raising a suspicion of fraud on his part. *Quære :* Whether the case might not have been decided against the second defendant on the ground that his mortgage was merged in the conveyance of 1886.

Shan Maun Mull v. *Madras Building Company* 268

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2. ——————————, ss. 17, 49—*Civil Procedure Code, ss.* 13, 43—Res judicata—*Instrument affecting movable and immovable property :*

The widow, daughter and divided brother of a deceased Hindu, executed an instrument which provided for the distribution of his property, both movable and immovable, as to which they had disputed. The document was not registered. The widow set up a will made by the deceased in her favour : the brother sued the widow for a declaration that the will was a forgery, but the Court held that it was genuine. He now sued the widow and daughter on the above instrument to recover his agreed share of the movable property of the deceased. The widow set up the will, which the plaintiff averred was invalid according to the custom governing the family :—*Held,* (1) that the plaintiff was not precluded by the decree in the former suit from impugning the validity of the will ; (2) that the unregistered instrument was admissible as evidence in support of the plaintiff's claim for the movable property.

Thandavan v. *Valliamma* 336

3. ——————————, ss. 72–75—*Criminal Procedure Code, s.* 195—"*Court*"—*Sanction prosecution for perjury :*

A Registrar, acting under Registration Act, ss. 72–75, is a Court for the purposes of Criminal Procedure Code, s. 195.

Atchayya v. *Gangayya* 138

REGULATION XXIX OF 1802 (MADRAS), s. 12—*Penal Code, s.* 166—*Public servant—Duties of zamindari karnam :*

Per cur : A zamindari karnam is a public servant and is bound by law to produce accounts to the proprietor or farmer of a zamindari.

Subramanya v. *Somasundara* 127

2. ——— **XXXII OF 1802 (MADRAS)** : *See* PANCHAYET.

3. ——— **XII OF 1816 (MADRAS)** : *See* PANCHAYET.

RELIGIOUS OFFICE, TRANSFER OF—*Transferee not solely entitled in succession to transferor:*

In a suit against the mooktessors or trustees of a temple, the plaintiff sought a declaration of his right to perform the puja in the temple, and an injunction restraining the defendants from interfering with the exercise of such right. It appeared that the office of pujari was hereditary in the plaintiff's family, that it had been held by the plaintiff's undivided uncle (deceased), that he transferred it in 1880 to the plaintiff's father (deceased), in succession to whom the plaintiff now claimed it. The High Court called for a finding as to whether the plaintiff's father was the sole heir next in succession to his transferor, and it was found that he had three brothers :—*Held,* that the transfer of the office to the plaintiff's father was invalid, and the suit should be dismissed.

Narayana v. *Ranga* 183

RELIGIOUS TRUSTEESHIP, ASSIGNMENT OF—*Civil Procedure Code, ss.* 292, 311—*Suit to set aside Court sale—Duty of vakil purchasing at Court sale—Fraud—Parties :*

A hereditary dharmakarta of a temple, who has assigned his office to a zamindar and consented to a decree being passed on the footing of such assignment, is competent nevertheless to bring a suit to set aside a Court sale of temple lands, treating such assignment as a nullity. A mortgagee having obtained a decree on her mortgage brought the mortgage property to sale ; and her vakil bid through an agent at the Court sale and became the purchaser. It appeared that the vakil had not informed his client that he intended to bid nor obtained the sanction of the Court, but he had been instructed by his client and had obtained the permission of the Court to bid on her account, and he was found to have acted in an underhand manner towards her. In a suit to set aside the sale, brought by the mortgagor, who had sought unsuccessfully to obtain the same relief by means of a petition under section 311 in which fraud was not alleged against the purchaser :—*Held,* (on

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its appearing that the vakil had not discharged the burden which lay on him of proving that the transaction was free from suspicion) that the sale should be set aside.

Subbarayudu v. *Kotayya* 389

RELIGIOUS USAGES OF MUHAMMADANS—CIVIL PROCEDURE CODE, s. 11—*Civil suit—Kutbah :*

Certain Moplahs, described as "the *Moktessor and Jamats*" of a mosque, sued certain other Muhammadans, described as "members of the Puslar caste," alleging that the custom was for the defendants to attend the plaintiffs' mosque on Friday at the reading of the kutbah, and that the defendants had recently built another mosque a short distance off, and had "for two months been attempting to read the kutbah" there." It was further alleged in the plaint that such reading of the kutbah was "quite contrary to the Muhammadan religion" and that the defendants nevertheless proposed to have the kutbah read, "whereby the kutbah or adoration conducted in our mosque will, according to religion, be fruitless." The prayer of the plaint was for an injunction, restraining the defendants from reading the kutbah in their mosque :—*Held,* that the plaint disclosed no cause of action.

Maine Moilar v. *Islam Amanath* 355

RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865, s. 3—*Registered zamindar—Zamindari held in coparcenary :*

A registered holder of a zamindari sued under the Rent Recovery Act to enforce the acceptance of a patta and execution of a muchalka by the defendant, a tenant on the estate. It was pleaded, in defence, that the zamindari was the undivided property of the plaintiff and his coparceners, in whose name a patta and muchalka had already been exchanged :—*Held,* that the plaintiff, as being the registered zamindar, was entitled to maintain the suit alone.

Ayyappa v. *Venkatakrishnamarazu* 484

2. ——————————, ss. 3, 12—*Mulgeni holding—Right of tenant to relinquish his lease :*

It is not competent to a Mulgeni tenant in South Canara to relinquish his lease and free himself from his obligation for rent without the consent of the landlord. *Quære :* Whether a Mulgar is within the class of landholders defined in Rent Recovery Act, s. 3.

Krishna v. *Lakshminaranappa* 67

3. ——————————, s. 7—*Limitation Act—Act XV of* 1877, *sched.* II, *arts.* 131, 132, 140—*Kattubadi—Recurring right :*

In a suit by a zamindar against the grantee of an inam to recover arrears of kattubadi, it appeared that no payment had been made in respect of kattubadi for a period of twelve years before suit. The suit was dismissed in the Court of First Appeal on the findings (1) that no exchange of patta and muchalka had been proved, (2) that the plaintiff had not proved his right to the kattubadi, and (3) that his right to it, if any, was barred by limitation. On second appeal by the plaintiff :—*Held,* that the second and third of the above findings should be accepted and the second appeal dismissed. *Alubi* v. *Kunhi Bi* (I.L.R., 10 Mad., 115) distinguished. *Per cur :* We do not think it necessary to consider whether if there had been a grant subject to kattubadi, patta and muchalka ought to have been exchanged.

Ramachandra v. *Jaganmohana* 161

4. ——————————, ss. 8, 9, 10—*Suit for a patta—Denial of tenancy by landlord :*

In a summary suit brought under Rent Recovery Act (Madras) to compel the defendant to give a patta to the plaintiff for certain land which plaintiff claimed to hold from him, the defendant denied that the plaintiff was his tenant :—*Held,* that the Collector was bound to try the question so raised and not to refer the parties to a regular suit for its determination.

Narayanachariar v. *Ranga Ayyangar* 223

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5. ——————————————, s. 9—*Lands irrigated from Kistna anicut—Act VII of* 1865 (*Madras*), *s.* 4—*Rate of rent—Restriction as to felling trees—Implied contract:*

A zamindar holding lands irrigated by the Kistna anicut, from whom no extra peishcush is on that account levied by Government, is not entitled to impose on his tenants a "wet" rate of rent without the permission of the Collector. The fact that the tenants have paid rent at such a rate for six years is not sufficient to establish an implied covenant to continue to do so. It is allowable for a landlord to insert in his pattas a term to the effect that the tenant shall not fell trees without his consent.

Apparau v. *Narasanna* 47

RES JUDICATA:

See CIVIL PROCEDURE CODE, ss. 13, 43.

REVENUE RECOVERY ACT—ACT II OF 1864 (MADRAS), s. 52—*Karnam in a permanently-settled zamindari:*

The karnam in a permanently-settled zamindari is a village servant employed in revenue duties within the meaning of the Revenue Recovery Act, s. 52.

Collector of North Arcot v. *Nagi Reddi* 35

2. ——————————————, s. 59—*Abkari notification referring to that Act—Sale to recover sum due from an abkari renter—Limitation for suits to recover land so sold:*

The right of selling toddy at certain places was put up to auction by the Collector under a notification which required that payments should be made at fixed periods and that the purchaser should take out licenses as therein provided, failing which the shops concerned might be resold and any loss accruing to Government recovered under the Revenue Recovery Act, Madras. The plaintiff bid at the auction and his bid was accepted. He sought to withdraw from the contract, but the sale to him was confirmed, and on his failure to make the payments above referred to the rights purchased by him were resold at a lower price, and his house was attached and sold as under the Revenue Recovery Act to realise the loss occasioned to Government by the resale. In a suit, in 1888, to recover the house from the defendant who had purchased it and been placed in possession in June 1886:—*Held*, (1) that the suit was not barred as having been brought more than six months after the date of the sale; (2) that the sale was *ultra vires*; (3) that the plaintiff having brought his suit within the twelve years' period of limitation was entitled to recover.

Raman v. *Chandan* 219

SPECIFIC RELIEF ACT—ACT I OF 1877, s. 42—*Aliyasantana law—Declaratory relief—Limitation Act—Act XV of* 1877, *sched. II, arts.* 127, 144:

In a suit in which the plaintiffs sought declarations that they were members of an undivided Aliyasantana family with the defendants, that certain property belonged to the family, and that plaintiff No. 1, the senior member of the family, was entitled to have the lands registered in his name, the defendants denied the allegations in the plaint, and pleaded that the suit for declarations only was not maintainable, and that it was barred by limitation. It was found that the plaintiffs had separated themselves from the defendants, and had for more than twelve years been excluded to their own knowledge from the joint family property:—*Held*, that, if, as alleged by the plaintiffs, plaintiff No. 1 was the *de jure* ejaman of the family, he was entitled to the possession and management of the family property, and a suit for a mere declaration of his right would not lie—*Chandu* v. *Chathu Nambiar* (I.L.R., 1 Mad., 381), distinguished. *Per cur:* "We are of opinion that article 127 applies to this case, and that the plaintiffs, having separated themselves from the defendants, have for more than twelve years been to their own knowledge excluded from the joint family property, and that their suit to enforce a right to share therein is barred"—*Mahalinga* v. *Mariyamma* (I.L.R., 12 Mad., 462), distinguished.

Muttakke v. *Thimmappa* 186

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2. ——————————————, s. 42—*Declaration—Consequential relief—Civil Procedure Code*, s. 53—*Amendment of plaint:*

A karar was executed by members of two Malabar tarwads, by which the tarwad of the plaintiffs and defendants Nos. 1 and 2 was amalgamated with that of which defendant No. 3 was a karnavan; part of the property of the plaintiffs' branch was in the possession of defendants Nos. 1 and 3, and part of it was held under demises from defendant No. 3. The plaintiffs sued for a declaration of their title to this property and for a declaration that the karar was not binding on them. An issue was framed on the question whether the suit was maintainable for want of a prayer for all relief consequential on these declarations:—*Held*, (1) that the suit was not maintainable for want of a prayer for possession of the lands under demise; (2) that the plaintiffs should not be permitted to amend the plaint on appeal by the addition of such a prayer.

Narayana v. *Shankunni* 255

3. ——————————————, s. 42—*Hindu law—Law of inheritance—Custom—Illegitimate son of a Sudra—Further relief:*

The widows of a shrotriemdar, who was a Sudra, brought a suit for a declaration of their title by inheritance to his lands against his illegitimate son, who had been registered as shrotriemdar in lieu of his deceased father, and to whom certain of the raiyats had attorned. The defendant claimed to be legitimate according to the customary law governing the family, although his parents might not have been married at the time of his birth, by reason of his parents having performed the ceremony of *pariyam* before his birth:—*Held*, (1) that the suit was not precluded by Specific Relief Act, s. 42, *proviso;* (2) that the defendant was illegitimate and that the plaintiffs were accordingly entitled to one-half of the lands in question, and the defendant was entitled to the other half. Observations on the allegation and proof of a custom in derogation of the general Hindu law of inheritance.

Chinnammal v. *Varadarajulu* 307

4. ——————————————ss. 42, 56—*Consequential relief—Civil Procedure Code*, s. 53—*Amendment of plaint:*

The plaintiff obtained a decree in a suit in which he averred that he was entitled to the office of Sheik of Kallai and to certain properties attached thereto, and prayed for a declaration that the defendant had no right either to the office of Sheik or to the properties in question, for an injunction restraining him from interfering with the properties or doing anything in any way inconsistent with the plaintiff's right to the office, and for further and other relief. It appeared, on the evidence for the defence, that the defendant was in possession of part of the property, but no issue had been framed as to the maintainability of the suit under the last clause of Specific Relief Act, s. 42:—*Held, on appeal by the defendant*, that the Court of First Instance should take evidence and try an issue specifically directed to this question. It having appeared on the evidence recorded on that issue that the defendant was substantially in possession of the office of Sheik and of its emoluments:—*Held*, that the suit was not maintainable, although an injunction was asked for as relief consequential on the declaration. The plaintiff was permitted to pay additional stamp duty and amend the plaint by adding a prayer for possession.

Abdulkadar v. *Mahomed* .. ..

STAMP ACT—ACT I OF 1879, s. 3, sched. I, art. 13—*Bond—Attestation:*

A Company agreed to pay £220,000 in five instalments for the cost of constructing a railway, on the terms, among others, that debentures on the railway should be handed over to the Company on each payment being made, and that in the event of the other party failing to perform his liabilities as to the construction of the railway, the Company should be entitled to sell the debentures, and also to recover damages and also to discontinue payments of the above instalments. It was also provided that the Company should be at liberty to retain £40,000 as compensation for risk, expenses, &c. The agree-

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ment was sealed with the seal of the Company in the presence of two Directors and the Secretary :—*Held*, that the instrument was liable to stamp duty as a bond for £220,000 under Act I of 1879.

Reference under Stamp Act, s. 46 193

2. ——————————, **s. 3, cl. 11 ; s. 29** (e)—*Instrument of partition :*

Three out of seven brothers, constituting an undivided Hindu family, executed documents whereby each acknowledged the receipt of certain property made over to him, "a division of family property having been effected," and acknowledged himself liable for one-seventh of the debts of the family. One of the documents contained a clause to the effect that the executant had no further claim on property of the family :—*Held*, that the documents should be stamped as instruments of partition, each member paying according to the share taken by him under the partition.

Reference under Stamp Act, s. 46 164

3. ——————————, **s. 3, cl. 16 ; s. 7, sched. I, art. 50** (e)—*Power-of-attorney—Trust :*

Ten mirasidars of a village executed an instrument authorizing the person therein mentioned to recover for them from their former agent the perquisites and other communal income appertaining to their mirasi rights, to cultivate their maniems, to distribute to them proportionately to their shares the profits of certain common land, &c. :—*Held*, that the instrument was a power-of-attorney and should bear a stamp of Rs. 5.

Reference under Stamp Act, s. 46 386

4. ——————————, **s. 46, sched. I, arts. 5** (c), 44, *Mortgage—"Agreement not otherwise provided for :"*

A license issued to an arrack renter expressly required as one of its conditions that the licensee should deposit a sum equal to three months' rental as a security for the due performance of the contract. The licensee executed a muchalka stating that he agreed to all the terms and conditions mentioned in the license :—*Held*, that the muchalka ought to be stamped with an eight-anna stamp.

Reference under Stamp Act, s 46 134

5. ——————————, **sched. I, art. 54**—*Release—One-anna adhesive stamp—Full stamp duty leviable :*

A release chargeable with four-anna stamp-duty was executed on paper bearing a one-anna adhesive receipt stamp :—*Held*, that in calculating the stamp due the one-anna stamp ought not to be taken into consideration. *Semble :* A Collector is entitled under Stamp Act, 1879, s. 50, to refer to the High Court the decision of a Provincial Small Cause Court admitting in evidence an insufficiently stamped instrument on payment of duty and a penalty.

Reference under Stamp Act, s. 50 259

6. ——————————, **sched. II, art. 2**—*Exemption—Agreement for the sale of goods :*

An agreement for the sale of goods does not require a stamp under the Indian Stamp Act, although it contains provisions as to the warehousing and insurance of the goods previous to delivery.

Kyd v. *Mahomed* 150

STATUTE 11 & 12 VIC., Cap. 21, ss. 9, 92—*Petitioning creditors' debt—Joint debt :*

A trader in Madras made a promissory note in the joint names of two merchants, trading together as members of an undivided Hindu family, on which Rs. 527 were due. On a petition by the holders of the note to have the maker adjudicated an insolvent :—*Held*, that the petitioning creditors' debt was sufficient to support the petition.

Ragavaloo Chetti (ex parte) In re Rangiah Chetti 356

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SUCCESSION ACT—ACT X OF 1865, s. 50, cl. 3—*Attestation—Initials of witness :*

Semble : If the attesting witnesses affix their initials at the time of witnessing the execution of a will, it is a sufficient compliance with the terms of section 50 of the Indian Succession Act.

Ammayee v. *Yalumalai* 261

2. ——————————, **ss. 68, 84, 98, 101, 105, 106, 125, 159**—*Will, construction of—Trust fund to be called after testator's name—Perpetuities, rule against—Creation of fund, and dispositions except directions for making it a perpetuity, held valid*—Personæ designatæ, *bequest to persons as—Vesting of legacy, time of—Income of fund, gift of, carries* corpus—*Tenancy in common created, not joint tenancy—Advancement out of minor legatee's share for his benefit, power of—Vested interest, liable to be divested by condition subsequent—Precatory trust, expression of wish held not to create—Patent deficiency as to objects of bequest—Failure of legacy—Charitable uses, void bequest to :*

Where by his will a testator directed the establishment in the Bank of Madras by the executor and trustee of the will of a fund, to be called, after the testator's name, the "Garratt Trust Fund," and directed "that such trust fund shall never be removed from deposit in the said Bank of Madras at Madras so long as that bank shall exist," and "that 'The Garratt Trust Fund' shall be a continuing fund to all time," and that the interest therefrom should be enjoyed by certain legatees and "the same shall be inherited by any child or children of them hereafter from time to time and from one generation to another in accordance with all legal rights" :—*Held*, that there was nothing illegal about the creation of this fund, except the direction that the securities representing it should never be received from deposit in the Bank of Madras, which, as an attempt to create a fund in perpetuity, was invalid ; but that this did not prevent the intention of the testator to create and endow the fund from being carried out and that the legatees took an absolute interest. The testator bequeathed "to my grandchildren by my said late daughter E. W., also to my grandson F. W. M. and to this step-brother G. W. M." in equal shares a certain fund :—*Held*, that this was a bequest to the estator's grandchildren by his late daughter E. W. not as a class, but to them individually as *personæ designatæ* :—*Held also*, that under the terms of the will, the testator's said grandchildren by the late E. W., and F. W. M. and G. W. M. took vested interests in their respective shares in the said fund from the death of the testator ; that the gift to them of "the benefit, interest and profit" of the fund was a gift of the *corpus* of the fund by virtue of section 159 of the Indian Succession Act ; that they took as tenants in common, not as joint tenants ; and that under a power given to the executor to make disbursements from the said fund for certain purposes for the benefit of F. W. M. in connection with his going to and returning from England the executor was not authorized to apply, towards those purposes, more than F. W. M.'s one-ninth share in the said fund, as it was not the intention of the testator to give F. W. M a benefit out of that fund over and above that share, and that the executor, in making disbursements for the purposes specified, was only empowered to trench upon the principal of that share if the income, as applied under the power of disbursement for F. W. M.'s support and maintenance in England, were not sufficient :—*Held also*, that under the terms of the devise in the third and fourth clauses of the will of a certain house and premises to F. W. M., the devisee took on the testator's death a vested interest in that property, liable to be divested in the event of his dying under the age of twenty-one years :—*Held also*, that under the terms of the devise in the fifth and sixth clauses of the will of a certain house and premises and furniture to the children of the testator's late daughter E. W. (who was dead at the date of the will), there was an absolute gift to the children of E. W. of the testator's whole interest in that property, and that such gift was not controlled by the directions in the latter part of the fifth clause that the house should not be sold until the youngest grand-child attained the age of eighteen years, which must be regarded merely as an expression of the wish of the testator and not as a precatory trust, and was of no legal effect ; and that the children of E. W., who were living at the testator's death, did not take as joint tenants, but took as *personæ designatæ*, each an equal share in the property which vested in them on the death of the testator, and therefore the share of one of them,

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E.G.W., who had survived the testator, but died subsequently, having vested in E. G. W., passed to E. G. W.'s representative, the ninth defendant. In the sixteenth clause of the will the testator directed his executor and trustee out of a certain sum of Rs. 500 to "disburse various petty pensions to some poor people who have been mentioned to him" (the executor and trustee) "by me":—*Held*, that there was a deficiency on the face of the will as to the objects of this bequest, and by section 68 of the Indian Succession Act no extrinsic evidence could be admitted as to the intention of the testator, and that this legacy therefore failed and fell into the undisposed of residue:—*Held also*, that the bequest in the seventeenth clause of the will of Rs. 10,000 to the support of the testator's temperance and reading rooms for European pensioners and the poor widows' quarters attached thereto, being a bequest to charitable uses, was void under section 105 of the Indian Succession Act, as the testator had nearer relatives than nephews, and the will was executed less than twelve months before his death.

Administrator-General of Madras v. *Money* 448

3. ——————————, s. 182—*Executor—Appointment of, by implication—Administration with will annexed:*

A Hindu died leaving a will whereby he bequeathed all his property whatever (including debts) to two of his sons, who now applied for probate of the will on the ground that they were appointed executors by implication:—*Held*, that the sons were not entitled to probate of the will.

Vittal Doss ex parte 360

SUCCESSION CERTIFICATE ACT—ACT VII OF 1889, ss. 4, 6—*Suit by assignee of a debt due to a deceased creditor:*

One Suppammal lent a sum of money to the defendant and died, leaving an adopted son, who assigned the debt to the plaintiff. Neither the plaintiff nor his assignor obtained a certificate under Act VII of 1889. The plaintiff now sued to recover the amount of the assigned debt:—*Held*, that the plaintiff was not entitled to recover, no certificate having been obtained under Act VII of 1889.

Karuppasami v. *Pichu* 419

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, ss. 2, 76—*Civil Procedure Code, s.* 111—*Waste by mortgagee in possession—Possession after date fixed for payment—Interest:*

In a suit in 1888 to recover principal and interest due on a usufructuary mortgage executed on 15th June 1870, which contained a convenant for repayment of the secured debt on 15th June 1878, the defendant pleaded and proved that the mortgagee had permitted certain buildings on the mortgage premises to fall into a ruinous condition, and it appeared that the mortgagee had remained in possession after June 1878:—*Held*, (1) that the defendant was entitled to have the amount of the loss occasioned by the plaintiff's failure to make repairs brought into the mortgage accounts under Transfer of Property Act, s. 76, and a separate suit by him for that amount was not necessary; (2) that the profits derived by the mortgagee after the date fixed for repayment should be regarded as having been enjoyed in lieu of interest.

Shiva Devi v. *Jaru Heggade* 290

2. ——————————, ss. 2, 135—*Limitation Act—Act XV of* 1877, *sched. II, arts.* 62, 120—*Money received for plaintiff's use—Suit for which no period prescribed:*

A obtained a money decree against B and attached certain land in execution. C intervened in execution successfully. A then brought a suit to establish that the land was liable to be sold in execution, and obtained a decree. Meanwhile the land was taken up by Government under the Land Acquisition Act, and the compensation money was paid to C. A attached this sum as a debt due to B and sold it in execution, and it was purchased by the plaintiff. The plaintiff now sued C to recover the amount of the debt:—*Held*, that the suit was governed by Limitation Act, sched. II, art. 120, and not by art. 62, and that the plaintiff was entitled to recover without regard to the terms of Transfer of Property Act, s. 135.

Krishnan v. *Perachan* 382

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3. ——————————, ss. 3, 78, 101—*Priority of mortgages—Gross negligence—Extinguishment of charges—Registration Act—Act III of* 1877, *ss.* 17 (*d*), 48—*Notice by registration:*

In a suit for the declaration of the priorities of mortgages and for foreclosure, it appeared that the mortgage premises had been purchased by the mortgagor from the second defendant and others in 1878, under a conveyance containing a covenant that they were free from incumbrances, and the mortgagor then received, *inter alia*, a Collector's certificate which was recited in another title-deed also handed over to her. The premises were mortgaged to defendant No. 2, who was an experienced sowcar in 1879, and to the plaintiff company in 1883 and again in 1884, and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff company on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff company and defendant No. 2 had no notice at the respective dates of their mortgages and conveyance of any previous incumbrance. The plaintiff company received the title-deeds of the estate from the mortgagor (but not the Collector's certificate) on the execution of the mortgage of 1883; the second defendant alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that before the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody:—*Held*, (1) that the plaintiff company were not affected with constructive notice of the mortgage of the second defendant by reason of its registration or of their failure to search the registry or to inquire after the Collector's certificate; (2) that the second defendant not having given a reasonable explanation of his conduct in leaving the title-deeds with the mortgagor four years after his mortgage, lost his priority by reason of his gross neglect under Transfer of Property Act, s. 78, apart from the circumstances raising a suspicion of fraud on his part. *Quære:* Whether the case might not have been decided against the second defendant on the ground that his mortgage was merged in the conveyance of 1886.

Shan Maun Mull v. *Madras Building Company* 268

4. ——————————, s. 6, cl. (*b*)—*Landord and tenant—Forfeiture for non-payment of rent—Transfer of reversion:*

A condition in a lease providing that the landlord may re-enter on non-payment of rent is penal and will be relieved against, apart from the provisions of the Transfer of Property Act. *Semble:* The transfer of the reversion based on a clause for forfeiture is not invalid by reason of Transfer of Property Act, s. 6, cl. (*b*).

Vaguran v. *Rangayyangar* 125

5. ——————————, s. 55 (2)—*Vendor and purchaser—Covenant for title, waiver of—Power of attorney, construction of:*

When a vendee, who sues to cancel a sale on the grounds of fraud, misrepresentation or concealment by his vendor, fails to establish these grounds of relief, he is not entitled to set up in second appeal a case founded on the implied convenant for title under Transfer of property Act, s. 55 (2).

Mahomed v. *Sitaramayyar* 50

6. ——————————, s. 58 — *Unregistered mortgage—Personal covenant to pay:*

An unregistered mortgage-deed executed in 1885 contained personal covenant by the mortgagors to pay the debt secured thereby:—*Held*, the mortgagee was entitled to sue on the convenant and obtain a personal decree against the mortgagors.

Gomaji v. *Subbarayappa* 253

7. ——————————, ss. 58, 67, 92, 93—*Mortgagor and mortgagee—Second redemption suit—Kanom:*

The jenmi of land in Malabar sued in 1886 to redeem a kanom of 1849, to which it was subject, and obtained a decree which merely directed the

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surrender of the land to the plaintiff, on payment of the kanom amount and the value of improvements, within three months of the date of the decree. This decree remained unexecuted, the money not being paid. The jenmi now brought another suit to redeem the same kanom :—*Held*, that the present suit was not barred by the former decree. The nature of a *kanom* discussed.

Ramunni v. *Brahma Dattan* 366

8. ——————————————, ss. 67, 68—*Usufructuary mortgage—Dispossession of mortgagee—Suit for sale—Costs :*

The plaintiff, at the request of the mortgagors, paid off part of the debt due on a usufructuary mortgage to one of two mortgagees thereunder, and was placed by the mortgagors in possession under a usufructuary mortgage of that part of the mortgage premises which had been in the enjoyment of the mortgagee so paid off, who executed a release. The other mortgagee under the first mortgage obtained a decree for sale on the footing of that instrument, and the mortgage premises were sold "subject to the establishment" of the plaintiff's claim: the decree-holder purchased and afterwards assigned his rights to two of the present defendants who dispossessed the plaintiff. The plaintiff now sued the mortgagors and mortgagees and the defendants above referred to :—*Held*, the plaintiff was not entitled to a decree for sale. *Semble :* The plaintiff might have sued to have the sale, which had taken place at the suit of the first usufructuary mortgagee, declared to be invalid as against him.

Samayya v. *Nagalingam* 174

9. ——————————————, s. 68—*Personal decree against mortgagor :*

Suit for a personal decree on a usufructuary mortgage which contained no express covenant to pay, but, provided that if the mortgagor repaid the secured debt before a certain date (now passed), he should be replaced in possession. The mortgage premises had been attached in execution of a decree obtained by a third party against the mortgagor, and a claim preferred by the plaintiff having been erroneously rejected and the premises sold, he was dispossessed. The mortgagee accordingly brought his suit as above :—*Held*, that the plaintiff was not entitled to maintain the suit either under the terms of the mortgage or under Transfer of Property Act, s. 68.

Gopalasami v. *Arunachella* 304

10. ——————————————, s. 68 (c)—*Personal suit for mortgage amount :*

In a suit against a mortgagor for the principal and interest due on a mortgage, it appeared that the payment of interest had fallen into arrears, and that the mortgage deed provided that in such event the mortgagee should be entitled to possession of the mortgage premises, the mortgagor falsely alleged that all the interest due had been tendered :—*Held*, that the mortgagee was entitled to sue as above.

Saravana v. *Chinnammal* 65

11. ——————————————, s. 85—*Parties to a mortgage suit—Objection in written statement as to non-joinder :*

In a suit by a mortgagee against two of his three mortgagors, the defendants objected in their written statement that the suit was bad for non-joinder of the third mortgagor, and also alleged that subsequent encumbrances on the mortgage premises had been created with the concurrence of the plaintiff. It appeared that the third mortgagor, as a witness, renounced interest in the greater part of the mortgage premises. On second appeal :—*Held*, that the suit should be remanded to the Court of First Instance for disposal after joinder of the third mortgagor and the subsequent encumbrancers.

Subban v. *Arunachalam* 487

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12. ——————————————, ss, 85, 91—*Parties—Redemption—Suit by puisne mortgagee—Joinder of mortgagor on second appeal—Plaintiff, a name-lender :*

On second appeal against a decree dismissing a suit which had been brought by a puisne mortgagee to redeem a prior incumbrance, it was ordered that the mortgagor be brought on to the record. On its appearing that it had not been intended that the plaintiff should take any interest under the mortgage sued on :—*Held*, that the second appeal should be dismissed.

Chinnan v. *Ramachandra* 54

13. ——————————————, ss. 92, 93—*Appeal against a decree for redemption—Time fixed for redemption :*

A mortgagor obtained a decree for redemption of his mortgage "within six months from the date of this decree." The mortgagee appealed, but the Appellate Court confirmed the decree. The mortgagor sought to redeem within six months from the date of the appellate decree :—*Held*, the Court to which the application of the mortgagor was made should, before passing orders on the application, have given the plaintiff time to apply to the District Court to amend the decree under Transfer of Property Act, s. 92.

Manavikraman v. *Unniappan* 170

VARIANCE BETWEEN PLEADINGS AND PROOF :

See PRACTICE.

WILL, CONSTRUCTION OF :

See SUCCESSION ACT.

ZAMINDAR'S TITLE TO A TRACT OF HILL AND FOREST, PROOF OF—*Construction of istemrar sanad of* 1803 *as to lands granted—Specification of villages—Effect of proved acts of possession by zamindar.*

Where the proprietary right in a tract of land had been constantly asserted, all questions between the disputants as to the amount of the use of the tract by the claimant, and as to the sufficiency of such use to establish his possession over the whole extent, were *held* to be questions of fact. A zamindar claimed from the Government the proprietary possession of a tract of hill and forest, in virtue of an istemrar sanad of the year 1803, conferring upon the grantee his heirs and successors a permanent property in the zamindari as then possessed. To the sanad, which was aptly worded to include the subject of this claim, the acts of the zamindar had been ascribed. But it did not contain any description of the lands which it was intended to carry, a marginal note only specifying three villages then comprising the zamindari :—*Held*, that the grant was not confined to the villages so named, and to an area in their immediate vicinity, but that the whole tract of hill and forest was claimable on its being shown, by direct evidence, or reasonable inference, that it was in the possession of the zamindar when he obtained a permanent title from the Government. As to part of the tract, the zamindar's acts of possession, such as grazing cattle, cutting timber, and collecting forest produce had been exclusive of the exercise of such rights by any other persons; but as to another part of the tract, his acts of that character had been concurrent with a similar user of hill and forest by raiyats of neighbouring villages, not part of the zamindari, and belonging to the Government :—*Held*, as to both parts, that the acts of possession, which had been found by both the Courts below to have been done by the zamindar, did not fall short of proving his proprietary possession, and that the user by the villagers, not having taken place in the assertion of conflicting proprietary right, and whether or not they were sufficient to establish rights of easement, were neither in amount nor quality sufficient to displace the zamindar's proprietary title. The decision of the first Court that the exercise of the abovementioned rights by the zamindar was evidence only of the right on his part to use the land of another for the purposes indicated, had been rightly reversed by the High Court.

The Secretary of State for India in Council v. *Nellakutti Siva Subramania Tevar* ... 101

THE

INDIAN LAW REPORTS,

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APPELLATE CIVIL.

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

NARAYANA (PLAINTIFF), APPELLANT,

v.

CHANDRA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1891.
August, 7, 25.

Panchayet—Regulation XXXII of 1802 (Madras)—Regulation XII of 1816 (Madras)—Cases in which a District Panchayet may be appointed—Finality of award—Notice of nomination of Panchayetdars.

The applicability of the procedure provided in Regulation XII of 1816 is not limited to cases in which a breach of the peace has taken place or is apprehended. When a District Panchayet, appointed under that regulation, has come to a decision, that decision is final and conclusive between the parties and cannot be impeached or set aside, except in the manner prescribed by the regulation. Such decision is not invalid, because only one party consented to the reference of the matter in dispute to a Panchayet, or because the other party, who protested against the proceedings, had not notice of the time when the nomination of the Panchayetdars was to take place.

APPEAL against the decree of E. C. Johnson, Acting District Judge of Ganjam, in original suit No. 13 of 1889.

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

Anandacharlu and *Sundara Rau* for appellant.

Ramachandra Rau Saheb for respondent No. 1.

Mr. *Powell* for respondent No. 2.

JUDGMENT.—This was a suit by the Zamindar of Pedda Kimidi to set aside the decision of a District Panchayet under Regulation

* Appeal No. 65 of 1890.

NARAYANA v. CHANDRA.

XII of 1816 awarding certain lands to the Zamindar of Chikati. The 1st defendant is the Zamindar of Chikati, 2nd defendant the Collector of Ganjam, the 3rd defendant the District Munsif of Berhampore who convened the Panchayet: defendants Nos. 4 to 8 are Panchayetdars.

The District Judge held that defendants Nos. 2 to 8 were not necessary parties and struck them off the record, but plaintiff has made them respondents to this appeal.

Plaintiff's Zamindari lies to the north of the 1st defendant's and the estates are conterminous for some distance, and there has been a long-standing dispute as to the boundary between the plaintiff's village of Jakkara and the 1st defendant's village of Kapanavugam involving about 200 acres of land, which each Zamindar claims to be within the boundaries of his own village.

By an order of 5th June 1888 the Collector referred the matter under Regulation XII of 1816 to the District Munsif for disposal by a District Panchayet under the regulation.

The District Munsif assembled a District Panchayet, which passed a decree in favour of the 1st defendant on the 29th of July 1888.

Plaintiff sues to set aside that decree on seven grounds :—

(*a*) That the Panchayet was not properly constituted.

(*b*) That no notice was given by the Munsif to plaintiff before constituting the Panchayet.

(*c*) That plaintiff was not allowed an opportunity of objecting to the Panchayetdars and they were appointed without consulting him.

(*d*) No opportunity was allowed to plaintiff of naming two Panchayetdars as required by Regulation V of 1816.

(*e*) The various steps prescribed by section 4 of Regulation V of 1816 were not strictly adhered to.

(*f*) The award was not read in the presence of the parties as required by section 6 of Regulation XII of 1816.

(*g*) The Panchayetdars went beyond their powers in proceeding to decide the rights of the plaintiff and the 1st defendant to the lands, tanks, &c., in dispute and in ordering them to be made over to the 1st defendant.

The plaint also prays that, as plaintiff has been dispossessed the lands, &c., he may be replaced in possession with *mesne* fits. The 1st defendant by his written statement denied

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plaintiff's right altogether and the allegations in the plaint as to the irregularity of the procedure.

Three issues were settled, which are called preliminary :—

(1) Whether, under the circumstances, the Collector had jurisdiction to refer the suit for the decision of a District Panchayet.

(2) Should the order of the Panchayet be set aside on the ground that no notice was given to plaintiff before nominating the Panchayet?

(3) Should it be set aside on any of the grounds (*a*), (*c*), (*d*), (*e*), or (*f*)?

The Judge made a note on the issue paper that, should any of these issues be decided in favour of plaintiff, it would be time enough to settle issues as to the title.

The District Judge found all the issues against the plaintiff and dismissed the suit with costs.

Plaintiff appeals.

There was a previous application for a reference to a District Panchayet in 1884 and the District Court then held that District Panchayets had become obsolete, Regulation VII of 1816, which constituted them, having been repealed. On appeal, the High Court held that the jurisdiction of District Panchayets still existed for the purposes of Regulation XII of 1816, but set aside the award on the ground of irregularity of procedure. The case is reported as *Chikati Zamindar* v. *Peddakimedi Zamindar*(1).

In the present appeal, the appellant's Vakil first argues that this was not a case for a reference to a Panchayet under Regulation XII of 1816, because no breach of the peace had taken place, or was apprehended. It is contended that, as Regulation XII of 1816 was only intended to add a new remedy to those provided by Regulation XXXII of 1802 and as the object of the latter Regulation, as shown by the preamble, was to prevent forcible dispossession and consequent breaches of the peace, it is a condition precedent to Regulation XII of 1816 being put in force that a breach of the peace should either have happened or be apprehended.

This argument appears to us to be founded on a mistaken view of the object and scope of the regulations. Regulation

(1) I.L.R., 8 Mad., 569.

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XXXII of 1802 by section 2 enacts that persons shall not assert their claims to lands or crops by force, but have recourse to the Civil Courts, that is, it proclaims what was already the law. Sections 3, 4 and 5 provide a summary remedy when persons persist in asserting their rights by force, viz., the restoration of possession without reference to title, and if death or other injury is caused, the forfeiture of the guilty party's rights, if any. Section 6 provides for forfeiture of the disputed property to Government and punishment by the Criminal Courts when force is used on both sides and an affray takes place.

Regulation XII of 1816 recites that the remedy by recourse to Civil Courts prescribed by section 2 of Regulation XXXII of 1802 had been found to be insufficient and provides for the determination by Village or District Panchayets of (1) "claims to lands or crops in districts permanently settled or otherwise, the validity of which may depend on the determination of an uncertain or disputed boundary or land mark;" and (2) "cases of disputes respecting the occupying, cultivating, and irrigating of land which may arise between the proprietors or renters and their ryots in those districts only, where the land revenue is fixed either permanently or for a term of years."

In cases coming within these two classes it was apparently considered that the Village or District Panchayets having local knowledge would be a more satisfactory tribunal than the Zillah Court.

The Village Panchayet is to be the tribunal when both parties agree to the reference and the District Panchayet when one only desires it.

Nothing whatever is said in Regulation XII of 1816 or section 2 of Regulation XXXII of 1802, to which it refers about a breach of the peace, and there is nothing to limit the application of Regulation XII of 1816 to cases in which a breach of the peace exists or is anticipated.

It is next argued on behalf of the appellant that the procedure under Regulation XII of 1816 is only summary and does not oust the ordinary jurisdiction of the Civil Courts. This argument is not quite accurately stated. No doubt, in one sense, the procedure under Regulation XII of 1816 does not oust the jurisdiction of the Civil Courts. If a suit were filed in the Civil

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Court first, it would be no answer to it to say that the matter should be referred to a Panchayet under Regulation XII of 1816. The regulation provides an alternative remedy to that of having recourse to the Civil Courts. The question is whether, when the jurisdiction of the Panchayet has once been called into play and a decision passed in due course, the matter can again be litigated in a Civil Court. It is contended that this question must be answered in the affirmative, because the proceeding contemplated by the regulation is a summary proceeding, and can never have been intended for a final adjudication of questions of title. The only reason assigned for treating the proceeding provided for by the regulation as summary is that in the case of the reference to a District Panchayet, it is a proceeding taken in spite of the objection of one party. It is argued that the consent of both parties is essential in order that an award may be final and conclusive, and that it cannot have been the intention of the Legislature to make a decision of a Panchayet on a question of title final and binding on both parties, where only one consented to refer the matter to the Panchayet.

To ascertain the intention of the Legislature, we must look at the words of the enactment when they are clear and free from doubt, and we can see nothing in the words of the regulation to indicate an intention that the decision of a Panchayet under it should not be final and conclusive between the parties, and on the contrary there is much to indicate the opposite intention. The reason given for the provisions of the regulation, viz., that the remedy of recourse to the Civil Court provided by section 2 of Regulation XXXII of 1802 had proved insufficient, seems to indicate the contrary, as also that the procedure prescribed is similar to that in regular suit. Plaints and decrees are spoken of. The decree is not to be set aside for any other cause than gross partiality of the Panchayetdars. No appeal is provided, and when the award is set aside for partiality and the second Panchayet agrees with the first, its decision shall be final.

Clause 8 of section 5, which provides that if neither party agrees to the reference of the suit to a District Panchayet, "the suit shall be dismissed and the parties shall be at liberty to seek redress from the Zillah Court or any competent jurisdiction," seems to point in the same direction. We must hold that the decision of a District Panchayet under the regulation is final

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and conclusive between the parties and cannot be impeached or set aside except in the manner prescribed by the regulation.

Lastly, it is argued that the decision of the Panchayet is invalid on the ground of irregularity of procedure. The only irregularity relied on in appeal is that no notice was given by the District Munsif to plaintiff before nominating the Panchayet.

The regulation does not require such notice; but plaintiff had, as a matter of fact, ample notice of the proceedings. He was duly summoned and informed that the matter was referred to the District Munsif for decision by a District Panchayet within 15 days. He knew, therefore, the time within which the Panchayet must be assembled and it was his business to find out when the nomination of the Panchayetdars was to take place. The truth is the objection on this ground does not lie in plaintiff's mouth at all, for he all along protested against the proceedings and declined to appear or be represented by a Vakil.

We agree with the District Judge that plaintiff has failed to show any valid reason why the Panchayet's decision should be set aside and we confirm the decree of the Lower Court and dismiss this appeal with separate costs of defendants Nos. 1 and 2.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar (Officiating Chief Justice), and Mr. Justice Wilkinson.

1891. January 29. August 11.

SHANKARAN AND OTHERS (PLAINTIFFS, NOS. 1 TO 14), APPELLANTS,

v.

KESAVAN AND OTHERS (DEFENDANTS, NOS. 1 TO 11), RESPONDENTS.*

Malabar law—Adoption by the last member of a Nambudri illom—Limitation Act —Act XV of 1877, sched. II, arts. 91, 120—Civil Procedure Code, s. 13—"Res judicata."

In a suit for a declaration that the members of the Nambudri illom to which the plaintiffs belonged were the sole heirs and successors of an illom known as

* Second Appeal No. 179 of 1890.

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Kiluvapura, of which the natural line had become extinct, and for possession of certain land which had formed part of its property, the defendants were the karnavan and manager of the plaintiffs' illom and the members of another illom. It was found on the evidence that the plaintiffs' karnavan had been adopted unto the Kiluvapura illom, and that subsequently that illom and the plaintiffs' had been amalgamated under a karar executed by, among others, the wife of the last male member of the Kiluvapura illom, and that she had died less than twelve years before this suit. The defendants, other than the karnavan and manager of the plaintiffs' illom, asserted a right to a moiety of the property of the Kiluvapura illom (with which, however, it was now found on the evidence that they were less closely connected than the plaintiffs), and it appeared that that right had been similarly asserted in suits brought after the date of the karar above referred to, by a member of the defendants' illom against the karnavan and manager of the plaintiffs' illom, and that decrees had been passed therein negativing the title now set up by the plaintiffs and that part of the property now claimed was held under one of those decrees. The plaintiffs did not ask that those decrees should be set aside:

Held, (1) that the suit was not barred by limitation;

(2) that it was unnecessary for the plaintiffs to prove *mala fides* against their karnavan in respect of his conduct in the former suits or to seek that the decrees passed therein be set aside, and that those decrees did not constitute the present claim *res judicata*, as the karnavan was not then impleaded in his capacity as such;

(3) that the adoption of the plaintiffs' karnavan was valid even assuming that no datta homam was performed, and the last male member of the Kiluvapura illom had died after merely indicating him as his heir, and the widow adopted him in the Dwayamushyayana form;

(4) that the plaintiffs were entitled to a decree as prayed.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 1089 of 1888, confirming the decree of V. Raman Menon, District Munsif of Angadiprom, in original suit No. 210 of 1887.

The plaintiffs were the junior members of a Nambudri illom called Alakapura, of which defendant No. 10 was the *de jure* karnavan, defendant No. 11 being in actual management. The plaintiffs sought (1) a declaration that the members of their illom were the sole heirs and successors of an illom known as Kiluvapura, of which the natural line had become extinct, and (2) possession of certain land which had formed part of its property.

Defendants Nos. 1 to 9 were members of the Valakunnath illom and as such claimed to be entitled by inheritance to a moiety of the property of the Kiluvapura illom; they denied the plaintiffs' title and pleaded, *inter alia*, that the suit was barred by limitation, and also precluded by Civil Procedure Code, s. 13,

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by reason of the decrees passed in two suits, viz., original suits No. 107 of 1876 and No. 389 of 1878, on the file of the District Munsif of Pattambi.

In original suit No. 107 of 1876 the present defendant No. 1 was the plaintiff, and the present defendants Nos. 10 and 11 were the first and second defendants. The prayer of the plaint was for a declaration of title to and for possession of a moiety of the land now in question. An issue was framed as follows:— "whether plaintiffs and defendants Nos. 1 and 2 have equal claim to Kiluvapura illom." Upon this issue a finding in the affirmative was recorded after contest between the parties; but no decree for possession was passed, because the tenants in actual possession had not been brought on to the record.

Original suit No. 389 of 1878 was thereupon brought by the same plaintiff against the same defendants above referred to and also the tenants in possession. After a similar contest the Court found that the plaintiff had the right claimed by him and accordingly passed a decree for possession which was subsequently executed.

The plaintiffs relied on the facts that they were not parties to those two suits, and that defendant No. 10 had not been impleaded in his character as karnavan; they also charged that the decrees were obtained through the negligence, fraud and collusion of defendants Nos. 10 and 11.

A further question arose upon the following allegations in the plaint, viz., that defendant No. 10 had been adopted into the Kiluvapura illom, and that when he attained his majority he had executed a karar, dated the 21st April 1864, to which defendant No. 11, plaintiff No. 1, and the widow of the last surviving male member of the Kiluvapura illom were some of the parties, whereby it was provided that the properties of the plaintiffs' illom and the Kiluvapura illom should be amalgamated and the two illoms formed into one.

The District Munsif held that the claim in this suit was *res judicata* by the reason of the above decrees and further held that defendant No. 10 had not been adopted as alleged, but that the karar of 1864 constituted a binding agreement, whereby the two illoms were amalgamated and the plaintiffs became the heirs to the property of the Kiluvapura illom.

SHANKARAN v. KESAVAN.

Upon the first of the above findings the District Munsif dismissed the suit.

This decree was upheld, on appeal, by the Subordinate Judge, who similarly held that the claim was *res judicata*, and also inferred from the evidence that the illoms of the plaintiffs and defendants were related in equal degree to the extinct illom.

The plaintiffs preferred this second appeal.

Sankaran Nayar for appellants.

Sankara Menon and *Sundara Ayyar* for respondents.

JUDGMENT.—The first contention is that the claim is not *res judicata* by reason of the decree in original suit No. 107 of 1876 or in original suit No. 389 of 1878. The District Munsif distinctly found that the claim was *res judicata* and the Subordinate Judge came to the same conclusion, though he does not refer to the decision in original suit No. 389 of 1878. Having regard to the decision of this Court in *Sri Devi* v. *Kelu Eradi*(1), we are unable to uphold this finding.

The Subordinate Judge has omitted to record any finding on the question of adoption. The plaint distinctly sets forth the adoption, and, if the adoption were true, no question of any reversionary right could arise, and the karar to which the adopted son was a party would prevail.

We must therefore ask the Subordinate Judge to record a distinct finding on the question of the adoption of the tenth defendant on the evidence on record.

As to the relationship the Subordinate Judge refers to certain documents and then observes that, as the illoms of the plaintiffs and contending defendants were found to be related in the same degree to the extinct illoms of Pattoli and Padinharedom, it follows that they were also related in the same degree to the Kiluvapura illom. We are unable to follow this argument. If as is asserted by the plaintiffs that Kiluvapura illom was an offshoot of Alakapura, the reasoning would certainly not hold good.

We must therefore ask the Subordinate Judge to consider the evidence on record and come to a revised finding on the question of relationship. The amalgamation and management of the joint

(1) I.L.R., 10 Mad., 79.

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illoms Alakapura and Kiluvapura by the members of the plaintiff's illom under the karar A was by the consent of the last surviving member of the Kiluvapura illom, who was the widow of Parameswaran Nambudri. She died within twelve years before the suit and possession under her during her life cannot support a claim of title by prescription as against the reversioners.

It is contended by respondents' pleader that the suit is barred by limitation either under article 91 or under article 120. With reference to the decision already cited, plaintiffs were entitled to recover possession in spite of the decrees in original suit No. 107 of 1876 and No. 389 of 1878 on proof of title without also showing *mala fides* on the part of the karnavan.

We do not therefore consider that the omission to ask in the plaint for the setting aside of those decrees can be pressed against plaintiffs.

Findings to be submitted within six weeks from date of receipt of this order, and seven days after posting of the finding in this Court will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge submitted the following finding :—

"My finding is (1) that the tenth defendant is the adopted "son of the deceased Kiluvapura Parameswaran Nambudri and "his wife Shridevi Anderjanom, and (2) that he was more nearly "connected with the Kiluvapura illom than the first to seventh "defendants' Valakunnath illom."

This second appeal coming on for final hearing, the Court delivered judgment as follows :—

JUDGMENT.—The Subordinate Judge finds that the tenth defendant was adopted into the Kiluvapura illom, and that the Kiluvapura illom was an offshoot of Alakapura illom. It is objected that the Subordinate Judge has overlooked exhibit XVIII in which tenth defendant's grandfather, Narayanan Nambudri, stated that the land sued for in original suit No. 417 of 1840 was the property of the Alakapura Padinhare-mana, and it is argued that this recital is strong evidence that the contention of the respondents was well founded. The real contention of the respondents was that Kiluvapura was the parent stock and that the other four illoms were its offshoots. It is true that the Subordinate Judge has not expressly referred to exhibit XVIII, but he bases his finding as to Kiluvapura being an offshoot of Alakapura on evidence, and also shows that for some years past in every transaction between the people of Alakapura and Kilavapura, identity of interest has been assumed. He also finds that the respondents' contention is not supported by the evidence. We therefore see no reason for thinking that the finding of the Subordinate Judge is open to any objection.

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With reference to the adoption it is alleged that the finding of the Subordinate Judge is at variance with the case set up in the plaint. The plaintiffs' case was substantially this, that he had by affiliation become a member of the Kiluvapura illom, and even assuming that no datta homam was performed, that Parameswaran Nambudri died after merely indicating the tenth defendant as his heir, and that as found by the Subordinate Judge the widow adopted Kuberan in the Dwayamushyayana form, we see no reason to hold that the adoption was anything but valid. There is a distinct finding of the Subordinate Judge that Kuberan was adopted, and the circumstances may be regarded as mere surplusage. We accept the finding of the Subordinate Judge and setting aside the decrees of the Courts below give plaintiff a decree as prayed for a declaration of their title and for possession of the properties mentioned in exhibit B. As regards mesne profits the finding of the District Munsif was that the annual yield of the land was 30 paras. No objection was taken, on appeal, to this finding, which we therefore accept and decree mesne profits for three years and future mesne profits. The plaintiffs are entitled to their costs throughout.

APPELLATE CIVIL.

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

1891. March 16. August 17.

VENKATASAMI (PLAINTIFF), APPELLANT,

v.

VENKATREDDI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Evidence Act—Act I of 1872, *s.* 35—Res inter alios acta—*Title-deeds—Petition of plaintiff's predecessor asserting title—Judgment obtained by plaintiff's predecessor recognising title.*

In a suit to establish the plaintiff's title to certain land, he put in evidence (1) a conveyance in favour of his father, (2) a sale-certificate issued to his father's vendor, (3) an order made in certain execution proceedings in which was recited a petition by his father asserting his title, (4) a judgment obtained by his father in which his title was recognised. Neither the defendants nor their predecessors were parties to any of these instruments or proceedings:

Held, that all these documents were relevant.

SECOND APPEAL against the decree of M. B. Sundara Rau, Acting Subordinate Judge of Ellore, in appeal suit No. 297 of 1888, reversing the decree of O. Sivaramakristnamma, District Munsif of Ellore, in original suit No. 109 of 1888.

Suit for a declaration of the plaintiff's title to certain land and for an injunction restraining the defendants from interfering with the plaintiff's possession.

The plaintiff and the defendants averred that the land formed part of the ancestral property of their respective families. The first issue was framed with reference to these averments.

The plaintiff's case was that the land in question formed part of the family property, which was divided between his father and his uncle Tataya; that Tataya's share in it and other property was attached and brought to sale in execution of a decree obtained against him by Tammana Ratnam in original suit No. 239 of 1866 on the file of the District Munsif of Ellore and purchased by the judgment-creditor, who obtained a sale-certificate filed in this suit and marked as exhibit A; and that the purchaser sold

* Second Appeal No. 1492 of 1889.

it to the plaintiff's father under a conveyance, dated 6th October 1875 and filed in this suit and marked as exhibit B; Tataya's share was subsequently attached in execution of a decree obtained against him by Mohamed Azam Saheb in original suit No. 255 of 1867, and the plaintiff's father intervened by petition in execution, but the attachment was released on payment of the judgment-debt without trial of the petition; an extract from the proceedings of the District Munsif of Ellore, dated 15th June 1876, which was filed in this suit as exhibit D, contained a recital of the above mentioned petition, stating the petitioner's title and the order releasing the attachment. In 1877 the plaintiff's father brought original suit No. 171 of 1877 in the same Court against his vendor's son and two persons in occupation, to eject the latter from the premises sold to him under the conveyance of the 6th October 1875 and obtained a decree; the judgment in that suit, filed in this suit as exhibit C, set out the plaintiff's title and the pleas of the contending defendant, viz., that it had been agreed between the plaintiff and Tataya that the property should be returned to the latter, under whose will the contending defendant claimed title.

The District Munsif passed a decree for the plaintiff. This decree was reversed, on appeal, by the Subordinate Judge, who held that the oral evidence did not establish the plaintiff's title, and ruled that the documentary evidence, above referred to, was inadmissible for reasons stated in his judgment as follows:—

"The fact of the existence of the sale-certificate (exhibit A) "and judgment (exhibit C), to which defendants or the person or "persons through whom they claim were no parties, do not affect "defendants' right. There is nothing to show that the defend-"ants or their predecessors in title were aware of the fact of the "sale or of the judgment. There is no evidence on record that "the purchaser, under exhibit A, was put in possession of the "premises purchased, thereby to show that, if the defendants were "in possession of the ground claimed, they would either have "resisted delivery or taken steps to have their right established to "it having the sale-certificate and judgment set aside. Likewise "exhibit B (the sale-deed) is *res inter alios acta*. The same "remarks are applicable, with equal force, in regard to exhibit D. "We must not, therefore, be misled by exhibits A to D which, "in their present state, are irrelevant to the present case."

ATASAMI v. NKAT-EDDI.

The plaintiff preferred this second appeal.

Parathasaradhi Ayyangar for appellant.

Bhashyam Ayyangar for respondents.

JUDGMENT.—The Subordinate Judge was in error in holding that exhibits A to D were inadmissible in evidence against the defendants. It is true they are not conclusive, since the defendants were not parties to them, but they are relevant evidence as tending to show that the plaintiff's ancestors had dealt with the site as their own for a long term of years.

The Subordinate Judge has thus decided the case upon the oral evidence alone, the defendants not having, on their part, any title-deeds, and he has found a title in the defendants, acquired by adverse possession, as to which no issue was framed.

We must ask the Subordinate Judge to retry the first issue, taking into consideration the documents A to D, and return a revised finding thereon with reference to these observations.

Finding is to be returned within one month from the re-opening of the Court after the recess, and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

[In compliance with the above order, the Subordinate Judge submitted his revised finding on the first issue, which was in favour of the plaintiff.

The second appeal having come on for final hearing, their Lordships accepted the above finding and reversed the decree of Subordinate Judge and restored that of the District Munsif.]

APPELLATE CIVIL.

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

ABDULKADAR (DEFENDANT), APPELLANT,

v.

MAHOMED (PLAINTIFF), RESPONDENT.*

1890. Dec. 11. 1891. April 27, 28. Sept. 11.

Specific Relief Act—Act I of 1877, ss. 42, 56—Consequential relief—Civil Procedure Code, s. 53—Amendment of plaint.

The plaintiff obtained a decree in a suit in which he averred that he was entitled to the office of Sheik of Kallai and to certain properties attached thereto, and prayed for a declaration that the defendant had no right either to the office of Sheik or to the properties in question, for an injunction restraining him from interfering with the properties or doing anything in any way inconsistent with the plaintiff's right to the office, and for further and other relief. It appeared, on the evidence for the defence, that the defendant was in possession of part of the property, but no issue had been framed as to the maintainability of the suit under the last clause of Specific Relief Act, s. 42:

Held, on appeal by the defendant that the Court of First Instance should take evidence and try an issue specifically directed to this question.

It having appeared on the evidence recorded on that issue that the defendant was substantially in possession of the office of Sheik and of its emoluments:

Held, that the suit was not maintainable, although an injunction was asked for as relief consequential on the declaration.

The plaintiff was permitted to pay additional stamp duty and amend the plaint by adding a prayer for possession.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 37 of 1888.

The plaintiff averred in the plaint that he was the Sheik of Kallai being solely entitled to that office and all the properties attached thereto, that on the death of his father and predecessor in office the defendant had obtained a certificate for the collection of his debts and subsequently "pretending that he is the Sheik, "has been trying to obtain possession of the properties belonging "to the stanom" and added "I have not been able to ascertain "the loss caused to the stanom by such pretensions and acts of "the defendant."

The prayer of the plaint was "that a decree may be passed "declaring that the defendant has no right either to the office of "the Sheik of Kallai or to the properties . . . and that a per-

* Appeal No. 114 of 1889.

ABDULKADAR v. MAHOMED.

"petual injunction be granted restraining him .... from dealing "with the properties in any way .... and from further doing "anything inconsistent with plaintiff's right to the office, and "granting other reliefs which may be prayed for and legally "granted during the pendency of the suit."

The defendant pleaded that he was the Sheik and in possession of the properties referred to in the plaint and added further pleas as follows:—"The suit is not sustainable under Specific Relief "Act, section 56, and it is not within the purview of section 54 "for the plaintiff to apply for the injunction prayed for" and "the relief claimed by the plaintiff is irregular and one that "cannot be granted."

The first issue related to the sufficiency of the stamp duty paid, the next three issues were framed with reference to the opposing claims of the plaintiff or defendant to be Sheik and the last was as follows:—"Whether the suit for an injunction will properly "lie under Specific Relief Act, section 56."

The Subordinate Judge passed a decree declaring "that the "plaintiff and not the defendant is the rightful Sheik .... and "as such entitled to the properties, &c., belonging to the stanom." And issued an injunction in the terms of the prayer of the plaint.

The defendant preferred this appeal on the ground, among others, that the suit was not maintainable without a prayer for possession.

Bhashyam Ayyangar and *Govinda Menon* for appellant.

Sankara Nayar and *Ryru Nambiar* for respondent.

JUDGMENT.—It is argued that the defendant, as alleged in paragraph 4 of the written statement, has been in possession of the mosque and its endowment and that the suit for a declaration of title and an injunction without seeking possession is not maintainable under section 42 of the Specific Relief Act. No specific issue has been framed as to this; and the fifth issue appears to have been framed on a special application with reference to the question whether a suit will lie for an injunction under section 56 of the Specific Relief Act. Some evidence as to possession appears to have been given by the defendant and considered by the Subordinate Judge under that issue. If, as some of the witnesses assert, the defendant is in possession of the mosque and some of its emoluments, and if the tenants have attorned to him or paid rent to him and executed fresh marupats and agreed to hold under him,

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we should be inclined to hold that plaintiff must sue for possession. As plaintiff had to begin, and, as there was no specific issue on this point, he had no opportunity of producing evidence.

We shall therefore ask the Subordinate Judge to take evidence and try the following issue and to submit a distinct finding within two months, viz., whether the mosque and mukham and properties attached thereto and the office of Sheik and its emoluments, or any, and which of them, were in possession of defendant at the date of the suit, and, if so, what is the value of such property.

Seven days, after the posting of the finding in this Court, will be allowed for filing objections.

[In compliance with the above order, the Subordinate Judge submitted his finding as follows:—

"My finding is that the mosque and mukham at Kallai and certain properties attached thereto, as shown in the subjoined list, were in the possession of the defendant on the date of the suit; that there is no reliable evidence that he was at the time in possession of the office of Sheik or of any of its emoluments over and above the sum of Rs. 22 and 150 dangalies of paddy a year, as deposed to by his seventeenth to nineteenth witnesses, and that the value of such property is Rs. 12,910 as shown below."]

This appeal having come on again, the Court delivered judgment as follows:—

JUDGMENT.—The finding of the Subordinate Judge, on the issue referred to him for trial, is that the mosque and mukham at Kallai and certain properties attached thereto were in the defendant's possession at the date of the suit and that they are of the value of Rs. 12,910. After referring to the evidence we are satisfied that it warrants the conclusion at which he has arrived. We are further of opinion that there is sufficient proof that the defendant is also substantially in possession of the office of Sheik and of its emoluments. The evidence adduced for the plaintiff only shows that he has received Nircha in two cases, and we do not consider it sufficient to justify a finding that neither party was in possession of the office. Upon these facts we think that a suit for a declaration of the plaintiff's right to the office cannot be maintained under section 42 of the Specific Relief Act without praying for possession of the mosque and its endowments. Though the plaint prays for a perpetual injunction restraining the

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defendant from interfering with the exercise by the plaintiff of his right to the office of Sheik, and, though an injunction is a form of consequential relief, yet it is clearly not sufficient, when the defendant is in possession, to meet the requirements of section 42. As observed by this Court in *Chokalinga Peshana Naicker* v. *Achiyar*(1), no suit will lie under that section unless there is no attempt either to evade the stamp law or to eject parties in possession under colour of a mere declaration of title. The reasonable construction of section 42 is that the further relief which the plaintiff is bound to claim is such relief as he would be in a position to claim from the defendant in an ordinary suit by virtue of the title which he seeks to establish and of which he prays for a declaration.

Another contention urged upon us is that the plaintiff may be allowed on appeal to pay additional stamp duty and to amend the plaint so as to include a prayer for recovery of possession, and our attention is drawn to *Limba Bin Krishna* v. *Rama Bin Pimplu*(2), *Chomu* v. *Umma*(3). It was held in those cases that, where the objection that the suit for a mere declaration of title was not maintainable was not taken in the Court of First Instance, the plaint might be allowed to be amended on appeal. Though in the present suit the defendant denied, in his written statement, that the plaintiff, was in possession either of the mosque or of its endowments and contended that the relief claimed was irregular and ought not to be granted in the suit, yet he did not ask for a distinct issue at the first hearing as to whether the suit was maintainable under section 42 of the Specific Relief Act.

The Subordinate Judge, however, in dealing with the fifth issue, incidentally discussed the evidence as to possession and came to the conclusion that neither party was in possession; but he now finds that defendant was in possession of properties to the extent of Rs. 12,000 and odd. But for the original finding of the Subordinate Judge on the question of possession, the plaintiff would have had an opportunity of amending the plaint in the Court below. Under the circumstances, we think we may allow the plaint to be amended. We allow the respondent-plaintiff three months' time to amend the plaint and to pay the additional stamp duty on the plaint so amended.

This appeal having come on again, after the plaint had been

(1) I.L.R., 1 Mad., 40. (2) I.L.R., 13 Bom., 548. (3) I.L.R., 14 Mad., 46.

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amended and stamp duty paid, in accordance with the foregoing order, the Court delivered judgment as follows:—

JUDGMENT.—The respondent has now amended the plaint and paid the necessary stamp duty. We must therefore set aside the decree and remand the suit to the Subordinate Court in order that a revised decree may be passed in accordance with the amended plaint after such further inquiry as may be necessary.

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

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Handley.

1891. Aug. 10, 11, 12. 13. 18.

BYATHAMMA (DEFENDANT No. 71), APPELLANT,

v.

AVULLA AND ANOTHER (PLAINTIFF AND DEFENDANT No. 35), RESPONDENTS.*

Malabar Law—Customary Law of Mapillas—Multifariousness—Suit by Karnavan—Limitation—Evidence—Evidence Act—Act I of 1872, *s.* 35—*Petition and order.*

The plaintiff sued as the karnavan of a Mapilla tarwad to recover lands in the possession of the defendants who were a donee from and the descendants of a previous karnavan and their tenants. It appeared that the alleged previous karnavan had died less than twelve years before the suit was filed, but more than twelve years before the joinder, as a supplemental defendant, of one to whom he had conveyed certain property by way of gift five years before his death. An issue was raised as to whether the rights of the parties were governed by Makkatayom or Marumakkatayom law, and an order of a District Munsif reciting a petition to which the alleged previous karnavan was a party, was put in evidence to show that he had in a particular instance acted in the capacity of karnavan of a Marumakkatayom tarwad. The rough draft of a plaint which had been filed by the alleged previous karnavan was put in evidence to show that he admitted having alienated property in a manner which would be adverse to the claim of his tarwad:

Held, (1) that on the allegations in the plaint the plaintiff was entitled to maintain the suit alone, and that the suit was not bad for multifariousness;

(2) that the order and draft plaint were admissible in evidence for the above-mentioned purposes;

(3) *on the evidence*, that the plaintiff had succeeded to the office the previous karnavan as alleged, and that the previous karnavan had followed the

* Appeal No. 125 of 1889.

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Marumakkatayom rule, although it was shown that other members of the family had dealt with property, described as self-acquired, under the precepts of Muhammadan law;

(4) that the suit was barred by limitation as against the donee above referred to, her possession having been adverse to the tarwad since the date of the gift.

Observations as to documents marked as exhibits without proof.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 31 of 1886.

The plaintiff sued as karnavan of a tarwad of Mapillas following the Marumakkatayom law to recover properties described in the plaint as "belonging to my and my karnavan's (the deceased Rayaroth Kunhi Soopi Haji) tarwad and acquired by Kunhi Soopi Haji with the profits of the tarwad." The defendants were persons in possession of the properties sought to be recovered and some of them in their written statements raised the plea (*inter alia*) of multifariousness. Soopi Haji was found to have died on 24th August 1874: the plaint in this suit bore date 13th August 1886; defendants Nos. 69, 70 and 71 were subsequently joined as supplemental defendants. Defendant No. 71, the donee from Soopi Haji above referred to, was not joined until after 15th December 1886. The further facts of the case appear sufficiently for the purposes of this report from the judgment.

Exhibit K, the admissibility in evidence of which is discussed by the High Court, was as follows:—

Extract taken from the diaries of the District Munsif's Court of Katathnad in the Tellicherry district, dated 3rd August 1864 and 30th September 1864.

M.P. No. 593 of 1864.

The petition presented by Chettayil Raman Nair, Vakil for Vazhelpitikayil *alias* Rayaroth Kunhi Soopi Haji and (2) Anandravan Rayaroth Cheriya Soopi Haji on the 18th Karkadagom 1039 (1st August 1864) states the following as the reasons for not selling Kayalavalappa paramba No. 6, the paramba No. 10 wherein a tiger's pen was built, Kattila *alias* Parambath paramba No. 11, Thanniyullathil paramba No. 12, Prachala paramba No. 13, Puthanpurayil paramba No. 14, and Koranthoti Kandi paramba No. 15 which were attached in satisfaction of the decree in suit No. 927 of 1830.

Of these, No. 6 is the first petitioner's self-acquisition and the remaining parambas were purchased by the petitioners' karnavan

the deceased Jakkian Soopi in jenm a very long time ago. With the exception of paramba No. 6, the assessment of all the parambas was in the name of the said karnavan who was paying the Government revenue and leasing them to tenants and was causing them to be held. After the death of karnavan, the first petitioner leased the parambas Nos. 11 to 15 and was causing them to be held and obtained Marupats under which the second petitioner received the purapad and was paying the Government revenue according to the old assessment from 1014 to 37 and, afterwards, according to the assessment in his own name and is enjoying them.

Order.

The claim set up in this must be proved within 8 days. *3rd August* 1864.

Second order.

The petitioners have not produced any documents whatever to show that the properties claimed are their jenm. Neither Kunhali, who admits that the first plaintiff sold the jenm right to paramba No. 6, nor his tenant has preferred any claim in this Court. The abovementioned paramba is released from attachment on the evidence adduced by the claimant in No. 571. The plaintiff has by means of witnesses and documents proved that the plaintiffs as jenmis have demised other properties to tenants and are causing them to be held. From the evidence adduced by the claimant in No. 589, it appears that paramba No. 23 was obtained from the first petitioner and is (so) held. The attachment is therefore withdrawn; but the disputes, namely, that between these petitioners and claimant in No. 571 with regard to paramba No. 6 and that, owing to the claimants in Nos. 566 and 678 saying that paramba No. 10 appertains to paramba No. 9 and the petitioners denying the same, should be decided by a regular suit. 30*th September* 1864.

The Subordinate Judge passed a decree now appealed against as prayed in the plaint, except with regard to certain items of the property claimed, of which some of the defendants were found to have been in possession adverse to Soopi Haji.

Defendant No. 71 preferred this appeal.

Sankara Menon for appellant.

Sankara Nayar for respondents.

JUDGMENT.—The plaintiff alleging himself to be the present karnavan of the Rayaroth tarwad, sued to recover properties which

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he alleged had been acquired by a former karnavan, one Kunhi Soopi Haji, who died in 1874, and which are now in the possession of the descendants of the said Soopi Haji or tenants under them. The Subordinate Judge decreed in plaintiff's favor for certain of the properties sued for, and the Appeals Nos. 125, 126, 127, 128, 140 of 1889, and Appeal No. 12 of 1890 are preferred by some of the defendants, while plaintiff appeals in Appeal No. 141 of 1889 as to some of the plaint items disallowed.

Preliminary objections were taken as to (1) misjoinder of causes of action, (2) the right to a karnavan to sue alone, and (3) limitation. Upon the first point we entertain no doubt that plaintiff can implead the several defendants in one suit to recover the tarwad property—*Vasudeva Shanbhaga* v. *Kuleadi Narnapai*(1), *Mahomed* v. *Krishnan*(2)—upon the second the right of a karnavan to sue for the tarwad property is well established—*Subramanyan* v. *Gopala*(3)—while the question of limitation will, it appears to us, depend upon the date in each instance on which the possession of the several defendants became adverse to the tarwad. It was further alleged that the whole suit was barred, inasmuch as it was not instituted within 12 years of the date of Kunhi Soopi Haji's death. Upon this point, we are satisfied that exhibit A is not a copy, but is the duplicate register of deaths kept in the amshom in the ordinary course of official business, and it fixes the date of Soopi Haji's death as having occurred on 24th August 1874. We accept that date accordingly.

We pass, therefore, to the second and principal issue in the suit, viz., whether Kunhi Soopi Haji followed Marumakkatayom or Muhammadan law. The Subordinate Judge found that the Marumakkatayom system governed the descent of the tarwad property, but that the self-acquisitions of members of the family were governed by the Muhammadan law.

Kunhi Soopi Haji was the sister's son of Jokkian Soopi, who died about 1822, and who is alleged to have been the original karnavan of the Rayaroth tarwad, so far at least as it is necessary to go back for the purposes of this litigation. We find, however, that the revenue registry of the 28 nunjah lands and 77 parambas which stood in his name were continued in his name till Fasli 1270 (1860), *i.e.*, for about 38 years after his death. Exhibit 115

(1) 7 M.H.C.R., 290. (2) I.L.R., 11 Mad., 106. (3) I.L.R., 10 Mad., 223.

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shows that the registry was then transferred, 14 out of the 28 nunjah lands and 55 out of the 77 parambas being transferred to the name of Rayaroth Cheriya Soopi Haji, who is represented by plaintiff to have been the fourth karnavan in succession from Jokkian Soopi, the first karnavan. The other lands and parambas were transferred to the names of eight other persons, and the Subordinate Judge states that it was conceded these were distant relations; but there is nothing in the evidence before us to show what the precise relationship was, and their names do not appear in the pedigree, as made out from the evidence of plaintiffs' witnesses.

Some confusion has been introduced into the case from the fact that the Subordinate Judge did not understand that the Rayaroth Cheriya Soopi, to whose name these lands were transferred in 1860, was not the Kunhi Soopi Haji whom he takes to have succeeded Jokkian Soopi as karnavan No. 2. Kunhi Soopi Haji was alive in 1860, and according to plaintiff was *de jure* karnavan; but he is said to have then been an old man, and we are asked to believe that the patta was issued in the name of Cheriya Soopi Haji as he actually collected the rents and paid the assessments on the property (see exhibit K). This document is objected to as not furnishing legal evidence of the contents of the joint petition by Kunhi Soopi Haji and Cheriya Soopi which it recites, and we were referred to the decision in *Subramanyan* v. *Paramaswaran*(1) (at page 122) in which the learned Judges stated that they followed the Full Bench decision in *Gujju Lall* v. *Fatteh Lall*(2). It is not clear what was the precise nature of the documents rejected in the Madras case, but we think the decision in *Parbutty Dassi* v. *Purno Chunder Singh*(3) is applicable to the present case, and is not inconsistent with the Full Bench ruling above referred to. We may point out that in *Gujju Lall* v. *Fatteh Lall*(2), the sole object for which it was sought to prove the former judgment was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favor on the same right claimed, and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. In the case before us, it is not the adjudication which it is sought to prove,—for the point was never adjudicated

(1) I.L.R., 11 Mad., 116. (2) I.L.R., 6 Cal., 171. (3) I.L.R., 9 Cal., 586.

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upon—but the judgment is tendered in evidence as proof that in a particular instance the plaintiff's predecessor acted in the capacity of karnavan of a Marumakkatayom tarwad wholly irrespective of the particular decision arrived at in the suit. This, we think, is a relevant fact, and the entry is therefore admissible under section 35 of the Evidence Act—See also *Ramasami* v. *Appavu*(1).

Exhibit AK is the revenue register of the 14 items of nunjah and 51 parambas which were entered in Cheriya Soopi Haji's name in Fasli 1290, and in coming to the conclusion that the Marumakkatayom rule governed the descent, the Subordinate Judge has been greatly influenced by the fact that several items of property which he enumerates are shown by exhibit 115 to have stood first in the name of Jokkian Soopi, that they were transferred to that of Cheriya Soopi in 1860 and were in the interval dealt with by Kunhi Soopi Haji under various documents. For the defendants it is not denied that Kunhi Soopi Haji came into possession of various properties which originally belonged to Jokkian Soopi, but it is contended that he took them as sister's son under Muhammadan law, and hence that from that fact alone no inference favorable to Marumakkatayom can be drawn.

We may here observe that there is no evidence to show that Kunhi Soopi Haji's mother, Biyathumma, survived her brother, Jokkian Soopi. If she did, and if the family followed the Muhammadan law, she would be a legal sharer, and we might expect to find traces of her having dealt with portions of the property and of her share being divided among her several children at her death. There are no such indications. If, on the other hand, (still assuming that Muhammadan law ruled the descent) Biyathumma did not survive Jokkian Soopi, Kunhi Soopi Haji as the sister's son, would have come under the head of distant kindred and have been altogether excluded by the brother's sons, the descendants of Jokkian Mammi and Jokkian Kutti Ali.

It is admitted, however, that Kunhi Soopi Haji did in fact succeed—whether under Marumakkatayom or under Muhammadan law—to a great deal of property which originally stood in the name of Jokkian Soopi. He was alive in 1860, and it is inexplicable if these properties were really governed by Muhammadan law, that he, and the descendants of his brothers and

(1) I.L.R., 12 Mad., 9.

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sisters would have permitted the revenue registry to be transferred to the name of Cheriandi Soopi; Kunhi Soopi Haji was an old man, and his death could not be far distant; and his own nephews, who would be his natural heirs under Muhammadan law, would hardly have allowed the transfer to the name of a distant cousin, who was no heir at all. If, on the other hand, we accept the theory of Marumakkatayom and the explanation given by exhibit K, the situation becomes intelligible.

It is objected by the defendant's pleader that many of the documents referred to in paragraphs 50 to 61 of the judgment of the Subordinate Judge were not proved, and that it is not shown they came from proper custody. With regard to his objection, we observe from the B diary in the suit that these documents were put in by the plaintiff's pleader, and may fairly be taken as having come from the plaintiff's custody, though the formality of examining plaintiff when they were put in was not observed. No objection appears to have been taken at the time; indeed the defendant's pleader was allowed to take precisely the same course with some of his documents. Many of these documents are judgments and public records as to whose genuineness there is no doubt,—while others (marupats and sale-deeds) purported to be more than 30 years' old and came from proper custody if the plaintiff is the karnavan of a Marumakkatayom tarwad. If he is not, his possession of them is unexplained, and no objection to their genuineness appears to have been taken at the proper time. We do not think it necessary to remand the appeal for further evidence on these points.

It is true that the items of property which the Subordinate Judge traces from Jokkian Soopi in this part of his judgment are not part of the property in suit,—but the evidence is relevant as showing that properties which originally stood in the name of Jokkian Soopi were afterwards dealt with by Kunhi Soopi Haji,—who would be the next karnavan if Marumakkatayom governed the descent,—but who is not proved to be the next heir under Muhammadan law, and that these properties were allowed without objection to be registered in the name of Cheriandi Soopi, who would be an heir under Marumakkatayom but not under Muhammadan law, there being no evidence whatever that he had acquired any title either by gift or purchase to Jokkian Soopi's property.

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The litigation referred to in paragraphs 55, 56 and 60 of the judgment also support the plaintiff's case. It was argued that no connection was proved between the property sued for as shown by exhibit A with that demised in exhibits D and E,—but exhibit A B shows that this property was sued for in 1828 by Kunhi Soopi Haji. It was demised in 1863 by the same person (exhibit D) and again in 1875 by Cheriandi Soopi (exhibit E) to the plaintiff's eighth witness who admits holding under the tarwad. If the property was not tarwad property it is not explained why Kunhi Soopi Haji's descendants allowed this witness to attorn to Cheriandi Soopi instead of to themselves.

Exhibit A D shows that Kunhali who is represented to have been karnavan from 1874 to 1878 sued as karnavan in 1877 to recover property given on a demise by his former karnavan Kunhi Soopi Haji and got a decree. In that case the plaintiff was brought in as supplemental plaintiff. It is objected that Cheriandi Soopi was the next senior anandravan and not the plaintiff, but exhibit B executed on 2nd October 1877 shows that the plaintiff was given a power-of-attorney by Kunhali to manage the affairs of the Rayaroth tarwad during his absence in Arabia. The genuineness of this document is not disputed, and it is important as tending to show that Kunhali made separate arrangement for the management of his self-acquired property and of his tarwad property.

A suggestion was made by the defendant's pleader that several of the documents had been executed since the death of Kunhi Soopi Haji in 1874 with a view to create evidence. This however, cannot be said with regard to several marupats executed in the early part of the century, and it is clear that the alleged successors of Kunhi Soopi Haji have not shown themselves in any hurry to assert their rights. Kunhali went to Arabia, and his successor is alleged by plaintiff to have been negligent of the interests of the tarwad. The plaintiff himself—as far as the evidence goes—did not become responsible for the management till 1885 and the suit was brought in 1886.

It is next urged that the Subordinate Judge omitted to consider several documents which would have tended to show that the descent of property in this family was governed by Muhammadan law, and in particular we were referred to exhibits 120, 118, 123, 145 and 184.

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In exhibit 120 the plaintiff is said to be the son of the brother of Kunhali (karnavan No. 3). He sued to recover property demised by his late brother, and the defence was that the land was held under his mother (fourth defendant). The District Munsif found that the document creating demise from the fourth defendant was a concoction, and observed that under Muhammadan law the plaintiff would have a right to succession in preference to the wife. The observation was a mere *obiter dictum*, and the question of Marumakkatayom or Muhammadan law did not arise in the suit. Exhibit 118 is a certified copy of a decree, but there is nothing before us by which we connect the parties with the parties to this suit. Exhibit 122 shows that in 1837 some relations of Kunhi Soopi Haji had obtained from him some share in some property; but there is nothing to show what was the nature of that property, or on what ground the share was given. Exhibit 140 is a patta which shows that a bit of land was transferred from Kunhi Soopi Haji's name in 1874 to that of Cheriya Soopi "with permission of son Ahmed Kutti Haji." This does not necessarily show anything more than that no objection was made by Kunhi Soopi Haji's son to the transfer and is consistent with the suggestion that the property may have been tarwad property. Exhibit 184 shows that Kunhi Soopi Haji purchased some property in 1844, but there is nothing to show how his vendors acquired a title, though it may have descended to them from their father.

We are unable, therefore, to hold that these documents in any material way assist the contention of the defendants.

Passing to the oral testimony, we find that the plaintiff's second witness is the grandson of Jokkian Kutti Ali, brother of Jokkian Soopi. His testimony that the family is governed by Marumakkatayom law is therefore clearly against his interest, as he would have been a nearer heir than Kunhi Soopi Haji in succession to Jokkian Soopi under Muhammadan law. The third and fourth witnesses have also opportunities of knowing the facts, and the evidence of the first witness called by the defendants was to the same effect.

Upon the whole, therefore, we are of opinion that the Subordinate Judge was right in his conclusion that Rayaroth Kunhi Soopi Haji was a follower of the Marumakkatayom rule, notwithstanding that it is shown that other members of this family have dealt

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with property which is described to be self-acquired under the precepts of Muhammadan law. We may point out that the very execution of such documents as exhibits F and G may tend to show the executants felt it necessary to make a special provision for their descendants to prevent the operation of the Marumakkatayom rule upon such property.

The next point is whether the plaintiff is the present karnavan of the tarwad. His seniority is disputed on account of the evidence of Kuruvangat Ahmed Kutti, first defence witness,—who alleged himself to be the plaintiff's senior and the eldest in the Rayaroth tarwad. We do not think much reliance can be placed upon the evidence of this witness. He was not called by the plaintiff, and the defendants complained that he had to be brought on a warrant and was hostile to them. It is difficult to reconcile his different statements. He at first declared that he belonged to the Kuruvangat tarwad, in which the plaintiff had no right, and then that he was the eldest in Rayaroth tarwad in which the plaintiff is undoubtedly a member. Had he really belonged to Rayaroth and been the eldest in it, we think he would have claimed the karnavanship on the death of Cheriya Soopi,—but he declares that he has no right to the property therein. We cannot give credit to the statement of this witness that he is the senior member of the Rayaroth tarwad.

It remains to consider whether the plaintiff is entitled to recover the property (item No. 55) from the appellant (71st defendant). The claim is resisted on the ground of limitation.

The 71st defendant was not a party to the suit till after the 15th December 1886, or more than 12 years after the death of Kunhi Soopi Haji. We think, however, we are bound to examine the original character of the possession, in order to see whether the 12 years' rule applies—*Byari* v. *Puttanna*(1). The contention is that the property was given to the 71st defendant by Kunhi Soopi Haji in 1869 and has since been held by her adversely to the tarwad. In proof of this contention we were referred to exhibits 81, 189, 190 and 191.

It was objected that exhibit 81 is inadmissible in evidence. We are satisfied that it is the rough draft of the plaint put in in original suit No. 270 of 1869 on the Badagara District Munsif's

(1) I.L.R., 14 Mad., 38.

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file and is not a copy but an original rough draft. It has been kept for record in the Vakil's office, bears the number of the suit, and the decision in the suit has been endorsed upon it. The plaint actually put in was a copy of this draft. We hold therefore that it is admissible and shows that in August 1869 Kunhi Soopi Haji admitted having alienated the property in a manner which would be adverse to the claim of his tarwad.

The razi decree in that suit was in favor of the present appellant (exhibit 190, dated 6th November 1869) and on 2nd September 1869 the tenant attorned to her (exhibit 189). The evidence of the 70th defendant's second witness proves that the 71st defendant held possession since 1869.

We are of opinion, therefore, that the plaintiff's claim to item No. 55 is barred. The appeal of the 71st defendant must be allowed and the plaintiff's claim as against the property in her possession (item No. 55) be dismissed with costs throughout.

APPELLATE CIVIL.

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

CHENNAPPA (APPELLANT),

v.

RAGHUNATHA (RESPONDENT).*

1891. March 31. May 5.

Civil Procedure Code, s. 111—*Set-off—Character in which claim is made—Court Fees Act—Act VII of* 1870, *ss.* 6, 28—*Levy of stamp due.*

In a suit in which the plaintiff sued, as son of a deceased vakil, to recover the amount of a promissory note and bond executed by the defendant to his deceased father, the defendant alleged in his written statement that the plaintiff's father had collected funds belonging to him, as his vakil, exceeding the amount due on the promissory note and bond and asked for a decree for the difference:

Held, (1) that the written statement must be regarded as a plaint in regard to the set-off and should have been stamped accordingly;

(2) that if the plaintiff claimed as the heir and representative of his father the set-off was rightly pleaded;

(3) that when a memorandum of appeal is insufficiently stamped the deficient stamp duty should be levied by the Appellate Court.

* Referred Case No. 36 of 1890.

CHENNAPPA v. RAGHUNATHA.

CASE referred for the decision of the High Court under section 617 of the Code of Civil Procedure by W. J. Tate, District Judge of South Canara, in the matter of appeal suit No. 14 of 1890 on the file of his Court.

The plaint in the suit in which this reference was made, set out (1) that the defendant borrowed Rs. 50 from the plaintiff's father and gave him a promissory note for that amount; (2) that the defendant borrowed Rs. 150 from the plaintiff's father, pledged certain jewels with him and executed a karar undertaking to repay the same in two months, with interest at 12½ per cent.; (3) that plaintiff's father was dead, and plaintiff, who was his heir, had "been enjoying all his estate" and prayed for a decree for the sums due on the note and the karar respectively.

The defendant pleaded that the suit was barred by limitation so far as the claim founded on the promissory note was concerned, and as to the rest of the claim his allegation was as follows:—

"I executed the plaint karar reposing confidence (in him) "because he had agreed to deduct the amount due to him by me "from the amount realized by him on my account, and only "because he had just then no time to square accounts;" and the written statement proceeded to state that "a sum exceeding the "amount of the karar" executed on the pledge "of the jewels, "that is, Rs. 182-8-3, recovered in execution taken out through "the plaintiff's father (who was a pleader) is remaining with him "and is due to me," and he prayed for a decree for the difference between the last mentioned sums.

The case as stated by the District Judge, after summarising the pleadings, proceeded as follows:—

"The District Munsif disallowed the set-off on the ground "that the parties did not fill the same character within the mean-"ing of section 111, Civil Procedure Code.

"It is now contended for the appellant that the requirements "of the section are complete, for the amount to be set off is "ascertained and legally recoverable, and the parties fill in the "matter of set-off the same character as they fill in the suit, inas-"much as the plaintiff sued on the promissory note and bond "simply as his father's representative, and it is as such represen-"tative that the monies due to defendant would have by him to "be disbursed; further, that there is no legal distinction between "money received by plaintiff's father in his capacity of pleader,

"and money received by him in a private capacity. It is also "argued that what has to be looked to is the position of the "present parties, and that *quâ* both sets of transactions the plain-"tiff stands to the defendant in an identical position.

"On the other hand, it is urged that although paragraph 6 of "the plaint sets up plaintiff's heirship to his father in respect of "all his property, it does not state that the plaint amounts are the "father's own (self-acquired) property; that the set-off is asked "for from plaintiff himself (last paragraph of the written state-"ment), and that he is entitled, now that it has been pleaded, to "dispute his liability to pay it in this suit, on the ground that "it has not been stated, or proved, in what capacity he is to be "saddled with the liability, *i.e.*, whether as his father's heir in "respect of self-acquired property, or by virtue of his right of "survivorship, in which case there would be no separate estate.

"The case is not one of equitable set-off, and so governed by "the then Chief Justice's judgment, in *Clark* v. *Ruthnavaloo* "*Chetti*(1).

"It falls, as seems to me, within the stricter limits of section "111, inasmuch as the *transactions* were different. And, on the "analogy of illustration (b) to section 111, I am, not without great "doubts, of opinion that, because the plaintiff virtually (the plaint "being taken as a whole) chose to bring himself forward as his "father's representative in respect of the money due on the promis-"sory note and the bond, and because such assumption of charac-"ter was not objected to by the defendant, it is not necessarily "open to defendant to say that any other sums due to him by "plaintiff's father are payable by plaintiff in such character, *i.e.*, "really to say that on the face of his plaint in this suit plaintiff "must be taken to represent his father in respect of all property "and for all purposes.

"I also consider that if plaintiff is to be taken as representing "his father in respect of the set-off he represents him only in "his fiduciary capacity, he being, on a species of implied contract, "trustee of the defendant's money. If this view be correct, the "set-off amount would not be recoverable as such from plaintiff's "father were he suing on the promissory note and bond. Much "less is it recoverable as set-off from the plaintiff.

(1) 2 M.H.C.R., 296.

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"Then, on the authority of two rulings, one of the Allahabad, "and one, following it, of the Bombay High Court, *Amir Zama* v. "*Nathu Mal*(1) and *Bai Shri Majirajbai* v. *Narotam Hargovan*(2), "it is said for the respondent that court-fee should have been "paid on the amount of the set-off. On the other side, it is urged "that there is no provision in the Court Fees Act authorizing "the charge, and that, by section 111, Civil Procedure Code, the "set-off has to be pleaded in a written 'statement' which is not, "*per se*, chargeable at all; moreover, that Government has already "received full court-fee on the plaint amount, of which the set-"off only, on the pleadings, forms a fraction, so that, at any rate, "where the amount of set-off is less than the amount in suit, the "dues of the State have been already satisfied by the court-fee "paid on the plaint. I incline, on the whole, to the latter view; "but as two High Courts have held the contrary, think it right to "ask for a ruling which shall govern the procedure in Madras.

"The appellant further urges that no interest was due on "the promissory note A until the date of demand. I think this "contention correct. A contains no mention of interest, and "interest could only be made payable, therefore, as damages. "The contract to pay was only broken at the date of the demand, "so that defendant would only, from that date, be liable in "damages.

"But the appeal-memorandum is only stamped with the "court-fee payable on *the amount of the set-off*. And the "respondent relying on the Allahabad full bench ruling in "*Balkaran Rai* v. *Gobind Nath Tiwari*(3) contends that court-fee "cannot now be admitted on this other sum objected to. If the "learned Judges of the Allahabad Court have interpreted the law "correctly, and I am bound, in the absence of a contrary ruling "of the High Court of this Presidency, to think that they have "done so, it seems to follow that *quâ* the second relief sought, the "appeal-memorandum in this suit is so much waste paper, it being "a 'document' incapable of being received or filed in any Court "under section 6 of the Court Fees Act, and of no validity under "section 28, and incapable under the same section of being vali-"dated. I have felt myself compelled to follow in another case "the strong authority of the full bench ruling, and would do so

(1) I.L.R., 8 All., 396. (2) I.L.R., 13 Bom., 672. (3) I.L.R., 12 All., 129.

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"here, but that I have (speaking respectfully) great doubts "whether that ruling is correct, *i.e.*, whether the word document "should be held to include, plaint or memorandum of appeal, see-"ing that section 54 (*b*), Civil Procedure Code, permits a plaint "to be returned for the affixing of the proper stamp (it is true "that the chapter including this section refers to the institution "of suits), and whether the 'mistake or inadvertence' mentioned "in section 28 of the Court Fees Act refers only to mistake or "inadvertence on the part of the Court or its officers, or may be "held to include inadvertence on the part of the party or his "vakil.

"And the last question, which follows the above, for the "answer to it seems deducible from the same view of the law, "is whether, if the statement pleading set-off should have been "stamped, and the proper stamp is tendered now, that stamp can "be received, and the statement thus become validated."

Pattabhirama Ayyar for appellant, (defendant).

Narayana Rau for respondent, (plaintiff).

JUDGMENT.—We are of opinion that the parties to the present suit fill the same character as regards both the subject-matter of the claim and of the set-off. The debt which the plaintiff sues for he seeks to recover as the heir and representative of his father, and the debt which the defendant pleads as a set-off is one which, according to him, the plaintiff is bound to pay as the heir and representative of his father. It may be that if the debts due on the promissory note and the pledge-bond are proved to be ancestral which survived to the plaintiff on his father's death, and if it appears further that he inherited no separate property from his father, and that the debt pleaded as a set-off is not one which, as a son, he is bound to pay under Hindu law, the set-off will have to be disallowed. But a distinction ought to be made between the character in which a liability is sought to be enforced and the conditions of the liability in that character. Section 111 premises two things as necessary to allowing a set-off, viz., (1) that the matter of set-off must be an ascertained sum legally recoverable by the defendant from the plaintiff, and (2) that the character in which the debt is claimed by, and from, the plaintiff must be the same. In the case before us, the character is the same, viz., the plaintiff is the heir and representative of his father. But if it turns out on enquiry that the plaintiff is not liable to pay the

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debt claimed by the defendant on the ground that he inherited no separate property from his father, the set-off will fail because the sum is not recoverable legally from the plaintiff by the defendant, and not because the character which the plaintiff fills as regards the debt sued for and the subject-matter of set-off is not the same.

Unless the defendant admits that the debt he seeks to recover is not legally recoverable from the plaintiff, the plea of set-off must be allowed to be set up and proved, and ultimately allowed or disallowed according as the cross-debt is or is not shown to be recoverable from the plaintiff.

As regards the second question, we are of opinion that a written statement containing a claim of set-off must be regarded as a plaint in regard to such set-off. Having regard to the language of the concluding paragraph of section 111 and of section 216, we think that the Legislature intended that it should be treated as a plaint for the cross-claim. The same view was taken of the effect of those sections by the High Courts at Allahabad and Bombay (*Amir Zama* v. *Nathu Mal*(1) and *Bai Shri Majirajbai* v. *Narotam Hargovan*(2)).

As to the third question, we consider that when the memorandum of an appeal is not sufficiently stamped, it is competent to the Court to levy the deficient stamp duty. This view is in accordance with the principle laid down by the Privy Council in *Skinner* v. *Orde*(3), and the wording of section 4 of the Limitation Act and section 54 of the Code of Civil Procedure appear also to support it. We do not concur in the opinion expressed in *Balkaran Rai* v. *Gobind Nath Tiwari*(4).

Our answer to the fourth question is also in the affirmative.

Costs to follow the result.

(1) I.L.R., 8 All., 396.
(2) I.L.R., 13 Bom., 672.
(3) I.L.R., 1 All., 230.
(4) I.L.R., 12 All., 129.

APPELLATE CIVIL.

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

1891. April 30. May 1.

COLLECTOR OF NORTH ARCOT AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

NAGI REDDI (PLAINTIFF No. 2), RESPONDENT.*

Revenue Recovery Act—Act II of 1864 (Madras), s. 52—Karnam in a permanently settled zamindari.

The karnam in a permanently settled zamindari is a village servant employed in revenue duties within the meaning of the Revenue Recovery Act, s. 52.

SECOND APPEAL against the decree of H. H. O'Farrell, Acting District Judge of North Arcot, in appeal suit No. 97 of 1889, reversing the decree of C. Ranga Rau, Acting District Munsif of Vellore, in original suit No. 11 of 1888.

The plaintiff's property had been attached and sold under Act II of 1864 to enforce payment of a sum said to be payable by him on account of mera due to the karnam of a village in the permanently settled Kangundi Zamindari.

The plaintiff now sued to have the order made by the Collector (defendant No. 1) under Act II of 1864 set aside and for damages.

The District Munsif dismissed the suit, but his decree was reversed on appeal by the District Judge, who awarded to the plaintiff Rs. 7-14-3 damages against the Collector and the manager of the zamindari, who was defendant No. 2.

The defendants preferred this second appeal.

Mr. *Powell* for appellant No. 1.

Subramanya Ayyar for appellant No. 2.

Bhashyam Ayyangar for respondent.

JUDGMENT.—The question is whether the karnam in a permanently settled zamindari is a village servant employed in revenue duties within the meaning of section 52 of Act II of 1864. It has been held by the District Judge that the section does not apply to such karnams, but only to karnams in unsettled

* Second Appeal No. 505 of 1890.

COLLECTOR OF NORTH ARCOT v. NAGI REDDI.

districts. It is clear that, independently of Regulation XXIX of 1802, the karnam was, as he is now admittedly everywhere except in lands settled under Regulation XXV of 1802, a revenue servant. By the preamble of Regulation XXIX of 1802, passed after the passing of Regulation XXV, it is declared that the office of karnam is still of great importance, and that it is expedient to provide for the continuance of it, and the Regulation goes on to indicate the duties which are to be performed by the karnam. Some of those duties are duties which may aptly be called revenue duties. The Regulation VI of 1831 further tends to show that these karnams were regarded as revenue servants, for the Regulation relates to hereditary village and other offices in the Revenue and Police departments, and by the last section it is expressly provided that the Regulation shall not apply to karnams holding office under Regulation XXIX of 1802. We cannot agree with the District Judge in the view he has taken of the question, and must reverse the decree and remand the appeal to be dealt with according to law. Costs are to be provided for in the revised decree.

APPELLATE CRIMINAL.

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

1891. Oct. 14, 15.

QUEEN-EMPRESS

v.

RANGA RAU.*

Criminal Procedure Code—Act X of 1872, s. 466—Act X of 1882, s. 197—Government orders as to tribunal for trial of officials.

In 1890 the Collector of Ganjam reported to the Board of Revenue a charge of bribery, &c., against a Sub-Magistrate and received directions to send the case for trial to some Magistrate other than himself, or the Principal Assistant Magistrate. He accordingly sent it to the Senior Assistant Magistrate of Berhampore; the accused was convicted, but he appealed to the Sessions Judge, who reversed the conviction on the merits. The Government did not appeal against the acquittal of the accused, but the District Magistrate referred to the High Court the question whether the Magistrate had jurisdiction:

* Criminal Revision Case No. 282 of 1891.

QUEEN-EMPRESS v. RANGA RAU.

Held, on the reference, that it was not a case for the interference of the High Court, because (1) it was not shown that the Magistrate had acted without jurisdiction; (2) Government had not appealed against the acquittal by the Sessions Judge who had tried and determined the question of jurisdiction.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by E. C. Johnson, District Magistrate of Ganjam.

The case was stated as follows:—

"A charge of bribery, extortion and criminal intimidation "having been made against the Sub-Magistrate and Deputy "Tahsildar of Narasannapet, I reported the same, in the capacity "of Collector, to the Board of Revenue on 18th September 1890, "and was directed in Board's Proceedings, No. 6967, Miscella-"neous, dated 31st October 1890, to send the case for trial to "some Magistrate other than myself or the Principal Assistant "Magistrate who had held departmental inquiry in the case. I "accordingly sent it for trial to the Senior Assistant Magistrate, "Berhampore.

"The case was taken up as calendar case No. 36 of 1890 on "his file; charges under sections 161, 166 and 384, Indian Penal "Code, were framed; the accused was found not guilty under "sections 166 and 384, Indian Penal Code, but guilty under "section 161, Indian Penal Code, and was sentenced to two years' "simple imprisonment and a fine of Rs. 1,000.

"Against this conviction appeal was made to the Sessions "Judge, who quashed the conviction. . . .

"I then asked the Government to direct the Public Pro-"secutor to present an appeal to the High Court against the "double acquittal; but Government, in declining to do so, has "directed me to refer to the High Court 'the question of the "'jurisdiction of the Senior Assistant Magistrate.'

"Government Order No. 572, dated April 9, 1875, specified, "under the last paragraph of section 466 of the Code of Criminal "Procedure of 1872 (corresponding with section 197 of the Code "now in force), 'the Court of Sessions' as the Court before which "any Deputy Tahsildar and Magistrate should be tried. This "order is declared by Government to be still in force.

"Under these circumstances the trial by the Acting Senior "Assistant Magistrate was without jurisdiction; and I have the "honour to request that his order in the case may be set aside

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"and the commitment of the accused for trial by the Court of "Sessions ordered."

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

Ramachandra Rau Saheb and *Pattabhirama Ayyar* for the accused.

JUDGMENT.—This is a case referred to us by the District Magistrate of Ganjam under the instructions of Government.

A charge of bribery, extortion and criminal intimidation was made against the Sub-Magistrate and Deputy Tahsildar of Narasannapet, and on the 18th September 1890 the District Magistrate of Ganjam reported the same to the Board of Revenue, and was directed by the Board to send the case for trial to some magistrate (other than himself or the Principal Assistant Magistrate). The case was, therefore, sent for trial to the Senior Assistant Magistrate, Berhampore. The prisoner was convicted under section 161, Indian Penal Code. The Sessions Judge on appeal reversed the conviction on the merits. It was argued before him by the vakil for the prisoner that the conviction was void on the ground that the Senior Assistant Magistrate had no jurisdiction. This defence, however, the Sessions Judge overruled on the ground that from the list of notifications and rules which have the force of law in this Presidency it does not appear that the Government has passed an order under section 197, Criminal Procedure Code. The Government did not appeal against the acquittal.

Mr. Powell, the Public Prosecutor, now argues that all the proceedings must be set aside, as the Senior Assistant Magistrate had no jurisdiction to try the case, and consequently all the proceedings are void, and he refers us to an order of Government, dated 9th April 1875, which specified, under section 466 of the Code of Criminal Procedure then in force the Court of Session as the Court before which a Tahsildar and Magistrate or a Deputy Tahsildar and Magistrate shall be tried exclusively. The Government has, however, furnished the High Court with a list of the notifications and rules having the force of law in this presidency revised up to July 1887, and we find no mention of the order of Government, dated 9th April 1875, in this list, and we must presume, therefore, that the order has been repealed or is considered to have ceased to have effect, the Code having been repealed. Mr. Pattabhirama Ayyar argues that such a Government order under section 197 of

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the *present* code would be *ultra vires*, because, as it now stands, the law limits the power of Government to determining, in each particular case as it arises, the person by whom and the manner in which the prosecution of such public servant is to be conducted, and empowers Government to specify the Court before which the trial of a public servant is to be held; whereas in the order of 1875 the Government directed that a class, viz., Tahsildars and Magistrates or Deputy Tahsildars and Magistrates, should be tried only by a Court of Session. This may be so and may explain why the Government order was repealed, if repealed it be.

We must decline to interfere on two grounds: (1) it has not been shown that the trial by the Senior Assistant Magistrate was without jurisdiction; (2) the question of jurisdiction was considered by the Sessions Judge and decided adversely to Government and Government has not appealed.

APPELLATE CRIMINAL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

QUEEN-EMPRESS

v.

MUNISAMI AND OTHERS.*

1891. August 6.

Criminal Procedure Code—Act X of 1882, *ss.* 436, 437—*Further inquiry—Power of District Magistrate to suggest a committal.*

A District Magistrate who refers a case to a Sub-Magistrate for further inquiry has no authority to fetter him in the exercise of his judicial discretion as to the question whether the case should or should not be committed to the Court of Sessions.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by E. J. Sewell, Sessions Judge of North Arcot.

The question referred was whether or not a committal was illegal which was made by a Second-class Magistrate, (who had previously discharged the accused and now expressed no opinion that a *primâ facie* case had been made out for the prosecution,) in

* Criminal Revision Case No. 297 of 1891.

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pursuance of an order of the District Magistrate, directing him to hold further inquiry and adding "as it might be doing a violence "to the scruples of the Lower Court to come to a different finding "from that already recorded, the Lower Court will do well if a re-"consideration of the evidence leads to the conclusion that it is "possible for two views to be held as to the conduct of the accused, "if it commits the accused to the Court of Sessions."

The *Acting Advocate-General* (Hon. Mr. *Wedderburn*) for the accused.

The *Government Pleader* and *Public Prosecutor* (Mr. *Powell*) *contra*.

JUDGMENT.—Under section 437, Criminal Procedure Code, the District Magistrate had power to make further inquiry himself or to direct the Sub-Magistrate to make further inquiry, but if he chose the latter course he had no legal authority to fetter the Sub-Magistrate in the exercise of his judicial discretion.

A commitment to the sessions (assuming that the case was one which ought to be tried by the Sessions Court) would not be justifiable unless the committing Magistrate considered a *primâ facie* case had been made out which in his judgment ought to be tried at the sessions. The order of the District Magistrate that the case was to be committed if the Sub-Magistrate thought it was possible for two views to be held, (the District Magistrate distinctly stating he held another view,) was therefore *ultra vires*, and practically took away from the Subordinate Magistrate the exercise of his judicial discretion. In making the commitment the Sub-Magistrate does not profess to have exercised any judicial discretion, but commits the case as it is possible two views may be held, though he does not say he himself entertains any doubt as to the correctness of the decision he himself had arrived at.

The commitment must be quashed and the order of the District Magistrate of 10th June must be restricted to a simple direction to hold a further inquiry.

APPELLATE CRIMINAL.

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

SRINIVASA

v.

ANNASAMI AND OTHERS.*

1891. October 10.

Penal Code—Act XLV of 1860, *s.* 372—*Illegal disposal of a minor.*

A dancing woman of a temple applied to the manager of the temple for the appointment of a minor girl, whom she falsely described as her daughter, to her "kothu" miras; the manager ordered that the girl be placed on the pay abstract like other dancing girls, and she was employed about the temple, though the ceremony of tying the bottu (after which the girl could not be married) did not take place:

Held, that the above facts constituted *primâ facie* evidence that an offence under Penal Code, s. 372, had been committed by the dancing woman, the manager above named, and the parents of the girl.

PETITION under Criminal Procedure Code, ss. 435 and 439, praying the High Court to revise the proceedings of T. Weir, Sessions Judge of Madura, in criminal revision petition No. 42 of 1890, in which he declined to interfere with the proceedings of W. B. Ayling, Acting Head Assistant Magistrate of Madura, dismissing a complaint.

The complaint was made against the manager of a temple, the parents of a minor girl, and a dancing woman, charging them with having committed an offence under Penal Code, s. 372.

The Acting Head Assistant Magistrate had, previously to the above order, forwarded the case under Criminal Procedure Code, s. 202, for preliminary inquiry to the Sub-Magistrate of Tirupatur, who recorded the evidence referred to in the following judgment of the High Court.

The Acting Head Assistant Magistrate in dismissing the complaint said: "From a perusal of the papers it is clear that no "offence has been committed at all. The tying of bottu to show "dedication or the enrolment of this girl among the dancing "girls of the temple is the important ingredient of the offence,

* Criminal Revision Case No. 248 of 1891.

SRINIVASA v. ANNASAMI.

"to prove which there is no evidence. It does not appear that "she had been dedicated with the formal ceremonies pertain-"ing to the occasion. Further, the girl is only nine or ten years "old and not matured. She is at liberty to marry, and the mere "fact of her having been appointed to some menial services in "the temple, (and even that has been cancelled before the date "of this complaint,) would not of itself constitute an offence under "the Penal Code."

The Sessions Judge said in paragraph 2 of his order: "The "evidence does not show that there was any tying of the bottu, "but shows that the girl was only employed to do certain menial "offices in the temple, viz., figuring on the floor before the idol."

The complainant preferred this petition.

The *Acting Advocate-General* (Hon. Mr. *Wedderburn*) for petitioner argued that the evidence showed that the girl had been dedicated to the temple service and referred to *ex-parte Padmavati*(1) and *Weir's Criminal Rulings*, 3rd edition, p. 215.

S. Subramanya Ayyar (*Bhashyam Ayyangar* with him) argued that mere registration as holder of the "kothu" miras was not enough, and that the tying of the bottu was a necessary preliminary to a girl entering on the occupation of a dasi.

JUDGMENT.—The only question which is before us is whether the Sessions Judge was right in holding that there had been no such disposal of the minor as would bring the accused under section 372, Indian Penal Code. The Acting Head Assistant Magistrate was of opinion that no offence had been committed, because there was no evidence of the tying of the bottu, which in his opinion forms the important ingredient of the offence. The Sessions Judge would appear, from paragraph 2 of his order, to have been of the same opinion. In our judgment there may be such disposal of a minor as is contemplated by section 372 even though bottu is not tied. The facts of this case have not been set forth either by the Acting Head Assistant Magistrate or by the Sessions Judge. If they had been attentively considered, we hardly think the lower Courts would have come to the conclusion that there was no ground for proceeding against the accused. The facts to be gathered from the report of the second-class Magistrate of Tirupattur, are as follows:—

(1) 5 M.H.C.R. 415.

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In November 1889, fourth accused, a dancing girl of Thirukoshtiyur Devastanam, falsely styling herself the mother of a girl, Pichaimuthu, petitioned the first accused, the devastanam manager, to "appoint her daughter" to her (fourth accused's) kothu miras. The first accused, without, so far as appears from the record, making any inquiry, endorsed on the petition that the applicant's request might be complied with if there was no objection. The Tahsildar of the temple replied that the applicant had no objection, and that he had accordingly ordered that "Pichaimuthu should be entered in the pay abstract *like other dancing girls*." It is not denied that the first accused received this communication, nor that Pichaimuthu was entertained and employed about the temple. From November 1889 to May 1890 Pichaimuthu's name was accordingly entered in the pay abstracts along with the names of the other dancing girls and she performed work in the temple. We consider that these facts constituted *primâ facie* such a disposal of the minor with the knowledge that it was likely that she would be employed or used for immoral purposes as to justify the magistrate in putting the accused upon their trial, and that the rejection of the complaint on the ground that there had been no such disposal as was contemplated by section 372 was illegal. We set aside the orders of the Courts below; but as the Acting Head Assistant Magistrate has already expressed an opinion on the case, we order it to be transferred to the District Magistrate of Madura for disposal.

APPELLATE CIVIL.

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

1891. Aug. 17, 18.

GAJAPATI (PLAINTIFF'S REPRESENTATIVE), APPELLANT,

v.

BHAGAVAN DOSS (DEFENDANT), RESPONDENT.*

Mutt—Relation between the founder's representative and the Mahant—Agreement by the Mahant on his appointment—Power of dismissal.

In the absence of a deed of endowment the obligations of the head of a mutt to the representative of the founder can only be deduced from the usage of the institution.

In a suit by the representative of the founder to remove the defendant from the headship of a mutt, it appeared that the usage was for the head of the institution for the time being to nominate his successor, and for the representative of the founder to sanction the nomination and invest the nominee with a *sade* on his installation, and that the defendant had asked the plaintiff to appoint him and had undertaken on his appointment to furnish to him accounts of the income and expenditure of the mutt:

Held, that the plaintiff was not entitled to remove the defendant from office on the ground of his refusal to furnish accounts.

APPEAL against the decree of E. C. Johnson, Acting District Judge of Ganjam, in original suit No. 8 of 1889.

Suit by the Zamindar of Parlakimidi to remove from his office the Mahant of the Devi Mutt at Parlakimidi. The plaintiff alleged that he had dismissed the defendant on 25th November 1885 for not furnishing him with the accounts of the mutt, &c., and that he had been justified in doing so under his authority as representative of the founder of the mutt and also under a document executed by the defendant on his appointment as Mahant.

The District Judge dismissed the suit.

The plaintiff preferred this appeal.

Anandacharlu for appellant.

Pattabhirama Ayyar for respondent.

JUDGMENT.—It is an essential part of the plaintiff's case, as disclosed in his plaint, that he is the hereditary trustee and manager of the mutt, the subject of the suit. This he has altogether failed to prove and, on the contrary, the evidence—oral and documentary

* Appeal No. 51 of 1890.

—shows that the mutt and some of the property now attached to it were dedicated to the worship of Madana Mohanaswami by the plaintiff's ancestor, and the management was handed over to a Brahman ascetic who, and his successors, have continued to manage the mutt and receive and administer its revenues down to the present time.

The mutt is a religious institution under the management of Byragi Brahman ascetics, and the plaintiff and his family not being ascetics could not take an active part in the management of its affairs. The legal relation, therefore, between plaintiff and defendant is not that of a trustee and his servant, but that of the representative of the founder and the manager of the institution.

The obligations attaching to that relation can, in the absence of any deed of endowment, only be deduced from the usages of the institution. As the plaintiff is not the hereditary trustee and manager, the question is whether the usage of the institution justifies his claim to remove the defendant from the headship of the mutt and the custody of its properties, which is the foundation of his suit. It is argued before us that this claim rests upon the fact that the plaintiff and his ancestors have always appointed the ascetics who have been successive heads of the mutt, and that the right of appointment involves a right of dismissal. And as against the defendant it is said the case for a right of dismissal is strengthened by the fact that, on his appointment, he executed exhibit N in favour of the Zamindar, by which he requested that he might be appointed, and undertook to render accounts of the income and expenditure.

But we agree with the District Judge that the power of appointment, which the plaintiff and his predecessors are shown to have exercised in respect to the headship of this mutt, is a limited one and does not involve the power of dismissal. The appointments have always been made from among the *chelas* or disciples of the last head of the mutt, and have really amounted to nothing more than that the Zamindar, as a powerful supporter and large benefactor of the mutt, has sanctioned the choice of a successor from among his *chelas* made by the head for the time being, and has invested the successor with a *sadi* on his installation.

With the exception of the series of documents marked as exhibits J to J3, which are accounted for by the fact that the Collector called for accounts and particulars of the property and

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income of the mutt, which the Zamindar obtained from the then head, there is no evidence that the heads of the mutt ever furnished accounts to the Zamindar, or except in the case of the demand made upon defendant before suit, were ever asked to furnish accounts.

And we think the defendant's undertaking in exhibit N to furnish accounts cannot operate to alter his *status* so as to render himself liable to dismissal for not furnishing accounts. If he was not by the terms on which he held his office liable to render accounts, he could not, by any voluntary promise on his part, impose on himself an obligation which had no legal existence. The obligation to render accounts does not appear to form part of the usage of the institution, nor does it appear that the provision in exhibit N for rendering accounts was ever acted upon until the demand before suit. No instance of a Zamindar having ever dismissed the head of this mutt, or having appointed a *chela* other than the one nominated by the head of the mutt, is proved. It is urged that it was open to the Zamindar to appoint any *chela* at his discretion. In this case it is not necessary to determine the precise nature of the Zamindar's right of appointment. It is sufficient to observe that he did appoint the defendant and that his right of appointment is a qualified right and does not necessarily involve the power of dismissal. It was for the plaintiff to prove his right to dismiss the defendant and we agree with the District Judge that he has failed to do so.

In this view of the case, the reasons alleged for the dismissal are immaterial, but we may as well express our opinion upon the evidence on this part of the case.

Three grounds of dismissal were originally alleged (1) misappropriation of mutt funds, (2) immorality, and (3) refusal to render accounts. The first is given up in appeal. As to the second the evidence is so vague and improbable that we cannot say the District Judge was in error in declining to accept it. As to (3), as mentioned above, in our opinion, according to the usages of the institution, the defendant was under no legal obligation to render accounts to plaintiff, and his refusal or failure to do so is no justification for his dismissal.

The suit was rightly dismissed by the District Judge, and we confirm his decree and dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

APPARAU (PLAINTIFF'S REPRESENTATIVE), APPELLANT,

v.

NARASANNA (DEFENDANT), RESPONDENT.*

1891. July 13, 28.

Rent Recovery Act—Act VIII of 1865 (Madras), s. 9—Lands irrigated from Kistna anicut—Act VII of 1865 (Madras), s. 4—Rate of rent—Restriction as to felling trees—Implied contract.

A zamindar holding lands irrigated by the Kistna anicut, from whom no extra peishcush is on that account levied by Government, is not entitled to impose on his tenants a "wet" rate of rent without the permission of the Collector.

The fact that the tenants have paid rent at such a rate for six years is not sufficient to establish an implied covenant to continue to do so.

It is allowable for a landlord to insert in his pattas a term to the effect that the tenant shall not fell trees without his consent.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 9 of 1887, modifying the decree of P. Ramachandra Rau, Acting Head Assistant Collector, in summary suit No. 39 of 1886.

Suit by a zamindar to enforce the acceptance of a patta and the execution of a corresponding muchalka by the defendant under the Madras Rent Recovery Act.

The facts of the case are stated sufficiently for the purposes of this report in the judgment of the High Court. The proposed conditions of the patta therein alluded to as mentioned in paragraps 15—17 of the judgment of the District Judge were stated by him as follows, viz. :—

"The first of these conditions recites that the raiyats are not "to neglect or refuse to take a patta in succeeding faslis. If a "raiyat cultivates so neglecting or refusing to take a patta he is "to pay half his sist in excess as a penalty.

"The second condition stipulates that raiyats converting dry "land into wet or garden land must pay wet or garden rates. If "it is without the zamindar's permission, the rates on neighbour-"ing lands must be paid. If it is with the zamindar's permission

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* Second Appeal No. 552 of 1889.

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"rates will be fixed. The third condition is that if cattle graze "or heaps are placed on any land in the zamindari, the trespasser "is to pay double the sist for the first offence, quadruple sist for "the second offence, and sextuple sist for the third offence, and "so on."

The provision in the patta as to trees to which the memorandum of objections related was as follows:—

"As the matarfa (tax) on the fruit trees, palmyra trees and "Indian date trees standing on the said lands and the tumma "(babul) trees thereon are not included in the said sist, you "should obtain my permission and fell tumma (babul) trees only "if required for cultivation."

The Head Assistant Collector made certain modifications in the patta and it was further modified by the District Judge.

The landlord preferred this second appeal and the tenant filed a memorandum of objections.

Bhashyam Ayyangar and *P. Subramanya Ayyar* for appellant.

Mr. *Ramasami Raju* and *Pattabhirama Ayyar* for respondent.

PARKER, J.—The facts found are that a general village rent was paid up to fasli 1280, in which year a system of individual holdings with rates per acre was introduced. For four years there were quarrels and disturbances about the rates of rent which the zamindar wished to levy, but for faslis 1285—1291 the rates paid have been Rs. 2-9-0 for dry and Rs. 8-8-0 for wet. The tenants object to the wet rate, and claim that they are only liable to pay the dry rate (Rs. 2-9-0 per acre) *plus* Rs. 4 Government tax upon dry land converted into wet by the water of the Kistna canal, thus distinguishing this wet land from the old mamul wet for which nanjah rates have to be paid to the zamindar.

After careful consideration I find myself unable to distinguish this case from *Narasimha* v. *Ramasami*(1).

The six years (fasli 1285—1291) during which these rates have been paid are not sufficient to establish an implied contract. No extra peishcush is levied from the zamindar, nor is it found that he has contributed to the cost of the improvements. In either case he has not obtained the sanction of the Collector to the

(1) I.L.R., 14 Mad., 44.

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enhancement of rent and that the charge of such consolidated assessment is an enhanced rate there is no doubt. The argument that the zamindar is only charging the mamul wet rates is of no force, since it is clear that no extra rate is demanded from him and section 4, Madras Act VII of 1865, exempts him from extra payment for lands to which he is entitled to irrigation free of separate charge.

I agree with the District Judge that the three conditions referred to in paragraphs 15—17 of his judgment must be omitted. No argument was addressed to us with respect to the first and third, while the retention of the second would be inconsistent with the principle of this decision.

The memorandum of objections was not pressed except with regard to the trees. *Primâ facie* a tenant has no right to cut down trees without his landlord's permission and I can see no reason to omit this clause in the patta.

I would dismiss this second appeal and memorandum of objections with costs.

WILKINSON, J.—I am of the same opinion. It was held in *Ramesam* v. *Bhanappa*(1) that the water tax of Rs. 4, which Government levies upon all lands irrigated from the Kistna channels, is not rent, and that if the landlord desires to add the tax to the rent and claim it as rent, he must obtain the sanction of the Collector. I can see no reason why the zamindar should be allowed to charge the mamul wet rate of Rs. 8-8-0 upon dry lands converted into wet by the use of the Kistna water, seeing that his doing so would be to enhance the rent from Rs. 6-9-0 to Rs. 8-8-0 without the consent of the Collector.

(1) I.L.R., 7 Mad., 182.

APPELLATE CIVIL.

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

1891. August 28. September 22.

MAHOMED AND OTHERS (PLAINTIFFS, NOS. 2 TO 11), APPELLANTS,

v.

SITARAMAYYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 55 (2)—Vendor and purchaser—Covenant for title, waiver of—Power of attorney, construction of.

When a vendee, who sues to cancel a sale on the grounds of fraud, misrepresentation or concealment by his vendor, fails to establish these grounds of relief, he is not entitled to set up in second appeal a case founded on the implied covenant for title under Transfer of Property Act, s. 55 (2).

SECOND APPEAL against the decree of H. T. Ross, Acting District Judge of Madura, in appeal suit No. 538 of 1889, affirming the decree of S. Gopalachariar, Subordinate Judge of Madura (East), in original suit No. 58 of 1888.

On 21st March 1888, defendants Nos. 1—4, who are coparceners, executed to plaintiff No. 1—

(1) A sale-deed (H) for Rs. 4,575, of one-fourth village of Kottiyarkottai, five other pangus in Kottiyarkottai, five pangus in Tirupalagudi, and the east half of a house-site in Ramnad.

(2) A mortgage-deed (J) for Rs. 440, of one and odd pangus in Kottiyarkottai, one and odd pangus in Tirugalagudi, and the west half of the house-site aforesaid.

On the same day, defendant No. 5 had executed to defendants Nos. 1—4 a sale-deed (G) of all the above properties which he (fifth defendant) had acquired as execution-purchaser in a suit (original suit No. 160 of 1883) instituted against them by him as agent for the holders of a mortgage from them in which he, as such agent, obtained a decree for sale.

The present suit was instituted by plaintiff No. 1 (since deceased) to obtain a cancellation of the sale and mortgage

* Second Appeal No. 941 of 1890.

(H and J) and a refund of Rs. 3,661 alleged to have been paid by him towards the consideration therefor, on the grounds :—

(*a*) That the properties sold and mortgaged to him by defendants Nos. 1—4 were charity properties, originally held by them as mere trustees, which they and their vendor, the fifth defendant, fraudulently represented to be their ancestral Dharmasanam properties, originally held by them as proprietors under a personal grant.

(*b*) That the fifth defendant had no power to sell the properties to defendants Nos. 1—4 having purchased them in the execution-sale, not on his own account, as was fraudulently represented to plaintiff No. 1, but merely as an agent of the original mortgagees who had not authorised the subsequent sale.

(*c*) That no effect was given to the transactions by transfer of possession to first plaintiff.

Defendant No. 5, the executant of exhibit G, had received jointly with his accountant, one Narayana Pillai, a power of attorney (filed as exhibit B) from the original mortgagees of the land in question which was translated as follows :—

"You both, on our behalf, shall be our representatives and "agents, and authorised to exercise the power in respect of the "one-fourth village and collect the arrears, relating to the former "incomes, &c., of the village, to institute suit for the previous "incomes to obtain the incomes, &c., all profits after tendering "patta to the raiyats from the present fasli and making "endeavours for conducting cultivation, and to deliver to us with "accounts; to appear and conduct civil, criminal and revenue "functions regarding the said one-fourth village and get them "legally disposed of, to raise loan, &c., as our agents for expenses as "required, to receive money, &c., and increase the funds to receive "and pay us the mortgage money after the expiry of the term "of mortgage or subsequent thereto or when you get it, to "continue to pay Circar paruppu; and to sue for the loss of "mortgage amount when there is difficulty in recovering the "incomes of the village. We shall admit all acts as well as all "reasonable acts done by you in the said matter, as if they were "done by us personally."

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

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The Subordinate Judge held that possession of the land which was, in fact, burdened with a charitable trust had been delivered to plaintiff No. 1, and that no fraud had been practised on him and accordingly dismissed the suit, and his decree was affirmed on appeal by the District Judge.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Sundara Ayyar* for appellants.

Ramachandra Rau Saheb for respondent No. 1.

Subramanya Ayyar for respondent No. 5.

JUDGMENT.—The argument addressed to us by the learned vakil for the appellants may be summarized as follows. Accepting the findings of the Lower Courts that there was no fraud, misrepresentation or concealment on the part of defendants as to the title of the properties they professed to sell and mortgage, the plaintiffs are entitled to succeed because section 55, clause 2 of the Transfer of Property Act imports into the contract of sale an absolute covenant for title on the part of the defendants, and the facts as they appear in the judgments of the Lower Courts show that the defendants could not make a proper title to the properties sold and mortgaged.

It is to be observed that this was not the case set up for appellants (plaintiffs) in the Lower Courts. The plaintiffs sued to set aside the sale and mortgage in question on the ground of fraudulent misrepresentation and concealment of facts relating to the title by the defendants. Both Courts found that there was no misrepresentation or concealment, and now the plaintiffs seek to fall back upon another ground of relief, viz., their rights under the covenant for title given them by the Transfer of Property Act. We think that they should not be allowed to do this in second appeal. No issue was raised upon this point and defendants had no opportunity of meeting it or of adducing evidence as they might have done, to show that there was a contract to the contrary which would prevent the incident of a covenant for title attaching to the transaction. Plaintiffs chose to go to trial upon the ground of fraudulent concealment and misrepresentation and having failed on that ground cannot at this stage be allowed to start a new case which would involve new issues and a fresh inquiry.

We think this appeal ought to be dismissed on this ground alone, but we are also of opinion that upon the facts found the

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plaintiffs' case would fail even if it were based upon the covenant for title conferred by the Transfer of Property Act.

The defects of title alleged as ground for the rescission of the sale are two: first, that as to one-fourth of the village of Kottiyarkottai it was not the absolute property of the defendants 1 to 4 but was charity property dedicated to the support of a chuttrum; second, that defendant No. 5 purchased the properties which he professed to sell to defendants Nos. 1 to 4 as agent for other persons and, therefore, could not sell without the consent of those persons. The second objection to the title may be disposed of at once by saying that there is nothing to show that the fifth defendant's principals ever objected to his selling. On the contrary, one of them was the defendant's second witness and stated that he did not object. The other is dead, and the Lower Courts disbelieve the rights of the person who claims as his representative to object to the transaction. Moreover, we agree with the District Judge that it is not shown that the act of the defendant No. 5 in selling to defendants Nos. 1 to 4 was beyond the scope of the authority given him by the power of attorney, exhibit B, to recover the debts due to his principals. As against defendant No. 5 it is to be noticed that the plaintiffs can have no cause of action except on the ground of fraud, for their contract for sale was with defendants Nos. 1 to 4 who purchased from defendant No. 5.

As to the first objection to the title the conduct of the first plaintiff at the time of, and since the contract for, sale, in our opinion, amounted to a waiver of the defect in the title even if it existed, which is more than doubtful. The District Judge finds that "the probability and the evidence is overwhelming that everything about this one-fourth village and all the papers connected with it were explained by the first and fifth defendants to the first plaintiff in the negotiations which ended in the sale and mortgage now sought to be cancelled." It is not shown to us that there is no evidence to support this finding, and, on the contrary, we see in some of the documents and evidence brought to our notice much to lead us to think that it is well founded.

With this knowledge, then, of the alleged defect in the title plaintiff No. 1 paid the consideration and entered into possession of the property, and we think he must be taken to have waived the defect in the title, a defect which, it may be observed, even if it exists, does not go to the root of the title but merely saddles

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one part of the property sold with a burden in favour of a charity. That there is any real danger of any disturbance to the plaintiff's enjoyment of the property by reason of the supposed claims of this charity we do not believe. The proceedings taken by the Local Fund Board on behalf of the charity appear to have been abandoned and there is nothing to show that the claim of the charity, if it ever existed, has been recognized or enforced for a considerable period of time.

On the whole, we agree with the Lower Courts that no case has been made out for setting aside the sale and mortgage in question and we must dimiss this second appeal with costs. A separate set for first and fifth respondents respectively.

APPELLATE CIVIL.

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

1891. March 11. August 31.

CHINNAN (PLAINTIFF), APPELLANT,

v.

RAMACHANDRA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, *ss.* 85, 91—*Parties—Redemption—Suit by puisne mortgagee—Joinder of mortgagor on second appeal—Plaintiff, a name-lender.*

On second appeal against a decree dismissing a suit which had been brought by a puisne mortgagee to redeem a prior incumbrance, it was ordered that the mortgagor be brought on to the record.

On its appearing that it had not been intended that the plaintiff should take any interest under the mortgage sued on:

Held, that the second appeal should be dismissed.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 167 of 1887, confirming the decree of T. Venkatarama Chettiar, District Munsif of Pattukotta, in original suit No. 123 of 1886.

The plaintiff sued as mortgagee under an instrument of usufructuary mortgage of $14\frac{3}{32}$ pangus of land, dated 8th April 1881 and executed in his favour by one Subramania Gurukkal, (which was filed in this suit as exhibit A,) to redeem a prior

* Second Appeal No. 1333 of 1888.

CHINNAN v. RAMA-CHANDRA.

mortgage executed in favour of the father of defendant No. 1 and to recover the land comprised therein which was in the possession of the other defendants. The mortgagor was not joined as a party to the suit. Among the defences raised on the pleadings, it was alleged that the mortgage set up by the plaintiff, even if it was a genuine document, was fraudulent and void as against the defendants. The third issue was framed as follows:—

"Whether the said Subramania Gurukkal usufructuarily "mortgaged after the death of the said Saminatha Gurukkal with-"out issue, and on the 8th April 1881 for Rs. 5,000, $14\frac{3}{32}$ pangus "(including those already mortgaged to the first defendant's "father) to the plaintiff?"

The District Munsif passed a decree dismissing the suit. The Subordinate Judge, on appeal, affirmed the decree of the District Munsif recording as to the third issue a finding "that the plaintiff's mortgage is not a *bonâ fide* one and he has therefore no right to claim redemption."

The plaintiff preferred this second appeal.

Ramasami Raju and *Subramanya Ayyar* for appellant.

Bhashyam Ayyangar and *Pattabhirama Ayyar* for respondents.

JUDGMENT.—The third issue has apparently been tried under a complete misapprehension of the law.

Assuming that the person, who executed the mortgage in the plaintiff's favour, was the owner of the property, the only question is whether in fact he did mortgage it to the plaintiff. That is the only real question. It is found by the Subordinate Judge that the sums stated in the mortgage document to have been advanced on the security of it have not really been advanced, and on that finding apparently the Subordinate Judge arrives at the conclusion that the plaintiff's mortgage is "not a *bonâ fide* one" and that he has no right to claim redemption. The expression "*bonâ fide* mortgage" is a very loose and indefinite one, and it is not clear what the Subordinate Judge means. *Primâ facie* when the execution of a mortgage or other conveyance is proved—and here apparently it was proved and not denied by the mortgagee—further evidence is not required to show that the purchaser has taken the interest which the document purports to convey. It is not necessary for him to prove as against a third person that the consideration passed, and proof that the consideration mentioned did not pass is of no avail to show that the interest which the instrument

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purported to convey was not conveyed to the purchaser. Such proof is only important, when taken with other circumstances, it tends to show that the instrument was a mere sham not intended to convey any interest to the ostensible purchaser at all.

In the present case, if the plaintiff's mortgagor is content that the plaintiff should redeem, the defendants can have no reason to object; but for that reason the mortgagor ought, as section 91 of the Transfer of Property Act requires, to be brought on the record.

We must ask the Subordinate Judge, after first adding the mortgagor or his representative as a defendant, to return a revised finding on the third issue, and, if he finds in favour of the plaintiff on that issue, to return findings on the other question raised in the appeal.

Findings to be returned within a month after the re-opening of the Subordinate Court, and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

[The Subordinate Judge, in compliance with the above order, returned a revised finding which was to the effect that the mortgage deed sued on was executed for the benefit of one Vellian Chetty and not for that of the plaintiff who had paid nothing for it. He observed that the plaintiff's case was not that he had obtained the mortgage *benami* for Vellian Chetty (who was his cousin), but that he had taken it for his own benefit.]

The second appeal having come on for final hearing, the Court delivered judgment as follows:—

JUDGMENT.—It is now found that, as far as the plaintiff is concerned, it was not intended that he should take any interest under exhibit A. We must accept the finding observing, however, that the observations of the Subordinate Judge are very confused.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

PATCHA AND OTHERS (DEFENDANTS 1—9), APPELLANTS,

v.

MOHIDIN (PLAINTIFF), RESPONDENT.*

1891, July 17, 24.

Limitation Act—Act XV of 1877, sched. II, art. 127—Joint family property—Suit by Muhammadan heir for his share in an undistributed estate.

The words "joint family property" in Limitation Act, 1877, sched. II, art. 127, are intended to refer to joint family property in the Hindu sense of the term.

A Muhammadan sued, as heir in 1888, to recover his share in the property of his grandfather, which had been enjoyed jointly by his descendants from his death, which occurred in 1840, up to a recent date. It did not appear that the family was governed by any special custom:

Held, that the suit was not governed by Limitation Act, 1877, sched. II, art. 127, and was barred by limitation.

APPEAL against the decree of H. R. Farmer, Acting District Judge of Cuddapah, in original suit No. 14 of 1888.

It was alleged in the plaint that the plaintiff's maternal grandfather, Kader Saheb, died twenty years before this suit, leaving him surviving a widow, two sons, Madar Saheb and Kassim Saheb, and a daughter, Lal Bee, who was the plaintiff's mother; that after his death his property had been jointly enjoyed by his heirs and legal representatives; and that his widow, and Madar Saheb and Lal Bee had since died—Madar Saheb leaving several children. The defendants were the heirs of Madar Saheb, Kassim Saheb and their transferees.

The prayer of the plaint was for the partition and delivery of possession of the plaintiff's share under the Muhammadan law of inheritance in the properties left by Kader Saheb and Madar Saheb.

The District Judge stated his findings as to the history and condition of the family as follows:—

"I find that the family by which the suit property was acquired "was a trading family of Mussalmans and a family, upon which, "like that of the plaintiff's father, the Muhammadan law sat "very lightly. This is shown by the fact that, when the repre-

* Appeals Nos. 13 and 105 of 1890.

PATCHA v. MOHIDIN.

"sentatives of the two brothers, Madar and Kassim, divided their "property, Madar's sons were allowed to take the share which "their grandmother, Morad Bee, had inherited from their father, "whereas Kassim, as son of Morad Bee, was entitled to two-thirds "of that property. Again the plaintiff himself was at first allowed "a share in his paternal grandfather's property, though his father "had predeceased his grandfather; afterwards, when the plain-"tiff's uncle consulted those who knew the law and found that "plaintiff had no legal claim, he took from him the property "which he had been allowed to hold on the mistaken impression "that he inherited it from his grandfather through his father who "predeceased his grandfather. I further find that this trading "family, who seemed to have acted as they thought fair and "reasonable, rather than in accordance with the complicated rules "of Muhammadan law with regard to the distribution of family "property, were content to recognise one man as head of the "family, and that he was allowed to manage the business, while "the other members of the family allowed him to act as banker, "took a subordinate part, and were content with such provision as "he chose to make for their maintenance. Kader, the grandfather "of plaintiff and of 8th, 10th and 11th defendants, may be re-"garded as the founder of the family for the purpose of this suit. "He was succeeded by his sons, Madar and Kassim. After "Madar's death about 1859, his brother Kassim became the leading "member of the family, and, since Kassim's death, in 1882, his "place has been taken by his son Patcha Miah, the first defendant. "I find that Kader died about 1840, that his son Madar died about "1859, that his widow, Morad Bee, died about 1872, his daughter "Lal Bee in 1879 or 1880, and his son Kassim in 1882."

Upon these facts, after reference made to Regulation II of 1802 (Madras), s. 18, and Act XIV of 1859, s. 18, Act IX of 1871, sched. II, arts. 122, 145, the District Judge held that the suit was not barred by limitation, but came with the provisions of Act XV of 1877, sched. II, art. 127, and he passed a decree as prayed.

Defendants 1—9 preferred this appeal.

Parthasarathi Ayyangar and *Sivagnana Mudaliar* for appellant.

Mahadeva Ayyar for respondent.

JUDGMENT.—The plaintiff's rights are derived through his mother Lall Bee who died in 1879. The rights of this lady were

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derived from her father who died about 1840 and from her mother who died in 1872, but she never obtained any distribution of her share. The Judge has held that the property was joint family property from which Lall Bee was never excluded during her life, and from which plaintiff was not excluded till 1882, and that the suit is governed by article 127, Limitation Act.

The Judge finds that the family was a trading family of Mussalmans, upon whom the Muhammadan Law sat very lightly. It was not alleged, however, that there was any special family custom by which the rules of Hindu Law, as to joint family property, would apply. On the contrary, the Judge points out that when in plaintiff's own family he had at first by mistake (under the rules of Muhammadan Law) been allowed a share in his paternal grandfather's property, it had afterwards been taken from him when the mistake was pointed out by friends who knew the Muhammadan Law. This case differs therefore from *Khatija* v. *Ismail*(1), in which it was held that the class called "Navayat" (the descendants of Arab immigrants and Hindu Konkanis) had adopted Hindu customs.

Nor are the rights which plaintiff seeks to enforce consistent with joint family rights under Hindu Law. Under Hindu Law the plaintiff's mother could have had no joint rights in her father's estate, nor would her mother have been entitled to anything but maintenance.

The decision in *Bavasha* v. *Masumsha*(2) was quoted as an authority for the propositions that joint family property includes property left by a deceased Muhammadan and divisible among his heirs until it is divided, and that article 127 of the Limitation Act applies to a suit for a division of such property. With all respect we cannot agree with the learned Judges in either of these propositions. It seems to us impossible that property, which was in no respect joint family property in the Hindu sense up to the date of the deceased's death, should become joint property in the Hindu sense because of his death, and we cannot but think the words "joint family property" in article 127 were intended to refer to joint family property in the Hindu sense of the term. We are strengthened in this opinion by the view taken by the Full Bench of the Allahabad High Court in *Amme Raham* v. *Zia Ahmad*(3).

(1) I.L.R., 12 Mad., 380. (2) I.L.R., 14 Bom., 70. (3) I.L.R., 13 All., 282.

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The Legislature had no doubt some reason in repealing the word "Hindu" and substituting the word "person," but it may have been done as pointed out by Mahmood, J., with the intention of meeting cases in which by special custom Muhammadan families were governed by the Hindu Law of succession, or it may have been intended to meet cases where a non-Hindu had become the purchaser of a Hindu's undivided share in joint family property.

Taking this view we are of opinion that the property left by Kader Saheb who died in 1840 never became joint family property, but at his death became separate property in which each individual owner became entitled to his or her separate share.

The suit is therefore barred. We would reverse the decree of the District Judge and dismiss the suit with costs throughout.

The stamp fee due to Government must be recovered from the plaintiff.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

1891. Aug. 4, 7, 24.

KASMI AND OTHERS (DEFENDANTS Nos. 1 TO 3 AND 5), APPELLANTS,

v.

AYISHAMMA AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 7 TO 9), RESPONDENTS. *

Limitation Act—Act XV of 1877, sched. II, arts. 123, 127, 144—Suit by a Mapilla widow for her share in her husband's property.

The widow of a Mapilla, who had died intestate more than fourteen years before suit sued to recover a one-sixteenth share of the property left by him and his brother:

Held, that although the parties were Mapillas the suit was governed by art. 123 of the Limitation Act and was accordingly barred.

SECOND APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suit No. 53 of 1889, affirming the decree of O. Chandu Menon, District Munsif of Shernad, in original suit No. 291 of 1888.

Hydroskutti, a Mapilla, who died in 1875, was the husband of the plaintiff; his brother Mamodkutti, who predeceased him,

* Second Appeal No. 794 of 1890.

KASMI v. AYISHAMMA.

was the father of the defendants. The plaintiff brought this suit in 1888 against the appellants and others, for the partition and delivery of possession of one-sixteenth share of the property left by these two persons, to which the plaintiff claimed to be entitled as the widow of Hydroskutti.

The District Munsif passed a decree for the plaintiff as prayed, which was affirmed, on appeal, by the District Judge.

The defendants preferred this second appeal.

Narayana Rau for appellants.

Sankara Menon and *Govinda Menon* for respondent.

JUDGMENT:—The question for decision in this second appeal is whether the plaintiff's suit is barred by limitation. The District Judge held that the case was governed by article 127 of the Limitation Act and that the suit was therefore within time. On behalf of the appellants, it is argued that article 123 applies, whereas respondent's pleader maintains that article 144, if any, is the proper article to apply.

The suit was instituted by a Muhammadan (Mapilla) lady who sought to obtain a declaration of her right to, and possession of, a certain share in property which, she alleged, had belonged to her husband, Hydroskutti, who died fourteen years before the suit was filed. Admittedly, Hydroskutti died intestate. This then being a suit for a distributive share of the property of an intestate, article 123 is the only one that applies, and the suit not having been brought within twelve years from the time when the share became deliverable it is clearly barred.

But it is argued, on behalf of the respondents, that coparcenery among Mapillas has been judicially recognized, and that the undivided family property having been held by the members jointly, time did not begin to run against the plaintiff until she was excluded. We are not aware in what case coparcenery has been judicially recognized as the custom of Mapilla families in Malabar. In *Ammutti* v. *Kunji Keyi*(1), although it was remarked that Mapillas in Malabar ordinarily follow closely the Hindu custom of holding family property undivided, that was not the point on which the decision of the case rested. We have referred to the records of the case and find that there was no issue as to the customs of the Mapillas in Malabar. Moreover, the case now set up

(1) I.L.R., 8 Mad., 452.

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was not the case put forward in the plaint. There it was asserted that the greater portion of the immoveable property in schedule A the moveable properties in schedule B, and part of the buildings in schedule C had been acquired by Kasmi, the father of Hydroskutti; that after his death (in 1859) the property had been improved by Hydros and his brother Mamod (father of appellants), who died in 1875, and that since their death plaintiff had been in possession of certain items, the remaining being in the possession of first or seventh defendant. Participation in the possession or enjoyment of the property held by the defendants was never pleaded, but plaintiff offered apparently to put the property, of which she has sole possession, into hotchpot provided she got a one-sixteenth share in the whole of the property left by Hydros and Mamod.

We have already held in *Patcha* v. *Mohidin*(1) that article 127 does not apply to Muhammadans, and article 144 can have no application to this case, because, as held by the Privy Council, that article only applies where there is no other article which specially provides for the case, and it applies only to immoveable property. In the present case, article 123 clearly applies, and plaintiff's suit, not having been instituted within twelve years from the date of Hydros' death, is barred. The decrees of the Lower Courts, so far as they affect the first, second, third, and fifth defendants (appellants) must be set aside and plaintiff's suit as against them dismissed with costs.

(1) See *ante* p. 57.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

SAMIAPPA AND OTHERS.*

1891. March 31. September 9.

Evidence Act—Act I of 1872, ss. 80, 132—Self-incriminating statements of witness—Proof and admissibility of depositions containing such statements in proceedings against the witness.

A revenue official was charged with the offence of attempting to receive a bribe from certain raiyats who gave evidence for the prosecution, and he was convicted. He subsequently charged the raiyats with having conspired to bribe him, and in their trial their depositions in the previous case were tendered in evidence for the prosecution:

Held, that the depositions should have been admitted in evidence.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code by E. S. Laffan, District Magistrate of Bellary.

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

Mr. *Paulie* for the accused.

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

JUDGMENT.—In calendar case No. 2 of 1889 on the file of the District Magistrate of Bellary, one Murtinjayalu, a classifier in the Revenue Settlement Department, was convicted of an attempt to receive a bribe from a body of raiyats at the rate of four annas an acre of their holdings and was sentenced to two years' rigorous imprisonment. In April last he complained to the District Magistrate against ten raiyats upon whose evidence he was convicted, and charged them with having conspired to bribe him. The District Magistrate transferred the complaint for disposal to the Deputy Magistrate, who, after examining the complainant, issued process. In his examination Murtinjayalu denied that he attempted to take a bribe, whilst he stated that the accused admitted having conspired to bribe him in the evidence which

* Criminal Revision Case No. 602 of 1890.

QUEEN-EMPRESS v. SAMIAPPA.

they gave in calendar case No. 2 of 1889. Seeing that the complaint was in its nature vindictive, the District Magistrate asked the High Court to interfere in revision. In *Queen-Empress* v. *Sunnappa*(1), a divisional bench of this Court considered that there was nothing illegal on the part of the Divisional Magistrate in entertaining the complaint and issuing process, and that it was premature for them as the case was *sub judice* to express any opinion on the other questions discussed by the District Magistrate in his letter of reference. The Deputy Magistrate then tried the accused, discharged the fifth, seventh, eighth and ninth, convicted the first, second, third, fourth, sixth and tenth accused under sections 116 and 161, Indian Penal Code, and sentenced the third and fourth to two months' simple imprisonment and the others to a fine of Rs. 25 each. On appeal the Sessions Judge acquitted the third and fourth accused. Both the District Magistrate and the Judge agree in thinking that the strength of the case for the prosecution depends mainly on the question whether the self-incriminating depositions given by the accused are receivable in evidence. The District Magistrate considers that they are not admissible under the proviso of section 132 of the Evidence Act, though the accused had not claimed an indemnity before criminating themselves. He questions the correctness of the decision of the majority of this Court in *The Queen* v. *Gopal Doss*(2) and drawing attention to the cases of *Manjaya* v. *Sesha Shetti*(3) and *Bhikumber Singh* v. *Becharam Sircar*(4) refers the convictions of the accused to this Court for revision so far as they have not been set aside by the Sessions Judge. As regards the acquittal of the third and fourth accused, the District Magistrate thinks that the Sessions Judge has overlooked section 80 of the Evidence Act, and that the acquittal, if supported, can only be supported for the reason mentioned by him, viz., that the self-incriminating depositions of the accused in calendar case No. 2 of 1889 are not legal evidence. All that was decided in *Manjaya* v. *Sesha Shetti*(3) was that a witness was not liable to be convicted of defamation on a statement made by him as a witness, and that if the statement was false the remedy was by indictment for perjury. Again, in the case of *Bhikumber Singh*

(1) Criminal Revision Case No. 267 of 1890, unreported. (2) I.L.R., 3 Mad., 271. (3) I.L.R., 11 Mad., 477. (4) I.L.R., 15 Cal., 264.

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v. *Becharam Sircar*(1), it was only decided that no suit would lie for damages on account of slander uttered by a witness whilst under examination in a judicial proceeding. There is no real conflict between these decisions and the decision in *The Queen* v. *Gopal Doss*(2), and we feel, therefore, bound to follow it. As observed by the District Magistrate, the Sessions Judge was clearly in error in holding that the depositions given by the third and fourth accused were not legal evidence against them, and that it was not one of the presumptions arising under section 80 of the Evidence Act that the witnesses did actually say what was recorded. Section 80 provides, *inter alia*, that the Court shall presume that the evidence was duly taken, and it could not be considered to be duly taken if it did not contain what the witness actually stated. Having regard to the decision in *The Queen* v. *Gopal Doss*(2) and to the mistake made by the Sessions Judge in declining to act upon section 80 of the Evidence Act, we think that the acquittal of the third and fourth accused was wrong. As the sentence of imprisonment has been suffered in part, we will merely restore the conviction and treat the sentence that has been undergone as sufficient.

APPELLATE CIVIL.

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

1891. August 26.

SARAVANA (DEFENDANT), APPELLANT,

v.

CHINNAMMAL (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, s. 68 (c)—Personal suit for mortgage amount.

In a suit against a mortgagor for the principal and interest due on a mortgage, it appeared that the payment of interest had fallen into arrears, and that the mortgage deed provided that in such event the mortgagee should be entitled to possession of the mortgage premises; the mortgagor falsely alleged that all the interest due had been tendered:

Held, that the mortgagee was entitled to sue as above.

(1) I.L.R., 15 Cal., 264. (2) I.L.R., 3 Mad., 271.

* Second Appeal No. 1015 of 1890.

SARAVANA v. CHINNAMMAL.

SECOND APPEAL against the decree of R. S. Benson, District Judge of South Arcot, in appeal suit No. 291 of 1888, reversing the decree of S. A. Krishna Rau, District Munsif of Chidambaram, in original suit No. 526 of 1888.

Suit for the principal and interest due on a mortgage dated 18th June 1887 : the sum secured was Rs. 300, and the material portion of the mortgage deed was as follows :—

"The interest accruing at the rate of half per cent. per men-"sem shall be paid in cash within the 30th Vykasi of every year. "In default of so paying, the said hypothecated land shall be "enjoyed. I myself shall pay the assessment of the said land."

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

Krishnamachariar for appellant.

Mahadeva Ayyar for respondent.

JUDGMENT.—By the terms of the mortgage document, on failure of payment of interest at the stipulated time, plaintiff was entitled to possession of the mortgaged property. Defendant alleged tender of the interest at the due date, but it is found that this allegation is false. On the findings, therefore, plaintiff was, some months before suit, entitled to possession, and defendant did not put her in possession, but, on the contrary, denied her right to possession on a false plea of tender of the interest. We think, therefore, that, under clause (*c*) of section 68 of the Transfer of Property Act, plaintiff was entitled to sue for the mortgage amount, and the decree of the Lower Court can be supported on this ground. The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

1891. August 28.

KRISHNA (DEFENDANT), APPELLANT,

v.

LAKSHMINARANAPPA (PLAINTIFF), RESPONDENT.*

Rent Recovery Act—Act VIII of 1865 (*Madras*), *ss.* 3, 12—*Mulgeni holding— Right of tenant to relinquish his lease.*

It is not competent to a mulgeni tenant in South Canara to relinquish his lease and free himself from his obligation for rent without the consent of the landlord :

Quære, whether a mulgar is within the class of landholders defined in Rent Recovery Act, s. 3.

SECOND APPEAL against the decree of S. Subbayyar, Subordinate Judge of South Canara, in appeal suit No. 299 of 1889, affirming the decree of K. Krishna Rau, District Munsif of Puttur, in original suit No. 103 of 1889.

The plaintiff, who was a *mulgar* in South Canara, sued to recover Rs. 18-8-0, being arrears of rent, with interest, due under a mulgeni lease granted to the defendant on 16th November 1877. The defendant pleaded that he had intimated to the plaintiff in the beginning of the year for which rent was claimed, that he had relinquished possession of the land and his rights under the mulgeni lease, and that accordingly the plaintiff was not entitled to recover. He further alleged that he had been compelled to quit the land, as the plaintiff had failed to get certain works on the land carried out as promised by him. This allegation was held by both the Courts not to have been substantiated, but no issue was framed with reference to it.

The District Munsif passed a decree for the plaintiff, providing that he should recover the decree-amount "from the defendant or by sale of the property mentioned in the plaint." This decree was affirmed on appeal by the Subordinate Judge. Both decrees were passed on the ground that it is not open to a mulgeni tenant to surrender his rights under the lease and thereby free himself of liability for rent without the consent of the landlord.

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* Second Appeal No. 1039 of 1890.

KRISHNA v. LAKSHMI-NARANAPPA.

The defendant preferred this second appeal on the following grounds :—

"The lower Courts were wrong in deciding that defendant "could not relinquish his lands in favour of his landlord.

"Defendant having relinquished his lands to plaintiff as per "I and II is not liable to pay plaintiff the rent sued for.

"The lower Courts should have framed an issue as to "whether there was an agreement between plaintiff and defendant "that plaintiff should do certain acts in reference to the land and "whether the non-performance of such acts justified defendant "in relinquishing the lands and the absence of such an issue "prejudiced defendant's case."

Ramasami Mudaliar for appellant.

Mr. *Subramanyam* for respondent.

JUDGMENT.—We are of opinion that section 12 of the Rent Recovery Act does not apply to this case. In the first place it is not shown that the plaintiff comes within the class of landholders defined by section 3, and next it is impossible to suppose that in an Act for consolidating and improving the law for the recovery of rent, it could possibly be intended to repeal the ordinary law relating to contracts and enact that one contracting party could put an end to the contract whenever he chose and the other never. (See the remarks of Holloway, J., page 173, in the case of *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady*(1).)

The appeal is dismissed with costs.

(1) 6 M.H.C.R., 164.

APPELLATE CIVIL.

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

1891. October 8.

NARAYANAN (PLAINTIFF No. 1), APPELLANT,

v.

NARAYANAN AND OTHERS (DEFENDANTS Nos. 2 TO 14 AND PLAINTIFFS Nos. 2 TO 18), RESPONDENTS.*

Civil Courts Act (Madras)—Act III of 1873, s. 12—Jurisdiction—Valuation of relief—Suit for partition.

In an appeal against a decree of a Subordinate Judge dismissing a suit brought by the members of one Nambudri illom against the members of another for partition and delivery of a moiety of the property of an extinct illom, it appeared that the value of the share claimed was less than Rs. 5,000 :

Held that the appeal lay to the District Court. *Krishnasami* v. *Kanakasabai* (I.L.R., 14 Mad., 183) followed.

APPEAL against the decree of E. K. Krishnan Subordinate Judge of Calicut, in original suit No. 16 of 1889.

Suit for the partition and delivery to the plaintiffs of the property formerly belonging to a Nambudri illom known as Varanasi, which was now extinct.

The Varanasi illom and those of which the plaintiff and defendants were respectively members were branches of the same illom. The plaintiffs sued as co-heirs and successors with the defendants of the extinct illom.

The value of the share claimed was Rs. 2,743-1-4.

The Subordinate Judge passed a decree dismissing the suit.

The plaintiffs preferred this appeal.

Bhashyam Ayyangar and *Sankaran Nayar* for appellant.

Sankara Menon for respondents Nos. 1 to 6.

Sundara Ayyar for respondent No. 1.

JUDGMENT.—We think that we should follow the principle laid down in *Krishnasami* v *Kanakasabai*(1) and other cases instead of that laid down in *Vydinatha* v. *Subramanya*(2) on the ground that when the Varanasi illom became extinct there were,

* Appeal No. 132 of 1890.

(1) I.L.R., 14 Mad., 183. (2) I.L.R., 8 Mad., 235.

NARAYANAN v. NARAYANAN.

according to plaintiffs' own case, only two illoms entitled to share in the property of the extinct illom. The value of the suit is, therefore, the value of the share claimed, and the appeal lies to the District Court. We return the appeal to be presented in the proper Court. Appellant must pay respondents' costs in this Court.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Handley.

1891. Nov. 3, 13.

RAMAYYAR (PLAINTIFF), APPELLANT,

v.

SHANMUGAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

Alteration in document sued on, materiality of—Forged attestation.

In a suit on a hypothecation bond, dated before the Transfer of Property Act came into operation, and executed in favour of the plaintiff by the father (deceased) of defendant No. 1, it appeared that, after the bond had come into the hands of the plaintiff, the name of defendant No. 1 had been added as that of an attesting witness and that this was a forgery:

Held, that the plaintiff was not precluded from recovering by reason of this alteration in the bond sued on.

SECOND APPEAL against the decree of W. F. Grahame, District Judge of Tinnevelly, in appeal suit No. 326 of 1889, reversing the decree of V. Kuppusami Ayyar, District Munsif of Ambasamudram, in original suit No. 1022 of 1888.

Suit to recover the principal and interest due on a hypothecation bond, dated 18th January 1881, executed by the father (deceased) of defendant No. 1, who was the father of defendants Nos. 2 and 3. The instrument sued on purported to contain the signature of defendant No. 1 as an attesting witness, but it was found that this signature was a forgery and had been added after the instrument came into the hands of the plaintiff.

The District Munsif passed a decree for the plaintiff. This decree was reversed on appeal by the District Judge, who held that the instrument had been materially altered, and the plaintiff was thereby precluded from recovering on it on the authority of

* Second Appeal No. 1234 of 1890.

Ramasamy Kon v. *Chinna Bhavani Ayyar*(1), *Christacharlu* v. *Karibasayya*(2), *Mohesh Chunder Chatterjee* v. *Kamini Kumari Dabia*(3), *Valiappa* v. *Mahommed Khasim*(4), *Govindasami* v. *Kuppusami*(5), *Sitaram Krishna* v. *Daji Devaji*(6), and *Paramma* v. *Ramachandra*(7).

The plaintiff preferred this second appeal.

Bhashyam Ayyangar for appellant.

Parthasaradhi Ayyangar for respondent No. 1.

SHEPHARD, J.—This is a suit brought upon an instrument of hypothecation executed in the plaintiff's favour by one Ponnappa Pillai, now deceased. The defendants are the sons and grandsons of Ponnappa. It has been found by the District Judge that, after the bond came into the plaintiff's hands, an attestation was added purporting to be signed, but not in fact signed by Ponnappa's son Shanmugam. In the opinion of the Judge this addition, for which the plaintiff was responsible, constituted a material alteration of the instrument, and he accordingly dismissed the suit. There can be no doubt that the object in making this addition was to facilitate the proof of the execution of the instrument as well against the executant as against his son, the defendant. It was the more important to obtain the son's attestation rather than that of a stranger, because when the instrument came to be enforced, it would be material to show that he had admitted the debt and that his interest in the property was therefore affected by the hypothecation. In this respect and also because in the Calcutta case cited in argument—*Mohesh Chunder Chatterjee* v. *Kamini Kumari Dabia* (3),—the added signature was genuine, that case is distinguishable from the present. I am, however, of opinion that the principle laid down in that case applies, and that there is here no material alteration of the instrument within the meaning of the penal rule on which the defendants rely.

It is clear that the adding of an attestation, whether the signature is genuine or not, does not purport to affect the terms of the contract between the parties to the instrument; nothing new is embodied in it, no fresh party is added as was the case in *Gardner* v. *Walsh*(8). The executant of the instrument could not

(1) 3 M.H.C.R., 247. (2) I.L.R., 9 Mad., 399. (3) I.L.R., 12 Cal., 313.
(4) I.L.R., 5 Mad., 166. (5) I.L.R., 12 Mad., 239. (6) I.L.R., 7 Bom., 418.
(7) I.L.R., 7 Mad., 302. (8) L.J., 24 Q.B., 285.

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be affected by the addition prejudicially or otherwise. It cannot be said that the identity or effect of the instrument is altered, for it remains as it was, when executed by Ponnappa Pillai, an instrument hypothecating his property. It is not as if the attestation were necessary in order to make the instrument legally operative. That would be a totally different case and is expressly excepted from the proposition laid down in *Mohesh Chunder Chatterjee* v. *Kamini Kumari Dabia*(1), and see *Davidson* v. *Cooper*(2). In the present case the object which the attestation fulfilled might have been almost equally well secured by a memorandum written on a separate piece of paper. It was not indispensable for the plaintiff's purpose that anything should be written on the very paper on which the instrument is written.

I can find no authority for holding that in such a case there can be deemed to have been a material alteration of the instrument, and I would therefore reverse the decree of the District Judge and remand the appeal.

HANDLEY, J.—In my opinion, even on the finding of the District Judge that the name of defendant No. 1 as an attesting witness to the hypothecation bond sued on was forged after execution and registration and after the document came into plaintiff's hand, the case does not come within the rule laid down in *Master* v. *Miller*(3) and the other English cases, and declared by the Full Bench decision in *Christacharlu* v. *Karibasayya*(4) to be applicable to this country, so as to disentitle plaintiff to sue on the bond. In the order in *Vazeeralli* v. *Surianarayana*(5), to which I was a party, this Court, following *Mohesh Chunder Chatterjee* v. *Kamini Kumar Dabia*(1) in preference to *Sitaram Krishna* v. *Daji Devaji*(6), held that the addition of the name of an attesting witness subsequently to the delivery of the document was not a material alteration which invalidated the document. I adhere to the principle of that decision; and it seems to me to make no difference in principle that the addition of the name of the attesting witness is a forgery and made with the fraudulent intention of precluding the person, whose name is forged, from denying the genuineness of the document. The attestation clause

(1) I.L.R., 12 Cal., 313.
(2) 11 M. & W., 778.
(3) 1 Sm. L. C. (Ed. 8), 857.
(4) I.L.R., 9 Mad., 399.
(5) Appeal No. 89 of 1890, unreported.
(6) I.L.R., 7 Bom., 418.

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is no part of the document as executed by the executant, but merely one means of proof of the document, and, as such, is not a material part of the document as executed within the principle of the rule under consideration. Attestation was not in this case necessary to the validity of the document as it was executed before the Transfer of Property Act came into force. I express no opinion as to what would be the effect of the addition of an attesting witness's name in cases where attestation was necessary to the validity of the document.

I would reverse the decree of the Lower Appellate Court and remand the appeal for disposal upon the other questions raised.

APPELLATE CIVIL.

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

1891. October 5, 6.

GRAY (PLAINTIFF), PETITIONER IN C.R.P. No. 303 AND RESPONDENT IN No. 408,

v.

FIDDIAN (DEFENDANT), RESPONDENT IN No. 303 AND PETITIONER IN No. 408.*

Master and servant—Liability of master for servant's act—Offer of money by defendant to avoid litigation.

The servant of the defendant, who was staying in the plaintiff's hotel, broke a filter, the property of the plaintiff. In a suit by the plaintiff for damages it appeared that the servant, when he broke the filter, was not acting within the scope of his employment, nor on the defendant's business, or for his benefit. The defendant offered to the plaintiff as compensation Rs. 30 (which was refused), but without acknowledging any liability:

Held, (1) that the defendant was not liable for the act of his servant;
(2) that the plaintiff was not entitled to a decree for Rs. 30.

PETITIONS under Provincial Small Cause Courts Act IX of 1887, section 25, praying the High Court to revise the decree of W. E. T. Clarke, Subordinate Judge of Nilgiris, Ootacamund, in original suit No. 366 of 1889, small cause side.

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

* Civil Revision Petitions Nos. 303 and 408 of 1890.

GRAY v. FIDDIAN.

The Subordinate Judge passed a decree for Rs. 30 without costs.

Plaintiff preferred civil revision petition No. 303 of 1890 and the defendant preferred civil revision petition No. 408 of 1890.

Mr. *W. Grant* for plaintiff.

Mr. *Gover* for defendant.

JUDGMENT.—In Civil Revision Petition No. 303 of 1890 :—In this case the plaintiff, an hotel proprietor, sued to recover from defendant the value of a filter broken by defendant's servant while defendant was resident in the hotel. The Subordinate Judge found that defendant's servant was not acting under any express or implied authority from his master when he broke the filter, and hence that defendant was not liable for the act of his servant. Inasmuch, however, as defendant had offered Rs. 30 to plaintiff as compensation for the loss of the filter and to avoid litigation, the Subordinate Judge decreed that amount against defendant without costs. Both plaintiff and defendant have applied to the Court to revise this decree.

The learned Counsel for the plaintiff has correctly stated the rule of law that a master is liable for the acts of his servant, provided they were within the scope of the employment, and also if they are intentionally done in the interest and for the benefit of the master. In the case before us there is no evidence that the servant, when he broke the filter, was doing anything for the benefit of his master or upon his master's business, and the question therefore is whether he was acting within the scope of his employment. The Subordinate Judge, after hearing the evidence, has decided that he was not so acting, and the contention before us is that the Judge was in error upon this point. We think that in revision we are bound to accept the finding of the Judge upon this question. The question of scope of authority was a question of fact, as to which the evidence was conflicting. In England such a question would have been left to the Jury, and the Judge would have been bound by the finding, the evidence being conflicting—*Stevens* v. *Woodward*(1). In revision, therefore, we must accept the finding, unless it is open to some legal objection. We cannot hold, as a matter of law, that for any act done by defendant's servant, the master should be held responsible, though the

(1) 6 Q.B.D., 318.

act was wholly outside the scope of the servant's employment, and in no way an incident of it. We must, therefore, dismiss the plaintiff's petition with costs.

In Civil Revision Petition No. 408 of 1890 :—Upon the queston raised by the defendant, we are clearly of opinion that the Subordinate Judge could not decree to plaintiff a sum of money which defendant had merely offered as a matter of grace and without acknowledgment of liability (but merely to avoid litigation) and which offer the plaintiff had refused to accept. We must allow the petition, and reverse the decree of the Subordinate Judge and dismiss the suit with costs throughout.

APPELLATE CRIMINAL.

Before Mr. Justice Parker and Mr. Justice Shephard.

1891. Nov. 5, 17.

QUEEN-EMPRESS

v.

BASAVA.*

Penal Code, s. 372—Disposal of a minor—Dedication of a girl in a temple.

The accused dedicated his minor daughter as a Basivi by a form of marriage with an idol. It appeared that a Basivi is incapable of contracting a lawful marriage, and ordinarily practises promiscuous intercourse with men, and that her sons succeed to her father's property :

Held, the accused had committed an offence under Penal Code, s. 372.

CASE reported for the orders of the High Court under section 438 of the Code of Criminal Procedure by H. T. Knox, Sessions Judge of Bellary.

In this case the Magistrate convicted the accused, a Madiga, of an offence under Penal Code, s. 372. The minor in respect of whom the offence was held to have been committed was the daughter of the accused, and the "disposal" charged consisted of the dedication of the girl as a Basivi by the performance of a marriage ceremonial between her and an idol.

In his letter of reference the Sessions Judge expressed an opinion that the conviction was wrong. The Sessions Judge pointed out that the record was silent as to the effect of the

* Criminal Revision Case No. 475 of 1891.

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Basivi marriage ceremony save that it prevented a subsequent marriage, in regard to which he referred by way of comparison to the formal marriage of girls in Malabar under the Marumakkatayam law. He referred to evidence that it was not a matter of course for Basivis to prostitute themselves for money and added:—

"The evidence is very clear that Basivis are made in accordance with a custom of the Madiga caste. Madigas are leather-workers, but in the western taluks of this district, where the custom seems to prevail, they appear to be in a position much better than that of the chucklers in the southern districts. It is also in evidence that one of the effects of making a girl a Basivi is that her male issue becomes a son of her father and perpetuates his family, whereas, if she were married, he would perpetuate her husband's family. In the particular case the girl was made a Basivi that she might be heir to her aunt who was a Basivi, but childless. Siddalingana Gowd says that they and their issue inherit the parents' property. There is evidence that Basivis are made on a very large scale, that they live in their parents' houses. There is no evidence that they are regarded otherwise than as respectable members of the caste. It seems as if the Basivi is the Madiga and Bedaru equivalent of the 'appointed daughter' of Hindu law (Mitakshara, chapter I, s. XI, 3).

"Upon the whole the evidence seems to establish that among the Madigas there is a widespread custom of performing in temple at Uchangidurgam a marriage ceremony, the result of which is that the girl is married without possibility of widowhood or divorce; that she is at liberty to have intercourse with men at her pleasure; that her children are heirs to her father and keep up his family, and that Basivis' nieces being made Basivis become their heirs. The Basivis seem in some cases to become prostitutes, but the language used by the witnesses generally points only to free intercourse with men, and not necessarily to receipt of payment for use of their bodies. In fact they seem to acquire the right of intercourse with men without more discredit than accrues to the men of their caste for intercourse with women who are not their wives."

The *Government Pleader* and *Public Prosecutor* (Mr. *Powell*) in support of the conviction.

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Accused was not represented.

PARKER, J.—The evidence shows that a girl, who is dedicated as a Basivi, becomes incapable of contracting a marriage, which would be recognized as valid by the laws and customs of her caste; that she is at liberty and is expected to have promiscuous intercourse with men generally, and that she and any children born to her inherit in her father's family only.

The dedication thus made effects a change in the circumstances of the minor which was recognized as a "disposal" within the terms of section 372, Indian Penal Code, in the Proceedings of this Court, dated 11th April 1881, No. 746, paragraph 13(1), and the parents of the minor cannot but be aware that the minor will in consequence live a life which is recognized as immoral.

I do not think that any analogy can be drawn as suggested by the Sessions Judge between the dedication of a girl as a Basivi and the formal marriage of a girl in Malabar under the Marumakkatayom law. In Malabar there is no legal marriage, and neither a woman nor her offspring can ever pass into the family of a husband, while among Madigas such is not the case, and a girl, by becoming a Basivi, becomes incapable, *ipso facto*, of contracting a legal marriage. Nor do I think that the Basivi is the Madiga equivalent of the "appointed daughter" under Hindu law, since the latter arrangement neither debars from ordinary marriage nor contemplates the possibility of promiscuous intercourse.

I would decline to interfere with the conviction.

SHEPHARD, J.—Having read the evidence in the case, I agree that an offence is proved and would decline to interfere.

(1) Weir's Criminal Rulings, 3rd Ed., p. 215.

APPELLATE CIVIL.

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

1891. August 24.

PATCHA SAHEB (PLAINTIFF), APPELLANT.

v.

SUB-COLLECTOR OF NORTH ARCOT (DEFENDANT), RESPONDENT. *

Limitation Act—Act XV of 1877, s. 4—Unstamped memorandum of appeal—Stamp affixed after expiry of time of limitation.

Where a petition of appeal was presented unstamped within the period of limitation and the stamp was ultimately affixed after the appeal would have been barred by limitation:

Held, following *Skinner* v. *Orde* (L.R., 6 I.A., 126) that the appeal was in time.

SECOND APPEAL against the decree of H. H. O'Farrell, Acting District Judge of North Arcot, in appeal suit No. 115 of 1889, affirming the decree of C. Ranga Rau, District Munsif of Vellore, in original suit No. 98 of 1888.

The suit was brought for a declaration that the revenue sale of the plaint lands was legal and to cancel the proceedings of the defendant annulling the sale. The District Munsif dismissed the suit. On appeal before the District Judge a preliminary point was raised that the appeal was presented beyond the period of limitation. On this point the judgment of the Lower Court proceeds as follows:—

"I have now to decide the second objection. The appeal "memorandum was presented *unstamped* within the period of "limitation to the Sheristadar of the Court on the 11th June, "the Court then being in recess. A note was made on the appeal "memorandum that the stamp could not be procured and would "be filed on the next Court day. This was not done, but the "stamp was ultimately affixed on 25th June. On that date the "appeal was barred by limitation admittedly."

The Judge finding the appeal barred by section 4 of Act XV of 1877, dismissed the appeal with costs.

The plaintiff preferred this second appeal.

Sankaran Nayar for appellant.

* Second Appeal No. 806 of 1890.

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

JUDGMENT.—The petition of appeal was presented on 11th June in the recess, and the stamp was received and affixed on the 25th. The Court opened on 27th June.

Following the principle laid down in *Skinner* v. *Orde*(1), we must hold that the petition must be regarded as an appeal from the date on which it was presented and not from the date on which the stamp was received. The decree of the District Court must be reversed and the appeal remanded. The appellant is entitled to the costs of this appeal, and the cost in the Lower Appellate Court will abide and follow the result.

APPELLATE CIVIL.

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

1891. September 17, 18, 20. November 2.

SADAGOPA RAMANJIAH AND OTHERS (DEFENDANT'S REPRESENTATIVES), APPELLANTS,

v.

MACKENZIE AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Contract Act, s. 27—Restraint of trade.

One having a license for the manufacture of salt entered into a contract with a firm of merchants, whereby it was provided that he should not manufacture salt in excess of the quantity which the firm, at the commencement of each manufacturing season, should require him to manufacture; and that all salt manufactured by him should be sold to the firm for a fixed price. The agreement was to be in force for a period of five years. In a suit by the merchants for an injunction restraining the licensee from selling his salt to others and for damages:

Held, that whether or not the first of these clauses was invalid under section 27 of the Contract Act, it was separable from the second clause which was not bad as being in restraint of trade.

APPEAL against the decree of Mr. Justice Handley sitting on the Original Side of the High Court in civil suit No. 142 of 1888.

Suit by the members of the firm of Messrs. Arbuthnot and Company for an injunction restraining the defendant from selling salt manufactured by him under a license to others.

(1) L.R., 6 I.A., 126.

* Appeal No. 30 of 1889.

SADAGOPA RAMANJIAH v. MACKENZIE.

The defendant was the holder of a license for the manufacture of salt and had entered into an agreement with the plaintiffs for the sale to them of all the salt manufactured by him. The material parts of the agreement which was contained in two documents are as follows :—

Clause 6.—The licensee shall not manufacture any salt in excess of the quantity which the said firm of Arbuthnot and Company shall, from time to time, at the commencement of each manufacturing season, require the licensee to manufacture.

Clause 12.—All salt manufactured and stored by the licensee under the said license, and, in accordance with these presents, shall be sold by the licensee to the said firm of Arbuthnot and Company at, and for the price or sum of, Rs. 11-8-0 for each and every garce of 120 maunds of the said salt measured and taken delivery of by them at Madras, and the licensee shall and will accept such sum of Rs. 11-8-0 for every such garce of salt in full payment and satisfaction for the same.

Mr. Justice Handley passed a decree for the plaintiffs, against which defendant preferred this appeal on the ground (among others) that the agreement was void as being in restraint of trade.*

Rama Rau, *Krishnasami Chetti*, and *Sriramulu Sastri* for appellants.

Mr. *W. Grant* and Mr. *K Brown* for respondents.

The Court delivered judgment on the above ground of appeal as follows :—

JUDGMENT.— Several points were raised by Mr. Rama Rau in this appeal, but the only one purporting to be a complete answer to the plaintiffs' claim and requiring any special notice is that the contract for breach of which damages have been decreed was invalid as being made in restraint of trade. The contract is expressed in two documents, dated the 13th May 1885, one of which was signed by the plaintiffs, and the other by the defendant. Shortly stated, the effect of it was on the one hand to oblige the defendant who had obtained a license under the Salt Commissioner to manufacture salt for a period of five years, and on the other hand to oblige the plaintiffs to take delivery of such salt at a

* See *Mackenzie* v. *Striramiah*, I.L.R., 13 Mad., 472, in which the same Judge, dealing with a precisely similar agreement, came to the same conclusion as that arrived at by their Lordships in the present appeal.

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certain price. Another material provision in the contract was that the defendant should not manufacture any salt in excess of the quantity which the plaintiffs might, at the commencement of any season, require to be manufactured. It was argued on behalf of the appellant that, as the contract had by implication prohibited him from selling the salt to third persons, and also empowered the plaintiffs to limit the amount of salt which he should manufacture, section 27 of the Contract Act became applicable and there was no legal agreement. The section provides as follows :— " Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void."

The agreement, it is to be observed, is only void in so far as it restrains any one from exercising his trade. In the present case the breach complained of was that the defendant sold to third persons the salt manufactured by him, which he ought to have delivered to the plaintiffs. It is an ordinary case of a breach of contract to manufacture and sell goods, and it cannot possibly be said that by such a contract the manufacturer is restrained from exercising his trade. On the contrary he is encouraged to exercise it because he is assured of a certain market for the products of his labour.

It is true that there is a clause enabling the plaintiffs to limit the amount of salt which should be manufactured; and if the plaintiffs had acted under that clause, and, notwithstanding the limit prescribed by them, the defendant had manufactured a larger quantity of salt, a question might have arisen as to the competency of the plaintiffs to restrain such manufacture in excess of the amount required by themselves. It may well be that to the extent to which the contract purported to empower the plaintiffs to restrict the defendant's manufacture of salt, the contract might be considered void. But this is not the question we have to consider. The plaintiffs are not seeking directly or indirectly to restrain the defendant from exercising his trade as manufacturer of salt. Section 27 of the Act has therefore no application and the contract for breach of which damages have been given is clearly legal. *Carlisles Nephews & Company* v. *Ricknauth Bucktearmull*(1), *Donnell* v. *Bennett*(2).

Barclay, *Morgan & Orr*, attorneys for respondents.

(1) I.L.R., 8 Cal., 809. (2) L.R., 22 Ch. D., 835.

APPELLATE CIVIL.

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

1891. Sept. 21, 22.

FAZAL SHAU KHAN (DEFENDANT), APPELLANT,

v.

GAFAR KHAN (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 14—Foreign judgment, suit on—Procedure—Waiver of objection to jurisdiction.

In a suit upon the judgment of a Court at Bastar, it appeared that in the suit in which the judgment was pronounced, the defendant took no objection as to the jurisdiction of the Court, and that he carried on business by his agent in the Bastar territory, and that a decree was passed for the plaintiff after evidence adduced on both sides in the ordinary way:

Held, (1) that the defendant was not entitled to have the case re-heard;

(2) that the defendant was not entitled to take objection to the jurisdiction of the Bastar Court.

APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in original suit No. 9 of 1888.

Suit upon a judgment of the Court of the Chief of Bastar in the Central Provinces. The plaintiff sued the defendant for the price of timber sold, and obtained a decree for Rs. 2,935-2-0 which had been satisfied in part. He now sued as above to recover the balance of the decree amount, viz., Rs. 2,545-10-6.

The District Judge passed a decree as prayed.

The defendant preferred this appeal.

Pattabhirama Ayyar for appellant.

Venkataramayya Chetti for respondent.

JUDGMENT.—The first point taken is that there was no judgment of a foreign Court on which an action would lie. This point is clearly not maintainable. From the record it is apparent that there is a Court in the Bastar territory, and that by that Court the plaintiff's claim was heard and determined after consideration of evidence adduced on both sides in the usual way.

It is then argued that the Bastar Court had no jurisdiction, because the defendant did not reside or possess property, and the cause of action did not arise within the Bastar territory.

* Appeal No. 146 of 1889.

It appears, however, from the evidence that the appellant carried on business by his agent within the limits of the territory. Moreover the defendant did not protest that the Court had no jurisdiction, but appeared by an agent and defended the suit. Having done so, and having taken the chance of a judgment in his favour, he cannot now, when an action is brought against him on the judgment, take exception to the jurisdiction—see *Schibsby* v. *Westenholz*(1) followed in *Kandoth Mammi* v. *Abdu Kalandan*(2). On this point, therefore, the appellant's contention fails. Finally, it is argued that notwithstanding the judgment, the District Judge ought to have taken the evidence afresh and re-heard the case *de novo*, and that upon the facts the judgment of the Bastar Court was wrong. We are clearly of opinion that it was not intended by the Legislature when amending section 14 of the Code that parties to an action on a foreign judgment should have the right to have the case re-heard.

All that the section says is that the Judge is not to be precluded from inquiry into the merits. In the present case he has so inquired having had before him ample materials in the judgment of the Bastar Court and the evidence then taken, and he then found that the judgment was well founded.

We see no reason to differ from him. The appeal is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Handley.

1891. June 10, July 13.

QUEEN-EMPRESS

v.

ERUGADU.*

Criminal Procedure Code, s. 260—Summary procedure—Bias of Magistrate.

A Deputy Magistrate, being also the Chairman of a Municipality, without issuing process, or making a record of the proceedings, or dismounting from a pony on which he was riding, convicted and fined an inhabitant of the town, who admitted that he had raised the level of a road within the limits of the Municipality which was considered by the Magistrate to amount to the offence of causing an obstruction in a public way:

(1) L.R., 6 Q.B., 155. (2) 8 M.H.C.R., 14.

* Criminal Revision Cases Nos. 174 to 178 of 1891.

QUEEN-EMPRESS v. ERUGADU.

Held, the Magistrate's procedure was illegal, and the conviction should be set aside.

CASE reported for the orders of the High Court under section 438 of the Code of Criminal Procedure by R. Sewell, District Magistrate of Bellary.

The case was stated as follows:—

"The Deputy Magistrate is Chairman of the Adóni Municipality, and as such is interested in keeping the town clean and preventing nuisances and encroachments. He does not say whether Venkanna made his complaint to him as a Magistrate or as Chairman of the municipality. No record of complaint was made, nor was any entry of the complaint or information made in the magisterial diary.

"The Magistrate's own explanation of the institution of the case is as follows:—'It was instituted under clause (c) of section 191, upon information received from one Venkanna and subsequent personal inspection.' No processes were issued and no notice of any kind given to the accused.

"On 12th February the Magistrate visited the spot, sitting on his pony, and there and then began and concluded his (very) 'summary trial.' There is no record of any inquiry having been made beyond the fact that the Magistrate saw the 'platform.' He does not describe it, but writes: 'The platform is over about half the road and is a real obstruction to the public, meant evidently to appropriate the whole space for the purpose of extending his house.' The plea of the accused is entered as 'admitted, but accused says he has no objection to the public walking over the platform.'

"Now (rightly or wrongly) I have no means of judging; the accused before me pleads that the whole of the case is prejudiced by the use of the word 'platform.' His plea is that the road being an alley common to only five houses, of which he owns three (or four), and it being worn into deep holes, he has mended and raised the road so as to bring it up to the level of the main street,— that there is no platform, but merely that the gravelled road in front of his own house has been raised. The plea may or may not be absolutely false, but the point is that he plainly pleaded not guilty. He did not admit any obstruction according to the record, but pleaded that there was no obstruction to the public, since the public were welcome to

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use the place. He may have 'admitted' doing something to the road, but he did not plead guilty to causing danger, obstruction, or injury to any one in a public way, which is the sole essence of the offence under section 283, Indian Penal Code. Section 283 does not contemplate the punishment of a man for raising anything in the street unless that something causes danger, obstruction or injury to the public, and this was expressly denied by the accused and not 'admitted.'

"Having seen the place and questioned the man, the Magistrate promptly, without getting off his pony, fined him Rs. 20 and went away. This proceedings was entered as a 'summary trial,' and next day process was issued and the fine paid.

"In the other cases sent up, I gather that the procedure was equally peculiar.

"In answer to my questions, the Deputy Magistrate . . . has made the following explanations:—

"(i) No oral or written complaint was preferred under section 200, Code of Criminal Procedure.

"(ii) No processes were issued against the accused.

"(iii) The Magistrate, sitting on a pony surrounded by a number of people, among whom was the Municipal Conservancy Inspector, and probably one or more municipal peons, visited the lane in question and called out the house-owner. Till then the latter had no knowledge of any criminal proceedings being taken against him, and there is nothing whatever to show that he was ever told that Mr. Kothanda Ramayya had come there in any other capacity but that of Chairman of the Municipal Council, in which capacity, probably, he had been often seen by the accused going his rounds of inspection. To the eyes of the accused, therefore, he had before him the Chairman of the municipality. There was no police constable or magisterial clerk present to show him that the Chairman had suddenly divested himself of his municipal powers, and that he was an accused person pleading in a Court of Justice. All appearances must have conveyed a totally contrary opinion.

"(iv) The Magistrate . . . thinks that sitting on a horse in the road is quite a fitting place for him to try a case, for in a letter received by me only two days ago he describes it 'as affording the best position for the public inquiry.'

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"(v) The entire procedure in case No. 2 appears to have "been that the Chairman-Magistrate used his eyes and thought "there was an encroachment, he called on the house-owner (from "his horse) to show cause why he should not be convicted for "'obstruction and encroachment on the road,' and on Viranna's "pleading that, though it was certainly he who had raised the "thing complained of, yet it was no obstruction, because the "public could not be injured—he was at once told that he was "fined Rs. 20.

"(vi) In none of these cases was any notice given to the "accused that they were entitled to require that the case against "them might be transferred to another Magistrate (last clause of "section 191, Code of Criminal Procedure, Act III of 1884, "section 2. I assume this from the Magistrate's reply to my "query, 'What opportunity was allowed to the accused to have the "cases transferred to another Magistrate if they thought fit under "the last clause of the section?' He replies: 'The accused did "not express their unwillingness to be tried by me, but plainly "admitted the offence (?) and submitted to my trial. There was "nothing in the circumstances of the trial to prevent . . . "their desiring a transfer.' It is plain from this answer that "none of the accused was informed that he could, if he pleased, "be tried by a court other than that of the interested Chairman-"Magistrate who sat on his horse before him.

* * * *

"A zealous Chairman of a municipality is the very last person "who should himself try cases which come to his knowledge as "Chairman, and it is a mere fiction for Mr. Kothanda Ramayya "to pretend that he was not Chairman but Magistrate when per-"ambulating the town on horseback hunting up nuisances and "encroachments. It is a well known rule that a man cannot be "both prosecutor and judge. Parallel cases are quoted in *Kharak* "*Chand Pal* v. *Tarack Chunder Gupta*(1) or I should say barely "parallel, for the present are much more flagrant instances than "either of those quoted. Perhaps the best case to refer to is "*Queen* v. *Meyer*(2), where it was ruled that a Judge ought not "to sit on a bench where he has such interest as to give him a "real bias.

(1) I.L.R., 10 Cal., 1030. (2) 1 Q.B.D., 173.

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"The Magistrate's explanation is given in the last paragraph "of his letter, No. 138, dated 25th March 1891. He says: 'I "beg to submit that, after careful observation for months together "of the requirements of the town and the numerous encroach-"ments by individuals in public places, and to the reckless manner "in which these were being used, notwithstanding numerous "punishments by Bench Magistrates, generally after considerable "delay and in remote court-houses not much attended by the "people, for whom the punishments were meant as warnings, it "seemed to me essential that to be really effective as warnings, "a few select cases should be taken up and disposed of by me "summarily and in an exemplary manner on the spot.'"

The *Government Pleader* and *Public Prosecutor* (Mr. *Powell*) for the crown.

JUDGMENT.—The procedure of the Deputy Magistrate in all these cases seems to have been irregular in several respects. In the first place the proceedings were not commenced by any summons to the accused or other formal notice that a criminal investigation was about to take place.

Chapter XXII of the Code of Criminal Procedure does not appear to intend that proceedings in summary trials shall commence ordinarily otherwise than in other criminal trials either by summons or warrant, indeed section 262 implies the contrary. Section 263 requires a record of the proceedings to be made by the presiding officer, and we think that it is intended that the record shall be made at the time of the trial. Presumably the Deputy Magistrate, while seated on his pony, could not have kept the record required by section 263, and he states that no clerk accompanied him. The record must, therefore, have been prepared after the close of the trial from memory or possibly from some rough note. This is not the procedure contemplated by the Code even in summary trials.

The admissions of the accused persons are directed by section 243 to be recorded, and this also should be done at once, and the words used in the admissions should be stated as nearly as possible. Here again the procedure of the Deputy Magistrate appears to have been defective, for he does not appear to have made any record of the admissions at the time, and the record he did ultimately make, does not profess to state the words of the admissions

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and does not show what was admitted. From the record it is impossible to say whether the accused admitted only the acts or omissions with which they were charged, or admitted them with all the accompanying circumstances necessary to constitute their acts or omissions offences. This may have led to a most serious miscarriage of justice. In our opinion these errors and irregularities of procedure are sufficiently serious to invalidate the proceedings of the Deputy Magistrate, and are not such as we can overlook even to secure the very desirable end of the improvement of the sanitary condition of Adoni.

And there is another fatal objection to these proceedings, viz., that the Deputy Magistrate, as Chairman of the Municipal Council, was the very person interested in abating the nuisances, in respect of which these proceedings were taken, and was therefore a judge in his own cause.

It is true section 555 of the Criminal Procedure Code provides that the mere fact of being a Municipal Commissioner shall not of itself be a disqualification for trying any case, but the Chairman of a municipality being an executive officer, who would be the proper person to institute prosecutions for offences against the health or comfort of the town, is a very different person from a mere Municipal Commissioner, and is clearly disqualified to try such cases.

For the foregoing reasons we set aside the convictions by the Deputy Magistrate, and direct that the cases be commenced *de novo* and tried according to law by some Magistrate other than the Chairman of the municipality.

APPELLATE CIVIL.

Before Mr. Justice Parker.

VAIKUNTA PRABHU AND ANOTHER (DEFENDANTS), PETITIONERS,

v.

MOIDIN SAHEB AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1891. Sept. 18, 23.

Civil Procedure Code—Act XIV of 1882, *s.* 588, *cl.* 17—*Provincial Small Cause Courts Act—Act IX of* 1887, *s.* 24—*Insolvency petition in execution of decree in Small Cause Suit—Appeal.*

In proceedings in execution of the decree passed in a Small Cause Suit by a District Munsif who had been invested with insolvency jurisdiction, the judgment-debtors filed a petition under section 344 of the Civil Procedure Code praying that they might be declared insolvents. Their petition was dismissed by the District Munsif:

Held, an appeal lay to the District Court against the order dismissing the petition.

PETITION under section 622 of the Civil Procedure Code praying the High Court to revise the order of W. J. Tate, Acting District Judge of South Canara, made on civil miscellaneous appeal No. 7 of 1889.

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

The defendants preferred this petition.

Pattabhirama Ayyar for petitioners.

Narayana Rau for respondents.

JUDGMENT.—In the execution of small cause suit No. 417 of 1885 on the Mangalore District Munsif's file, the defendants applied to be declared insolvents. This application was filed as insolvency suit No. 7 of 1888, and was dismissed by the District Munsif. Their appeal to the District Court has been dismissed on the ground that no appeal lies; hence this revision petition under section 622, Civil Procedure Code.

The ground on which the District Judge has dismissed the appeal is that it is one from an insolvency order passed by the District Munsif in the exercise of his small cause jurisdiction,

* Civil Revision Petition No. 234 of 1890.

VAIKUNTA PRABHU v. MOIDIN SAHEB.

and that under section 24 of Act IX of 1887, an appeal is only given from one of the orders specified in section 588, Civil Procedure Code (clause 29), chapter XLIII of the Civil Procedure Code (in which sections 588 and 589 occur), is not included in the chapter of the Procedure Code extended to Provincial Courts of Small Causes by schedule II, Civil Procedure Code.

On appeal it is argued that the order passed by the District Munsif was not passed in the exercise of his small cause jurisdiction, but in the exercise of a special jurisdiction conferred upon him by the Local Government under section 360, Civil Procedure Code, by which he has been invested with the powers conferred on District Courts in insolvency matters (*vide* G.O. of 14th December 1886, No. 480, Fort St. George Gazette, 14th December 1886, page 1093). It is pointed out that the special jurisdiction and powers given by sections 354 to 359 are far more extensive than the powers ordinarily vested in a Small Cause Judge, and hence it is argued that from the exercise of this special jurisdiction as an Insolvent Court an appeal will lie under section 588, clause 17, Civil Procedure Code, and that under section 589 as amended by section 3 of Act X of 1888, the appeal will lie to the District Court.

I am of opinion that this view is sound and must prevail. It appears also in consonance with the view taken by this Court in *Sitharama* v. *Vythilinga*(1).

I set aside the order of the District Judge and remand the appeal for investigation. The petitioner is entitled to his costs in this Court, and the costs in the District Court will abide and follow the result.

(1) I.L.R., 12 Mad., 472.

APPELLATE CRIMINAL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

QUEEN-EMPRESS

v.

SEVUDAPPAYYAR AND OTHERS.*

1891. July 24, 28.

District Municipalities Act (Madras)—Act IV of 1884, s. 222—Nuisance—Sewage water.

An occupier of a building who allows sewage water to run into a street within the limits of a Municipality, governed by the District Municipalities Act, Madras, commits an offence under section 222 of that Act, although the Municipality may have supplied no side drains in the street in question.

CASE reported for the orders of the High Court under section 438 of the Code of Criminal Procedure by J. Thomson, Acting District Magistrate of Tanjore.

The case was stated as follows :—

"I have the honor to state that the accused concerned were "charged under section 222 of the District Municipalities Act IV "of 1884 with having allowed sewage water to run into the street, "but were acquitted on the ground that no side drains have "been provided by the Negapatam Municipality and the accused "could not escape allowing the water to run into the street for "want of any other place of discharge. The President of the "Bench, on being directed to explain fully, urges the same "ground and argues that section 222 of the Act does not regard "the running of sewage water into the street as an offence, while "it is the bounden duty of the Municipality to take steps to "prevent any nuisance resulting from such water soaking into the "ground. The view of the President is wrong and the orders of "acquittal illegal."

Counsel were not instructed.

PARKER, J.—The complaint against the accused was they "let out *sewage* water to run into the street."

By section 222 of the District Municipalities Act every owner or occupier, who allows the water of any sink, drain or privy, or

* Criminal Revision Cases Nos. 79 to 93 of 1891.

QUEEN-EMPRESS v. SEVUDAPPAYYAR.

the drainage from any stable or place, or any other offensive liquid matter belonging to him or being on his land or in his building or in any building or land occupied by him, to run down on or to be put upon, any street or into any drain in or alongside of any street, except in such a manner as shall prevent any avoidable nuisance from any such liquid or offensive matter soaking into the walls or ground at the side of the said drain, shall be liable to a fine of Rs. 10."

The first witness deposed that the accused had let "stagnant water" run into the street (presumably the word stagnant is a clerical error or misdescription for "sewage") and that such water could not be kept inside the house. The Bench of Magistrates did not record any finding upon the facts, but dismissed the prosecution on the ground that the Municipality had not provided drains, and that it was not possible for poor people to provide places for their stagnant water.

It appears to me that the ground of decision is based on an error in law. The Legislature has not made the providing of drains by the Municipality a condition precedent to the obligation imposed upon the owner or occupier. The words "except in such a manner as shall prevent any avoidable nuisance from any such liquid or offensive matter soaking into the walls or ground at the side of the said drain" seem to be limited to the case in which the owner or occupier permits such water to be "put into any drain in or alongside of any street," and that the section also makes punishable any owner or occupier who allows such water to *run down on*, or to *be put upon* any street.

The section is awkwardly worded, but it seems to contemplate two classes of cases, in one of which the street is not provided with drains, and in the other in which such provision has been made. In the latter case it was intended to secure that the offensive water should actually pass into the drain, and not be allowed to soak into the walls or ground at the side of the drain.

As the Bench has dismissed the prosecution upon an erroneous ground, and without recording any finding as to whether or not the accused have allowed sewage water to run into the street, I would set aside the acquittals and direct that the case be retried.

WILKINSON, J.—There was no finding by the Bench as to whether the stagnant water which the accused are charged with having allowed to flow into the street was "the water of a sink,

QUEEN-EMPRESS v. SEVUDAPPAYYAR.

drain or privy, or the drainage from any stable or place, or any other offensive liquid matter." The acquittal on the ground that the Municipality has not provided drains was erroneous. The Municipality are not bound to make drains, whereas every owner or occupier is bound to keep his offensive liquid matter from running into the street. If drains are provided, the owner or occupier may apparently discharge offensive liquid matter into them, provided that in so doing he avoids causing a nuisance by allowing such liquid matter to soak into the walls or ground.

The acquittal must be set aside and the cases retried.

APPELLATE CRIMINAL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

QUEEN-EMPRESS

v.

THIMMACHI. *

1891. October 16.

Penal Code, s. 186—Obstructing a public servant—Public vaccinator.

To spread a false report and thereby prevent persons from bringing their children for vaccination to the public vaccinator is not an offence under Penal Code, s. 186.

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

The act charged as obstruction was the following:—

"While a vaccinator was at work, the accused spread a report "that the children vaccinated would go mad, and the mothers who "were in attendance with their children ran away, so that the "latter could not be vaccinated. Vaccination is not compulsory "in the locality."

Counsel were not instructed.

WILKINSON, J.—I do not think the conviction can be maintained. Spreading a false report and thereby preventing people from bringing their children for vaccination does not appear to me to amount to voluntary obstruction of the vaccinator in the

* Criminal Revision Case No. 476 of 1891.

QUEEN-EMPRESS v. THIMMACHI.

performance of his public duties. The conviction and sentence should be quashed.

SHEPHARD, J.—To prevent by physical means persons willing to be vaccinated from being vaccinated might be obstruction of the vaccinator within the meaning of the section. But merely to dissuade a person from submitting to vaccination is another matter. That is not obstruction, for it is only with regard to willing patients that the vaccinator has any duty. The conviction should be set aside, and the fine, if paid, refunded.

Ordered accordingly.

APPELLATE CRIMINAL.

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

1891. September 28.

MADAVARAYACHAR

v.

SUBBA RAU AND OTHERS.*

Criminal Procedure Code, s. 528—Village Munsif.

A Village Munsif not being a Magistrate under Criminal Procedure Code, a Joint Magistrate has no power under Criminal Procedure Code, s. 528, to withdraw a case from a Village Munsif and transfer it for disposal to a Second-class Magistrate.

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

Aravamudu Ayyangar for accused.

JUDGMENT.—Village Magistrates are not Magistrates under the Code of Criminal Procedure, and, therefore, we do not think that the Joint Magistrate had power under section 528 to withdraw the case and transfer it for disposal to the Second-class Magistrate.

The order must be set aside.

* Criminal Revision Case No. 189 of 1891.

APPELLATE CIVIL.

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

1891. September 8.

VENKATACHARLU (PLAINTIFF), APPELLANT,

v.

KANDAPPA (DEFENDANT), RESPONDENT.*

Landlord and tenant—Suit for ejectment—Burden of proof.

In an ejectment suit by a landlord against his tenant the plaintiff cannot succeed unless he shows that under the terms of the tenancy and in the circumstances that exist he has a right to eject the defendant, although the latter may allege and fail to establish a right of permanent occupancy.

SECOND APPEAL against the decree of H. H. O'Farrell, Acting District Judge of North Arcot, in appeal suit No. 135 of 1889, reversing the decree of C. Rama Rau, District Munsif of Tirupati, in original suit No. 387 of 1888.

Plaintiff, as Inamdar of the village of Athur, sued to eject defendant from certain lands occupied by him in that village, and for damages for cultivating them for the years 1884-85, 1885-86, 1886-87, without plaintiff's consent.

It appeared that defendant had been in possession of the disputed land for the last 40 or 50 years, and that in the year 1874-75 he obtained a lease (exhibit A) for a term of ten years from the plaintiff expiring 1883-84, and paid plaintiff rent for these years. On the expiry of this lease, defendant continued in possession of the lands in question, but refused to execute a muchalka in consequence of a dispute with the plaintiff as to its terms. In consequence of this refusal and non-payment of rent since 1883-84, the present suit was filed. The defendant claimed to have a permanent right of occupancy. An issue was framed as to this claim, but the finding of the District Munsif which was accepted by the District Judge was adverse to the defendant.

The Munsif held that plaintiff had not proved his right to eject, but passed a decree for damages on the ground that defendant had not paid rent for the three years 1884–87.

* Second Appeal No. 1030 of 1890.

VENKATA-CHARLU v. KANDAPPA.

The District Judge reversed this decree and dismissed the suit throughout on the ground that plaintiff had not established his right to eject, there being no stipulation to that effect in exhibit A or any evidence on the point.

The plaintiff appealed on the grounds that, (1) the District Court was wrong in law in holding that the burden of proof of the fact that the tenants had no right of occupancy was on plaintiff; (2) there was no evidence in this case sufficient in law to hold that the tenants had permanent rights of occupancy.

The other grounds of appeal are not material for the purposes of this report.

Mr. *Subramanyam* for appellant.

Parthasaradi Ayyangar for respondent.

JUDGMENT.—In our opinion the District Judge was right in holding that plaintiff had not proved his right to eject defendant. On the findings of both courts, it must be taken that the only facts proved are that plaintiff is the Inamdar of the village, that defendant and his father have been in occupation of the lands for 40 or 50 years as tenants. Plaintiff's case, as set up in his plaint, was that of an occupancy commencing with the execution by defendant of a muchalka for 10 years in 1874-75. This is clearly not supported by the evidence. It was for plaintiff to show that, under the terms of the tenancy and in the circumstances that exist, he has a right to eject defendant, and this he has not shown. The cases of *Appa Rau* v. *Subbanna*(1), and *Venkan* v. *Kesavalu*(2) there referred to, are distinct authorities for the position that, when the plaintiff does not prove what the terms of the tenancy are, he cannot eject, although defendant may fail to prove his right of occupancy. *Achayya* v. *Hanumantrayudu*(3) does not, in our opinion, conflict with this decision. We agree with the District Judge that the muchalka (exhibit A) does not of itself show that plaintiff has any right to eject defendant.

The appeal fails, and is dismissed with costs.

(1) I.L.R., 13 Mad., 60. (2) S.A. No. 1078 of 1887 unreported. (3) I.L.R., 14 Mad., 269.

APPELLATE CIVIL.

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

KOTHANDAPANI (PLAINTIFF), APPELLANT,

v.

SOMASUNDARAM AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1891. October 5.

Indian Companies Act—Act VI of 1882, s. 177—Voluntary liquidation—Liability to be sued.

Where a Company has gone into a voluntary liquidation it can still be sued for debts due by it incurred prior to liquidation, although the fact that there are liquidators may be material if execution of the decree is sought.

PETITION under section 622 of the Civil Procedure Code, praying the High Court to revise the decree of P. D. Shaw, Chief Judge, Small Cause Court, Madras, in small cause suit No. 24941 of 1889.

The plaintiff sued the "Sagothara Sagaya Sasvatha Nidhi (Limited) by its liquidators P. K. Somasundara Mudali and B. Rajahgopaul Naidu" to recover with interest Rs. 400, being the balance of Rs. 600 deposited with the company in February 1882. The defendants contended that the suit was not maintainable, as the plaint disclosed that the fund was in liquidation; that interest had not been paid up to 30th November 1886, and that the suit was barred. The Chief Judge referred to judgments previously delivered by the Full Bench of the Small Cause Court on the construction of the Indian Companies Act, 1882, s. 117, and held that the suit was not maintainable.

Plaintiff presented this petition under section 622 of the Civil Procedure Code.

Parthasaradhi Ayyangar and *Ambrose* for petitioner.

Rajaratna Mudaliar for respondents.

JUDGMENT.—The learned Judges of the Small Cause Court have given no reasons for their decision.

The right to sue to recover a debt is in the nature of a common law right, and unless it is taken away either expressly or by necessary implication, it must be treated as subsisting. We are

* Civil Revision Petition No. 249 of 1890.

KOTHANDAPANI v. SOMASUNDARAM.

not referred to any section in the Indian Companies Act under which we can support the decision of the learned Judges. Section 177, which enumerates the consequences of the voluntary winding up of a company, only recognizes the liability of the liquidators to pay the debts of the company and limits the right of creditors to a payment *pari passu*. It does not absolve the debtors from liability to be sued. The fact that there are liquidators may be material if execution is sought of the decree. We set aside the order and direct that the suit be restored to the file and disposed of in accordance with law. The costs will be costs in the cause.

APPELLATE CIVIL.

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

1891. September 8.

MUTTUKARUPPAN (PLAINTIFF), APPELLANT,

v.

SELLAN AND ANOTHER (DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Civil Procedure Code, s. 586—Provincial Small Cause Courts Act—Act IX of 1887, s. 23—Suit transferred to regular side.

A suit of a nature cognizable by a Small Cause Court does not cease to be so within the meaning of Civil Procedure Code, s. 586, because the court in which it was instituted as a small cause suit returned the plaint to be filed on the regular side under Provincial Small Cause Courts Act, section 23, on the ground that the suit involved questions of title.

SECOND APPEAL against the decree of S. Gopalachariar, Subordinate Judge of Madura (East), in appeal suit No. 631 of 1889, reversing the decree of T. Venkataramayya, District Munsif of Sivaganga, in original suit No. 462 of 1888.

Suit for Rs. 55, value of fish taken by defendants from a tank in the village of Thanavally Vayal, of which plaintiff claimed to be the owner. The defendants admitted plaintiff's right as melvaramdar, but contended that they owned the kudivaram right in the village and enjoyed the right over the fish in the tank.

* Second Appeal No. 980 of 1890.

MUTTUKARUPPAN v. SELLAN.

The District Munsif of Sivaganga passed a decree for the plaintiff, but the Subordinate Judge of Madura (East) reversed his decree and dismissed the suit with costs.

The plaintiff preferred this second appeal. It was objected for the respondents that no second appeal lay.

Sadagopachariar and *Subramanya Ayyar* for appellant.

Bhashyam Ayyangar for respondents.

JUDGMENT.—The suit was of a nature cognizable by a Court of Small Causes, and did not cease to be so by reason of the Court having exercised its discretion under section 23 of the Provincial Small Cause Courts Act to direct the plaint to be presented to the Court on its regular side. This point has been previously decided by this Court. No second appeal lies under section 586 of the Civil Procedure Code, and this appeal must be dismissed with costs.

APPELLATE CIVIL.

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

1891. September 2.

GOPI REDDI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

MAHANANDI REDDI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 525—Suit on award maintainable—Secondary evidence.

Where an award cannot be filed and a decree obtained upon it under Civil Procedure Code, s. 525, a party is not precluded from suing upon it. Secondary evidence of the contents of the award is admissible on proof of its being lost.

APPEAL against the order of M. R. Weld, District Judge of Kurnool, under section 53 of the Code of Civil Procedure returning the plaint in original suit No. 3 of 1890 to be amended.

Suit to enforce an award under the following circumstances. Plaintiffs and defendants, who were members of an undivided family, owing to family disputes, agreed to effect a partition of the family property, and, for this purpose, referred the matter to arbitration. The arbitrators, by an award dated 1st March 1887,

* Appeal against Order No. 119 of 1890.

GOPI REDDI v. MAHANANDI REDDI.

awarded to plaintiffs about Rs. 11,498, but as the award was subsequently not forthcoming, the plaintiffs were unable to file it under section 525 of the Code of Civil Procedure.

Thereupon plaintiffs brought the present suit and further alleged that the award was not forthcoming owing to collusion between the defendants and the principal arbitrators. The District Judge by an order dated 28th July 1890, under section 52 of the Code of Civil Procedure, returned the plaint for amendment with the following remarks:—"I am of opinion that the only "way in which an award can be enforced is under section 525 "*et seq*, and failing that, that it cannot be enforced, and that the "plaintiffs must bring a regular suit to obtain what he says was "given by the award."

The plaintiffs preferred this appeal.

Ramachandra Rau Saheb and *Krishnasami Rau* for appellants.

Respondents were not represented.

JUDGMENT.—The District Judge is clearly in error in supposing that no suit will lie upon an award. Section 525, Code of Civil Procedure, only provides that a party *may* apply to the Court to have an award filed; this is no bar to his right to sue upon the award, and, if the award cannot be produced, secondary evidence of its contents will be admissible on proof of its loss.

We must therefore set aside the order and direct the Judge to entertain the plaint. The costs will be provided for in the revised judgment.

PRIVY COUNCIL.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT),

and

NELLAKUTTI SIVA SUBRAMANIA TEVAR (PLAINTIFF).

* P.C. 1891. Nov. 4, 5, 21.

[In Appeal from the High Court at Madras.]

Proof of a Zamindar's title to a tract of hill and forest—Construction of istemrar sanad of 1803 *as to lands granted—Specification of villages—Effect of proved acts of possession by Zamindar.*

Where the proprietary right in a tract of land had been constantly asserted, all questions between the disputants as to the amount of the use of the tract by the claimant, and as to the sufficiency of such use to establish his possession over the whole extent, were *held* to be questions of fact.

A Zamindar claimed from the Government the proprietary possession of a tract of hill and forest, in virtue of an istemrar sanad of the year 1803, conferring upon the grantee his heirs and successors a permanent property in the zamindari as then possessed. To the sanad, which was aptly worded to include the subject of this claim, the acts of the Zamindar had been ascribed. But it did not contain any description of the lands which it was intended to carry, a marginal note only specifying three villages then comprising the zamindari:

Held, that the grant was not confined to the villages so named, and to an area in their immediate vicinity, but that the whole tract of hill and forest was claimable on its being shown, by direct evidence, or reasonable inference, that it was in the possession of the Zamindar when he obtained a permanent title from the Government.

As to part of the tract, the Zamindar's acts of possession, such as grazing cattle, cutting timber, and collecting forest produce, had been exclusive of the exercise of such rights by any other persons; but as to another part of the tract, his acts of that character had been concurrent with a similar user of hill and forest by raiyats of neighbouring villages, not part of the zamindari, and belonging to the Government.

Held, as to both parts, that the acts of possession, which had been found by both the Courts below to have been done by the Zamindar, did not fall short of proving his proprietary possession, and that the user by the villagers, not having taken place in the assertion of conflicting proprietary right, and whether or not they were sufficient to establish rights of easement, were neither in amount nor quality sufficient to displace the Zamindar's proprietary title. The decision of the first Court that the exercise of the above mentioned rights by the Zamindar was evidence only of the right on his part to use the land of another for the purposes indicated, had been rightly reversed by the High Court.

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* *Present*:—LORDS WATSON, HOBHOUSE and MORRIS, Sir R. Couch and Mr. SHAND.

Chennai-600 008

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NELLAKUTTI SIVA SUBRAMANIA TEVAR.

APPEAL from a decree (30th April 1885) of the High Court(1) reversing a decree (8th January 1883) of the District Judge of Tinnevelly. On the 29th July 1880 the plaintiff, as the sanad-holding Zamindar of Singampatti in the Tinnevelly District, sued the Government to obtain the proprietary possession of a tract of hill and forest described as consisting of three parts. The first or eastern part was an area of 10 square miles; the second or central part was an area of less than 1 square mile; and the third or western part comprised nearly 33 square miles. They formed the Singampatti Hills, and had been, as was alleged, from time immemorial in the possession of the plaintiff's ancestors. He also alleged that his possession having been continuous, he had acquired a title by prescription against the Government. During his minority, and while his estate was in the hands of the Collector of the Tinnevelly district, as agent of the Court of Wards, the Assistant Superintendent of Revenue Survey, Mr. Baber, acting under Act XXVIII of 1860(2), decided, on the 6th April 1880, that the tract now in dispute was the property of the Government. That under section 25 of the above Act this order should be cancelled, was now claimed as well as a decree for possession on the title. The Government denied his title asserting that the tract was outside, though in the neighbourhood, of the zamindari, and belonged to the State, as land undisposed of by it.

The District Judge having transferred the suit to his file from that of the Subordinate Judge was of opinion that the Zamindar of Singampatti had, over the whole of the western part of the tract, exercised, to the exclusion of all other persons, the right of grazing cattle, of cutting wood, and collecting forest produce, those acts being all the profitable use that could be made of the tracts. As to the eastern part of the tract, the Judge found that the Zamindar had exercised similar rights but not exclusively; inasmuch as that the raiyats of neighbouring raiyatwari villages had all along done the like acts by way of user of the eastern part. He was also of opinion that the Government had always had the power of regulating, in the general interests of the people of the

(1) *Siva Subramanya* v. *Secretary of State for India*, I.L.R., 9 Mad., 285.
(2) An Act of the Government of India for the establishment and maintenance of boundary marks and for facilitating the settlement of boundary disputes in the Presidency of Fort St. George.

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district, the management of all the tract of hill and forest. He made no order as to the middle tract, which was small, of little value, and not affected, in his view, by the evidence.

The Judge's finding was that only rights of easement, and not the proprietary right over the tract in dispute, had been proved to have been exercised by the Zamindar. But he considered that the Assistant Superintendent of the Revenue Survey had been wrong in deciding that the Zamindar had no rights whatever in respect of that land. He referred to the following cases:— *Vaman Janardan Joshi* v. *The Collector of Thana*(1), *Vyakunta Bapuji* v. *Government of Bombay*(2), *Bhaskarappa* v. *The Collector of North Kanara*(3), *Clark* v. *Elphinstone*(4).

The High Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.,) agreed with the District Judge in accepting as proved the acts done by the Zamindar upon the land in dispute; but disagreed with him as to the effect of those acts. According to them the acts so done were acts of ownership, as the person exercising the right to do them asserted general ownership. If he had asserted a particular right so to act upon the property of another, easement only might have been established. The judgment is reported in I.L.R., 9 Mad., but to explain the Court's view the following extract is here added:—

"It may be that specific portions of the hills were not regularly "cultivated, but such cultivation is not necessary when other acts "of ownership are done upon them. As already observed, there "is evidence of acts of enjoyment done in the open assertion of "title as owner, and the ayakut accounts, and the special circum-"stances of the case warrant the presumption that such acts were "done for more than sixty years, if not from time immemorial. As "to the interference by officers of Government with the enjoyment "by the Zamindar of his rights in full, there is no evidence to "show that such interference was accompanied with a denial of "the Zamindar's right as owner. The enjoyment of any right of "ownership over the soil, whether it be the cutting of timber or "of turf, or the gathering of produce, is *primâ facie* proof of "ownership of the soil; and, when the District Judge found that "there had been such an enjoyment of the forests as proved a

(1) 6 Bom. H.C.R., 191. (2) 12 Bom. H.C.R., App. pp. 1, 57.
(3) I.L.R., 3 Bom., 452. (4) L.R., 6 App. Cas., 164.

"title to the profits, he was logically bound to find a title established to the soil, seeing that the enjoyment had been throughout accompanied with an insertion of such ownership. We see no reason to doubt that all the hills to which the suit refers were included in, and formed part of, the zamindari as it existed in 1803, and as it had been enjoyed by the appellant's family prior to the permanent settlement."

The Court concluded by saying,—

"We are of opinion that the acts of enjoyment proved in this case are acts of ownership, done adversely to the respondent; and that as the adverse possession has extended to more than sixty years, the appellant has acquired a title by prescription."

The decree was that the plaintiff should recover possession of the three tracts, with mesne profits from the date of suit till date of possession and costs. All rights of vicinage held by any raiyats were reserved.

The Secretary of State for India in Council having appealed, Mr. *W. F. Robinson, Q.C.*, and Mr. *J. D. Mayne* appeared for the appellant.

Mr. *J. Rigby, Q.C.*, and Mr. *R. V. Doyne* for the respondent.

Among the arguments for the appellant were the following:—A definite connection has not been shown, as regards proprietorship, between the different parts of the tract of hill and forest, to which the plaintiff has attempted to make out a title by evidence only of acts done in distant and isolated places. Some of the hills are not only far distant, but are inaccessible, on account of thick jungle, from where the acts of ownership are said to have taken place. Again, there is no evidence to show that the zamindari of Singampatti, before 1803, comprehended the tract, or that the Zamindar before then had possession of it. In the sanad of 1803, no boundaries are stated, and it is difficult to suppose that the term "villages" included many square miles of hill and forest. All the zamindari villages, as shown in Mr. Baber's map of 1880, are to the north, and near Government villages. The High Court has inferred from the ayakut accounts of villages lying to the north, and to the east, that the tract of hill and forest must have been included in the zamindari, not having been shown to belong to the Government villages. But no such inference can be drawn. The hill and forest tracts would not, *primâ facie*, belong to either a raiyatwari or a zamindari village, unless expressly

granted. The documents, maps, and suits between the Zamindar and the villagers referred to. The Zamindar had only a permitted user, under the control of the real proprietor.

Documents show that even within the limits, within which the Government did recognize rights as possessor by the Zamindar, they yet claimed authority to restrain him in the exercise of those rights, in a manner inconsistent with his being the proprietor of the soil. From 1837 onwards, it appears that the revenue officials have been in the habit of restricting the inhabitants of villages adjacent to the hills in the exercise of their rights of cutting wood, when these rights were likely to diminish the rainfall by stripping the hills of their trees. Orders to this effect, issued to the inhabitants of other villages in 1837, 1839, 1842 and 1844, are upon the record. Similar orders were issued as regards the Singampatti Zamin Hills in 1861, 1862 and 1866. When a case was granted of part of the hills in 1866, by the guardian of the then minor Zamindar, the lessee agreed to abide by the Government regulations and acts for the preservation of the hill and forest. As it is admitted by the High Court that the Government questioned the Zamindar's title in 1865, it is unnecessary to refer in detail to similar proceedings in 1878, 1879 and 1880. It is submitted that the view taken by the High Court, that these were acts done by the Government agents in the interests of the minor Zamindar, and on his behalf, is wholly untenable.

The oral evidence is non-existent as regards the central tract; it is vague and insufficient as regards the eastern tract; and, as regards the western tract, it does not make out an actual proprietorship of the soil in the Zamindar. Taking the evidence of the witnesses who are credited by the District Judge, it only shows that the rights, which existed in the undisputed district, had been carried on by way of encroachment into the adjoining tract. It must be remembered that the whole hill country is destitute of visible boundaries or marks of delimitation.

As regards the alleged title by prescription, it is necessary to prove a sixty years' adverse possession. Since 1865 the Zamindar's title has been disputed. The period of prescription must therefore begin to run from some date not more recent than 1805, and the High Court seems to be of opinion, chiefly on the evidence of the ayakut accounts, that the possession of these hills by the Zamindars has been from time immemorial. There

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is, however, no sufficient evidence to that effect, especially as the sanad appears to negative any such possession in 1803.

Counsel for the respondent were not called upon.

Afterwards (on 21st November) their Lordships' judgment was delivered by LORD WATSON.

JUDGMENT —This appeal is taken by the Secretary of State for India in a suit instituted before the District Court of Tinnevelly by the respondent, the Zamindar of Singampatti, for cancellation of a decision of the Government Survey Officer, dated the 10th April 1880, and for a declaration of his title to certain tracts of mountain land, covered with forest and jungle, as being parts of his zamindari.

The villages and cultivated lands of the zamindari are situated on the plains, and are contiguous to lands and villages belonging to the Government of India. These lands lie at the northern base of a mountain range whose crest or watershed runs nearly due east and west, rising to an elevation varying from 3,850 to 4,900 feet above sea level. The watershed is a well defined natural line and forms the northern boundary of the territory of Travancore.

The respondent was a minor when he succeeded to the zamindari, and did not attain majority until the year 1880. Until 1867 his estate was managed by his mother ; and from that date until 1880 it was under the management of the Court of Wards.

For a considerable period, antecedent to the year 1865, it appears to have been well known to the Government that the Zamindars of Singampatti claimed, as their property, the extensive hill tract lying between their cultivated lands and the Travancore boundary. In that year the Government began, for the first time, to suggest doubts as to the validity of their right ; and, in 1870, a demand was made for production of the evidence of their title. A report was thereafter made by Lieutenant Campbell Walker, which was submitted to the Government pleader ; but no further steps were taken in the matter until October 1879, when an order was issued directing a Survey Officer, empowered under the Boundary Act, to take up the settlement of the case.

That order was carried out by Mr. Baber, who, after making inquiries, and personally surveying the tract in dispute, issued his report and decision on the 6th April 1880, with a relative plan prepared by him, which shows the whole area then claimed, and also that portion of it which he held to be part of the zamin-

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dari. The latter, roughly estimated, comprehends about one-half of the area claimed, and forms the north-western portion of that area. The lands, which Mr. Baber held to be Government property, consisted of a tract varying in breadths lying outside the eastern and southern boundaries of the lands assigned by him to the Zamindar.

In this suit, which was brought by the respondent in July 1880, after he became of full age, the Government concede, as they have all along done, his right to the land to which he was found to be entitled by the decision of their Survey Officer. The subjects now in controversy are described in the plaint as consisting of three parcels. The first, which has been termed in these proceedings the eastern tract, does not include the whole area to the east which was claimed before and disallowed by Mr. Baber, but only that portion of it about 12 square miles in extent, which lies to the north of the river Varattar. The second, termed the central tract, about 1 square mile in extent, is bounded on the north by the land now admitted to be the respondent's, on the east by the Kusavankuli river which is also, in that locality, the eastern boundary of the admitted land, on the south by Travancore, and on the west by the third tract claimed. That third or western tract, which extends to 35 square miles, is bounded on the north by the lands awarded to the Zamindar in April 1880, on the east by those lands and by the central tract now claimed, on the south by the Travancore boundary, and on the west by the river Tambraparni, which is also the western boundary of the lands to which he has already been found to have right.

The title of the respondent is a sanad, dated the 22nd of April 1803, granted by Lord Clive to his ancestor, Nallakutti Teven, then Zamindar of Singampatti. The sanad contains the usual recitals, one of these setting forth that the object of the grant was to confer upon the Zamindar, his heirs and successors, "a permanent property in their land in all time to come." It contains no specification or description of the lands which it was intended to carry, but is a grant in general terms of the zamindari as then held and possessed by the grantee. There is a marginal note specifying the names of three villages then composing the zamindari ; and it was suggested, in the argument for the appellant, that the effect of the note is to limit the grant to these three villages and a limited area in their immediate vicinity,

and to exclude the claim of the respondent for any land beyond these limits which is not shown to have been subsequently acquired from the Government by prescription. Their Lordships do not think that a marginal specification of the villages existing at its date can control the plain terms of the grant, or can be taken as definitive of the extent of land, cultivable or not, which was then held and possessed by the Zamindar of the villages enumerated. In their opinion, the respondent must prevail in this suit, if he has been able to show, either by direct evidence or as matter of reasonable inference, that the lands now in dispute were held and possessed by the Zamindar at the time when he obtained a permanent title from the Government.

The issue settled in the District Court for the trial of the cause upon its merits was simply "Whether the right to, and possession of, the property in dispute belonged to plaintiff or to Government?" Documentary and oral evidence was adduced by both parties, into the details of which their Lordships find it unnecessary to enter, because of the unanimity of the conclusions in fact which both Courts below have derived from it. It is sufficient to say that there is evidence of both kinds tending to prove that the Zamindars had, for a period beyond living memory or at least for fifty years past, uniformly asserted their right to all the tracts now claimed, by including them in leases of their hill land. Not only so, but in the year 1843 the Government Collector, who was at that time in possession of the zamindari for arrears of revenue, granted a lease of the hill lands and their products, in which these tracts were expressly included; and a Collector who was in possession in the years 1857-58 also dealt with them as forming part of the zamindari. On the other hand, there is no evidence tending to prove that before the challenge which ultimately led to the present litigation, there was any similar assertion of right, either on the part of the Government or of any other person.

Whether there has been a persistent claim of right to a tract of land is, their Lordships need hardly say, a question of fact. Such assertion being proved, all questions as to the amount of use and enjoyment of the tract by the claimants, and as to the sufficiency of such use and enjoyment to constitute possession of the whole extent claimed, are also, in the opinion of their Lordships, pure questions of fact.

The District Judge held it to be established by the evidence that, throughout the third or western tract, the Zamindars of Singampatti had all along exercised the exclusive right of grazing cattle, cutting timber, and collecting mountain produce. With regard to the first or eastern tract, he found that the Zamindars had exercised rights of precisely the same kind over the whole tract, but not to the exclusion of a certain amount of user by inhabitants of Government villages. Upon these findings, the learned Judge came to the conclusion in law that the possession of the western tract by the respondent and his predecessors ought not to be ascribed to a title of property, but that it was sufficient to give him right to exclusive easements of pasturage, cutting timber, and collecting mountain produce over its whole area. As to the western tract, he held that the respondent was entitled to easements over it of the same character, but not exclusive. The only observation upon the second or central tract which occurs in his judgment is to the effect that "it appears to be of comparatively "little value, and no evidence regarding it was produced on either "side."

The result was that the learned Judge set aside the decision of the Survey Officer, which found that the respondent had no interest in the disputed lands; and pronounced no further order beyond finding neither party entitled to costs.

On appeal, the High Court adopted the findings of the District Judge with respect to the Zamindars' exclusive possession of the western tract, but rejected his legal inference that the right thereby constituted was in the nature of easement, and held that it amounted to a full right of ownership. In that view of the law their Lordships entirely concur. Having regard to the character of the subjects in controversy, the exclusive possession which the Zamindars are, by concurrent judgments, found to have enjoyed appears to them to have in no particular fallen short of proprietary possession. There is no ground for presuming that a proprietor, whose title was clear, and who was desirous of turning his estate to the best account, would have occupied or used the subjects in any other way than they did. When that circumstance is taken in connection with the fact that the Zamindars had a title which will aptly include these subjects, and that their acts of possession have invariably been ascribed to that title, the inference drawn by the High Court appears to be inevitable.

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The learned Judges of the High Court also expressed their concurrence in the findings of the District Judge with respect to the Zamindars' possession of the eastern tract, but came to the conclusion that their possession alone was that of proprietors, and that the proved acts of user by raiyats from neighbouring villages were not of that character. On examining the judgments of the two Courts, their Lordships were satisfied that the possession of the Zamindars, as found by both, would, in the absence of conflicting possession sufficient to cut down or qualify their right, entitle the respondent to a declaration of his proprietorship. But it did not seem to be equally clear that the two Courts were altogether agreed as to the extent and character of the stranger raiyats' possession; and they accordingly permitted the appellant's Counsel to bring before them all the evidence bearing on that point. Their Lordships are unable to affirm that there was any difference of opinion in the two Courts upon that point; but, whether that be so or not, they are satisfied, upon the evidence, that the decision of the High Court is right. Beyond what may be implied in the acts themselves, there is nothing to show that aught done by these stranger raiyats was in the assertion of right; and, assuming the statements of the appellant's witnesses to be absolutely true, the acts of user to which they speak are neither in amount nor quality sufficient to displace the proprietary title of the Zamindar. Whether the evidence would *per se* be sufficient to raise rights of easement, and, if so, in whose favour, are issues which do not arise in the present case.

The High Court, differing from the District Judge, held that the respondent has proved his title to the second or central tract claimed; and in that finding also their Lordships concur. It is not easy to understand why the tract was made the subject of a separate claim. It adjoins the hill lands which have been found to belong to the zamindari; it lies within their natural limits, namely, the Kusavankuli river on the east, and the watershed on the south. There is nothing to suggest that it was ever claimed or possessed by any other person, whilst it was persistently claimed and treated by the Zamindars as part of their estate. In these circumstances, their Lordships are of opinion that their proprietary possession of the hill lands adjoining is sufficient to establish their title to the central tract.

The High Court, upon these findings, allowed the appeal,

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reversed so much of the decree of the Court below as dismissed the respondent's claim, and decreed the claim as made, with costs in all Courts. Being of opinion, for the reasons already indicated, that the decision of the High Court is right, and ought to be affirmed, their Lordships will humbly advise Her Majesty to that effect. The appellant must pay to the respondent his costs of this appeal.

Appeal dismissed.

Solicitor for the appellant:—The Solicitor, India Office.

Solicitors for the respondent:—Messrs. *Lawford, Waterhouse & Lawford.*

ORIGINAL CIVIL.

Before Mr. Justice Subramanya Ayyar.

1891. December 16.

VITHILINGA PADAYACHI (PLAINTIFF),

v.

VITHILINGA MUDALI AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, ss. 13, 98, 103—"*Res judicata*"—"*Court of competent jurisdiction*"—*Landlord and tenant—Quiet enjoyment, covenant for,—Parties—Suit for damages against lessor, including costs—Joinder of one of two co-lessees as defendant—Suit dismissed against such lessee.*

In 1883 A, the trustee of a certain charity, executed in favour of X and Y an agricultural lease for nine years and delivered over possession of the lands comprised in it, being part of the trust property. The lease contained a provision that it should be cancelled on default being made in payment of the rent and kist, and it contained no express covenant for quiet enjoyment. In 1887 default was made in payment of the rent and kist. A thereupon cancelled the lease and sued X and Y in a Subordinate Court and obtained a decree for the arrear, the total amount of his claim being Rs. 2,807. In that suit X alleged that Y was merely a name-lender for A who desired to benefit himself at the expense of the charity, and also that certain raiyats setting up a false claim had evicted X from the lands demised at the instigation of A, who had subsequently sought unsuccessfully to obtain further advantages for himself. The Subordinate Judge framed an issue on each of these allegations and recorded findings in the negative. In the same year X filed a suit for damages for breach of contract against A and Y in the High Court, repeating in his plaint the above allegations. When that suit came on for hearing, it was dismissed for default, Y being the only party who appeared. X now sued A again on the same cause of action, making the same allegations. Y was subsequently brought on to the record as being a necessary party to the suit, being joined as

* Civil Suit No. 148 of 1890.

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second defendant, but he applied to be and was struck off the record on the ground that the dismissal of the former suit in the High Court was final as against him:

Held,

(1) that the suit was not bad for the non-joinder of the co-lessee as a plaintiff, nor for the reason that the plaintiff could not prosecute the suit against him;

(2) that the matters put in issue in the Subordinate Court were not *res judicata* by reason of the decision of that Court;

(3) that the plaint disclosed a good cause of action against the lessor;

(4) that even if the plaintiff had substantiated his allegations against his lessor, he would not have been entitled to recover the cost of civil and criminal proceedings against the raiyats who had evicted him.

SUIT for damages by one of two lessees against the lessor of a village in the Tanjore district. The lands comprised in the lease formed part of the endowment of certain charities of which the lessor was trustee under the will of Ammoyee Ammal. The other lessee was a relation of the lessor, and it was alleged by the plaintiff that he held his ostensible share in the lease really for the benefit of the lessor. The plaintiff's case was that the lessor had sought to obtain from him a larger share, and on his refusal had instigated the raiyats of the village to oust him, that they had in fact ousted him, and that the lessor had wrongfully cancelled the lease for non-payment of rent in 1887, whereby he suffered damages, in the assessment of which he included the cost of certain civil and criminal proceedings instituted by him against them. The lease contained no covenant for quiet enjoyment. It provided for the cancellation of the lease on default in payment of rent and taxes, and it was under this provision that the lease had been cancelled in 1887.

In original suit No. 59 of 1887 on the file of the Subordinate Court at Kumbakonam the lessor sued both lessees for the arrears of rent, the amount of kist paid by him, &c., the total amount of the claim being Rs. 2,807-11-1. Upon the allegations of the present plaintiff that Court framed the following among other issues:—

(1) Whether defendant No. 2 has joined in the execution of the lease agreement on behalf of the plaintiff in his individual capacity, and, if so, whether the plaint lease is invalid on that account.

(3) Whether the plaintiff instigated the tenants of the village to claim a kudikani right in themselves.

(4) Whether any and what portions of the lands included in the lease agreement were lying waste in *fasli* 1296, and whether

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defendant No. 1 can on that account object to pay plaintiff the lease amount.

The Subordinate Judge recorded findings on the above issues in favour of the lessor, and his findings were upheld on appeal by the District Judge. It was now pleaded that the matters referred to in these issues were *res judicata*.

In civil suit No. 187 of 1887 on the file of the High Court the present plaintiff sued the lessor and his co-lessee upon the same cause of action as that now set up. That suit was dismissed for default against the lessor, who did not appear under Civil Procedure Code, s. 98, and against defendant No. 2, who did appear under Civil Procedure Code, s. 103.

The present suit was, in the first instance, filed against the lessor alone in his individual capacity. The plaint was subsequently amended and the lessor was described as "Mirasidar and executor under the will of one Ammoyee Ammal"; and by order of the High Court Singaravelu Mudali, the second lessee, was joined as being a necessary party. The latter applied to be struck off the record on the ground that the dismissal of the former suit as against him was final, and this was done by the order of Best, J.

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

Visvanadha Ayyar for plaintiff.

Mr. *K. Brown* and Mr. *R. F. Grant* for defendants.

JUDGMENT.—The inam village of Puttoor in the Tanjore district forms the endowment of certain charities founded by one Lakshmana Mudali, deceased, of Madras. The first defendant is the present executor of the said Lakshmana Mudali's estate and the trustee of the said charities.

A lease of the village of Puttoor was granted on the 17th April 1883 by the first defendant under an instrument purporting to be for the benefit of the plaintiff and of the second defendant. The parties exchanged registered instruments regarding the lease. It was for a term of nine years from fasli 1293 and the rent reserved was 2,200 calams of paddy *per annum*, deliverable in two instalments within the year. The lessees had further to pay certain taxes amounting to Rs. 200 annually. The instruments between the parties provided that the lease might be forfeited for non-payment of the rent or the taxes. The plaintiff at once entered into possession under the lease. So far the facts are undisputed.

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I shall now briefly state the other material allegations of the parties as ascertained from the pleadings or at the trial. Those of the plaintiff are as follows:—The second defendant possessed in reality no interest under the lease; his name was introduced into the transaction merely to secure a benefit to the first defendant, whose daughter by a concubine is married to the second defendant. A fourth share of the profits that the plaintiff might make from the village during the term of the lease was to go to the first defendant, the plaintiff taking the remaining three-quarters. This was the original understanding; but shortly after the lease was granted, the first defendant wanted half the profits instead of a fourth; the plaintiff refused to comply with that demand, and the first defendant, who was bound by law and by the contract to secure quiet possession and enjoyment to the plaintiff, instigated certain inhabitants of the village who had been cultivating the lands before falsely to set up occupancy rights, to disturb his possession and obstruct his enjoyment. In faslis 1295 and 1296 the obstruction became so complete that the plaintiff and his tenants were unable to cultivate any of the lands, which consequently lay waste. The first defendant having thus succeeded in ousting the plaintiff, sent a notice on the 17th May 1887 professing to cancel the lease under the forfeiture clause and openly resumed possession. The damages sustained by the plaintiff are estimated at Rs. 20,500, which he seeks to recover from the first defendant.

The material allegations of the first defendant, so far as they are necessary, are these:—The plaintiff's statements summarised in the last paragraph are untrue. The lease was a *bonâ fide* transaction, and the first defendant had no manner of connection with the profits. The second defendant was in reality one of the lessees, and the plaintiff cannot sue without joining him. The disturbances and obstructions alleged by the plaintiff were caused by the ill-feeling, which arose between the plaintiff and the inhabitants of the village in consequence of the plaintiff's attempting to raise the rents, his refusing to give lands to cultivate to such of them as declined to accept his terms, his bringing in tenants from other villages, and his having offended them by other imprudent acts. The plaintiff failed to pay the rent and the tax due for fasli 1296; the lease was thereupon lawfully cancelled by notice to the plaintiff and possession of the village

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taken by the first defendant. Subsequently the first defendant brought original suit No. 59 of 1887 against the plaintiff and the second defendant in the Kumbakonum Subordinate Court for the recovery of the above rent and tax, &c., and obtained a decree for the same, and the matters raised by plaintiff in the present suit are, therefore, *res judicata*.

The second defendant put in a written statement urging that there was no cause of action against him, and that as civil suit No. 187 of 1889 on the file of this Court instituted by the plaintiff in respect of this very matter against the first defendant and second defendant was dismissed for default of appearance on the part of the plaintiff; this suit is not maintainable against him.

On the 20th November 1890, Best, J., passed an order dismissing the suit as against the second defendant.

The following issues were recorded:—

First.—Is the suit maintainable in the absence of Singaravelu Mudali?

Second.—Is the suit not maintainable in whole or in part by reason of the decree in original suit No. 59 of 1887 on the file of the Subordinate Court of Kumbakonum?

Third.—Was the first defendant justified in cancelling the lease?

Fourth.—To what damages, if any, is plaintiff entitled?

Fifth.—Is the defendant personally liable for such damages, if any?

Mr. Brown, in opening the first defendant's case, commented on the inconsistent manner in which the plaintiff's case was presented. From paragraphs 4 and 8 and the prayer of the plaint it clearly appears that the plaintiff intended to rely on a covenant for quiet enjoyment, and that he treated the suit as one for breach of contract. Later on, however, the plaintiff informed the Court that he sued the first defendant not as executor, but in his personal capacity. Mr. Brown argues that this is in effect an admission that the suit is not one for breach of contract. Though the first defendant traversed the allegation about the covenant for quiet enjoyment, no express issue was raised by the plaintiff on the point. But on the other hand, if the plaintiff was understood to have abandoned the case on the footing of a breach of contract, that ought to have been made clearer upon the record and the plaint amended accordingly; for if the plaintiff is

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to be taken as suing the first defendant solely on the ground of a wrongful eviction by him, it may be open to doubt whether the reliefs which the plaintiff seeks are the appropriate ones. The trial has, however, proceeded on the assumption that the issues recorded cover the real questions arising in the case, and I shall deal with them as they stand.

First issue.—On the face of the lease the plaintiff and the second defendant are co-lessees. *Primâ facie,* therefore, both must be parties to this litigation. The plaintiff, alleging that the second defendant had in reality no interest in the matter, sued the first defendant alone without making the second defendant a party. But the latter was made a party by the order of the Court. His contention that the dismissal of civil suit No. 187 of 1887 was fatal to the maintenance of this suit prevailed, and the suit was dismissed so far as the second defendant was concerned by the order of the 20th November 1890. Now it is argued for the first defendant that in consequence of that order this case must proceed as if the second defendant had never been made a party, and that the plaintiff's claim must fail on the ground of non-joinder of a necessary plaintiff. I do not agree with this argument. Assuming, as the first defendant contends, that the second defendant had an interest in the lease, plaintiff is in no view entitled to recover anything from the second defendant except it be costs. As one entitled with the plaintiff to sue, but refusing to join, the second defendant could only have been made a defendant so that all persons interested might be before the Court. This was expressly done, and I cannot see how the subsequent order relied on can alter the fact.

It is next contended for the first defendant that, even if my view as stated above be correct, the suit cannot be maintained without the second defendant being arrayed as co-plaintiff. According to the Indian practice it is sufficient that persons having the interest that the second defendant is alleged by the first defendant to possess are made defendants. *Kanna Pisharody* v. *Narayanan Somayajipad*(1). It is unnecessary, therefore, to consider the English authorities cited by Mr. Brown in support of his argument(2).

(1) I.L.R., 3 Mad., 234.
(2) Dicey on Parties, pp. 104–110, and cases there cited.

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Upon the view I take of this legal objection, I must decide the first issue against the first defendant, even if I should come upon the evidence in the case to the conclusion that the second defendant is a co-lessee; I therefore refrain from discussing the evidence upon this feature of the transaction, which reveals its questionable character. That it is a questionable transaction is clear whether the evidence for the plaintiff or the evidence for the defendant be accepted. The plaintiff's case is that at the time of the lease, which, I consider, was granted on favourable terms, the lessee agreed to give the lessor, a trustee, one-fourth of the profits during the whole term as an inducement to his granting the lease. On the other hand the second defendant as the first defendant's witness admits that the plaintiff offered him a share in the profits to make the first defendant give the lease, and that the latter did, in consequence, grant the lease with the full knowledge that the profits were to go to the second defendant, his own son-in-law then living with him as a member of his family, and with the knowledge that second defendant was to take no trouble whatever in connection with the management of the property demised.

Second issue.—The main question in the present suit is whether the first defendant was justified in cancelling the lease He says he was entitled to act upon the forfeiture clause as the plaintiff and the second defendant had neglected to pay the rent and the tax due for fasli 1296. The plaintiff's case on the other hand is that he had been unlawfully evicted and kept out of possession during that fasli by the first defendant, that the latter was consequently not entitled to treat the rent, &c., for that period as in arrears, and the first defendant's action in cancelling the lease is, therefore, invalid. This contention on the part of the plaintiff is based on the rule that eviction of the lessee by the lessor from the whole or any part of the premises demised creates a suspension of the entire rent during the continuance of the eviction, until the tenant re-enters and resumes possession,—*Morrison* v. *Chadwick*(1). The material question, therefore, to be determined is whether the plaintiff had been evicted by the first defendant as alleged by him. This was, in my opinion, decided against the plaintiff in original suit No. 59 of 1887, wherein the first defendant sued and obtained

(1) 7 C.B., 266.

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a decree for the very same rent, &c., against the plaintiff and the second defendant. The third issue and the finding thereon (exhibits VII and VIII) in that suit were, no doubt, expressed in somewhat different words, but it is clear that the point in issue was really as stated by me. It is contended for the first defendant that that adjudication bars this suit,—*Ananta Balacharya* v. *Damodhar Makund*(1). This raises a question on which the authorities are not quite agreed. In *Bholabhai* v. *Adesang*(2), West and Nanabhai Haridas, JJ., held that the decision of a District Court in appeal in a suit for less than Rs. 500 was not binding on the same or any other Court in a subsequent suit for more than Rs. 500 in which the identical question was raised between the parties, because they are entitled to prefer a second appeal to the High Court in the subsequent suit, whilst no such appeal lay in the first suit. This case was recently followed by Sir Charles Sergent, C.J., and Telang, J., in *Govind Bin Lakshman Shet* v. *Dhondbarav Bin Ganbarav Tambye*(3). In *Singaracharlar* v. *Krishnasami*,(4) Wilkinson, J., came to a different conclusion, whilst Kernan, J., adopted the view which is to be explained on the principle referred to by West, J., in the latter part of the second paragraph on page 80. *Bholabhai* v. *Adesang*(2) was not brought to the notice of Wilkinson, J., and the latter decision of the Chief Justice and Telang, J., was subsequent.

The Bombay rulings seem to me necessarily to involve the proposition, which, for the purpose of the point I am now considering, may be shortly stated thus. In appealable cases, a decision to be *res judicata* must have been given in a previous suit which the parties, according to the ordinary procedure, were entitled to take, as to fact and law, ultimately to the same (or corresponding) appellate tribunal to which the subsequent litigation, wherein the decision is relied on as conclusive, could be carried. If the rule thus deduced is correct, the first defendant's contention as to *res judicata* is unsustainable, as the suit in the Subordinate Court was for less than Rs. 5,000 and only an appeal upon questions of law lay to the High Court; whereas the present claim is for a sum over Rs. 5,000 and admits of an appeal on the facts also. Mr. Brown argues that, as the Subordinate Court could entertain a suit for

(1) I.L.R., 13 Bom., 25. (2) I.L.R., 9 Bom., 75. (3) I.L.R., 15 Bom., 104.
(4) Second Appeal No. 1200 of 1887 unreported.

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more than Rs. 5,000, it was competent, within the meaning of section 13, Civil Procedure Code, to entertain the present suit and that the letter of the law requires nothing more. But section 13 of the Civil Procedure Code is not exhaustive. Moreover the decisions on the section relating to *res judicata* in the successive Civil Procedure Codes show that the legislature did not find it quite easy to make the language of that section precise and comprehensive at the same time. It is sufficient to refer to one decision on each in support of this statement. In *Krishna Behari Roy* v. *Brojeswari Chowdranee*(1), the Privy Council held that the words "cause of action" in section 2 of Act VIII of 1859 cannot be taken in its literal and most restricted sense. The same tribunal ruled in *Misir Raghobardial* v. *Rajah Sheo Baksh Singh*(2) that the words "Court of competent jurisdiction" in section 13 of Act X of 1877 meant a Court which had jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive. In *Bababhai* v. *Narharbhai*(3), the Bombay High Court construed the same term "Court of competent jurisdiction" in explanation VI, section 13 of the present code as including a foreign competent Court. Dr. Whitley Stokes, who had much to do with the preparation of the codes of 1877 and 1882, refers to the matter dealt with by section 13 as "a subject of which the importance in a country inhabited by a litigious population is only "equalled by the difficulty of dealing with it clearly, concisely "and accurately in a legislative enactment"—Volume II, Anglo-Indian Codes, p. 392.

These considerations being kept in view, the interpretation suggested on behalf of the first defendant cannot, I think, be insisted on when it leads to results so manifestly opposed to reason as pointed out by West, J. In one place he puts the matter thus: "Moreover for the purpose of establishing a prior decision as "*res judicata*, we must look to the whole series of possible proceedings up to the highest available ordinary tribunal, otherwise "as we have seen, the anomaly must arise of the highest Court "being bound by a prior decision in the lowest Court in a case "too paltry for an appeal." The passage from Savigny, cited in support of this view, is quoted by West, J., in *Anusuyabai*

(1) L.R., 2 I.A., 283. (2) L.R., 9 I.A., 197. (3) I.L.R., 13 Bom., 224.

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v. *Sakharam Pandurang*(1), and is as follows:—"Everything "that should have the authority of *res judicata* is and ought "to be subject to appeal." This being so, it follows that that element of *res judicata* on which the whole of the present discussion turns, viz., concurrence of jurisdiction, must exist not only as to the Original Court, but also as to the appellate tribunals and their powers in the respective suits. That the necessity for this complete concurrence of jurisdiction in appeal also was distinctly present to the Privy Council when it laid down the law in terms very similar to those of section 13 of the Civil Procedure Code is clear from the observation of their Lordships. "It is "true that there is an appeal from the Munsif's decision, but that "upon the facts would lie to the District Court, and not to the High Court," *Misir Raghobardial* v. *Rajah Sheo Baksh Singh*(2). Mr. Brown cites *Krishna Behari Roy* v. *Brojeswari Chowdranee*(3), but the point now raised was not taken there, whereas, in the later case of *Misir Raghobardial* v. *Rajah Sheo Baksh Singh*(2) just referred to that aspect of the matter with which the present question is closely connected was fully considered. The great impropriety of binding the higher Court in a case of considerable magnitude by the decision of a lower Court presided over by a Judge of presumably inferior qualifications was strongly pointed out, and the argument based on one of the maxims on which the doctrine of *res judicata* rests was met by the remark that "although it may be desirable to put an end to litigation, the "inefficiency of many of the Indian Courts makes it advisable not "to be too stringent in preventing a litigant from proving the "truth of his case."

It has been said that the conclusion of the Bombay High Court would itself in some cases lead to anomalous results. This is not, however, quite clear to me. But supposing it to be otherwise, I should still hold that the balance of advantages is in favour of that conclusion, and I accordingly venture to adopt it.

Third issue.—As I have already noticed a covenant for quiet enjoyment is relied on in the plaint. It is not now contended that there was any express contract, but apart from the Transfer of Property Act, which it is conceded does not apply, there is no

(1) I.L.R., 7 Bom., 466. (2) L.R., 9 I.A., 197. (3) L.R., 2 I.A., 283.

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doubt that the law implies a covenant of the description in question. By such covenant for quiet enjoyment, however "the "lessee is to enjoy his lease against the lawful entry, eviction or "interruption of any man, but not against the tortious entries, "evictions or interruptions and the reason for the law is solid "and clear, because against the tortious acts the lessee has his "proper remedy against the wrong-doers" (Woodfall's *Landlord and Tenant*, 14th edition, page 695, see also *Douzelle* v. *Girdharee Singh*(1)). The case for the plaintiff is that the persons that actually ousted him had no occupancy rights, but set up a false claim, their entry therefore was, according to him, unlawful and the first defendant cannot, as lessor, be made liable on the covenant in law. If, however, the first defendant had instigated his former tenants to set up an unfounded claim and thereby ousted the plaintiff, he would be liable as a wrong-doer. It is thus clear that in one view the plaintiff cannot here derive any advantage from the implied covenant and that in the other view no question of covenant arises.

Mr. Brown next argued that the acts on the part of the people in the village, relied on by the plaintiff, did not in law amount to an eviction. It cannot be denied and, I believe, it is not denied, that in the *fasli* in question the plaintiff and his tenants were, in consequence of the objection of the former tenants, utterly unable to cultivate any of the wet lands, which were the most valuable part of the property demised, and a great portion of the dry lands. The Magistrate, by an order (exhibit H) under the Criminal Procedure Code, upheld the possession of those that set up occupancy rights. Upon this state of the facts, I would have no hesitation in holding that there was an eviction sufficient to create, according to *Morrison* v. *Chadwick*(2) already referred to, a suspension of the rent, &c., for the non-payment of which the first defendant proceeded to determine the lease, should I find that the first defendant instigated the people that turned out the plaintiff to do so.

The question I have now to consider is that of the first defendant's responsibility for the acts of the people of the village. The evidence, on behalf of the plaintiff on the point, is almost purely

(1) 23 W.R., 121. (2) 7 C.B., 266.

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oral and I distrust it, as it is inconsistent with the conduct of the parties and against the probabilities of the case.

[After a discussion of the evidence, His Lordship recorded a finding on the third issue in favour of the defendant observing, "I come to the conclusion that the plaintiff brought the troubles on himself by demanding more rent and by his unconciliatory conduct towards the raiyats of the village and that the first defendant was in no way responsible for them." The judgment proceeded as follows:—]

As to the damages neither party has produced any accounts. The evidence as to the profits that the plaintiff is likely to have made if he had had undisturbed possession is oral and there is in reality no conflict between the evidence for the plaintiff and that for the defendant; both sets of witnesses give only rough estimates. I have already said that, in my opinion, the lease was granted on favorable terms. I think the annual profits may be fairly taken at Rs. 1,000 a year. As to the Rs. 2,500 appropriated by the first defendant towards the rent of fasli 1295 at the express request of the plaintiff, I do not understand how the plaintiff is entitled to a refund thereof.

The remaining item is Rs. 4,000 claimed as costs incurred by the plaintiff in connection with criminal complaints and civil suits. I hold that the plaintiff is not entitled to claim this by way of damages. *Khaja Mahomed Isakhan* v. *Baboo Kisho Lal*(1). Apart from this, I think the plaintiff has failed to establish that he spent this large amount as alleged by him. Exhibit K is quite unreliable. The plaintiff swore, in the examination in chief, that he was personally aware that the account was kept in the course of business from 1883 to 1885, but when his attention was drawn in cross-examination to the water mark, dated 1885 in the sheets of paper of which the book consists, he admitted that he first knew of this book only a short time before this plaint was filed. There is no other satisfactory evidence about this matter. For this $\frac{3}{4}$ share, I would give the plaintiff Rs. 5,000 on account of the profits, if he were entitled to damages, but, in consequence of the conclusion at which I have arrived as to the cancelment of the lease, I must hold he is not entitled to recover any amount.

(1) 6 B.L.R., App., 44.

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I find, on the first issue, that the suit is sustainable; on the second issue that the suit is not unmaintainable either in whole or in part by the decree in O. S. No. 59 of 1887 of the Subordinate Court at Kumbakonum, on the third issue, that the first defendant was justified in cancelling the lease and on the fourth issue Rs. 5,000 is the amount, I would award to the plaintiff if he were entitled to recover any damages, but that he is not entitled to any. I record no finding on the fifth issue.

The result is that the plaintiff's suit is dismissed with costs.

Branson & Branson attorneys for defendants.

APPELLATE CIVIL.

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

MADAVAN (PLAINTIFF No. 2), APPELLANT,

v.

ATHI NANGIYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

1891. October 26.

Malabar law—Anubhavom tenure—Forfeiture by alienation—Landlord and tenant—Denial of landlord's title in pleadings—Limitation.

Lands in Malabar were demised on anubhavom tenure. Some of them were alienated by the tenant, but the landlord subsequently accepted rent. More than twelve years after the alienation, the landlord sued to eject the tenant on the ground that the tenure was thereby forfeited. The tenant for the first time in his written statement denied the landlord's title:

Held,

(1) that the cause of action alleged in the plaint was barred by limitation;

(2) that the plaintiff could not recover in this suit on the ground of the denial of his title in the written statement.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar at Calicut, in appeal suit No. 473 of 1889, confirming the decree of P. J. Ittiyerah, District Munsif of Kutnad, in original suit No. 632 of 1888.

Suit for recovery of three parcels of land demised on anubhavom tenure by plaintiff's predecessor in title to the karnavan of defendant No. 1 on 22nd April 1850 on the ground that defendant No. 1 alienated her right over the property contrary to the terms of her holding and thereby forfeited the tenancy.

* Second Appeal No. 1122 of 1890.

MADAVAN v. ATHI NANGIYAR.

Defendant No. 1 denied the demise and plaintiff's title and contended that the land was jenm of her tarwad, that she had sold item No. 1 to defendant No. 2 and items Nos. 2 and 3 were held by defendant No. 3 under her tarwad.

Defendants Nos. 2 and 3 supported the statement of defendant No. 1 and pleaded limitation.

The District Munsif held that the plaintiff had established the demise sued on, that such a demise was a perpetual grant for past or future services, that one of its incidents was that the grantee had no power of alienation, and that the services in question were of a feudal nature, the necessity of which no longer exists, and following *Forbes* v. *Meer Mahomed Tuquee*(1) held that the grant was not resumable, and accordingly dismissed the suit. His decree was affirmed on appeal by the Subordinate Judge who concurred in the above rulings.

The plaintiff No. 2 preferred this second appeal.

Govinda Menon for appellant.

Raman Menon for respondents.

JUDGMENT.—Assuming that the rights under the demise were forfeited by the alienations made by first defendant, these alienations were admittedly made more than twelve years before suit, and the suit, so far as it is based upon forfeiture, is barred by Limitation. We also observe that rent was accepted for several years after the alleged alienation. On these grounds, we think the decision of the Lower Courts can be supported. It is argued for appellant that he has a right to recover, because first defendant denied his title in the written statement. It is not shown that there was any denial of title before suit, and therefore plaintiff had no cause of action at the time of filing the suit.

The cases referred to by appellant's Vakil, including *Chidambaram* v. *Saminatha*(2), all relate to the question whether a disclaimer of the landlord's title would preclude the necessity of proving a valid notice to quit.

We do not think the disclaimer in the written statement in this case can relate back to the date of institution of the suit, and thereby give plaintiff a cause of action which he did not otherwise possess. There is no question of notice to quit in this case.

The appeal fails and is dismissed with costs.

(1) 13 M.I.A., 438. (2) Second Appeal No. 512 of 1890 unreported.

APPELLATE CIVIL.

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

1891. September 4.

VAGURAN AND OTHERS (DEFENDANTS NOS. 3 TO 11), APPELLANTS,

v.

RANGAYYANGAR (PLAINTIFF), RESPONDENT.*

Landlord and tenant—Forfeiture for non-payment of rent—Transfer of reversion—Transfer of Property Act—Act IV of 1882, *s.* 6, *cl.* (*b*).

A condition in a lease providing that the landlord may re-enter on non-payment of rent is penal and will be relieved against, apart from the provisions of the Transfer of Property Act.

Semble: The transfer of the reversion based on clause for forfeiture is not invalid by reason of Transfer of Property Act, s. 6, cl. (*b*).

SECOND APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Madura (West), in appeal suit No. 2 of 1890, modifying the decree of T. B. Vasudeva Sastri, District Munsif of Tirumangalam, in original suit No. 91 of 1886.

Suit for ejectment and damages.

The lands in question belong to a religious endowment attached to a temple, of which defendant No. 1 is trustee. Defendant No. 1 leased these lands by exhibit C, dated 4th May 1881, to defendant Nos. 2 and 3 for a term of six years on an annual rent of 71 kalams of paddy payable on or about 11th April of each year. Defendants committed default in payment of rent due for faslis 1292 and 1293, but these defaults were condoned or waived by acceptance of rent subsequently. Defendants Nos. 2 and 3 again failed to pay rent in fasli 1294, whereupon defendant No. 1 proceeded to enforce the condition of forfeiture reserved to him by the lease and gave notice to defendants on 13th June 1885, cancelling the lease and intimating that if the rent due was not paid he would recover it by suit. The rent not having been paid as demanded, defendant No. 1 sued and obtained a decree for the amount. On 20th June 1885, defendant No. 1 leased the lands to the plaintiff, and gave notice of the fact to defendants Nos. 2 and 3, calling upon them not to interfere with

* Second Appeal No. 1055 of 1890.

VAGURAN v. RANGAYYANGAR.

the plaintiff's entry on and enjoyment of the lands. Defendants Nos. 2 to 15, who were all members of one family, failed to give up possession of the land, the plaintiff accordingly sued as above.

Defendants Nos. 2 to 15 pleaded, *inter alia*, that the condition for re-entry was penal and not enforceable, and that the right of re-entry could not be validly transferred under clause (*b*), section 6, Transfer of Property Act.

The Lower courts overruled both of these pleas and passed decrees for the plaintiff.

Defendants 3—11 preferred this second appeal.

Parthasaradhi Ayyangar for appellants.

Ramachandra Ayyar for respondent.

JUDGMENT:—It is argued that upon the true construction of exhibit C, the last clause which relates to forfeiture does not apply to the failure to pay rent, but to failure to comply with the other terms of the lease. We have no doubt that the last clause does refer, *inter alia*, to the covenant for payment of rent on the due date. The words "further" and "as per terms of the above-mentioned lease" leave no room for doubt on this point.

We agree, however, with the appellant's pleader that the clause is a penal one which should be relieved against. There is a series of cases in this and in the Bombay High Court in which the right of relief against forfeiture in cases like the present has been recognised and acted on. The Transfer of Property Act does not apply to agricultural leases and the landlord had, prior to the institution of this suit, obtained a decree for the payment of rent for fasli 1294.

As to the right of re-entry we are of opinion that the decisions of the Courts below are right. What was transferred was not the right of re-entry by itself, but the reversion as based on the clause for forfeiture. Though the lease has expired since the suit was instituted, in dealing with this second appeal, we must be guided by the status of the parties at the date of the institution of the suit. The result will be that we set aside the decree of the Courts below and dismiss the plaintiff's suit with costs of defendants Nos. 3 to 11 throughout.

APPELLATE CRIMINAL.

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

1891. October 28.

SUBRAMANYA

v.

SOMASUNDARA.*

Penal Code, s. 166—*Public servant—Regulation XXIX of* 1802 (*Madras*), *s.* 12—*Duties of zamindari karnam.*

Per cur: A zamindari karnam is a public servant and is bound by law to produce accounts to the proprietor or farmer of a zamindari.

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

The case was stated as follows:—

"The offence of which the accused was convicted is that he "being a public servant disobeyed a direction of law with intent "to cause injury (section 166, Indian Penal Code), and he was "imprisoned for three weeks and made to pay a fine of Rs. 25.

"He is, what both Magistrates call the *de facto* karnam of a "zamindari village, *i.e.*, they both admit that he is not legally "occupying that post, but he is deemed to be liable to the penalties "under section 21, explanation II, Indian Penal Code.

"Both Magistrates hold the accused to be a public servant on "the authority of the High Court, the Lower Court quoting High "Court Proceedings No. 1381, dated 25th July 1881. The Head "Assistant Magistrate says it has 'often been ruled,' but does "not quote any rulings. The Regulation of 1802 sets out in the "preamble the object with which the office is maintained, and it "seems to me that the karnam is not appointed to do anything in "the interest of the landholder, but to secure the revenue of Gov-"ernment, to protect the rights and property of the people, and "to secure authentic information and accounts for the officers of "Government and the Courts of Judicature. Here he has been "convicted of conducting himself as a public servant in dis-

* Criminal Revision Case No. 462 of 1891.

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"obedience to legal directions so as to injure the landholder. In "the case quoted, High Court Proceedings No. 1381, dated 25th "July 1881, the prosecutor was a receiver under a Court of "Judicature; although a zamindari karnam is a public servant "for the purposes set out in the preamble, it does not follow that "he is so in all his functions. His 'conduct' in this case is the not "keeping or not preparing in time certain accounts. The first set "of accounts are the demand, collections, and balance accounts for "faslis 1299 and 1300. The accounts which a zamindari karnam "has to keep are described in Section 11 of Regulation XXIX of "1802. A demand, collection, and balance account is not one of "them. The Court of first instance explains that under clause 8 "an account of land cultivated and of money rents must be pre-"pared and under clause 10, a register of quit-rent and ready "money payments must be prepared, and he says 'the balance "must be worked out from both accounts.' But this is a "criminal charge, and in respect of it the law must be construed "strictly. Moreover the account in clause 8 is one which clearly "comes within the wording of the preamble as an account neces-"sary in the interests of Government and the Courts, and the "account in clause 10 comes within the wording of the preamble "as an account to secure individual persons from injustice, but a "demand, collection, and balance account is one whose object is "the convenience of the landholder only, and therefore it seems to "me that in the preparation of it a karnam is not conducting "himself as a public servant. Both the demand account (clause 8) and the tandal or collection account (clause 10) for fasli 1299 were produced at the inquiry, one witness stated that the "latter had not been 'furnished,' but he does not say that it "was not prepared, and the Magistrate does not find that it was "not prepared, nor even that it was not produced when asked "for, but says 'the collections have been totalled twice and the "second account is obviously a second addition' whatever that "may mean. The Appellate Court also records no finding on the "point.

"The second account was the demand, collection, and balance "account for fasli 1300, *i.e.*, the current fasli, and the accused "urged that it was too soon for the preparation of the account. "As already stated, I do not think the karnam is required as a "public servant to prepare this account. An account showing

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"the gross demand (clause 8) was produced. As to collections "(clause 10) it must be remembered that they are made at the "very end of the fasli. There is no distinct finding by either "Court as to whether there was any negligence in respect of the "keeping of the account (clause 10) such as was a breach of the "Regulation.

"The third account is the harvest account of fasli 1300. The "account which a karnam is bound to keep is described in clause "6. It is admitted that the account was kept, but there is the "oral evidence of the complainant and others that, in practice, it "should be prepared previous to division, whereas it was in point "of fact prepared at or after division.

"There is nothing in the Regulation prescribing the time at "which it is to be prepared, and 'practice' cannot vary the law "on a criminal charge.

"The Lower Court found that the karnam had broken the law "in preparing the account at division, because there was so much "'rule of three' to be gone through in the preparation of the "account that it ought to be prepared beforehand.

"There is one other point requiring notice on the facts. If the "finding of the Magistrate in the Lower Court is that the tandal "(account in clause 10) for fasli 1299 was asked for but not pro-"duced (which may be his meaning, though he does not say so), "then this may be an infringement of section 12 of the Regula-"tion which directs the karnam to produce certain accounts on the "requisition of the proprietor supposing 'revenue' to mean collec-"tions. But the prosecutor and the person, if any, who 'required' "the production of the accounts is one Raman Chetti. The "zamindar has leased the whole zamindari to certain lessees, who "in turn have sub-let this village to one Alagappa Chetti. The "latter is therefore the proprietor and he has given no power "of attorney or other authority to Raman Chetti. The Appellate "Court says the accused was 'estopped' from denying Raman "Chetti's right to demand production of accounts, because he had "for a considerable time recognised Raman Chetti's management. "But under section 115, Evidence Act, estoppel acts in a suit or "proceeding between the parties themselves. This is a proceed-"ing between the accused and the crown."

Mr. *E. Norton* and *Parthasaradhi Ayyangur* for complainant.

Accused was not represented.

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JUDGMENT.—This case has been so much complicated by the Lower Courts having wandered into the consideration of many irrelevant matters that it is very difficult to understand what has been decided. From what we can make out of the confused judgments the karnam has been convicted for not producing certain accounts as he is required by section 12 of Regulation XXIX of 1802 to do to the proprietor or farmer.

We think the Lower Courts have rightly held that the accused is a public servant and that he was bound by law to produce the accounts in question to the proprietor or farmer.

But in our opinion the prosecution has failed to prove that the person complaining of the non-production of the accounts was the proprietor or farmer within the meaning of the Regulation. The complainant Subramanya Ayyar is said to be the peishcar of one Ramasami Ayyar, the agent of one Raman Chetti, the undivided brother of Alagappa Chetti, the lessee, who is said to be absent in Singapore. It is impossible in a criminal case, where every thing must be strictly proved against the accused, to hold that the agent of the undivided brother of a lessee is the proprietor or farmer within the meaning of the Regulation. It is said that Alagappa Chetti subsequently recognized Raman Chetti's appointment of Ramasami Ayyar as his agent, but the only proof of this is a letter which is certainly not sufficient to constitute such an agency as is required to give Ramasami Ayyar all the powers of Alagappa Chetti under the Regulation.

Upon this ground we hold that the conviction is illegal.

We also agree with the District Magistrate that even if accused had been rightly convicted the sentence was under the circumstances far too severe, although we consider that a karnam who does persistently and wilfully refuse to produce accounts to the landowner should be severely punished.

The convictions of sentence are set aside, and the fine, if paid, must be refunded.

APPELLATE CRIMINAL.

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

1891. November 19.

QUEEN-EMPRESS

v.

VENKATASAMI.*

Penal Code, s. 228—Insulting a Magistrate—Criminal Procedure Code, ss. 1, 195, 480–482—Village Munsif.

The accused intentionally insulted a Village Munsif in the discharge of his magisterial duties: the Village Munsif did not prefer a complaint or sanction a prosecution, but a Second-class Magistrate charged the accused under Penal Code, s. 228, on a police report and convicted him:

Held, (1) that Criminal Procedure Code, ss. 480–482 do not apply to Village Munsifs;

(2) that the Second-class Magistrate was competent to try the complaint, and the conviction was right.

PETITION under Criminal Procedure Code, ss. 435 and 439, praying the High Court to revise the proceedings of the Sub-Divisional Magistrate of Madanapalli confirming a conviction by the Second-class Magistrate of Peler Division.

The accused was charged under Penal Code, s. 228, with having intentionally offered an insult to a Village Munsif while sitting in a stage of a judicial proceeding and was convicted by a Second-class Magistrate. The Village Munsif did not prefer the complaint nor sanction the prosecution.

The accused preferred this petition on the following grounds:—

"The proceedings in this case are wholly void, since the lower "Courts had no jurisdiction whatever to try an offence under "section 228, Indian Penal Code.

"The conviction by the Courts below is wrong in law, because "no sanction was given nor complaint made as required by "section 195 of the Criminal Procedure Code.

"The Lower Appellate Court is wrong in saying that no "sanction is necessary since the Criminal Procedure Code does "not apply to Village Munsifs.

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* Criminal Revision Case No. 366 of 1891.

QUEEN-EMPRESS v. VENKATASAMI.

"The offence under section 228 being a non-cognizable offence, "the Second-class Magistrate had no jurisdiction to try the case "on a police report, and the First-class Magistrate is wrong in "construing the evidence of the Village Munsif as a complaint."

Mr. *Subramanyam* for accused.

The *Government Pleader* and *Public Prosecutor* (Mr. *Powell*) in support of the conviction.

JUDGMENT.—We do not think the provisions of sections 480–482, Criminal Procedure Code, apply to Village Magistrates (section 1, Criminal Procedure Code).

It is true that no complaint was made by the Village Munsif, but that defect is covered by section 537, Criminal Procedure Code. The Second-class Magistrate is of a grade competent to try the complaint, and the sentence was reduced to simple imprisonment on the appeal. The imprisonment has been undergone.

There is nothing now to call for our interference. The petition is dismissed.

APPELLATE CRIMINAL.

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

1891. Sept. 14.

QUEEN-EMPRESS,

v.

VIRANNA AND OTHERS.*

Criminal Procedure Code, s. 40—Transfer of a Sub-Registrar invested with powers of a Special Magistrate—Act XXIV of 1859 (*Madras*), *s.* 48.

A Sub-Registrar having been invested with Magisterial powers with reference to offences under Act XXIV of 1859 was transferred from the place where he was officiating at the time he was so invested to another place, and there took on to his file and tried certain cases. The District Magistrate having reported the cases for the orders of the High Court, the Court declined to quash his proceedings.

CASE reported for the orders of the High Court under Criminal Procedure Code, s. 438, by A. W. B. Higgens, Acting District Magistrate of Kistna.

The case was stated as follows :—

"The Sub-Registrar of Ponnur, M. Safdar Ali Saheb, was "invested with third-class powers for trial of offences under

* Criminal Revision Cases Nos. 353 to 358 of 1891.

QUEEN-EMPRESS v. VIRANNA.

"section 48 of Act XXIV of 1859 by him as a Special Magistrate "within the said town (*vide* Notification No. 388, published in "the *Fort St. George Gazette*, dated 16th August 1887). This "officer was recently transferred from Ponnur to Gannavaram, "another Sub-Registrar's station in the district, he requested the "Head Assistant Magistrate to inform him if he could continue "exercising at the latter station the powers already granted to him. "The matter was referred to me by the Head Assistant Magistrate "for orders. As I considered that the Sub-Registrar's previous "powers were limited to the town of Ponnur, I requested the "Government for his investiture with powers in respect of Ganna-"varam. The Sub-Registrar not having qualified himself by "passing the requisite tests, the Government in its order No. 613 "of 29th May 1891 declined to grant him the powers applied for; "but before the Government order reached him, he began taking "up cases on his file and completed the trial of the six cases so "taken up. In explanation for this, he states that on further "consideration, he thought he could exercise the powers at the new "station under section 40, Criminal Procedure Code, as the same "were not withdrawn after his transfer. I consider that as he "had only received powers in respect of Ponnur, he could exercise "no powers at Gannavaram, and that, under section 530, Criminal "Procedure Code, cl. (*p*), his proceedings are void."

Counsel were not instructed.

JUDGMENT.—It appears to us that under section 40, the Sub-Registrar was competent to exercise on his transfer to Gannavaram the powers conferred upon him as Sub-Registrar of Ponnur unless the local Government directed him not to exercise them. In the Government order of 29th May last, the Government declined to invest him with those powers as Sub-Registrar of Gannavaram. The order was passed apparently under the impression that the powers had to be conferred again whilst no such fresh grant of powers was necessary under section 40. Again the Government order was not communicated to the Sub-Registrar until after he had decided the cases under reference. We do not think that under these circumstances there is any necessity to interfere.

APPELLATE CIVIL—FULL BENCH.

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

1891. October 13.

REFERENCE UNDER STAMP ACT, s. 46.*

Stamp Act—Act I of 1879, *s.* 46, *Sched. I, arts.* 5 (*c*), 44—*Mortgage—"Agreement not otherwise provided for."*

A license issued to an arrack renter expressly required as one of its conditions that the licensee should deposit a sum equal to three months' rental as a security for the due performance of the contract. The licensee executed a muchalka stating that he agreed to all the terms and conditions mentioned in the license:

Held, that the muchalka ought to be stamped with an eight-anna stamp.

CASE referred for the opinion of the High Court by the Board of Revenue under section 46 of the Indian Stamp Act, 1879.

The case was referred as follows:—

"The question is, what is the stamp duty on a muchalka "executed by an abkari licensee? The muchalka simply states "that the executant agrees to all the terms and conditions men-"tioned in the license. One of the conditions of the license is "that, as a security for the due performance of the conditions of "the contract, the licensee shall deposit with the Collector in cash, "Government notes or stock notes, a sum equal to three months' "rental. Should the document be stamped as a mortgage under "article 44, schedule I, or as an agreement under article 5 (*c*), "or, if not under either of these, under what other article of sche-"dule I?

"According to the Indian Stamp Act, a mortgage deed in-"cludes every instrument, whereby one person transfers in favour "of another a right over specified property for the performance "of an engagement. Thus neither the license nor the muchalka "taken separately or together fulfils the conditions of a mortgage "as defined in the Stamp Act, *i.e.*, neither thereby actually "creates an interest in the deposit in favour of Government.

"The Board is, therefore, of opinion that an abkari muchalka "of the kind under reference comes under article 5 (*c*), schedule "I, and that the proper stamp duty is eight annas. But as the

* Referred Case No. 23 of 1891.

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"matter is not free from doubt, it is referred to the Honorable "the Judges of the High Court for the favour of an authoritative "ruling."

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

JUDGMENT:—We think, the Board are right and that the document ought to be stamped with an eight-anna stamp.

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APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

1891. December 1.

KRISHNA VIJAYA PUCHAYA NAICKER, PLAINTIFF,

v.

MARUDANAYAGAM PILLAI, DEFENDANTS.*

Civil Procedure Code, s. 39—*Pleader retained by a Collector as Agent of Court of Wards—Validity of vakalat after the Collector's death.*

The Collector of a district, who was Agent for the Court of Wards, filed a suit on behalf of a ward of the Court of Wards and executed a vakalatnama to a Pleader whom he retained to conduct it. The Collector died before the suit was determined:

Held, that it was not necessary for a new vakalatnama to be executed to enable the pleader to proceed with the conduct of the suit.

CASE referred for the decision of the High Court under Civil Procedure Code, s. 617, by M. A. Tirumalachariar, Acting District Munsif of Kulitalai.

The case was stated as follows:—

"In small cause No. 224 of 1891 on the file of this Court, "the plaintiff is the minor Zamindar of Marungapuri, represented "by the Court of Wards.

"Before the suit could be disposed of Mr. G. W. Fawcett, "the late Collector of the district of Trichinopoly and Agent to "the Court of Wards, who gave the vakalatnama to a Vakil of "this Court, died.

"As the suit came on for hearing and disposal after his "demise, it was objected on the defendant's side that a fresh vak-"alat should be produced from the present Collector since the

* Referred Case No. 29 of 1891.

KRISHNA VIJAYA PUCHAYA NAICKER v. MARUDA-NAYAGAM PILLAI.

"vakalats, already given by Mr. Fawcett, ceased to be in force "under section 39, Act XIV of 1882.

"This Court thought that the objection was valid and ordered, "on 30th July 1891, that a fresh vakalat from the present Collec-"tor should be produced.

"This order is now sought to be reviewed, and the com-"munication of the present Acting Collector of the district and "Agent to the Court of Wards, upon the opinion of the Govern-"ment Pleader of the district, is presented to this Court to be "considered along with the petition for review of my order. "The Government Vakil states that the client in the present case, "under section 39, Act XIV of 1882, is the ward and not the Agent "to the Court of Wards. The cases of transfers of Collectors to "other districts, not rendering ineffectual the vakalats executed "by them, before such transfers, are adduced by him as argu-"ments justifying the Court in proceeding upon vakalats given "by such officers, even after their actual deaths.

"But so long as the man is alive, his responsibilities under the "vakalat do not cease to exist, whenever he may be sent, after "the vakalat is given. In the case of actual death, the vakalat "appears to me to be of no force. I have yet to know if transfers "can be compared to actual deaths, for such purposes.

"The word 'client' used in the section 39, Act XIV of 1882, "is explained in the Webster's Pocket Dictionary referred to by "me, in the words, an 'employer' of an attorney.

"This employer may be a different person from the party "although he may represent the party during his lifetime under "any law or written authority from the party. Although the "analogy of ordinary cases of private persons suing as next "friends of minors, may not apply to this case, the death of the "client rendering the vakalat given by him inefficacious accord-"ing to the express words of section 39 of Act XIV of 1882. I "am inclined to think that the vakalat given by the Collector "(deceased) cannot be now acted upon by me."

Counsel were not instructed.

JUDGMENT.—The Pleader is really retained by the Court of Wards. We do not think any fresh vakalat is necessary.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

ARLAPPA AND OTHERS.*

1891. September 30. October 19.

Criminal Procedure Code, s. 419—Petition of appeal, presentation of.

A petition of appeal sent by post is not presented to the Court within the meaning of Criminal Procedure Code, s. 419.

CASE reported for the orders of the High Court, under section 438 of the Code of Criminal Procedure, by O. Wolfe-Murray, Acting District Magistrate of Cuddapah.

The case was stated as follows:—

"The Head Assistant Magistrate admitted a criminal appeal "presented by post. He requests me to refer the question to "the High Court for a definite ruling on the matter in view of "the apparently contrary rulings of the High Court on the "point which now exists.

"His procedure in admitting the appeal is in contravention of "the ruling in *Lurisetti Pitchaiya in re*(1) and in conformity "with the ruling in Criminal Revision Case No. 607 of 1890; the "latter, however, does not specifically overrule the ruling referred "to above."

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

COLLINS, C. J.—I was at first inclined to think that a petition, under section 419, Code of Criminal Procedure, sent through the post, should be received as fulfilling the requirements of the section, but on further consideration, I am of opinion that the decision of Kernan and Muttusami Aiyar, JJ., reported in Weir's Criminal Rulings, page 1006, is correct. The words used in the section are "Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader."

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* Criminal Revision Case No. 326 of 1891.

(1) Weir's Criminal Rulings, 3rd edition, p. 1006.

QUEEN-EMPRESS v. ARLAPPA.

The word presented evidently means that such petition shall be delivered to the proper officer of the Court either by the appellant or his pleader. Any other interpretation of the section would give rise to numberless difficulties. I hold, therefore, that a petition sent by post is not presented to the Court within the meaning of section 419, Code of Criminal Procedure.

SHEPHARD, J.—I have had considerable doubts on this question, but am not prepared to differ.

APPELLATE CRIMINAL—FULL BENCH.

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

1891. January 22. October 13. 1892. January 8.

ATCHAYYA AND ANOTHER (ACCUSED NOS. 1 AND 2), PETITIONERS,

v.

GANGAYYA (COMPLAINANT), COUNTER-PETITIONER.*

Criminal Procedure Code, s. 195—Registration Act—Act III of 1877, ss. 72-75—"Court"—Sanction prosecution for perjury.

A Registrar, acting under Registration Act, ss. 72-75, is a Court for the purposes of Criminal Procedure Code, s. 195.

PETITION, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of F. H. Hamnett, Sessions Judge of Godavari, dated 21st November 1890, passed on criminal revision petition No. 9 of 1890.

Parthasaradhi Ayyangar and *Srirangachariar* for petitioners.

Mr. *Wedderburn* for respondent.

This criminal revision petition having come on for hearing before MUTTUSAMI AYYAR and WILKINSON, JJ., their Lordships made the following order of reference to the Full Bench.

ORDER OF REFERENCE TO FULL BENCH.—The counter-petitioner denied the execution of an instrument of mortgage which was presented for registration to the Sub-Registrar of Rajahmundry by the second petitioner as the agent and on behalf of the first in July last. Thereupon the Sub-Registrar refused to register the document. The first petitioner then applied to the Registrar of Godavari district under section 73 of Act III of 1877 to establish

* Criminal Revision Case No. 590 of 1890.

ATCHAYYA v. GANGAYYA.

his right to have the document registered. That officer held an inquiry as provided in section 74 and refused to register the document on the ground that he was not satisfied that it had been executed. On the 10th October 1890, the petitioner brought a suit to enforce the registration of the document under section 77, and, on the same day, the counter-petitioner complained to the Joint Magistrate that petitioners and five others had forged the document and thereby committed an offence punishable under section 467, Indian Penal Code. On the 12th October 1890, the Joint Magistrate transferred the complaint to the Second-class Magistrate of Rajahmundry for disposal. On the 19th November the Subordinate Magistrate held on the authority of the decision in *Queen-Empress* v. *Sobhanadri*(1) that the complaint could not be entertained without the Registrar's previous sanction, and upon that ground he returned it to the counter-petitioner for want of sanction. On the 21st November last, the Sessions Judge of Godavari directed the District Magistrate under section 437 of the Code of Criminal Procedure to re-open the case and to order the Taluk Magistrate to deal with it under Chapter XVIII of the Code on its merits. He observed that the sanction of the Registrar was not necessary, and that it was not competent to the Second-class Magistrate to dismiss the case without inquiry into its merits after it had once been taken cognizance of by the Joint Magistrate. In support of his opinion that no sanction of the Registrar was necessary, he relied on the decision in *Queen-Empress* v. *Tulja*(2). The main question for decision is whether the sanction of the Registrar is necessary within the meaning of section 195, Criminal Procedure Code, cl. (*c*). The answer must depend upon the meaning of the words 'any proceeding in any Court in respect of a document given in evidence in such proceeding.' It must be in the affirmative if the proper construction is that the expression refers to a judicial proceeding or inquiry held before any officer in the course of which the document is given in evidence. If, on the other hand, the person holding the inquiry must be a Judge presiding over a Court ordinarily exercising judicial functions as in civil suits, the answer must be in the negative.

On this question there is conflict of authority. In the case of *Venkatachala*(3) it was held that a Sub-Registrar acting under

(1) I.L.R., 12 Mad., 201. (2) I.L.R., 12 Bom., 36. (3) I.L.R., 10 Mad., 154.

ATCHAYYA v. GANGAYYA.

section 41 of Act III of 1877 is a Court, the ground of decision being that the general expression Court is used in section 195 in preference to the more restricted description 'Court of Justice' that the Sub-Registrar who is legally authorised to take evidence under Part VIII of the Registration Act for certain purposes is a Court, when acting under section 41 of the Registration Act, within the meaning of the Indian Evidence Act, and that the document under consideration in that case was given in evidence in a proceeding in which the Sub-Registrar had to determine whether the document should or should not be registered.

So early as 1881, a Divisional Bench of this Court held that a Registrar acting under sections 73, 74 and 75 of the Registration Act was a Court within the meaning of section 195, Criminal Procedure Code. Mr. Justice Innes observed 'a Registrar is empowered in a legal proceeding to give a definite judgment on the points mentioned in section 74 of the Registration Act. He is, therefore, a Judge, and his Court is a Court of Justice under the definitions of the Penal Code.' (Weir's *Criminal Rulings, 3rd edition, p.* 844.)

It was also held in *Queen-Empress* v. *Subba*(1) that a Sub-Registrar acting under section 34 of the Registration Act, 1877, is not a Court. It was observed that for certain purposes the Registration Act declared that the term 'judicial proceedings' shall include proceedings before Registering Officers, viz., in order to bring those proceedings within the purview of section 228, Indian Penal Code, and for other similar purposes, it declared that Registrars are and that Sub-Registrars are *not* to be deemed Courts, that the Registration Act did not constitute Registering Officers Courts generally, and that section 84 would be unnecessary if the Legislature regarded such officers as Courts.

In *Queen-Empress* v. *Sobhanadri*(2), the question whether a Sub-Registrar refusing to register a document, of which execution was denied was a Court, was again raised with reference to the decision of the Bombay High Court in *Queen-Empress* v. *Tulja*(3). It was pointed out in that case that a Sub-Registrar refusing to register a document on the ground that its execution was denied was *not* a Court; that there was no conflict in the course of decision in this Presidency, and that, though the Bombay case was

(1) I.L.R., 11 Mad., 3. (2) I.L.R., 12 Mad., 201. (3) I.L.R., 12 Bom., 86.

ATCHAYYA v. GANGAYYA.

in conflict with the Madras decision *in re Venkatachala*(1), the question whether a Registrar acting under sections 73, 74 and 75 of the Registration Act, 1877, was a Court did not arise in the case then brought to notice. It will be noted that the expression 'any proceeding in any Court in which the document is given in evidence' was construed in the foregoing decisions to include a proceeding in which the Legislature authorised a person to hold a judicial inquiry, to record evidence and to form a judgment as to the right of the party to have the document registered, and that such authorisation was accepted as rendering him a Court for the limited purpose of that inquiry within the meaning of section 195, Criminal Procedure Code.

The decision of the Bombay High Court rests on two principal grounds, viz., that the position of a Registrar as a Court is anomalous, that both in the Registration Act, s. 84, and in section 483 of the Code of Criminal Procedure, the Legislature has declared for what purposes he shall be deemed a Court, and that the decision that he may also be deemed a Court for other purposes is at variance with the principle, that an exceptional provision which is an 'excrescence' on the general rule ought not to be extended so as to derogate from it.

That such is the general principle was never doubted by this Court, the point as to which there is a difference of opinion being whether the word 'Court' in section 195 signifies any officer authorised to receive a document in evidence and to form an opinion as to whether there is a right to claim its registration, and thereby to make it the source of a jural relation, and whether the exceptions enumerated in section 84 are exhaustive.

A Registering Officer is expressly declared by section 84 of Act III of 1877 to be public servant as defined in the Indian Penal Code. There can, therefore, be no doubt that it is his ordinary status. The section then specifies two exceptions: the first has reference to the purposes of section 228 of the Indian Penal Code, and for those purposes, the Registrar's proceedings under the Registration Act are declared to be judicial proceedings; the second exception has reference to what are known as cases of contempt. For the purposes of those cases, section 84 declared that the Registrar shall be deemed, and that the Sub-Registrar shall

(1) I.L.R., 10 Mad., 154.

ATCHAYYA v. GANGAYYA.

not be deemed a Court, but section 483 of the present Code of Criminal Procedure vests a power in the local Government to direct that any Registrar or Sub-Registrar shall be deemed to be a Civil Court. There is nothing in section 84 of the Registration Act or in section 483 of the Code of Criminal Procedure to show that a Registering Officer may not be deemed to be a Court under section 74 of the Registration Act for the purposes of section 195 of the Code of Criminal Procedure; that it was not expressly included among the purposes specified in section 84 is the only circumstance in favour of the view taken in *Queen-Empress* v. *Tulja*(1) —is that circumstance of itself conclusive?

On the other hand, the words, as if he were a Civil Court, are used in section 74, and they are susceptible of the construction that they signify that he shall be deemed a Civil Court for the purpose of the inquiry contemplated by sections 73 to 75.

Again, the subject-matter of the inquiry is a civil right—a right to have the document registered and to invest it with a capacity to generate a jural relation under the provisions of the Registration Act. The procedure prescribed for the investigation of the right is also judicial. The application for registration is required to be verified as a plaint, the Registrar is authorised to summon and enforce the attendance of witnesses, and to compel them to give evidence, and he is empowered to order by whom costs are to be paid. Such costs are declared to be recoverable as if they had been awarded in a suit under the Code of Civil Procedure. In the event of registration being refused after inquiry, a suit is permitted to be brought in a Civil Court to obtain a decree directing that the document be registered. The intention is to constitute the right to have the document registered into a civil right, to protect it by creating a right of suit, to authorise a judicial inquiry in the first instance by the Registrar, and to allow a regular suit in the nature of an appeal from his judgment when he refuses registration.

Again the intention of the Legislature in prescribing a previous sanction by section 195 is as stated *in re Gyan Chunder Roy* v. *Protap Chunder Dass*(2) to ensure that the person resorting to criminal prosecution acts *bonâ fide* and not from a vindictive feeling, and not to prevent his adversary from taking

(1) I.L.R., 12 Bom., 36. (2) I.L.R., 7 Cal., 208.

ATCHAYYA v. GANGAYYA.

any further legal proceeding which he is entitled to take. The decision that a Registrar acting under section 74 is a Court for the purposes of section 195 is in furtherance of that intention. Again, the words used in section 469 of the former Code of Criminal Procedure were 'any Civil or Criminal Court.' Whilst the words used in section 195 are proceeding in 'any Court' in which the document is given in evidence and the difference in the language used in the present Code appears to be significant. In *Queen-Empress* v. *Tulja*(1), the inquiry contemplated by sections 73, 75 appears to have been regarded as administrative and a reference is made to the case of *The Queen* v. *Price*(2).

The inquiry distinguished by Mr. Justice Blackburn from a judicial inquiry was as to whether certain facts existed and whether in consequence the event in which a statute cast an obligation on a body of persons to do a certain thing had occurred. In the same case he compares the language of 15 and 16 Vict., c. 57, with that of 26 and 27 Vict., c. 29, and observes that under the former enactment, the Commissioners had a discretion to decide whether a witness was entitled to a certificate of indemnity, whereas under the latter enactment, they had no such discretion but were bound to give a certificate if the witness answered certain questions and those answers criminated him. The distinction pointed out appears to be between an inquiry as to certain matters of fact in a case in which the Commissioners had no discretion to exercise and no judgment to form, but were enjoined to do a certain thing in a certain event as a matter of duty, and an inquiry in a case in which the Legislature authorised them to form a judgment and to grant or withhold a certificate on that judgment. In the latter case, the inquiry was regarded as judicial, and this appears to us to support the view taken by this Court.

The question, however, is not free from difficulty. On the one hand, section 84 of the Registration Act and section 469 of the Code of Criminal Procedure lend support to the opinion expressed by the Bombay High Court which appears to have been concurred in by a Divisional Bench of this Court in *Queen-Empress* v. *Subba*(3). On the other hand, the language and the presumable intention of section 195 of the Code of Criminal Procedure, the definition of Court contained in the Evidence Act,

(1) I.L.R., 12 Bom., 36. (2) L.R., 6 Q.B., p. 418. (3) I.L.R., 11 Mad., 8.

ATCHAYYA v. GANGAYYA.

and the character of the inquiry prescribed by sections 72 to 75 of the Registration Act and several considered decisions in this Presidency seem to support the view that the Registrar acting under those sections is a Court for the purposes of section 195, Code of Criminal Procedure. Under these circumstances, we consider it desirable to refer to the Full Bench the question whether a Registrar acting under sections 72 to 75 of the Registration Act is or is not a Court for the purposes of section 195 of the Code of Criminal Procedure."

Upon this reference the case came on for hearing before a Full Bench composed of COLLINS, C. J., MUTTUSAMI AYYAR, PARKER and SHEPHARD, JJ.

Srirangachariar for petitioners.

The Acting Advocate-General (Hon. Mr. *Wedderburn*) for respondent.

COLLINS, C. J.—The question referred to the Full Bench is whether a Registrar acting under sections 72 to 75 of the Registration Act is or is not a Court for the purposes of section 195, Code of Criminal Procedure.

The facts of the case are fully set out in the order of reference made by MUTTUSAMI AYYAR and WILKINSON, JJ.

The question is undoubtedly one of some difficulty, as there is no definition of a "Court" either in the Registration Act or in either of the Codes.

By section 3 of the Evidence Act, a "Court" includes all persons except arbitrators legally authorised to take evidence. A "Court of Justice" is defined by the Indian Penal Code, s. 20, and is more restricted in its application.

Are we then at liberty to apply the definition of "Court" given in the Evidence Act to the Registrar acting under sections 72 to 75 of the Registration Act? It is argued that the definition of "Court" given in the Evidence Act is framed only for the purposes of the Act itself and cannot be applied to cases under the Registration Act (see *Queen-Empress* v. *Tulja*(1)). If this argument prevailed the difficulty in holding the Registrar's inquiry to be a "Court" would be much increased. The duties of the Registrar on the point in question are defined by sections 72 to 75 of the Registration Act and are as follows:—

(1) I.L.R., 12 Bom., 36.

ATCHAYYA v. GANGAYYA.

"An application shall be made to him in writing, and the statements in the application shall be verified in the manner required by law for the verification of plaints. He shall then inquire—(1) whether the document has been executed; (2) whether the requirements of the law have been complied with so as to entitle the document to registration. If he finds the document has been executed and that certain requirements have been complied with he shall order the document to be registered.

"The Registrar has power to summon and enforce the attendance of witnesses, he can compel them to give evidence 'as if he were a Civil Court,' and he has also a discretion as to the costs."

It is therefore clear to my mind that the Registrar exercises more than mere administrative functions—in the examination of witnesses he is bound to observe the rules of evidence, and he is to consider the weight and credibility of the evidence and form his own conclusions. The learned Judges in *Queen-Empress* v. *Tulja*(1) appeared to consider the Registrar's functions purely administrative and the fact appears to have mainly influenced their judgment.

It appears also that in the former Code of Criminal Procedure the words used in section 469 were "any Civil or Criminal or Revenue Court," whilst in section 195 of the present Act the words used are "any Court." I assume that it was the intention of the Legislature to give the word "Court" a more extended meaning than it had in the former Act, I am of opinion, therefore, that I am entitled to hold that the definition of "Court" used in the Evidence Act applies to the Registrar holding an inquiry and taking evidence under the Registration Act, and I therefore answer the question in the affirmative.

MUTTUSAMI AYYAR, J.—For the reasons recorded in the order of reference to the Full Bench I am of opinion that the question must be answered in the affirmative.

PARKER, J.—The question referred to the Full Bench is whether a Registrar acting under sections 72 to 75 of the Registration Act is or is not a Court for the purposes of section 195 of the Criminal Procedure Code. The reference has been made in consequence of the decision in *Queen-Empress* v. *Tulja*(1) in which the decision of this Court in *Venkatachala in re*(2) was dissented

(1) I.L.R., 12 Bom., 36. (2) I.L.R., 10 Mad., 154.

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from. The question, therefore, for decision is in what sense the word "Court" is used in section 195, Criminal Procedure Code. The Code does not contain any definition of the term, and it is used in more than one meaning in some places as signifying a personal judicial authority and in others a place. In section 352 the same word is used in the two significations, but when used as signifying a person it does not appear to be synonymous with "Court of Justice" as defined in section 20 of the Indian Penal Code. The term "Court of Justice" (section 20, Indian Penal Code) necessarily denotes a "Judge" as defined in section 19. Now, illustration (*d*) to section 19 declares that a Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial is not a Judge. The explanation to section 193, Indian Penal Code, makes it clear, however, that a preliminary inquiry under Chapter 18 of the Procedure Code is a stage of a judicial proceeding. There is, again, no doubt that a Committing Magistrate is a Court within the meaning of the term as used in the Evidence Act and a Criminal Court within the definition of section 6 of the Code of Criminal Procedure. He is also referred to as a Court in sections 342 to 344 of the Criminal Procedure Code. The contention, therefore, that the term "Court" in the Criminal Procedure Code, section 195, is necessarily identical with Court of Justice as limited in the Indian Penal Code definition cannot be supported.

In order to ascertain the sense in which the word is used by the Legislature in section 195 it will be useful to compare the present Criminal Procedure Code with its predecessor, Act X of 1872. Both the Codes have contained provisions for requiring previous sanction to certain prosecutions and also prescribing the procedure to be followed when a prosecution is instituted by a Court *suo motu*. The sections dealing with these matters in the old Code X of 1872 are sections 467 to 471. Sections 467 to 470 are reproduced in section 195 of the present Code and section 471 (as to prosecutions instituted by the Court itself) in section 476 of the present Code. It will be noticed that section 468 of the old Code declared that a complaint of an offence against Public Justice, when such offence is committed before or against any Civil or Criminal Court, should not be entertained except with the sanction of the Court, whereas the corresponding provision in the present Code (section 195 *b*) requires the same sanction when such offence is committed "in or in relation to any proceeding in any Court."

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The words used in the latter Code are therefore wider in their signification. There is a similar alteration in regard to complaints of offences relating to documents—compare section 469, Act X of 1872 with section 195, clause (*c*) of the present Code. But in re-enacting the procedure to be followed when the Court itself acts we do not find the powers given to "any Court" but to "any Civil, Criminal or Revenue Court." Had the enumeration of the three classes of Courts, Civil, Criminal or Revenue, been absolutely exhaustive of all possible Courts, it is only reasonable to suppose the Legislature would have used the term 'any Court' as it did in section 195. The difference in language leads to the supposition that there may be Courts as created and defined by the Legislature on which it was not intended to confer the powers given in section 476, Criminal Procedure Code.

This supposition appears reasonable when it is remembered in what terms the Legislature defined the word "Court" for the purposes of the Indian Evidence Act (section 3) in which enactment the term simply means all persons except arbitrators legally authorised to take evidence. In this sense a Commissioner holding an inquiry under Act XXXVII of 1850, a Settlement officer under Act XXVII of 1860, a Forest officer under section 59, Madras Act V of 1882, and a Registrar under sections 72 to 75 of the Registration Act are all Courts, though it may be, they are not invested with powers to take action under section 476, Criminal Procedure Code, as Civil, Criminal or Revenue Courts. The Proceedings before these officers are judicial in their character and false evidence given before them is punishable under section 193, Indian Penal Code, Explanations 2 and 3—as given in a stage of a judicial proceeding, though not given before a Court of Justice.

The view that the term Court in section 195, Criminal Procedure Code, was intended to include all persons except arbitrators legally authorised to take evidence is strengthened when the principle of that section is considered. The restriction was obviously intended "to prevent prosecutions for acts done or evidence given at the suit of disappointed or hostile parties, and it was intended to protect parties against reckless or groundless Criminal Proceedings. Sanction is required in order to ensure that the prosecution should not in such cases be instituted unless there was ground sufficient in the opinion of the proper officer to justify such proceeding"—*vide* remarks of Kernan and Muttu-

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sami Ayyar, JJ., in *Vasteva Putturaiya* v. *Lakshmi Narayana Kachinthaiya*(1). The word 'Court' in section 195 is used strictly with reference to offences of fabrication of evidence and of documents used in evidence, and, therefore, it seems not unreasonable to hold that the term is used—like the term "evidence"—in the same sense as in the Indian Evidence Act. The Registrar is a public servant—section 84, Act III of 1877; and it would seem anomalous if the Legislature had made his sanction a condition precedent in case of disobedience of summons (section 174, Indian Penal Code), or refusal to give evidence or to take oath (section 178), but yet had required no such sanction for the far graver offences mentioned in clauses *b* and *c* of section 195—alleged to have been committed in relation to a proceeding before him, which proceeding is a stage of a judicial proceeding.

It was moreover urged before the Full Bench that the words "as if he were a Civil Court" in section 75 of the Registration Act signify that a Registrar should be deemed a Civil Court for the purposes of the inquiry contemplated by sections 73–75. The argument was that the proceedings before the Registrar are judicial and the inquiry judicial, and the right sought to be enforced was a legal right, registration being necessary to give legal validity to the document.

It appears to me there is some difficulty in adopting this view. The words "as if he were a Civil Court" would seem to imply that the Registrar was not one, and the words have reference only to the procedure to enforce the attendance of witnesses and compel them to be examined. If the Registrar can give a definitive judgment upon a civil right, he would be a Judge within the definition of section 19 of the Indian Penal Code, and, therefore, a "Court of Justice" under section 20. The registration of a document is merely a consequence of the Registrar finding that the document is genuine. But his finding upon that point is not a definitive decision which, in the absence of an appeal, can make the matter *res judicata* between the parties.

In the view I have taken, however, it is not necessary to decide this point. I still adhere to the view taken in *Venkatachala in re*(2) to which I was a party. Holding that the term 'Court' in section 195 has the same meaning as that assigned to it in

(1) Weir's Cri. Rulings (Ed. 3), 849. (2) I.L.R., 10 Mad., 154.

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section 3 of the Indian Evidence Act, I would answer the question referred to the Full Bench in the affirmative.

SHEPHARD, J.—It is argued as well with reference to the provisions of the Registration Act as with reference to certain sections of the Criminal Procedure Code that the Registrar, acting under section 72 of the Act, is not a Court within the meaning of section 195 of the Code.

Considering, first, the provision of the Act, I observe that the methods and procedure which a Registrar entertaining an application under section 72 is enjoined to follow are precisely those which a Judge trying a civil suit has to pursue. The application has to be written and verified like a plaint—the Registrar has power to summon and enforce the attendance of witnesses and to compel them to give evidence 'as if he were a Civil Court'—he also has power to adjudicate on the subject of costs. Moreover, as is pointed out in the order of reference, the subject-matter of inquiry is a civil right. The claim, which the holder of a registrable instrument has to have that instrument registered, may be compared with that of a person entitled to be registered as a parliamentary voter. In both cases, in order to constitute a certain legal relation, the law requires registration, and registration must, in the case of dispute, necessarily be proceeded by an inquiry. When it is found that the lines upon which that inquiry must proceed are those which are followed in the adjudication of an ordinary civil suit, it seems to me that as the public officer who conducts the inquiry discharges all the functions of a Court, he must also be deemed to be a Court, unless a clear intention to the contrary is indicated by the Legislature.

It is said that the language of section 84 of the Act and also of section 483 of the Code indicates such intention. These sections have reference to proceedings for contempt for which provision is now made by sections 480 and 482 of the Code. It is argued that, if the Registrar, acting under section 72 was a Court, there was no occasion for the provision in section 84 that he should be deemed to be a Court within the meaning of the law relating to proceedings for contempt—and again, that there was no occasion to confer on the local Government power to constitute a Registrar a Court for the same purpose, as has been done by section 483 of the Code. I confess that I was at first inclined to accede to this argument, but, on consideration, seeing that, in

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other respects, the Registrar is in all essentials, a Court, I am not disposed to give weight to the circumstance that the Legislature doubted whether the Registrar was a Court, or thought it expedient to leave it to the Government to say whether he should be ranked as a Court, with reference to a particular purpose. I do not think that circumstance can be considered conclusive to show that the Legislature in passing the Registration Act did not intend the Registrar to be a Court for other purposes than those referred to in section 84.

For this reason, I think, that the decision of this Court mentioned in the order of reference ought to be followed, and that the question referred to us should be answered in the affirmative.

This petition having come on for final disposal, the Court delivered the following judgment.

JUDGMENT.—The only parties to these proceedings are the first and second defendants. So far as they are concerned the order of the Sessions Judge must be set aside inasmuch as the sanction of the Registrar is required by section 195, Criminal Procedure Code, for their prosecution. The order of December 3rd, 1890, staying proceedings is discharged.

APPELLATE CIVIL.

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

1891. April 16.

KYD AND ANOTHER (PLAINTIFFS),

v.

MAHOMED (DEFENDANT).*

Stamp Act—Act I of 1879, sched. II, art. 2—Exemption—Agreement for the sale of goods.

An agreement for the sale of goods does not require a stamp under the Indian Stamp Act, although it contains provisions as to the warehousing and insurance of the goods previous to delivery.

CASE stated under section 69 of the Presidency Small Cause Court Act, 1882, and section 617 of the Code of Civil Procedure by P. Srinivasa Rau, Second Judge of the Small Cause Court, Madras, in his letter, dated 13th February 1891, No. 129, in the matter of Small Cause suit No. 20431 of 1890 on his file.

* Referred Case No. 5 of 1891.

KYD v. MAHOMED.

The question referred was the following:—

"Are the agreements A and B filed by the plaintiffs in "this suit such as are exempted from stamp duty under article "2, schedule II of the General Stamp Act I of 1879?"

The agreements A and B were as follows:—

A.

Madras, 7th February 1889.

"I have this day purchased from Mr. F. M. Bowden the following article "at the prices as specified below payable in cash within thirty days from the date "of the steamer arrival less one and three-quarter per cent. discount, 5 cases of 100 "pieces each John Orr Ewings assorted jacconets, quality and patterns as per in- "dent No. 403 at Rs. 3-11-0 per piece, 38/39; 20 yards Turkey red and yellow "jacconets.

"In default of payment within the time above specified I do hereby authorize "Mr. F. M. Bowden, to sell at public auction or by private bargain to the best "advantage the goods above referred to or such portion of them as may be left "with them unpaid for and uncleared at the time on my account and credit the "proceeds thereof less 3½ per cent. (being commission on resale) to my account, "and I do hereby further engage and promise to pay to Mr. F. M. Bowden, "on demand, any loss that may be incurred by such resale or balance that may "still remain due by me on account of the purchase forfeiting all advantages "and the amount of the deposit, if any. It shall, however, be in the option of Mr. "F. M. Bowden, in the event of the goods not being cleared on or before the prompt "of thirty days above referred to, to allow the goods or any portion of them to "remain uncleared for such further period as he may think fit and for this accom- "modation I undertake to pay to Mr. F. M. Bowden, a consolidated charge of 12 "per cent. per annum to cover godown rent, fire insurance, and interest. It is "further provided that all claims on account of late delivery, inferiority of goods, "or otherwise are to be preferred within the prompt of thirty days above referred to, "failing which it shall be competent to Mr. F. M. Bowden to decline to enter- "tain them. Service of notices to be considered complete if it can be shown that "same have been duly despatched. In the event of the goods above referred to "not being forthcoming owing to frost, strikes at manufacturer's works, destruc- "tion by fire, loss at sea, &c., this agreement is to be considered null and void, "but on the other hand should only a portion be so lost or destroyed this agree- "ment will become null and void only as regards the portion lost or destroyed, but "remain in force as regards the portion available. Should any dispute arise in "regard to the time of delivery, alleged inferiority of the goods or otherwise I "hereby agree to refer the matter to and abide by the decision of two European "arbitrators skilled in Import business, one of whom shall be appointed by me and "one by Mr. F. M. Bowden, and should the said arbitrators differ in opinion it "shall be competent to them to refer the question to an aversman, whose decision "shall be final.

"In the event of any import or other duties being imposed I agree to pay the "same in addition to the sale price.

"The above has been explained to me, and I understand it.

"(Signed) EBRAHAM SALAY MAHOMED."

KYD
v.
MAHOMED.

B.

Madras, 16*th May* 1889.

"I have this day purchased from Mr. F. M. Bowden the following articles "at the price as specified below payable in cash within thirty days from less one "and three-quarter per cent. discount, 6 (six) bales each 300 pieces 29/30 inches "4/5½ yards filled dhooties at Rs. 0-11-10½ pies, per piece."

"(Signed) EBRAHAM SALAY MAHOMED."

Mr. *W. Grant* for plaintiffs.

Mr. *K. Brown* for defendant.

JUDGMENT.—We are of opinion that the agreements A and B fall within the exemption. It is urged that the stipulations relating to the payment of godown rent and fire insurance as also those relating to reference to arbitration are extraneous to the contract of sale, but we are of opinion that they are only collateral and subsidiary incidents relating to the sale of the goods, which is the transaction evidenced by the documents.

The test which should be applied is to see whether the document evidences only a transaction of sale or a sale and some other independent transaction, and if the former the number of subsidiary stipulations it may contain cannot alter the nature of the transaction. The material words of the exemption are "an agreement for or relating to the sale of goods or merchandize exclusively," and the intention was to exempt *bonâ fide* sales and purchases of merchandize from stamp duty. If the contention were to prevail fair effect could not be given to that intention.

We answer the question referred to us in the affirmative. The plaintiffs are entitled to the costs of this reference.

D. Grant, Attorney for plaintiffs.

Branson & Branson, Attorneys for defendants.

APPELLATE CIVIL.

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

1881. October 30.

MUNICIPAL COUNCIL OF TELLICHERRY (DEFENDANT), PETITIONER,

v.

BANK OF MADRAS (PLAINTIFF), RESPONDENT.*

District Municipalities Act—Act IV of 1884 (*Madras*), *ss.* 55, 56, 60, 262, *cl.* (2)—*Profession tax.*

The Bank of Madras carried on business at (among other places) Negapatam and Tellicherry, in both of which places the Madras District Municipalities Act was in force. The Bank paid profession tax under that Act to the Municipality of Negapatam two days before it was due. The Municipality of Tellicherry subsequently, and with knowledge of the above facts, assessed the Bank to the same tax for the same period and levied the amount which was paid under protest:

Held, that the Bank was entitled to recover the amount so paid, from the Municipality of Tellicherry.

Semble: The aggregate income derived by the Bank from the exercise of its business in the separate municipalities would regulate the class under which it would be liable to taxation.

PETITION, under section 25 of Act IX of 1887, praying the High Court to revise the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in small cause suit No. 336 of 1890.

Suit by plaintiff to recover Rupees 50 with interest, profession tax wrongfully collected by the defendant from the plaintiff for the second half-year ending 31st March 1890, on the ground that the tax for the half-year in question had been already paid to the Negapatam Municipality, and the fact of such payment had been brought to the notice of the defendants. The tax was paid to the Negapatam Municipality before the due date.

The Subordinate Judge of North Malabar on the authority of *Tuticorin Municipality* v. *South Indian Railway*(1) passed a decree for the plaintiff.

The defendant preferred this petition.

Mr. *Powell* and Mr. *Subramanyam* for petitioner.

Mr. *K. Brown* for respondent.

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* Civil Revision Petition No. 339 of 1890.

(1) I.L.R., 13 Mad., 78.

MUNICIPAL COUNCIL OF TELLICHERRY v. BANK OF MADRAS.

JUDGMENT.—The first objection taken is that the profession tax was paid in Negapatam three days before it fell due and therefore was not paid in discharge of a legal obligation; hence that plaintiff is liable to the tax at Tellicherry, the payment at Negapatam having been voluntary. The liability to pay is created by section 53, Madras Act IV of 1884, and section 55 operates to exempt a person who has exercised his profession for less than 60 days in the half-year. Section 55 therefore indicates a ground on which a person may, if he wishes, claim exemption from liability and also gives him the privilege of paying the tax in two instalments. It is not the petitioner's case that the Madras Bank ceased to carry on business at Negapatam before the expiry of 60 days, nor do we think that payment, three days before the expiration of that time, can be treated as made otherwise than in discharge of the liability for the second half-year.

The next contention is that each Branch Bank ought to be treated as a distinct person—but there is only one corporation, and the Bank carries on its business through agents in different municipalities. Having regard to the definition in cl. xxix, section 3, of the Act, we cannot hold that the Madras Bank is not a single person the within the meaning of the Act.

Section 60 precludes the supposition that the same person carrying on business by agents in different municipalities is liable to pay the profession tax in each municipality for the same half-year.

Section 59 is not applicable, as the person, *i. e.*, the Bank, does not carry on more than one class of business, and even if it did it would not be liable to pay more than one tax, though the class under which it was to be taxed might be determined by the aggregate income.

We dismiss the petition with costs.

Barclay, Morgan & Orr, Attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

1891. December 1.

FISCHER (PLAINTIFF),

v.

TURNER, COLLECTOR OF MADURA AND AGENT TO THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).*

Provincial Small Cause Courts Act—Act IX of 1887, *s.* 15, *sched.* II, *art.* 41.

The plaintiff sued to recover from the defendant Rs. 227, being his share of the cost of repairing a channel, which was the property of the plaintiff and defendant:

Held, the suit was cognizable by a Court of Small Causes.

CASE referred for the decision of the High Court under Code of Civil Procedure, s. 646B., by T. Weir, District Judge of Madura.

The case was stated as follows :—

"I have the honor to submit to the High Court the record in "small cause suit No. 593 of 1890 on the file of the Subordinate "Court, Madura (West), in which the Subordinate Judge has, I "consider, failed to exercise a jurisdiction vested in him by law.

"The suit is to recover from defendant Rs. 227-9-6, being "his share of the cost of repairing in faslis 1297, 1298 and 1299, "a channel which is the joint property of plaintiff and defendant.

"The Subordinate Judge has held that the suit falls under "article 41 of the second schedule of the Provincial Small Cause "Courts Act.

"The present suit is of the very same nature as original suit "No. 59 of 1888 on the file of the Madura Munsif's Court and "between the same parties. One of the issues in that suit was— "'Has the Court jurisdiction in this case on its original side?' "The Munsif thought the suit was cognizable on the small cause "side and returned the plaint for presentation on that side; but "he took it back on the original side under section 23 of the Act "as questions of title were raised. The suit was then registered "in original suit No. 158 of 1889. In their judgment, dated 19th "January 1891, in *The Secretary of State for India in Council* v. "*Fischer*(1) which arose from the said suit, their Lordships have

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* Referred Case No. 26 of 1891. (1) Second Appeal No. 598 of 1890 unreported.

FISCHER v. TURNER, COLLECTOR OF MADURA AND AGENT TO THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

"remarked as follows:—'The suit is of a nature cognizable in a "Court of Small Causes, although the District Munsif acting "under section 23 of Act IX of 1887 very rightly directed that ". the plaint should be presented to a Court having jurisdiction to "determine a question of title which arose in the suit.' I am of "opinion that, in the face of the above ruling, the Subordinate "Judge's order holding that the present suit is not cognizable on "the small cause side is erroneous and should be set aside, and "the plaint ordered to be received on the small cause side of the "Subordinate Court.

"It should be stated that this reference is made at the instance "of the plaintiff and is rendered necessary by the circumstance "that the District Munsif of Madura rejected the plaint when "presented on the regular side, being of opinion that the suit was "cognizable as a small cause suit."

Counsel were not instructed.

JUDGMENT.—The suit is cognizable by a Small Cause Court.

APPELLATE CRIMINAL.

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

1891. October 8.

QUEEN-EMPRESS

v.

KRISHTNAYYAN.*

Forest Act—Act V of 1882 (*Madras*), *s.* 21 (*d*) – *Grazing cattle in a forest reserve.*

The owner of cattle found grazing in a forest reserve cannot be convicted under Madras Forest Act, s. 21 (*d*), in the absence of evidence that he either pastured the cattle or permitted them to trespass in the reserve.

CASE reported for the orders of the High Court under Criminal Procedure Code, s. 438, by W. J. Tate, Acting District Magistrate of Coimbatore.

Counsel were not instructed.

JUDGMENT.—To sustain a conviction under section 21 (*d*) of the Forest Act there must be some evidence either that defendant

* Criminal Revision Case No. 398 of 1891.

QUEEN-EMPRESS v. KRISHTNAYYAN.

pastured the cattle or permitted them to trespass in the reserved forest. In the present case all that the prosecution proved was that defendant's cattle were found in a reserve. Such cattle may be impounded, but the owner cannot be held liable unless some overt act of his be proved. We set aside the conviction and sentence and direct that fine be repaid.

APPELLATE CIVIL.

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

1891. October 29.

SUBBAKKA (DEFENDANT), APPELLANT,

v.

MARUPPAKKALA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Limitation Act—Act XV of 1877, *sched. II, arts.* 49, 116—*Suit to recover title-deeds left with a mortgagee after redemption—Demand and refusal.*

After the redemption of a mortgage, the title-deeds of the mortgage premises were left with the mortgagee, who refused to return them on demand made by the mortgagor. The mortgagor now sued to recover possession of them:

Held, that Limitation Act, sched. II, art. 49, was applicable to the case, and that time began to run from the date of the mortgagee's refusal.

CASE referred for the orders of the High Court under Civil Procedure Code, s. 617, by W. J. Tate, District Judge of South Canara.

The case was stated as follows:—

"The suit was brought for the possession of certain title-deeds. "Two mortgages, one for Rs. 3,300 and one for Rs. 1,200, were "executed by relations to the defendant's mother. Defendant "sued one Ganapa (the surviving descendant of the mortgagors, "and a minor), thereon in original suit No. 14 of 1883 on the file "of the Subordinate Court. With Ganapa (first defendant) was "joined his mother Gauramma (defendant No. 2) and another. "Defendant obtained a decree for the whole mortgage money, "and a direction that the mortgaged (hypothecated) property be "sold after two months. In order to raise the money and so save

* Referred Case No. 20 of 1891.

SUBBAKKA v. MARUPPAKKALA.

"the property, Gauramma and Ganapa's other guardian, Laksh-"mamma, executed two usufructuary mortgages to plaintiffs for "Rs. 5,300 and Rs. 4,500 respectively, on the same two separate "properties. The plaintiffs accordingly redeemed the properties "by paying the mortgage money into Court; and the same was "received by defendant.

"Defendant did not, however, deliver to plaintiffs the title-"deeds, *i.e.*, the original deeds of mortgage and the connected "documents, and more than three years after she received the "mortgage amount, the plaintiffs bring this suit to enforce deli"very of the same.

"The defendant contended, first, that the suit was barred "under article 49 of the second schedule of the Limitation Act "And the first question I have the honor to refer to the High "Court is, whether that article applies to a suit like the present "which is one for the recovery of title-deeds; in other words "whether the title-deeds of immovable property fall under the "head of specific movable property? Under the former Limita"tion Act (IX of 1871) there was a special article (No. 33 "relating to such property, and Mitra, in his 'Law of Limitation "and Prescription,' second edition, thinks that a suit for title "deeds *is* governed by the article in question (No. 49 of the "present Act) in the absence of a repetition in schedule II of a "article corresponding to article 33 of Act IX of 1871; so in "the note to Whitley Stokes' 'Anglo-Indian Codes' under article "49. But the two reported cases—*Jagjivan Javherdas* v. *Gulab* "*Jilani Chaudhri*(1) and *Rameshar Chaubey* v. *Mata Bhikh*(2)—"referred to by the latter author do not seem to be in point, as "they refer only to suits for money.

"My own opinion on the point is that the article applies, "inasmuch as title-deeds do not, at any rate in India, fall under "the definition of immovable property in the General Clauses "Act, s. 2, and are therefore by the same statute 'movable "property.'

"The next question is, whether the period of limitation "under this article, supposing it to apply, runs from the date "when defendant *received* the mortgage money (1st April 1886—"*vide* exhibits A, B and C), or, as the Munsif thought, from the

(1) I.L.R., 8 Bom., 17. (2) I.L.R., 5 All., 241.

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"date of receipt by defendant of plaintiff's letter of notice "(exhibit D shows that this was in July 1888)? In the former "case the suit is barred, in the latter not barred.

"The point seems doubtful, but on the analogy of article 33 "of the former Limitation Act, and relying on the definition of "the mortgagor's rights in section 60 (*vide* right '*a*') of the "Transfer of Property Act, I am inclined to think that the period "of limitation runs from the former date, *i.e.*, from 1st April "1886, when the mortgage money was received by defendant, "her detention of the title-deeds being thereafter wrongful.

"The third question, which was raised only in appeal is "whether, inasmuch as the mortgage deeds (both the original ones "to defendant's mother and also those to the plaintiffs) reveal a "privity of contract between the parties that the title-deeds "should be surrendered on receipt of the money—a contract which "is in writing registered—the true article to apply is not article "116 on the principle of giving the longest available time, when "either of two limitation periods apply to the person whose right "is sought to be barred?

"I have great doubts in this point, but am, on the whole, of "opinion that article 116 does not apply, inasmuch as it governs "only a suit for 'compensation' for breach of contract, and not "a suit for movable property; but it is not at all certain that "the present suit cannot be held to fall under the definition 'suit "for compensation' owing to the request in the plaint for Rs. 200 "damages in case the title-deeds are not produced and delivered "to the plaintiffs.

"Appellant (defendant) further contends that the suit is bad for "misjoinder, inasmuch as separate suits should have been brought "with reference to each of the two plaint mortgages. My own "opinion is that the suits may, legally and not improperly, be "joined with reference to sections 42 and 45, Code of Civil Proce-"dure; but, as I am raising the other points in the case and have "some doubt in the matter, I would ask the High Court to decide "whether the present suit is bad owing to the joinder in it of the "title-deeds relating to two separate mortgages, such mortgages "being separately redeemable under section 61 of the Transfer of "Property Act.

"Lastly, defendant says she is willing to waive other objec-"tions and to surrender the title-deeds to plaintiffs provided she

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"be secured by them against any possible suits brought by Ganapa "on attaining his majority. She further says that Ganapa's "present guardians have not authorised her to deliver to plaintiffs "the title-deeds. Is she bound to do so without such security? "The request for security seems certainly equitable, but rests on "no provision of law. The equity of redemption having been "transferred to the plaintiffs, they must, *qua* the defendant, be, I "think, regarded as owners. If so, she is bound to deliver the "deeds to them unconditionally. She is also, in my opinion, "estopped by her acceptance of the plaintiff's tender. She might, "perhaps, have refused to accept this in the absence of authoriza-"tion from the guardians, but, having done so, her lien on the "title-deeds would cease.

"There are, however, doubts in the matter, and I therefore "refer also to the High Court the question 'whether defendant "is bound to surrender the plaint title-deeds without furnishing "security?'"

Sankaran Nayar for appellant.

Narayana Rau for respondents.

JUDGMENT.—We are of opinion that article 49 applies. The original possession of the title-deeds by defendant was lawful and the time runs from the date of the detainer's possession becoming unlawful. The mere retention of the deeds in defendant's possession after payment of the decree amount was not unlawful, though plaintiffs had a legal right to demand delivery, but his retention of them after a lawful demand for delivery was made was an illegal detention.

The time will, therefore, run from the date of demand (July 1885) and the suit is not barred.

The Judge does not state he entertains any doubt on the question of misjoinder, and we see no reason to consider it under the provisions of section 617, Civil Procedure Code. In answer to the last question, the point for decision is whether plaintiffs are entitled to the deeds. If they are, and if the defendant is not entitled to detain them, there can be no question of security.

APPELLATE CIVIL.

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

1891. April 29. September 9.

RAMACHANDRA (PLAINTIFF), APPELLANT,

v.

JAGANMOHANA AND OTHERS (DEFENDANTS NOS. 3 TO 6), RESPONDENTS.*

Limitation Act—Act XV of 1877, *sched.* 11, *arts.* 131, 132, 140—*Kattubadi—Recurring right—Rent Recovery Act—Act VIII of* 1865 (*Madras*), *s.* 7.

In a suit by a zamindar against the grantee of an inam, to recover arrears of kattubadi, it appeared that no payment had been made in respect of kattubadi for a period of twelve years before suit. The suit was dismissed in the Court of first appeal on the findings (1) that no exchange of patta and muchalka had been proved, (2) that the plaintiff had not proved his right to the kattubadi, and (3) that his right to it, if any, was barred by limitation.

On second appeal by the plaintiff:

Held, that the second and third of the above findings should be accepted and the second appeal dismissed *Alubi* v. *Kunhi Bi* (I.L.R., 10 Mad., 115) distinguished.

Per cur: We do not think it necessary to consider whether if there had been a grant subject to kattubadi, patta and muchalka ought to have been exchanged.

SECOND APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in appeal suit No. 33 of 1890 reversing the decree of B. Rajalinga Sastri Garu, District Munsif of Parvatipore, in original suit No. 389 of 1888.

The plaintiff, zamindar of Salur, sued to recover from defendants twelve years' arrears of kattubadi accrued due on service inam lands at Rs. 30 per annum, alleging that the last payment was made in 1883 for the amount due for 1871-72.

Defendants pleaded, *inter alia*, that the lands were inam lands free of kattubadi, that no services were ever rendered, that a permanent patta was given to the ancestor of defendants by the ancestor of plaintiff, that plaintiff's claim was barred by limitation, and that plaintiff's claim to kattubadi for more than three years prior to suit was barred by limitation.

The District Munsif passed a decree for the plaintiff for five years' arrears. The District Judge on appeal reversed this decree and dismissed the suit.

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* Second Appeal No. 1254 of 1890.

RAMA-CHANDRA v. JAGAN-MOHANA.

The plaintiff preferred this second appeal.

Subramanya Ayyar for appellant.

Mr. *Gantz* and Mr. *K. Brown* for respondents.

JUDGMENT:—The appellant is the zamindar of Salur and respondents are the descendants of the grantee of an inam. The questions for decision were whether the original grant was rent free or subject to the payment of kattubadi of Rs. 30 a year and whether the present suit for arrears of kattubadi for a period of twelve years was barred by limitation. The District Munsif determined both questions in appellant's favour, but decreed his claim to arrears of kattubadi for five years only, commencing with fasli 1293 on the ground that kattubadi had been paid for fasli 1292, and that, in the circumstances of the case, he was entitled to presume that there had been no arrears due for the prior period. From this decree defendants Nos. 3—6 appealed, and on appeal the District Judge found that payment of kattubadi for 1292 was not proved, and that the entry in exhibit G as to a part payment in 1871-72 was not reliable and, in the view which he took of the facts, he held that the appellant was not entitled to claim any kattubadi, that even if he was, he could only claim arrears for three years before suit and that his right to kattubadi, if any, had become extinct under section 28 of the Limitation Act by reason of respondents' refusal to pay it for more than twelve years prior to suit. He observed also that the kattubadi claimed by the appellant was a mere rent and that no suit would lie for its recovery, no patta and muchalka having been exchanged as required by Act VIII of 1865. In the result, the Judge dismissed appellant's suit with costs; hence this second appeal.

Upon the facts found by the Judge, we think his decision is right though we do not agree in all the reasons assigned by him in its support. He discusses at some length the question whether kattubadi payable to a zamindar is a mere rent or a rent charge, but we entertain no doubt that when a grant is made subject to an annual payment of kattubadi, it represents the portion of the revenue reserved by the grantor and excluded from the interest alienated as inam. As regards the question, whether the appellant was entitled to claim payment of kattubadi, the Judge observes that none was paid prior to 1846, and infers from that fact that the original grant was rent free. He rests this opinion on exhibit H and we cannot say that it is not well founded. Though the

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District Munsif found that kattubadi was paid in 1871-72 and in 1883, yet the Judge after discussing the evidence, set aside the finding and held that the evidence in its support was not trustworthy. This is a question of fact which it was for him to determine and in second appeal we are bound to accept his conclusion as to the weight due to the evidence. Again, the suit was brought on the 1st November 1888, and upon the evidence as appreciated by the Judge, no rent had been paid not only for twelve years prior to the date of the suit but also from 1869. There only remains then the fact that when the appellant's estate was under the Court of Wards a kattubadi had been levied prior to 1869. The District Munsif considered that such payment, though made more than twelve years ago, was sufficient proof of the appellant's title, but the Judge declined to attach weight to it as it was levied under the erroneous impression that an alienee claiming from a zamindar could not make good a title by adverse possession for twelve years, and as on that ground it was not levied in 1869 when the Court of Wards again happened to take charge of the estate. We cannot say that if kattubadi had been irregularly levied for a time and then abandoned more than twelve years before suit, it is wrong in law to refuse to accept such irregular collection as proof of a legal right, especially when that right, if any, has become barred by non-payment for more than twelve years before suit. The District Munsif relied upon the decision *Alubi* v. *Kunhi Bi*(1), but the case now before us is not all fours with it. There the nature of the tenure and the liability to pay kattubadi were admitted, the only matter in dispute being whether the then plaintiff was really the party to whom it ought to be paid, and as his title was considered to be established, the Court held that there was no statutory bar. In the present case the nature of the tenure and the plaintiff's right to kattubadi were denied. In the view which we take of the case we do not think it is necessary to consider whether if there had been a grant subject to kattubadi, patta and muchalka ought to have been exchanged. We accept the findings that the appellant has not proved his right to the kattubadi and that the right, if any, is barred by limitation and dismiss the second appeal with costs.

(1) I.L.R., 10 Mad., 115.

APPELLATE CIVIL—FULL BENCH.

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

1891. October 13.

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

Stamp Act—Act I of 1879, *s.* 3, *cl.* 11, *s.* 29 (*e*)—*Instrument of partition.*

Three out of seven brothers, constituting an undivided Hindu family, executed documents whereby each acknowledged the receipt of certain property made over to him, "a division of family property having been effected," and acknowledged himself liable for one-seventh of the debts of the family. One of the documents contained a clause to the effect that the executant had no further claim on property of the family:

Held, that the documents should be stamped as instruments of partition, each member paying according to the share taken by him under the partition.

CASE stated for the opinion of the High Court by the Board of Revenue under Stamp Act, section 46.

The case was stated as follows:—

"The documents evidence that three out of seven brothers "have received Rs. 200 each in pursuance of partition of family "property and that they remain liable, each for one-seventh of the "family debts; in one case also the executant adds that his claims "have been fully satisfied.

"The first question is what are these documents; presumably, "the whole of the family property was divided, but it is not "actually said so, and all the seven documents are not produced. "They are on the face of them receipts, and are stamped as such: "their combined effect would be much the same as that of a "formal deed of partition, and if all of them could be produced, "and the release clause had been continued through all of them, "the ruling in *Reference under Stamp Act*, s. 46(1), would apply; "but only three of them are produced, and two of these do not "contain the release clause.

"The second question is what is the amount of duty payable on "them? If they are a partition deed, do they pay on the amount, "the receipt of which is evidenced in the three documents pro-"duced, viz., Rs. 600, or on the whole amount of the family pro-

* Referred Case No. 19 of 1891.

(1) I.L.R., 12 Mad., 198.

"perty divisible, presumably Rs. 1,400; and does each document "pay separately or all three together?

"If not a deed of partition, of what effect are the clauses "accepting liability for a one-seventh share of the family debts, "and the clause stating that the recipient's claims have been "satisfied?"

The papers placed before the High Court referred also to *Reference under Stamp Act*, s. 49(1).

The following is a translation of one of the documents in question:—

Dated Palmanair, 4th June 1890.

I, Venkataramanayya by name, the son of Jallapeta Subbayya, whose means of livelihood is some lands assigned to the Brahman caste, grant this receipt written in my own handwriting to my brothers (1) Appayya *alias* Apparaw, (2) Raghavayya, (3) Krishnayya, (4) Gopalakrishnayya, (5) Adayya and (6) Rangayya, all residing in Palmanair village, Palmanair taluk, North Arcot district.

A division of our family property having been effected by lottery, the following is the description of the above which I got and which all of you made over to me for my free enjoyment. . . . . I agree to take for my share (1) dry, wet, circar and inam lands above detailed; (2) 7, 8 sarams of a house on the eastern side of the houses which now form our residence and which are situated between the following boundaries, viz., west of Kuppayya's house, south of P. Surayya's and M. Sayar Kuppurau's houses and north and east of two small lanes; (3) plain ground extending north and south in front of my sarams and having a breadth of one and-a-half yards; and (4) one-seventh of the debts due by our family up to this date. I received the property above detailed which is worth about Rs. 200.

(Signed) JALLAPETA VENKATARAMANAYYA.

Presented by the undersigned, in the office of the Sub-Registrar of Palmanair at 4-40 P.M., on 4th June 1890.

(Signed) JALLAPETA VENKATARAMANAYYA.

It is agreed that the receipt was written by the undersigned.

(Signed) JALLAPETA VENKATARAMANAYYA.

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

(1) I.L.R., 7 Mad., 385.

REFERENCE UNDER STAMP ACT, s. 46.

JUDGMENT:—We are of opinion that these documents are partition deeds and must be stamped accordingly having regard to the provisions of section 29 (*e*) of Act I of 1879. Each member must pay according to the share which he has taken under the partition.

APPELLATE CIVIL.

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

1891. Sept. 23, 24. Oct. 19.

RAMUNNI AND OTHERS (DEFENDANTS Nos. 1, 2 AND 13), APPELLANTS,

v.

KERALA VARMA VALIA RAJA AND OTHERS (PLAINTIFFS Nos. 1—17 AND DEFENDANT No. 16), RESPONDENTS.*

Landlord and tenant—Surrender—Limitation—Adverse possession—Malabar law—Karnavan, powers of—Perpetual lease.

The karnavan of a Malabar kovilagom executed a kuikanom lease of certain land, the jenm of the kovilagom, in 1846, and in 1861 his successor demised the same land to the same tenants in perpetuity. The present karnavan sued in 1889 to recover possession of the land:

Held, (1) that the perpetual lease, as being of an improvident character, was *ultra vires* and void;

(2) that the original lease was not surrendered;

(3) that the suit was not barred by limitation, the possession of the defendants never having been adverse to the plaintiff's kovilagom.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in original suit No. 26 of 1889.

Plaintiff No. 1 was the Valia Raja of the Cherikal kovilagom, of which plaintiffs Nos. 2—17 and defendant No. 16 were the junior members. They sued to recover possession of a paramba, being the jenm of their kovilagom, alleged to have been comprised in a kuikanom lease executed by a predecessor of plaintiff No. 1 to the karnavan of the remaining defendants in August 1846. The contending defendants denied the demise set up in the plaint and alleged that they were in possession under a perpetual lease executed in May 1861 by another predecessor of plaintiff No 1, and also pleaded limitation.

* Appeal No. 45 of 1890.

The Subordinate Judge held that both the above leases were proved, but he was of opinion with reference to *Tod* v. *Kunhamad Hajee*(1) that the execution of that of 1861 was beyond the authority of the then karnavan of the plaintiff's kovilagom. With regard to the further pleas of the defendants he referred to *Aliba* v. *Nanu*(2) and *Rangasami* v. *Muttukumarappa*(3), and pointed out that the lease of 1846 specified no term for its duration and proceeded to record his rulings as follows:—

"The perpetual grant was unauthorized, ineffectual and legally "inoperative as against the kovilagom, and I certainly agree "in the soundness of the contention that the latter has the right "to treat it as altogether non-existent and to fall back on the "original lease of 1846, which was made on its behalf by Ravi "Varmah Valia Rajah and has never been since determined by any "act of the kovilagom (*Haji* v. *Atharaman*(4) and *Madhava* v. "*Narayana*(5)), and there can, of course, be no surrender, either "express or implied, without the consent of both the landlord and "tenant, and the landlord, in this case the kovilagom, is not shown "to have assented to any surrender at all (*Balaji Sitaram Naik* "*Salgavkar* v. *Bhikaji Soyare Prabhu Kanolekar*(6) and *Judoonath* "*Ghose* v. *Schoene Kilburn & Co.*(7)). I therefore find that the "paramba is now held by the 1st to 13th defendants' family "under the plaintiffs' kovilagom not under the perpetual right "evidenced by exhibit I, but under the improving lease in exhibit "A and that the suit is not barred by article 139 or any other "provision of the Limitation Act."

Defendants Nos. 1, 2 and 13 preferred this appeal.

The Acting Advocate-General (Hon. Mr. *Wedderburn* and *Sankara Menon* for appellants).

Sankaran Nayar and *Ryru Numbiar* for respondents.

JUDGMENT.—It is quite clear that the perpetual lease given by the plaintiff's predecessor in title in 1861 was a disposition of an improvident character which could not bind his successors.

It is argued that by reason of the acceptance of this lease there was a surrender of the prior lease of 1846 and that therefore the suit was barred by limitation. In our judgment, however, any

(1) I.L.R., 3 Mad., 176.
(2) I.L.R., 9 Mad., 222.
(3) I.L.R., 10 Mad., 515.
(4) I.L.R., 7 Mad., 512.
(5) I.L.R., 9 Mad., 244.
(6) I.L.R., 8 Bom., 164.
(7) I.L.R., 9 Cal., 671.

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surrender by operation of law that might have ensued on the taking of the perpetual lease was nullified by the plaintiff's repudiation of the perpetual lease. The surrender must fall to the ground with the transaction on which it is supported (*Doe d Egremont* v. *Courtenay*(1). It is contended by the Acting Advocate-General that this principle is not applicable, because the plaintiff's right to challenge the lease of 1861 was extinguished by the law of limitation more than 12 years having elapsed since the date when the defendants' possession under it began. The case is compared with *Madhava* v. *Narayana*(2). In that case it was held that possession acquired under a kanom, granted by the manager of a Nambudri family, and extending over more than 12 years, gave the holder a prescriptive title against the successor in management, who otherwise would have been entitled to repudiate the kanom and recover immediate possession.

It is clear that in such a case where the only legal title to which the defendants' possession could be referred was repudiated by the plaintiff, the possession must have been adverse to the family. But in the present case it is otherwise, because apart from the perpetual lease which the plaintiff treats as non-existent the defendants had a right to possession under the prior lease which had never been determined.

The plaintiff was never in a position to recover immediate possession from the defendant as from a trespasser. It was not competent to him at one and the same time to repudiate the perpetual lease and to take advantage of it by claiming that it operated to effect a surrender of the prior lease.

Under these circumstances, it is clear that the possession of the defendant cannot be deemed adverse and that the suit is not barred by limitation.

The appeal is therefore dismissed with costs.

(1) 11 Q.B., 702. (2) I.L.R., 9 Mad., 244.

APPELLATE CIVIL.

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

1891. September 21.

ANDERSON (PETITIONER),

v.

PERIASAMI (RESPONDENT).*

Civil Procedure Code, s. 598—Application for certificate for appeal to Privy Council—Limitation Act—Act XV of 1877, *s.* 12, *sched. II, art.* 177.

In computing the period of limitation for an application for a certificate admitting an appeal to Her Majesty in Council, the time occupied in obtaining copies of the decree and judgment sought to be appealed against cannot be excluded.

PETITION under section 598 of Act XIV of 1882 praying for the grant of a certificate to enable the petitioner to appeal to Her Majesty in Council against the decree of this Court in appeal No. 5 of 1889.

Biligiri Ayyangar for petitioner.

Bhashyam Ayyangar for respondent.

JUDGMENT.—This application for the admission of an appeal to Her Majesty in Council is put in 92 days out of time, and the time taken by the petitioner in obtaining copies of the decree and judgment cannot be excluded.

An application of this nature under article 177 of the Limitation Act does not fall within the provisions of section 12, Act XV of 1877.

We agree with the view taken by Stuart, C. J., in *Jawahir Lal* v. *Narain Das*(1), and the same view was taken by this Court in civil miscellaneous appeal No. 254 of 1886.

We may also observe that section 599 of the Code of Civil Procedure has been repealed by Act VII of 1888. We cannot see that the argument based upon the alleged harshness of the law has any foundation. The period of six months, which is allowed by law, seems ample, and in this case the petitioner was actually in possession of copies of the decree and judgment on August 26th, so that he had ample time before November 6th to

* Civil Miscellaneous Petition No. 540 of 1891. (1) I.L.R., 1 All., 644.

ANDERSON v. PERIASAMI.

prepare a memorandum of grounds of appeal and make an application to this Court under section 600. We are, therefore, constrained to dismiss this application with costs.

APPELLATE CIVIL.

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

1891. Sept. 24, 25, 28.

MANAVIKRAMAN (APPELLANT), APPELLANT,

v.

UNNIAPPAN AND OTHERS (RESPONDENTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, *ss.* 92, 93—*Appeal against a decree for redemption—Time fixed for redemption.*

A mortgagor obtained a decree for redemption of his mortgage "within six months from the date of this decree." The mortgagee appealed, but the Appellate Court confirmed the decree. The mortgagor sought to redeem within six months from the date of the appellate decree:

Held, the Court to which the application of the mortgagor was made should, before passing orders on the application, have given the plaintiff time to apply to the District Court to amend the decree under Transfer of Property Act, s. 92.

APPEAL under Letters Patent, section 15, against the judgment of SHEPHARD, J., on appeal against order No. 20 of 1889, which was preferred against the order of L. Moore, District Judge of South Malabar, in civil miscellaneous appeal No. 124 of 1889, reversing the order of K. Ramanadha Ayyar, Acting District Munsif of Nedumganad, in civil miscellaneous petitions Nos. 337 and 341 of 1889.

On 9th December 1887 a decree was passed for the redemption of a mortgage within six months from that date. An appeal was preferred against that decree, but it was confirmed on 29th September 1888. The mortgagor deposited in Court the amount due on the mortgage within six months from the date of the decree of the Appellate Court. The mortgagee objected that the equity of redemption had been lost by the efflux of time.

The District Munsif held that the mortgagor was still entitled to redeem. On appeal the District Judge reversed this decision.

* Letters Patent Appeal No. 30 of 1890.

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The mortgagor preferred an appeal against the decision of the District Judge which came on for hearing before SHEPHARD, J., who affirmed that decision. The mortgagor now appealed against the judgment of SHEPHARD, J., under Letters Patent, section 15.

Bhashyam Ayyangar for appellant.

Sundara Ayyar for respondents.

JUDGMENT.—The plaintiff obtained a decree on 19th December 1887 entitling him to redeem certain property on payment of the redemption amount to second defendant within six months from the date of that decree. The second defendant appealed, and the District Court, on 29th September 1888, ordered that the decree of the Lower Court be confirmed and this appeal dismissed. The plaintiff then applied for execution, but was resisted by second defendant under section 92 of the Transfer of Property Act on the ground that as plaintiff had not paid the redemption amount within six months of the original decree, the right to redeem was barred. The District Munsif held, upon the authority of *Noor Ali Chowdhuri* v. *Koni Meah*(1) and *Daulat and Jagjivan* v. *Bhukandas Manekchand*(2), that the appeal decree of the District Court incorporated the decree of the first Court and thus became the only decree capable of execution, hence that the petition for execution was not barred. On appeal the District Judge, following *Govindan* v. *Chapputti*(3), held that the mere fact that an appeal was preferred would not extend the time allowed for payment, and reversed the order of the District Munsif.

The appeal was first heard by a single Judge (Mr. Justice Shephard), who held that he was bound by the decision in *Govindan* v. *Chapputti*(3). Hence this appeal under the Letters Patent.

We have no doubt that when an appeal has been heard, the decree of the Appellate Court becomes the final decree in the suit, and the only one capable of execution. This doctrine has

(1) I.L.R., 13 Cal., 13. (2) I.L.R., 11 Bom., 172.

(3) Before *Kernan* and *Parker*, JJ. Appeal against Appellate Order 23 of 1888. JUDGMENT.—The plaintiff was barred by non-payment at the day fixed. The pendency of the appeal by the defendant could not have the effect of relieving plaintiff from redeeming within the proper time. The appeal is dismissed with costs.

MANA-VIKRAMAN v. UNNIAPPAN.

been recognized in various decided cases—*Arunachellathudayan* v. *Veludayan*(1), *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan*(2) and *Noor Ali Chowdhuri* v. *Koni Meah*(3)—and has been referred to with approval by the Privy Council in *Kistokinker Ghose Roy* v. *Burrodacaunt Singh Roy*(4). Granting, however, that the decree of the Appellate Court is the decree to be executed, the further question arises whether that decree incorporates the original date fixed for payment of the redemption money, or modifies the original decree by prescribing that the money shall be paid within six months of the appellate decree.

As the decree of the Appellate Court is drawn, there is in words no modification of the original order, but the decree of the first Court is simply confirmed as it stands. In *Govindan* v. *Chapputti*, which has been followed by the District Judge and by the learned Judge in the miscellaneous Court, a date (March 31st, 1887) was actually fixed in words to be the date within which the property must be redeemed. In the case before us the direction is that the plaintiff do pay the money "within six months from the date of this decree," and the decree is dated December 19th, 1887. The cases are, therefore, not quite parallel, though we doubt whether the fact that January 19th, 1888, is not mentioned in the decree as the date within which redemption must be made can affect the case.

For the appellants we were referred to the decisions in *Noor Ali Chowdhuri* v. *Koni Meah*(3), *Rup Chand* v. *Shamsh-ul-jehan*(5), and *Daulat and Jagjivan* v. *Bhukandas Manekchand*(6). These no doubt support the contention of the appellant, though the Bombay Court recognized the difficulty of holding that a confirmation and incorporation of a decree should be attended with a change of time, though nothing is said to that effect.

In coming to the conclusion referred to above, the different High Courts have not noticed the proviso to section 93 of the Transfer of Property Act, by which it is provided that upon good cause shown, and upon such terms as it thinks fit, a Court may, from time to time, postpone the day fixed under section 92 for payment to the defendant. This provision is in accordance with the practice of English law, and it gives the Court full discre-

(1) 5 M.H.C.R., 215. (2) I.L.R., 11 All., 267. (3) I.L.R., 13 Cal., 13.
(4) 10 B.L.R., 101. (5) I.L.R., 11 All., 346. (6) I.L.R., 11 Bom., 172.

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tionary power to act, from time to time, as circumstances may require.

It is evident that, unless a plaintiff either makes use of this proviso, or applies for execution of the decree, he is liable to find himself deprived of the fruits of his decree by the defendant adopting the simple expedient of first preferring an appeal and then withdrawing it as soon as the time for redemption has expired. An instance of this is the case of *Patloji* v. *Ganu*(1).

The payment of the redemption money by the plaintiff within the time allowed by the decree is a condition precedent to his being allowed to execute the decree, and though a decree passed on an appeal preferred by the defendant may give plaintiff a fresh starting point of time within which he may execute, it does not *necessarily*, unless the appeal decree so declares, give him an extension of the time during which he must fulfil the condition precedent. Clearly the mere pendency of the appeal will not extend the time—*Patloji* v. *Ganu*(1).

When the defendant has preferred an appeal, he will naturally not be willing to accept from plaintiff the redemption amount, and if plaintiff pays it into Court his capital will be idle. The Legislature has, however, provided a remedy (section 93, Transfer of Property Act), and plaintiff can either apply for extension of time during the pendency of the appeal, or, by applying for execution, compel defendant to furnish some adequate security which will protect his interests.

While recognizing, therefore, that the decree of the Appellate Court is the only decree capable of execution, we think it is open to doubt whether that decree, when it simply purports to incorporate and confirm the decree of the Court of first instance, can be held to vary that decree by the grant of further time during which redemption may be made, the time fixed by the original decree having already expired, without express words to that effect.

But, inasmuch as the decree of the Appellate Court becomes the final decree in the suit, we think that section 92 of the Transfer of Property Act imposes upon that Court the duty (if the decree of the first Court has not been executed) of prescribing a date, within six months of the date of that decree, within which plaintiff must pay the redemption money to the defendant or into Court.

(1) I.L.R., 15 Bom., 370.

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In this respect the decree of the Appellate Court is defective, and we think the proper course would have been to give the plaintiff time before passing orders on the execution petition to apply to the District Court to amend the decree in accordance with the statutory directions contained in section 92 of Act IV of 1882. Taking this view, we set aside the orders that have been passed and remand the application for execution to the Court of first instance, in order that the District Munsif may act in accordance with these directions.

The question not being without difficulty, we shall make no order as to costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Handley.

1891. Nov. 6, 19.

SAMAYYA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

NAGALINGAM AND OTHERS (DEFENDANTS AND FOURTH DEFENDANT'S REPRESENTATIVES), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, *ss.* 67, 68—*Usufructuary mortgage—Dispossession of mortgagee—Suit for sale—Costs.*

The plaintiff, at the request of the mortgagors, paid off part of the debt due on a usufructuary mortgage to one of two mortgagees thereunder, and was placed by the mortgagors in possession under a usufructuary mortgage of that part of the mortgage premises which has been in the enjoyment of the mortgagee so paid off, who executed a release.

The other mortgagee under the first mortgage obtained a decree for sale on the footing of that instrument, and the mortgage premises were sold "subject to the establishment" of the plaintiff's claim: the decree-holder purchased and afterwards assigned his rights to two of the present defendants who dispossessed the plaintiff. The plaintiff now sued the mortgagors and mortgagees nd the defendants above referred to:

Held, the plaintiff was not entitled to a decree for sale.

Semble: the plaintiff might have sued to have the sale, which had taken place at the suit of the first usufructuary mortgagee, declared to be invalid as against him.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 299 of 1889 modifying the

* Second Appeal No. 418 of 1890.

decree of V. Suryanarayana, District Munsif of Guntur, in original suit No. 462 of 1888.

Suit on a usufructuary mortgage, dated 18th May 1885, and executed in favor of plaintiff No. 1 (the father of plaintiff No. 2) by defendant No. 5 and his sons defendants Nos. 6 to 8. The principal sum secured by the mortgage was Rs. 225. The mortgage instrument, after reciting the debt and describing the mortgage premises, proceeded as follows:—

"We have delivered to your possession the two plots within "these boundaries, assessed at Rs. 10 and measuring acres 1-61 "of seri wet land, for five years from the year Parthiva to the "end of the year Virodhi. You shall, therefore, cultivate the said "land as you like and be enjoying the produce thereof in lieu of "the interest on the above sum. We shall ourselves be paying "the water-cess and other sist payable for that land every year. "We shall pay you the said principal of Rs. 225 from the other "properties we possess within five years. If we fail to pay "the Sircar sist in any year, you shall regard this very bond as a "sale-deed for this land in consideration of the said amount of "principal and take possession of it. If we fail to pay you the "amount of principal within the 15th Palguna Suddha of the "said Virodhi year, you shall regard this very bond as a sale-"deed and take possession of the land. If we pay you the "amount of principal before the 15th Chaitra Suddha of any year "within the said five years, you shall put us in possession of our "land. Usufructuary mortgage bond executed to this effect "with our consent. Dated as above."

The mortgage premises comprised in the above mortgage were referred to in the suit as plots B and E. These plots, together with other pieces of land referred to as plots A, C, D and F, were comprised in a usufructuary mortgage, dated 27th May 1879, and executed by defendants Nos. 5 and 6 in favor of the father of defendant No. 3, one Betra Pantulu and defendant No. 4. It was now alleged in the plaint that these three mortgagees originally held the lands in separate enjoyment, defendant No. 4 holding plots B and E; and that subsequently, viz., on 21st April 1885, Betra Pantulu transferred his interest in the mortgage to defendant No. 3 (a minor), who thereupon, his father having died, became the holder of plots A, C, D and F. It appeared that plaintiff No. 1 paid off defendant No. 4 at the

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request of the mortgagors, who, having obtained a release from defendant No. 4, executed the mortgage now in suit on 18th May 1885 and placed plaintiff No. 1 in possession of plots B. and E.

In 1886 defendant No. 3 by his mother and next friend obtained a decree against defendant No. 4 and the mortgagors for the balance of the money due under the mortgage of 27th May 1879 and for the sale of the mortgage premises. He accordingly brought the six plots of land to sale in execution, but the plaintiffs intervened and the land was sold "subject to the establishment" of the plaintiffs' claim to plots B and E. The decree-holder became the purchaser at the Court sale; and subsequently sold the land to defendants Nos. 1 and 2. These vendees then dispossessed the plaintiffs, who accordingly sued as above for the sum due on the mortgage of 18th May 1885 and for sale of the mortgage premises. Defendant No. 3 was joined as defendant by his mother and guardian.

The District Munsif passed a decree as prayed. On appeal the District Judge ruled that the plaintiffs in a suit on a usufructuary mortgage were not entitled to a decree for sale; but, observing that it was not disputed that the mortgage debt was a family debt, he proceeded to hold:—"Plaintiffs may have a decree "for the mortgage money against defendants Nos. 5, 6 and 7 and "against the share in the family property of defendant No. 8, who "is a minor, with interest at 6 per cent. per annum from date of "plaint to date of payment. The judgment of the lower Court is "modified accordingly. As this litigation has been caused by the "erroneous action of defendant No. 3, he will bear all the costs "throughout of all the parties."

The plaintiffs preferred this second appeal on the following grounds:—

"The plaintiffs are under the circumstance entitled to obtain "a decree for sale of the properties B and E and the "declaration prayed for in the plaint.

"The plaintiffs virtually stand in the position of defendant "No. 4, and are entitled to all the rights which the said "defendant had under his mortgage.

"The original mortgage was split up by the mortgagees them-"selves, and defendant No. 3 had by his conduct aban-"doned his rights over plots B and E. The said defendant "and those who claim through him are now estopped

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"from contending that the plots B and E continued to be "liable to the claims of the other two mortgagees.

"A suit for sale is maintainable under the terms of the "contract.

"If the sale to defendant No. 3 under the decree is invalid, "defendants Nos. 1 and 2 have no right to deprive the "plaintiffs of their possession, and the plaintiffs are at "any rate entitled to the declaration asked for and "possession.

"Even if the plaintiffs are mere puisne-mortgagees, they may "be permitted to redeem the prior mortgage if it was "really subsisting in respect of plots B and E."

S. Subramanya Ayyar and *P. Subramanya Ayyar* for appellants.

Anandacharlu for respondents.

JUDGMENT.—It is not clear what the lower Courts intended to find to have been the effect of the division between the three original usufructuary mortgagees, the third defendant's father, defendant No. 4 and Betra Pantulu. The Munsif in paragraph 14 of his judgment finds that there was an agreement that each mortgagee should discharge his debt from the usufruct of the plots that went to his share, and that an agreement must be inferred that one should have no further claim on the plots that went to the other. If this were the effect of the division, then the plots B and E were only subject to the fourth defendant's share of the mortgage debt, which was extinguished by his release, and therefore they came into the first plaintiff's hands upon the occasion of the usufructuary mortgage to him free from any claim under the original mortgage and could not be sold in execution of the third defendant's decree upon that mortgage. But the above finding of the Munsif is inconsistent with another part of his judgment, paragraph 20, where he holds that every part and parcel of the mortgaged property is liable to every pie of the debt, which again appears to be inconsistent with the last part of the same paragraph. The District Judge appears to agree with the Munsif as to the fact of the division, but has not found distinctly as to its effect. But we think it is not necessary to call for a finding on this question, as the case can be disposed of on the facts as found. We agree with the District Judge that as usufructuary mortgagees the plaintiffs cannot sue for sale of the

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mortgaged property. It is argued for the appellants that the circumstances mentioned in section 68 of the Transfer of Property Act having occurred, that section gives them the right to sue for the mortgage debt, and therefore, by implication a right to sue to enforce the debt by sale of the mortgaged property. We cannot concur in this reasoning, assuming the circumstances contemplated by section 68 exist in this case.

Sections 67 and 68 deal with three kinds of rights of mortgagees, viz., foreclosure, sale and suit for the money due, section 67 being concerned with the two first and section 68 with the last. Section 68 declares the right of the mortgagee to sue for the mortgage money in certain cases, but it does not affect the provisions of section 67 as to his right to foreclosure or sale, and that section expressly denies to a usufructuary mortgagee the right to sue for foreclosure or sale. It is true third defendant was also only a usufructuary mortgagee and therefore had no right to sue for sale of the mortgaged property, and the decree for sale and the sale under it might have been set aside as regards plots B and E at the instance of plaintiffs who were no parties to that suit. Plaintiffs might, therefore, have sued to have the sale declared invalid as against them and as a necessary consequence to be put in possession of the plots B and E, of which they have been illegally dispossessed. This, however, is not the suit plaintiffs have brought, and we do not think the present suit can be allowed to be converted into one of that nature. They have mistaken their remedy and must be content with the decree for the money which they have obtained and against which there is no appeal.

It is unnecessary to decide whether the District Judge was right in holding that the circumstances contemplated by section 68 of the Transfer of Property Act as entitling a mortgagee to sue for the mortgage money exist in this case, as there is no appeal against that part of the decree. The appeal fails and is dismissed but without costs, as the conduct of third defendant's guardian in bringing the property to sale and of first and second defendants in dispossessing plaintiffs was illegal.

On behalf of third defendant, a minor, a memorandum of objections is presented by his guardian objecting to that part of the decree of the Lower Appellate Court which makes him liable for all the costs of all parties throughout. This is clearly wrong.

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The minor cannot be made personally responsible for the act or defaults of his guardian or of the first and second defendants.

We think the proper decree as to costs is that all parties do bear their own costs throughout. We shall modify the decree of the Lower Appellate Court accordingly. We make no order as to costs of the memorandum of objections.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

1891. Dec. 4, 8.

OAKSHOTT AND OTHERS (PLAINTIFFS),

v.

THE BRITISH INDIA STEAM NAVIGATION COMPANY (LIMITED), (DEFENDANTS.) *

Presidency Small Cause Courts Act—Act XV of 1882, ss. 37, 69—Application to Full Bench for retrial—Case stated.

The full bench of a Presidency Court of Small Causes cannot state a case for the opinion of the High Court on an application for a new trial made under Act XV of 1882, s. 37.

CASE stated under section 69 of Act XV of 1882 and section 617 of the Civil Procedure Code by the Judges of the Court of Small Causes, Madras, in small cause suit No. 22581 of 1890 on their file.

The *Acting Advocate-General* (Hon. Mr. *Wedderburn*) for plaintiffs.

Mr. *K. Brown* for defendants.

JUDGMENT.—The first question referred to us by the full bench of the Small Cause Court is whether a hearing of an application for a new trial by a full bench under section 37 of the Presidency Small Cause Act XV of 1882 can be said to be the hearing of a suit within the meaning of section 69 of the said Act, so as to entitle the Court to state a case for the opinion of the High Court either on its own motion or at the requisition of either party.

Section 69 of the Presidency Small Cause Act provides for a reference to the High Court in two cases (1) when two or more

* Referred Case No. 32 of 1891.

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Judges sit together in any suit and differ in their opinion as to any question of law or usage having the force of law, and (2) if any such question arises in any suit in which the subject-matter is over Rs. 500 in value and either party requires such reference. The concluding clause of the section provides for the course to be adopted by the Court in both of the above cases: it is to draw up a statement for the opinion of the High Court of the facts of the case, and either postpone judgment or deliver judgment contingent upon such opinion.

It was urged by the learned counsel for the defendant company that the words "in any suit" were wide enough to include an application for a new trial under section 37, and we were referred to the judgment of Sir Barnes Peacock in *Ishan Chander Singh* v. *Haran Sirdar*(1), in which it was ruled that an application for a new trial under the Mofussil Small Cause Act XI of 1865 was a point in the proceedings previous to the hearing of a suit within the meaning of section 1, Act X of 1867, and that the opinion of the High Court upon a question of law could be asked for upon such an application, *per contra* we were referred by the learned Advocate-General to the remarks of Sargeant, C.J., and Farran, J., in *Ralli Brothers* v. *Goculbhai Mulchand* (2.)

The language used in section 1, Act X of 1867, appears to us clearly distinguishable from that used in section 69, Act XV of 1882. Although an application for a new trial may undoubtedly be "a point in the proceedings previous to the hearing of a suit," yet the words "in any suit" in the later Act appear to presuppose that a suit is actually pending. If the application for a new trial is rejected, the suit is not revived, and it becomes impossible to give effect to the direction in the last clause of section 69, viz., to reserve judgment or give judgment contingent upon such opinion. We are fortified in this opinion by the fact that the High Court of Calcutta has taken a similar view in *Nusserwanjee* v. *Pursutum Doss*(3), in which it was held, following the principle laid down in *Hall* v. *Joachim*(4), that if in hearing an application for a new trial the Judges thought it advisable to take the opinion of the High Court, their proper course was to grant a new trial, so that the point could be properly

(1) 11 W.R., 525.
(2) I.L.R., 15 Bom., 376.
(3) I.L.R., 11 Cal., 298.
(4) 12 B.L.R., 34.

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raised. In an application for a new trial no judgment could be given which would be a contingent judgment within the meaning of the Presidency Small Cause Act. We must answer the first question referred to us in the negative. We cannot, therefore, consider the other points referred. Costs in this Court to follow the result of the reference.

Champion & Short—Attorneys for plaintiffs.

Barclay, Morgan & Orr—Attorneys for defendants.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

KERALA VARMA (PLAINTIFF), APPELLANT,

v.

CHADAYAN KUTTI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1891. Nov. 12.

Court Fees Act—Act VII of 1870, *s.* 10, *cl. II; s.* 12, *cl. II.*

The plaintiff sued four persons to recover, with arrears of rent, possession of three parcels of land and obtained a decree in the Court of a District Munsif. The suit was valued at Rs. 489-8-0. Defendant No. 4, who claimed to be entitled as jenmi to one of the parcels, preferred an appeal. The District Judge held that the suit should have been valued at Rs. 1,164-8-0, and he made an order that additional Court Fees should be paid accordingly; the order not having been complied with, he made an order "original suit rejected." He subsequently referred the appeal for disposal to a Subordinate Judge, who accordingly passed a decree, allowing the appeal of defendant No. 4 with costs. On appeal against the above order and decree:

Held, that the order of the District Judge was irregular and the appeal should be restored to the file of the Subordinate Judge to be disposed of according to law.

SECOND APPEALS against the order and decrees of J. P. Fiddian, Acting District Judge of North Malabar, and of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 278 of 1889, being an appeal against the decree of S. Subramanya Ayyar, District Munsif of Cannanore, in original suit No. 278 of 1889.

The plaintiff sued four defendants to recover, with arrears of rent, three parcels of land demised to the karnavan of defendants

* Second Appeals Nos. 1252 of 1890 and 527 of 1891.

KERALA VARMA v. CHADAYAN KUTTI.

Nos. 1 and 2. The District Munsif passed a decree for the plaintiff, against which defendant No. 4, who asserted a jenm right over part of the land in question, preferred an appeal.

In that appeal the Acting District Judge of North Malabar, considering that the suit had been improperly valued, made an order on 14th March 1890 as follows :—

"Plaintiff will be called on to pay Rs. 56-10-0, balance payable on all three items, on or before the 7th June, or show cause; "or his suit will be dismissed."

On 7th July 1890 he made a further order as follows :— "Respondent (plaintiff) appeared on 2nd July 1890, but failed "to show cause. Original suit rejected."

On 26th July 1890 the Acting District Judge referred the appeal to the Subordinate Court for disposal. The Subordinate Judge considered the above orders to have been made under Court Fees Act—Act VII of 1870,—s. 10, cl. II, and s. 12, cl. II, and said "as the original suit has been wholly rejected by the above order "of the District Judge, it seems to me that the fourth defendant's "appeal should be allowed with costs," and decreed accordingly.

The plaintiff preferred second appeal No. 1252 of 1890 against the order of the Acting District Judge and second appeal No. 527 of 1891 against the decree of the Subordinate Judge.

Sankara Nayar and *Ryru Nambiar* for appellant.

Mr. *Gantz* for respondents.

JUDGMENT.—The order of the District Judge in dismissing the suit for failure of plaintiff to pay additional stamp duty demanded was irregular for the following among other grounds. In the first place he had no jurisdiction over the whole subject matter of the suit, the appeal by fourth defendant relating to one item only. Secondly, the appeal had not been admitted when the order was passed, and therefore the matter was not before the Judge in such a shape that he had jurisdiction to make any order. The order of the Subordinate Judge reversing the decree so far as the fourth defendant was concerned after the original suit had been already dismissed was clearly *ultra vires*. We set aside the decrees and orders both of the District Judge and of the Subordinate Judge and direct the Subordinate Judge to replace the appeal on his file and to dispose of it according to law. Costs to follow result.

APPELLATE CIVIL.

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

1891. July 17. Oct. 27.

NARAYANA AND OTHERS (DEFENDANTS), APPELLANTS,

v.

RANGA (PLAINTIFF), RESPONDENT.*

Religious office, transfer of—Transferee not solely entitled in succession to transferor.

In a suit against the mooktessors or trustees of a temple, the plaintiff sought a declaration of his right to perform the puja in the temple, and an injunction restraining the defendants from interfering with the exercise of such right.

It appeared that the office of pujari was hereditary in the plaintiff's family, that it had been held by the plaintiff's undivided uncle (deceased), that he transferred it in 1880 to the plaintiff's father (deceased), in succession to whom the plaintiff now claimed it. The High Court called for a finding as to whether the plaintiff's father was the sole heir next in succession to his transferor, and it was found that he had three brothers:

Held, that the transfer of the office to the plaintiff's father was invalid, and the suit should be dismissed.

SECOND APPEAL against the decree of S. Subbayyar, Subordinate Judge of South Canara, in appeal suit No. 380 of 1888, affirming the decree of M. Mundappa Bangera, District Munsif of Karkal, in original suit No. 374 of 1887.

The plaint alleged that the office of pujari in a certain temple was hereditary in the plaintiff's family, that the office was held by Baba Bhatta (deceased), that he, in 1880, transferred it to the father (deceased) of the plaintiff, who now sued the mooktessors of the temple for a declaration of his right to perform puja, and for an injunction restraining them from interfering with the exercise of this right.

The transfer to the plaintiff's father was evidenced by a *muktiarnama* filed as exhibit A, whereby, as well as the office in question, certain other rights and some property was also assigned, and it was provided that the assignee should pay various creditors therein named.

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

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* Second Appeal No. 686 of 1890.

NARAYANA v. RANGA.

The defendants preferred this second appeal.

Ramachandra Rau Saheb and *Pattabhirama Ayyar* for appellants.

Bhashyam Ayyangar and *Narayana Rau* for respondent.

JUDGMENT.—It is argued that the finding that the plaintiff's family had an hereditary right to the office ought not to be accepted, and our attention is drawn to exhibits I, II, F, III, IV and V, and also to exhibits O, VI to XVIII. Nothing is urged to show that they have been misconstrued, or not duly considered by the Court below. Exhibit I only shows that the award A was not thought to favour the claim set up by the then plaintiff. The words in exhibit II "you should act with consent, &c.," are not inconsistent with the plaintiff's case. They only imply that in the conduct of the puja, the son was to act subject to the direction and control of the mooktessors. As regards exhibits F and III, the ground on which the suit to which they refer was dismissed was that there had been a prior partition. Though the District Munsif dealing with the review petition remarks that "the office is dependent on the pleasure of the dharmakartas," we cannot say that the Courts were wrong in not attaching weight to the remark in the face of the other evidence in the case. As to exhibits IV, V and N, the Subordinate Judge is not in error in saying that that the finding in exhibit N was not set aside by the High Court. As to the security-bonds, we agree with the observation of the Subordinate Judge. On the whole we are satisfied that there are no grounds for questioning the finding as to the matter of hereditary right.

The next question argued is that the office was not alienable, and that no effect ought to be given to exhibit A.

It has no doubt been established by a series of decisions that the sale of a religious office is illegal—*Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty*(1) and *Kuppa* v. *Dorasami*(2). But it is urged that the plaintiff's father, the grantee under exhibit A, was the nearest heir of Baba Bhatta, who is now dead, and that the transfer in his favour was in the nature of a relinquishment by way of anticipating his legal right. The District Munsif found that the plaintiff's father was nearer in the line of descent than defendant No. 15, who was appointed by the mooktessors.

(1) I.L.R., 1 Mad., 235. (2) I.L.R., 6 Mad., 76.

NARAYANA v. RANGA.

On this point the Subordinate Judge recorded no opinion, though the Munsif's finding was objected to. Before determining whether the instrument A is or is not valid, we shall ask the Subordinate Judge to find whether at the date of exhibit A the plaintiff's father was the sole heir next in succession of Baba Bhatta. Finding is to be returned within six weeks from the date of receipt of this order, when seven days, after the posting of the finding in this Court, will be allowed for filing memorandum of objections.

Fresh evidence may be taken by the Subordinate Judge by consent.

The Subordinate Judge returned a finding to the effect that the plaintiff's father had three brothers.

This second appeal having come on for final hearing, the Court delivered judgment as follows :—

JUDGMENT.—We have already decided that the office in question is an hereditary one. The question now is whether the transfer of it by the last holder to the plaintiff's father was a valid one. According to general principles, a religious office cannot, *primâ facie*, be made the subject of alienation. The succession to such an office is governed, in the first instance, by the will of the founder, and, in the absence of direct evidence on that point, by usage of the particular institution from which the founder's will may be inferred. A religious office appears to us to stand with reference to alienability on a different footing from private property. It was argued at the last hearing on the authority of the case of *Mancharam* v. *Pranshankar*(1) that the holder of a religious office may transfer it to one who is in the line of descent, whether he be the next heir or a possible future heir, and that the plaintiff's father was, in the present instance, the next heir. The finding, however, returned by the Subordinate Judge shows that he was not the sole next heir, because he had three brothers. In *Kuppa* v. *Dorasami*(2) it is observed by the learned Judge, with reference to a contention that the alienee was of the same caste and sect as the alienor: "To hold so would tend to public mischief in inducing needy incumbents of hereditary religious offices, who desired to sell them to give a dishonest recognition to qualifications which, in fact, were not the qualifications demanded by

(1) I.L.R., 6 Bom., 298. (2) I.L.R., 6 Mad., 76.

NARAYANA v. RANGA.

the nature of the office." Unless the alienee is the sole heir, the alienor might be under the temptation to make the office the subject of bargain and thereby defeat the intention of the founder. It was in this view that we called for a finding at the former hearing. We are not prepared to dissent from the dictum above quoted, and to hold that in the absence of special usage an alienation would be valid if made in favour of any person other than the sole immediate heir.

It was then argued that in the case before us the brothers of the plaintiff's father consented to the alienation in his favour, and that there is evidence to that effect on the record.

On looking at the evidence of Lakshman Joishi, one of the brothers, we find no distinct admission regarding the office. Moreover this point was not taken at the last hearing, nor we were asked to call for a finding as to the alleged consent. We cannot at this stage allow this point to be raised and order a new trial regarding it. Of course it is not intended that those who may have a claim by hereditary right, the legal heir, should be in any wise prejudiced by this judgment. We must reverse the decree of the Courts below and dismiss the suit. Under the circumstances we direct each party to bear his own costs throughout.

APPELLATE CIVIL.

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

1891. Oct. 6. Nov. 18.

MUTTAKKE AND OTHERS (DEFENDANTS Nos. 1 TO 16 AND 18 TO 41), APPELLANTS,

v.

THIMMAPPA AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Aliyasantana Law—Specific Relief Act—Act I of 1877, *s.* 42—*Declaratory relief—Limitation Act—Act XV of* 1877, *sched. II, arts.* 127, 144.

In a suit in which the plaintiffs sought declarations that they were members of an undivided Aliyasantana family with the defendants, that certain property belonged to the family, and that plaintiff No. 1, the senior member of the family,

* Appeal No. 131 of 1890.

MUTTAKKE v. THIMMAPPA.

was entitled to have the lands registered in his name, the defendants denied the allegations in the plaint, and pleaded that the suit for declarations only was not maintainable, and that it was barred by limitation. It was found that the plaintiffs had separated themselves from the defendants, and had for more than twelve years been excluded to their own knowledge from the joint family property:

Held, that, if as alleged by the plaintiffs, plaintiff No. 1 was the *de jure* ejaman of the family, he was entitled to the possession and management of the family property, and a suit for a mere declaration of his right would not lie—*Chandu* v. *Chathu Nambiar*, I.L.R., 1 Mad., 381, distinguished.

Per cur: "We are of opinion that article 127 applies to this case, and that the plaintiffs, having separated themselves from the defendants, have for more than twelve years been to their own knowledge excluded from the joint family property, and that their suit to enforce a right to share therein is barred"—*Mahalinga* v. *Mariyamma*, I.L.R., 12 Mad., 462, distinguished.

APPEAL against the degree of S. Subbayyar, Subordinate Judge of South Canara, in original suit No. 41 of 1888.

The plaintiffs claiming to be members of an undivided Aliyasantana family with the defendants, prayed for a declaration to this effect, and for declarations that certain property referred to in the plaint was their joint family property, and that plaintiff No. 1 was the senior member of the family, and as such entitled to have the revenue registry of the lands changed into his name. The plaint further set out that Sanka Rai, who was the son of Akkamma, a member of the plaintiffs' branch of the family, had managed the property till his death in 1887 on behalf and by the consent of plaintiff No. 1. The defendants denied the various allegations in the plaint, alleged that the plaintiffs had never been in possession of the property in question, and pleaded that the suit was not maintainable as being for declarations only, and because other persons being interested in the claim should have been joined as plaintiffs, and also that it was barred by limitation.

The Subordinate Judge framed the following issues:—

(i) Are the plaintiffs and defendants members of an undivided Aliyasantana family?

(ii) Are the plaint properties the joint family property of the said family?

(iii) Did Sanka Rai referred to in the plaint manage the plaint lands on behalf of and with the consent of the first plaintiff?

(iv) Were the properties Nos. 8, 9, 10, 16 and 17 the self-acquisition of the deceased Sanka Rai?

(v) Whether Sanka Rai was managing the plaint lands on

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behalf of and with the consent of the first plaintiff as stated in paragraph 2 of the plaint? And is the action barred by limitation?

(vi) Is the suit unsustainable for want of the permission referred to in section 30 of the Code of Civil Procedure in consequence of plaintiffs' omission to adopt the preliminary procedure prescribed by the said section?

(vii) Is the suit for a declaratory decree maintainable?

The Subordinate Judge recorded findings on all these issues in favour of the plaintiffs. With reference to the first and second he cited *Munda Chetti* v. *Timmaju Hensu*(1) and *Korapen Nayar* v. *Chenen Nayar*(2): with reference to the third he cited *Nambiatan Nambudiri* v. *Nambiatan Nambudiri*(3) and *Mahalinga* v. *Mariyamma*(4): as to the fifth he said "I have already stated that "the management of Sanka Rai must have been on behalf of the "*de jure* ejaman, who is the eldest among the plaintiffs; and if the "possession of the junior members is the possession of the ejamans, "there is manifestly no bar by limitation," and his judgment proceeded as follows:—

"If the decision in *Appasami Odayar* v. *Subramanya Odayar* (5) is applicable to "the case of Aliyasantana properties, it would appear that the omission of the plain-"tiffs' branch to take up the actual ejamanship when it came to their turn about "eighteen or twenty years ago on the death of Appa Rai would constitute laches; "but I do not think that clause 13 of section 1 of the Limitation Act XIV of 1859 "is applicable to Aliyasantana families; for it refers to a suit for a *share* of family "property not brought within twelve years from the date of the last *participation of* "*profits*. The right of an Aliyasantana member is a right to maintenance in the "family house and to the benefit enjoyment of the property so long as he remains "there—*Subba Hegade* v. *Tongu*(6). No share can be claimed in Aliyasantana "properties as declared by the judgment in *Munda Chetti* v. *Timmaju Hensu*(1) and "therefore the clause 13 is inapplicable. The said clause was further held to be "inapplicable to a suit brought for division after twelve years—*Subhaiyan* v. *San-*"*kara Subhaiyar*(7). The same remark applies to article 127 of the present Act "and the corresponding article of the previous Act.

"A suit for ejamanship, if regarded as a suit relating to a right to immoveable "property, would be barred by the rule prescribed in clause 12 of section 1 of Act "XIV of 1859, which prescribes twelve years from the date of the cause of action. "The cause of action to plaintiffs accrued when the defendants denied the plain-"tiffs' membership of the family in the Kudtala proceedings.

"The period of limitation prescribed by the present Act, article 42, and the "previous Act, article 143 is twelve years. The rulings under these sections con-

(1) 1 M.H.C.R., 380.
(2) 6 M.H.C.R., 411.
(3) 2 M.H.C.R., 110.
(4) I.L.R., 12 Mad., 462.
(5) I.L.R., 12 Mad., 26.
(6) 4 M.H.C.R., 196.
(7) 2 M.H.C.R., 347.

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"template cases of possession and dispossession, in which case it had been held that "it was for the plaintiff to prove possession within twelve years.

"In cases falling under article 144 it has been held that nothing but hostile "possession in defendants for the period of twelve years accompanied by a denial "of the plaintiffs' rights made to plaintiffs' knowledge can constitute adverse posses-"sion—*Sayad Nyamtula* v. *Nana*(1), *Sarsuti* v. *Kunj Behari Lal*(2), *Karan Singh* v. "*Bakar Ali Khan*(3), *Dadoba* v. *Krishna*(4), *Chandmal* v. *Bachraj*(5). In one case "for thirty years there was admittedly no possession in plaintiff, and yet it was "held insufficient to create a bar—*Nilo Ramchandra* v. *Govind Ballal*(6). In another "case non-participation in profits was held insufficient to create exclusion. From "1863 to 1872 the plaintiff (a Government servant) did not participate—*Dinkar* "*Sadashiv* v. *Bhikaji Sadashiv*(7). The decisions in *Hansji Chhiba* v. *Valabh* "*Chhiba*(8) and *Kali Kishore Roy* v. *Dhununjoy Roy*(9) show that mere lapse of any "time would constitute no bar such as that contemplated by the Act of limitation. "Maintenance at the family house which an Aliyasantana man can claim cannot "be refused except after demand *Narayan Rao Ramchandra Pant* v. *Ramabai*(10) "followed in *Ramanamma* v. *Sambayya*(11) which overruled a former decision in "*Abbakka* v. *Ammu Shettali*(12). Ejamanship, which admittedly accrued in 1872, "could not be barred, because the defendants did not profess to hold adversely. If "it is said that in 1859 hostile possession was asserted against a member of the "plaintiffs' branch to the plaintiffs' knowledge, a cause of action accrued, such "cause of action was only a cause of action to claim a share, which having been "subsequently declared not allowable, the plaintiffs cannot be found fault with. I "find this issue also in plaintiffs' favour.

"*Sixth Issue.*—The objection under section 30 of the Code of Civil Procedure "is untenable. The right claimed is not one that accrues to the whole of the "members of the plaintiffs' branch.

"*Seventh Issue.*—A declaratory suit is maintainable in such cases (vide *Tirumala-*"*thammal* v. *Venkataramanaiyan*(13). I find this last issue also in plaintiffs' favour."

Mr. *D'Rozario* and *Narayana Rau* for appellants.

Ramachandra Rau Saheb and *Fernandez* for respondents.

JUDGMENT.—This is a suit by certain persons claiming to be members of an undivided Aliyasantana family for a declaration (i) that plaintiffs and defendants are members of an undivided family, (ii) that plaintiff No. 1 is the senior member of the family, and as such entitled to get the kudtala, or revenue registry of the lands transferred to his name.

The defendants denied that the plaintiffs and defendants were members of an undivided Aliyasantana family, and that the property was joint family property, and asserted that for more than

(1) I.L.R., 13 Bom., 424.
(2) I.L.R., 5 All., 345.
(3) I.L.R., 5 All., 1.
(4) I.L.R., 7 Bom., 34.
(5) I.L.R., 7 Bom., 474.
(6) I.L.R., 10 Bom., 24.
(7) I.L.R., 11 Bom., 365.
(8) I.L.R., 7 Bom., 297.
(9) I.L.R., 3 Cal., 228.
(10) I.L.R., 3 Bom., 415.
(11) I.L.R., 12 Mad., 347.
(12) 4 M.H.C.R., 137.
(13) 2 M.H.C.R., 381.

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a century the property had been in their exclusive possession, and that a declaratory suit would not lie.

The Subordinate Judge held that a declaratory suit was maintainable, and that the suit was not barred by limitation. These two points have been fully argued before us, and we are of opinion that the decision of the Subordinate Judge cannot be maintained.

The case on which the Subordinate Judge relied in support of his opinion that a declaratory suit would lie, *Chandu* v. *Chathu Nambiar*(1), is clearly distinguishable from the present case. That was a suit by the karnavan of a Malabar tarwad for a declaration that certain property was the common property of the tarwad, and that the plaintiff was entitled to transfer of the revenue registry of the land to his name. All that this Court decided was that, under the circumstances of the case, the plaintiff was entitled to a declaration that the property was the property of the tarwad, so that he might move the Revenue authorities to register his name. But the Collector would not have been bound to effect the transfer. He was no party to the suit, and, though, no doubt, he would respect the decree of the Court, he may have had reasons which would have justified him in refusing to comply with the application even when supported by the decree. Moreover in that case the status of the plaintiff as karnavan of the tarwad was not denied, the defendants relying on an alleged family custom that self-acquisitions of members did not on their death lapse to the tarwad. In this case the status of the plaintiffs as members of the family is denied. The plaintiffs have admittedly been for a long time living on their own "*anayatha*" property apart from the defendants, who had sole and undisturbed management and enjoyment of the plaint property. If, as is alleged by the plaintiffs, the plaintiff No. 1 is the *de jure* ejaman of the family, he is entitled to the possession and management of the family property, and a suit for mere declaration of his right will not lie.

The fifth issue as originally framed ran thus: "Were plaintiffs in possession or management within twelve years, and is the suit barred by limitation?" Subsequently the plaintiffs put in a petition praying that the issue might be amended so as to show that the question at issue was "when were the plaintiffs excluded from sharing the joint family property." The amendment was

(1) I.L.R., 1 Mad., 381.

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opposed, but the Subordinate Judge amended the issue as follows: "Whether Sanka Rai was managing the plaint lands on behalf of and with the consent of the plaintiff No. 1 and is the action barred by limitation." He held that though Sanka Rai had no express permission to manage on behalf of any of the plaintiffs, yet a permission must be presumed by law and relied upon *Mahalinga* v. *Mariyamma*(1). The case is not in point, as it was not questioned there that the senior female was the *de jure* ejaman, and the only question was whether, according to the general Aliyasantana usage, the senior male excludes the senior member of the family when she is a female. In the circumstances of that case, it was, the Court held, rightly presumed that management was by the sufferance of the ejaman for the time being. We do not think that the learned Judges who decided that case intended to hold, as the Subordinate Judge appears to think, that no lapse of time can affect the rights of a person who claims to be the ejaman of an Aliyasantana family.

With reference to article 127 of the second schedule of the Limitation Act, the Subordinate Judge appears to hold that it is not applicable to the present suit, because no definite share can be claimed in Aliyasantana properties. No doubt it was decided in *Munda Chetti* v. *Timmaju Hensu*(2) that the Aliyasantana law does not allow compulsory division, but this is not a suit for a share, nor does article 127 refer to such a suit. What the plaintiffs really seek by the present suit is to enforce their right to share in joint family property. Assuming for the sake of argument that the property is joint family property, the defendants' pleader contends that the plaintiffs' have been excluded therefrom for a century. It appears to us that the only conclusion which can be come to upon the evidence is that the plaintiffs' branch long ago severed their connection with the defendants' branch. They have for the last fifty or sixty years lived apart on the property acquired by their paternal ancestors. There is no reliable evidence to show that they have, within the memory of the present generation, had any community of property with the defendants' branch. The evidence of the plaintiffs' witnesses as to visits paid to Pavur Gutta, cultivation work carried on there, and joint performance of ceremonies is vague, contradictory and unsatisfactory.

(1) I.L.R., 12 Mad., 462. (2) 1 M.H.C.R., 380.

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We are not prepared to assent to the proposition laid before us by Mr. Ramachandra Rau Saheb that a member or a branch of an Aliyasantana family is, after complete separation from the parent branch for any number of years, entitled on demand to participate in the original property of the family. To entitle a person or a branch to retain their rights, the connection with the family must be kept up, either by exercise of the right to share in the joint-family property by joining in the *sacra*, by intermarriage or otherwise. In the present case the whole evidence points to separation or exclusion, or both. The right of the three branches into which Akkamma's family has become divided was admittedly denied so long back as 1859, and though the plaintiffs' branch purchased the rights of the excluded branch in the same year, they have never taken any steps to enforce the right. It is, however, argued that the right of the plaintiffs' branch has never been actually denied, and that in an Aliyasantana family the possession of one member being the possession of all, it must be held that the defendants had possession on behalf of the plaintiffs, and that such possession has never become adverse. It has been held by the Privy Council that article 144 of the Limitation Act only applies where there is no other article which specially provides for the case. But even if article 144 did apply to this case, we should hold that the possession of the defendants had long since become adverse to the plaintiffs, as it is evident that the defendants have held the land on their own behalf and not on behalf of the plaintiffs. But we are of opinion that article 127 applies to this case and that the plaintiffs having separated themselves from the defendants have, for more than twelve years, been to their own knowledge excluded from the joint family property and that their suit to enforce a right to share therein is barred.

We reverse the decree of the Subordinate Judge and dismiss the plaintiffs' suit with costs throughout.

APPELLATE CIVIL—FULL BENCH.

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

1891. October 13.

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

Stamp Act—Act I of 1879, *s.* 3, *sched. I, art.* 13—*Bond—Attestation.*

A company agreed to pay £220,000 in five instalments for the cost of constructing a railway, on the terms, among others, that debentures on the railway should be handed over to the company on each payment being made, and that in the event of the other party failing to perform his liabilities as to the construction of the railway, the company should be entitled to sell the debentures, and also to recover damages and also to discontinue payments of the above instalments. It was also provided that the company should be at liberty to retain £40,000 as compensation for risk, expenses, &c. The agreement was sealed with the seal of the company in the presence of two Directors and the Secretary:

Held, that the instrument was liable to stamp duty as a bond for £220,000 under Act I of 1879.

CASE referred by the Board of Revenue under section 46 of the Indian Stamp Act, 1879.

The case was stated by the Board of Revenue as follows:—

"The Debenture Company bind themselves to pay £220,000 "*minus* £40,000. It is doubtful whether the stamp should be "calculated on the £220,000 as previously decided by the Board "or on the net amount only or on what and under what article "of schedule I, if not under article 13 as a bond; and the Board "would be glad of the decision of the High Court on this point."

The document in question was an agreement, dated the 20th December 1889 and made between Richard Woolley of the one part and the Union Debenture Company thereinafter called the Debenture Company of the other part. It recited an indenture, dated 26th February 1886, and made between the Secretary of State for India of the one part and the Nílgiri Railway Company of the other part, whereby it was agreed among other things that the Railway Company should construct a railway on land to be provided by the Secretary of State and pay to the credit of the Government of Madras Rs. 25,00,000 as therein provided. It

* Referred Case No. 15 of 1891.

REFERENCE UNDER STAMP ACT, S. 46.

further recited an agreement made between the Nilgiri Railway Company of the one part and Richard Woolley of the other part, whereby it was among other things agreed that Richard Woolley should upon receiving possession from the Railway Company of the land required for the Railway, construct the same and that the Railway Company should create and issue debentures to the amount of £220,000 to bear interest and be secured as therein provided, and that the said debentures should be issued to Richard Woolley, and that the Railway Company should pay the sum of Rs. 25,00,000 to Richard Woolley, or as he should direct in the manner provided for in the agreement of 26th February 1886, and that Richard Woolley should subscribe or procure substantial subscriptions for the whole share capital of Rs. 25,00,000 of the company. The document proceeded as follows :—

"And whereas the said Richard Woolley has applied to the Debenture Company to supply him with funds for the purpose of making all requisite payments in respect of the subscription to the shares of the Railway Company and in respect of the other obligations incident to the said recited agreement which the company have agreed to do to the extent in the instalments subject to the deductions and otherwise in the manner hereinafter appearing upon the terms of the said Richard Woolley selling and making over to the Debenture Company in manner hereinafter appearing the whole of the said debentures for two hundred and twenty thousand pounds so to be issued to him as aforesaid and such fully paid-up shares of the Railway Company as hereinafter mentioned and upon the other terms and conditions hereinafter appearing. Now it is hereby agreed as follows that is to say :—

1. The Debenture Company shall pay and provide for the purposes of this agreement the sum of two hundred and twenty thousand pounds in the instalments and at the dates following that is to say :—

£25,000 on or before the 21st day of December 1889.
£40,000 on or before the 31st day of March 1890.
£50,000 on or before the 31st day of October 1890.
£50,000 on or before the 31st day of March 1891.
£55,000 on or before the 31st day of October 1891.

Provided always that the first second third and fifth of the said instalments shall be subject to the deductions hereinafter particularly mentioned.

2. Upon and simultaneously with the making by the Debenture Company of the aforesaid payments the said Richard Woolley shall cause to be handed to the company for their own absolute use and benefit the whole of the debentures so issued to him as aforesaid in equivalent amounts and by the like instalments that is to say :—

£25,000 such debentures on or before the 21st day of December 1889.
£40,000 such debentures on or before the 31st day of March 1890.
£50,000 such debentures on or before the 31st day of October 1890.
£50,000 such debentures on or before the 31st day of March 1891.
£55,000 such debentures on or before the 31st day of October 1891.

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3. For the purposes of these presents the whole of the said debentures shall forthwith or so soon as the same are issued be delivered by the Railway Company with the concurrence of the said Richard Woolley to the branch at Madras of the Agra Bank Limited for transmission by such Bank to its Head Office in the City of London to be held by the said Bank as stakeholder for the purposes hereinafter mentioned.

[Clause 4 prescribed the mode in which the payments were to be made by the Debenture Company, and provided that on each payment being made an equivalent amount of debentures was to be delivered to the Company. Clause 5 contained provisions as to the form of the debentures and the mortgage securing the same. In clause 6 the instrument dealt with the accrual and payment of interest on the debentures.]

7. The sums paid by the Debenture Company to the said Richard Woolley shall be duly applied by him first in payment of all moneys payable by him or by the subscribers procured by him in respect of the said shares in the Railway Company and subject thereto in fulfilling the other obligations under these presents and his said agreement with the Railway Company.

8. In addition to the said debentures and as further consideration for the payments so to be made by the Debenture Company as aforesaid the said Richard Woolley shall so soon as the shares in the Railway Company shall have been fully paid up make over and transfer to the Debenture Company or as they shall direct Three thousand such fully paid-up shares of Rupees one hundred each such shares shall unless the Debenture Company and the said Richard Woolley shall otherwise agree be those numbered 8 to 3007 inclusive.

[Clause 9 provided for the contingency of a public issue of the debentures under the agreement with the Railway Company.]

9(*a*). The said Richard Woolley shall finish and equip the said railway in accordance with his said agreement with the Railway Company within the time limited by the said indenture of the twenty-sixth February one thousand eight hundred and eighty-six, or such further time (if any) as may be allowed by the Secretary of State and shall otherwise perform and fulfil the obligations and liabilities undertaken by him in his said agreement with the Railway Company and shall use his best endeavours to procure the said railway to be duly started and worked and the said debentures of the company and the shares thereof to be thereby rendered valid and marketable securities and property.

10. In case the said Richard Woolley shall fail to perform and fulfil the obligations and liabilities mentioned in the last preceding clause the Debenture Company shall forthwith thereafter give notice to the said Richard Woolley specifying the breach or breaches of which it complains and if the same shall be capable of remedy requiring the said Richard Woolley to remedy the same and if the said Richard Woolley fails within the space of three months after the receipt by the said Richard Woolley of such notice to remedy the same or if such breach shall be irremediable then immediately upon giving such notice the Debenture Company shall be entitled to damages against him which shall be estimated on the footing that but for such failure the debentures which have then been handed over by the said Bank to the Debenture Company would have been worth ninety-five per cent. of the full nominal value thereof and on the further footing that the actual value of the said debentures after such failure is the price which the Debenture Company is able to obtain for them by selling and disposing of them by public auction after due publicity shall have been given by advertisement and otherwise of such intended sale within three

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calendar months or if the Debenture Company is unable within such period to sell or dispose of the said debentures at all or at any reasonable price then that the value of the debentures so unsold is either the highest price offered for them and declined or if no price whatever has been offered then nothing but if in case such breach shall be capable of remedy the said Richard Woolley shall within the space of three months after the receipt of the beforementioned notice remedy the breach or breaches complained of in such notice then the damages to which the Debenture Company shall be entitled against him shall be ascertained by referring the question to arbitration in pursuance of clause sixteen hereinafter contained. Provided always that the Debenture Company shall before it shall sell or dispose of the Debentures in the events mentioned in the first part of this clause offer the same debentures for sale to the said Richard Woolley at ninety-five per cent. of the nominal value thereof and the said Richard Woolley shall be at liberty within two months after the same shall have been so offered to purchase the same debentures in which event the purchase money therefor shall be payable by two equal half-yearly instalments with interest at the rate of five per cent. per annum on the instalment or instalments for the time being remaining unpaid calculated from the date on which the said debentures shall have been so offered to the said Richard Woolley up to the date of payment of such instalment or instalments respectively the first of such instalments to become due and payable three months after the date on which the said Richard Woolley shall elect to purchase the said debentures or at such earlier date or dates as the said Richard Woolley shall elect. Provided always that in case of default as aforesaid and any damages being thereby occasioned to the Debenture Company the said Richard Woolley shall upon payment of such damages together with the reasonable costs of the Debenture Company be entitled to receive from the Debenture Company the whole of the said debentures.

11. In case the said Richard Woolley shall after receiving possession of the necessary land or a substantial part thereof make any unreasonable delay in the commencement of the said railway and works or after having commenced the same shall fail to prosecute the same with due deligence to the satisfaction of the Secretary of State or shall otherwise fail in some material respect to fulfil the obligations and liabilities undertaken by him in his said agreement with the Railway Company or in these presents in such manner as to prejudice the security intended to be hereby given to the Debenture Company then and in such case the Debenture Company shall forthwith thereafter give notice to the said Richard Woolley specifying the obligations and liabilities which he has so failed to perform and of which it complains and if the same shall still be capable of performance requiring the said Richard Woolley to perform the same and if the said Richard Woolley fails within the space of three months after the receipt of such notice to do so or if any such obligation or liability shall no longer be capable of performance the Debenture Company may by notice to the said Richard Woolley elect to discontinue the payment of the remaining instalments to be paid and provided by the Debenture Company and shall thereupon be freed from all obligation and liability to pay or provide the same such discontinuance shall not affect the right of the Debenture Company to any debentures already handed to them nor their right to have the said Three thousand shares fully paid up and transferred to them or as they shall direct nor their right to damages for breach of this agreement. Provided nevertheless that in the event of any such default as aforesaid on the part of the said Richard Woolley the Debenture Company shall not be bound to make any further payment of the moneys payable by it hereunder notwithstanding that the due date for the

REFERENCE UNDER STAMP ACT, s. 46.

payment of the same may have arrived unless and until the said Richard Woolley shall within the time hereinbefore limited have made good such default to their reasonable satisfaction. Provided always that in case the Debenture Company shall on any such alleged default elect to discontinue payment as aforesaid the remainder of the said two hundred and twenty thousand pounds debentures not then already handed over to the Debenture Company by the said Agra Bank shall thenceforth be held by the said Bank as a security for the payment of the amounts due or to become due from the said Richard Woolley or other the holders of the said shares to be subscribed for as hereinbefore provided to the Railway Company upon and in respect of the said shares and for the purpose of raising such amounts the said Richard Woolley or the said Bank at his request may sell or mortgage the said debentures or any of them and the Bank so acting at the request of the said Richard Woolley shall not be bound to enquire whether any such alleged default has actually occurred or whether the Debenture Company shall have elected to discontinue payments as aforesaid and subject thereto the same shall be held by the said Bank as a security to the Debenture Company for any damages or other claims against the said Richard Woolley under these presents or otherwise and the Debenture Company shall for enforcing such damages or other claims against the remainder of the said debentures have subject as aforesaid all the powers and remedies of mortgagees by deed and may at any time give good receipts for such debentures to the said Bank.

12. Notwithstanding anything hereinbefore contained the Debenture Company shall be entitled to deduct and retain out of the first three and the fifth instalments of money so to be paid and provided by them as aforesaid the following sums as compensation for expenses risk commission stamp duties payable in India (if any) and in England upon the said Debentures and in England only upon the said Debenture mortgage also all legal expenses of the said Debenture Company in England and in India and otherwise in respect of the transaction aforesaid that is to say—

(1) From the first instalment of twenty-five thousand pounds payable on or before the twenty-first day of December next of the sum of four thousand pounds leaving twenty-one thousand pounds only to be actually paid and provided together with one half of the cost of stamping in India the Debenture mortgage not exceeding five hundred pounds.

(2) From the second instalment of forty thousand pounds payable on or before the thirty-first day of March one thousand eight hundred and ninety the sum of eight thousand pounds leaving thirty-two thousand pounds only to be actually paid and provided.

(3) From the third instalment of fifty thousand pounds payable on or before the thirty-first day of October one thousand eight hundred and ninety the sum of Eight thousand pounds leaving forty-two thousand pounds only to be actually paid and provided.

(4) From the fifth instalment of fifty-five thousand pounds payable on the thirty-first October one thousand eight hundred and ninety-one the sum of twenty thousand pounds leaving only thirty-five thousand pounds to be actually paid and provided. Provided always and it is hereby agreed and declared that for the purpose of ascertaining the amount of Debentures to be handed over to the Debenture Company and the moneys to be paid on account of the said shares in the Railway Company and for all other the purposes of these presents the said four respective instalments shall notwithstanding the respective deductions aforesaid be deemed to have been paid and provided by the Debenture Company in full.

REFERENCE UNDER STAMP ACT, s. 46.

13. In case of any default by the Debenture Company to pay the moneys aforesaid by the instalments and on the dates aforesaid the contractor or his agent or attorney in England may give the Debenture Company notice by prepaid letter addressed to it at its registered office for the time being requiring the Debenture Company to pay the moneys then due and payable hereunder within one month from the date of the receipt of such notice and unless the said moneys shall be paid to the said Agra Bank within the time prescribed by such notice. The Agra Bank shall thereupon hand over to the said Richard Woolley or as he shall direct the whole of the said Debentures then remaining in the custody of the said Bank and his receipt shall absolutely exonerate the said Bank from any liability to account therefor and the Debenture Company shall thereupon cease to have any interest in or claim against the said Debentures or the said three thousand fully paid-up shares but nothing in this clause contained shall be deemed to affect or prejudice the rights of the said Richard Woolley against the Debenture Company for damages in respect of any such default.

[The remaining clauses of the instrument provided for the reference of disputes to arbitration, &c., &c.]

In witness whereof the said Richard Woolley has hereunto set his hand and the Debenture Company has caused its common seal to be hereunto affixed the day and year first above written.

The common seal of the Union Debenture Company Limited was affixed hereto in the presence of

(Signed)———— } *Directors.*
(Signed)———— }
(Signed)———— *Secretary.*

Signed by the abovenamed Richard Woolley in the presence of } (Signed) RICHARD WOOLLEY."

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

JUDGMENT.—We are of opinion that the instrument must be stamped as a bond for the payment of £220,000.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

RAJARAM AND OTHERS (PLAINTIFFS Nos. 1, 2, 4 AND 5), APPELLANTS,

1891. Dec. 14, 17.

v.

NARASINGA (DEFENDANT), RESPONDENT.*

Landlord and tenant—Construction of lease—Word of inheritance.

A fixed permanent ijara patta confers no rights on the heirs of the demisee.

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Salem, in original suit No. 6 of 1888.

Suit for a declaration of the plaintiffs' title as *ijaradars* of the village of Chinnamottur attached to the mitta of Chinnaveppampattu and for possession of the village with mesne profits.

The plaintiffs claimed under the following document which was filed as exhibit K:—

"Confirmed permanent ijara (lease) patta granted by Jeya-
"ram Lala and Latchma Bhoy, Zamindars of Ambarpeta mitta,
"in favour of Dowlatram Lala, son of Latchmana Doss, Monyagar,
"residing in Valayampattu.

"Particulars of rent fixed per year, according to the permanent
"beriz for the village of Chinnamottur attached to Ambarpeta
"mitta given to you, are—

"Rs. 590-3-1.

"We have given permanent lease having confirmed the per-
"manent muchalka you have executed for the sum of rupees five
"hundred and ninety, annas three and pie one, you should pay
"the money in the mitta treasury according to the kistbandies
"fixed in each year within the 30th and obtain receipts. No
"remission will be given if there should be any loss by excess
"or want of rain or by the acts of the ruling power or by God.
"You should act in accordance with Bittajegaru's Aramayishe
"and Paramayishe Damasha (list showing the proportion of pro-
"visions supplied gratis). Besides this, fishery, fruit trees and

* Appeal No. 7 of 1891.

RAJARAM v. NARASINGA.

"wood trees, &c., belong to you only. To this effect we have "executed and given this confirmed permanent ijara (lease) patta."

Fasli 1266, 10*th Margali of the year Nala*, 22*nd December* 1856. (Signed) Jeyaram Lala. (") Jeyaram Lala with the consent of Latchma Bhoy."

It was admitted that the village had been the property of Vasudeva and Hari Lala, who in 1848 leased it to Jeyaram Lala, the defendant's brother-in-law, and Dowlatram Lala, the brother and father of the first and second plaintiffs respectively. The plaint set out, with reference to the above instrument, as follows:—

"Afterwards, the said Vasudeva Lala and Hari Lala having "died, the said village of Chinnamottur was in fasli 1266, on "10th Margāli of the year Nala, 22nd December 1856, perma-"nently leased out after them by the late mittadars Jeyaram "Lala, younger brother of the said Vasudeva Lala, and Lakshmi "Bhoy, wife of the said Vasudeva Lala, solely to Dowlatram "Lala, on condition of paying the circar peishcush amounting "to Rs. 590-13-1 per year, and, accordingly, he, and after him, "his undivided brothers and family members, the first plaintiff "and Ram Lala, the father of plaintiffs 3, 4 and 5, had been "enjoying it uninterruptedly until the end of 1876."

It was further alleged that in 1877 Jeyaram Lala (since deceased) denied the plaintiffs' title, ousted them unlawfully and sold the village to his brother-in-law, the defendant.

Plaintiffs Nos. 1, 2, 4 and 5 preferred this appeal.

Mr. *Norton* and *Parthasarathi Ayyangar* for appellants.

Ramasami Mudaliar for respondents.

SHEPHARD, J.:—Two questions are raised by this appeal. It is contended, on the plaintiffs' behalf, that the Subordinate Judge was wrong in his finding of fact with reference to the instrument on which the plaintiffs found their claim; and on the defendant's side it is urged that by that instrument the plaintiffs claiming as the heirs of the original grantee, who died in 1867, acquired no title. On the question of fact, I am unable to agree with the decision of the Subordinate Judge, for, in my opinion, there is abundant evidence to prove the execution of the instrument (exhibit K); but, in the view I take, it is unnecessary to discuss the evidence, because the construction which I think must be put on the instrument is fatal to the plaintiffs' claim.

The instrument is described as a fixed permanent *ijara patta*, and it provides for a rent to be paid according to the permanent beriz. There are no special words to show that it was to operate beyond the lifetime of the grantee, Dowlatram. The words translated "fixed, permanent" seem to be nearly equivalent to the words istemrari mokurari common in instruments, which come before the High Court of Bengal. Dealing with a case in which the instrument under discussion contained this expression, the Judicial Committee observed that they thought it to be established that "the words istemrari mokurari in a patta do not *per se* convey an estate of inheritance," and they proceeded to hold that, in that particular case, the intention to create a perpetual grant had not been sufficiently indicated (*Tulshi Pershad Singh* v. *Ramnarain Singh*)(1). No distinction in favour of the plaintiffs can be pointed out between the instrument before the Privy Council and that which we have to construe. On the contrary, in the former, there was a clause, which, at least, showed that the grantor intended to bind his heirs. In *Gopayyan* v. *Balaji*(2) cited for the defendant, the same view was taken in this Court. There is nothing in the circumstances since the death of Dowlatram to favour the contention of the plaintiff. In my judgment, the plaintiffs have failed to prove their title and the appeal must be dismissed. I agree that each party should bear his own costs.

PARKER, J.—The Subordinate Judge has found that the lease-deed (exhibit K) has not been satisfactorily proved. The learned counsel has, I think, shown to demonstration that this finding cannot be supported. Not only does exhibit Q prove that a document, identical in terms with exhibit K, must have been filed in 1859 in the proceedings before the Tahsildar, which ended in the decision (exhibit P), but exhibits G and R, dated the day after the execution of exhibit K, also support the document. The genuineness of exhibit G is not impugned, and it shows that the original permanent ijara was granted in 1848 for Rs. 650 to Jeyaram Lala and Dowlatram Lala by the deceased Vasudeva Lala and Hari Lala, the Zemindars of the mittah. Exhibit S is a copy of G, which copy was also filed in 1859.

Exhibit H is a takid addressed by Dowlatram to the karnam Alagiri Ayyar in fasli 1268, and exhibit J four days later shows

(1) I.L.R., 12 Cal., 117. (2) Second Appeal No. 607 of 1874 unreported.

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that Jeyaram Lala resigned his share in the lease in favour of Dowlatram and informed the village officers accordingly. Exhibit O shows clearly that exhibit K must have been produced in 1859.

Dowlatram Lala died in 1867. After his death, we find suits were brought against his brothers (exhibits A and B), alleging a fresh agreement in April 1868 for a permanent lease at a permanent beriz of Rs. 590-15-7 (being an increase of 12 annas and 6 pies on the rate fixed in exhibit K). Exhibit VIII is the answer to the plaint B, and exhibit VI, the judgment, and exhibit CC, the appeal judgment. The permanency of the lease was not disputed.

Exhibits C, D, BB, XI and XII show subsequent litigation between the same parties and their representatives. These documents go to show a fresh permanent lease in 1867, the year of Dowlatram Lala's death.

The plaintiffs, in contending for the hereditary character of the lease, rely on the words "Kayam Saswata" in exhibit K. I agree with Mr. Justice Shephard that it is not easy to distinguish these words from istemrari mokurari, which the Privy Council has held do not *per se* convey an hereditary estate unless used in conjunction with words denoting from "generation to generation" (naslan bad naslan) or "with sons" (ba farzandan) *Tulshi Pershad Singh* v. *Ramnarain Singh*(1). In this case, however, the conduct of the parties, not less than the language of the instrument, raises a presumption that the lease was not intended to be hereditary. There was one ijara to Jeyaram Lala and Dowlatram Lala in 1848 at a beriz of Rs. 650, a second in 1856 to Dowlatram Lala alone for Rs. 590-3-1 (exhibit K), and a third in 1867 for Rs. 590-15-7 to Rajaram Lala and Rama Lala. On these grounds, I am of opinion that the appeal must fail and should be dismissed. As a false defence was set up, I would direct that each party bear his own costs in the appeal.

(1) I.L.R., 12 Cal., 117.

APPELLATE CIVIL.

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

1891. September 16, 17, 29.

ARUNACHELLAM (PETITIONER AND PURCHASER), APPELLANT,

v.

ARUNACHELLAM AND OTHERS (COUNTER-PETITIONERS AND DEFENDANTS NOS. 8 AND 10, AND SURETIES NOS. 1 TO 9), RESPONDENTS.*

Civil Procedure Code, ss. 211, 253, 318, 610—*Construction of order giving effect to judgment of Privy Council—Mesne profits—Cost of management—Interest—Sureties for execution of decree.*

Land was put up for sale and purchased in execution of a decree. The sale was confirmed, and the purchaser was put into possession. On appeal against the order confirming the sale, the High Court held that the sale had been vitiated by certain irregularities and set it aside. The purchaser preferred an appeal to the Privy Council against the judgment of the High Court. While the appeal was pending, he was compelled to deliver up possession of the land, but security was furnished under an order of the Court by persons not being parties to the suit for its redelivery to him, and for the payment of mesne profits, in the event of his appeal being successful. Meanwhile, the land in question was placed in charge of a receiver on the motion of other persons holding decrees against the judgment-debtors. On appeal the Privy Council reversed the order of the High Court. The purchaser was accordingly replaced in possession of the land; and he applied for execution in respect of the mesne profits against the respondents in the Privy Council and the sureties. The Court of First Instance dismissed the application as against the sureties and limited the applicant's claim against the others to the net income of the land, less the cost of management by the receiver, and allowed him no interest:

Held, (1) the order must be taken to have been made under Civil Procedure Code, s. 610 and an appeal lay therefrom.

(2) although the appeals to the High Court and the Privy Council related to the order confirming the sale and not to that by which possession was awarded, and the order in Council did not direct payment of mesne profits, yet such payment was within its purview as being a benefit by way of restitution fairly and reasonably consequential upon it. *Rodger* v. *The Comptoir D'Escompte de Paris* (L.R., 3 P.C., 465) followed.

(3) the application was rightly dismissed against the sureties.

(4) the charges involved by the appointment of the receiver should not have been allowed against the petitioner, since they were not necessary in the ordinary course of prudent management.

* Appeal against Order No. 20 of 1889.

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(5) interest at 6 per cent. should have been allowed to the petitioner on the mesne profits for each year from the end of the year to the date of payment.

APPEAL against the order of S. Gopalachariar, Subordinate Judge of Madura (East), made on execution-petition No. 72 of 1888, in original suit No. 44 of 1879.

In original suit No. 44 of 1879, on the file of the Subordinate Court of Madura (East), the plaintiff therein obtained a money decree in execution of which certain land was attached and brought to sale as the property of defendants Nos. 8 and 9, of whom the latter was the father of defendant No. 10.

The present petitioner was the purchaser at the Court sale, who had paid into Court Rs. 20,500 as the purchase money; the first and second respondents to his petition were the eighth and tenth defendants above referred to, the remaining respondents were persons who had given security for the delivery of the land in question, together with mesne profits thereon to the purchaser under the circumstances mentioned below. The purchaser had already obtained possession of the property; by his present petition he sought to recover Rs. 25,782-15-10 for the mesne profits accrued on the land during the period (from 26th February 1885 to 30th June 1888), while he was out of possession, by attaching the sale-proceeds which remained in Court and also the property which was the security furnished by respondents Nos. 3—11 as above.

The petitioner's purchase took place on 28th July 1882; and he obtained possession in the first instance on 15th October 1882; but, on 16th October 1883, the High Court made an order setting aside the sale to him. On 3rd December 1883, he applied for leave to appeal against this order to Her Majesty in Council and also made an application under Civil Procedure Code, s. 608 (*d*) that he should be permitted to remain in possession, the purchase money paid into Court being treated as security for the mesne profits. Pending the disposal of these applications, viz., on 26th February 1885, respondents Nos. 1 and 2 were placed in possession, but, on 13th April 1885, the High Court admitted the petitioner's appeal to Her Majesty in Council, and, with reference to his other application, ordered that respondents Nos. 1 and 2 (by their guardians) should furnish security for the payment of the mesne profits and the redelivery of the land in case that appeal should be successful. In pursuance of the last-mentioned order, after a prolonged inquiry, a surety bond was executed in February 1886, charging the property to which the second part of the present petition related. In the interval, viz., in October 1885 the land, which had been sold to the petitioner, was placed in the possession of a receiver appointed by the Court on the motion of other persons who held decrees against respondents Nos. 1 and 2.

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The Privy Council delivered judgment in the above appeal in favour of the petitioner and the order in Council upon this judgment was received on 14th August 1888, in pursuance of which he was put into possession on 25th August 1888.

To the present petition various objections were raised, upon which and upon the petition the following questions arose for determination, which were summarized by the Subordinate Judge, in paragraph 25 of his order (referred to in the judgment of the High Court) as follows:—

(1) "Whether the application is not sustainable against de-"fendant No. 8.

(2) "Whether the tenth defendant's interest also passed by "the sale or not, and, if not, should any and what share be "excluded on his account?

(3) "What is the amount of net income due to the petitioner "for each of the faslis in question?

(4) "Whether the sureties can be proceeded against by this "application.

(5) "To what extent and for what amount are the several "sureties or their properties liable?

(6) "Whether the deposit money should be first proceeded "against by petitioner or other properties of the minors exhausted, "before the sureties' properties are pursued."

The Subordinate Judge held as to the first and second questions that the contentions of respondents Nos. 1 and 2 were clearly unsustainable. On the 3rd question, he held that the total sum payable, in respect of the net income for the four faslis 1294—1297, was Rs. 17,965. In arriving at this sum, he allowed to the petitioner no interest, observing that there was no provision for such allowance in the decree and referring to *Hurro Doorga Chowdhrani* v. *Maharani Surut Soondari Debi*(1), but he did allow to respondents Nos. 1 and 2 the full collection charges incurred during the receiver's management. As to the remaining questions,

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

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he pointed out that, in his view, the security had not been given for the performance of any order in Council, but merely for the payment of mesne profits during the period of the defendant's possession before such order was made, and held that respondents Nos. 3—11 could not be made liable in the present proceedings, their obligation being an independent one and not comprised in the decree and not coming within the purview of Civil Procedure Code, s. 253.

The petitioner preferred this appeal on the following grounds:—

(1) "The Subordinate Judge is wrong in holding that the "appellant cannot obtain restitution by proceeding against the "sureties in execution proceedings, but must resort to a regular "suit against them.

(2) "The Subordinate Judge overlooked the definition of "mesne profits in disallowing interest on the amount of net income "of each fasli on the ground that interest is not allowed on such "amounts in the decree.

(3) "In ascertaining the amount of mesne profits, the Subor-"dinate Judge is wrong in deducting from the income the salary "of, and the charges incidental to the appointment of a receiver.

(4) "The Subordinate Judge ought to have awarded the "actual amount of mesne profit for fasli 1297, though it was in "excess of the probable amount estimated by the appellant."

Respondent No. 1 preferred a memorandum of objections on the following ground, *inter alia*, that "the purchaser is not entitled "to recover mesne profits in execution proceedings. His remedy, "if any, is by regular suit."

Bashyam Ayyangar for appellant.

Subramanya Ayyar, *Krishnasami Ayyar*, *Seshagiri Ayyar*, and *Sundara Ayyar* for respondents.

JUDGMENT.—This is an appeal from an order made by the Subordinate Judge of Madura with reference to the order of Her Majesty in Council, dated the 29th June 1888. The appellant is the purchaser at the Court sale held in execution of the decree in original suit No. 44 of 1879 on the file of the Subordinate Court and respondents Nos. 1 and 2 are the eighth and tenth minor defendants in that suit. The properties, which the appellant purchased, were put up to sale as belonging to the first respondent and to the ninth defendant, the father of the second respondent,

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and knocked down to the appellant, as the highest bidder, on 28th July 1882. An application was afterwards made, on behalf of the respondents, under section 311 of the Code of Civil Procedure, to set aside the sale on account of certain irregularities, but the Subordinate Judge disallowed their objection. He then passed an order confirming the sale under section 312, granted a certificate to the appellant under section 316, and placed him in possession of the properties purchased under section 318 on the 15th October 1882. From the order confirming the sale, respondents Nos. 1 and 2 appealed to the High Court under section 588, and, on the 16th October 1883, the High Court considered that the sale was irregular and reversing the order of the Subordinate Judge, made under section 312, set aside the sale. The representatives of the first and second respondents applied to be put back in possession, and, on the 26th February 1885, the Subordinate Judge replaced the properties sold in their possession. Meanwhile, the appellant applied for leave to appeal to the Privy Council, and, on the 13th April 1885, the High Court admitted his appeal and ordered that respondents Nos. 1 and 2, by their guardians, should furnish security for redelivery without waste of the properties sold to the appellant and for mesne profits if its order, setting aside the sale should be reversed by the Privy Council. Pursuant to that order, security was furnished for Rs. 10,000 and Rs. 5,000 on 2nd November 1885 and 20th February 1886. Meanwhile, several creditors, who had obtained decrees against respondents Nos. 1 and 2, attached the villages, which were put up to sale in July 1882, and, on their application, the Subordinate Judge appointed a receiver. From October 1885 the receiver held the villages on behalf of the decree-holders, and the collections, which he remitted to the Subordinate Court from time to time, were applied in satisfaction of their decrees. On the 27th June 1888, the Judicial Committee heard the appeal from the order of the High Court, and held that that order should be reversed, that the order of the Subordinate Judge should be affirmed, and that the respondents should pay the appellant's costs throughout.

On the 29th June 1888, Her Majesty in Council passed an order in accordance with the judgment of the Judicial Committee, and, on the 14th August 1888, the High Court transmitted that order to the Subordinate Court for execution. The appellant then applied to be put back in possession of the villages purchased by

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him on the ground that he was entitled to restitution and the Subordinate Judge restored possession to him on the 25th August 1888. The appellant then claimed mesne profits from the 26th February 1885, when respondents Nos. 1 and 2 were put back in possession with reference to the order of the High Court to the end of fasli 1297 or 30th June 1888. He sought to recover them in excution proceedings not only from respondents Nos. 1 and 2 by attachment of the sale amount deposited in Court, but also from their sureties by attachment of properties offered as security. The respondents resisted the application and the several questions raised by them for decision are set forth by the Subordinate Judge in paragraph 25 of his order. The Subordinate Judge held that the appellant was entitled to recover mesne profits from respondents Nos. 1 and 2 by application for restitution and found that the amount payable for such mesne profits was Rs. 17,965. But he was of opinion that the appellant was not entitled to proceed against the sureties, respondents Nos. 3 to 11, summarily or by way of execution and that his remedy against them was by a regular suit. Accordingly, he permitted execution against respondents Nos. 1 and 2 for the amount mentioned above, and dismissed the appellant's application so far as it related to enforcement of liability of the sureties, respondents Nos. 3 to 11. In the view which the Subordinate Judge took of the case, as against the sureties, he did not consider it necessary to determine the fifth and sixth questions mentioned in paragraph 25 as arising upon their contention. To this order, both the appellant and respondents Nos. 1 and 2 object and six questions are argued before us, two for the latter and four for the former, the other questions not being pressed upon us.

It is urged for respondents Nos. 1 and 2 that no appeal lies from the order made by the Subordinate Judge. The order in question was made in enforcement of the order of Her Majesty in Council and it can only be made under section 610 of the Code of Civil Procedure, which renders the rules applicable to execution of original decrees also applicable to enforcement of that order. Any party aggrieved by an order made in execution of a decree of the Subordinate Judge is entitled to appeal, and the objection is, therefore, one which cannot be supported.

The next contention is that the Subordinate Judge has misconstrued the order of Her Majesty in Council, that it did not

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direct payment of mesne profits, and that such payment was not within its purview. It is also urged that the Subordinate Judge placed the appellant in possession under section 318 and that there was no appeal to the Privy Council from the order made under that section. The formal order of Her Majesty in Council declares that the appeal was allowed, that the order of the High Court was reversed, and that the order of the Subordinate Judge was confirmed, and directs the several Courts and all parties concerned to conform to it. The true construction is not simply that the relief awarded in terms by the order restored should be continued to the appellant from the date of it, but also that every benefit fairly and reasonably consequential upon it should likewise be continued to him. That was the construction put by the Judicial Committee upon a similar order in *Rodger* v. *The Comptoir D'Escompte de Paris*(1). It is true that the order, which the High Court set aside on appeal, and which the Privy Council restored, was the one made by the Subordinate Judge, confirming the sale to the appellant under section 314 and that it said nothing further than that the sale was confirmed. But sections 316 and 318 which are peremptory directed what relief or benefit should be conferred upon him when an order confirming the sale was made; and the former ordered the issue of a certificate as a title-deed and the latter, the delivery of the property purchased. The three sections 314, 316 and 318 are, when read together, related to each other, the first as declaring that the purchaser has a valid title, the second as directing that statutory evidence of such title be furnished to him, and the third as giving effect to the sale by transfer of possession without the intervention of a regular suit. The declaration, therefore, that the order of the Subordinate Judge is restored includes a direction necessary to continue to the appellant the consequential benefit which the appellant had secured under section 318 when the High Court set aside the order of the Subordinate Judge. This is also apparent from the respondent's action when the High Court set aside the sale under section 314, and he claimed under that order to dispossess the appellant who had been placed in possession under section 318, and to be put back in possession though there had been no appeal to the High Court from the order made under that section. We are of

(1) L.R., 3 P.C., 465.

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opinion that a benefit by way of restitution is clearly within the purview of the direction embodied in Her Majesty's order in Council. It does not appear that this objection was taken when the High Court transmitted Her Majesty's order for execution to the Subordinate Court.

No other objection contained in the memorandum of objections is pressed and we dismiss it with costs.

Passing on to the objections taken by the appellant, the first and the main contention is that the Subordinate Judge erred in holding that the sureties could not be proceeded against except by a regular suit in respect of mesne profits to which he is entitled by way of restitution. The sureties being no parties to the order made by Her Majesty in Council, their liability could only be enforced on general principles by a regular suit in the absence of a special statutory direction on the subject. This is conceded, but our attention is drawn to section 253 of the Code of Civil Procedure and to the words in section 610, "in the manner and according to the rules applicable to the execution of its original decrees," and it is argued that section 253 ought to be read as part of section 610. It might be so if there was no special provision inconsistent with such contention in section 610 as amended by Act VII of 1888, section 58. That section provides that "in so far as the order awards costs to the respondent, it may be executed against a surety therefor to the extent to which he has rendered himself liable, in the same manner as it may be executed against the appellant." On comparing it with section 253, it is apparent that the words, "in so far as the order awards costs to the respondent" are substituted for the words in section 253, "the decree may be executed." The intention it suggests is to make the rule contained in section 253 part of section 610 only so far as the order of Privy Council awards costs to the respondent. On the view that the rule embodied in section 253 was intended to be included by the words, "according to the rules, applicable to the execution of its original decrees" there is no necessity for the amendment; nor is it sensible. It is suggested that we may treat it as surplusage or as introduced by way of illustration, but we cannot accede to this suggestion without departing from the recognised rules of interpretation. There is reason to think that the amendment was made with reference to a conflict of opinion on the subject between the different High

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Courts. In *Bans Bahadur Singh* v. *Mughla Begam*(1) which was decided in January 1880, the question whether the general words in section 610 "according to the rules applicable to execution of its original decrees" include the rule contained in section 253, was considered by the Full Bench of the Allahabad High Court. The majority of the Court held that it did, but two of the learned Judges dissented from that opinion. In that case there were two references and one of them related to a surety-bond which secured the costs of the Privy Council, whilst the other covered the whole decree appealed against including the decretal amount and the costs. The learned Chief Justice, who delivered the judgment of the majority of the Court, observed that the legal question was the same in both and must be answered in the same way. The answer was that all the rules applicable to execution of original decrees including section 253 were made part of section 610, the ground of decision being that sureties were intended to be placed on the same footing with defendants, and that there was no reason why a distinction should be made between persons who became sureties in the Original Court before decree and those who became such in the Appellate Court before the appellate decree. The dissenting Judges, however, held that the liability of a surety rested on his bond and not on the decree, and that section 253, which introduced a rule of substantive law among the rules of procedure, was limited to the class of sureties mentioned therein, and could not be extended to sureties who became such when an appeal was preferred to the Privy Council, and that the general words in section 610, "rules applicable to execution of original decrees," referred only to rules of procedure and did not include a rule of substantive law embodied in section 253. In *Radha Pershad Singh* v. *Phuljuri Koer*(2), the same question was considered by a Divisional Bench of the High Court at Calcutta with reference to an application for execution against a surety in respect of costs awarded by the Privy Council, and the learned Judges, who decided that case, concurred in the opinion of the dissenting Judges in the Allahabad case. The effect of similar words used in section 583 was considered by Divisional Benches of the High Courts at Bombay and at Madras in *Venkapa Naik* v. *Baslingapa*(3) and *Thirumalai* v. *Ramayyar*(4) and the Judges who decided those cases agreed

(1) I.L.R., 2 All., 604.
(2) I.L.R., 12 Cal., 404.
(3) I.L.R., 12 Bom., 411.
(4) I.L.R., 13 Mad., 1.

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with the majority of the Allahabad High Court. All these decisions had been passed except *Thirumalai* v. *Ramayyar*(1) before the amendment was introduced, and, though section 610 was amended, section 583 was not similarly amended. The amendment was apparently made with reference to the conflict of opinion between the High Courts at Allahabad and Calcutta, and the insertion of the words, "in so far as the order awards costs," to the respondent becomes significant when it is remembered that the majority of the Judges of the High Court at Allahabad held that the whole order, whether it related to costs or the decretal amount, might be enforced against the surety in execution. It is clear, therefore, that the amendment contemplated a distinction between the order as to costs and the other orders and declared that the surety might be proceeded against in respect of the former, implying thereby that but for the amendment, section 253 should not be treated as incorporated with section 610 by the general words, "according to the rules applicable to the execution of original decrees." Having regard to the circumstances in which the amendment was made and to the principles on which the use of a special phrase may be held to evidence no special intention on the part of the Legislature as laid down in *Hough* v. *Windus*(2), we are of opinion that the order of the Subordinate Judge is right so far as it refused the appellant's application to proceed against the sureties in execution in respect of their liability for mesne profits.

The second question argued in support of this appeal relates to interest claimed on mesne profits from the end of the fasli on which they became due to the date of payment. The expression "mesne profits" is explained in section 211 as including interest on such profits and the respondents Nos. 1 and 2 are ordered to pay mesne profits to the appellant, on the ground that such payment is consequential on the order of the Privy Council. Again, whenever money paid on account of a decree since reversed on appeal is ordered to be refunded, the refund is ordinarily directed to be made with interest. *Jaswant Singh* v. *Dip Singh*(3), *Ram Sahai* v. *The Bank of Bengal*(4), and *Rodger* v. *The Comptoir D'Escompte de Paris*(5). The case of *Hurro Doorga Chowdhrani* v.

(1) I.L.R., 13 Mad., 1. (2) L.R., 12 Q.B.D., 228. (3) I.L.R., 7 All., 432. (4) I.L.R., 8 All., 262. (5) L.R., 3 P.C., 465.

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Maharani Surut Soondari Debi(1) on which the Subordinate Judge relies is not in point, the ground of decision being that interest was disallowed by the decree and that in execution the Court is not at liberty to amend it. Nor is *Chaku Modan Isana* v. *Dullabh Dwarka*(2) in point, for it is only an authority for the proposition that the cases contemplated in section 211 form an exception to the common law rule about interest and it was decided with reference to section 196, Act VIII of 1859, which did not define mesne profits as including interest. We think that interest at 6 per cent. per annum should be awarded on the mesne profits for each fasli from the end of that fasli to the date of payment and that the order of the Subordinate Judge should be varied accordingly.

The third objection argued relates to the order of the Subordinate Judge so far as it debits against the appellant the salary of the receiver and his establishment. The receiver was appointed certainly not for the appellant's benefit, or at his request, but at the instance of the first and second respondents' creditors and for their benefit. The Subordinate Judge considered that, under section 211, the defendants should not be charged with anything more than what they had actually received. But for the intervention of the first and second respondents, judgment-creditors, it is clear that the appointment of a receiver would have been unnecessary, and it does not appear just that the appellant, who was dispossessed by the respondents Nos. 1 and 2, should bear a charge consequent on their act and not shown to be necessary in the ordinary course of prudent management. This objection must, we think, also be allowed and the order appealed against amended.

The only other objection taken on appeal relates to the difference between the average income for fasli 1297 and the amount claimed by the appellant. The Subordinate Judge disallowed the difference, because it was in excess of the amount actually claimed by the appellant. We must take the agreement on which the Subordinate Judge acted to have been made subject to the rule that no more than what the appellant himself claimed was to be awarded to him. We disallow this objection.

The order of the Subordinate Judge will be amended to the

(1) L.R., 9 I.A., 1. (2) 9 Bom. H.C.R., 7.

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extent indicated above and confirmed in other respects. Costs will be paid proportionately by appellant and first and second respondents, but the other respondents are entitled to their costs, as many sets as there are separate pleaders.

APPELLATE CRIMINAL.

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

1892. Feb. 3, 4, 9.

THIAGARAYA AND OTHERS (PETITIONERS),

v.

KRISHNASAMI (COMPLAINANT).*

Penal Code, s. 499, exc. X—Defamation—Privilege—"Mala fides"—Privilege exceeded.

The complainant, a Brahman who had been put out of caste, was re-admitted by the executive committee of the caste after performing expiatory ceremonies. This re-admission was not approved of by the accused, who formed a faction of the caste; and they, after an interval of six months, distributed in the bazaar to all classes of the public printed papers in which the complainant was described as a "doshi" or sinner, which signified that he was a person unfit to be associated with. The accused were charged with the offence of defamation. They pleaded privilege, and it was admitted that they had acted without malice:

Held, that the accused had not acted in good faith, and that the publication was not under the circumstances privileged and protected by Penal Code, s. 499, exc. X, and that the accused were accordingly guilty of defamation.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of Sultan Mohideen Saheb, a Presidency Magistrate, Black Town, Madras, in calendar case No. 16872 of 1891.

The facts of the case, as stated by the Magistrate, are as follow:—

"One Akilandayya, a Smarta Telugu Brahman of the Valva-"nad sect, went to England with his wife and two minor children "(daughter and son aged five and two years respectively). Having "stayed there for some time, he returned to India with his family. "He and his wife were, of course, expelled from caste under the

* Criminal Revision Case No. 600 of 1891.

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"shastras for having committed the sin of crossing the sea. So "were the poor children, who were taken by their parents to "England. It was announced by the community to which the "family belonged that those who associated with the members "thereof would be guilty of Pathitha Sumsunga Doshum, *i.e.*, the "sin of associating with the fallen or outcaste.

"One Davalla Venkatakrishnayya is the brother of the wife of "the aforesaid Akilandayya. It is said that this man lived with "the family after its return from England for a year and a half and "performed the cunniathanum (marriage ceremony) of his niece "(Akilandayya's daughter) and upanayanam of his nephew (Aki-"landayya's son). He was under the circumstances, as the accused "would have it, guilty of Pathitha Samsurgam.

"It is contended by the accused that under the shastras no "penance or any purificatory ceremony (prayaschithum) could "exonerate him from the sin, and that death alone was his prayas-"chithum.

"The aforesaid Davalla Venkatakrishnayya, however, submitted "a petition (see exhibit No. 1) to the second and third accused "begging of them to consider his case and re-admit him into caste. "The matter lay in abeyance. In the meantime he submitted "another petition to one Chivakulu Krishnayya, the elected presi-"dent of the executive committee (see exhibit B) praying for re-"admission. Upon this, a meeting was duly convened in the mattam "and the members proceeded to take action in the matter of the "petition. It was decided that Davalla Venkatakrishnayya should "be admitted into caste on his performing certain expiatory cere-"monies. This being done, Davalla Venkatakrishnayya was duly "admitted into caste. There were now two factions in the com-"munity—one adhering to the views of the committee declaring "Davalla Venkatakrishnayya eligible for readmission, and the "other dissenting from them. The prosecutor belongs to the "former faction and the accused to the latter.

"The accused, indignant at the decision of the prosecutor's fac-"tion, gave publicity to this Telugu hand-bill marked as exhibit "A, the subject matter of the present charge. In this publication "they say the prosecutor and others are the associates of Davalla "Venkatakrishnayya and therefore guilty of Pathitha Samsurgam. "They publicly declare them to be doshis or Samsurga doshis. "This and the latter part of the publication are what the prosecutor

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"complains to be defamatory. Six hundred copies of A were struck "off and promiscuously distributed to all classes of people.

"The accused admit the publication. The first accused is the "proprietor of the printing press at which the hand-bill was "printed and issued. The rest are the signatories."

The Acting Advocate-General (Hon. Mr. *Wedderburn*) for petitioners.

The Crown Prosecutor (Mr. *W. Grant*) for complainant.

COLLINS, C.J.—The accused were convicted of the offence of defamation under section 500 of the Indian Penal Code, and the question I have to decide is whether the evidence is sufficient to support the conviction, or whether the accused can claim the benefit of any of the exceptions to the section. The accused are Brahmans, and the complainant is also of that caste. It appears that one Akilandayya, a Smarta Telugu Brahman, went to England with his wife and family, and, by doing so, committed a caste offence. He was, therefore, expelled from caste under the shastras for having committed the sin of crossing the sea. The brother-in-law of Akilandayya associated with Akilandayya, and apparently thereby committed an offence against caste. He, however, petitioned and submitted his case to Chivakalu Krishnayya, the elected president of the executive committee, and, at a meeting in February 1891 duly convened, it was resolved that Davalla Venkatakrishnayya should be re-admitted into caste after performing certain expiatory ceremonies. The present accused, however, objected to this, and in August 1891 they published a statement setting forth the facts of the case, the grievous results that must follow if Brahmans associated in any way with persons outcasted, and naming the complainant as one of the "sinners" who associated with Davalla Venkatakrishnayya. A number of copies of the paper containing this statement was distributed to the public by one of the accused in the bazaar. The evidence satisfies me that the word "doshi" or sinner signifies a person unfit to be associated with, and is therefore *primâ facie* clearly defamatory.

The Acting Advocate-General for the accused contends that the accused are protected by the tenth exception to section 499 of the Indian Penal Code. "It is not defamation to convey a "caution, in good faith, to one person against another, provided "that such caution be intended for the good of the person to "whom it is conveyed, or of some person in whom that person is

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"interested, or for the public good." The Crown Prosecutor, however, points out that, although Davalla Venkatakrishnayya was re-admitted to caste in Febuary 1891, the statement complained of was made in August 1891, and that the defamatory matter being published and scattered broadcast amongst the people generally, it was not done in good faith, and that the accused being admittedly only a faction of the Brahmans, had no right to act in the way they did. To bring this case within exception X of section 499 of the Indian Penal Code, it must be proved that the accused intended in good faith to convey a caution to one person against another, that such caution was intended for the good of the person to whom it was conveyed, or of some person in whom that person was interested, or for the public good, and that the caution should be conveyed by the proper means. The defamatory statement was in this case distributed indiscriminately. It cannot be said that it was necessary to caution every pariah who received a copy of the statement against associating with certain Brahmans, or to inform all Madras that the complainant was a doshi. It must also be borne in mind that Davalla Venkatakrishnayya had been re-admitted into caste by at least a portion of the Brahman community, and it would be intolerable to allow a few dissentients to circulate defamatory statements about a person, because they believed that in a caste dispute a wrong conclusion was arrived at. I believe that there was an utter absence of good faith in the proceedings the accused chose to take; that the manner in which the publication was made was unnecessary and in excess of the purpose for which the privilege was allowed, and therefore not protected. In *The Queen* v. *Sankara*(1), the guru of N published a notice declaring N to be an outcaste and sent by post a registered post-card of similar purport to N. It was held by TURNER, C.J., and MUTTUSAMI AYYAR, J., that the mode of publication adopted by the defendant, *i.e.*, sending the notice on a post-card, vitiated the privilege and indicated a conscious disregard of the complainant's legal right, and that, therefore, legal malice had been made out and the defendant was guilty of defamation. See also *Williamson* v. *Freer*(2) and *Somerville* v. *Hawkins*(3). It is not suggested that the publication was for the public good. As I find that the accused did not act in good faith, none of the other

(1) I.L.R., 6 Mad., 381. (2) L.R., 9 C.P., 393. (3) 10 C.B., 583.

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exceptions to section 499 of the Indian Penal Code can protect them.

I hold, therefore, that the conviction was right, and I would dismiss the petition.

PARKER, J.—I am of opinion that the circulation of the warning to members of the caste would certainly be privileged, and here it is admitted that there was no malice. The evidence, however, shows that six hundred copies of exhibit A were struck off and promiscuously distributed to *all classes* of people in the bazaar. Such a mode of publication would destroy the privilege, since the communication would be made to persons who had no corresponding interest in it, and the mode and extent of the publication would be more injurious to the complainant than necessary.

It is then urged by the Acting Advocate-General that all castes are interested that the Brahmans who frequent the temple should not be contaminated, but, on reading exhibit A carefully, I do not find it alleged that others than Brahmans were unable to eat the food offered, because some of those to whom chits had been granted were "sinners." The Magistrate finds that the question only affects the Brahman class of the Hindu community, and is not one in which the general public is interested. That finding on revision must be accepted.

For these reasons, I agree that we should not interfere with the conviction, and dismiss the petition.

Ranganadham, Attorney for petitioners.

APPELLATE CIVIL.

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

RAMAN (PLAINTIFF), APPELLANT,

v.

CHANDAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1891. November 23.

Revenue Recovery Act—Act II of 1864, (*Madras*), *s.* 59—*Abkari notification referring to that Act—Sale to recover sum due from an abkari renter—Limitation for suits to recover land so sold.*

The right of selling toddy at certain places was put up to auction by the Collector under a notification which required that payments should be made at fixed periods and that the purchaser should take out licenses as therein provided, failing which the shops concerned might be resold and any loss accruing to Government recovered under the Revenue Recovery Act, Madras. The plaintiff bid at the auction and his bid was accepted. He sought to withdraw from the contract, but the sale to him was confirmed, and on his failure to make the payments above referred to the rights purchased by him were resold at a lower price, and his house was attached and sold as under the Revenue Recovery Act to realise the loss occasioned to Government by the resale. In a suit, in 1888, to recover the house from the defendant who had purchased it and been placed in possession in June 1886:

Held, (1) that the suit was not barred as having been brought more than six months after the date of the sale;

(2) that the sale was *ultra vires*;

(3) that the plaintiff having brought his suit within the twelve years' period of limitation was entitled to recover.

SECOND APPEAL against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 246 of 1890, reversing the decree of S. Subramanya Ayyar, District Munsif of Cannanore, in original suit No. 165 of 1888.

Suit to recover possession of a house.

In March 1885 the plaintiff made a bid for the right of selling toddy at certain places in Cannanore for the following twelve months, and his bid was accepted; the Collector's notification under which the auction was held contained, among others, the following provisions:—

"As soon as the result of the auction is declared, the deposits made by the unsuccessful bidders will be returned to them. The

* Second Appeal No. 280 of 1891.

RAMAN v. CHANDAN.

persons whose bids are accepted shall at once deposit a further sum of Rs. 15 for each shop other than the first shop knocked down to them; and shall within ten days from the date on which the acceptance of their bids is notified to them, deposit such further sum as, with the original deposit of Rs. 15 per shop, will make up an amount equal in each case to two months' rent. They shall also take out licenses on the conditions hereinafter set forth, failing which the shops may be resold at their risk or be otherwise disposed of, and any loss accruing to Government thereby shall be recoverable from them under (Madras) Act II of 1864."

The plaintiff subsequently sought to withdraw from the sale, but the sale to him was confirmed. He did not make the payments required by the above notification; and the sale to him having been on that account cancelled, a fresh auction was held, at which the right in question was purchased for a smaller sum. In June 1886 the house now in question was attached and sold by the Collector as under the Revenue Recovery Act, 1864, to realise the difference between the amount of the plaintiff's bid and the price paid by the second purchaser, and defendant No. 3 purchased it.

The District Munsif passed a decree as prayed. On appeal the District Judge reversed the decree on the ground that the suit was brought after the expiry of the six months period prescribed by the Revenue Recovery Act, 1864, for suits to set aside a sale for arrears of revenue.

The plaintiff preferred this second appeal.

The *Acting Advocate-General* (Hon. Mr. *Wedderburn*) for appellant.

Respondents were not represented.

JUDGMENT.—The District Judge was in error in holding that section 59 of Act II of 1864 applied to the suit, inasmuch as the sale by the Collector was not a proceeding under the Act, as there is no provision in Act II of 1864 for treating the sum payable for plaintiff as revenue. The sale was *ultra vires*, and plaintiff had twelve years within which to bring his suit. We set aside the decree of the Lower Appellate Court and restore that of the Munsif. Appellant will be entitled to his costs in the Lower Appellate Court.

There will be no costs in this Court.

APPELLATE CRIMINAL.

Before Mr. Justice Wilkinson and Mr. Justice Subrahmanya Ayyar.

QUEEN-EMPRESS

v.

SOMMANNA.*

1892. Jan. 25, 28.

Penal Code, ss. 183, 186—"*Voluntarily.*"

A District Judge ordered that the house of the defendant in a suit pending before him be searched and certain property brought to the Court, and appointed a commissioner to carry out this order. The commissioner went to the house, but the defendant shut the doors and would not admit him. A crowd collected, and the commissioner felt it would be unsafe to proceed to carry out the order by force, and was unable to do so otherwise. The defendant was prosecuted and sentenced under Penal Code, s. 186:

Held, that the facts disclosed no offence under that section.

PETITION under Criminal Procedure Code, ss. 435, 439, praying the High Court to revise the judgment and sentence of T. Rama Rau, Sub-Divisional Magistrate of Cuddapah, in criminal appeal No. 40 of 1891, confirming the judgment and sentence of the Second-class Magistrate of Pullampet in calendar case No. 102 of 1891.

The facts of the case as found by the Sub-Divisional Magistrate were as follows:—

In a certain civil suit the District Judge of Cuddapah issued a commission to P. Tirumala Rau, First-grade Pleader, to search the house of the accused and remove certain property thence to the District Court. The commissioner accordingly went to the village of the accused and, having read out the order, asked him to allow it to be executed. The accused remained inside his house and, closing the doors against the commissioner, obstructed the execution of the commission in spite of repeated requests addressed to him. The commissioner tried for several hours to effect an entrance into the house, but did not succeed. He invoked the assistance of the Village Magistrate and got some implements to force open the doors. But, seeing that the accused was a wealthy and influential merchant, and that there was a

* Criminal Revision Case No. 581 of 1891.

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large crowd round his house, the commissioner feared that there might be a disturbance of the public peace if he resorted to that measure. He then reported the matter to the nearest police-station house officer. But by the time the police arrived the plaintiff, on whose behalf the commission had been issued, had come to terms with the defendant and requested the commissioner not to execute it.

The *Acting Advocate-General* (Hon. Mr. *Wedderburn*) for petitioner.

The *Government Pleader and Public Prosecutor* (Mr. *Powell*) in support of the conviction.

JUDGMENT.—The petitioner was convicted by the Second-class Magistrate of Pullampet under section 183, Indian Penal Code, of resistance to the taking of property by the lawful authority of a public servant and sentenced to two months' rigorous imprisonment and a fine of Rs. 200. On appeal the Sub-Divisional Magistrate confirmed the sentence, but altered the finding to one of an offence under section 186, Indian Penal Code, and the only question now is whether the ingredients of the offence have been made out. On behalf of the petitioner it is urged that there was nothing more on his part than non-compliance with an order which he was not bound to obey. On the part of the Crown it is argued that there was active obstruction and a threatened breach of the peace. There is nothing in the judgment of the Sub-Divisional Magistrate to lead us to think that it was the petitioner who gathered the crowd, nor on referring to the evidence of the commissioner do we think that it can be held that it was through the instrumentality of the prisoner that the crowd came together. It would seem to have been a very orderly crowd which collected upon hearing that an inventory was to be made of all the goods and chattels in the house of the principal merchant in the place. All that is found is that the commissioner, who appears to have acted throughout in a very injudicious manner, read out the order and asked the petitioner to be allowed to carry it out, and that petitioner, without giving any answer, remained inside his house with closed doors. We do not think that mere failure to comply with the request of the commissioner amounts to such obstruction as is contemplated in section 186. The use of the word "voluntarily" seems to us to indicate that the Legislature contemplated the commission of some overt act of obstruction, and did not intend to render penal

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mere passive conduct. It was not asserted that petitioner barricaded his doors or assaulted the commissioner, or took any active step to oppose the execution of the commission. He merely shut himself up in his house and took no notice of the commissioner. His object apparently was not to obstruct, but to gain time for the compromise, which later on in the day was effected. The conviction cannot be sustained, and we accordingly set it aside, and the fine, if paid, will be refunded.

APPELLATE CIVIL.

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

1891. Dec. 4, 10.

NARAYANACHARIAR (PLAINTIFF), APPELLANT,

v.

RANGA AYYANGAR AND ANOTHER (DEFENDANT AND SUPPLEMENTAL RESPONDENT), RESPONDENTS.*

Rent Recovery Act—Act VIII of 1865 (*Madras*), *ss.* 8, 9, 10—*Suit for a patta—Denial of tenancy by landlord.*

In a summary suit brought under Rent Recovery Act (Madras) to compel the defendant to give a patta to the plaintiff for certain land which plaintiff claimed to hold from him, the defendant denied that the plaintiff was his tenant:

Held, that the Collector was bound to try this question so raised and not to refer the parties to a regular suit for its determination.

SECOND APPEAL against the decree of W. F. Grahame, District Judge of Tinnevelly, in appeal suit No. 180 of 1889, affirming the decision of T. Varada Rau, Acting Head Assistant Collector of Tinnevelly, in summary suit No. 3 of 1889.

The plaintiff brought this suit to compel the defendant, from whom he alleged he held certain land, to give him a patta in respect thereof. The defendant denied the tenancy, and the Head Assistant Collector dismissed the suit, observing:—"As a question regarding the existence or otherwise of the relationship of landlord and tenant has arisen in this case, the matter must be determined in the regular way."

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* Second Appeal No. 1593 of 1889.

NARAYANA-CHARIAR v. RANGA AYYANGAR.

The District Judge concurred in the opinion so expressed.

The plaintiff preferred this second appeal.

Sadagopachariar for appellant.

Sankara Menon for respondents.

JUDGMENT.—The District Judge is no doubt right in holding that section 10 of Madras Act VIII of 1865 has reference to proceedings under section 9 only, but it does not, in our opinion, follow that in a summary suit under section 8 the Collector is debarred from adjudicating upon the question whether the relation of landlord and tenant exists between the parties.

He is to try the case, and the plaintiff's case is that he is a tenant and entitled to a patta which defendant denies. To say that the Collector is to hold his hand and make no further inquiry, merely because the landholder denies that plaintiff is his tenant is to put it in the power of the landholder always to deprive the tenant of the remedy by summary suit given him by section 8. If upon inquiry the Collector finds that plaintiff does not hold land under the landholder, that may be a reason for dismissing the suit, but the issue whether the plaintiff is or is not a tenant of the defendant must be properly tried and determined on the evidence and not on the mere word of the defendant.

We must reverse the decrees of the lower Courts and remand the suit to the Head Assistant Collector for trial on the merits.

Appellant is entitled to his costs in this and the lower Appellate Court.

APPELLATE CRIMINAL.

Before Mr. Justice Parker and Mr. Justice Shephard.

1892. Jan. 5, 15.

ABDUL KHADAR AND OTHERS (PETITIONERS),

v.

MEERA SAHEB (COUNTER-PETITIONER).*

Criminal Procedure Code, ss. 195, 435, 478—*Forged documents filed in Court—Prosecution ordered by Court.*

Certain documents having been put into Court in a suit pending before a District Munsif, but not given in evidence, the District Munsif made an order for the prosecution of the parties who so put them in, on the ground that the documents were forgeries:

Held, (1) that the High Court had power to revise the proceedings of the District Munsif;

(2) that the District Munsif was not competent to go beyond the record;

(3) that the order was wrong and should be set aside.

PETITION under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of T. T. Rangachariar, District Munsif of Paramagudi, in register case No. 1 of 1891, and to stay further proceedings in the said register case No. 1 of 1891.

Mr. *Norton* for petitioners.

Mahadeva Ayyar for counter-petitioner.

JUDGMENT.—The District Munsif purports to be acting under section 478, Criminal Procedure Code. The words "any such offence" relate to offences referred to in section 195, and such of those offences as fall under sections 403 and 471, Indian Penal Code, must have been committed by a party to any proceeding in any Court in respect of "a *document given in evidence* in such proceeding."

In the present case a decree against defendants Nos. 2, 3 and 5 has been passed upon the oath of the plaintiffs. The suit as against fourth defendant is still undisposed of, and the documents, alleged to be forgeries, have been put into Court, but are not yet given in evidence, inasmuch as the suit has not been tried.

It is not competent to the Court to go beyond the record—*Zamindar of Sivagiri* v. *The Queen*(1).

We have no doubt as to the power of the High Court to interfere on revision.

The proceedings of the District Munsif must be set aside and the present prosecution dropped.

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(1) I.L.R., 6 Mad., 29.

* Criminal Revision Case No. 528 of 1891.

ABDUL KHADAR v. MEERA SAHEB.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Shephard.

1891. November 12. December 15.

NAGAMUTHU AND OTHERS (DEFENDANTS Nos. 1, 2 AND 4), APPELLANTS,

v.

SAVARIMUTHU (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 244—"Parties to the suit"—Questions relating to execution—Separate suit.

A plaintiff, alleging that her husband (deceased) had advanced money on the security of land belonging to a family of four Hindus, sued them to enforce his lien and obtained a decree. The representatives of one of the defendants only appealed, and the decree was reversed as regarded them. The decree was executed as against the other defendants by the attachment and sale of their shares of the land, and the plaintiff became the purchaser. The successful appellants obstructed her in her attempts to obtain possession, and she now sued them for partition of the three-quarters share purchased by her:

Held, that the suit was not precluded by Civil Procedure Code, s. 244.

SECOND APPEAL against the decree of H. H. O'Farrell, Acting District Judge of Trichinopoly, in appeal suit No. 146 of 1888, affirming the decree of V. Swaminatha Ayyar, Additional District Munsif of Trichinopoly, in original suit No. 559 of 1887.

Suit for the partition of certain land and for possession of a three-quarters share therein. The land in question had belonged to an undivided family consisting of four brothers, of whom the eldest (Chinnamuthu Veeran) was the father of the defendants, and it was mortgaged to Srinivasa Thathachari. While this mortgage was subsisting the four brothers effected a partition, and a question was subsequently raised whether the land above referred to was left in common or fell to the share of Chinnamuthu. It appeared, however, that in 1854 he mortgaged it to Maruthanayakam Pillai to pay off the other mortgage. In 1879 one of his brothers, Kuppumuthu, brought a suit to redeem the mortgage of 1854 and by the consent of the mortgagee obtained a decree for possession, conditional on his paying the mortgage amount into Court, which he did, having previously borrowed from the present

* Second Appeal No. 1297 of 1890.

plaintiff's husband, as she now alleged, Rs. 600 on the security of the same land. Subsequently, in the same year, Chinnamuthu sued to redeem the same mortgage, which he alleged he had, in great part, paid off. This suit was dismissed, and the decree dismissing it was confirmed on appeal on the ground that the plaintiff's remedy, if any, was to be sought against the decree-holder who had paid the money into Court. Chinnamuthu then sued his brother and failed, it being found that the land was not his divided property, but belonged to the family in common. In 1884 the present plaintiff sued Chinnamuthu and his brothers to enforce the mortgage lien of her husband (deceased). In the Court of first instance the plaintiff was held to have a valid charge to the extent of Rs. 400, and a decree was passed for that amount. Against this decree an appeal was preferred by the sons of Chinnamuthu alone, and the decree was reversed as against them. It remained, however, in force as against the other defendants and was executed by the attachment and sale of their three-quarters share in the land. The plaintiff was the purchaser at the Court sale, and having been obstructed by the sons of Chinnamuthu in her attempts to obtain possession, she now sued as above for partition.

The District Munsif passed a decree for the plaintiff, which was affirmed on appeal by the District Judge.

The defendants preferred this second appeal.

Mr. *Subramanyam* for appellants.

Ramasami Mudaliar for respondent.

SHEPHARD, J.—The only question argued was whether the maintenance of the suit was precluded by the provisions of section 244 of the Civil Procedure Code by reason of the plaintiff and the defendants having been parties to a prior suit. As far as the plaintiff is concerned, there can be no doubt that, although it is in the character of purchaser at the sale in execution of her decree that she now brings the suit to secure possession of the lands sold to her, she is, nevertheless, a party to the suit in which the decree was obtained within the meaning of section 244 of the Civil Procedure Code. The defendants, also having been defendants in the prior suit, are parties to that suit, and none the less so, because ultimately it was as against them dismissed, while as against their co-defendants, who did not appeal, the decree in the plaintiff's favour remained standing. But, although both the plaintiff and

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the defendants are parties to the former suit, I do not think that the question now raised is one "arising between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree" within the meaning of the section. As between the plaintiff and the defendants no such question can arise, because there is no decree against the defendants to be executed, discharged or satisfied. They are not judgment-debtors of the plaintiff. No doubt the present suit is occasioned by the decree-holder's desire to give effect to his decree, and may be said to arise out of the execution of his decree. But in my opinion, regard being had to the language of the section, a question relating to the execution of the decree presupposes a person against whom execution is sought and cannot arise as between the decree-holder and persons who, as far as concerns execution, are complete strangers. In the present case the defendants were dismissed from the prior suit on appeal. But a much stronger case might be put to illustrate the inconvenience of giving a larger operation to the section. For instance in a suit against two defendants the plaintiff might withdraw the suit against one with or without liberty to bring a fresh suit and obtain a decree against the other. The defendant against whom the suit was withdrawn would of course be a party to the suit in which the decree was passed. But he would have no concern in the execution of the decree, and in my opinion no question relating to the execution could arise between him and the decree-holder. If it be correct to say that the object of the section is to put a limit to litigation and prevent one suit growing out of another, it is clear that in such a case as the one put the section ought not to be applicable. It cannot have been intended to prohibit suits between persons as between whom no adjudication in respect of their right has as yet taken place.

In my opinion the District Judge was right in the conclusion at which he arrived, and therefore the appeal should be dismissed with costs.

WILKINSON, J.—I am of the same opinion. The question is not, as the District Judge puts it, whether the present suit is a part of the execution proceedings, but whether, within the meaning of section 244, Civil Procedure Code, the plaintiff and defendants were parties to the suit in which the decree was passed. In one sense no doubt they were so, and the defendants, having been

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allotted their costs in appeal, are or were entitled to take out execution of the decree. But the question at issue between the parties in the present suit is not one relating to the execution, discharge or satisfaction of the decree in that suit. The defendants are not, with reference to the subject-matter of the present suit, judgment-debtors, but occupy the position of third parties, who, being in possession of the land for which the plaintiff has obtained a decree, obstruct delivery to her. If the provisions of section 244 applied, it must be held that the plaintiff could execute her decree as against the defendant. But if the plaintiff were to take out execution proceedings against the defendants, she would be met by the plea that there is no decree to be executed, the decree so far as the defendants were concerned having been quashed. None of the cases quoted in argument apply. In *Viraraghava* v. *Venkata*(1) the parties were parties to the suit in which the decree was passed. In *Vallabhan* v. *Pangunni*(2) the parties were the decree-holder and the judgment-debtor, and in *Muttia* v. *Appasami*(3) the question was one relating to the execution of the decree between the representative of the original decree-holder and one of the judgment-debtors, the decree-holder having become, as the plaintiff in this case has, the purchaser of the property. The present defendants cannot, in my opinion, be regarded as occupying any one of these positions. The second appeal fails and is dismissed with costs.

(1) I.L.R., 5 Mad., 217. (2) I.L.R., 12 Mad., 454. (3) I.L.R., 13 Mad., 504.

APPELLATE CIVIL.

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

1891. October 26.

VENKATASUBBAYYA (PLAINTIFF), APPELLANT,

v.

VENKAYYA (DEFENDANT), RESPONDENT.*

Mortgagor and mortgagee—Mortgage by conditional sale before Transfer of Property Act—Redemption.

Suit, in 1889, to redeem a mortgage of 1880, which contained a provision that, if the mortgage money was not paid in March 1882, the mortgage premises should become the absolute property of the mortgagee:

Held, that the plaintiff was entitled to redeem. *Ramasami Sastrigal* v. *Samiyappanayakan* (I.L.R., 4 Mad., 179) explained and followed.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 461 of 1890, reversing the decree of M. Ramayya Pantulu Garu, District Munsif of Bapatla, in original suit No. 279 of 1889.

A suit to redeem the following mortgage:—

"Hypothecation bond, dated the 11th Ausvayuja Bahulam of "the year Vikrama corresponding to 29th October 1880, executed "to Reddy, son of Itturi Vencatramudu, Kamma by caste, living "by cultivation, and residing at Thathapudi Agraharam attached "to the sub-district of Narasarowpet, Narasarowpet taluk, Kistna "district, by Vencatasubbiah, son of Guntupalli Sivaramiah, "Brahman, living by agraharam inams and residing at Mattuki-"pudi attached to the sub-district of Narasarowpet in Narasarow-"pet taluk in the said district.

"The amount taken from you as loan on account of my urgency "is Rs. 500. I bind myself to pay this principal with interest "at 1 per cent. per month on the 30th Chaithra Bahulam of the "year Chithrabhanu (29th March 1882). Particulars of property "hypothecated to you by me until the discharge of the amount "are as follow:—

[Here follow boundaries.]

"As I have hypothecated to you 10 acres 73 cents. situated "within these four boundaries and the inam land of 10 acres 80

* Second Appeal No. 1154 of 1890.

"cents. bearing a quit-rent of Rs. 1-4-0 per year out of my half "share in the inam land bearing D No. 765 held by me and Gantu-"pali Kotlingayya and Narasayya in the village of Marutur, I "bind myself to pay your money on the said fixed date and redeem "my hypothecated property. In default of payment of money on "the said date, I bind myself to give over possession of the said "land to you treating this as an absolute sale-deed for the amount "of the said principal and interest, to file a deed of consent and "cause your name entered in the accounts. I or my heirs shall "not raise any claim in respect of this. This hypothecation deed "is executed with my consent."

[Signed] GANTUPALLI VENCATA SUBBAYYA.

The defendant was the grandson of the mortgagee.

The District Munsif passed a decree as prayed.

The District Judge, on appeal, reversed this decree observing:—

"It is thus necessary to inquire what were the relative positions of this plaintiff and of the defendant's grandfather in March 1882, when the stipulated period expired. The defendant's grandfather was in possession of the Tatapudi lands as tenant, so no further transfer of the land was necessary and, on the stipulated date, it became his property. The Marutur land was in possession of the shepherd tenants, and so, from that date, the right to collect rent from them passed to defendant's grandfather. The registered document must be held to have taken effect. I think that the District Munsif, in his finding on the first issue, has overlooked the fact that no further sale was necessary.

"The dates of the mortgage and of the sale are prior to the date upon which the Transfer of Property Act came into force. Upon the authority of *Ramasami Sastrigal* v. *Samiyappanayakan*(1), the District Munsif held that the plaintiff may nevertheless redeem. It is now contended, on behalf of defendant, that the decision upon which the Munsif relies, applied only to mortgages of date prior to 1875, and that, as this mortgage was executed in 1880, after the decision in *Thumbusawmy's case*(2) was published, it must be presumed that the parties knew of that decision. There is much force in this contention."

Mr. *Michell* and R. *Subramanya Ayyar* for appellant.

Bhashyam Ayyangar for respondent.

(1) I.L.R., 4 Mad., 179. (2) I.L.R., 1 Mad., 1; s.c. L.R., 2 I.A., 241.

VENKATA-SUBBAYYA v. VENKAYYA.

JUDGMENT.—In *Ramasami Sastrigal* v. *Samiyappanayakan*(1), the majority of the Court adopting the rule laid down by the Privy Council in *Thumbusawmy Moodelly* v. *Hossain Rowthen*(2) held that mortgages executed subsequent to 1858 shall be treated according to what the Privy Council considered to be the erroneous course of decisions, nothing was expressly decided in that case as to how long this rule shall be followed, but the principle kept in view appears to be that that which had been, though erroneously, supposed to be the law in Madras should be followed as to mortgages after 1858 until the Legislature interfered to settle the law. In the present case the District Judge has laid down a new rule, that mortgages executed after the date of the Privy Council decision in *Thumbusawmy Moodelly* v. *Hossain Routhen*(2) in 1875 must be treated as governed by the principle of that decision. We are not prepared to adopt this principle, and so still further unsettle rights created by mortgages in this Presidency. We consider that under the Privy Council ruling the Courts of this Presidency are at liberty to apply the doctrine of English Courts of Equity to mortgages executed after 1858 until the Legislature settled the law, as it has now done, by the Transfer of Property Act. It is not in favor of the new rule which the District Judge propounds that there has been no decision to that effect in Madras, though it is now sixteen years since the Privy Council decision in *Thumbusawmy Moodelly* v. *Hossain Rowthen*(2).

We think the District Munsif's view was right, and we reverse the decree of the Lower Appellate Court, and restore that of the Munsif. Respondent must pay appellant's costs in this and the Lower Appellate Court.

(1) I.L.R., 4 Mad., 179. (2) I.L.R., 1 Mad., 1; s.c. L.R., 2 I.A., 241.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Subramanya Ayyar.

MAHADEVA, PLAINTIFF,

v.

KUPPUSAMI, DEFENDANT.*

1892. January 11.

Civil Procedure Code, s. 356—Insolvency proceedings—Receiver, commission of, how computed.

A receiver appointed in insolvency proceedings under the Civil Procedure Code is entitled to a lien for the amount of his commission on the net assets remaining after payment of the charges specified in Civil Procedure Code, s. 356 (*b*), (*c*) and (*d*).

CASE stated under section 617 of Act XIV of 1882 by C. Vencobachariar, Subordinate Judge of Tanjore.

The case as stated disclosed the following facts:—

A receiver was appointed in the matter of insolvency petition No. 2 of 1888 on the file of the Subordinate Court, Tanjore, to realise and distribute the assets of the insolvent under Civil Procedure Code, s. 356, and he was to receive 5 per cent. commission. He was unable to collect any debts due to the estate, but he realised Rs. 3,675 by the sale of certain immovable property of the insolvent, and he now applied for payment of his commission out of the sale-proceeds. This application was opposed by persons to whom the immovable property had been mortgaged.

The amount of the scheduled debts was Rs. 5,670 and it was found that the payment of the secured debts would almost exhaust the estate.

The question referred was as follows:—

Is the receiver entitled under the Court's order appointing him receiver to a commission of 5 per cent. on the sum realised, which may remain after defraying charges of the kind specified in clauses (*b*) and (*c*) of section 356, Civil Procedure Code, or on the balance remaining after discharging the secured debts specified in clause (*d*), and whether the phrase "balance so distributed" means the balance, which remains after the payment of charges

* Referred Case No. 27 of 1891.

MAHADEVA v. KUPPUSAMI.

mentioned in clauses (*b*) and (*c*) only or of clauses (*b*), (*c*) and (*d*) together?

Pattabhiramayyar for plaintiff.

R. Subramanya Ayyar for defendant.

JUDGMENT.—We are of opinion that the receiver is entitled to remuneration at the rate fixed by the late Subordinate Judge, but for the amount of that fee, he is only entitled to a lien to the extent of 5 per cent. upon the sum remaining as net assets after the charges specified in clauses (*b*), (*c*) and (*d*) of section 356 have been paid. The question whether the opposing creditor's claim is a debt secured by mortgage is not before us. *See* ex parte *Browne in re Maltby*(1).

APPELLATE CIVIL.

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

1891. November 27. December 15.

SUBBARAZU AND OTHERS (DEFENDANTS NOS. 2 TO 6), APPELLANTS,

v.

VENKATARATNAM AND ANOTHER (PLAINTIFF AND DEFENDANT NO. 1), RESPONDENTS.*

Hindu Law—Partition—Mortgagor and mortgagee—Redemption—Successive mortgages on family property—Assignment of equity of redemption.

Two brothers constituted an undivided Hindu family. The eldest mortgaged half of certain family lands to P and the other half to the father (since deceased) of the contending defendants, and placed the mortgagees respectively in possession. Neither mortgage was binding on the younger brother who mortgaged his share of the same land to the plaintiff. The plaintiff obtained a decree on his mortgage and attached and brought to sale in execution and himself purchased the half share of his mortgagor, and having afterwards purchased the share of the elder brother and come to a settlement with P, now brought a suit for a moiety of the land in the possession of the contending defendants as forming part of the half share of his mortgagor:

Held, (1) that the contest being between strangers to the family, and the plaintiff having purchased the entire rights of the family in the land in question, the plaint was not defective for want of a prayer for the partition of the whole property of the family.

(2) that the plaintiff being the assignee of the elder brother could not

(1) L.R., 16 Ch. D., 497.

* Second Appeal No. 272 of 1891.

SUBBARAZU v. VENKATA-RATNAM.

deprive his mortgagees of a portion of their security without asking for an account and offering to pay whatever might be due on the footing of the mortgage.

SECOND APPEAL against the decree of F. H. Hamnett, Acting District Judge of Godavari, in appeal suit No. 351 of 1889, affirming the decree of Lakshminarayana Rau, District Munsif of Rajahmundry, in original suit No. 152 of 1889.

Suit for possession of a moiety of certain land which had been the property of an undivided Hindu family consisting of two brothers. The plaintiff had acquired the rights of both brothers in the land in question. Defendants Nos. 2 to 5 held a mortgage from one of the brothers earlier in date than the transfer of his rights to the plaintiff. Defendant No. 1 was the widow and representative of the mortgagee.

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

Both of the Lower Courts decreed in favour of the plaintiff. Defendants Nos. 2 to 6 preferred this second appeal.

Srirangachariar for appellants.

Ramasami Mudaliar for respondent No. 1.

JUDGMENT.—Venkatarazu and Sreeramulu were undivided brothers. They owned 13 odd acres of inam land in Penkarametta as well as other property. Venkatarazu, who was the elder brother, mortgaged a moiety of the land in Penkarametta to one Peddiah, and the other moiety to the father of defendants Nos. 2 to 6 and put each of his mortgagees in possession of 6 acres 59 cents, that is of the whole land. Both the Lower Courts have found that these mortgages were not binding on Sreeramulu and the finding is not impeached on second appeal. Sreeramulu mortgaged his share of the land in Penkarametta to the plaintiff, who, having obtained a decree on his mortgage in original suit No. 132 of 1887, purchased in execution Sreeramulu's half share, and having settled with Peddiah and purchased the share of Venkatarazu, now sues for a moiety of the land in the possession of the defendants Nos. 2 to 6, on the ground that Sreeramulu was entitled to that moiety. Both the Lower Courts have decided in his favour, and defendants Nos. 2 to 6 appeal. In the first place it is contended that the suit was not sustainable, as the plaintiff was bound to sue for a partition of the whole family property and could not maintain a suit for a specific portion only. In support of this contention reliance is placed on *Venkatarama* v. *Meera*

SUBBARAZU v. VENKATA-RATNAM.

Lalai(1), but that case is distinguishable from the present. There the conflict was between a stranger who had purchased from one member of the joint family his share in a specific land and the members of the joint family. Here the contest is between strangers. The plaintiff having purchased the rights of the only members of the joint family in the Penkarametta land stands in the shoes of the joint family, and therefore the general principle on which the case above referred to was decided has no application to the present case. For the same reason, the case relied on by the respondents' pleader—*Chinna Sanyasi* v. *Suriya*(2)—is not in point. The plaintiff cannot set up the right of Sreeramulu to affirm the mortgage by Venkatarazu to defendants Nos. 2 to 6, appellants, and claim by partition to recover that share to which the alienation could not extend, because he stands in the shoes of Venkatarazu. If he represented Sreeramalu alone, he might perhaps avail himself of the right recognized in the latter case, but, having five years prior to the present suit purchased all the rights of defendant's mortgagor, he cannot now maintain a suit for Sreeramulu's half share. What he purchased from Venkatarazu was the right of redemption, and he cannot seek to deprive Venkatarazu's mortgagees of a portion of their security without asking for an account and offering to pay whatever may be due on the footing of the mortgage. The suit in its present form was clearly not maintainable. The defendants are entitled to say "you stand in the shoes of our mortgagor and you cannot repro-"bate your mortgage to us and plead that you had no right to "give us possession of a moiety of the land. You had, at the "time you granted the land, an undoubted right to a moiety, and "you cannot oust us without discharging your liability." We fail to see what answer there is to this. Plaintiff is the owner by purchase of the whole land, and if he wants possession of the whole land, he must discharge his vendors' debts on the land and not seek by setting off the rights of one of his vendors against the other to deprive defendants of their security. The decrees of the Courts below must be reversed, and the suit dismissed with costs throughout.

(1) I.L.R., 13 Mad., 275. (2) I.L.R., 5 Mad., 196.

APPELLATE CIVIL—FULL BENCH.

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

PICHAYEE (PETITIONER),

v.

SIVAGAMI (COUNTER-PETITIONER).*

1890. October 9. 1891. January 12. March 13.

Civil Procedure Code, s. 596—"Value of the subject-matter of the suit"—Civil Courts Act (Madras)—Act III of 1873, *s.* 14.

Civil Courts Act (Madras) III of 1873 does not control the construction of Civil Procedure Code, s. 596, and under that section the real market value of the matter in dispute is the test as to whether or not an appeal lies to the Privy Council.

PETITION under section 595 of the Code of Civil Procedure for the grant of a certificate to appeal to Her Majesty in Council in appeal No. 166 of 1887 on the file of the High Court, Madras.

The case is stated sufficiently for the purposes of this report in the judgment of the High Court.

Subramanya Ayyar and *Pattabhiramayyar* for petitioner.

Bhashyam Ayyangar for counter-petitioner.

The case came on for disposal before MUTTUSAMI AYYAR and WILKINSON, JJ.

JUDGMENT.—The affidavits put in by the petitioner and counter-petitioner will be forwarded to the Subordinate Judge, who will be directed to ascertain and report what is the market value of the subject-matter of the suit. It is argued by the counter-petitioner's pleader that the second clause of section 596, Civil Procedure Code, does not apply to this case. We do not now decide that point, but it will be open to argument on receipt of the report of the Subordinate Judge. Both sides will be at liberty to adduce evidence.

The finding is to be returned within six weeks from the date of receipt of this order, and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

[In compliance with the above order, the Subordinate Judge

* Civil Miscellaneous Petition No. 662 of 1889.

PICHAYEE v. SIVAGAMI.

submitted a finding to the effect that the market value of the lands in question exceeds Rs. 10,000.]

This petition coming on again for hearing before MUTTUSAMI AYYAR and BEST, JJ., on receipt of the finding of the Lower Court, the Court referred the matter to the Full Bench as follows:—

ORDER OF REFERENCE TO FULL BENCH.—"A question is raised in this case as to what is meant by the phrases 'value of the subject-matter of the suit in the Court of First Instance' and 'value of the matter in dispute on appeal' occurring in section 596 of the Code of Civil Procedure.

It is contended on one side that the *market* value is meant and reference is made to the decisions of the Privy Council in *Mohun Lall Sookul* v. *Bebee Doss*(1) and *Baboo Lekraj Roy* v. *Kanhya Singh*(2) and also to a ruling of the Sadr Court printed at page 5 of Chamier's Rules of Practice.

On the other hand it is contended that it is the value as calculated in the Court of First Instance under the law now in force.

The question is one of general importance which we think desirable to refer for the opinion of the Full Bench."

This reference came on for hearing and was argued before a Full Bench, consisting of COLLINS, C.J., MUTTUSAMI AYYAR, PARKER and SHEPHARD, JJ.

COLLINS, C.J.—The point submitted to the Full Bench is what is meant by the phrases "value of the subject-matter of the suit in the Court of First Instance" and "value of the matter in dispute on appeal" occurring in section 596 of the Code of Civil Procedure relating to appeals to Privy Council.

It is contended on the one side that the market value is meant, and on the other side that it is the value as calculated in the Court of First Instance.

The rules of the Privy Council, dated 1838, declared that no appeal shall lie to the Privy Council unless the value of the matter in dispute in such appeal shall amount to the sum of Rs. 10,000 at least.

In *Mohun Lall Sookul* v. *Bebee Doss*(1), the Privy Council held, in a case in which the value was laid in the plaint as being under Rs. 10,000, that as the calculation was estimated with

(1) 7 M.I.A., 428. (2) L.R., 1 I.A., 317.

PICHAYEE v. SIVAGAMI.

reference to the stamp duty only, if satisfactory evidence was produced that the real or market value of the property exceeded Rs. 10,000, leave to appeal would be granted; and in *Gourmoney Debia* v. *Khaja Abdool Gunny*(1), the same course was adopted. In *Baboo Lekraj Roy* v. *Kanhya Singh*(2), Sir James Colville in the judgment of the Privy Council says, "The stamp duties imposed for fiscal purposes are calculated on a certain rule fixed by law, but the right of appeal depends on the value, which is a matter of fact."

In 1874 the Privy Council Appeals Act was passed and section 5 enacts that "the amount or value of the subject-matter of the suit in the Court of First Instance must be Rs. 10,000 or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum or upwards," and these words are incorporated in section 596, Code of Civil Procedure.

I do not think that the words "value of the subject-matter in the Court of First Instance" in any way affect the right of appeal when the real value of the subject-matter is Rs. 10,000. If it was intended to bind the applicant to the value indicated by the amount paid as stamp duty, the Legislature would surely have said so, and it ought not to be assumed that the Legislature intended to take away from the subject or limit such an important privilege as the right to appeal to the Privy Council without the words being clear and explicit.

It has been suggested that these words were added in the Act of 1874 to prevent costs being added to the matter in dispute so as to raise the value by the addition of costs to over the sum of Rs. 10,000, but this appears to be mere surmise.

I am of opinion, in answer to the reference, that the real market value of the matter in dispute is the test as to whether an appeal to the Privy Council lies.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. Having regard to section 616, clause *b*, I do not think that the value of the matter in dispute on appeal to Her Majesty in Council and of the subject-matter of the suit in the Court of First Instance is any other than the market values. The only effect that can reasonably be given to the first part of section 596 is

(1) 8 M.I.A., 268. (2) L.R., 1 I.A., 317.

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that of excluding costs incurred in the Court of First Instance in fixing the value of the matter in dispute on appeal. Otherwise, there would be no necessity for referring to the value of the subject-matter of the suit in the Court of First Instance. I do not consider that Madras Civil Court's Act (Act III of 1873, s. 14) can be permitted to control the construction to be put upon section 596 which is applicable to the whole of British India.

PARKER, J.—I agree.

SHEPHARD, J.—I am of the same opinion and agree with Muttusami Ayyar, J., in thinking that the object of the allusion to the Court of First Instance was to exclude costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

1891. December 1.

LAKSHMI NARASIMHA (PLAINTIFF), APPELLANT,

v.

ATCHANNA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 373, 647—Application for execution struck off for non-payment of process fees—Subsequent application.

A decree-holder having applied for execution of his decree, notice was issued to the judgment-debtors, and their property was attached, but the applicant failed to pay the process fees, and the application was struck off, and no leave to make a fresh application was obtained under Civil Procedure Code, s. 373:

Held, that the decree-holder was entitled to apply again for execution of his decree.

APPEAL against the order of M. B. Sundara Row, Subordinate Judge of Ellore, in appeal against order No. 372 of 1890, reversing the order of Vepa Krishnamurti, District Munsif of Ellore, in execution petition No. 1037 of 1890.

Application for the execution of the decree in original suit No. 588 of 1875 on the file of the District Munsif of Ellore. It appeared that an application for execution of this decree had been made on 11th July 1887, and, after notice to the judgment-debtors, their property was attached, but the decree-holder, having failed to pay batta, that application was struck off on 10th August

* Appeal against Appellate Order No. 5 of 1891.

LAKSHMI NARASIMHA v. ATCHANNA.

1887, and the decree-holder obtained no permission to make a fresh application under Civil Procedure Code, s. 373. The District Munsif held that the above circumstance was no bar to the present application, which he accordingly granted. But the Subordinate Judge, on appeal, reversed his order on the authority of *Radha Charan* v. *Man Singh*(1).

The decree-holder preferred this appeal.

Ramachandra Rau Saheb for appellant.

Parthasaradhi Ayyangar for respondent.

JUDGMENT.—The ruling in *Radha Charan* v. *Man Singh*(1) has never been adopted as the correct view of the law in this Presidency, see *Ramanadan* v. *Periatambi*(2) or in Calcutta and Bombay, see *Wajihan alias Alijan* v. *Bishwanath Parshad*(3) and *Shankar Bisto Nadgir* v. *Narsinghrao Ramchandra*(4)—and we cannot follow it.

The order of the Subordinate Judge must be set aside and that of District Munsif restored. Appellant is entitled to his costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Subrahmania Ayyar.

1892. Jan. 11, 14, 15, 19.

AUGUSTINE AND OTHERS (DEFENDANTS), APPELLANTS,

v.

MEDLYCOTT AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, ss. 15, 539—Evidence Act, ss. 57, 87—Public charitable trust—District Court, jurisdiction of—Books of history.

A church at Palayur and the property appertaining to it were in the possession of certain of the yogakars or parishioners, who had been elected kaikars or church-wardens, but whose election had since been superseded in favour of three other persons who now sued to recover possession. The plaintiffs were Roman Catholics; and with the three persons above referred to were joined as plaintiffs the Vicar Apostolic, the Vicar appointed to the church by him, and two other persons representing the Roman Catholic yogakars. The defendants were Syro-Chaldean Christians, and with the two persons above referred to were joined the Chor Episcopa, the vicar appointed to the church by him, and four persons representing the other yogakars.

(1) I.L.R., 12 All., 392. (2) I.L.R., 6 Mad., 250. (3) I.L.R., 18 Cal., 462. (4) I.L.R., 11 Bom., 467.

* Appeal No. 13 of 1891.

AUGUSTINE v. MEDLYCOTT.

The plaint was framed under Civil Procedure Code, s. 539, and contained, besides a prayer for possession, prayers for a declaration that the church, &c., was held on trust for worship according to the faith and discipline of the Church of Rome, and for injunctions against the defendants. The suit was tried by the District Judge in whose Court it was instituted, although the defendants pleaded to his jurisdiction on the ground that Civil Procedure Code, s. 539, was inapplicable. He passed a decree for the plaintiffs, holding that the church, &c., was dedicated to the trust above stated, although it had been diverted from the purposes of that trust for a time. In coming to this conclusion, he referred to a Portuguese work dated 1606, "*India Orientalis Christiana*" published in 1794, and Hough's "*History of Christianity in India*" published in 1839:

Held, (1) that the suit not being one brought by beneficiaries against trustees, or for any of the purposes mentioned in Civil Procedure Code, s. 539, that section had no application;

(2) that, although the suit should accordingly have been brought in the Subordinate Court, the District Judge had jurisdiction to try it;

(3) that the District Judge was justified in referring to the books above mentioned;

(4) that the decree was right, on its appearing that the church, &c., had been held on the above trust from 1599 to 1882 with a doubtful interruption for one year, although the original trust may have been different.

APPEAL against the decree of A. Thompson, Acting District Judge of South Malabar, in original suit No. 1 of 1890.

Suit instituted with the consent of the Advocate-General under Civil Procedure Code, s. 359.

Plaintiff No. 1 was the Vicar Apostolic of Trichur, exercising as such authority over all Romo-Syrian churches (*i.e.*, Roman Catholic churches in which the Syrian rite is observed) within that vicariate; plaintiff No. 2 was the vicar of one of such churches situate at Palayur; plaintiffs Nos. 3 to 5 were the kaikars or wardens of that church; plaintiffs Nos. 6 and 7 were members of the yogam of the church, and they sued as representing all the yogakars or parishioners "remaining in obedience to the faith and discipline of the Church of Rome."

Defendant No. 1, who used the designation of Chor Episcopa, claimed authority over the Palayur church by virtue of his appointment by Bishop Mellus, described in the plaint as a schismatic from the Church of Rome, but stated by the defendants to be the lawfully constituted ecclesiastical authority to whom the Chaldean Syro-Christian community was subordinate in all spiritual matters. Defendant No. 2 was the vicar appointed under his authority. Defendants Nos. 3 and 4 had been elected kaikars by a meeting of the yogam in 1887 at the same time as

AUGUSTINE v. MEDLYCOTT.

plaintiff No. 6, and in October 1889 they had been declared by a magisterial order to be in possession together with him of the church and the property appertaining to it, and to be entitled to retain such possession until evicted by due course of law. The other defendants were members of the yogam of the church and were sued as representing all such yogakars as were not in obedience to the faith and discipline of the Church of Rome. The plaint contained the following paragraphs as to the history and constitution of the church:—

"The plaint church, together with all the property appertaining thereto as described in the schedules hereunto annexed, belongs to the yogakars, in trust, to use and cause to be used, the same for the worship of God in the communion and according to the faith and discipline of the Church of Rome, in obedience to the authority on that behalf ordained for the time being by His Holiness the Pope of Rome, and is included within the Vicariate Apostolic of Trichur.

"In or about the year 1599 the yogakars of the plaint church came into the communion of the Church of Rome; and from that time until the present, except for a short time hereinafter spoken of, the said church has ever been used for the worship of God in the communion and according to the faith and discipline of the Church of Rome in obedience to the Bishops or Vicars Apostolic or other authority for the time being appointed or sanctioned in that behalf by the Pope of Rome. In pursuance of such faith and discipline the vicar and clergy of the said church, except as is stated in the 6th paragraph herein, have ever been exclusively priests in communion with the said Church of Rome and appointed to the plaint church by the Bishops, Vicars Apostolic, or other authority aforesaid sanctioned in that behalf as aforesaid.

"For the more convenient management of the secular affairs of the plaint church and properties it has ever been, and still is, the custom of the said yogam, subject to confirmation by and under the authority of the said Bishops, Vicars Apostolic or other authority aforesaid periodically to elect out of their number certain men called kaikars for the purpose of such management. The 3rd to 5th plaintiffs were so elected as kaikars in the month of July 1889 in the place and stead of the 3rd and 4th defendants and 6th plaintiff formerly elected as aforesaid.

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"In or about the year 1874 the aforesaid Bishop Mellus came "to Malabar pretending to have been appointed by His Holiness "the Pope to be Metran over the Romo-Syrian churches in "Malabar. Deceived by the said Bishop Mellus, certain of the "yogakars of the plaint church, in disobedience to the authority "of His Holiness, and contrary to the faith and discipline of the "Church of Rome, in or about the year 1876, yielded them-"selves to the authority of the said Bishop Mellus, and so re-"mained until by decrees of the High Court of Madras given in "respect of certain other Romo-Syrian Churches in Malabar in "like case with the plaint church, it was declared that the said "Bishop Mellus had no authority over the said churches; where-"upon, in or about the month of September 1886, the yogakars "of the plaint church with the then kaikars and the second plain-"tiff, he then being the vicar of the said church, returned to their "allegiance to the Church of Rome by a submission made to the "Gubernador of Cranganore, who at that time was the local "ecclesiastical superior of the said church under the authority of "His said Holiness, and so remained until the 14th July 1889."

The prayers of the plaint were for declarations that the church was subject to the jurisdiction of the Vicar Apostolic of Trichur; that the yogam held the church, &c., on the trust mentioned in paragraph 3 of the plaint; that plaintiffs Nos. 3 to 5 were the duly appointed kaikars; there were also prayers for possession of the church, &c., and for injunctions against the defendants and their section of the yogam.

The defendants denied the right of the plaintiffs to the reliefs claimed, and alleged as to history and constitution of the church as follows:—

"The plaint church, together with all the property appertain-"ing thereto, belong, and have ever belonged from the date of its "foundation, exclusively to the Chaldean Syrian Christian com-"munity in Palayur, Orumanayur, Chavakad, Iringaprom, Guru-"vayur and other amsoms in British Malabar, and in Ariyannur "and Choovallur desoms in Choondapravirthi in the Cochin State; "have ever been devoted exclusively to the faith, and have re-"mained in the uninterrupted possession and control of the said "community. The said church and its properties have never at "any time belonged to the Church of Rome, and have never been

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"subject to the temporal or ecclesiastical jurisdiction of the Pope "of Rome or of any authority subordinate to the Pope of Rome. "The plaint church has ever since its foundation followed the "practice, ritual and communion of the Chaldean Church at "Babylon, and has been subject solely to the jurisdiction of the "Patriarch of Babylon in all spiritual matters. But the present "Patriarch of Babylon having been, contrary to custom, ap-"pointed to his office by the Pope of Rome, the said Chaldean "Syrian Christian community do not now hold themselves subject "to his spiritual authority.

"No person other than the said Chaldean Syrian Christian "community and their duly appointed kaikars has any voice in "the temporal concerns of the plaint church.

"The said community of Chaldean Syrian Christians assembled "in yogam elect from among their members annually, or at such "other intervals as they deem fit, three persons called kaikars to "manage the property of the church during their time of office "and to act subject to the directions of the said community in all "matters. The kaikars have never been elected subject to the "confirmaton of any spiritual authority, Roman Catholic or Chal-"dean Syrian.

"The defendants 3 and 4 and sixth plaintiff are the present "kaikars. The third defendant is the present senior or head "kaikar and, as such, in possession of all the title-deeds and "properties of the said church."

Further, the defence of limitation was raised, and it was pleaded that the suit should have been brought in the Subordinate Court and was wrongly brought under Civil Procedure Code, s. 539.

The District Judge held that the plaintiffs had established their allegations and passed a decree as prayed. In his judgment he referred (in paragraphs 8 and 9) to a Portuguese work by Fra Antonio de Goneca, published at Coimbra in 1606, to the *India Orientalis Christiana*, by Father Paulinus of Saint Bartholemew published in Rome in 1794, and to Hough's *History of Christianity in India*.

The defendants preferred this appeal.

Mr. *Norton* for appellants.

Mr. *Gover* for respondents.

JUDGMENT.—The first point taken before us is that the suit is not one within the scope of section 539 of the Civil Procedure

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Code, and hence will not lie in the District Court. The District Judge held that, though the suit was not one for any of the five kinds of relief specially described in that section, the relief sought for came under the words "such further *or other* relief as the nature of the case may require."

It appears to us that the suit is not of the class contemplated in section 539 at all. That section deals with suits brought by beneficiaries against trustees, or for any of the special purposes mentioned in section 539; whereas this suit is brought by persons claiming to be the *de jure* church-wardens entitled to possession of the building against their predecessors in office whose term has expired and who refused to surrender possession and have usurped possession of the church and become trespassers. Plaintiffs Nos. 1 and 2 on the one side and defendants Nos. 1 and 2 on the other are joined in the suit in order to obtain a declaration at the same time as to the purposes of the trust, as to which the defendants, members of the congregation, are not in accord with the plaintiffs.

We are of opinion, therefore, that the suit should have been brought in the Subordinate Court; but we do not think it necessary on that ground to reverse the decree and return the plaint for presentation to the proper Court. The District Court had undoubtedly jurisdiction to try the suit, and we agree with the view taken by the High Courts of Allahabad and Calcutta as to the effect of section 15 of the Civil Procedure Code—*Nidhi Lal* v. *Mazhar Husain*(1) and *Matra Mondal* v. *Hari Mohun Mullick*(2). In this case the suit has been fully tried on the merits by a Court which had jurisdiction to try it, and it would be manifestly unfair to direct an unnecessary re-trial on account of an irregularity not affecting the merits.

The next point urged is that all the defendants' witnesses were not examined. We find that issues were settled on 30th July 1890, and the suit was then posted for final hearing on 14th October. On 7th October the defendants applied for summonses for 17 witnesses, many of whom were resident in the Cochin State. The trial began on 14th October and continued for several days, but not till 24th October did the defendants ask for an adjournment on the ground that all their witnesses were

(1) I.L.R., 7 All., 220 (2) I.L.R., 17 Cal., 155.

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not present. It was not then stated that the summonses had not been issued, and there is nothing before us to show that they were not issued. The Judge rightly held that the defendants had been guilty of negligence and refused an adjournment. It is true that further time was asked for in September in order to obtain instructions and evidence from the Patriarch of Babylon, but this necessity (if real) does not excuse the defendants in neglecting to summon till too late witnesses who resided in their own immediate neighbourhood. Nor was the necessity for instructions from Babylon mentioned in the petition of 24th October.

Passing to the merits, it was next objected that the District Judge was not justified under sections 57 and 87 of the Evidence Act in referring to the works spoken of in paragraphs 8 and 9 of his judgment. In this contention also we are unable to agree. Of these works, the first was published more than 200 years *ante litem motam*, the second in 1839, and the third, *India Orientalis Christiana*, was published at Rome in 1794 and is of recognized historical authority. So far, therefore, as these books related to matters of public history, the Judge was justified in referring to them.

With reference to the general history of Christianity in Malabar we may also refer to Logan's *Malabar Manual*. Practically, however, there is no dispute as to the events which led to the Synod of Diamper in 1599, or to the fact that Archbishop Menezes in that year brought the Syrian churches in Malabar into subjugation to the Church of Rome. By decree VIII, session III of that synod the acknowledgment of the Patriarch of Babylon as supreme pastor was expressly forbidden under pain of excommunication. It is true no doubt as pointed out by the District Judge that after the synod several of the Syrian churches reverted to Nestorian doctrines and united themselves to what is known as the Jacobite church; but we may point out that the Jacobite Bishop sent out in 1653 (Mar Ignatius) was sent by the Patriarch of Antioch and not by the Patriarch of Babylon. It appears (*Manual*, p. 209) that the present community of Syrian Christians, not under allegiance to Rome, is at the present day under the Patriarch of Antioch, and we are not referred to any historical work which shows that there is any body of Christians now in Malabar rejecting allegiance to Rome which is under the jurisdiction of the Patriarch of Babylon. It is a significant fact

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that the defendants have never alleged that the Palayur church is under the Patriarch of Antioch, yet that prelate now represents those Nestorian doctrines which were held in Malabar anterior to the Synod of Diamper. It is remarkable that, while the defendants now claim that the trust should revert to the ancient faith, notwithstanding the lapse of time during which the authority of Rome has been impressed upon the trust, they do not claim to be subordinate to the only patriarch who now exercises spiritual jurisdiction in Malabar over congregations professing the Nestorian doctrine.

It was urged that the evidence to show that the Palayur church came under the jurisdiction of Rome at the Synod of Diamper was but meagre. The facts shown, if not many in number, are, however, significant, and there is absolutely no evidence on the other side to show that from 1599 to 1861 the Patriarch of Babylon exercised any jurisdiction over their church. In Hough's *History of Christianity in India*, Vol. II, page 314, published in 1839, reference is made to the arrival of two Carmelite monks on the Malabar Coast in 1657 after the martyrdom of Bishop Attala and to the dissatisfaction of the Jesuits and Portuguese at their arrival. The narrative tells of their arrival at Palayur, one of the parishes in the diocese of Angamale (a Roman Bishopric), and that the cattanar (the rector of the place) concealed himself in order to avoid the unwelcome visitors. This certainly tends to show that at that time Palayur was under the jurisdiction of the Latin Bishops.

There can, we think, be no doubt that the Palayur church, entered in the list of Catholic churches at page 267 of *India Orientalis Christiana*, is the church now in dispute. Palayur is supposed to be one of the most ancient churches in Malabar, and it can hardly be supposed its name would be omitted in such a list. The mark affixed to the name shows that Palayur was one of the churches destroyed by fire by the army of Tippu Sultan.

It is scarcely possible that there can be stronger evidence as to what is really the faith and discipline of any church than the rituals in use in that church. Those in use at Palayur are the Syriac rituals prescribed for the use of the Malabar Romo-Syrian churches, and are printed at the Press of the Propaganda at Rome. Had the church not been Romo-Syrian, it is inconceivable such books would have been either supplied by the Propaganda or

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have been allowed to be used in the church by any of the metrans under a schismatic patriarch. It is not even suggested that from 1599 up to the present date any other ritual has been used. The oral evidence likewise points to the inference that up to the coming of Mar Thoma in 1861 the Palayur church was subject to the jurisdiction of the Roman Bishop of Virapoli.

It is admitted that Mar Thoma was sent by the Patriarch of Babylon in 1861, and that the Palayur church placed itself under him. Whether he came or professed to come with or without the sanction and authority of the Papal See there is no evidence to show; but his stay was short, and he left India in 1862. The defendants contend that after his departure the Palayur church remained under the authority of a metran appointed by the Patriarch of Babylon, while the plaintiffs assert that the church then submitted to the "Gubernador" of Cranganore.

A large number of documents were put forward as showing that the Gubernador exercised jurisdiction over the Palayur church subsequent to 1861 and up to the coming of Bishop Mellus in 1874. It is objected before us in appeal that these documents were not proved and that they were not produced at the right time. No such objections appear to have been taken in the Court below, and the Judge found that their genuineness was proved. A similar objection was taken in the Chittatur case and overruled—*Bishop Mellus* v. *the Vicar Apostolic of Malabar*(1). The documents unquestionably show that jurisdiction was exercised by the "Gubernador."

It may be noted as curious that the Palayur church did not on the departure of Mar Thoma again submit itself to the jurisdiction of the Bishop of Virapoli. In explanation, it is suggested that discipline was lax, and that so long as the churches did not place themselves under heretical bishops, the Roman authorities were not very particular which Latin Bishop was acknowledged. This explanation is by no means improbable. It was in 1861 that, in accordance with a concordat made between the Vatican and the King of Portugal, commissioners were sent out to define the jurisdiction of the Goanese prelates and the Vicars Apostolic under the control of the Propaganda. It was not, however, until 1887 that the whole of the Roman churches of the Syrian rite

(1) I.L.R., 2 Mad., 295.

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(Palayur included) were handed over to the Vicar Apostolic of Trichur by the Vicar-General of the Portuguese mission at Cranganore (*vide* exhibit T T.*)

It is then contended that, at any rate, since the arrival of the Bishop Mellus in 1874 the Palayur church has ceased to acknowledge the jurisdiction of the Pope of Rome, and has returned to the Syro-Chaldean faith as it existed previous to 1599. Upon a careful examination of the evidence, we are not prepared to hold that Bishop Mellus came to Malabar in the character of a bishop repudiating the supremacy of the See of Rome. The book marked C C C C † shows conclusively that in 1868 he was a Roman Catholic Bishop, and, as such, published a book which was printed at the Press of the Propaganda at Rome, of which the preface written by himself expressly asserted the supremacy of the Pope and denounced the Nestorian heresy to which he is now alleged to be an adherent. The first defendant admits that this book is now used in the schools under him.

Bishop Mellus was no doubt sent to Malabar by the Patriarch of Babylon. Exhibit D D D D is a certified translation of the Syriac letter of the Patriarch introducing him to the church at Trichur. Nothing can be clearer from that letter than that the patriarch himself at that time acknowledged the jurisdiction of the Roman See. It is quite clear that the real object which the patriarch had at heart was that the Romo-Syrian churches of Malabar should be exempted from the jurisdiction of the Latin Bishops and placed under a bishop of the Syro-Chaldaic rite. For that object he had twice visited Rome, and it is quite clear from what he says that it was not the supremacy of the Pope, but the supervision of the Propaganda which the Romo-Syrian church so strongly objected to. It is apparent from the letter itself that his petition to the Pope was unsuccessful, for he goes on to say that in his capacity of Patriarch of Babylon (no mention is made of the Pope's approval) he sends Bishop Mellus, though he anticipates he will meet with opposition from the Propaganda on his arrival in Malabar. Exhibit XVIII, ‡ which contains the

* A letter from the Vicar-General, Cranganore, to Bishop Medlycott, dated 24th January 1888.

† Directorium spirituale a Reverendissimo Domino Elia Joanne Mello auctum, printed at the Propaganda in Rome in 1868.

‡ Certified copy of the Proceedings of the Madras Government, Political Department, dated 16th October 1874.

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introduction given by the Patriarch to Her Majesty's Consul-General at Bagdad, and is forwarded to the Bombay Government, contains the same complaint against the tyranny of the Roman Propaganda, against which the protection of Her Majesty's Government is requested.

There is considerable evidence that on first arrival in Malabar Bishop Mellus professed to have come with the authority of the Pope. That authority was, however, soon questioned in a suit brought against him by the Vicar Apostolic of Malabar (*Bishop Mellus* v. *The Vicar Apostolic of Malabar*(1)) in which the bull which he professed to hold from the Pope was denounced as a forgery. The evidence leaves no doubt that in course of time he was excommunicated by the Pope and was *then* recalled by the Patriarch of Babylon. Before leaving Malabar he appointed the first defendant as Chor Episcopa, but there is nothing to show that this appointment was ever approved by the patriarch, and the validity of any appointment under such circumstances may well be questioned. Exhibit XXIII is the pastoral letter addressed by Bishop Mellus to his flock in 1882 on taking leave of them. It does not allude to the circumstances under which he was undoubtedly recalled, and contains no repudiation of the supremacy of the Pope, but contains an earnest appeal to remain faithful to the ancient Chaldean faith notwithstanding the interference of "foreigners."

The inference, therefore, to be drawn from this evidence is that the Palayur church in submitting originally to the authority of Bishop Mellus never intended to repudiate the supremacy of the Roman See. Dr. Mellus held himself out as long as he could as having come with the sanction of the Pope; when that illusion was dispelled, he set up the plea that the Patriarch of Babylon had the right to appoint him; but he was then recalled by the patriarch. On his departure the yogam and kaikars did no doubt submit themselves for a time to the authority of the first defendant, who now denies the supremacy of the Pope, though there is no evidence that he himself is an adherent to Nestorian doctrines.

That the vicar and the kaikars did again submit themselves to the Pope in 1886, and that Bishop Medlycott did visit and

(1) I.L.R., 2 Mad., 295.

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formally assume jurisdiction over the church there is no reason to doubt. But even had the first defendant held uninterrupted possession since 1882, that fact could make little difference. We have seen that from 1599 till 1882, with the doubtful interruption of one year (1861), the church had been held upon a trust for the worship of God according to the faith and discipline of the Church of Rome, and that being the case, the fact that the Palayur congregation prior to the Synod of Diamper in 1599 may have been Nestorian in doctrine is immaterial. The objects of the original trust, if different, have long since ceased to exist, and the profession for 290 years of the faith, doctrine and discipline of the Roman Catholic Church according to the Romo-Syrian ritual is amply sufficient to impress a trust of that character upon the funds and property of the Palayur church. We have no doubt that the decision of the Judge upon this main contention is right.

Objection was then taken that plaintiffs Nos. 3 and 5 were not duly elected as kaikars. The point does not appear to have been strongly pressed in the Lower Court, and we do not think there is sufficient reason to hold there was any technical informality in summoning the meeting. The plaintiffs, at all events, represent that part of the yogam who are desirous of rescuing the property of the church from men who are seeking to divert the use of the trust to purposes alien to its proper object, and are on that ground entitled to succeed.

We can see no reasonable objection to the form of the decree. The language certainly would not preclude the See of Rome from transferring spiritual or ecclesiastical jurisdiction to any other Vicar Apostolic, and it is quite clear that those members of the yogam who repudiate the objects of the trust have for the time disqualified themselves from the exercise of the right to take part in its management.

The appeal must, therefore, be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Handley.

1891 November 3.

GOMAJI (PLAINTIFF), APPELLANT,

v.

SUBBARAYAPPA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 58—Unregistered mortgage—Personal covenant to pay.

An unregistered mortgage-deed executed in 1885 contained a personal covenant by the mortgagors to pay the debt secured thereby:

Held, the mortgagee was entitled to sue on the covenant and obtain a personal decree against the mortgagors.

SECOND APPEAL against the decree of W. C. Holmes, Acting District Judge of Bellary, in appeal suit No. 42 of 1890, reversing the decree of W. Gopalachariar, District Munsif of Bellary, in original suit No. 115 of 1888.

Suit to recover principal and interest due on the following instrument executed by defendants Nos. 1 and 2 in favor of the plaintiff and not registered :—

"Mortgage-deed executed jointly by Subbarayappa, son of "Bysani Narayanappa, and Seenappa, son of Polepally Dasappa, "Komaties, living by trade, and residing in Brucepettah, Bellary, "to Gomaji Garu, son of Marwadi Fitajee, living by trade, and "residing in Brucepettah, Bellary, on the 3rd of Aswija Bahula "of the year Parthiva, corresponding to 26th October 1885, is as "follows :—

"After deducting the cash paid on settling to-day the account "of principal and also interest relating to the pro-note written and "executed in your name, by both of us together, on the 13th "Chaitra Sudham of the year Tharana, we having become indebted "in a remainder of Rs. 600, in words six hundred only, have "executed this deed in your name. Therefore, the description of "the immoveable property—

* * * *

"Having mortgaged as security for your amount three "immoveable properties in all, we have made over to you the

* Second Appeal No. 1197 of 1890.

GOMAJI v. SUBBARAYAPPA.

"sale and mortgage-deed connected therewith. Having settled "interest for the said amount at Rs. 1½ per cent. per mensem, "of us he that is present will pay the principal and also interest "—your principal and interest—on your demand. When you so "demand, if there should be any obstruction on your part, with-"out paying the principal and interest, you are at liberty to sell "according to your pleasure the mortgaged properties and to "receive the proceeds, and to recover the remaining debt-amount "from our other real and personal properties and from us. Till "your amount is liquidated, we will have no right to make a gift "of, or to sell or to mortgage, &c., the mortgaged properties. If "payment of any kind whatever not mentioned in this deed "should be pleaded as having been made, a Court of Justice "should not accept our word."

The District Munsif passed a personal decree for the money claimed, holding that such a decree was not precluded by the want of registration, on a consideration of *Striseshathri Ayyengar* v. *Sankara Ayen*(1), *Venkatrayudu* v. *Papi*(2), *Mattongeney Dossee* v. *Ramnarain Sadkhan*(3), and *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan*(4).

The District Judge, on appeal, reversed this decree.

The plaintiff preferred this second appeal.

Rama Rau for appellant.

Parthasaradhi Ayyangar and *Rangachariar* for respondent.

JUDGMENT.—In our opinion, the judgment of the District Judge is clearly wrong. By the terms of the instrument sued on, the defendants covenanted to pay the money, and, at the same time, the plaintiff was empowered to sell the property and realize the amount. Had the document been registered, it would have been competent to the plaintiff either to proceed on the covenant or to sue for sale of the mortgaged property. The decision in *Mattongeney Dossee* v. *Ramnarain Sadkhan*(3) is distinguishable.

We must reverse the decree of the District Judge and remand the appeal for disposal on the merits. The respondents must pay the costs of this appeal. Other costs to be provided for in the revised decree.

(1) 7 M.H.C.R., 296.
(2) I.L.R., 8 Mad., 182.
(3) I.L.R., 4 Cal., 83.
(4) I.L.R., 9 Cal., 520.

APPELLATE CIVIL.

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

1891. Sept. 22. Oct. 5.

NARAYANA (DEFENDANT No. 4), APPELLANT,

v.

SHANKUNNI AND OTHERS (PLAINTIFFS AND DEFENDANTS Nos. 1 TO 3), RESPONDENTS.*

Specific Relief Act—Act I of 1877, *s.* 42—*Declaration—Consequential relief—Civil Procedure Code, s.* 53—*Amendment of plaint.*

A karar was executed by members of two Malabar tarwads, by which the tarwad of the plaintiffs and defendants Nos. 1 and 2 was amalgamated with that of which defendant No. 3 was a karnavan; part of the property of the plaintiffs' branch was in the possession of defendants Nos. 1 and 3, and part of it was held under demises from defendant No. 3.

The plaintiffs sued for a declaration of their title to this property and for a declaration that the karar was not binding on them. An issue was framed on the question whether the suit was maintainable for want of a prayer for all relief consequential on these declarations:

Held, (1) that the suit was not maintainable for want of a prayer for possession of the lands under demise;

(2) that the plaintiffs should not be permitted on appeal to amend the plaint on appeal by the addition of such a prayer.

APPEAL against the degree of E. K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 9 of 1887.

The plaintiffs alleged that they together with defendants Nos. 1 and 2 constituted the Vadakampat tarwad, plaintiff No. 1 being the present karnavan; that by a karar, now claimed to be invalid, executed by defendants Nos. 1 and 2 and representatives of the other defendants' tarwad, the two tarwads were amalgamated; that of the property of the plaintiffs' tarwad, the tarwad house was in the possession of defendant No. 3 as karnavan of the defendants' tarwad as per schedule B, and certain land in that of tenants to whom it had been demised by defendant No. 3 as per schedule A to the plaint. The prayer was for a decree declaring (1) that the karar was invalid as against the plaintiffs, and that the defendants, other than defendants Nos. 1 and 2, had no right to the property above referred to or to the rents thereof, but that the same was

* Appeal No. 149 of 1888.

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vested in the plaintiffs' tarward; (2) showing the defendants' claim upon, and possession of the tarwad house specified in schedule B and directing the defendants Nos. 3 to 17 to restore it to the plaintiffs; (3) ordering that the defendants Nos. 3 to 17 do deliver to the first plaintiff all the subsidiary deeds and kychits in respect of the lands mentioned in schedule A; (4) ordering that the defendants Nos. 3 to 17 do pay costs with interest; (5) and by granting such other reliefs as to the Court seems fit.

Issues were framed raising the questions among others, "whether the plaintiffs are entitled to a decree as prayed for?" and "are the plaintiffs bound to ask for consequential relief under the "circumstances mentioned?"

The Subordinate Judge made the declarations prayed for and decreed that defendant No. 3 surrender to the plaintiffs the house mentioned in schedule B and the title-deeds of the properties mentioned in schedule A.

The defendants preferred this appeal on the following among other grounds:—

"The plaintiffs are not entitled to a declaratory degree so far as the properties in A are concerned. They ought to have prayed for consequential relief or possession."

Sankaran Nayar and *Ryru Nambiar* for appellants.

Rama Rau for respondents.

JUDGMENT.—The only question which it is necessary for us to determine is whether the suit can in its present form be maintained under section 42 of the Specific Relief Act. The plaint contains no prayer for possession of the properties mentioned in schedule A, though the right which it is sought to establish is the right to set aside the karar and the amalgamation effected thereby of the plaintiffs' branch and that of the defendants Nos. 3—17 into a single tarwad, and so to establish the exclusive title of the plaintiffs' branch to those properties.

The effect of the declaration must practically be to restore the plaintiffs' branch to the position which it occupied prior to the date of the karar, and to restore its exclusive possession and title. The separate allotment and possession to which they claim to be entitled is clearly a consequential relief within the meaning of section 42. There is also a distinct averment in the plaint that plaintiff No. 1 is the lawful karnavan of his branch, and a decree awarding possession of a house and title-deeds to him

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in that capacity has also been claimed and obtained. It is no doubt true that most of the properties mentioned in schedule A are stated to be in the possession of tenants, but we observe that they are held under demises granted by defendants Nos. 1 and 3 in accordance with the stipulations contained in the karar, and the possession of the tenants can only be regarded as the legal possession of the demisors, which is clearly adverse to the title which the plaintiffs desire to establish. The fact therefore that the tenants are in actual possession is no ground for the plaintiffs omitting to claim possession as against the defendants. Our attention is drawn to the fact that defendant No. 1, who is a member of the plaintiffs' branch, is in joint possession with defendant No. 3, who is the karnavan of the other branch, but such possession is distinct from the possession which the plaintiffs are entitled to claim. If the present suit were instituted by him, defendant No. 3, he would be bound to claim separate possession of the properties mentioned in schedule A in supersession of the arrangement embodied in exhibit I. We are therefore of opinion that plaintiffs are not entitled to maintain the present suit without praying for possession of the properties as consequential relief.

It is suggested for the respondents that we should allow them to amend the plaint by adding a prayer for possession. We observe that the objection that the suit was not maintainable under section 42 was taken in the Court below on 15th August 1887, and that the plaintiffs instead of asking for permission to amend the plaint contended that the suit was maintainable and took a fresh issue in regard to it. This is not a case in which the objection is taken for the first time in appeal, and we do not consider that the decisions in *Limba Bin Krishna* v. *Rama Bin Pimplu*(1), *Chomu* v. *Umma*(2), and in *Abdulkadar* v. *Mahomed*(3) are in point.

Nor is this a case in which the amendment was asked for and refused in the Court of First Instance. It is not therefore on all fours with *Tildesley* v. *Harper*(4), or *Kurtz* v. *Spence*(5). On the other hand, the objection was taken in the Court below, and the plaintiffs elected to take an issue and to allow the suit to proceed subject to the risk of an adverse decision. It is true that, as a

(1) I.L.R., 13 Bom., 548. (2) I.L.R., 14 Mad., 46. (3) See *ante*, p. 15.
(4) 10 Ch. D., 393. (5) 36 Ch. D., 770.

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general rule, the plaintiff may be permitted even on appeal to amend the plaint when he had framed it *bonâ fide* under a mistake or erroneous advice, and the other party could be adequately compensated by an award of costs, but it must be observed that when such amendment might possibly create a necessity for fresh written statements and for fresh issues and practically amount to a trial *de novo* from the commencement, it is much more convenient to leave the plaintiffs to the liberty of maintaining a suit for ejectment, so that the opposite party might in no way be prejudiced in his defence or harassed with a second trial of the same suit. Under the circumstances we do not consider that this is a case in which we should allow the suit to be changed into one for ejectment at this stage. We reverse the decree of the Subordinate Judge on the ground that a declaratory suit will not lie and dismiss the suit with costs.

APPELLATE CIVIL.

Before Mr. Justice Parker.

1891. November 12.

THANIKACHELLA AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

SHUDACHELLA (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, arts. 99, 132—Payment of entire rent by a co-tenant—Suit for contribution.

One of two persons, having a joint holding from a mittadar, paid the whole of the mittadar's dues for one year, and more than three years after the date of payment he sued the other for contribution:

Held, the payment did not create a charge on the land, and the suit was consequently barred by limitation.

APPEAL against the order of P. Narayanasami Ayyar, Subordinate Judge of Salem, in appeal suit No. 271 of 1889, reversing the decree of T. S. Krishna Ayyar, District Munsif of Krishnagiri, in original suit No. 133 of 1889, and remanding the suit for retrial.

The plaintiff and defendants were described in the plaint as owners each of one moiety of two permanent ijara villages held on

* Appeal against Appellate Order No. 134 of 1890.

THANIKACHELLA v. SHUDACHELLA.

patta in the plaintiff's name, on which a certain sum was annually payable to the mittadars; the plaintiff, it was alleged, paid the whole of this sum for one year on 29th August 1885, and he now sued for contribution.

The District Munsif held the suit was barred by limitation and dismissed the suit. The Subordinate Judge on appeal reversed the decree and remanded the suit, holding, on the authority of *Seshagiri* v. *Pichu*(1), that the payment constituted a charge and the period of time applicable was twelve years in the Limitation Act, sched. II, art. 132.

The defendants preferred this appeal.

Mr. *Norton* for appellants.

Sivasami Ayyar for respondent.

JUDGMENT.—The case quoted by the Subordinate Judge was under the Revenue Recovery Act, not under Act VIII of 1865.

The suit, however, is not for rent, but for contribution on account of a payment made by plaintiff in defendants' interest. There is no provision of law making such a claim a charge upon immoveable property. Article 99 of the Limitation Act applies.

The decree of the Subordinate Judge must be reversed and that of the District Munsif restored. The appellants are entitled to their costs in this and in the Lower Appellate Court.

APPELLATE CIVIL—FULL BENCH.

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

1891. October 13.

REFERENCE UNDER STAMP ACT, s. 50.*

Stamp Act—Act I of 1879, sched. I, art. 54—Release—One-anna adhesive stamp—Full stamp-duty leviable.

A release chargeable with four-annas stamp-duty was executed on paper bearing a one-anna adhesive receipt stamp:

Held, that in calculating the stamp due the one-anna stamp ought not to be taken into consideration.

Semble: A Collector is entitled under Stamp Act, 1879, s. 50, to refer to the

(1) I.L.R., 11 Mad., 452.

* Referred Case No. 4 of 1891.

REFERENCE UNDER STAMP ACT, s. 50.

High Court the decision of a Provincial Small Cause Court admitting in evidence an insufficiently stamped instrument on payment of duty and a penalty.

CASE referred under Act I of 1879, s. 50, by V. A. Brodie, Acting Collector of South Canara.

The case was stated as follows :—

"A document on plain paper purporting to be a release in "respect of Rs. 28, and stamped with a one-anna adhesive receipt "stamp, was produced in Small Cause suit No. 28 of 1889 on the "file of the District Munsif of Karkal. Impounding the deed "under section 33 of Stamp Act, the Munsif admitted it in "evidence under section 34 after levying thereon annas 3 as "stamp duty and Rs. 5 as penalty.

"The amount for which the release was granted (viz. Rs. 28) "required a stamp of annas 4 under article 54 (*a*) and 13 of "schedule I; and in levying only annas 3 on account of duty "the Munsif appears to have taken into account the one-anna "adhesive stamp which the instrument bore.

"As, however, the action of the Munsif in making allowance "for the one-anna adhesive stamp was opposed to the ruling of "the High Court in *Reference under Stamp Act*, s. 46(1), the matter "was brought to the notice of the District Judge. That officer, "while concurring in my opinion that the document ought to "have been treated as unstamped, declined to interfere on the "ground of want of jurisdiction, the Munsif's order admitting the "deed in evidence having been passed by him when sitting as a "Small Cause Court, from which no appeal lies to the District "Court, and references are to be made to the High Court, and "section 49 of the Stamp Act and section 617 of the Code of "Civil Procedure being inapplicable to the case.

"The case was then reported to the Board of Revenue, "which has held that, though under section 27 of the Provincial "Small Cause Courts' Act IX of 1887, a decree or order made by "a Court of Small Causes is final, the High Court having, under "section 25, power to call for the record of any case and to pass "such orders as it thinks fit, would be the Court to which re-"ferences would be made by the Provincial Small Cause Courts, "and that applications may be made to it under section 50 of the "Stamp Act."

(1) I.L.R., 8 Mad., 87.

REFERENCE UNDER STAMP ACT, s. 50.

Counsel were not instructed.

JUDGMENT.—Following the decision in *Reference under Stamp Act*, s. 46(1), we hold that in calculating the stamp due on the document, which is a release, the one-anna adhesive stamp ought not to have been taken into account.

APPELLATE CIVIL.

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

AMMAYEE (DEFENDANT), APPELLANT,

v.

YALUMALAI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1891. December 1. 1892. January 4. February 23.

Succession Act—Act X of 1865, s. 50, cl. 3—Attestation—Initials of witness.

Semble:—If the attesting witnesses affix their initials at the time of witnessing the execution of a will, it is a sufficient compliance with the terms of s. 50 of the Indian Succession Act.

APPEAL against the judgment of WILKINSON, J., sitting on the Original Side of the High Court in testamentary suit No. 2 of 1890.

In this case two persons, as executors appointed by the will of Cunneappa Chetty deceased, propounded and sought probate of a testamentary instrument signed by the deceased and attested by three witnesses, of whom only one signed his name in full and the others only wrote the initial letters of their names.

The question was raised whether the instrument propounded was duly attested with reference to the provisions of Indian Succession Act, s. 50, cl. 3, and, upon this question, the judgment was as follows :—

WILKINSON, J.—The preliminary question for determination in this case is whether the attesting witnesses signed the will. There were three attesting witnesses to the will, only one of whom has signed his name in full, the other two witnesses having merely affixed the initials of their names. The question is whether they have complied with the requirements of clause 3, section 50 of the

(1) I.L.R., 8 Mad., 87.

* Appeal No. 17 of 1890.

AMMAYEE v. YALUMALAI.

Indian Succession Act, which lays down that each of the witnesses must sign the will.

There can be no doubt that the legislature intended to draw a marked distinction between the action required of the testator and that required of the witness as regards the mode of their signature. The testator, the Act says, shall sign or shall affix his mark to the will, whereas each of the witnesses must sign the will. If the legislature had intended that witnesses should be permitted to affix their mark in place of their signature, there was no reason why the words "or affix their mark" should have been omitted in clause 3. I am of opinion that the cases *Fernandez* v. *Alves*(1) and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar*(2) were rightly decided, and that it is necessary for the validity of a will that the signature of at least two witnesses should appear on the will.

But that does not dispose of this case unless it be held that initials are not a signature, but are merely equivalent to a mark, and I am not prepared to go so far. In a case reported as *In the goods of Christian*(3), Sir H. Jenner Fust is reported to have said "The attesting witnesses to the codicil have affixed their initials only. I am not aware that the witnesses can be required to sign their names. I am of opinion that there is a sufficient subscription on their parts." In that case the same witnesses, who initialled the codicil, had signed the will, but that does not alter the case, as the codicil required subscription as much as the will itself. There is, therefore, distinct authority for holding that it is sufficient for an attesting witness to a will to affix his initials in place of his full signature, and I see no reason why I should not follow it. There is, it seems to me, considerable difference between a mark and the initials of the witness' name, and I am not prepared to assent to the argument of the learned Advocate-General that initials of a witness' name must be regarded in the same light as a mark. I concede that, in all probability, the reason why the legislature required that the witnesses should sign their names was to require strict proof of execution, but initials are quite capable of identification, and it would, I apprehend, amount to forgery if feigned initials were inserted. The law does not require witnesses to sign their names in full, and I am, therefore,

(1) I.L.R., 3 Bom., 382. (2) I.L.R., 11 Cal., 429. (3) 2, Robertson, p. 110.

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disposed to hold that, so far as the witnesses' signatures are concerned, the will before me is a valid will."

The rest of the judgment is not material for the purposes of this report.

This appeal came on for disposal before COLLINS, C.J., and HANDLEY, J., and the above question was again raised.

The *Acting Advocate-General* (Hon. Mr. *Wedderburn*), and Mr. *R. F. Grant* for appellant.

Mr. *W. Grant* for respondents.

JUDGMENT.—We have no doubt that the learned Judge in the Court below was right in holding that the will was rightly attested.

It is admitted by the learned Acting Advocate-General for appellant that, according to English Law, it is sufficient if the attesting witnesses affix either their marks or their initials. In the recent case of *Margary* v. *Robinson*(1) the testator, two days before his death, being paralysed and partly speechless, expressed his wishes by signs which were interpreted to a medical man who wrote them down on a card. The testator made a cross with a pencil in the middle of the writing on the card and the same medical man and another placed their initials on the back of the card. The will was held to be duly executed and attested. But it is contended that the Indian Succession Act, s. 50, which is made applicable to wills of Hindus by the Hindu Wills Act, by providing that the testator "shall sign or shall affix his mark to the will" and that the attesting witnesses "must sign the will," makes a distinction between the testator and attesting witnesses and precludes the latter from merely putting marks or initials in attesting the will. In support of this contention, *Fernandez* v. *Alves*(2) and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar*(3) are quoted. In these cases it was held that it was not sufficient for the attesting witnesses to put their marks to the will. We wish not to be understood as agreeing with these decisions. It seems to us open to argument that the principle of the English decisions as to what is a sufficient "subscribing" within the meaning of the English Act applies equally as to what is a sufficient "signing" by an attesting witness within the meaning of the Indian Act. But it is not necessary to decide that

(1) L.R., 12 P.D., 8. (2) I.L.R., 3 Bom., 382. (3) I.L.R., 11 Cal., 429.

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question in this case, for we agree with Mr. Justice Wilkinson that the Bombay and Calcutta decisions referred to do not apply to initials of an attesting witness, which stand on an entirely different footing from marks. The Act does not provide that the attesting witnesses should sign in full and we know of no authority for the proposition that initials are not a signature. On the contrary it has been held that they are equivalent to a signature to an acknowledgment under the Limitation Act. In our opinion, if the attesting witnesses affix their initials at the time of witnessing the execution of the will, it is a sufficient compliance with the terms of section 50 of the Indian Succession Act.

[After a consideration of the evidence, their Lordships recorded their finding as follows:—

Upon the whole we must hold that it is not proved that the deceased M. Chinna Cunneappa Chetty signed the will in question being fully aware of its contents and of the nature of what he was doing.]

Narasimhachari, attorney for appellant.

Branson & Brauson, attorneys for respondents.

APPELLATE CIVIL.

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

1892. January 11.

MADHAVI (PLAINTIFF), APPELLANT,

v.

KELU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 13—" Res judicata *" between defendants.*

The plaintiff, a junior member of a Malabar tarwad, alleged that the karnavan had assigned to her his kuikanom right over certain land, and that she had obtained a fresh demise from the jenmi and placed a tenant in possession. The tenant was dispossessed by the present karnavan, and in 1886 sued him and the plaintiff to recover possession of part of the land. That suit was dismissed on the ground that the above allegations of the plaintiff were unfounded. She now sued the present karnavan for possession of the entire land:

Held, that the claim of the plaintiff was *res judicata* as far as it related to the land in question in the former suit, but not as to the rest.

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* Second Appeal No. 812 of 1890.

MADHAVI v. KELU.

SECOND APPEAL against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 747 of 1889, affirming the decree of A. Chatu Nambiyar, District Munsif of Nadapuram, in original suit No. 257 of 1889.

Suit to recover possession of three parambas. The plaintiff and defendants Nos. 1 and 2 were members of the same tarwad, of which defendant No. 1 was the karnavan, and it was alleged in the plaint that the land in question had been demised by the jenmi to a previous karnavan of the tarwad on kuikanom tenure in 1861, and that in 1885 the plaintiff, to whom the karnavan had assigned his rights, obtained a fresh lease of the land and sub-leased it to one Kunhamed, whose possession was subsequently disturbed by Sankaran Adiodi, the new karnavan of the plaintiff's tarwad. It appeared that Kunhamed had sued the last-mentioned karnavan and the present plaintiff in original suit No. 506 of 1886 on the file of the District Munsif of Nadapuram to recover possession of two of the parambas in question. In that suit the karnavan denied the right of the present plaintiff to the land, alleging that there had been no assignment and no lease to her in 1885, and on appeal this contention prevailed and the suit was dismissed. It was now pleaded that the plaintiff's claim was *res judicata*. This plea prevailed in both the lower Courts.

The plaintiff preferred this second appeal.

Sankaran Nayar and *Ryru Nambiar* for appellant.

Sankara Menon, for respondents.

JUDGMENT.—It is argued for appellant that the suit is not barred by *res judicata* because the plaintiff in the former suit was a tenant of present plaintiff, and present plaintiff was only a formal party (second defendant) in that suit, and *Brojo Behari Mitter* v. *Kedar Nath Mozumdar*(1) is quoted in support of this contention. That case certainly does seem to support the appellant's arguments, but the decision in *Venkayya* v. *Narasamma*(2), not dissented from in *Chandu* v. *Kunhamed*(3), is a direct authority for the proposition that a matter may be *res judicata* in a subsequent suit, although the parties in that suit, between whom the matter was decided, were arrayed as co-defendants in the former suit and not as plaintiff and defendant, if the matter in dispute in the second suit formed the subject of active controversy between the co-

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(1) I.L.R., 12 Cal., 580. (2) I.L.R., 11 Mad., 204. (3) I.L.R., 14 Mad., 324.

MADHAVI v. KELU.

defendants in the former suit. There can be no question that in the former suit and the present case the question whether the land in dispute was the property of the tarwad of the present plaintiff, then the second defendant, was the subject of active controversy between the present plaintiff and the then karnavan of the tarwad. The present plaintiff's title was put forward by the then plaintiff and actively supported by the present plaintiff. This case comes, therefore, within the principle laid down in *Chandu* v. *Kunhamed*(1) and we must follow the decision of this Court in preference to that of the High Court of Calcutta.

Lastly it is argued for appellant that the plea of *res judicata* applies only to item 2 in the present suit, as the remaining two items were not in dispute in the former suit. It appears that there were only two parambas in question in the former suit, while in this there are three, and the appellant's vakil states that one of the parambas in the former suit is not in question in this. The respondent's vakil can give us no information on this point, and we must, therefore, hold that the whole suit is not shown to be barred by *res judicata* and reverse the decrees of the lower Courts and remand the appeal for decision on the merits with reference to the foregoing observations.

Costs of this appeal to be dealt with in the revised decree.

It has also been argued that the question of *res judicata* could not be decided by the judgment in the former case without the decree, which was not produced. No doubt the decree ought to have been produced, and we direct the District Judge to receive it in evidence at the further hearing of the appeal.

(1) I.L.R., 14 Mad., 324.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

1891. Nov. 3, 11.

SHANGARA (PLAINTIFF), APPELLANT,

v.

KRISHNAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 13—"Res judicata"—*Suit by benamidar.*

In a suit to recover a parcel of land, the plaintiff's case was that it had been purchased by him *benami* in the name of his brother, who had sued the present defendants to obtain possession in 1887, but had been negligent in the conduct of the suit which was consequently dismissed. It was found that there had been no negligence in the conduct of the suit, and that it had been instituted with the plaintiff's knowledge:

Held, that the plaintiff was bound by the decree in the former suit, and could not recover on his secret title.

SECOND APPEAL against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 263 of 1890, affirming the decree of A. Venkataramana Pai, District Munsif of Tellicherry, in original suit No. 166 of 1889.

Suit to recover possession of land. The plaintiff's case was that he had obtained a conveyance of the land in the name of his brother, defendant No. 1, whom he placed in management of it; that defendant No. 1 leased it to defendant No. 2 and subsequently brought original suit No. 610 of 1887 against defendant No. 2 and defendant No. 3, who claimed to be the jenmi to recover possession; that that suit was not proceeded with due diligence and was consequently dismissed.

The District Munsif held that there was no negligence in the conduct of the previous suit and that the present claim was *res judicata* and dismissed the suit. The District Judge on appeal upheld these findings, distinguishing as to the latter point *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury*(1) and *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar*(2), and affirmed the decree of the District Munsif.

* Second Appeal No. 1338 of 1890.

(1) I.L.R., 16 Cal., 355. (2) I.L.R., 16 Cal., 364.

SHANGARA v. KRISHNAN.

The plaintiff preferred this second appeal.

Sankaran Nayar for appellant.

Ryru Nambiar for respondents.

JUDGMENT.—Original suit No. 610 of 1887 was instituted by the defendant No. 1, the plaintiff's brother, who is alleged by the plaintiff to have been his agent, the property which defendant No. 1 sought to recover in the above suit having been purchased in his name *benami* for the plaintiff. The question is whether the plaintiff is bound by the decision in that case. The presumption is that the *benamidar* instituted the suit with the authority and consent of the true owner *Gopi Nath Chobey* v. *Bhugwat Pershad*(1); and the lower Courts have found upon the evidence that the suit was instituted with the knowledge of the plaintiff. He is therefore as much bound by the decree as if he had himself instituted the suit, and the present suit is barred as being *res judicata*. The plaintiff stood by and permitted his undivided brother to sue for possession. There was nothing to put the person in possession upon inquiry as to who was the real owner, and it is too late now for plaintiff to be allowed to recover on his secret title. The second appeal is dismissed with costs.

APPELLATE CIVIL.

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

1891. October 19, 20. November 24.

SHAN MAUN MULL AND ANOTHER (REPRESENTATIVES OF DEFENDANT No. 2), APPELLANTS,

v.

MADRAS BUILDING COMPANY (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, *ss.* 3, 78, 101—*Priority of mortgages—Gross negligence—Extinguishment of charges—Registration Act—Act III of* 1877, *ss.* 17 (*d*), 48—*Notice by registration.*

In a suit for the declaration of the priorities of mortgages and for foreclosure, it appeared that the mortgage premises had been purchased by the mortgagor from the second defendant and others in 1878, under a conveyance containing a covenant that they were free from incumbrances, and the mortgagor then received *inter alia*

(1) I.L.R., 10 Cal., 697.

* Appeal No. 43 of 1890.

SHAN MAUN MULL v. MADRAS BUILDING COMPANY

a collector's certificate, which was recited in another title-deed also handed over to her. The premises were mortgaged to defendant No. 2, who was an experienced sowcar in 1879 and to the plaintiff company in 1883 and again in 1884 and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff company on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff company and defendant No. 2 had no notice at the respective dates of their mortgages and conveyance of any previous incumbrance. The plaintiff company received the title-deeds of the estate from the mortgagor (but not the Collector's certificate) on the execution of the mortgage of 1883; the second defendant alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that before the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody:

Held, (1) that the plaintiff company were not affected with constructive notice of the mortgage of the second defendant by reason of its registration or of their failure to search the registry or to inquire after the Collector's certificate.

(2) that the second defendant not having given a reasonable explanation of his conduct in leaving the title-deeds with the mortgagor four years after his mortgage, lost his priority by reason of his gross neglect under Transfer of Property Act, s. 78, apart from the circumstances raising a suspicion of fraud on his part.

Quære: whether the case might not have been decided against the second defendant on the ground that his mortgage was merged in the conveyance of 1886.

APPEAL against the judgment of Mr. Justice Shephard in *Madras Building Company* v. *Rowlandson* and another(1). That was a suit by the plaintiff company for a declaration of the priority of their two mortgages over a mortgage of December 1879, under which defendant No. 2 claimed to be interested in the same premises and for foreclosure. The mortgagor, Mrs. Anne Smith, was an insolvent, and defendant No. 1 was the Official Assignee of Madras and as such Assignee of her estate. The learned Judge passed a decree as prayed, and the executor of defendant No. 2 (deceased) preferred this appeal.

Mr. *E. Norton* and Mr. *R. F. Grant* for appellants.

As to registration we rely upon the Bombay authorities that registration is constructive notice to every one. If the Court adopts this view, there is no ground on which the plaintiffs can claim priority, see also *Gangadhara* v. *Sivarama*(2), *The Madras Hindu Union Bank* v. *C. Venkatrangiah*(3), *Damodara* v. *Somasundara*(4). As to "gross negligence," &c., in Transfer of Property Act, s. 78, see *The Madras Hindu Union Bank* v. *C. Venkatran-*

(1) I.L.R., 13 Mad., 383.
(2) I.L.R., 8 Mad., 246.
(3) I.L.R., 12 Mad., 424.
(4) I.L.R., 12 Mad., 429.

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giah(1), *Evans* v. *Bicknell*(2). The question is what was the intention with which the papers were handed over.

[*Collins*, C.J.—We ought to know what sort of person Mrs. Smith was.]

Yes, there was an oversight in that respect; neither side called her. Unless defendant No. 2 acted with a fraudulent intention to enable the mortgagor to act as she did, he should not lose his priority. *Northern Counties of England Fire Insurance Company* v. *Whipp*(3). His intention was not to defeat any one's right for none other has been created: it could not have been to enable Mrs. Smith to affect his title prejudicially.

[*Handley*, J.—There is no evidence where the documents were between 1878 and 1883.]

He said he never got them back after 1878. In *Damodara* v. *Somasundara*(4) again, the intention in parting with the deeds was to enable money to be raised on them. But mere finding of negligence would not disentitle defendant No. 2 to stand in his right as first incumbrancer; it is a question of his motive.

[*Collins*, C.J.—The deeds were only given back, he said, to remain in her possession to get the Collector's certificate.

Handley, J.—He was not to believe anything she said.]

Again, we claim that the plaintiffs were affected with notice, because the deeds handed to them referred to a Collector's certificate which was not handed to them and after which they should have inquired.

[*Handley*, J.—A stronger case is necessary to postpone a legal mortgage to an equitable, than an equitable to an equitable. As between holders of equal rights, it wants less than if the mortgage to be postponed is legal, and the other equitable.]

The Court will not impute fraud or dishonesty unless it is proved.

[*Handley*, J.—Fraud is not necessary under Transfer of Property Act, s. 78.]

A money lender would not leave documents with another for the purpose of invalidating his own title to weaken his own security, L.R., 26 Ch. D., 494-5. The explanation he got, as to procuring a certificate, in his view was reasonable and sufficient,

(1) I.L.R., 12 Mad., 424. (2) 6 Ves. Jun., 173.
(3) L.R., 26 Ch. D., 482. (4) I.L.R., 12 Mad., 429.

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and it is the reasonableness of the explanation in his view that is to be considered. Also he said he never had had occasion to apply for a certificate before.

[*Handley*, J.—Does that matter? He was in the habit of taking mortgages.

Collins, C.J.—He produced no books. What came of the money got from the plaintiff?]

That does not appear. The directors were guilty of gross negligence, and at least contributed to the mortgagor's fraud. They held no consultation together, and had no conversation with Mrs. Smith.

Story, § 105, *Churaman* v. *Balli*(1), *Fry* v. *Tapson*(2), *Lloyd's Banking Company* v. *Jones*(3), *Manners* v. *Mew*(4), *Union Bank of London* v. *Kent*(5), *Farrand* v. *Yorkshire Banking Company*(6) were also referred to.

Mr. *Michell* and Mr. *K. Brown* for respondents.

The second defendant by his fraud and gross neglect lost his priority, Transfer of Property Act, section 78. He knew that, by allowing the first defendant to keep the title-deeds, he enabled her to raise money on them, her possession of them raising the presumption that there was no subsisting mortgage on the property, and thus probably to pay off some of her debt to him on his mortgage. This was fraud on his part. In *Northern Counties of England Fire Insurance Company* v. *Whipp*(7) there was only carelessness without any element of fraud on the part of the Company (the prior mortgagees). But even gross negligence, without fraud, postpones the prior mortgagee under the Transfer of Property Act. In *The Madras Hindu Union Bank* v. *C. Venkatrangiah*(8) it was held that an element of fraud is not necessary; gross negligence is sufficient. It was also in that case held that the first mortgagees retaining some of the title-deeds, while parting with the principal ones, makes no difference. In *Damodara* v. *Somasundara*(9), Kernan, J. attached considerable weight to the fact that the mortgagor was in possession of the mortgaged property. The mortgagor was in possession in the present case. Kernan, J. also held, in that case, that the prior mortgagee was postponed through his gross negligence, notwithstanding the

(1) I.L.R., 9 All., 599. (2) L.R., 28 Ch. D., 268. (3) L.R., 29 Ch. D., 221.
(4) L.R., 29 Ch. D., 725. (5) L.R., 39 Ch. D., 238. (6) L.R., 40 Ch. D., 182.
(7) L.R., 26 Ch. D., 482. (8) I.L.R., 12 Mad., 424. (9) I.L.R., 12 Mad., 429.

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subsequent mortgagee was guilty of some negligence. See also *Hewitt* v. *Loosemore*(1), *National Provincial Bank of England* v. *Jackson*(2), *Briggs* v. *Jones*(3), *Mumford* v. *Stohwasser*(4), *Union Bank of London* v. *Kent*(5).

The burden lay on the second defendant to explain his conduct, from which the presumption of fraud arises, but this he failed to do. He ought to have cited the first defendant and the Collector of Madras; he has only called his gumastah. The second defendant is estopped by his conduct from denying the plaintiff's claim: *Mayor, &c., of Merchants of the Staple of England* v. *Governor and Company of Bank of England*(6), Evidence Act, section 119.

The view taken by the Bombay High Court in *Lakshmandas Sarupchand* v. *Dasrat*(7), and the cases referred to in the judgment in that case that registration amounts to notice, has not been adopted by the Madras High Court. In *Gangadhara* v. *Sivarama*(8), Turner, C.J. said: "It has not as yet been held in this Court that registration is notice." The observation in the judgment in the *Madras Hindu Union Bank* v. *C. Venkatarangiah*(9) that "registration would be notice" was *obiter dictum*. If the legislature had intended that registration should operate as notice, it would not have left such an important effect unexpressed in the Acts. In the Yorkshire Registration Act (47 & 48 Vic., c. 54) there is a section(10) expressly making registration under the Act to be notice. When there is fraud or gross negligence, non-registration will not avail against the effect of such fraud or gross negligence, *Kettlewell* v. *Watson*(11). Section 78 of the Transfer of Property Act contains no exception of the case of a prior mortgage which has been registered, although the legislature had before them the decision in *Lakshmandas Sarupchand* v. *Dasrat*(12) which was prior to the passing of that Act.

The second defendant's mortgage of 1879 was merged in the sale to him of 1886, and thereby extinguished. The question as to merger depends on the question what was the intention of the party paying off the prior charge? Did he intend to keep it alive or not? *Gangadhara* v. *Sivarama*(8), *Mohesh Lal* v. *Mohant Bawan Das*(13),

(1) 9 Hare, 449. (2) L.R., 33 Ch. D., 1. (3) L.R., 10 Eq., 92.
(4) L.R., 18 Eq., 556. (5) L.R., 39 Ch. D., 238. (6) L.R., 21 Q.B.D., 160.
(7) I.L.R., 6 Bom., 168. (8) I.L.R., 8 Mad., 246. (9) I.L.R., 12 Mad, 424.
(10) 5. (11) L.R., 26 Ch. D., 501. (12) I.L.R., 6 Bom., 168.
(13) I.L.R., 9 Cal., 961.

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Gokaldas Gopaldas v. *Puranmal Premsukhdas*(1), in which it was held that the doctrine laid down by the Court of Chancery in *Toulmin* v. *Steere*(2) was not to be applied to cases in India, even apart from the provisions of the Transfer of Property Act. In *Gokul Das Gopal Das* v. *Rambux Senchand* (3), the first mortgage was held to have been kept alive, because the third mortgage had notice of the second mortgage, and therefore an intention to keep alive the first was presumed. In the present case, the second defendant has stated in his deposition that when he made the purchase in 1886, he did not know of the mortgage to the plaintiff. He cannot therefore be held to have intended to keep alive his mortgage.

Mr. *E. Norton* in reply.

JUDGMENT.—It is an admitted fact that the three principal title-deeds relating to the property in question in this suit, which should have been in the possession of the late second defendant as mortgagee under a deed of mortgage from Mrs. Annie Smith of the 5th December 1879, were in September 1883 in the possession of the mortgagor, who was thereby enabled to obtain a loan of Rs. 10,000 from the plaintiff company on executing to them a mortgage of the property in question dated 15th October 1883, and subsequently to obtain a further sum of Rs. 500 by way of further charge on the same property. The explanation which the second defendant gave of the title-deeds being out of his possession was that he was in possession of them in 1878, having obtained them on the occasion of taking a prior mortgage from Mrs. A. Smith, but gave them up to her in that year to enable her to obtain a new Collector's certificate in her name, that such new Collector's certificate was issued in May 1878 and handed to him, but he did not receive back the title-deeds from Mrs. Smith, and on asking her for them was told that they were retained by the Collector, with which answer he was satisfied and took no further steps to obtain the title-deeds. We understand from the judgment that the learned Judge who tried the case did not believe this explanation and we see no reason whatever to differ from him. It is possible that the first part of the story is true and that the title-deeds were given up by the second defendant to Mrs. Smith to enable her to get the new Collector's certificate, but we agree with the learned Judge that it is incredible that the second defendant,

(1) I.L.R., 10 Cal., 1035. (2) 3 Mer., 210. (3) L.R., 11 I.A., 126.

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a sowcar of experience, who, on his own admission, had had a good deal to do with mortgages and who is well known in this Court as having been concerned in much litigation connected with mortgage transactions, could have believed that it was the practice for the Collector to retain possession of title-deeds handed to him on the occasion of a new certificate being applied for—not to retain them temporarily, but to keep them altogether—and that he should have believed this extraordinary statement merely on the word of Mrs. Smith and should never have made inquiries as to its truth at the Collector's office. This part of the second defendant's story rests only upon the evidence of himself and of his relative and agent Hunsraj, and we think the learned Judge was amply justified in rejecting it as incredible.

The case is therefore one of a first mortgagee, who allows the title-deeds, nearly 4 years after his mortgage, to be in the possession of the mortgagor and gives no reasonable explanation of their being so in her possession, and the question is whether he is on that account to be postponed to the second mortgagee, the plaintiff company. The law under which this question has to be decided is unquestionably section 78 of the Transfer of Property Act, for the inducing the plaintiff company to advance money on the security of the property in question took place after the Act came into force. That the allowing the title-deeds to be in the hands or at the disposal of the mortgagee nearly 4 years after the date of his mortgage was gross neglect on the part of the second defendant in the ordinary meaning of the words can hardly be doubted. We think it would be so even if his explanation were believed and *a fortiori* when it is not believed. But it is argued that the words "gross neglect" in section 78 of the Act must be understood in the limited sense in which they are used in the English decisions on the subject, viz., as meaning such gross neglect as is evidence of fraud or complicity in fraud. No doubt the tendency of the English decisions and especially since the case of the *Northern Counties of England Fire Insurance Company* v. *Whipp*(1), where the previous cases were the classified and summarized, has been to refuse to postpone the owner of the prior legal estate to a subsequent equitable incumbrancer merely on the ground of gross negligence unaccompanied by any element of fraud. We are

(1) L.R., 26 Ch. D., 482.

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not prepared however to hold that the words "gross neglect" in section 78 of the Transfer of Property Act must necessarily be read by the light of the English decisions. On the contrary the language of the section "where through the fraud, misrepresentation or gross neglect, &c." seems to us to indicate an intention to make gross neglect of itself and apart from fraud a reason for postponement of the prior mortgagee and this view is strengthened by the use of the word "misrepresentation," which is not necessarily fraudulent misrepresentation. The framers of the Indian Act must have considered the English decisions prior to the *Northern Counties of England Fire Insurance Company* v. *Whipp*(1), and if they had wished to limit the application of the words "gross neglect" to cases where there was an element of fraud could have done so by appropriate words. And it is in our opinion strictly in accordance with the principles of equity that a person who, by his gross neglect, enables another to commit a fraud shall suffer for that fraud. We should therefore hold that, under section 78 of the Transfer of Property Act, apart from the question of fraud, the second defendant having been guilty of gross neglect in allowing the title-deeds to be out of his possession and thereby allowing the plaintiff company to be induced to advance money on the security of the mortgaged property should be postponed to the plaintiff's mortgage.

It may be noted that such was the view of the law taken by the Madras High Court before the passing of the Transfer of Property Act in *Somasundra Tambiran* v. *Sakkarai Pattan*(2). In that case, after quoting some Sudder Court decisions on the subject and commenting on the English cases and in particular the then recent case of *Thorpe* v. *Holdsworth*(3), the learned Judges quoting the words from that case—"The mere possession of the title-deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default on the part of the first mortgagee to have this effect," observe:—"We consider this to be a just and reasonable rule to be applied to this country. The non-possession of the title-deeds by the first mortgagee is a circumstance which certainly calls for explanation on his part, but it may be explained; and if he can satisfy the Court that the absence of the title-deeds was reasonably

(1) L.R., 26 Ch. D., 482. (2) 4 M.H.C.R., 369. (3) 38 L. J. Ch., 194.

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accounted for to him, at the time when he obtained his mortgage, or that he was subsequently induced to part with them upon such grounds and under such circumstances as to exonerate him from any serious imputation of negligence, he ought not to lose his priority, because the mortgagor may afterwards have dishonestly handed over the title-deeds to a second mortgagee." The decisions upon section 78 of the Transfer of Property Act in *The Madras Hindu Union Bank* v. *C. Venkatrangiah*(1), *Damodara* v. *Somasundara*(2) adopt the same principle though they are professedly based upon the English decisions.

But even on the principle of the English decisions we agree with the learned Judge that second defendant should be postponed. The case of *Hewitt* v. *Loosemore*(3) quoted in the judgment and which has not been dissented from in later cases is directly in point. There it was held that the Court will not impute fraud or gross and wilful negligence to the prior mortgagee if he has *bonâ fide* inquired for the title-deeds and a reasonable excuse has been given for their non-delivery, but otherwise will impute fraud or gross and wilful negligence. Here on the finding of the learned Judge in which we concur there was no *bonâ fide* inquiry for the title-deeds or reasonable excuse for their non-production, and the Court therefore will impute fraud, or gross and wilful negligence which is evidence of fraud, to the second defendant and will therefore postpone him to plaintiff. It is argued for appellant that the circumstances of the case negative fraud on the part of the second defendant, for it could not have been to his advantage that the title-deeds should be out of his possession. As to this it must be said that we have very little evidence as the exact nature of the pecuniary transactions between the second defendant and Mrs. Smith; and that little only the statements of himself and his agent. He admitted that he had other money dealings with her besides the mortgage in question. We know from the documents that he advanced money on mortgage of this very property to former owners of it and joined them in conveying it to Mrs. Smith in January 1878. According to his own story, he immediately obtained a mortgage of the property from Mrs. Smith in February 1878. Then he takes the mortgage in December 1879 and subsequently sues Mrs. Smith

(1) I.L.R., 12 Mad., 424. (2) I.L.R., 12 Mad., 429. (3) 9 Hare, 449.

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on this mortgage and withdraws the suit on her selling the property to him and she conveys it to him by deed of 19th August 1886. Even then he does not profess to have made any inquiry about the title-deeds, for he says he first knew of the mortgage to the plaintiff company at the end of 1887. And this, although the conveyance to him by Mrs. Smith, contains the very unusual covenant on her part that she had delivered to him "all the title-deeds and other muniments of title in anywise relating or appertaining to the said premises." Mrs. Smith filed her petition and schedule in the Insolvent Court in February 1888. All these circumstances combined with the unexplained absence of the title-deeds from the second defendant's hands do in our opinion raise a strong suspicion of fraud or complicity with fraud on the part of the second defendant such as would be sufficient to justify his being postponed to the plaintiff's mortgage even on the principle of the latest English cases.

This is of course assuming that the plaintiff company had no notice of the second defendant's mortgage. It is not alleged that they had actual notice, but it is argued that the second defendant's mortgage being registered and registration being legal notice, they must be taken to have had notice. In support of the contention that registration is legal notice, we are referred to the cases decided by the High Court of Bombay and particularly to the Full Bench decision in *Lakshmandas Sarupchand* v. *Dasrat*(1), where the question was fully considered and it was declared that in Bombay the Courts had adopted the rule which prevails in America, and had held that registration does amount to notice to all subsequent purchasers and mortgagees of the same property. In the English and Irish Courts, as admitted by the learned Judges of the Bombay High Court in the above case, the current of decisions has been the other way, though with an occasional expression of dissent from the principle by some of the Judges. As far as we know the High Courts of the other presidencies have not followed the High Court of Bombay in holding that registration is notice. In *Gangadhara* v. *Sivarama*(2), Turner, C. J. observed:—"It has not as yet been held in this Court that registration is notice." Under these circumstances we prefer to follow the English and Irish decisions and to hold that registra-

(1) I.L.R., 6 Bom., 168. (2) I.L.R., 8 Mad., 246.

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tion is not of itself notice to subsequent purchasers and mortgagees. To hold otherwise might have the effect of seriously disturbing titles created upon the understanding that the law here was the law of the English and Irish Courts. Upon the abstract question of the comparative expediency of the one rule or the other we say nothing. Much is to be said on both sides. It is for the legislature if it considers that it is expedient to make notice one of the effects of registration to so enact in express words, as is done in the latest Yorkshire Registration Act 47 and 48 Vict., Cap. 54. The Indian legislature must have been aware of the conflict between the English and Irish decisions and those of the Bombay High Court upon the subject, and yet in laying down what shall be the effect of registration and non-registration they have abstained from declaring that notice to subsequent purchasers and mortgagees shall be one of the effects of registration. We think it is not the province of the Courts to do that which the legislature has abstained from doing. In the judgment in *The Madras Hindu Union Bank* v. *C. Vênkatrangiah*(1) the words occur "Registration would be notice to subsequent lenders, but without it how is a prior mortgage to be discovered?" We do not understand that it was intended by those words to lay down the rule that registration of itself would amount to notice. The first mortgage there was unregistered and it was pointed out that this was a reason for extra caution on the part of the first mortgagee in parting with the title-deeds, as a subsequent purchaser or mortgagee would not be able to discover the prior mortgage by searching the registry. The question whether registration amounted to notice or not was not raised in that case.

Upon this question we are referred by the learned Counsel for the appellant to the last clause of the definition of notice in the Transfer of Property Act, section 3—"A person is said to have notice of a fact when he actually knows that fact or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, &c." We shall show hereafter when dealing with another part of the argument for appellant that in our opinion the plaintiff company was not guilty of any wilful abstention from inquiry or of gross negligence. No doubt the persons acting on behalf of the company

(1) I.L.R., 12 Mad., 424.

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did not make search in the Registration Office, and had they done so they would have discovered the second defendant's mortgage. It would have been more prudent had they done so, but we are not prepared to lay down as a general principle that non-search of the registry is such gross negligence as to disentitle a subsequent purchaser or mortgagee to relief, for to do so would be practically to make registration notice, which, for other reasons, we have declined to do. In *Damodara* v. *Somasundara*(1) the prior mortgage was registered and it was held by Kernan, J. that the subsequent mortgagees were not guilty of such negligence as to disentitle them to priority over the first mortgagee on the ground of his gross negligence in parting with the title-deeds. We do not think that the plaintiff company by reason of the non-search in the Registration Office for incumbrances can, under the circumstances, which we shall consider more fully hereafter, be said to have been guilty of wilful abstention from a search which they ought to have made within the meaning of section 3 of the Transfer of Property Act.

It is further argued for the appellant that even if the plaintiff company would be entitled to priority over the second defendant by reason of his gross negligence with regard to the title-deeds, they themselves have been guilty of such gross negligence as to disentitle them to priority. With the matter of negligence in not searching in the Registration Office we have already dealt. It is also charged against them that they omitted to inquire for the Collector's certificate and that their attention should have been particularly directed to the matter of the certificate by the recital in one of the title-deeds (exhibit B3) of the old Collector's certificate, which, if they had asked for, they might have got upon the track of the new certificate and of the second defendant's mortgage. As to this we observe that the same document (exhibit B3), which was a conveyance by the second defendant and some previous mortgagors to Mrs. A. Smith, contains a covenant that the property was then (January 1878) free from incumbrances. This of itself would divert persons, dealing with Mrs. Smith and having no reason to suspect her of dishonesty, from inquiry as to incumbrances. The documents which showed a legal title in Mrs. Smith being in her possession, the absence of the Collector's certificate

(1) I.L.R., 12 Mad., 429.

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would not of itself be sufficient to arouse suspicion. The company's agents ascertained that Mrs. Smith was in possession of the property and she put them into possession by executing a rent agreement in their favour. Although they might have been more careful, we do not think that they were guilty of such gross negligence as to disentitle them to relief.

We have dealt with the case on the assumption that the second defendant was entitled to rely on his mortgage of 1879. It is argued for respondent that that mortgage is merged in his purchase of 1886. In August 1886, Mrs. A. Smith conveyed the property to second defendant, the consideration stated in the deed (exhibit III) being Rs. 15,000 made up of Rs. 14,291-10-6 due on the mortgage of 1879 and Rs. 420-5-6 cash. The conveyance says nothing about keeping alive the mortgage, on the contrary it appears on the face of it to extinguish it, for it conveys the property free from incumbrances and the consideration includes the amount due on the mortgage. The appellant's Counsel relies on section 101 of the Transfer of Property Act as keeping the mortgage of 1879 alive for the benefit of the second defendant. That section enacts that "where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares by express words or necessary implication that it shall continue to subsist, *or such continuance would be for his benefit.*" Declaration express or implied there was none. The mortgage can only be saved from extinction by the latter words of the section on the ground that the continuance of the incumbrance would be for the second defendant's benefit. We are inclined to think that these words must have reference to the time when the conveyance was executed and it is not clear that it could be said that at that time it would have been for his benefit that the mortgage should not be extinguished. And it is doubtful whether the mortgage could be considered to be kept alive even if it were for his benefit to do so in the face of the deed of conveyance which seems to extinguish it. We are not sure that the case might not have been decided against the second defendant on this ground. But we have followed the Lower Court in giving him the benefit of the doubt on this point and deciding the question of priority between his mortgage and the plaintiff's.

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We confirm the decree of the Lower Court and dismiss the appeal with costs.

D. Grant, Attorney for Appellants.

Branson & Branson, Attorneys for respondent.

APPELLATE CIVIL.

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

RARICHAN (PLAINTIFF), APPELLANT,

v.

PERACHI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1891. November 16. 1892. March 7.

Malabar Law—Makkatayam rule of inheritance—Custom of Tiyars in South Malabar.

A community, following the Makkatayam rule, must not be taken to be necessarily governed by the Hindu law of inheritance with all its incidents.

Accordingly, when a member of the Tiyar community in Calicut following that rule, alleged and proved a custom that brothers succeeded to self-acquired property in preference to widows, it was held that the Court should give effect to it.

SECOND APPEAL against the decree of A. Thompson, Acting District Judge of South Malabar, in appeal suit No. 282 of 1890, reversing the decree of T. V. Anantan Nayar, Principal District Munsif of Calicut, in original suit No. 904 of 1888.

Suit for a declaration that the plaintiff was entitled to the self-acquired property left by his brother (deceased) whose widow was defendant No. 1. The parties were Tiyars, admittedly following the Makkatayam rule, and the plaintiff alleged that his claim was in accordance with the custom governing them. Upon the allegation, the fourth and fifth issues were framed as follows:—

"What is the law of succession which governs the parties.

"Whether, according to the law of succession which governs "the parties, the plaintiff, the undivided brother of the deceased "or his widow, the defendant, is his legal representative in respect "of his self-acquired properties."

The District Munsif recorded findings on these and the other issues in favour of the plaintiff and passed a decree accordingly.

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* Second Appeal No. 1267 of 1890.

RARICHAN v. PERACHI.

The District Judge reversed this decree for reasons which appear from the judgment of the High Court.

The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Ramachandra Ayyar for respondent No. 1.

This second appeal came on for hearing before PARKER and HANDLEY, JJ., who delivered judgment as follows :—

JUDGMENT.—The judgment of the District Judge appears to be based upon the assumption that, because a community is said to follow Makkatayam, it must be taken to be governed by the Hindu law of inheritance with all its incidents. This is not so. The word 'Makkatayam' is generally used in Malabar to denote the succession of sons in contradistinction to Marumakkatayam or succession of nephews.

The case set up in the plaint was that, under the law by which plaintiff's family was governed, the brother succeeded to self-acquired property in preference to the widow. The fourth issue settled was what is the law of succession which governs the parties. The Munsif held that it was proved that by the law of succession governing Tiyars of Calicut, the brother succeeded in preference to the widow.

The Judge has treated the succession of the brother as a special custom deviating from the ordinary law. This way of treating the case rests upon the fallacy abovementioned; that the ordinary law of the Tiyars of Calicut is the Hindu law pure and simple. We must ask the present District Judge to re-hear the appeal and return findings on the fourth and fifth issues with reference to the foregoing observations.

Finding to be 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.

[In compliance with the above order, the District Judge submitted his findings as follows :—

(1.) The High Court have directed me to submit fresh findings on the fourth and fifth issues in this case.

(2.) The parties are Tiyars of Calicut, who follow Makkatayam, and the question to be considered is whether, according to the law or custom followed by such Tiyars, the self-acquisition of a member of an undivided family devolves on his undivided coparceners or is inherited by his widow. The District Munsif, after a careful consideration of all the evidence before him, found that the custom among the Makkatayam Tiyars of Calicut was that the self-acquisition of a member of an undivided tarwad went on his death to the tarwad, and that the widow was entitled to nothing more than maintenance. That finding appears to me to be the only one which the District Munsif could have arrived at on the evidence produced before him. It is also, I may add, in accordance with what I understand is the custom among Makkatayam Tiyars in South Malabar.

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(3.) I accordingly return a finding on the fourth and fifth issues to the effect that, according to the law of succession which governs the parties, the plaintiff, as the undivided brother of the deceased, is his legal representative in respect of his self-acquired properties.]

This second appeal having come on for final hearing, the Court delivered judgment as follows :—

JUDGMENT :—We must accept the finding of the present District Judge.

The evidence is to the effect that the Tiyars of Malabar are not governed by the Hindu law pure and simple, but that their usages, with regard to divorce, re-marriage and inheritance are not entirely in accordance with the Hindu law, though the succession of sons does obtain among them.

There is legal evidence that in South Malabar, or, at all events, in Calicut taluk, the brother succeeds to self-acquired property in preference to the widow.

The decree of the Lower Appellate Court must be reversed, and that of the District Munsif restored. The appellant is entitled to his costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

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

1891. Nov. 24.

VENKATARAYADU AND OTHERS (REPRESENTATIVE OF DEFENDANT No. 5 AND DEFENDANTS Nos. 6 TO 9), APPELLANTS,

v.

VENKATARAMAYYA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Karnam, hereditary office of—Enfranchisement of endowment—Devolution of land enfranchised.

The holder of a hereditary office of karnam had two undivided sons, in favour of one of whom he resigned his office. Subsequently a revision of the village establishment took place, the new karnam was removed from the office, and the lands, which constituted its endowment having been enfranchised by the Inam Commissioner, a title-deed in respect of them was issued to him. After his death without issue his nephews sued to establish their right to the land:

Held, that the land passed to the grantee personally and not to his family, and, consequently, devolved, on his death, as private property.

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 50 of 1888, reversing the decree of R. Hanumantha Rau, District Munsif of Tanuku, in original suit No. 94 of 1885.

Suit for the possession of certain land with mesne profits.

One Seetanna held the hereditary office of karnam of Tanuku, of which the land now in question formed the endowment. He had two sons undivided from him, of whom one was the father of the plaintiffs, and the other (Venkata Narasiah) was the husband of defendant No. 2. Seetanna having grown old, resigned his office in favour of Venkata Narasiah, who became karnam in his place; the land was enjoyed by them in common. Subsequently a revision of the village establishment took place, Venkata Narasiah was removed from the office of karnam, and the endowment of the office was enfranchised by the Inam Commissioner who issued to Venkata Narasiah a title-deed in respect of the land in question. After the death of Venkata Narasiah, the land was registered in the name of

* Second Appeal No. 2 of 1891.

defendant No. 2 as his heiress and she alienated it to defendants Nos. 4 to 17.

The plaintiffs sought to recover the land as property belonging to their family, or, by virtue of a hereditary title, claiming that defendant No. 2 was entitled to maintenance only.

The District Munsif held that the suit was not maintainable. The Subordinate Judge passed a decree for the plaintiffs. He referred to the case cited in the judgment of the High Court and said —

"The facts of that case widely differ from those on which the "present case stands.

"In that case the officeholder had never a hereditary right to "the office. He was a stranger, and the lands were enfranchised "in his name. Plaintiff was one of the persons who had a hered-"itary right to the office. He was an adopted son of one of the "persons who had a similar right. Soon after his adoptive father's "death, the lands were resumed by Government, and the appli-"cation made on his behalf for restoration of such lands to the "plaintiff was rejected. No further steps were taken to have this "order of rejection set aside in appeal for more than three years "after that order, and the lands were enfranchised in the name of "defendant, the officeholder, who had no hereditary right to it. "After enfranchisement of the lands in the name of the office-"holder, the plaintiff lodged his suits for the lands. His claim was "rejected by the High Court on the ground that he held no office "at the date of enfranchisement, and that the plaintiff had there-"fore no title to the lands. The case shows a contest between a "new comer to the office and one whose claim to it and the lands "was rejected some years ago.

"The present case is this. Seetanna, the father of Venkata "Narasayya, resigned his office in favour of his son on account of "his old age, and the latter was enlisted as a karnam in his stead. "Both the father and Venkata Narasayya lived together and "enjoyed the profits of the lands, until the latter's death. Plain-"tiffs are sons of an undivided brother and they are men having "a hereditary right both to the office and emoluments thereof "on the death of Venkata Narasayya or his father.

"On the death of the appellant, plaintiff, in the case in which "the Full Bench decision was passed, had no such hereditary "right, for they do not stand in the line of heirs to one another."

VENKATA-RAYADU v. VENKATA-RAMAYYA.

Defendants Nos. 5 to 9 preferred this second appeal.

Bashyam Ayyangar for appellants.

R. Subramanya Ayyar for respondents.

JUDGMENT.—We think that the decision of the Subordinate Judge is opposed to the principles laid down in the Full Bench decision in *Venkata* v. *Rama*(1). The land which formed the emolument of the office of karnam did not become the family property of the person appointed to the office, although he may have had an hereditary claim to the office. The land was designed to be the emolument of the person into whose hand the office of the karnam might pass and was inalienable by him. The effect of enfranchisement was to free the lands from their inalienable character and to empower the Government to deal with them as they pleased. The grant of them to Venkata Narasiah was not a grant to the undivided family, of which he formed a unit, but to him personally, and the future succession and transmission of the land was placed in the same position as any other private property. The plaintiffs were neither holders of the office at the time of enfranchisement, nor in possession of the lands, and their suit, therefore, was, as the Munsif held, not sustainable. We reverse the decree of the Subordinate Judge and restore that of the Munsif with costs in this and the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Handley.

1891. October 27. November 11.

HAYAGREEVA (PLAINTIFF), APPELLANT,

v.

SAMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Easements Act—Act V of 1882, s. 24—Rights accessory to an easement.

The plaintiff having in a previous suit obtained a decree declaring his right of having the roof of his house projecting over the defendants' land, and discharging water thereon, now sued for a declaration of his right to go upon the defendants' land for the purpose of repairing the roof:

(1) I.L.R., 8 Mad., 249

* Second Appeal No. 1198 of 1890.

HAYAGREEVA v. SAMI.

Held, that the plaintiff was entitled to the right claimed as being accessory to the easement already established, but that it should be exercised only once a year and after notice to the defendants.

SECOND APPEAL and memorandum of objections against the decree of L. A. Campbell, Acting District Judge of Coimbatore, in appeal suit No. 32 of 1890, modifying the decree of V. Malhari Rau, District Munsif of Coimbatore, in original suit No. 622 of 1888.

The facts of the case are stated above sufficiently for the purpose of this report.

The District Munsif passed a decree as prayed. The District Judge on appeal modified this decree "by directing that the repairs in question be done within three months from this date."

The plaintiff preferred this second appeal.

Balaji Rau for appellant.

Ramachandra Ayyar for respondents.

JUDGMENT.—We think that the Lower Courts were right in holding that the plaintiff's right to go into defendants' land for the purpose of repairing his wall and roof was a right accessory to the easement which was established in the former suit of having the roof of his house projecting on defendants' land and discharging the water on defendants' land; and the Lower Appellate Court was quite right in holding that there must be some limit of time to the exercise of such accessory right; but we think it was in error in only allowing the right to be exercised on one occasion and thus rendering further litigation necessary when other repairs become necessary in future. We shall modify the decree of the Lower Appellate Court by providing that plaintiff's right of entering upon defendants' land to repair his roof and wall shall only be exercised once a year after one month's notice to defendants and between the hours of 9 A.M. and 5 P.M. Each party will bear his own costs of this second appeal.

The memorandum of objections is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

1891. Nov. 2, 12.

KAMMATHI AND OTHERS (PLAINTIFFS Nos. 1 to 3), APPELLANTS,

v.

KUNHAMED (DEFENDANT No. 2), RESPONDENT.*

Court Fees Act—Act VII of 1870, *s.* 10, *cl. ii ; s.* 12, *cl. ii ; sched. II, art.* 17, *cl. vi—Order in appeal by defendant for payment of fee by plaintiff—Notice.*

The plaintiffs, having raised a claim to a kanom attached in execution of a decree against their undivided brother, which was allowed in part, now sued for a declaration of their title to four-fifths of the kanom amount, affixing to the plaint a Rs. 10 stamp. The plaintiffs obtained a decree, against which the defendant appealed to the District Court. While the appeal was pending the District Judge, holding that the Court fee paid on the plaint was insufficient, ordered that the plaintiffs should pay the balance due on an *ad valorem* computation of the fee, and, in default, that the suit should stand dismissed. The plaintiffs first became aware of this order on the 26th March ; the balance was not paid within the time fixed by the District Judge for the payment to be made, and on the 28th March he accordingly made an order dismissing the suit :

Held, that plaint was sufficiently stamped, and that in any case the order dismissing the suit while the appeal was still pending was irregular.

SECOND APPEAL against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 822 of 1889, reversing the decree of A. Venkataramana Pai, District Munsif of Tellicherry, in original suit No. 57 of 1889.

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

The Acting District Judge cited *Naraina Putter* v. *Aya Putter*(1) as supporting his order dismissing the suit.

Plaintiffs Nos. 1 to 3 preferred this second appeal.

Narayana Rau for appellants.

Ryru Nambiar for respondent.

JUDGMENT.—Defendant No. 2 having obtained a decree against defendant No. 1, the undivided brother of the plaintiffs, attached a kanom of Rs. 400. Plaintiffs put in a claim which was allowed to the extent of Rs. 250 only. They then instituted the present

* Second Appeal No. 1250 of 1890.

(1) 7 M.H.C.R., 372.

suit to establish their right to four-fifths of the kanom amount. They obtained a decree in the Court of First Instance, and defendant No. 2 appealed. The District Judge, being of opinion that the proper stamp duty had not been paid, called upon defendant No. 2, the appellant to pay additional Court-fees. This appears to have been done. Thereupon, the District Judge called upon the plaintiffs (respondents Nos. 1 to 4 in the Lower Appellate Court) to show cause why they should not pay additional Court-fees. The plaint had been stamped with a Rs. 10 stamp, but the Judge was of opinion that *ad valorem* fees should be paid, and, as the plaintiffs failed to pay the same within the date fixed, he dismissed the suit. His order is supported on the ground that, by section 12, clause ii, Act VII of 1870, the Court of Appeal was authorized to require the plaintiffs to pay the additional Court-fee, and, by section 10, clause ii, was bound to dismiss the suit, inasmuch as the additional fee was not paid within the time fixed by the Court. This was the view taken by a Bench of the Calcutta High Court in *Shama Soondary* v. *Hurro Soondary*(1), where the decision of the Appellate Court, on the question of the stamp duty, was undoubtedly correct. But the proper stamp duty, in the present case, where the plaintiffs sought to establish their title by getting the summary order set aside, was Rs. 10 under clause vi, article 17, schedule II of the Court-fees Act, *Vithal Krishna* v. *Balkrishna Janardan*(2), and the order of the Judge calling upon the plaintiffs to pay *ad valorem* fees was wrong. Moreover there is nothing to show that the order of the Judge was communicated to the plaintiffs, who, on the 26th March filed an affidavit to the effect that they had, on that day, for the first time, received intimation of the orders of the Court. At the same time they put in a petition together with the required fee. Notwithstanding this, the Judge, on the 28th idem, dismissed the suit.

In any case the order dismissing the suit, while the appeal was still pending, was irregular.

The appeal is allowed, and the order of the Judge dismissing the suit is set aside with costs.

(1) I.L.R., 7 Cal., 348.

(2) I.L.R., 10 Bom., 610.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Handley.

1891. Nov. 23.

SHIVA DEVI (PLAINTIFF), APPELLANT,

v.

JARU HEGGADE AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, s. 111—*Transfer of Property Act—Act IV of* 1882, *ss.* 2, 76 —*Waste by mortgagee in possession—Possession after date fixed for payment—Interest.*

In a suit in 1888 to recover principal and interest due on a usufructuary mortgage executed on 15th June 1870 which contained a covenant for repayment of the secured debt on 15th June 1878, the defendant pleaded and proved that the mortgagee had permitted certain buildings on the mortgage premises to fall into a ruinous condition and it appeared that the mortgagee had remained in possession after June 1878 :

Held, (1) that the defendant was entitled to have the amount of the loss occasioned by the plaintiff's failure to make repairs brought into the mortgage accounts under Transfer of Property Act, s. 76, and a separate suit by him for that amount was not necessary.

(2) that the profits derived by the mortgagee after the date fixed for repayment should be regarded as having been enjoyed in lieu of interest.

SECOND APPEAL against the decree of S. Subbayyar, Subordinate Judge of South Canara, in appeal suit No. 282 of 1889, affirming the decree of S. Raghunathaya, District Munsif of Karkal, in original suit No. 201 of 1888.

The facts of the case are stated above sufficiently for the purpose of this report.

The plaintiff contended that the defendant could not recover in respect of the plaintiff's waste by way of set-off under Civil Procedure Code, section 111. As to this the Subordinate Judge held that that section had no application to the case which was governed by Transfer of Property Act, section 76. As to his claim to interest the Subordinate Judge said :—

"The next question is whether the plaintiff is entitled to claim "any interest. She is admittedly in possession of the mortgaged "property under the mortgage deed, which provides that the mort-"gagee should appropriate the profits in lieu of interest and that

* Second Appeal No. 189 of 1891.

"the mortgagor should not claim surplus profits or the mortgagee "a higher interest than 12 per cent. per annum ; but the plaintiff "contends that the money was repayable on the 15th June 1878, "and that after that date the stipulation for appropriation of the "proceeds towards the interest is not obligatory. *Baldeo Panday* "v. *Gokal Rai*(1) and *Mansab Ali* v. *Gulab Chand*(2). In the "absence of evidence on either side to show the income of the "property, it must be presumed that the income did not fall short "of the 12 per cent. interest agreed to be paid under the bond. "Otherwise the mortgagee would have brought his suit soon "after the expiry of the term. I think therefore that interest was "properly disallowed."

The plaintiff preferred this second appeal.

Narayana Rau for appellant.

Pattabhirama Ayyar for respondents.

JUDGMENT.—The first point raised is that the set-off was wrongly allowed, and in support of this contention we were referred to the decision in *Raghu Nath Das* v. *Ashraf Husain Khan* (3). We do not think the case has any application. The point here raised was not there taken and that decision was prior to the passing of the Transfer of Property Act. We agree with the Sub-Judge that section 76 applies. The question is one of procedure and the estimation of the loss caused to the mortgagor by the failure of the mortgagee to make necessary repairs is an item which must be considered in determining the accounts in settlement of the mortgage.

It was a paramount duty for the mortgagee to make such necessary repairs, and we cannot accept as valid the excuse that to do so would diminish his interest or profits.

We think the Subordinate Judge rightly held that as the mortgagee continued in possession after 13th June 1878 the profits must be regarded as having been enjoyed in lieu of interest.

The appeal is dismissed with costs.

(1) I.L.R., 1 All., 603. (2) I.L.R., 10 All., 85. (3) I.L.R., 2 All., 252.

APPELLATE CIVIL.

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

1891. Nov. 27.

KRISHNAYYA (PLAINTIFF), APPELLANT,

v.

THE BELLARY MUNICIPAL COUNCIL (DEFENDANT), RESPONDENT.*

District Municipalities Act (Madras)—Act IV of 1884, *s.* 169—*Suit for declaration of title against a Municipality—Parties.*

The plaintiff sued a Municipal Council, under the Madras District Municipalities Act, for a declaration of his title to a certain structure situated in the limits of the Municipality and of his right to put a roof over it. The structure was found to belong to the plaintiff:

Held (1), that the Secretary of State was not a necessary party to the suit.

(2), that the Municipal Council had no discretion under s. 169 of the above Act to prevent the plaintiff from dealing with the structure, provided he did not interfere with the convenience of the public or with any sanitary regulation.

SECOND APPEAL against the decree of W. C. Holmes, Acting District Judge of Bellary, in appeal suit No. 58 of 1890, reversing the decree of W. Gopalachari, District Munsif of Bellary, in original suit No. 162 of 1889.

The facts of the case are stated above sufficiently for the purpose of this report.

The District Munsif passed a decree for the plaintiff. The District Judge on appeal reversed this decree. He said as to the two questions above referred to—

"One of the grounds of appeal is that the Secretary of State "should have been joined as a defendant. Section 23 of the "Municipal Act (IV of 1884) vests in the Municipal Council all "public streets. As under an English statute, I think it should "be held that only the surface of the soil, and as much of it in "depth as is necessary for doing all that is reasonably and usually "done in streets, vested in the Municipality (Maxwell on the "Interpretation of Statutes, pp. 109 and 377). Strictly speak-

* Second Appeal No. 192 of 1891.

"ing, therefore, I think the Secretary of State should be joined as "a party in a suit of this nature.

"There is a further question whether, under section 169 of the "Municipal Act, the Municipal Council has not a discretion as to "granting a license to put up a verandah over the pyals, even "though they be on private property. On the 1st May 1889, the "Chairman of the Bellary Municipal Council gave a license to the "plaintiff 'to rebuild the walls on both sides of the pyal' in front "of his house, but permission for roofing the outer pyals was "refused. On the 30th May 1889, on plaintiff having again "petitioned, after a sub-committee had inspected the place, the "chairman informed the plaintiff 'that the sub-committee con-"sidered that permission ought not to be granted for roofing the "pyals; hence this petition is rejected.' In the orders passed by "the chairman the section under which the Municipality refused "to grant the permission prayed for is not stated, but it would "appear that section 169 left the granting or not of the permission "prayed for to the discretion of the Municipality."

The plaintiff preferred this second appeal.

Ramachandra Rau Saheb for appellant.

Ramasami Mudaliar for respondent.

JUDGMENT.—We fail to see any reason why the Secretary of State was a necessary party to the suit. The real question to be determined was whether the pyal, which plaintiff wanted to roof over, was his private property or not. The District Munsif found, upon a careful review of the evidence, that the pyal was plaintiff's private property, he and his ancestors for the last fifty years having exercised acts of ownership over it. The defendant, on the other hand, adduced absolutely no evidence to show that the ground occupied by the pyal ever formed part of the street. The District Judge does not decide that the pyal is not private property, but merely remarks that the proof of plaintiff's right cannot be considered very satisfactory. It is argued that this must be held to be a finding that the pyal is not private property. If we thought so, it would be necessary to ask the Judge to reconsider his decision as the evidence seems to us overwhelming, but we do not consider that he intended to set aside the finding of the District Munsif as to the question of plaintiff's right. With reference to section 169 of the Act (Madras Act IV of 1884), we think that the Judge has misinterpreted it. It must be read in connection with

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the definition of the word street in section 3. According to that, private property is exempted from the action of the Commissioners. It seems to us absurd to suppose that section 169 empowers the Commissioners to prevent a person dealing with his own property, provided he does not interfere with the convenience of the public or with any sanitary regulation. If the pyal in front of a house is not private property, the Municipal Commissioners would undoubtedly have the right to grant or withhold a license for roofing it, but when, as in the present case, the pyal is private property, the right of the Commissioners to interfere cannot arise, until the owners building projects beyond his own limits. In the words of the section, the erection must not cause any public inconvenience. We reverse the decree of the District Judge and restore that of the Munsif with costs in this and the Lower Appellate Court.

APPELLATE CIVIL.

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

1891. December 8.

PARATHAYI (PLAINTIFF), APPELLANT,

v.

SANKUMANI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Court Fees Act—Act VII of 1870, *sched. I, art.* 1—*Cancellation of an agreement to sell*—Ad valorem *fee.*

The plaintiff had executed an agreement to sell certain property in discharge of mortgages executed on his behalf during his minority. He now brought a suit alleging that the agreement had been extorted from him, and praying for a declaration that the agreement was not binding on him and for any other relief "which the Court considers to be reasonable."

Held, that the plaintiff was bound to pay Court-fees upon the value of his interest in the document sought to be invalidated.

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of Calicut, in original suit No. 20 of 1889.

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* Appeal No. 26 of 1891.

PARATHAYI v. SANKUMANI.

The plaint began as follows:—

"A karar is executed and registered on the 15th karkidakam "1061 (29th July 1886) jointly by the first defendant, and, by "his compulsion, defendants Nos. 2 to 4 and the plaintiff, stipulat-"ing to sell and purchase lands that will be sufficient for interest "at the rate of Rs. 5 for Rs. 100 and 5 paras of paddy for 100 "fanams, on the rent that will be fixed by arbitrators, on the lands "charged with Rs. 60,500 follows:—Rs. 30,000 under a panayam "deed executed on the 10th karkidakam 1057 (20th July 1882) "on 254 items of land, the jenm of the plaintiff's tarwad, by "defendants Nos. 2 to 4 and mother, Kochukurumpa, and others "in the capacity of the plaintiff's guardian, together with Rs. "17,000, under 3 purumkadum deeds, on the same lands, thus "Rs. 47,000 and Rs. 13,000 on settling the past accounts and "Rs. 500 paid ready money, thus altogether amounting to Rs. "60,500."

The plaint proceeded to allege that the instrument of 29th July 1886 had been executed under coercion and that the debts secured by the other documents above referred to were not binding on him. The prayers of the plaint were as stated above.

The Court fee stamp affixed to the plaint was Rs. 10 only. The Subordinate Judge held that this was insufficient and ordered the payment of an *ad valorem* fee on Rs. 60,500. This payment was not made and the Subordinate Judge rejected the plaint.

The plaintiff preferred this second appeal.

Sankaran Nayar for appellant.

Ramachendra Ayyar for respondent, No. 1.

JUDGMENT.—We are of opinion that the plaintiff was bound to pay duty upon the value of his interest in the document, the invalidity of which he sought to have declared. He had executed an agreement to sell certain property, in discharge of mortgages executed on his behalf during his minority. His agreement virtually amounted to a ratification of those mortgages, which he cannot avoid, so long as the agreement executed, after he attained his majority, stands. A declaration of the invalidity of that document would afford plaintiff relief of a very substantial character, and we think that plaintiff was not entitled to sue for a bare declaration and to stamp his plaint accordingly. The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

1892. January 6.

MARIATHODI (DEFENDANT No. 1), APPELLANT,

v.

APPU (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 43—Res judicata —"*Omit to sue.*"

The plaintiff, having previously obtained against his brother, defendant No. 1, who had been the managing member of their family a decree for partition of the family property including certain debts scheduled in the plaint therein, now sued to recover his share of certain other family debts collected by defendant No. 1 without the plaintiff's knowledge;

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

SECOND APPEAL and memorandum of objections against the decree of V. P. DeRozario, Subordinate Judge of South Malabar, in appeal suit No. 638 of 1890, modifying the decree of M. Achuthan Nayar, District Munsif of Nedunganad, in original suit No. 105 of 1888.

The plaintiff's case was summarized by the Subordinate Judge as follows:—

"Plaint states that plaintiff and first defendant are brothers; "that plaintiff brought suit No. 17 of 1886 for his share of the "family properties which were in first defendant's possession, "and obtained a decree; that first defendant and his son, second "defendant, fraudulently collected large sums of money from "several creditors of their family and illegally retained it in their "possession; that he had no notice of this at the time when his "suit for partition was filed; that he was aware of this only "recently, and that he is entitled to a proportionate share thereof. "Plaintiff therefore sues to recover his share in 16 items of family "debts alleged to have been collected and misappropriated by "first defendant, and to recover the arrears of micharom which "had accrued before the passing of his decree, but which he had "to pay to the jenmi."

* Second Appeal No. 106 of 1891.

The District Munsif passed a decree for the plaintiff which was in substance affirmed by the Subordinate Judge.

Defendant No. 1 preferred this second appeal.

Sundara Ayyar for appellant.

Sankaran Nayar for respondent.

JUDGMENT.—We think the Lower Courts were right in holding that the suit was not barred in any part by section 43 of the Civil Procedure Code. The former suit by plaintiff was for a general partition of the family property and in that suit he obtained a declaration that he was entitled to ¼ of the debts due to the family. In the present suit he sues for some of the debts which, he alleges, were collected by the managing member, first defendant, without his knowledge. It is clear that plaintiff's omission to claim from 1st defendant in that suit a share of debts, which he did not know had been recovered, cannot be a bar to his now suing for that purpose. The words "omit to sue" in section 43 must refer to an omission which might have been avoided, not to an omission to claim that which a party could not know he was entitled to.

As to the items 1 to 4, 9, 10, 12, 13, and 14, the Subordinate Judge finds that they are clearly proved, and that decision cannot be questioned in second appeal. As to items 5 and 11 we think the decision of the Subordinate Judge is correct.

The memorandum of objections relates to items on which the Subordinate Judge has given decisions upon the evidence and we must refuse to discuss them.

The appeal and memorandum of objections are dismissed with costs.

APPELLATE CIVIL.

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

1892. January 7.

ANNAMALAI (PLAINTIFF), APPELLANT,

v.

SUBRAMANYAN (DEFENDANT), RESPONDENT.*

Provincial Small Cause Courts Act—Act IX of 1887, *sched. II, cl.* 31—*Suit for profits of land—Civil Procedure Code, s.* 586.

The plaintiff sued on the Small Cause side of a Subordinate Court before the Small Cause Courts Act, 1887, came into operation, to recover with interest from the date of suit, Rs. 500 the value of crops alleged to have been illegally carried away by the defendant, while the plaintiff was in possession. The defendant raised a plea to the jurisdiction of the Court, and the Judge, without recording any decision on its validity, directed that the plaint be presented on the regular side of the Court for the reason that it raised questions of complexity. It was so presented after the above Act had come into operation. The plaintiff obtained a decree which was reversed on appeal. A petition of second appeal was presented by the plaintiff. The defendant objected that no second appeal lay under Civil Procedure Code, s. 586:

Held, that the objection should prevail, since the suit was not excepted from the jurisdiction of the Small Cause Court under the Provincial Small Cause Courts Act of 1887.

SECOND APPEAL against the decree of H. T. Ross, Acting District Judge of Madura, in appeal suit No. 770 of 1889, reversing the decree of S. Gopalachari, Subordinate Judge of Madura (East), in original suit No. 63 of 1888.

The facts of the case were stated by the District Judge as follows:—

"Plaintiff and defendant are uncle and nephew, and this suit "is to recover from defendant Rs. 500 (with interest and costs) "the estimated profits for faslis 1294 to 1296 on certain shares "in the Dharmasanam village of Kurukkattai, which plaintiff "claims under a division effected by an award of arbitrators, dated "the 17th October 1881, and which, he alleges, were wrongfully "taken by defendant and others in the 3 faslis aforesaid.

"Plaintiff first filed this plaint on 29th June 1887 as small "cause No. 227 against the first defendant and others, of whom

* Second Appeal No. 107 of 1891.

"he subsequently exonerated two. On 30th September 1887, "plaintiff obtained an *ex-parte* decree against first, fifth and sixth "defendants. On 21st November 1888, the *ex-parte* decree "against first defendant was set aside and the small cause suit "re-opened as against him. Defendant thereupon raised his pre-"sent defence questioning plaintiff's title to the property, and "he also objected to the jurisdiction of the Court on the ground "that the plaint had been presented on 29th June 1887, *i.e.*, two "days before the new Small Cause Act (IX of 1887) came into "force. The Subordinate Judge, without deciding the latter "objection, considered that, in view of the complicated question of "title raised by the defence, it was not a proper case for a Small "Cause Court to decide, and he directed the plaint to be returned "to plaintiff for presentation in the proper Court. The plaint "was accordingly taken back by plaintiff and represented, with "no alteration, on the ordinary side of the Sub-Court on 4th "December 1888. For the purposes of jurisdiction the property, "the title to which was in dispute, was valued at Rs. 2,550, "being 15 times the estimated net profits of fasli 1296. Under "the Court's orders, plaintiff was made to pay stamp-duty over "again on the Rs. 500 sought to be recovered from defendant."

The Subordinate Judge passed a decree for the plaintiff. This decree was reversed on appeal by the District Judge for reasons not material for the purposes of this report.

The plaintiff preferred this second appeal.

Kristnasami Ayyar for appellant.

Bhashyam Ayyangar and *Desikachariar* for respondent.

JUDGMENT.—The preliminary objection is taken on behalf of respondent that no second appeal lies under section 586 of the Code of Civil Procedure, as the value of the suit does not exceed Rs. 500, and it is of a nature cognizable by a Court of Small Causes, and, we think, the objection must prevail. It is argued for appellant that the case falls within clause 31 of schedule II of the Provincial Small Cause Courts Act IX of 1887, and that the suit was, therefore, not cognizable by a Court of Small Causes. The question is what was the nature of the suit as originally filed, and, in our opinion, this suit, in its inception, was not a suit for the profits of immoveable property within the meaning of clause 31 of schedule II of Act IX of 1887. This suit is in effect brought to recover the value of crops alleged to have been illegally carried

ANNAMALAI v. SUBRAMANYAN.

away by defendant while plaintiff was in possession. This is not a suit, in our opinion, exempted from the jurisdiction of the Small Cause Court by clause 31, Act IX of 1887. The suit was therefore of a nature cognizable by a Court of Small Causes within the meaning of section 586 of the Civil Procedure Code, and no second appeal lies; and it makes no difference that, in the course of investigation of the suit, it appeared that defendant, in carrying off the crops, was acting under color of some claim of title to the land.

We agree generally with the principles laid down in *Krishna Prosad Nag* v. *Maizuddin Biswas*(1), the authority of which is not shaken by the decision in *Sriram Samanta* v. *Kalidas Dey*(2).

The second appeal must be dismissed with costs.

The memorandum of objections also must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Shephard.

1891. Dec. 11, 15.

SUBBARAYA (PLAINTIFF), APPELLANT,

v.

KYLASA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Inheritance—Step-sister's son.

A step-sister's son is entitled to inherit under the Hindu law in force in the Madras Presidency.

APPEAL against the decree of G. D. Irvine, District Judge of Coimbatore, in original suit No. 2 of 1890.

The plaintiff sued for possession of certain property left by Ramasami Mudaliar, deceased, the brother of the plaintiff's mother. An issue was raised as follows:—"Was plaintiff's mother the "uterine sister or only the half-sister of Ramasami Mudaliar?" The finding on this issue was that Ramasami Mudaliar and the plaintiff's mother were children of the same father by different wives. The District Judge held that the plaintiff was not within

(1) I.L.R., 17 Cal., 707. (2) I.L.R., 18 Cal., 316.

* Appeal No. 40 of 1891.

SUBBARAYA v. KYLASA.

the line of inheritance to Ramasami Mudaliar, and dismissed the suit without trial of various other issues which were raised on the pleadings.

The plaintiff preferred this appeal.

Ramachandra Ayyar for appellant.

Rama Rau and *Sadagopachariar* for respondent No. 11.

Ramasami Mudaliar for respondents Nos. 8, 9 and 14.

Mahadeva Ayyar for respondents Nos. 5 and 6.

Ragavendra Rau for respondents Nos. 4 and 21.

JUDGMENT.—The question is whether the plaintiff, whose mother is found to have been the step-sister of Ramasami Mudaliar, now deceased, stands in the line of inheritance to him?

If he were the son of Ramasami's sister of the full blood, there can be no doubt that he would be so entitled, being a *bandhu* of the deceased; but it has been argued that a step-sister's son does not stand on the same footing as a sister's son, and, with regard to the cases cited, it is said that they are of no authority in this presidency.

Apart from those cases we are of opinion that the position of the step-sister's son cannot be distinguished from that of the sister's son. The relationship between the maternal uncle and his sister's son or step-sister's son is alike that of *sapindas*, for, in both cases, there is a common grandfather and "the relation of *sapindas* arises from connection as parts of one body." See Mitakshara cited in *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty*(1) and *Mari* v. *Chinnammal*(2). As to the other condition requisite to make the plaintiff a *bandhu* there is no doubt, for clearly he is sprung from a different family. It was contended that the decision in *Mari* v. *Chinnammal*(2) with reference to the position of the step-mother was adverse to the present claim; but that contention is answered by the observation that the exclusion of a woman in no way involves the exclusion of her offspring. There are several cases in which the children have rights which their mother would not have (Mayne's Hindu Law, § 492, *Rayaningaru* v. *Vencata Gopala Narasimha Rau*(3)). The observation of *Muttusami Ayyar, J.*, in *Mari* v. *Chinnammal*(2) seems to show that, in his opinion, the right of the step-sister's son must

(1) 2 B.L.R., 33. (2) I.L.R., 8 Mad., 126.

(3) 6 M.H.C.R., 278.

SUBBARAYA v. KYLASA.

be recognized. For these reasons we are of opinion that the judgment of the District Judge must be reversed, and the suit remanded for trial. Costs to abide event.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramanya Ayyar.

1892. February 3.

BAIRAGULU AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

BAPANNA (DEFENDANT), RESPONDENT.*

Civil Procedure Code, ss. 244, 258—Suit for declaration of satisfaction of a decree—Satisfaction of decree out of Court.

A judgment-debtor, alleging that he had entered into an agreement with the decree-holder in satisfaction of his decree, and that the latter had, in breach of such agreement, procured the issue of a warrant of attachment, now sued for a declaration that the decree had been satisfied, and prayed also for the cancellation of the warrant of attachment:

Held, that the suit was not maintainable.

SECOND APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in appeal suit No. 267 of 1889, affirming the decree of V. Subramanya Ayyar, District Munsif of Ongole, in original suit No. 111 of 1889.

The facts of the case are stated above sufficiently for the purpose of this report.

The plaintiff preferred this second appeal.

Seshagiri Ayyar for appellants.

Ramachandra Rau Saheb for respondent.

JUDGMENT.—The suit has been dismissed on the ground that the matter in question, viz., the satisfaction of the decree is a matter which should be dealt with by the Court in execution of the decree, and not by a separate suit.

It is clear that it is of this nature.

The effect of section 258 of the Civil Procedure Code is only to exclude proof of an uncertified agreement in execution proceedings. It does not limit the operation of section 244. The

* Section Appeal No. 810 of 1891.

BAIRAGULU v. BAPANNA.

case of *Viraraghava* v. *Subbakka*(1) is cited by the appellants' pleader. This case shows that an action for the breach of the contract to certify adjustment of the decree may be brought; but it is not authority for the position that a suit to declare that a decree has been satisfied will lie. The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Subramanya Ayyar.

1892. January 18.

JAGANATHA (PLAINTIFF), APPELLANT,

v.

GANGI REDDI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Evidence Act—Act I of 1872, s. 115—Estoppel—Execution-purchaser without notice of mortgage.

The plaintiff sued to realise his security under a mortgage executed to him by defendant No. 1, by sale of the mortgage premises which were in the possession of defendants Nos. 2 and 3. It appeared that the plaintiff had previously attached and brought to sale the mortgage premises in execution of a decree against defendant No. 1, and that the other defendants had purchased at the Court sale, without notice of the plaintiff's mortgage, which was not referred to in the attachment lists or sale certificates:

Held, that the plaintiff was estopped from setting up his present claim.

SECOND APPEAL against the decree of O. Wolfe Murray, Acting District Judge of North Arcot, in appeal suit No. 139 of 1890, affirming the decree of S. Subba Rau, District Munsif of Chittur, in original suit No. 372 of 1889.

The facts of the case are stated above sufficiently for the purposes of this report.

The District Munsif dismissed the suit and his decree was affirmed on appeal by the District Judge.

The plaintiff preferred this second appeal.

Rama Rau for appellant.

Parthasaradhi Ayyangar for respondents.

JUDGMENT.—We think the plaintiff is estopped from recovering on the mortgage when he has allowed the auction purchaser to

(1) I.L.R., 5 Mad., 397.

* Second Appeal No. 477 of 1891.

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buy without notice in a suit in which he himself brought the property to sale—see *Agarchand Gumanchand* v. *Rakhma Hanmant*(1).

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Subramania Ayyar.

1892. Jan. 25, 28.

GOPALASAMI (DEFENDANT No. 1), APPELLANT,

v.

ARUNACHELLA (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, *s.* 68—*Personal decree against mortgagor.*

Suit for a personal decree on a usufructuary mortgage which contained no express covenant to pay, but, provided that if the mortgagor repaid the secured debt before a certain date (now passed), he should be replaced in possession. The mortgage premises had been attached in execution of a decree obtained by a third party against the mortgagor, and a claim preferred by the plaintiff having been erroneously rejected and the premises sold, he was dispossessed. The mortgagee accordingly brought his suit as above:

Held, that the plaintiff was not entitled to maintain the suit either under the terms of the mortgage or under Transfer of Property Act, s. 68.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 938 of 1889, affirming the decree of C. Srirangachariar, District Munsif of Shiyali, in original suit No. 126 of 1889.

The facts of the case are stated sufficiently for the purposes of this report in the judgment of the High Court. The decrees of the Lower Courts were for the plaintiff. The defendant preferred this second appeal.

Subramanya Ayyar and *Sadagopa Chariar* for appellant.

Mr. *Gantz* for respondent.

JUDGMENT.—The plaintiff obtained a usufructuary mortgage of certain lands and held possession of the same until he was ousted by a person who purchased the property in execution of a money decree held by the latter against the first defendant, the mortgagor.

The plaintiff now sues for the recovery of the mortgage money.

(1) I.L.R., 12 Bom., 678.

* Second Appeal No. 289 of 1891.

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The mortgagor did not bind himself to repay the mortgage amount. The clause in the instrument of mortgage, relied on by the plaintiff, merely provides that if the mortgage money be repaid at the end of any fasli within the 27th May 1886, the mortgagor should be put back into possession of the lands. The Subordinate Judge was, therefore, in error in holding that there was a promise to pay.

The circumstances under which the plaintiff was dispossessed were these. Before the lands in question were sold by the Court, the plaintiff preferred a claim based upon his mortgage; but it was disallowed on the ground that, at the date of the mortgage, the property was under attachment on account of a decree held by another creditor of the present defendant. It is, however, now admitted that there was no sale on account of debt due under the latter decree, and that the debt for which the property was eventually sold was not a claim enforceable under that attachment. Section 276 of the Civil Procedure Code had, therefore, no application to the case. The mortgage to the plaintiff was valid against the creditor who subsequently got the property attached and sold, and became the purchaser thereof. The order rejecting the claim was wrong; but the plaintiff took no steps to have it set aside and allowed the purchaser to obtain possession of the lands sold.

The defendant had nothing to do with the claim put in by the plaintiff or the order passed thereon, and it is clear that the defendant was in no way responsible for the erroneous order or the plaintiff's omission to question it by a suit.

It is argued for the plaintiff that the failure of the defendant to pay up the judgment debt, which led to the sale entitles the plaintiff to sue for the money under clause (*b*) of section 68 of the Transfer of Property Act. This contention is unsustainable. The creditor, who held the money decree, had a right to bring to sale the equity of redemption possessed by the defendant in the lands, and the defendant was at liberty to allow such equity to be conveyed by Court sale for his debt. The sale thereof could not properly have affected any of the plaintiff's rights as mortgagee and the defendant cannot be treated as having thereby committed a wrongful act or default whereby the mortgagee was deprived of the whole or any portion of his security, within the meaning of clause (*b*) of section 68.

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The next contention is that the defendant failed to secure the possession of the mortgage property to the plaintiff. In support of this stress is laid on the words in clause (*c*) of section 68 "without disturbance by any other person", and on the absence in the clause in question of any qualifying provision, such as that contained in section 7 of the English Conveyancing Act of 1881, where the covenant is stated to be "against lawful interruption or disturbance by the person who conveys as beneficial owner or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made." Though the last part of clause (*c*) is not as clear as it should be, yet we cannot think that the Legislature intended to make the mortgagor liable for the wrongful acts of third parties. Covenants for quiet enjoyment, however generally expressed, must be understood as applying merely to the acts of those claiming by title. The rule is the same whether the covenant is a covenant in law, or an express covenant to indemnify not against an individual named but against all persons. The reason of the law is clear. For it would be unreasonable to hold that the grantor could either foresee or prevent the tortious acts of strangers, and the remedy against the such tortious acts is against the wrong doers (*Hayes* v. *Bickerstaff*(1) Woodfall on Landlord and Tenant, 14th edition, p. 695). We see no warrant for thinking that the Legislature meant to depart from so sound and well established a rule. In our opinion, the proper construction to be placed upon the words "any other person" in the concluding part of clause (*c*) of section 68 is to interpret them to mean any other person having a title.

Upon the facts admitted, the mortgage to the plaintiff was binding upon the purchaser who ousted him. It was not alleged that the defendant committed any breach of the implied contract under clause (*b*) of section 65 in respect of the defence of the mortgagor's title should the mortgagee's possession be unlawfully disturbed. If the plaintiff placed himself in a position which precluded him from objecting to his dispossession by the purchaser at the Court sale, the defendant was not answerable for such a state of things.

We must allow the appeal, reverse the decrees of the Courts below, and dismiss the suit with costs.

(1) Vaughan's Reports, 118.

APPELLATE CIVIL.

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

1891. April 9, May 5, December 4. 1892. January 5.

CHINNAMMAL AND ANOTHER (PLAINTIFFS NOS. 1 AND 2), APPELLANTS,

v.

VARADARAJULU AND ANOTHER (DEFENDANT AND PLAINTIFF NO. 3), RESPONDENTS.*

Hindu law—Law of inheritance—Custom—Illegitimate son of a Sudra—Specific Relief Act—Act I of 1877, *s.* 42—*Further relief.*

The widows of a shrotriemdar, who was a Sudra, brought a suit for a declaration of their title by inheritance to his lands against his illegitimate son, who had been registered as shrotriemdar in lieu of his deceased father, and to whom certain of the raiyats had attorned. The defendant claimed to be legitimate according to the customary law governing the family, although his parents might not have been married at the time of his birth, by reason of his parents having performed the ceremony of *pariyam* before his birth:

Held, (1) that the suit was not precluded by Specific Relief Act, s. 42, *proviso*;

(2) that the defendant was illegitimate and that the plaintiffs were accordingly entitled to one-half of the lands in question, and the defendant was entitled to the other half.

Observations on the allegation and proof of a custom in derogation of the general Hindu law of inheritance.

APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in original suit No. 5 of 1889.

The plaintiffs sued for a declaration of their title to certain shrotriem lands in succession to Thanappa Naick, their late husband, who died in September 1885. They alleged that they were in enjoyment of the land, but that the defendant, claiming to be the son of the deceased shrotriemdar, had tried to collect rent from the raiyats in occupation.

The defendant pleaded that he was the legitimate son of the deceased, and the third issue was framed with reference to the plea as follows:—"Whether the defendant is the son and legal heir of the deceased Thanappa Naick?"

Evidence was given to show that the defendant's father and mother were not married at the time of his birth, whereupon the

* Appeal No. 119 of 1890.

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defendant set up a custom in support of his legitimacy, the nature of which is discussed in the judgment of the High Court. On this point the District Judge found that the defendant's parents were not married at the date of his birth, but had performed the ceremony of *pariyam*, and held that the defendant was legitimate under the customary law to which he was subject.

An issue was also raised as to whether the suit was bad by reason of the proviso of Specific Relief Act, s. 42, for want of a prayer for relief consequential on the declaration sought. On this issue the District Judge ruled in favour of the defendant, finding that "the defendant's name has been entered on the register in lieu of that of the deceased Thanappa Naick," and that "it was established that the defendant, through his lessee, is constructively in possession of the suit properties, and that the plaintiffs are not."

The District Judge accordingly passed a decree, dismissing the suit.

The plaintiffs preferred this appeal.

Mr. *Johnstone*, Mr. *Subramanyam* and *Ethiraja Mudaliar* for appellants.

Srirangachariar for respondents.

JUDGMENT.—We are unable to agree with the District Judge that the plaintiffs are precluded from obtaining a declaratory decree by the *proviso* to section 42 of the Specific Relief Act. The oral evidence as to possession of the disputed lands is, as the Judge admits, very conflicting, and the documents on which he relies in coming to the conclusion that possession is with the defendant are, in our opinion, worthless as evidence of possession. Exhibit V is a rent agreement in favor of the defendant, dated 11th January 1888, long after the dispute arose between the plaintiffs and the defendant. It is not proved that the executant of this rent agreement obtained possession of the house to which it relates. If he is the same person as the defendant's ninth witness, he was not asked about this, and he is the defendant's gumasta. And even if it were proved that the house in question is occupied by a tenant of the defendant, it is a small portion of the property in dispute, and against such a fact, if proved, would have to be set the admitted fact that the plaintiffs are in possession of the family house. Exhibit VI consists of a series of documents called irusalnamahs, purporting to show that kist for two shrotriem

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villages forming part of the property in question was paid by the defendant, and sent to the treasury from the village munsif's office for faslis 1295 to 1298. That kist was so paid is of itself no evidence of possession. Admittedly the defendant was registered as the shrotriemdar by the Revenue authorities soon after the death of the late shrotriemdar Thanappa Naicker, but this would neither give him the legal title nor put him in possession of the lands. Kist would only be received by the Revenue authorities from the registered shrotriemdar, so that the payment of kist would not carry the matter any further than the registration of the shrotriem in the name of the defendant. Exhibit IX consists of 12 cultivation muchalkas by raiyats of one of the shrotriem villages in favor of the defendant's lessee Venkatachella Naicker. These again are executed in fasli 1297 or 1887-88 after the disputes between the plaintiffs and the defendant began. It would not be difficult for the defendant or his lessee to obtain such muchalkas from some of the raiyats. On the other hand, it is admitted that many raiyats of that same village did not give muchalkas to the defendant's lessee, and he filed suits to compel them to do so and obtained decrees (see copy judgment exhibit VIII). It is admitted that these decrees have not been executed, and the raiyats, who were the defendants therein, have not attorned to the defendant's lessee. The District Judge attaches great weight to the fact that the plaintiffs produce no documentary evidence in support of their assertions that possession of the disputed property is with them; but it must be remembered that they are women, and widows, and would, therefore, not be so able to obtain documentary evidence of the kind produced by the defendant. It appears to us that the conclusion to be drawn from all the evidence as to possession is that possession of the whole property in dispute is neither with one nor the other of the contending parties. As might be expected in the case of a dispute as to the title to lands, most of which are in the actual occupation of raiyats, some of the raiyats recognize one claimant as their landlord, and some the other. Such a case is eminently one in which a declaratory decree is desirable, to avoid multiplicity of suits and obtain a decision once and for all, which shall secure peaceful possession of the property. And we think there is nothing in the language of the proviso to section 42 of the Specific Relief Act to prevent the Court passing a declaratory decree in this case. It is only if "the

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plaintiff being able to seek further relief than a mere declaration of title, omit to do so," that the Court is precluded from making a declaration of title. And what further relief could the plaintiffs obtain in this suit? Not possession of the whole property in dispute, for admittedly the defendant is not in possession of the whole, and the raiyats, who do not recognize the defendant's title, would have to be made parties before possession of the lands in their occupation could be decreed to the plaintiff. And we can see no other prayer for relief which the plaintiffs could combine in this suit with the prayer for a declaration.

We must hold that a declaration of the plaintiffs' title can be made in this suit if their title is proved.

As to the plaintiffs' title, it is admitted that, as the widows of the late Thanappa Naicker they are entitled to succeed to his property, unless the defendant is the preferential heir. The defendant is said to be the son of Thanappa Naicker by one Tolasi, who is said to have been married to Thanappa Naicker long after the defendant's birth: some of the witnesses put it at more than fifteen years after. The defendant in his written statement merely claims to be the lawful son of Thanappa Naicker, and, as such, to be his legal heir and representative. Apparently, in the course of the case, he set up some peculiar custom of his caste or family by which he was entitled to be treated as his father's legitimate son, notwithstanding his having been born before the marriage of his mother, and the District Judge considers such custom proved, and finds that the defendant is the son and legal heir of Thanappa Naicker. It is not at all clear, however, what is the custom alleged or which the Judge considers proved, whether it is that the *pariyam* or betrothal ceremony is equivalent to marriage, and children born after that ceremony are legitimate, independently of any subsequent marriage, or whether a subsequent marriage is necessary to legitimatize children so born. Nor is it clear whether the custom found by the Judge is a custom of the defendant's caste or only of his particular family, and, if the former, what his caste is. The Judge calls it Paligar or Yanadi. Neither of these terms is generally known as descriptive of a caste. The defendant's evidence as to the custom consists of the depositions of his second, third, fourth, fifth and sixth witnesses. He himself, examined as his seventh witness, makes no definite statement as to the custom. His second, third and fourth witnesses seem to

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consider betrothal as equivalent to marriage and lay no stress on subsequent marriage as legitimatizing the children, while the fifth and sixth seem to imply that a subsequent marriage is necessary. The only other evidence to prove the custom consists of depositions made by some of the plaintiff's witnesses in an inquiry before the Tahsildar of Trivellore (exhibits I, II, III, IV). These depositions are retracted by the plaintiffs' witnesses in this case, and are only admissible for the purpose of contradicting them. They are no evidence of the custom. This is, in our opinion, wholly insufficient evidence on which to find a peculiar custom of marriage or legitimacy prevailing in the defendant's caste or family. No judicial decisions recognizing the custom are proved. The only instances in which the custom is alleged to have been followed are in the defendant's own family. The custom is one contrary to the general law of marriage and inheritance prevailing amongst Hindus and requires strong evidence to support it. We notice also that the defendant's mother is said to have been of a different caste. That very loose notions of morality and of the sacredness of the marriage tie prevailed in the family to which the parties belong is probable enough, for Thanappa Naicker appears to have kept the defendant's mother and another woman in his house from the time they were girls and had children by them, and subsequently to have married them, having, in the meantime, married three other women. But something more than a prevailng low tone of morality in a family is required to establish a binding custom of legitimacy differing from the ordinary law.

It appears, however, from the evidence that sons born under circumstances somewhat similar to those of the defendant's birth have inherited property in the defendant's caste or family, and we think some further inquiry as to the existence of any peculiar custom in the caste or family ought to be made.

We shall direct the District Judge to return a revised finding on the third issue with reference to the above observations. He will require the defendant to put in a supplemental written statement, setting out precisely and accurately what is the custom he sets up, and will take such further evidence as the parties may adduce.

Finding is to be returned within two months from the date of the re-opening of the Court after recess, and seven days after

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posting of the finding in this Court will be allowed for filing objections.

[In compliance with the above order, the District Judge submitted a finding, from which the following passages are extracts :—

The issue on which I am required to submit a revised finding is—whether the defendant (Varatharajulu Naicken) is the son and legal heir of the deceased Thanappa Naicken.

That he is the son of Thanappa Naick I think there is no reason to doubt. The evidence of the witnesses examined in the case shows that he was born of Tolasiammal after she and her elder sister were taken to the house of Thanappa Naick. It is further proved that Tolasi bore to Thanappa Naick a daughter named Sithammal before the birth of this defendant. . . . .

Is he his legal heir? This depends upon whether his mother was the legally married wife of Thanappa at the time of defendant's birth.

It is admitted on the side of the defendant that a marriage ceremony was gone through between Thanappa Naick and defendant's mother, Tolasi, some ten years after the defendant's birth. But it is contended that this ceremony was not necessary for the validation of the marriage, which had been completed by a ceremony called *pariyam* prior to Tolasi's coming to live in Thanappa's house. On the other hand the plaintiff's witnesses deny that there is any such ceremony as *pariyam*, and swear that there is no such custom as is alleged by defendant's witnesses of tying a second bottu—a thali.

In the supplemental written statement put in by the defendant, as required by the High Court's order, this second marriage is said to be 'like marriage among Brahmans at the sixtieth year,' and it is explained that it is only performed in the case of 'men of position, if they like, when the family is in good condition and there are children.'

Of the witnesses examined on behalf of the defendant only one, namely, the fourteenth witness, Sahadeva Naick, admits having tied a second bottu to his wife, and he says he did so 'because the first one was worn out' merely! He adds that there is no ceremony on such occasions and no feeding of relatives. Whereas defendant's thirteenth witness says there is 'no difference between the ceremony of tying the second bottu and of the first *pariyam*.'

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While defendant's eighteenth witness, Candaswami Naik, never heard of such a thing as tying second bottu. Defendant's fifteenth witness, Sendi Naick, says that, though he has not himself tied second bottu to his wife, he has an elder brother who did so. Defendant has not examined that elder brother, whereas Yegappa Naick (who seems to be the man) has been examined as plaintiff's fifteenth witness and denies having tied second bottu to his wife. . . . . .

The witnesses examined on behalf of plaintiffs swear that their marriage ceremony is similar to that of other Sudras, and that there is among them no such thing as *pariyam* marriage.

On a consideration of the whole evidence I am not satisfied that defendant's mother was at the time of his birth the legally married wife of Thanappa Naick. I consequently find on the issue that defendant Varatharajulu Naicken is not the legal heir of Thanappa Naick, unless it be as an illegitimate son, which is a question of law as to which I am not required to express any opinion.]

This appeal having come on for final hearing, the Court delivered judgment as follows :—

JUDGMENT.—The District Judge has found that the defendant is the son of the late Thanappa Naick, but that his mother was not the legally married wife of Thanappa Naick at the time of his birth. He also finds that the family is a Sudra family. No good reason has been shown by either side for doubting the correctness of these findings, which, we think, are supported by the evidence, and we accept the findings accordingly. The defendant then being found to be the illegitimate son of a Sudra, the question is to what decree (if any) are the plaintiffs entitled?

For the appellants (first and second plaintiffs) it is contended that they are entitled to a declaration that the whole property, or at least half, belongs to them. Respondent No. 1, on the other hand, contends that the plaintiffs having failed to prove the right they set up, viz., a right to the whole property, their suit should be dismissed.

The authorities as to the respective rights of a widow and an illegitimate son are somewhat conflicting, but the following appears to be the general result so far as they are agreed. If there be a widow and daughters or daughters' son and an illegitimate son, the latter takes half the estate, leaving the other half to be

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enjoyed as woman's estate by the widow and daughters or daughters' son in succession—Mayne's Hindu Law and Usage, 4th edition, § 507; *Ranoji* v. *Kandoji*(1), *Parvathi* v. *Thirumalai*(2), *Shesgiri* v. *Girewa*(3).

It is argued for appellants that the decision in *Parvathi* v. *Thirumalai*(2) is an authority for the proposition that the widow excludes the illegitimate son altogether, but we do not consider that such was the effect of that decision. That was a case of an impartible zamindari, and it was held that the illegitimate son of a Sudra zamindar did not exclude his father's coparcener or widow from succession. But the principle that the illegitimate son is co-heir with his father's widow, daughter or daughter's son was expressly affirmed (see page 343).

For the respondents a recent decision of the Privy Council—*Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh*(4)—is quoted as deciding that the illegitimate son takes the whole as against the widow. When examined, however, this case does not support that proposition. In that case there had been a legitimate son who survived the father, and it was held in the case out of which the appeal arose—*Jogendro Bhuputi* v. *Nittyanund Mansingh*(5)—that the illegitimate son took as a coparcener with his legitimate brother, and, therefore, on the death of the legitimate son took the whole estate by survivorship, and this decision was affirmed by the Privy Council. There was no question there of the right of the widow of the father, but Mr. Mayne (4th edition, § 508), says that in such a case the illegitimate son would supersede the widow, and quotes the decision of the Calcutta High Court in this case in support of that view. This decision of the Calcutta Court was no doubt dissented from by this Court in *Parvathi* v. *Thirumalai*(2), and to that extent the authority of that Madras case is shaken by the Privy Council decision, but that does not affect the doctrine established by the Madras cases as to the right of the widow to at least half when the deceased has left no legitimate but only an illegitimate son.

The Madras decisions have made no distinction between the case of an illegitimate son by a slave girl and any other illegitimate son, provided the concubinage with the mother has been

(1) I.L.R., 6 Mad., 557. (2) I.L.R., 10 Mad., 334. (3) I.L.R., 14 Bom., 282.
(4) I.L.R., 17 I.A., 128; s.c. I.L.R., 18 Cal., 151. (5) I.L.R., 11 Cal., 702.

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continuous—*Krishnayyan* v. *Muttusami* (1). The result is that the plaintiffs are entitled to half of the property of the late Thanappa Naick in the plaint schedules set forth, and the defendant as the illegitimate son of Thanappa Naick is entitled to the other half, and we reverse the decree of the Lower Court and make a declaration accordingly. We think the appellants should have their costs, original and appeal, as the defendant has failed in establishing the case which he set up, and which has been the principal subject of contention in this suit, viz., that he was the legitimate son of Thanappa Naick. Both memoranda of objections are dismissed without costs.

APPELLATE CIVIL.

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

SECRETARY OF STATE FOR INDIA (DEFENDANT), APPELLANT,

v.

BAVOTTI HAJI (PLAINTIFF'S REPRESENTATIVE), RESPONDENT.*

1890. January 30. April 30. 1892. Feb. 16, 22.

Forest Act—Act V of 1882 (*Madras*), *s.* 6—*Burden of proof—Long possession—Presumption of title.*

Certain land was notified under Madras Forest Act, 1882, to be constituted a reserved forest. One, alleging that the jenm title had been in his family for six or seven centuries, claimed to be the owner of the land. His claim was contested by Government on the allegation that the land had belonged to another family and had been escheated. The claimant admitted that he had not been in possession for six years before the date of the notification, Government having objected to his interfering with the land. It was found that his family had been in possession for the previous sixty years at least, and that the alleged escheat was not proved:

Held, that the claim should be allowed.

Observations on the burden of proof and on the presumption of title arising ou of possession

SECOND APPEAL against the decree of A. F. Cox, Acting District Judge of North Malabar, in appeal suit No. 374 of 1887, reversing the decision of A. Thompson, Forest Settlement officer, Kanot, in claim case No. 108 of 1885.

(1) I.L.R., 7 Mad., 407. * Second Appeal No. 831 of 1888.

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Claim preferred under Madras Forest Act, 1882, s. 6, to certain land notified to be constituted a reserved forest under the provisions of that Act. The District Forest officer on behalf of the Secretary of State, alleged that the land in question had belonged to the Kanot Nambiyar and had been escheated to Government. The claimant alleged that his family had been the jenmis of the land for six hundred or seven hundred years. The Forest Settlement officer found that neither of these allegations was established and dismissed the claim. The District Judge, on appeal, reversed this decision and allowed the claim, on the ground that the claimant's family had been in uninterrupted possession for more than sixty years.

The Secretary of State preferred this second appeal.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and the *Government Pleader* (Mr. *Powell*) for appellant.

Mr. *Gantz*, Mr. *Norton* and *Sankara Menon* for respondent.

BEST, J.—This is an appeal by the Secretary of State for India, represented by the Collector of Malabar, against the decision of the District Court of North Malabar, allowing the claim of one Ponnampilath Parapraven Kunhamed Haji to certain lands, of which it had been intended by the Governor of Madras in Council to constitute a reserved forest under the third and following sections of Madras Forest Act (Act V of 1882). A Forest Settlement officer was accordingly appointed, and, it is to be presumed, proceeded as required by section 6 of the Act, when the above-named Kunhamed (now respondent) came forward, claiming to be the owner of the land in question. The Forest Settlement officer thereupon inquired into the case, and, though he was not satisfied with the evidence adduced in support of the case, set up for Government, viz., that the land in question belonged to the Kanot Nambiyar and was escheated to Government, rejected the claim of the present respondent on the ground that he had failed to establish his title, the burden of proof being on him and not on the Government, as the latter occupied the position of defendant in the case.

On appeal, the District Judge reversed the decision of the Forest Settlement officer, remarking that, though there was an absence of proof of jenm title on the claimant's part, there was sufficient evidence to justify the conclusion that his family had

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been in uninterrupted possession for more than sixty years; while, on the other hand, no escheat was proved.

The first ground now taken on behalf of the Government in the second appeal is that the District Court erred in throwing the burden of proof on the present appellant; and that, as the respondent had failed to prove his *title* to the lands claimed by him, his claim was rightly dismissed by the Forest Settlement officer.

I do not think it necessary, for the disposal of this appeal, to consider the general question on which side the burden of proof lies in cases of this kind; for, even assuming it to be on the claimant (respondent), I think he has proved a sufficiently lengthy possession to shift the burden on to the opposite party. The documentary evidence adduced by him in support of his possession and enjoyment of the property in question is found by both the Lower Courts to be genuine; and there is in these exhibits ix. to xli. enough proof of possession of different parts of the property in question by the respondent's family for a period of sixty years, *i.e.*, from 1820 to 1880, when the respondent admittedly ceased to exercise rights of ownership in the property "owing to objections made by Government officers to his meddling with the land." The District Judge's finding of the claimant's family's possession for sixty years is no doubt arrived at by taking the period from the Malayalam year 988, *i.e.*, 1813, mentioned in exhibit ix, as the date of a previous lease, whereas, as has been pointed out by the appellant's counsel, there is nothing in exhibit ix to identify the previously leased property therein mentioned with any portion of the property now in dispute. Consequently 1820, Malayalam year 995, is the date from which possession can be held to be *proved* by exhibit ix.; but when such possession is proved by the other documentary evidence to have continued till 1876, I do not see why it should be considered to have ceased then or at any time prior to 1880, when was admittedly passed the order prohibiting the claimant's interference with the land. In the absence of proof to the contrary, it is to be presumed that the possession of land proved to have extended from 1820 to 1876 continued till the prohibitory order of 1880, and, if so, the period does not fall short of sixty years. Moreover, the finding is not that the possession *commenced* in 1820, but merely that it is proved to have existed from that time. But is it necessary on the part of the claimant to give positive evidence of possession for sixty

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years? As has been pointed out by the respondent's counsel, the period of sixty years prescribed by article 149 of the Indian Limitation Act applies only to suits "*by or on behalf of* the Secretary of State for India," whereas the contention in the present case that the burden of proof is on the respondent is rested on the very circumstance that the *latter* and not the Secretary of State is the *plaintiff* in the suit. If so, it is not a suit "by or on behalf of the Secretary of State," and therefore the period of sixty years prescribed by the Indian Limitation Act is inapplicable. On the other hand, if the suit were to be held to be one by or on behalf of the Secretary of State and the burden of proof held to be on him, *as plaintiff*, it must undoubtedly fail: as both the Lower Courts have found that the escheat alleged has not been proved, exhibit A being clearly worthless as evidence of the alleged escheat.

The presumption of ownership from the fact of possession cannot be held to prevail where, as in the present case, the possession of the appellant is found to have commenced only in 1880, when was issued the order prohibiting the respondent from interfering with the plaint property. The finding that the respondent was in possession even till 1876 (which is within twelve years prior to the commencement of this litigation) is sufficient to shift on to the appellant the burden of proving title. Moreover in the district of Malabar and in the tracts administered as part thereof, the presumption is not that forest lands are the property of the Crown—*Secretary of State* v. *Vira Rayan*(1).

It is true that, as contended by appellant, no evidence, documentary or oral, has been produced by respondent of the exercise of acts of ownership by him or his family over the four hills noted in the margin. Considering that the appellant denied the respondent's claim as a whole, I do not think that the mere fact of his not having taken objection to each item separately can be held to be a tacit admission that all the property included within the boundaries, specified in the claim put in by the respondent constituted one single estate. On the other hand it is quite intelligible that the respondent failed to adduce evidence in support of his claim to these particular lands under the impression that

Vanancheri. | Mutrad.
Ellarad. | Chekkeri.

(1) I.L.R., 9 Mad., 175.

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the whole of the property in question was to be considered as a single estate, and that it was sufficient if he adduced evidence of his possession of different portions of such entire estate. He should, I think, be afforded an opportunity of proving that these lands were also in his possession till 1880, or that they are so situated as to justify the finding that they also belong to him. For this purpose, a plan is required showing all the lands included within the boundaries given in the claim petition, (which is treated as the plaint in this case,) in which map should be shown *nominatim* each and all of the lands the subject of this claim, and also (with reference to paragraph 6 of the memorandum of second appeal) any hill or land within these boundaries not claimed by the respondent. Further evidence may be adduced on either side before the District Judge, who will be required to consider the same together with the plan above referred to and submit his finding as to possession by respondent of the four hills—Vanancheri, Ellarad, Mutrad and Chekkeri—in question within two months after the receipt of this order, when seven days, after posting of the finding in this Court, will be allowed for filing objections.

MUTTUSAMI AYYAR, J.—This is one of those second appeals which relate to a considerable tract of forest land in Malabar. The contest in this case is as to the claimant's title to the property in dispute. Both the Lower Courts concur in finding that the claim of escheat set up for the Crown has not been proved. They also agree in thinking that the claimant has proved adverse possession from 1820 to 1876. Differing, however, from the Forest Settlement officer, the District Judge finds further that the claimant has made out title as against the Crown by proving more than sixty years' possession. The question for consideration in this second appeal is whether the decision of the Lower Appellate Court is correct.

The first question argued before us is as to the burden of proof. I see no reason to doubt that it lay on the claimant in this case to prove his title in the first instance. The tract of land in dispute was constituted by the Government into a reserved forest under Madras Act V of 1882, and a notification was published to that effect in 1886. Land at the disposal of Government for that purpose is defined in the Act to include all unoccupied land. The claimant himself admitted that since the Malayalam year 1055 (1880) he ceased to be in possession owing to the objections taken

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by the officers of Government to his meddling with it. Whether the Government was since actually in possession through its officers, or only excluded the claimant from possession in 1880, the land was unoccupied for six years at the date of the proclamation within the meaning of the Act so as to cast the onus of showing title in the first instance on the claimant.

The next question urged upon us is that the finding on the question of title is one which we ought not to accept with reference to the provisions of section 584 of the Code of Civil Procedure. The finding by the Court of first instance is that from the Malayalam year 995 (1820) to 1876 the claimant has exercised a continuous series of acts of ownership in regard to some one or other of these hills. Referring to documents ix to xli and the recital in document ix of a prior lease of 1813, the Lower Appellate Court observed that it was impossible to escape from the conclusion that the claimant's family had more than sixty years' uninterrupted possession of the hills which they claim. The first objection taken to this finding is that exhibit ix dated 1820, which is the earliest document in evidence, is neither proved nor legally admissible. It purports to be the counterpart of a lease more than sixty years old, and comes from proper custody, and both the Lower Courts have considered it to be genuine. Moreover, no objection was taken to its reception in evidence in either of the Courts below, and there is other evidence in proof of acts of subsequent enjoyment. This objection must be overruled.

The second objection to the finding is that the recital of a prior lease of 1813 in exhibit ix is no evidence of such lease. A reference to the document shows that it is doubtful if the plots mentioned in it as the subject of a prior lease are not different from those demised by the document, and there is nothing on the record to show that they are included in the property now in litigation. Again, such recitals are only evidence of reputation in the case of public or general rights, and the objection taken in appeal must prevail. There are, however, four presumptions which arise in favour of the claimant from the proved possession of his family from 1820 to 1876 and which materially support the finding of the Judge. In the first place, the prior possession of the claimant's family raises a presumption of title on his favour. It is true that the Forest Settlement officer refers to evidence showing that the Government interrupted the claimant's possession in 1877

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and was in possession from 1880, and that the Judge does not apparently dissent from that view. It is clear, however, that the possession of the Government falls short of twelve years; and as both Courts find that its claim of escheat is not proved, the presumption of ownership arising in favour of the Government from present possession is met by the presumption of ownership arising in favour of the claimant from prior possession. In *Doe d Harding* v. *Cooke*(1) the plaintiff showed a presumptive title arising out of twenty-three years' possession, and the defendant set up a latter possession of ten years. It was held, in the absence of proof of title on either side, that there was presumption against presumptions, which threw on the defendant the burden of establishing, if he can, a title of a higher description.

Another presumption in favour of the claimant's title arises from the fact that, though exhibit ix shows that his family was in possession in 1820, yet it does not show that it commenced in that year only. In a case like this, in which he claimed that his family had the jenm title for six hundred or seven hundred years, or from time immemorial, there will arise a presumption that the possession of the family extended to a much earlier period than 1820, unless there is some circumstance in the evidence to indicate that the possession originated at a particular point of time. Though Act V of 1882 throws the onus of proof on the claimant in the first instance, yet it does not disable him from proving his title against the Crown in the same way in which he is entitled to prove it in a suit between party and party, nor take away from him the benefit of presumptions arising in favour of his title from possession. In the *Singampatti case*(2) possession was proved only until 1818 and for less than sixty years, and yet it was held by this Court that there was sufficient proof of title. Again, there is the further fact that, though the claimant's possession was interfered with in 1877, and his right of possession was disputed, yet he was not actually dispossessed until 1880, when he was finally prohibited from meddling with the lands in dispute. This again favours the contention that until he was wholly dispossessed, his possession must be taken to have continued. Further, it was observed in

(1) 7 Bing., 346.

(2) *Sivasubramanya* v. *Secretary of State for India*, I.L.R., 9 Mad., 285, affirmed in P. C. *sub. nom.* Secretary of State for India *v.* Nellakutti Siva Subramania Tevar *ante*, p. 101.

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Secretary of State v. *Vira Rayan*(1) there was no presumption in Malabar that forest land belonged to the Crown. For these reasons, I do not think that the second objection can be supported.

The third ground of objection is that the District Judge has dealt with the several hills in dispute as if they formed together one estate and referred to no common characteristic nor peculiarity in support of his procedure. This objection would be valid in regard to those hills as to which there is no reliable evidence of prior possession from which title can be presumed. On the view that prior possession is *primâ facie* evidence of title unless it is met by proof of title on the part of Government, I am unable to uphold the contention that sixty years' possession must be proved as regards each of the lands in dispute, unless there was some common characteristic with reference to which possession of some hills may be treated as the possession of all.

The next objection is that as regards the four hills mentioned in the fourth ground in the memorandum of second appeal, there is no evidence of prior possession. There is no documentary evidence regarding any of them, and the Judge has expressed no opinion as to the weight due to the evidence of witnesses 4 and 5, which is said to refer to Mutrad hill. I concur in the order proposed by my learned colleague in regard to the four hills.

With reference to the sixth ground of objection mentioned in the memorandum of second appeal, it is desirable to have a plan showing with precision the boundaries comprising the hills in regard to which the claim is recognized.

For these reasons, I concur in the order proposed by my learned colleague.

[In compliance with the above order the District Judge returned a finding to the effect mentioned in the following judgment of the High Court.]

The second appeal having then come on for final hearing their Lordships delivered judgment as follows:—

JUDGMENT.—The finding of the Judge is that the claimant has not proved that he was at any time in possession of any of the four hills now in question, and that none of these hills is so connected with those found to be the claimants' as to justify a finding that these hills also belong to the claimant.

(1) I.L.R., 9 Mad., 175.

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These findings have been objected to; but on looking into the evidence we find they are correct.

The result is that we disallow plaintiff's claim to these hills, *i.e.*, Vanancheri, Ellarad, Mutrad, and Chekkeri, and to this extent modify the decree of the Lower Appellate Court; while we uphold the decree in so far as it concerns the rest of the property claimed in this suit.

Each party will bear his own costs of this appeal.

APPELLATE CRIMINAL.

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

SRINIVASA (COMPLAINANT), PETITIONER,

v.

ANNASAMI AND OTHERS (ACCUSED), RESPONDENTS.*

1892. March 8, 9, 22.

Penal Code—Act XLV of 1860, *s.* 372—*Illegal disposal of a minor—Revision.*

A dancing woman (fourth accused) of a temple applied to the manager (first accused) of the temple for the appointment of a girl under the age of sixteen, whom she had adopted as her daughter, to her "kothu" mirasi office to which duties more or less connected with the preparation of provisions of the temple were attached. The manager, before whom the girl had sung and danced, ordered that she be placed on the pay abstract like other dancing girls, and she was employed in the abovementioned duties about the temple for about five months. It appeared that the dancing women of the temple lived partly at least by prostitution, and there was evidence that the girl sang and danced in the temple, received wages and wore a pottu (an emblem of marriage). The Magistrate upon these facts refused to frame a charge against the manager of the temple and the adoptive mother of the minor under Penal Code, s. 372:

Held, per Collins, C.J. (*Parker, J., diss.*) that the Magistrate should have framed a charge.

On a petition under Criminal Procedure Code, ss. 435, 439, preferred by the complainant, who was a dismissed servant of the temple, after the prosecution had been pending for two years, it appeared that the girl had suffered no harm:

Held, that whether or not the Magistrate should have framed a charge, the High Court was not bound to send the case for retrial.

PETITION under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of discharge

* Criminal Revision Case No. 3 of 1892.

SRINIVASA v. ANNASAMI.

passed on the accused in calendar case No. 3 of 1891 on the file of the District Magistrate of Madura.

This case came before the High Court at an earlier stage of the proceedings, when the judgment was delivered which is reported *ante*. p. 41. The facts of the case appear sufficiently for the purposes of this report from the following judgments of the High Court.

Mr. *Wedderburn* and Mr. *Subramanyam* for petitioner.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and *Subramanya Ayyar* for accused No. 1.

Ananda Charlu for accused No. 4.

COLLINS, C.J.—The points that are to be decided in this case are, first, upon the evidence taken by the District Magistrate is there a *primâ facie* case disclosed against the accused under section 372 of the Indian Penal Code? and, second, ought the High Court to order the District Magistrate to frame a charge? There were four persons accused—the first, the manager of a temple; the second and third, the natural father and mother of the girl Pichaimuthu; and the fourth, a dasi of the temple with whom Pichaimuthu has been living for some years.

The case for the prosecution consisted of oral and documentary evidence; the witnesses were not cross-examined, and the District Magistrate held that the prosecution had failed to prove an offence, and, accordingly, discharged all the accused under section 253 of the Criminal Procedure Code.

With respect to the second and third accused no evidence implicating them was given, and the District Magistrate was right in discharging them.

I have now to consider the evidence against the first and fourth accused, and to consider whether the District Magistrate was justified in refusing to frame a charge. Section 372 of the Indian Penal Code enacts that "whoever sells, lets to hire, or otherwise "disposes of any minor under the age of sixteen years with intent "that such minor shall be employed or used for the purpose of "prostitution or for any unlawful and immoral purpose, *or knowing it to be likely that such minor* will be employed or used for "any such purpose shall be punished, &c."

It must be taken as proved in evidence in this case that the dasis of this temple live by prostitution and kovil wages (see

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evidence of eleventh witness). The fourth accused, a dasi of the temple (of which the first accused is manager) and holding a kothu miras in that temple, became, in 1889, incapacitated from age and illness from performing her duties in the temple, and, sometime before November 1889, she, accompanied by Pichaimuthu, went to a dancing party at the private house of the Village Munsif's brother. The first accused was present, and the fourth accused told him that she had taught Pichaimuthu dancing and singing and requested first accused to appoint Pichaimuthu in her place in the temple. The girl Pichaimuthu must have been then thirteen or fourteen years of age (as her age is given in 1891 as sixteen).

She danced and sung before the first accused on this occasion, and it is stated that he gave her Rs. 5, and in answer to fourth accused's request that she should be appointed in her place, the first accused directed fourth accused to present a petition, and told the Tahsildar to take work from her. On this point the thirteenth witness says that the fourth accused asked the first accused that her dasi appointment should be registered in the name of the girl, and the fourteenth witness, herself a dasi, corroborates that statement. On the 27th November 1889 exhibit A was sent by fourth accused directed to first accused, "Annasami Aiyar Avergal, Agent of the Sivaganga Zamindari." It is a petition by fourth accused describing herself as of the twelfth kothu miras of Tirukoshtiyur temple, praying that the employment of Vairavi and taking paddy for pounding into rice attached to the said kothu miras, which is in her name, be entered in the name of her daughter Pichaimuthu, and the petition is endorsed by first accused thus:—"The person named in the petition may be entered if there be no other objection to the miras duties mentioned in this petition," and he signs as agent and manager. This petition, No. 87, is also initialled by the Tahsildar of the temple, who, on the 20th December 1889, makes the following order in the temple records (exhibit B):—

"Tiruku—Yadast No. 108. As per the endorsement order No. 87, of the 28th ultimo, passed on petition presented to the head office by dasi Periamuthurutnam (fourth accused) of the twelfth kothu in the Tirukoshtiyur temple, enter for her duties her daughter Pichaimuthu in the pay abstract *like other dasis* and

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take work from her. Yadast has already been sent. Cooked rice should be entered without entering pay.

(Signed) KRISHNIER,
Tahsildar."

Exhibit B is also signed by the head gumastah, and is said to have been communicated to the monigar and the karnam. The evidence further shows that after this Pichaimuthu attended at the temple and did work. She also sang and danced. She received wages. She wore a pottu (an emblem of marriage), and this continued for five or six months. The fact that she danced and sung in the temple is proved by the fourth, sixth, thirteenth and fourteenth witnesses, the last named being a temple dasi, who says "Pichaimuthu has danced and done work in the kovil with us."

The fact that she wore a pottu in the temple is proved by the fourth, fifth and eleventh witnesses, but is denied by the girl herself in answer to a question put by the District Magistrate after the counsel for the accused had obtained permission to reserve cross-examination. After Pichaimuthu had been, as is stated, performing these duties in the temple for five or six months, exhibit D was written by the Tahsildar to the first accused and a reply was sent, exhibit E. The District Magistrate says on this part of the case that it is reasonably certain that exhibits D and E originated in a fear of prosecution.

The exhibits F and G are not proved to have come from the records of the temple, and, as the counsel for the prosecution did not prove who wrote them or from whence they came, the District Magistrate was right in not considering them in his judgment.

I have now to consider whether there was a *primâ facie* case against the first and fourth accused. The District Magistrate does not say he disbelieves the oral evidence *in toto;* it is true that in paragraph 5 of his judgment he says that the evidence is "discrepant" as to whether the girl danced alone or with others at the private dance; that the evidence is "discrepant" as to whether she danced and sang in the temple, or whether she did only work, such as sweeping, drawing figures on the floor, &c., and that the evidence is also "discrepant" as to whether she at any time wore a pottu. There is no contradiction that I can observe in the material points of the evidence, except a denial of the girl herself that she wore a pottu, and that was, as I have

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observed before, in answer to question from the District Magistrate; it is true that some witnesses give fuller particulars than others, but there is no material contradiction except the one I have noticed.

The District Magistrate also is of opinion that the pay abstracts show that her position was distinct from that of the regular dasis.

The principal point to be decided is, was there evidence of such a disposal of the girl as is contemplated by section 372? In other words, was there evidence that the accused disposed of the girl in such a way that they knew it to be likely that she would be employed or used for the purpose of prostitution. I am of opinion that there was evidence of such a disposition. The first accused, at the request of the fourth accused, caused the girl to be borne on the books of the temple, and there is evidence that in consequence of the petition in exhibit A being granted the girl was entered for her duties in the temple "like other dasis"—exhibit B. The fact that there is no evidence of dedication of the girl to the temple is immaterial. I am of opinion that at the time she was appointed to do the duties of the fourth accused (admittedly a dasi of the temple), and when she was enrolled in the temple books, and attended at the temple for the purpose of performing those duties, there was a sufficient disposal of her to satisfy the words of section 372, and it being in evidence that the dasis of this temple live partly at least by prostitution, the two accused knew it to be likely she would be employed or used for such a purpose. It was the duty, therefore, of the District Magistrate to have framed a charge.

The next point to be considered is whether or not the High Court is bound to send the case back to the District Magistrate and order him to frame a charge. I take into consideration the fact that there is no evidence that the girl was debauched during the time she was at the temple; that the prosecution is not conducted by the Government, but by a former servant of the temple who is prosecuting the accused, as the District Magistrate believes, out of spite against the first accused, that the first accused did, in May 1890, discharge the girl from her duties in the temple. I think, therefore, that the High Court is not bound to order the case to be retried, and I would dismiss the petition.

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PARKER, J.—The questions before us are (1) whether the evidence taken establishes a *primâ facie* case of an offence under section 372 of the Indian Penal Code, and (2) whether, if it does, we should direct the District Magistrate to draw a charge.

As regards the documentary evidence I may observe that exhibits F and G are not proved. They are not shown to be attendance registers kept in the temple in the ordinary course of business, nor is it shown they come from proper custody.

It is admitted that no evidence has been offered against the second and third accused. As against the first and fourth accused, the facts which appear in evidence are that first accused saw the girl Pichaimuthu at a private party and was pleased with her dancing and singing. The fourth accused (the girl's adoptive mother and a dasi) then represented to first accused that she herself was sick and getting old, and requested that Pichaimuthu might be appointed to her mirasi office in the temple. The first accused told the mother to present a petition and told the temple Tahsildar he might take work from the girl. Exhibit A is the petition presented. It merely prays that the employment of Vairavi taking paddy for pounding rice and other duties attached to the twelfth kothu miras may be entered in Pichaimuthu's name. It appears from other evidence that the duties enumerated are all more or less connected with the provisions of the temple. The endorsement on exhibit A directs that Pichaimuthu's name may be entered to the miras duties if there is no other objection.

It is found that the girl performed these miras duties above specified for four or five months. There is further evidence that the girl sang and danced in the temple and wore a pottu when she did so. The District Magistrate expresses himself as not entirely satisfied with the evidence that she sang and danced. He does not find whether she wore a pottu or not, but the only witnesses who speak to this are those whose testimony is not accepted as to the singing and dancing.

On 28th May 1890 the then Tahsildar reported (exhibit D) that Pichaimuthu had been entered on the register and had done work connected with Vairavi, &c. (enumerating these duties as to provisions), but stated that, as pottu was not tied, she was not able to take her turn and do other duties before the swamy. He also said she was not of proper age. The agent replied blaming the late Tahsildar for omitting to notice this fact, and directed that

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the girl be removed from service and her name struck off the acquittance roll.

It is not necessary to notice exhibit B. That document is not inconsistent with the above evidence, but as it was not written either by or to the first or fourth accused, and there is no evidence they ever saw it, it cannot affect the case.

This is the whole of the evidence in the case. It is not alleged that the girl has been actually debauched or that any attempt has been made to do so, and beyond the fact that by going to the temple she has been brought into association with dasis there is nothing to show that any harm has been done. As, however, her natural father and mother, as well as her adoptive mother, are all of the "dasi" caste, there can have been no change in her associations, which must have remained the same from her earliest childhood.

Do the facts found constitute a "disposal of" the minor within the meaning of section 372, Indian Penal Code? There is no evidence of dedication to the deity or of the formal tying of pottu, so that there has been no such change in the girl's *status* as would debar her from contracting a legal marriage. Nor has there been any transfer of possession since the minor has lived at home and merely gone to the temple to perform certain services. All that is proved is that her name has been entered in the kothu miras, and that she has been sent to perform certain duties in the temple. She has not been formally dedicated, and it is not at all clear that without dedication she is competent to hold the miras or to perform all the duties attached thereto. Her name may have been entered *pro tempore*, with a view to future dedication; but the question is whether such a disposal is complete.

The term "dispose of" has many meanings. In Webster's Dictionary it is defined as (*a*) to determine the fate of, to exercise the power of control over, to fix the condition, employment, &c., of, to direct or assign for a use; (*b*) to exercise finally one's power of control over, to pass over into the control of some one else as by selling, to get rid of.

Seeing that the term in section 372, Indian Penal Code, is used in conjunction with selling and letting to hire, it would seem that the Legislature rather contemplated some physical disposal for a mercenary purpose or the exercise of some power of control which would be final and irrevocable in its *moral effects*, more

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especially as the words used are "sells, lets to hire, or *otherwise* disposes of," thus suggesting other acts *ejusdem generis*.

In this case there has clearly been no irrevocable disposal. The girl is not dedicated; there is no change in her *status*, and she is still free to marry; no physical possession of her person has been handed over; all that has been done is to register her name among the servants of the temple *pro tempore* and remove it when found unqualified. The District Magistrate does indeed say that this removal may have been the result of fear of prosecution, but this is a mere surmise. The evidence is not inconsistent with the rectification of a *bonâ fide* mistake.

Then as to the criminal intention, beyond the inference that it was intended Pichaimuthu should eventually become a dasi there is no evidence. It is not shown as to first accused at any rate that he intended she would become a dasi during her minority, and the terms of the endorsement on exhibit A may bear out the Magistrate's view that the intention was to the contrary. That there was any intention to use the girl for the purpose of prostitution before she became a dasi, or whether she became a dasi or not, there is no evidence at all.

Cross-examination might have brought out the facts more clearly, but upon the evidence as it stands it appears to me very doubtful whether the offence of disposing of the girl for the purposes of prostitution can be held to be complete.

Penal provisions of law must be strictly construed, and must not be strained against an accused person. There is no reason to hold that the provisions of section 372, Indian Penal Code, were directed against dasis as such, and it has been held in two cases—*Venku* v. *Mahalinga*(1) and *Queen-Empress* v. *Ramanna*(2)—that prostitution is not the essential condition or necessary consequence of becoming a dancing girl, and *a fortiori* it is not the necessary consequence of education to become one.

While, however, I am not able to agree with the learned Chief Justice that a technical disposal for the purposes named in section 372, Indian Penal Code, has been completed, I agree with him that, in either view, no further inquiry is necessary. The prosecution has been pending against the accused for nearly two years. Enough has been done to warn the temple authorities of the

(1) I.L.R., 11 Mad., 393. (2) I.L.R., 12 Mad., 273.

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danger they incur if acts are done which amount to the disposal of a minor for immoral purposes, even though the ceremony of dedication to the deity be omitted. The prosecution has been carried on by a dismissed temple servant who has been convicted of theft, and who has endeavoured to support his case against his late employers by the production of records which he has stolen from the temple. Further proceedings could only tend to the gratification of private malice, and are not called for either for the protection of the girl or for the public good. I concur, therefore, in dismissing this petition.

APPELLATE CIVIL.

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

1892. March 11, 14.

ARUMUGA (PLAINTIFF), APPELLANT,

v.

CHOCKALINGAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, *sched. II, arts.* 136, 138.

Limitation Act, 1877, sched. II, art. 138 is applicable to a suit brought by the assignee of a purchaser of land at a Court sale to obtain possession of the land.

SECOND APPEAL against the decree of R. S. Benson, District Judge of South Arcot, in appeal suit No. 95 of 1890, affirming the decree of P. Subramania Pillai, District Munsif of Virdhachalam, in original suit No. 366 of 1889.

Suit for possession of land sold to the plaintiff in 1883 by defendant No. 1, who had purchased it at a Court sale in April 1877. Neither had been in possession.

The District Munsif dismissed the suit, holding that the suit was barred by limitation. The District Judge on appeal affirmed the decree of the District Munsif.

The plaintiff preferred this second appeal.

Mr. *Subramanyam* for appellant.

Mahadeva Ayyar for respondents.

MUTTUSAMI AYYAR, J.—This was a suit by a purchaser at a private sale from the son of a purchaser at a Court sale, who had not

* Second Appeal No. 532 of 1891.

ARUMUGA v. CHOCKALINGAM.

obtained possession from the judgment-debtors. Both the Courts below held that it was barred by article 138, second schedule of the Act of Limitations. I think that the decision is correct and that the appellant's contention that article 136 governs the claim is not tenable. If the suit was brought by the auction purchaser, article 138 would clearly apply. There is no reason to think that when it is brought either by his son or a purchaser claiming under him, the article ceases to be applicable. Reading articles 136, 137 and 138 together, I think that article 136 applies to suits brought upon claims not derived from purchasers at a Court sale. I would dismiss the second appeal with costs.

BEST, J.—The only point urged before us is that the Lower Courts are in error in holding that the plaintiff's suit is barred by limitation. It is contended that article 136 of schedule II of the Limitation Act, and not article 138 as held by the Lower Courts, is applicable to this case.

Plaintiff sues as assignee of the purchaser at a sale in execution of a decree, and it is contended that, though article 138 might apply to a suit by the purchaser himself, it must be read strictly, and so read is inapplicable to such purchaser's assignee. It has been held that the term "mortgagee" in article 148 of the same schedule includes an assignee of a mortgage—*Bhagwan Sahai* v. *Bhagwan Din*(1), and even a co-mortgagor by whom the mortgaged property had been redeemed—*Ashfaq Ahmad* v. *Wazir Ali*(2), and there is no reason why the word purchaser in article 138 should be strictly construed so as to exclude the assignee of such purchaser, who of course stands in the shoes of his assignor and can have no right as such assignee greater than that possessed by his assignor.

Article 136 is intended to apply to cases in which the vendor is at the time of sale not entitled to possession of the property sold, and consequently the institution of a suit for possession has to be deferred till the right of any third person to its possession has determined. Had plaintiff's vendor purchased the property under such circumstances, no doubt plaintiff as his assignee would be entitled to the benefit of the further time allowed by article 136. But this is not plaintiff's case. His contention is merely that as his vendor was not entitled to possession of the property

(1) I.L.R., 9 All., 97. (2) I.L.R., 11 All., 423.

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purchased by him *till the sale was confirmed*, the limitation period must be counted from the date of confirmation of the sale, and not from the date of the sale itself. This is, however, opposed to the express provisions of article 138—*Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal*(1), *Seru Mohun Bania* v. *Bhagoban Din Pandey*(2).

It is not denied that the judgment-debtors were in possession at the date of the sale at which plaintiff's vendor, the first defendant, purchased the property. The first defendant has allowed the suit to proceed *ex parte* so far as he is concerned. The other defendants who have opposed the suit are the parties in possession of the property. If this suit had been brought against them by first defendant, it would clearly have been barred under article 138, and it is similarly barred under that article when brought by plaintiff as assignee of the first defendant. This second appeal fails therefore and must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Best.

GOVINDA (PLAINTIFF), APPELLANT,

v.

KRISHNAN (DEFENDANT), RESPONDENT.*

1892. Feb. 11, 15.

Malabar Law—Nambudri—Karnavan, decree against—Sale in execution.

A junior member of a Nambudri illom, of which he was held out as the manager and *de facto* karnavan, contracted a debt for the purposes of the illom. The creditor sued him on the debt, but did not implead him as karnavan, and, having obtained a personal decree, attached and brought to sale in execution property belonging to the illom. A son of the judgment-debtor now sued to set aside the sale:

Held, that the sale should be set aside.

SECOND APPEAL against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 66 of 1890, reversing the decree of V. Ramen Menon, District Munsif of Kavai, in original suit No. 380 of 1888.

(1) I.L.R., 14 Cal., 644. (2) I.L.R., 9 Cal., 602.

* Second Appeals Nos. 474 and 656 of 1891.

GOVINDA v. KRISHNAN.

Suit by a member of a Nambudri illom to set aside the sale of certain property belonging to the plaintiff's illom in execution of a decree obtained against the plaintiff's father in original suit No. 363 of 1875 on the file of the Court of the District Munsif of Kavai. This was a personal decree, and the judgment-debtor was not described as karnavan.

The District Munsif passed a decree as prayed. This decree was reversed on appeal by the District Judge, who held that it was proved that the debt in question in the former suit had been "contracted for illom necessity." The further findings of the District Judge on the facts of the case appear from the following extracts from his judgment :—

"Plaintiff does not seek in this suit to escape his personal "liability, but to set aside the sale of illom properties in execution "of the decree in original suit No. 363 of 1875 on the ground "that the debt was not contracted for illom necessity.

"It is not denied that at the time the debt was contracted "plaintiff's father was a junior in the illom, but the evidence "shows clearly that the member senior to him spent his time in "Travancore, and that plaintiff's father managed the illom affairs; "but the Munsif found that the decree under which the property "was sold was a personal one, and that there was no authority for "holding that the debts of the manager if a junior were binding "on the tarwad, and that this decree debt was therefore not valid "against the tarwad.

"I have no doubt, therefore, that plaintiff's father was held out "to the world as the manager and *de facto* karnavan of the tar-"wad, and I must hold that it is for plaintiff to prove that the "debt was not one contracted for the tarwad, especially as he "seeks to set aside a Court sale."

Plaintiff preferred this second appeal.

Sankara Menon for appellant.

Sankaran Nayar and *Ryru Nambiar* for respondent.

JUDGMENT.—It has been held by the Full Bench in *Ittiachan* v. *Velappan*(1) that when the karnavan of a Malabar tarwad has not been impleaded as such in a suit, and there is nothing on the face of the proceedings to show that it was intended to implead him in his representative character, tarwad property cannot

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

be attached and sold in execution of the decree, *even though it is proved that the decree was obtained for a debt binding on the tarwad.* Compare also *Sankaran* v. *Parvathi*(1).

The Judge has found that the law applicable to plaintiff's family is that to which Nambudri Brahmans in the Malabar district are subject, *i.e.*, Hindu law modified by special custom. Compare *Vishnu* v. *Krishnan*(2) and *Vasudevan* v. *The Secretary of State for India*(3). As was found in *Nilakandan* v. *Madhavan*(4), "the customs of the Nambudris in the management and assignment of property do not differ from the customs of the Nayars. Impartibility is the rule, and the eldest member is the manager. . . . . The only difference between a Nambudri illom and a Nayar tarwad is that in the former the offspring of the marriage and the married woman become members of the husband's illom, while the children of a Nayar woman become members of her own tarwad." As was also noticed in that same finding, *Vasudeva* v. *Narayana*(5),—one of the earliest cases in which it was held that a decree obtained against the karnavan is not binding on members of the family who were not parties to the suit in which that decree was obtained or had not notice of the suit under section 30 of the Code of Civil Procedure,—was a suit between Nambudris.

The decision in *Nilakandan* v. *Madhavan*(4) is that the principle of Hindu law, which imposes a duty on a son to pay his father's debt contracted for purposes neither illegal nor immoral, is not applicable to Nambudris. As the property is joint and impartible and belongs to the whole family, and the father has in it no definite share that could be made available for his individual debt or which devolves, on his death, to his son to the exclusion of the other joint members of the family, there is no room for the application of the rule of the pious duty of the son to pay the father's debts. The decrees of the Lower Appellate Court in both these suits must, therefore, be set aside and those of the Court of First Instance restored, and the respondent must pay the appellant's costs in each case, both in the Lower Appellate Court and in this Court.

(1) I.L.R., 12 Mad., 434.
(2) I.L.R., 7 Mad., 3.
(3) I.L.R., 11 Mad., 157.
(4) I.L.R., 10 Mad., 9.
(5) I.L.R., 6 Mad., 121.

APPELLATE CIVIL.

Before Mr. Justice Subramanya Ayyar and Mr. Justice Best.

1892. Feb. 8, 15.

THANDAVAN AND ANOTHER (PLAINTIFFS NOS. 2 AND 4), APPELLANTS,

v.

VALLIAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 13, 43—"Res judicata"—*Registration Act—Act III of* 1877, *ss.* 17, 49—*Instrument affecting movable and immovable property.*

The widow, daughter and divided brother of a deceased Hindu, executed an instrument which provided for the distribution of his property, both movable and immovable as to which they had disputed. The document was not registered. The widow set up a will made by the deceased in her favour: the brother sued the widow for a declaration that the will was a forgery, but the Court held that it was genuine. He now sued the widow and daughter on the above instrument to recover his agreed share of the movable property of the deceased. The widow set up the will, which the plaintiff averred was invalid according to the custom governing the family:

Held, (1) that the plaintiff was not precluded by the decree in the former suit from impugning the validity of the will;

(2) that the unregistered instrument was admissible as evidence in support of the plaintiff's claim for the movable property.

APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in original suit No. 40 of 1888.

Suit for possession of a one-third share in the movable property of Paramasiva Chetti deceased, the brother of the plaintiff. The plaintiff alleged in the plaint that he was by custom entitled to the whole property; but the present claim was founded on an instrument, dated 28th December 1887, and made between the plaintiff and defendants Nos. 1 and 2, the widow and daughter, respectively, of the deceased, embodying the result of a compromise of disputes which had arisen between the parties as to their rights to the property. This instrument was not registered. Its terms (omitting formal parts) were as follows:—

"The following is the arrangement made by us three consent-
"ing to the decision given by our relatives and friends who have
"attested this, and who, having been chosen arbitrators, heard
"the representations made by us three regarding our disputes on

* Appeal No. 99 of 1891.

"the morning of this 28th day of the current December month
"after the death, which took place at 10 P.M., on the 27th idem,
"of Paramasivan Chettiar, who was the younger brother of the
"said Appavu Chettiar, husband of Valliamma Ammal and father
"of Mangaiyarkarasi *alias* Tangathammal. We three shall divide
"into three shares, each of us taking a share, the balance remain-
"ing out of the movables and outstanding debts, &c., after paying
"in common thereout, at the time of our division, the following
"items, namely, in accordance with what the said Paramasivan
"Chettiar expressed before his death, Rs. 700 in cash, and gold
"ornaments worth Rs. 300 to the said Mangayarkarasi *alias*
"Tangathammal, who is the daughter of the said Paramasivan
"Chettiar; Rs. 300 to Pichammal, who is the daughter of
"Appavu Chettiar and wife of Orayur Sivanthilingam Chettiar;
"Rs. 190 to Gengadhara Mudaliar on behalf of the charity to
"Sree Matharbhutta Iswara Swami, the same being the balance
"remaining payable after deducting what was paid by the said
"Paramasivan Chettiar for that charity; and Rs. 150 to Vee-
"rabadra Chettiar's son Marudai Chettiar and cloth merchant
"Lakshmana Pillai, that amount being the total of Rs. 100 on
"account of Kailasanatha Swami Kovil, which stands in the Peri-
"yakadai street of the said fort and of Rs. 50 on account of
"Pillayar Kovil, which stands in the said street. The share taken
"by each of us shall be at his or her disposal with power of
"alienation, &c., at pleasure; and the others shall have no right
"or claim thereto, or interest therein, whatever. The immovable
"properties consisting of two strong terraced houses, which bear
"Municipal Nos. 11 and 12 and are situate in the southern portion
"of Periya Chetti street of the fort, and of nunjah lands lying in
"Kaluthaimalaipatti, shall be enjoyed by the said Valliamma
"Ammal during her life-time; and, after her death, the said
"Appavu Chettiar and his heirs shall perform her obsequies, &c.,
"and the said Appavu Chettiar and others shall enjoy the said two
"houses and the said nunja land with all rights thereto. The
"said Appavu Chettiar himself shall enjoy, with all rights thereto,
"the thatched house which fell to the share of the said Parama-
"sivan Chetti. To this effect this karar-agreement was entered
"into among us three. This agreement shall be in the possession
"of Nagalingam Chettiar, son of Velayudan Chettiar of Orayur;
"and the key of the said house shall be with the cloth merchant

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"Lakshmana Pillai. The said Lakshmana Pillai shall put a lock "and seal on the said house."

The plaintiff died during the pendency of the suit which was proceeded with by his sons.

The District Judge held that this instrument was bad for want of consideration and also by reason of its being unregistered. Defendant No. 1, among other defences, pleaded that she was entitled to the property under the will of her husband. In a previous suit brought by the plaintiff against this defendant for a declaration that the will in question was a forgery, a decree was passed for the defendant on a finding that it was a genuine will. The District Judge held that the plaintiff was now estopped from bringing into question the validity of the will.

On the abovementioned rulings, the District Judge dismissed the suit.

The plaintiffs preferred this appeal.

Mr. *Subramanyam* for appellants.

Bhashyam Ayyangar and *Pattabhirama Ayyar* for respondent, No. 1.

Panchapagesa Sastri for respondent, No. 2.

SUBRAMANYA AYYAR, J.—One Paramasivan Chetti died on the 27th December 1887 leaving him surviving, his divided brother, the first plaintiff, his widow, the first defendant, and his daughter, the second defendant. The plaintiffs, Nos. 2 and 4, are the sons of the first plaintiff, who died after the institution of the suit.

The case for the plaintiffs is that the late first plaintiff was entitled, according to the custom of the caste, to succeed, to the exclusion of the first defendant, to the properties left by Paramasivan Chetti, that, on his death, disputes arose between the late first plaintiff, and the first defendant respecting his properties; that, through the mediation of certain persons, the disputes were settled and the terms of the settlement were embodied in an agreement executed between the first plaintiff and the first and second defendants on the 28th December 1887; that, according to the said agreement, the first plaintiff became entitled to one-third of the movable properties and certain immovable properties left by Paramasivan. This suit is to recover the plaintiffs' one-third share of the movable properties.

It was contended by the first defendant that the agreement sued on was obtained from her by coercion; that there was no

consideration for it; and that it was not receivable in evidence. The custom alleged by the plaintiff was also denied and the first defendant claimed the whole estate of Paramasivan as his widow and also under his will.

In original suit No. 12 of 1887, the late plaintiff sued the first defendant for a declaration that the will set up by her was a forgery. It was held by the Court of First Instance, as well as by the High Court, on appeal, that the document impeached was genuine.

This decision, the District Judge held, in the present case, estopped the plaintiffs from questioning the validity of the will. He further held that the instrument of compromise was void for want of registration and was without consideration. He dismissed the suit and the plaintiffs appeal.

I shall first deal with the objection that, as the document sued on was not registered, it was void. It was urged that the transaction evidenced by the document was indivisible, and, therefore, the plaintiffs could not be permitted to rely on the document or use it in evidence in respect of any part of the transaction in question. I think this contention is unsustainable. Section 49 of the Registration Act lays down that no document required to be registered by section 17 shall, unless duly registered, "affect any *immovable* property comprised therein," or "be received as evidence of any transaction affecting *such* property." The object of the law is obviously to prevent documents which ought to be, but are not, registered from affecting immovable property and immovable property only. There does not seem to be any warrant for supposing that, if a document relating to both immovable and movable property is not registered as required by law, then the document becomes wholly inoperative, not taking effect even as regards the movable property comprised therein. The words of the section are the very reverse of what one would expect the Legislature to use if it was intended to render an unregistered document falling within the provisions of section 49 inadmissible as evidence for any purpose whatever. On the other hand, the terms of the section clearly imply that it was not so intended.

The decision in *Lakshmamma* v. *Kameswara*(1) relied on for the respondent, when taken with the facts of the case, is, I think,

(1) I.L.R., 13 Mad., 281.

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not in conflict with my view. The document A in that case was in reality a deed of gift of movable and immovable properties executed in 1886. There was, no doubt, also an arrangement for a partition—not a partition on the footing of a pre-existing right—but a partition to carry out the gift made under the document itself. The Court in that case said "there can be no such thing as a partition apart from this document" and in effect held that the document could not be looked at for any purpose whatever, and that the transaction was void for want of registration.

In *Mattongeney Dossee* v. *Ramnarain Sadkhan*(1) the argument of indivisibility was urged and accepted in respect of a hypothecation bond for money lent; but the contrary view was taken in *Krishto Lall Ghose* v. *Bonomalee Roy*(2). In the order referring the question for the decision of the Full Bench in *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan*(3), Wilson, J., drew attention to the divergence between the views expressed in the two cases *Mattongeney Dossee* v. *Ramnarain Sadkhan*(1), *Krishto Lall Ghose* v. *Bonomalee Roy*(2) just referred to. He explained that, according to the decision in *Mattongeney Dossee* v. *Ramnarain Sadkhan*(1), the word "transaction" in section 49 meant "the whole bargain;" whereas, according to the opinion of the Judges who decided the case in *Krishto Lall Ghose* v. *Bonomalee Roy*(2), it meant "not the bargain but that term of the bargain which affects land." The Judges who formed the Full Bench decided that the true construction was that no document should be received in evidence of any transaction *so far as it affected land*, and that the view they took of the section rendered it unnecessary to consider whether the document of the kind then in question embodied one single transaction or might properly be said to contain more. The same view has been taken by this Court after the Registration Act of 1871 came into force—see *Stri Seshathri Ayyengar* v. *Sankara Ayen*(4), *Jagappa* v. *Latchappa*(5). *Achoo Bayamah* v. *Dhany Ram*(6) cannot be relied on, as that decision proceeded on the clause "no instrument required by section 17 to be registered shall be received in evidence in any civil proceeding in any Court unless registered," which existed in section 49 of Act XX of 1866; but nothing corresponding to this is to be found in the present section

(1) I.L.R., 4 Cal., 83. (2) I.L.R., 5 Cal., 611. (3) I.L.R., 9 Cal., 520.
(4) 7 M.H.C.R., 296. (5) I.L.R., 5 Mad., 119. (6) 4 M.H.C.R., 378.

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49. Now, in dealing with the question of indivisibility of contracts, the rule laid down in the *Bishop of Chester* v. *John Freland*(1) must be borne in mind. There Hutton, J., said that "when a good "thing and a void thing are put together in the same grant, "the law makes such construction that the grant shall be good "for that which is good and void for that which is void." For guidance in the practical application of this principle, (adapting the language of a writer of authority,) perhaps no better rule can be given than that if the part which is void be in its own nature separable and divisible, and there be no express stipulation or necessary implication which makes that which is void and that which is good absolutely one thing, and that which is void may be regarded not as a condition going to the essence of the contract, in such a case that which is good may be taken as distinct from that which is void. (Parsons on Contracts, 7th Edition, Vol. I, p. 494.) Construing the document in question with reference to these principles, I am of opinion that it is admissible in evidence in support of the plaintiffs' claim to the share of the movable properties comprised therein.

The next question argued was whether the plaintiffs were entitled to question the validity of the will left by Paramasivan Chetti. The District Judge seems to me to be in error in considering that the plaintiffs were estopped by the decision in original suit No. 12 of 1887 from raising such a contention. The infringement of right complained of in that suit was that the first defendant put forward a fabricated document as the genuine will of her husband; whilst the infraction complained of in connection with the matter under consideration at present, is that Paramasivan himself purported to dispose by his will of property which, according to the alleged custom of the caste, he could not alienate. This latter case was not, in my opinion, matter which ought to have been made a ground of attack in the former suit; *Allunni* v. *Kunjusha*(2), *Konerrav* v. *Gurrav*(3). Therefore no question of estoppel arises.

In consequence of the view taken by the District Judge, he excluded the evidence which the parties were prepared to produce upon the main issues in the case. I would therefore set aside

(1) Ley., 79. (2) I.L.R., 7 Mad., 264. (3) I.L.R., 5 Bom., 594.

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the decree of the Lower Court and remand the suit for disposal according to law.

BEST, J.—I concur in finding that the suit is not barred by the previous suit (original suit No. 12 of 1887), and also that the agreement sued on is not inadmissible in consequence of its non-registration as evidence in support of the claim for the movables, which alone are sought to be recovered in this suit.

Section 49 of the present Registration Act renders an unregistered document inadmissible as evidence of any transaction affecting immovable property, which is the kind of property expressly mentioned in the preceding clause and referred to as "such property" in the clause in which its non-admissibility as evidence is declared—see *Stri Seshathri Ayyengar* v. *Sankara Ayen*(1) and *Guduri Jagannadham* v. *Rapaka Ramanna*(2), in the latter of which cases the decision of the majority of the Full Bench in *Achoo Bayamah* v. *Dhany Ram*(3) is referred to, but not followed because (as is remarked) "the new law has explicitly adopted the doctrine "which the late Chief Justice of this Court believed to be derivable "from the old, namely, that the object of section 49 was solely to "prevent instruments from being of legal force for any of the pur-"poses which make registration compulsory under section 17." This last decision was also followed in *Jagappa* v. *Latchappa*(4). None of these cases are noticed in the judgment in *Lakshmamma* v. *Kameswara*(5), which proceeds, moreover, mainly on the ground that the transaction evidenced by the document then in question was "one and indivisible." Such, however, is not the case here. The partition of movables, now sought to be enforced, can be effected quite independently of the immovable properties which are also included in the agreement.

The decision of a Full Bench of the Calcutta High Court in *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan*(6) is also in accordance with the decisions in *Stri Seshathri Ayyenyar* v. *Sankara Ayen*(1), *Achoo Bayamah* v. *Dhany Ram*(3) and *Jagappa* v. *Latchappa*(4).

I agree therefore in finding that want of registration is no bar to the admissibility of the agreement sued on as evidence for the purposes of this suit.

(1) 7 M.H.C.R., 296. (2) 7 M.H.C.R., 348. (3) 4 M.H.C.R., 378.
(4) I.L.R., 5 Mad., 119. (5) I.L.R., 13 Mad., 281. (6) I.L.R., 9 Cal., 520.

As to the question whether the suit is *res judicata* by the decision in original suit No. 12 of 1887, it is to be observed that the object of that suit was merely to get a declaration that the will was not genuine. The property was not then sued for and it cannot be said that plaintiff ought in that suit to have questioned the validity of the will in case of its being found to be genuine.

I concur, therefore, in setting aside the Lower Court's decree and remanding the suit for disposal according to law.

The costs hitherto incurred will be provided for in the decree to be passed by the Lower Court.

APPELLATE CIVIL.

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

1891. April 16. 1892. February 17.

SULTAN MOIDEEN (DEFENDANT No. 2), APPELLANT,

v.

SAVALAYAMMAL AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

Civil Procedure Code, ss. 231, 258—Joint decree—Execution, application for—Uncertified payment to one decree-holder.

One of two holders of a joint decree applied for execution of the decree to the full amount. It appeared that the other decree-holder had received a certain sum from the judgment-debtor on account of the decree out of Court, but this payment had not been certified:

Held, that the payment was valid only to the extent of the share to which the payee was entitled, and that this share having been ascertained and credit given for it, the decree should be executed in favour of the present applicant for the balance.

APPEAL against the decree of T. Weir, District Judge of Salem, on execution petition No. 444 of 1890, in which Savalayammal, one of two joint decree-holders, prayed for the execution of the decree in original suit No. 13 of 1883 on the file of the District Court of Salem.

The decree, which was passed in the terms of a compromise, was to the effect that the defendant should pay to the plaintiffs (viz., the present petitioner and one Appaji Chetti) jointly Rs.

* Appeal against Order No. 33 of 1890.

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2,000 and interest in two instalments. The present application was for the execution of the decree for the full amount, and it was resisted on the ground, among others, that the defendant had paid out of Court Rs. 1,100 under the decree to Appaji Chetti. It appeared that no satisfaction of the decree had been certified.

The District Judge made an order as prayed. The judgment-debtor preferred this appeal.

S. Subramanya Ayyar for appellant.

Mr. *E. Norton* for respondents.

SHEPHARD, J.—If the payment actually was made to Appaji Chetti, I think the decree cannot now be executed, at any rate, as to the half share to which he was presumably entitled. I must ask the District Judge to find distinctly whether in fact the payment was made.

The finding will be returned within one month after the re-opening of the Court after the recess, and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

In compliance with the above order, the Acting District Judge submitted his finding, which was to the effect that that the Rs. 1,100 were paid by the judgment-debtor Sultan Moideen Ravuthan to one of the judgment-creditors, Appaji Chetti.

This appeal having come on again for disposal, it was referred to a bench of two Judges. It subsequently came on for disposal before MUTTUSAMI AYYAR and BEST, JJ.

Sundara Ayyar for appellant.

Mr. *E. Norton* for respondents.

JUDGMENT.—The finding is that the sum of Rs. 1,100 was paid by the defendant to Appaji Chetti, one of two decree-holders. This finding is, however, not sufficient for the disposal of the case. A further finding is also necessary as to what was the share to which Appaji Chetti is entitled as between him and the first plaintiff Savalayammal. The payment made to Appaji Chetti can be held valid only to the extent of his share to which he is entitled:—See *Tarruck Chunder Bhuttacharjee* v. *Divendro Nath Sanyal*(1), with the decision in which case we agree.

As to the contention that the application made by Savalayammal for execution of the whole decree was premature, we are

(1) I.L.R., 9 Cal., 831.

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unable to rule that the first instalment was paid in conformity with the direction contained in the decree.

The payment was not certified by Appaji Chetti to have been received by him on behalf of both judgment-creditors, and it appears that he has applied the whole of the money for his own use. Having regard to section 231 of the Code of Civil Procedure, a payment made out of Court to one of several joint creditors, and not certified by him as having been received or applied for the benefit of all, cannot be regarded as made in satisfaction of the decree, except for the purpose of determining what order should be passed under section 231.

The District Judge should, therefore, ascertain what is the share due to Appaji Chetti, and, giving credit for the amount thus ascertained, execute the decree in favour of Savalayammal for the balance.

If Appaji Chetti's share should exceed Rs. 1,100, the District Judge will, of course, make such order as may be necessary to protect his interest as regards such excess.

The costs incurred hitherto to abide and follow the result.

APPELLATE CIVIL.

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

1891. April 6. September 9.

KELU (PLAINTIFF), APPELLANT,

v.

VIKRISHA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 223, 295—Execution—Rateable distribution—Transfer of decree for execution.

Two decrees were passed against the same defendant in the Court of a District Munsif and on the small cause side of a Subordinate Court in the same district, respectively. The holder of the decree in the small cause suit attached and brought to sale the judgment-debtor's interest in a benefit fund. The other decree-holder applied for rateable distribution, his decree having been transferred for execution to the Subordinate Court directly and not through the District Court:

Held, (1) that the direct transfer of the decree of the District Munsif was not illegal;

* Appeal against Order No. 11 of 1890.

KELU v. IKRISHA.

(2) that the Subordinate Judge had inherent jurisdiction to execute the decree of the District Munsif;

(3) that the order for rateable distribution was right.

APPEAL against the order of E. K. Krishnan, Subordinate Judge of South Malabar, made on civil miscellaneous petition No. 1397 of 1889.

Govinda Menon obtained a money-decree in original suit No. 310 of 1889 in the Court of the District Munsif of Shernad, and Kelu Menon obtained a money-decree against the same defendant in small cause suit No. 154 of 1889 in the Court of the Subordinate Judge at Calicut and attached and brought to sale, in execution, the defendant's interest in a benefit fund. Govinda Menon's decree had meanwhile been transferred to the Subordinate Court directly without the intervention of the District Court, and he applied for rateable distribution under Civil Procedure Code, s. 295.

The Subordinate Judge granted the application for rateable distribution.

The decree-holder in the small cause suit preferred this appeal.

Sankara Menon for appellant.

Govinda Menon for respondent.

JUDGMENT.—The second respondent obtained a money-decree against first respondent in original suit No. 310 of 1888 on the file of the Shernad Munsif. Appellant also obtained a decree for money against first respondent on the small cause side of the Subordinate Court at Calicut in small cause No. 154 of 1889. In its execution, appellant attached the judgment-debtor's interest in certain kuri or benefit fund, brought it to sale, and realized Rs. 488. Meanwhile second respondent had his decree transmitted to the Subordinate Judge for execution, and then applied for rateable distribution under section 295 of the Code of Civil Procedure. Appellant objected to this proceeding on three grounds, viz., (i) that the decree in second respondent's favour was collusive; (ii) that it was not transmitted to the Subordinate Judge for execution through the District Court; (iii) that the decree, being one passed in a regular suit, was not capable of being executed on the small cause side of the Subordinate Court. The Subordinate Judge disallowed these objections and ordered rateable distribution. To this order three objections are taken. It is argued that a District Munsif is not at liberty to transmit his decree to a Subordinate Judge for execution otherwise than through the District Court.

KELU v. VIKRISHA.

In the case before us both Courts are in the same district, and the last paragraph of section 223 is conclusive on this point. Another contention is that a decree passed by a District Munsif in the exercise of ordinary jurisdiction is not capable of being executed by a Subordinate Judge executing a decree passed by him in the exercise of his small cause jurisdiction. If both decrees were passed by the same Court, one on its regular and the other on its small cause side, there is no warrant in the language of section 295 for the suggestion that they cannot be admitted to rateable distribution. The intention is to recognize the equal right of holders of decrees for money to share in the sale-proceeds realized by any one of them in execution, provided that the others have, prior to the realization, applied to the Court for execution. There is no apparent reason why a distribution should be made between one who holds a small cause decree and one who obtains a decree on the regular side. In this connection our attention is drawn to the decisions in *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee*(1) and *Durga Charan Mojumdar* v. *Umatara Gupta*(2), wherein the decision in *Narasayya* v. *Venkatakrishnayya*(3) was dissented from. In the last-mentioned decision, a Divisional Bench of this Court held that chapter XIX created an extraordinary jurisdiction in cases mentioned in the last paragraph of section 223, and that a District Munsif was at liberty to execute, and that a District Judge was competent to transfer to him for execution, a decree for a sum in excess of the pecuniary limit of the ordinary jurisdiction of the former. But two Divisional Benches of the High Court at Calcutta considered that there was no intention to create an exceptional jurisdiction in District Munsifs to execute decrees for more than the value of their pecuniary jurisdiction, and that section 223 ought to be read as if section 6 was incorporated with it. It is not necessary to determine, for the purposes of this case, whether the District Munsif has jurisdiction to execute a decree passed by a Subordinate or District Court for more than Rs. 2,500; but it is sufficient to observe that the Subordinate Judge had inherent jurisdiction to execute the decree for money passed by the District Munsif of Shernad. We dismiss the appeal with costs.

The civil revision petition is also dismissed.

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(1) I.L.R., 16 Cal., 457. (2) I.L.R., 16 Cal., 465.
(3) I.L.R., 7 Mad., 397.

APPELLATE CIVIL.

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

1891. April 13. May 5.

VENKAYYA (DEFENDANT), APPELLANT,

v.

VENKATAPPAYYA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 522—Decree on an award—Appeal.

After issues had been framed in a suit to wind up a partnership, the matter was referred to an arbitrator, who made his award, and with regard to certain property, not part of the partnership property, he referred the parties to a separate suit. A decree was passed in accordance with the award:

Held, that an appeal lies against a decree passed on an award, on the ground that the award was not legal; but that the award was not illegal by reason of its comprising the reference of the parties to a separate suit.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 73 of 1889, affirming the decree of O. V. Nanjunda Ayyar, Acting District Munsif of Masulipatam, in original suit No. 85 of 1888.

The facts of the case are stated above sufficiently for the purposes of the report.

Pattabhirama Ayyar for appellant.

S. Subramanya Ayyar and *P. Subramanya Ayyar* for respondent.

JUDGMENT.—The first question we have to determine is one raised by the respondent whether any appeal lay from the decree and judgment of the District Munsif, which admittedly were in accordance with the award. It is laid down in section 522 of the Code of Civil Procedure that no appeal shall lie from a decree passed in accordance with an award, except so far as the decree is in excess of, or not in accordance with, the award. It has been held that the effect of that section is that it is not enough for the Appellate Court to satisfy itself as to the mere correspondence of the decree and the award, but that the Appellate Court must so far look behind the decree as to satisfy itself that the award is a legal award. If the Appellate Court is satisfied that an award has been properly and regularly arrived at by an arbitrator or

* Second Appeal No. 1659 of 1889.

arbitrators duly appointed, and that the decree is in accordance with the award, then, and then only, must the appeal be dismissed, *Lachman Das* v. *Brijpal*(1), *Debendra Nath Shaw* v. *Aubhoy Churn Bagchi*(2), *Pugardin* v. *Moidin*(3). A second appeal will of course lie to this Court on a point of law.

Now it is argued for the appellant that the award in the present case was illegal, because the arbitrator, after finding the plaintiff and defendant had equal shares in the indigo vat at Kumarapalem and the Tekupalli sluice, directed the parties to settle those matters by a separate suit. The suit was brought to wind up a partnership. After issues had been framed, both plaintiff and defendant applied to the Court to refer to an arbitrator for disposal "the issues framed by the Court regarding the points in dispute." The arbitrator having submitted an award without recording any finding on the seventh, eighth or ninth issues, the award was remitted. Application was made to set aside the final award on the ground of the misconduct of the arbitrator and the invalidity of the award which it was alleged had not been made within the period allowed by the Court. The objections were fully considered by the District Munsif and overruled, and a decree was passed in accordance with the award. On appeal the District Judge held that there was nothing illegal in the procedure of the arbitrator. We are not prepared to say that the legality of the award was in any way affected, because the arbitrator referred the parties to a separate suit with reference to two matters in which he found they had a common interest. If, as is suggested, the arbitrator virtually decided the indigo vat and the sluice were not partnership property, and that other parties had interests in these works, he was probably right in referring the parties to a fresh suit. He determined all the matters referred to him, but decided that, so far as the vat and the sluice were concerned, they were outside the partnership. Nor can we say that the award was illegal, because no witnesses were examined after remand. It appears that the defendant (appellant) himself dispensed with his witnesses. It has not been made out that there was any illegality in the award which was regularly and properly arrived at by an arbitrator duly appointed, and we therefore dismiss this second appeal with costs.

(1) I.L.R., 6 All., 174. (2) I.L.R., 9 Cal., 905. (3) I.L.R., 6 Mad., 414.

APPELLATE CIVIL.

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

1891. Sept. 3, 15.

VIRASAMI (PLAINTIFF), APPELLANT,

v.

RAMA DOSS AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation—Suit for mutation of names in register—Parties.

The Collector of the district is a necessary party to a suit by a purchaser against his vendor to compel mutation of names in the register. Such a suit is not barred by limitation unless the Collector has refused without qualification to effect such mutation, negativing the plaintiff's right to the land in question.

APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in original suit No. 9 of 1887.

The plaintiff purchased from the first defendant two zamin villages on 6th March 1872 and sought to have his name substituted for that of the vendor in the registry. In May 1876, the Collector refused to effect the mutation of names for want of the consent of the vendor; and, again, in July 1882, he made an endorsement on an application of the plaintiff for mutation of names as follows:—"Registry cannot be transferred to the plaintiff's name unless he appears with his vendor." The plaintiff sued the vendor in 1887 for a decree "directing the registers of the zamin to be made in the name of the plaintiff instead of in the name of the defendant." The defendant pleaded, but failed to prove an agreement for a resale to him of the property in question.

The District Judge dismissed the suit as being barred by limitation. His decree was reversed on appeal (appeal No. 74 of 1888) by the High Court (MUTTUSAMI AYYAR and WILKINSON, JJ.), and the suit remanded. Their Lordships said:—"We hold that Act I of 1876 has no application, that following "*Mangamma* v. *Timmapaiya*(1), the Collector is a necessary party, "and that time began to run from his refusal to register. We "reverse the decree of the Lower Court, and remand the suit for

* Appeal No. 100 of 1890.

(1) 3 M.H.C.R., 134.

"the Collector to be made a party, and direct that the suit be "reheard."

The suit was reheard and the District Judge again passed a decree dismissing it as barred under Limitation Act, sched. II, art. 120.

The plaintiff preferred this appeal.

Subramanya Ayyar and *Sadagopachariar* for appellant.

Bhashyam Ayyangar for respondent No. 1.

The *Government Pleader* (Mr. *Powell*) for respondent No. 2.

JUDGMENT.—The sales sued upon are in terms admittedly absolute, and the alleged agreement to resell, whenever the purchase money is repaid, is found by the Judge not to have been proved. This being so, the title to the property is in the plaintiff, and, as registry follows title, it is clear on the merits the plaintiff must succeed, unless the suit is, as held by the Judge, barred by limitation. The Judge finds that the Collector refused to register the plaintiff's name in May 1876, and, upon that finding, he considers that the claim is barred by article 120 of the second schedule of the Limitation Act. He appears to us to have misapprehended our former judgment, wherein it was stated that the time would begin to run from the Collector's refusal to register. The refusal must be absolute and unqualified, negativing the plaintiff's right to the property, of which registry was sought. The evidence in the case discloses only a conditional refusal, and it does not show that the Collector ever denied the appellant's title, or that he did more than refuse to register unless and until the defendants appeared before him and admitted the plaintiff's title or the plaintiff obtained, what is equivalent to such admission, a decree of Court. The appellant's title being absolute upon the facts now found, we are of opinion that no question of limitation arises, and that the claim must be decreed with costs throughout.

APPELLATE CRIMINAL.

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

1892. March 30.

QUEEN-EMPRESS

v.

RAMA TEVAN AND OTHERS.*

Criminal Procedure Code, ss. 193, 287, 288, 339, 349—*Conditional pardon to prisoner—Approver, trial of—Proof of confessional statements of accused.*

Several persons were charged with dacoity. While the case was pending, two of the accused made confessional statements; afterwards a conditional pardon was tendered to them, and they were examined as witnesses by the Magistrate and subsequently on behalf of the prosecution in the Sessions Court, to which the other accused were committed for trial. They there denied that they had been taken as approvers, whereupon the Sessions Judge placed them in the dock, called on them to plead, and permitted the depositions made by them before the Magistrate, but not their confessional statements, to be read to the jury:

Held, that the trial of the two persons, who had not been committed to the Sessions Court, was *ultra vires*.

Per cur: the Sessions Judge committed an irregularity in refusing to place on the record the confessional statements of persons whom he treated as accused.

It is unfair to put an approver, whose conditional pardon has been cancelled on trial, along with other prisoners, in the course of whose trial such approver has given evidence.

APPEAL against a conviction and sentence by T. Weir, Sessions Judge of Madura, in calendar case No. 116 of 1891.

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

The appellants were not represented.

Mr. *Wedderburn* for the Crown.

JUDGMENT.—The procedure of the Sessions Judge in the disposal of this case was extremely irregular. Certain persons were charged with having committed dacoity. During the pendency of the case before the Magistrate, two of these persons, viz., M. Peryakaruppan and Ocha Tevan, made confessional statements on the 3rd and 27th October. On the 19th November the District Magistrate tendered a conditional pardon to these two persons,

* Criminal Appeal No. 31 of 1892.

who were thereupon examined by the Magistrate as witnesses on the 22nd November. They were not committed to the Sessions Court, but were sent up as witnesses. At the trial in the Sessions Court they were examined on behalf of the prosecution as witnesses 1 and 2, and denied that they had been taken as approvers. This statement was undoubtedly false. The Sessions Judge thereupon placed them in the dock along with the other accused and called upon them to plead. The trial then proceeded. After the evidence for the prosecution and the statements of the prisoners 1–21 had been recorded, the Public Prosecutor proposed to put in the statements made by Peryakaruppan and Ocha Tevan before the Magistrate on the 3rd and 27th October. The Sessions Judge refused to admit these statements on the record, but admitted and had read out to the jury the depositions given by these persons as approvers. They are marked Y and Z.

The Government Pleader admits that the Sessions Judge has no power to try these two persons, inasmuch as they had not been committed to the Court by any Magistrate competent to commit (section 193). He also points out that the course which the Sessions Judge should have adopted was to have treated the evidence given by these two persons before the committing Magistrate as evidence in the case (section 288), and have allowed the accused 1–21 to cross examine them.

We are of opinion that this is so and that the trial of these two persons, who had not been duly committed to the Court was altogether *ultra vires*.

The Sessions Judge also committed another irregularity in refusing, contrary to the provisions of section 287, to place on the record the confessional statements of persons whom he treated as accused. It is not optional with the prosecution to put in such statements.

We do not understand the remark of the Sessions Judge in paragraph 8 of his charge to the jury that these two persons (Peryakaruppan and Ocha Tevan) have fallen back into their original position of accused persons, as they, on the face of the record, did not fulfil the condition on which they were pardoned. The Sessions Judge seems to have taken an erroneous view of the case and the law.

By section 349, Act X of 1872, a Sessions Judge was empowered to commit or direct the commitment of any person who,

QUEEN-EMPRESS v. RAMA TEVAN.

having accepted an offer of pardon, did not conform to the conditions under which the pardon was tendered, but the present Code contains no such provision, and in section 339 it is merely laid down that such a person may be tried for the offence in respect of which the pardon was tendered; but section 193 provides that no Court of Session shall take cognizance of any offence as a Court of original jurisdiction, unless the accused has been committed to it by a Magistrate duly empowered.

It is impossible to say that the jury were not influenced by the inclusion of these two persons in the trial and by the admission of their depositions on the record. The other twenty-one accused were not allowed the opportunity of cross-examining them as to the truth or otherwise of their depositions. This was an irregularity which cannot but have prejudiced the accused persons.

Even supposing that the Sessions Judge had had power to try the two approvers, we concur with the learned Judges of Calcutta Court—*The Queen* v. *Petumber Dhoobee*(1) and *The Queen* v. *Bipro Dass*(2) that it is unfair to put an approver, whose conditional pardon has been cancelled, on trial along with the other prisoners, in the course of whose trial such approver has given evidence, and that the proper course is to defer taking action against the approver until the conclusion of the trial then proceeding.

We observe that the jury were not unanimous, the foreman finding only prisoners 1 and 2 and the approvers guilty.

We consider that there has been such misdirection as led to a serious miscarriage of justice, and we, therefore, set aside the conviction and sentence of all the accused 1–23, and direct the retrial by the Sessions Judge of prisoners 1–21.

Ordered accordingly.

(1) 14 W.R., Cr. Rul., 10. (2) 19 W.R., Cr. Rul., 43.

APPELLATE CIVIL.

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

MAINE MOILAR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

ISLAM AMANATH AND OTHERS (DEFENDANTS), RESPONDENTS.*

1891. Nov. 26.

Civil Procedure Code, s. 11—Civil suit—Religious usages of Muhammadans—Kutbah.

Certain Moplahs, described as "the *Moktessor and Jamats*" of a mosque, sued certain other Muhammadans, described as "members of the Puslar caste," alleging that the custom was for the defendants to attend the plaintiffs' mosque on Friday at the reading of the kutbah, and that the defendants had recently built another mosque a short distance off, and had "for two months been attempting to read the kutbah there." It was further alleged in the plaint that such reading of the kutbah was "quite contrary to the Muhammadan religion" and that the defendants nevertheless proposed to have the kutbah read, "whereby the kutbah or adoration conducted in our mosque will, according to religion, be fruitless." The prayer of the plaint was for an injunction, restraining the defendants from reading the kutbah in their mosque:

Held, that the plaint disclosed no cause of action.

SECOND APPEAL against the decree of W. J. Tate, Acting District Judge of South Canara, in appeal suit No. 367 of 1889, affirming the decree of J. Lobo, District Munsif of Kasaragod, in original suit No. 235 of 1888.

The facts of the case are stated above sufficiently for the purposes of this report. The District Munsif dismissed the suit, and his decree was affirmed on appeal by the District Judge, who quoted, with reference to the reading of the kutbah, Sadr Adalat Decisions, No. 1 of 1814. The plaintiffs preferred this second appeal.

Ramachandra Rau Saheb for appellants.

Narayana Rau for respondents.

JUDGMENT.—We agree with the Courts below that the plaint discloses no cause of action. The plaintiffs wish to prevent the defendants, who are also Muhammadans, from performing a service called "kutbah" in their own private mosque on Friday. The

* Second Appeal No. 195 of 1891.

MAINE MOILAR v. ISLAM AMANATH.

ground on which they seek to obtain a permanent injunction is, not that, the performance causes annoyance or obstruction to them in the exercise of their own worship, but that it is contrary to the Muhammadan religion. It is not the province of the Courts to determine what is or what is not contrary to the Muhammadan religion, or to decide what religious service different sects of a community may hold in their own places of worship, provided the holding of such services cause no disturbance or illegal annoyance to the rest of the community, or does not infringe on the rights of their co-worshippers. It is argued that the Courts below should have decided whether the defendants were entitled to read the kutbah. In the case referred to by the District Judge, this very point was put by the Judges of the Sadr Adalat to the Muhammadan Law officers, who replied "the performance of prayers on Friday, in which the reading of the kutbah is included, is permitted alike in a mosque, or in a house, or in any other place which may be selected by common consent." The Puslars have, by common consent, selected the Moidin Palli mosque as the place in which they will have the kutbah read, and they were within their rights in so doing, it having been found that the vicinity to the plaintiffs' mosque is not such as to cause either annoyance or disturbance to the plaintiffs and their co-worshippers. This second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

1891. Dec. 15, 18.

EX PARTE RAGAVALOO CHETTI AND ANOTHER (PETITIONERS), APPELLANTS,

IN RE RANGIAH CHETTI, RESPONDENT.*

Insolvency— 11 & 12 Vic., Cap. 21, ss. 9, 92—Petitioning creditors' debt—Joint debt.

A trader in Madras made a promissory note in the joint names of two merchants, trading together as members of an undivided Hindu family, on which Rs. 527 were

* Appeal No. 25 of 1891.

EX PARTE RAGAVALOO CHETTI IN RE RANGIAH CHETTI.

due. On a petition by the holders of the note to have the maker adjudicated an insolvent:

Held, that the petitioning creditors' debt was sufficient to support the petition.

APPEAL against the order of Mr. Justice Wilkinson, sitting as Commissioner of the Insolvency Court, made on a petition to adjudicate a trader, one Suri Chetti Rungiah Chetti, an insolvent.

The petitioning creditors were Pasumarthi Ragavaloo Chetti and Alwar Chetti, described as merchants trading together as members of an undivided Hindu family. Their debt was Rs. 527 due to them on a promissory note made by Suri Chetti Rungiah Chetti in their joint names.

The petition came on before Mr. Justice Wilkinson.

Mr. *R. F. Grant* for the petitioners.

Mr. *K. Brown*, contra.

WILKINSON, J.—Under section 9 of the Act the persons who may petition the Court to adjudge that a person has committed an act of insolvency are—

(1) Any person being a creditor to the amount of Rs. 500.

(2) Two or more persons being partners in trade and creditors to the amount of Rs. 500.

(3) Two creditors whose debt amounts to Rs. 700.

(4) Three or more creditors whose debt amounts to Rs. 1,000.

The petitioners, P. Ragavaloo Chetti and Alwar Chetti, describing themselves as "Merchants trading together as members of an undivided Hindu family." Their debt is Rs. 527. It is argued that they are not entitled to petition, inasmuch as their debt does not amount to Rs. 700. On the other hand, it is argued that they come under the first class; that the debt being joint, the two persons must be viewed as one creditor; that, unless this is done, petitioners and persons in like case have no relief under the Act. It is also argued, but the argument was not pressed that the petitioners are partners, and, as such, entitled to maintain the petition. I am of opinion that the petition is not maintainable. I do not see how the petitioners can be said to be a person, even though their debt is joint and their rights under the bond indivisible. Neither alone can transfer the promissory note or sue on it, and they clearly cannot come under the first class. Even if they are members of an undivided Hindu trading family, they cannot be said to be partners in trade in the sense in which the words are used in the Act. They have not agreed to combine their profes-

EX PARTE RAGAVALOO CHETTI IN RE RANGIAH CHETTI.

sional labour or skill, and—though Hindu joint families may, in certain respects, resemble partnerships—they certainly are not partners. But, as certainly, petitioners do come under class 3, and, as their debt does not amount to Rs. 700, they cannot petition. I have been referred to section 92, where it is laid down that words importing the singular number should be understood to include several persons as well as one person, provided that there be nothing in the context repugnant to such construction. In section 9 the context is clearly repugnant to the construction of the words any person in class 1 as any one or more person or persons—such a construction would defeat the subsequent provisions.

The petition must, therefore, be dismissed with costs.

The petitioning creditors preferred this appeal.

Mr. *E. Norton* (Mr. *R. F. Grant* with him) for appellants.

Mr. *K. Brown* for respondent.

JUDGMENT.—We cannot agree with the learned Commissioner in Insolvency that petitioners are not entitled, under section 9 of the Insolvent Act, to petition for an adjudication of insolvency against their debtor. It appears to us that the construction put by the learned Judge upon section 9 would prevent a Hindu joint trading family, or, indeed, any other joint creditors from obtaining an adjudication of insolvency whatever were the amount of their debts, for, in our opinion, the two last classes of persons named in the section, as entitled to apply, are intended to be separate creditors, whose debts amount, in the aggregate, to Rs. 700 and Rs. 1,000, respectively, and not joint creditors to whom one debt is due. In our view the object of this part of the section is to prevent a debtor from being harassed in respect of single small debts or a number of petty debts coming to a small amount in the aggregate. This object is attained by providing that proceedings for adjudication as an insolvent, shall only be taken in respect of single debts, whether due to a person or a partnership, amounting to Rs. 500 or of separate debts amounting to Rs. 700 or Rs. 1,000, in the aggregate, according as the petitioning creditors are two or three in number. There seems no reason, having regard to the object of the provision, why joint creditors should be in a worse position in respect of one debt due to them than they would be if they were a single creditor in respect of the same debt. And we think the definition clause of the Act, s. 92, does allow the word "person" in section 9 to be read as "persons," and that there is

EX PARTE RAGAVALOO CHETTI IN RE RANGIAH CHETTI.

nothing repugnant to the rest of the section in such a reading, in the case of a single debt jointly due to several persons. In section 48 the words occur "person and persons who would be a creditor," and similarly section 9 might be read in the case of joint creditors "persons being a creditor." This seems to us the most reasonable construction to put upon the section. The other construction involves this, amongst other anomalies, that joint creditors, who are partners in trade, would be able to obtain an adjudication if their debt is Rs. 500, whereas joint creditors, who are not partners, would not be able to do so, unless their debts are Rs. 700 in the case of two and Rs. 1,000 in the case of three. There seems absolutely no reason for this distinction. In the present case the debt is due on a promissory note in favour of the petitioners jointly, and, we think, they come within the first class of persons named in section 9 as entitled to obtain an adjudication of insolvency.

We are disposed also to think that they come within the second class "partners in trade." Members of a Hindu joint trading family may not be, in all respects, partners within the definition in the Contract Act, but it does not follow that they may not be partners for the purposes of section 9 of the Insolvent Act. That they are partners in some sense has often been held. See *Ram Lal Thakursidas* v. *Lakhmichand Muniram*(1) and *Samalbhai Nathubhai* v. *Someshvar Mangal and Harkisan*(2). But it is not necessary to decide that question now, as we hold that petitioners are entitled to apply for an adjudication of insolvency as joint creditors whose debt exceeds Rs. 500.

The order of the Insolvency Court must be set aside and the petition remanded to the learned Commissioner for disposal on the merits. Costs to abide the event

(1) 1 Bom. H.C.R., App., 51 (2) I.L.R., 5 Bom., 38.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

1891. October 6.

EX PARTE VITTAL DOSS AND ANOTHER, PETITIONERS.*

Succession Act—Act X of 1865, *s.* 182—*Executor, appointment of by implication—Administration with will annexed.*

A Hindu died leaving a will whereby he bequeathed all his property whatever (including debts) to two of his sons, who now applied for probate of the will on the ground that they were appointed executors by implication:

Held, that the sons were not entitled to probate of the will.

PETITION for probate of the will of Govindoo Doss Jey Kistna Doss deceased, the father of the petitioners, Balu Chiroonjeev Vittal Doss and Chiroonjeev Krisan Doss who claimed to be entitled to probate as executors constructively appointed.

The will propounded was as follows :—

"Written by Sha Govindoo Doss Jey Kistna Doss. I the under-"signed write and give the following with my voluntary consent "and while in the enjoyment of my senses. Balu Chiroonjeev "Vittal Doss Chiroonjev Krisan Doss are the heirs to my outstand-"ings, debts, my house, Takoorjees Seva (or idols), utensils, &c., "and my property whatever it may be. Chiroonjeev Nunoo Pa-"ramanund Doss has no right whatever in respect of my property. "I have put my signature here below with my voluntary consent "and while in the enjoyment of my senses in the presence of all. "This is written at 4 o'clock at night on the 12th June of the year "1886.

(Signed) GOVINDOO DOSS, JEY KISTNA DOSS.

"What is written above is correct. This was written while in "the enjoyment of my senses. Therefore Chiroonjeev Vittal Doss "and Krisan Doss are the owners of everything. No one should "question them.

"Witness 1.—Sookha Deva Lakhotia Govinda Dossjee signed "this while in the enjoyment of his senses in my presence.

"Witness 1.—Mathura Doss Pashesia Govinda Dossjee signed "this while in the enjoyment of his senses in my presence.

* Application for probate.

"Sha Moothoora Doss Nathoo, witness.

"This was written and given with the voluntary consent of the "owner (or master).

"This was written by Tukker Devalshand Narayanjee at the "dictation of the owner (or master)."

P. V. Krishnasami Chetti for petitioners.

The applicants are declared the heirs to the properties and of all outstandings and liabilities, *i.e.*, they are directed to recover outstandings and pay debts. In other words they are charged with the duties of an executor. See *In the matter of Monohur Mookerjee*(1), *In the goods of Radhika Mohan Sett*(2), *Mun Mohan Ghossal* v. *Puresh Nath Roy*(3) and *Wilkinson* v. *Adam*(4).

JUDGMENT.—I do not think that the language used in this will is such that Krisan Doss can be said to be constructively appointed executor. My attention was called to the decision *In the goods of Radhika Mohan Sett*(2) in which the words of the will being somewhat similar the opinion was expressed that probate might be granted to the applicant as executor according to the tenor of the will. The case there mentioned does not bear out the proposition for which it is cited. In that case there was a direction that the person named should collect the testator's estate and pay all just debts in other words, that he should discharge the function of executor. That therefore is a totally different case from the present. On the other hand, when the testator left all his property and effects to his wife without giving any further directions, the Court held *In the goods of Thomas Henry Oliphant*(5) in accordance with the practice which had actually prevailed, that the wife was entitled to administer with the will annexed and not to probate.

(1) I.L.R., 5 Cal., 756. (2) 7 B.L.R., 563. (3) 22 W.R., 174. (4) 1 Ves & B., 466. (5) 1 Sw. & Tr., 525.

APPELLATE CIVIL.

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

1891. October 1. 1892. February 23.

KANAGAPPA (PLAINTIFF), APPELLANT,

v.

SOKKALINGA AND OTHERS (DEFENDANTS, NOS. 1 TO 4), RESPONDENTS.*

Civil Procedure Code, s. 559—Parties—Joinder of respondents on appeal—Collusive discharge by one of two creditors—Mortgage.

In 1877 the plaintiff executed a deed of hypothecation to one of two partners to secure a loan obtained from them jointly. In 1881 the plaintiff sold *inter alia*, the hypothecated property to defendants Nos. 2 to 4 and it was arranged that the secured debt should be paid off by the vendees. They failed to do this, but in 1882 they executed a mortgage for the amount due in favour of the other of the two partners, and he thereupon gave a written discharge to the plaintiff, who was found to have been acting in collusion with him to the disadvantage of his partner, the holder of the hypothecation bond. The latter brought a suit in 1885 upon the hypothecation bond and obtained a personal decree against the present plaintiff who was *ex parte*, the amount of the decree being declared to be charged on the land in the possession of defendants Nos. 2 to 4. Meanwhile, defendant No. 1, who was the assignee of the mortgage of 1882, had obtained a decree upon it against defendant No. 4. This decree not having been executed, he subsequently sued upon the mortgage again and obtained a decree against defendants Nos. 2 to 4. The plaintiff now sued to have the last mentioned decree set aside and recover the balance of the purchase-money from defendants Nos. 2 to 4. The Court of First Instance passed a decree for the amount claimed and declared it to be charged on the land. Defendant No. 1 preferred an appeal in which defendants Nos. 2 to 4 were joined by the Court of First Appeal. The decree of this Court dismissed the suit:

Held, (1) that defendants Nos. 2 to 4 were rightly joined as respondents by the Court under Civil Procedure Code, s. 559.

(2) that plaintiff, having allowed a decree to be passed against him *ex parte* in the suit of the holder of the hypothecation bond, and having obtained a collusive discharge from the other partner, was not entitled to recover against the defendants.

SECOND APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in appeal suit No. 499 of 1889, reversing the decree of S. Dorasami Ayyar, District Munsif of Tiruturaipundi, in original suit No. 34 of 1887.

In October 1877, the plaintiff borrowed Rs. 500 from a firm of traders consisting of Venkatasami Pillai and Ramasami Dikshitar and hypothecated certain land to the latter to secure the loan. The hypothecation deed was filed as exhibit D. In June 1881, the plaintiff sold the hypothecated land, together with other land to defendants Nos. 2 to 4 for Rs. 700, of which Rs. 570 was arranged to be paid by them to Ramasami Dikshitar in satisfaction of the secured debt. This arrangement was not carried out. In November 1882, Venkatasami Pillai, who was the plaintiff's father-in-law, obtained from defendant No. 4 a mortgage (which was attested by the plaintiff) on the land in question to secure Rs. 671-2-0, being the sum payable under the arrangement above referred to. This mortgage was filed as exhibit A. On the same day, Venkatasami Pillai gave the plaintiff a document which was filed as exhibit B, stating that the hypothecation of 1877 was discharged by the mortgage of 1882. At the date of the last mentioned transactions, there had been a disagreement between Venkatasami Pillai and his partner, and the Subordinate Judge held that they were the result of collusion between the plaintiff and his father-in-law.

The mortgage of 1882 was subsequently assigned by Venkatasami Pillai to his brother-in-law, defendant No. 1, who brought a suit upon it (original suit No. 53 of 1885 on the file of the Subordinate Court of Negapatam) and obtained a decree against defendant No. 4 who paid the money into Court, where however it was ordered to be "detained," because a claim by Ramasami Dikshitar was apprehended.

Ramasami Dikshitar then brought a suit in the Court of the District Munsif of Tiruturaipundi (original suit No. 295 of 1885) on the hypothecation bond of 1877 against the present plaintiff, defendants Nos. 2 to 4, and another who had purchased some of the land from them. Neither Venkatasami Pillai nor defendant No. 1 was joined as a party. The present plaintiff was *ex parte*. The District Munsif passed a decree as prayed against the present plaintiff personally and against the land.

Defendant No. 1 next brought original suit No. 56 of 1886 in the same Court against defendants Nos. 2 to 4 on the mortgage of 1882 and obtained a decree.

The present suit was brought against defendants Nos. 1 to 4 to set aside the last mentioned decree and to recover from defendants Nos. 2 to 4 Rs. 1,000, being Rs. 671-2-0, the unpaid balance

* Second Appeal No. 1090 of 1890.

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of the purchase money due in respect of the transactions of 1881-2 together with interest.

The District Munsif refused to set aside the decree, but passed a decree for Rs. 671-2-0, the amount secured by exhibit A and interest at 6 per cent. "recoverable on the charge of the immovable property mentioned in the plaint." Against this decree defendant No. 1 preferred an appeal, to which defendants Nos. 2 to 4 were not parties till they were made so under Civil Procedure Code, s. 559, by the Subordinate Judge who then passed a decree, dismissing the suit. The plaintiff preferred this second appeal.

Pattabhirama Ayyar for appellant.

Bhashyam Ayyangar for respondents.

WILKINSON, J.—Two questions have been raised for determination in this appeal. The first question is whether the Subordinate Judge rightly exercised the discretion vested in him by section 559 of the Civil Procedure Code by adding the defendants Nos. 2 to 4 and making them respondents in the appeal presented by the first defendant. The other question is whether the Subordinate Judge was right in holding that plaintiff must look to Vencatasami alone for relief. With reference to the first question, I think that defendants Nos. 2 to 4 were rightly added as respondents for there can be no doubt that defendants Nos. 2 to 4 were interested in the result of the appeal presented by the first defendant and that they were likely to be affected by the result of the suit. The suit was instituted to obtain a declaration that the transfer of a certain mortgage executed by the fourth defendant to one Venkatasami Pillai and the decree obtained thereon by first defendant against defendants Nos. 2 to 4 in original suit No. 56 of 1886 were not binding on the plaintiff, and to recover from defendants Nos. 2 to 4 and on the security of the property sold to them the sum of Rs. 1,000. The District Munsif, though he found that the prayer to set aside the decree in original suit No. 56 of 1886 was just and proper, gave the plaintiff a decree of Rs. 671-2-0 against defendants Nos. 2 to 4, and directed that, in default of payment within six months, the property conveyed to them by plaintiff should be sold. This very property had been mortgaged to Venkatasami Pillai; and first defendant, his assignee, had, in original suit No. 56 of 1886, obtained a decree against defendants Nos. 2 to 4 for Rs. 671-2-0, the property mortgaged being rendered liable for his claim. It is evident

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that defendants Nos. 2 to 4, although they had not appealed against the decree, were deeply interested in the questions which had to be determined and that the decision would affect their interests very materially. The fact that an appeal by them was time-barred does not affect the question, because the discretionary power conferred on the Appellate Court is not limited by any provision of the Limitation Act (*Manickya Moyee* v. *Boroda Prosad Mookerjee*(1)).

With reference to the second question also, I think that the decision of the Subordinate Judge was right and that, after having been a party to exhibit A, and having accepted from Venkatasami the discharge (exhibit B) of his debt to Ramasami Dikshitar, plaintiff cannot now be allowed to repudiate these transactions and to recover from defendants Nos. 2 to 4 the amount of the debt due to Ramasami Dikshitar which they originally undertook to pay. It may be that Ramasami Dikshitar has, in execution of the decree, obtained, in original suit No. 295 of 1885, recovered from plaintiff the sum originally lent to him with interest, but plaintiff allowed that suit to be heard *ex parte* instead of applying to have Venkatasmi Pillai and first defendant added as parties and pleading discharge and non-liability. Plaintiff cannot rely on the allegation that exhibit A was got up fraudulently, for he was a party to the fraud, if any, and accepted from Venkatasami Pillai, the partner of Ramasami Dikshitar, a full discharge of the bond executed by him to Ramasami Dikshitar. Venkatasami Pillai, being his father-in-law, plaintiff must have been aware of the value of the discharge granted by Venkatasami Pillai, and no reason is assigned why he omitted to plead this discharge in defence in original suit No. 295. I concur with the Subordinate Judge in thinking that plaintiff cannot recover against the present defendants and would dismiss the second appeal with costs.

MUTTUSAMI AYYAR, J.—I agree.

(1) I.L.R., 9 Cal., 355.

APPELLATE CIVIL.

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

1892. March 24. April 25.

RAMUNNI (DEFENDANT No. 4), APPELLANT,

v.

BRAHMA DATTAN (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, *ss.* 58, 67, 92, 93—*Mortgagor and mortgagee—Second redemption suit—Kanom.*

The jenmi of land in Malabar sued in 1886 to redeem a kanom of 1849, to which it was subject, and obtained a decree which merely directed the surrender of the and to the plaintiff, on payment of the kanom amount and the value of improvements, within three months of the date of the decree. This decree remained unexecuted, the money not being paid. The jenmi now brought another suit to redeem the same kanom :

Held, that the present suit was not barred by the former decree.

The nature of a *kanom* discussed.

SECOND APPEAL against the decree of V. P. deRozario, Subordinate Judge of South Malabar at Palghat, in appeal suit No. 901 of 1890, affirming the decree of J. F. Pereira, District Munsif of Angadipuram, in original suit No. 215 of 1890.

Suit for redemption. The facts of the case appear sufficiently for the purposes of this report from the judgments of the High Court. The Lower Courts decreed for the plaintiff.

Defendant No. 4 preferred this second appeal.

Sankaran Nayar for appellant.

Govinda Menon for respondent.

MUTTUSAMI AYYAR, J.—This was a suit to redeem a kanom dated September 1849. Respondent is the present jenmi and appellant is the assignee of the kanom right. In original suit No. 493 of 1886, the former sued the assignor of the latter for redemption of the kanom, and obtained a decree which directed surrender of the property under kanom on payment of the kanom amount and the value of improvements within three months from the date of the decree, *i.e.*, 28th June 1887. Respondent, however, failed to pay into Court the amount he was ordered to pay within the appointed time, and his application to execute the

* Second Appeal No. 1236 of 1891.

decree afterwards was held barred. The decree however, contained no declarations that on default of payment on or before the due date, the mortgage be foreclosed or the property be sold. In January 1890 respondent brought the present suit for redemption and his claim was resisted on the ground that it was barred by the former decree. Both the Courts below decreed redemption and relied on the decisions of the High Court in *Sami* v. *Somasundram*(1), *Periandi* v. *Angappa*(2) and *Karuthasami* v. *Jaganatha*(3). It is contended for appellant that respondent's right to redeem became extinct when the former decree ceased to be enforceable, and reliance is placed on the decision in *Gan Savant Bal Savant* v. *Narayan Dhond Savant*(4), *Maloji* v. *Sagaji*(5) and *Anrudh Singh* v. *Sheo Prasad*(6).

There is a conflict between the decisions of the Madras High Court and those of the Bombay and Allahabad High Courts. The principle on which the former rest was explained by the late Chief Justice in *Karuthasami* v. *Jaganatha*(3) in the following terms :—

"In our judgment, the relation in which the mortgagor and "mortgagee stood to one another was not terminated by the decree. "It was intended by the decree that it should be terminated on "the happening of a certain event which event has not occurred. "The relation then still exists and the right to redeem is inseparable from the relation so long as it exists. An unexecuted "decree for partition would not alter the relation of the members "of a joint family."

The principle on which the Bombay cases proceed was explained by Mr. Justice West in *Gan Savant Bal Savant* v. *Narayan Dhond Savant*(4). He observes :—"Where there is *res judicata*, the "original cause of action is gone and can only be restored by getting rid of the *res judicata*." After stating that under the Roman and English law, a second suit might lie in certain cases, though there was a former decree, the learned Judge says that, "under "the Anglo-Indian law it has long been recognized that a decree-"holder must obtain satisfaction of his decree by execution, *not* "by another suit. A new suit cannot be brought either on the "original cause of action or, save in special cases, on the decree

(1) I.L.R., 6 Mad., 119. (2) I.L.R., 7 Mad., 423. (3) I.L.R., 8 Mad., 478.
(4) I.L.R., 7 Bom., 467. (5) I.L.R., 13 Bom., 567. (6) I.L.R., 4 All., 481.

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"in which that cause has become merged. The object of the legis-"lature has been to prevent litigation on the same grounds and "this would obviously be defeated by allowing a decree-holder "to abstain from putting his decree in force and proceed again "on the same cause as before." It must be noted here that the decisions of the Bombay High Court save that in *Maloji* v. *Sagaji*(1) were cited in *Karuthasami* v. *Jaganatha*(2), and the allusion to an unexecuted decree in a partition suit was apparently made in answer to the objection resting on the doctrine of *res judicata*.

Turning to the practice of the Court of Chancery in England, it was observed in the *Bishop of Winchester* v. *Paine*(3), decided in 1805, that it was established that if a bill filed by a mortgagor for redemption was dismissed, the money not being paid at the time, such dismissal operated as a foreclosure, and was equivalent to a decree for a foreclosure. In *Hansard* v. *Hardy*(4) decided in 1812 it was ruled, however, that the dismissal for want of prosecution was not the same as a decree of dismissal for non-payment of the mortgage money at the day appointed. Again in *Faulkner* v. *Bolton*(5) decided in 1835 the Vice-Chancellor held that if the plaintiff in a suit for redemption did not pay the principal and interest at the time appointed, he should not be allowed to redeem, although before the motion to dismiss was made, he had tendered the amount due with subsequent interest. Until 44 and 45 Vict., Cap. 41, the practice in England was for the decree to direct that on failure of the plaintiff to pay the amount on the due date, the suit should be dismissed (Seton on Decrees, 5th edition, p. 1040), and such dismissal was held to operate as a judgment of foreclosure; but by section 25 of 44 and 45 Vict., Cap. 41, the Court was empowered to order a sale in a suit for redemption.

Passing on to the Transfer of Property Act—Act IV of 1882, and reading sections 58 to 93 in the light thrown upon them by the practice of the Court of Chancery in England, it seems to me necessary to keep in view certain important features of the scheme embodied in the Act. In the first place no suit for foreclosure is allowed by that Act in the case of a simple mortgage, and no suit is permitted either for foreclosure or sale to the holder of an

(1) I.L.R., 13 Bom., 567. (2) I.L.R., 8 Mad., 478. (3) 11 Ves., 199.
(4) 18 Ves., 460. (5) 7 Sim., 319.

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usufructuary mortgage (see section 67). The mortgagor, however, is at liberty to sue for redemption, and in such suit, the Court is directed to pass a decree which is first, to ascertain the amount payable prior to redemption, next to fix a day for its payment within six months, and further direct when the mortgage is simple or usufructuary that in default of payment on the due date, the mortgaged property shall be sold (section 93). It is thus observed that according to Act IV of 1882 an usufructuary mortgagee is not entitled to sue either for foreclosure or for sale, and that a simple mortgagee may sue for sale but not for foreclosure, but that the Court is to order a sale in the case of a simple or an usufructuary mortgage when the mortgagor sues for redemption.

Another point to be borne in mind is that section 58 which defines the several kinds of mortgage, as simple mortgage, usufructuary mortgage, mortgage by way of conditional sale and English mortgage, has reference to their pure forms, and that a transaction which forms the subject of a particular suit may combine in it one or more of such forms. Thus a simple mortgage contains a covenant to pay the mortgage-debt at the appointed time and provides that in the event of failure to pay according to the covenant, the mortgagee shall have a right to cause the mortgaged property to be sold. The essence of an usufructuary mortgage, however, is defined to consist in the mortgage being accompanied with transfer of possession and in a covenant therein to the effect that the mortgagee shall retain such possession until payment of the mortgage money, and receive the rents and profits accruing 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. A kanom which is the transaction before us combines in it the ingredients of both a simple and an usufructuary mortgage. According to the usage of Malabar, it is a mortgage with possession for twelve years, with a right in the kanomdar to appropriate the usufruct in lieu of interest, or both of principal and interest, and the jenmi is also bound, under the contract, to pay the kanom amount on the expiration of twelve years. It is clear from paragraph 34 of the Report of the Law Commissioners of 15th November 1879 that there may be a combination of a simple and an usufructuary mortgage or of an usufructuary mortgage and of mortgage by conditional sale. In such cases, the intention was that the

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mortgagor and mortgagee should have the rights and liabilities as are created by the Act with reference to each of the forms so combined. Such being the case, the kanom-holder may, as the holder of a simple mortgage, sue for the sale of the kanom property, but he cannot claim foreclosure either as a simple or an usufructuary mortgagee.

Another feature of the Transfer of Property Act is, that in a suit for redemption, as the former suit brought by the respondent was, the decree could only have contained a direction under section 92 that in default of payment the property shall be sold. The decree passed under that section is only in the nature of a decree *nisi* and does not of itself extinguish the right of redemption until it is made absolute by an order made under section 93 that the property be sold. Between the dates of the order for sale and that of the actual sale the position of the plaintiff is that of a judgment-debtor whose property has been ordered to be sold in execution, and he may pay the money as a judgment-debtor and thereby obviate the necessity for the sale (see Macpherson on Mortgages, p. 698). Assuming that all the directions contained in Act IV of 1882 are duly complied with, the right of redemption exists until an order for sale is made, and the mortgagor's right of property subsists until there is an actual sale. The English practice of dismissing the suit when the mortgagor fails to pay the mortgage money on the due date so as to make the dismissal operate as a judgment for foreclosure, is superseded in the cases of simple or usufructuary mortgages by section 92 which substitutes instead an order that the property shall be sold. The result is that in a suit for redemption the mortgagee can never insist on an order for foreclosure when the mortgage is simple or usufructuary, and that the order for sale on which he can insist under section 93 does not operate to divest the mortgagor of his ownership in the property until the sale has actually taken place.

Such being the scheme of the Transfer of Property Act, the Madras decisions are more consistent with it, while the Bombay decisions introduce in this country a doctrine of constructive foreclosure founded on the plea of *res judicata*.

Assuming that what sections 92 and 93 direct have been done, still the ownership would vest in the mortgagor until there is a sale, and the processual law must be construed so as not to defeat the provisions of the substantive law. I am, therefore, of opinion

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that I must adhere to the Madras decisions until the Full Bench overrules them. I would dismiss this second appeal with costs.

BEST, J.—The question is whether the present suit by the mortgagor's assignee for redemption of the mortgaged property is barred as *res judicata* by reason of a decree for redemption of the same property having been previously obtained by the present plaintiff's assignor under the same kanom deed, which decree is no longer executable in consequence of a period exceeding three years from its date having been allowed to pass without any step having been taken to execute it.

The former decree, it must be observed, contained no direction that the mortgage should be foreclosed in default of the mortgagor exercising the right of redemption thereby decreed to him.

It has been held by this Court in *Sami* v. *Somasundram*(1), *Periandi* v. *Angappa*(2) and *Karuthasami* v. *Jaganatha*(3), that a decree, such as the above, is no bar to a subsequent suit for redemption; and both the Courts below have held, in accordance with those rulings, that the present suit is not barred and have given the plaintiff a decree.

Hence this appeal by the defendant who relies on *Gan Savant Bal Savant* v. *Narayan Dhond Savant*(4), *Maloji* v. *Sagaji*(5) *and Anrudh Singh* v. *Sheo Prasad*(6).

These decisions are no doubt in conflict with those of this Court; but having considered them, I see no reason to doubt the correctness of the decisions of this Court.

The latest of the above decisions of this Court, *Karuthasami* v. *Jaganatha*(3), was in 1885, *i.e.*, subsequent to the coming into force of the Transfer of Property Act, to which appellant's vakil referred as a reason for reconsidering the rulings of this Court, and in it both *Anrudh Singh* v. *Sheo Prasad*(6), and *Gan Savant Bal Savant* v. *Narayan Dhond Savant*(4) were considered. As was then remarked, the relation of mortgagor and mortgagee was intended by the former decree to be terminated only on the redemption of the property, an event which did not occur. Further, under section 92 of the Transfer of Property Act, there can be no decree for foreclosure in the case of a simple or usufructuary mortgage; and a kanom is in fact a usufructuary mortgage for a

(1) I.L.R., 6 Mad., 119. (2) I.L.R., 7 Mad., 423. (3) I.L.R., 8 Mad., 478.
(4) I.L.R., 7 Bom., 467. (5) I.L.R., 13 Bom., 567. (6) I.L.R., 4 All., 481.

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period of twelve years, at the end of which it becomes redeemable as a simple mortgage. The only decree that could have been made in the former suit was therefore that in default of payment within a time to be fixed (no such time appears, however, to have been fixed in the former decree) the property be sold. It was admittedly never sold and consequently the relation of mortgagor and mortgagee still subsists. There is no reason why the assignee of the former plaintiff should not be allowed now to redeem.

I agree, therefore, in dismissing this second appeal with costs.

APPELLATE CIVIL.

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

1891. May 5, 8.

VIRARAGHAVA AND OTHERS (PETITIONERS),

v.

PARASURAMA (RESPONDENT).*

Civil Procedure Code, ss. 295, 622—Rateable distribution—Vesting order in insolvency.

A debtor against whom several decrees had been passed, filed his petition in the insolvent Court at Madras, and the usual vesting order was made. One of the decree-holders had already attached property of the insolvent and had obtained an order for sale in a District Court, and now another decree-holder applied to the same Court in execution of his decrees for the attachment of other property, and for rateable distribution of the proceeds of the sale to be held in execution of the attachment already made. The District Judge held that the vesting order was a bar to both of these applications:

Held, (1) that the order rejecting the application for fresh attachments was right;

(2) that the order rejecting the application for rateable distribution was wrong, and that the High Court had power to set it aside on revision under Civil Procedure Code, s. 622.

APPEALS against the orders of J. D. Irvine, District Judge of Coimbatore, made on Civil Miscellaneous petition No. 29 of 1888, and execution petition No. 27 of 1888, and petitions under Civil Procedure Code, s. 622, praying the High Court to revise his orders made on execution petitions Nos. 28 and 30 of 1888.

The facts of the case appear sufficiently from the following order which was made by HANDLEY and WEIR, JJ.

* Civil Miscellaneous Petitions Nos. 708 and 710 of 1890.

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S. Subramanya Ayyar for appellants and petitioners.

The respondent did not appear in person or by counsel.

ORDER.—These appeals and petitions arise out of the insolvency of one Mahomed Marakayar against whom decrees had been passed in several suits in the District Court of Coimbatore.

The decree-holder, Parasurama Ayyar, in one of these suits (original suit No. 11 of 1886) obtained an order for sale of certain immovable property of the judgment-debtor. Subsequent to the date of that order, but before sale, Mahomed Marakayar filed his petition in insolvency in the High Court and a vesting order was made.

The Official Assignee opposed the sale, but the District Judge overruled his objections and allowed the sale. Before the sale under that order took place, Seshu Ayyar, the original appellant and petitioner in the present appeals and petitions, made a double application to the District Court in each of two suits in which he had obtained decrees against Mahomed Marakayar (original suits Nos. 18 and 29 of 1887).

All four applications were filed on the same day. In two of these he applied in the two suits for execution by attachment and sale of the immovable property of Mahomed Marakayar and in the other two, apparently as an alternative in case the other two applications were refused, he applied in the two suits for a rateable distribution between himself and Parasurama Ayyar of the proceeds of sale of the immovable property which had been ordered to be sold in Parasu rama Ayyar's suit.

The District Judge has rejected the applications for execution by attachment and sale of immovable property of Mahomed Marakayar on the ground that the vesting order "bars any further proceedings in execution when there has been no order for sale," and he has also rejected the two applications for a rateable distribution on the ground that the orders on these applications must follow the orders on the applications for execution by attachment and sale of the immovable property of the judgment-debtor.

Appeals Nos. 138 and 139 of 1888 are against the orders rejecting the applications for execution by attachment and sale of the immovable property of the judgment-debtor. Petitions Nos. 312 and 313 of 1888 are for revision of the orders rejecting the applications for a rateable distribution of the proceeds of sale in Parasurama Ayyar's suit.

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As to the orders appealed against, we think the District Judge was right in his conclusion, but not precisely upon the grounds upon which he puts it. It is not strictly correct to say that the vesting order bars all further proceedings in execution. The more correct way of putting it is, we think, that the vesting order divests the judgment-debtor of the property, and, therefore, there is no property of his which can be attached and sold. On this ground the applications for execution by attachment and sale of Mahomed Marakayar's immovable property might rightly have been rejected, and, on this ground, we dismiss the Civil Miscellaneous Appeals Nos. 138 and 139 of 1888.

But we are not satisfied that it follows that the simultaneous applications for a rateable distribution of the proceeds of sale of the property ordered to be sold in Parasurama Ayyar's suit must also be rejected. These are distinct applications for execution of the decree in this way. We are informed that the District Court had already decided against the Official Assignee's right to oppose that sale and had ordered the sale to go on. If this is so, it may be that there is no further question in regard to that sale between the Official Assignee and the judgment-creditors, and the vesting order and other proceedings in insolvency have no effect upon the rights (if any) of the judgment-creditors to a rateable distribution of the proceeds of that sale. Before disposing of these revision petitions, we shall request the District Judge to furnish us with a copy of the order (if any) passed upon the Official Assignee's objections to the sale of the property of Mahomed Marakayar in execution of Parasurama Ayyar's decree, and also to report what further proceedings have been taken in reference to that sale.

After the return called for in the above order had been made the case came on again for disposal.

Bhashyam Ayyangar for petitioner.

The Court made the following order.

ORDER.—Petitioner Seshu Ayyar having applied to the Court which realized the assets prior to realization for execution of his decree was entitled to a rateable distribution of the assets.

The orders of the District Judge are set aside, and he is directed to give effect to this order by calling on Parasurama Ayyar, plaintiff in original suit No. 11 of 1886, who appears to have received the entire sale-proceeds, to refund the amount he has

received and on this being done, the District Judge will proceed to make a rateable distribution.

Under the circumstances we make no order as to costs of these petitions.

Parasurama Ayyar preferred petitions for the review of this order.

WEIR, J., having left the High Court, the petitions came on for disposal before MUTTUSAMI AYYAR and HANDLEY, JJ.

Mr. *K. Brown* and *Ramachandra Ayyar* for petitioner.

Bhashyam Ayyangar for respondent.

JUDGMENT.—These are applications for review of judgment in Civil Revision Petitions Nos. 312 and 313 of 1888. The facts are fully set out in the order of this Court of 9th May 1890. By that order certain information was called for from the District Judge, on receipt of which the final order of this Court was passed, setting aside the orders of the District Judge, which were the subject of these revision petitions, and directing the District Judge to call upon Parasurama Ayyar to refund the amount he had received and upon this being done to proceed to a rateable distribution. Parasurama Ayyar was named in Civil Revision Petitions Nos. 312 and 313 of 1888 as a counter-petitioner, but it appears that owing to some mistake, notice was not served upon him, and the final order was consequently made in his absence. On this ground, a review was admitted, and the case has now been argued on his behalf.

The first point raised by his counsel is that as he was no party to the proceedings in the District Court, out of which these petitions arose, no order can be made against him on these petitions. As to this, it is true that he received no notice of Seshu Ayyar's application for a rateable distribution of the proceeds of sale of the property ordered to be sold, because the District Judge dismissed it on the preliminary point that the vesting order shut out Seshu Ayyar from any claim to a rateable distribution, but he must have been fully aware of the proceedings for he was a joint applicant with Seshu Ayyar in one of the petitions. But, however this may be, the High Court in directing the District Judge to order Parasurama Ayyar to refund the amount he had received was merely putting matters in the same state as they were when what was held to be the erroneous order of the District Judge was passed. After that, strictly speaking, notice would have to be

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given to him to show cause why the amount should not be rateably distributed. He has had full notice now however and his counsel waives any further notice, and the question whether the rateable distribution asked for by the original petitioner Seshu Ayyar can now be ordered has been fully argued and may now be decided.

It is next argued that this is not a case in which this Court can interfere in revision under section 622 of the Code of Civil Procedure as there was no question of jurisdiction. The order passed on the two applications for rateable distribution out of which the present petitions arose, was that the order must follow that on the application for execution on which it was based. We must look to the latter order, therefore, to ascertain what was the decision of the Court. The general order made on several applications for execution by attachment and sale of the judgment-debtor's property was :—"The vesting order has been received. It clearly bars any further proceeding in execution when there has been no order for sale. This application must, therefore, be rejected." The District Judge, therefore, declined to entertain the application, and to make the rateable distribution, which he was bound by law to make, because he considered he was precluded from doing so by the proceedings in the insolvency and the vesting order. In so declaring, assuming as we shall show afterwards that he was wrong in his view of the effect of the insolvency proceedings, we think he *failed* to exercise a jurisdiction vested in him by law, and that this Court has power to interfere under section 622. In so holding, we consider that we are following the principles laid down as to the construction of that section in the case of *Manisha Eradi* v. *Siyali Koya*(1).

Then it is contended for Parasurama Ayyar that the Judge was right, and he was precluded by the proceedings in insolvency and the vesting order from proceeding to a rateable distribution of the proceeds of sale of property attached and sold in execution of a decree against the insolvent judgment-debtor. The fallacy, as it appears to us, of this contention, and of the District Judge's view, is that it assumes that because the Official Assignee may come in and apply for stay of proceedings in execution, the insolvency and the vesting order have of themselves the effect

(1) I.L.R., 11 Mad., 220.

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of staying such proceedings. In the present case, the Official Assignee did, subsequently to the order now in question, apply to the District Court to stay the sale of the property, to which these orders refer, and his application was refused, and he did not appeal against that order as appears in the present case, though served with notice. There was, therefore, as pointed out in this Court's order of 9th May 1890, no further question between the Official Assignee and the judgment-creditors as to this property and the pendency of proceedings in insolvency could be no reason for the District Court's refusing to make the rateable distribution ordered by law and allowing one creditor to walk off with the whole proceeds of sale of the attached property.

Lastly, it is argued on the authority of *Tiruchittambala Chetti* v. *Seshayyangar*(1), that there could be no rateable distribution in the present case, because there was no application for execution on the file of the Court pending and undisposed of.

The facts are that Seshu Ayyar presented apparently on the same day two applications for execution in the prescribed tabular form. In one the entry in the last column headed "mode in which the assistance of the Court is required" asked for attachment of immovable property of the judgment-debtor; in the other it asked that the applicant might share in the rateable distribution of the proceeds of sale of the property attached by Parasurama Ayyar when it should be sold.

By the order of this Court of 5th May 1890, it is ruled that the application for attachment of the immovable property was rightly dismissed by the District Judge, not on the ground on which he put it that the proceedings in insolvency were a bar to execution, but because the vesting order vested the property of the insolvent judgment-debtor in the Official Assignee, and there was therefore no property of the judgment-debtor to be attached. But this ruling did not affect the application for a rateable distribution which was also an application for execution to which the judgment-debtor was a party, as well as an application for rateable distribution, and, therefore, as this Court holds that the latter application was wrongly dismissed by the District Judge, it must be treated as pending within the meaning of *Tiruchittambala Chetti* v. *Seshayyangar*(1), for the purpose of supporting Seshu

(1) I.L.R., 4 Mad., 383.

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Ayyar's right to share in a rateable distribution of the proceeds of sale of the property attached and sold in execution of Parasurama Ayyar's decree.

We see no reason to doubt the correctness of the orders of this Court of 5th May 1890 and 12th August 1890, and we pass a fresh order accordingly in terms of the latter order.

Petitioner must pay the costs of counter-petitioners of these applications.

APPELLATE CIVIL.

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

1892. March 9.

THAMA (PLAINTIFF), APPELLANT,

v.

KONDAN AND OTHERS (DEFENDANT No. 6 AND DEFENDANTS Nos. 1—5 AND 7—26), RESPONDENTS.*

Evidence Act—Act I of 1872, s. 35—Recital in a judgment—Admission of jenmi's title.

In a suit by a melkanomdar to redeem a kanom, the kanom document was proved to have been lost; it appeared that a previous suit had been brought by the jenmi to redeem the same kanom, and the judgment in that suit, in which it was stated that the defendants admitted their position as kanomdars, was tendered in evidence to prove the jenmi's title:

Held, that the judgment was admissible in evidence.

SECOND APPEAL against the decree of A. Thompson, Acting District Judge of South Malabar, in appeal suit No. 263 of 1890, reversing the decree of A. Annasami Ayyar, District Munsif of Ernad, in original suit No. 400 of 1889.

Suit by the holder of a melkanom from the predecessor in title of defendant No. 1 to redeem lands demised on kanom by the predecessor of defendant No. 1 to the tarwad of defendants Nos. 1—25. The kanom document had been lost. The plaintiff, for the purpose of proving his jenmi's title, tendered the judgment in a previous suit, brought by the jenmi to redeem the same kanom, of which the District Munsif said:—

* Second Appeal No. 247 of 1891.

THAMA v. KONDAN.

"Exhibit C, the judgment in original suit No. 304 of 1860, "contains a clear admission that defendants Nos. 2, 6, 9 and 21, "tarwad karnavers, came in possession of the lands as kanomdars "in 1014 (1839); they purchased the prior kanomdar's kanom in "1014 (1839). Their karnavan, one Raman Kutti Nair, even "pleaded that his karnavan attorned to first defendant's prede-"cessor in stanom and obtained a renewal in 1029, (1854,) and "paid the porapad (rent) due up to 1032, (1856-57,) as defence "to that suit. The Munsif gave a decree to first defendant's "predecessor in stanom (the plaintiff in that suit) on the strength "of the defendants Nos. 2, 6, 9 and 21 karnaver's admission."

The District Munsif held that the plaintiff's title was proved and passed a decree in his favour. Defendant No. 6 preferred an appeal to the District Judge, who held that the recital of the admissions in the abovementioned judgment was not legal evidence of them, and reversed the decree.

The plaintiff preferred this second appeal.

Sankara Menon for appellant.

Ryru Nambiar for respondents.

JUDGMENT.—We think that the recital of the admission in the judgment C was a relevant fact as evidence of the jenmi's title under section 35 of the Evidence Act (see *Lekraj Kuar* v. *Mahpal Singh*(1), *Parbutty Dassi* v. *Purno Chunder Singh*(2), *Byathamma* v. *Avulla*(3).

The Judge was therefore wrong in excluding the evidence from consideration. It is for him to consider the binding effect of the admission and also the question raised in the second ground of appeal.

We must reverse the decree and remand the appeal to the Lower Appellate Court for disposal. Costs will follow the result.

(1) I.L.R., 5 Cal., 744. (2) I.L.R., 9 Cal., 586. (3) See *ante*, p. 19.

APPELLATE CIVIL.

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

1891. September 24.

RAMASAMI (PLAINTIFF), APPELLANT,

v.

MUTTUSAMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, *s.* 19, *sched. II, arts.* 57, 115—*Date when money becomes due—Acknowledgment in holograph will unsigned.*

In a suit against the legal representative of a deceased debtor to recover the amount of the debt, it appeared that the debt was contracted more than three years, but was payable less than three years before suit. In bar of limitation the plaintiff relied upon an admission of the debt in a draft will, written by the testator, in the first line of which his name appeared:

Held, per Weir, J., that the admission in the will did not constitute an acknowledgment under Limitation Act, s. 19;

per Muttusami Ayyar and Parker, JJ., that the period of limitation should be computed from the date when the debt was due and the suit was not barred.

PETITION under Provincial Small Cause Courts Act, 1887, section 25, praying the High Court to revise the proceedings of C. W. W. Martin, District Judge of Salem, in small cause suit No. 19 of 1888.

The facts of the case are stated above sufficiently for the purposes of this report.

The District Judge passed a decree for plaintiff quoting the following cases: *Andarji Kalyanji* v. *Dulabh Jeevan*(1), *Daia Chand* v. *Sarfraz*(2) and *Mohesh Lal* v. *Busunt Kumaree*(3).

The defendants preferred this petition.

Ramasami Mudaliar for petitioners.

Parthasaradhi Ayyangar for respondent.

WEIR, J.—The decision cannot, I think, be supported. The will, although in the testator's handwriting, is not signed; and section 19 of the Limitation Act requires the acknowledgment to be made in writing, signed by the party against whom the right is claimed. The decisions of the Allahabad and Calcutta Courts relied on by the District Judge are clearly distinguishable in their circumstances from the present case, and the counter-petitioner's

* Letters Patent, Appeal No. 26 of 1890.

(1) I.L.R., 5 Bom., 88.
(2) I.L.R., 1 All., 117.
(3) I.L.R., 6 Cal., 340.

pleader admits that they do not apply. He relies, however, on the case of *Andarji Kalyanji* v. *Dulabh Jeevan*(1) referred to by the District Judge. That case proceeded on the special ground that among the community, whose writing was in question, it was the practice not to sign the account, but to head it in a peculiar way, showing that it was written in the writer's own hand. No such practice is alleged, nor can be alleged in regard to the class of documents in question in the present proceeding, viz., a will.

I must hold, therefore, that the District Judge erred in law in holding that there was an acknowledgment of the debt; and reversing the District Judge's decree, I direct that the suit be dismissed, but I shall not allow costs.

The plaintiff preferred an appeal under Letters Patent, section 15, against this judgment.

The appeal came on for disposal before MUTTUSAMI AYYAR and PARKER, JJ.

Mr. *R. F. Grant* and *Panchapagesa Sastri* for appellant.

Ramasami Mudaliar for respondents.

JUDGMENT.—The District Judge found the plaintiff's case was established, the averment in the plaint being that the loan was made on 30th September 1885 and was repayable in one month from that date. The plaint was presented on 24th October 1888. There was also evidence to support the finding of the Judge.

Even, therefore, if the admission contained in the will does not amount to an acknowledgment, the suit is not barred. We agree with the decision of the Calcutta High Court in *Rameshwar Mandal* v. *Ram Chand Roy*(2) that such a suit will fall under article 115 of the Limitation Act and not under article 57.

The decree of the learned Judge must, therefore, be reversed and that of the District Judge restored, but as this point was not taken before we shall make no order as to costs in this Court. The plaintiff is entitled to other costs.

(1) I.L.R, 5 Bom., 88.
(2) I.L.R., 10 Cal., 1033.

APPELLATE CIVIL.

Before Mr. Justice Subramanya Ayyar and Mr. Justice Best.

1892. February 15.

KRISHNAN (PLAINTIFF), APPELLANT,

v.

PERACHAN (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, *sched. II, arts.* 62, 120—*Money received for plaintiff's use—Suit for which no period prescribed—Transfer of Property Act—Act IV of* 1882, *ss.* 2, 135.

A obtained a money decree against B and attached certain land in execution. C intervened in execution successfully. A then brought a suit to establish that the land was liable to be sold in execution, and obtained a decree. Meanwhile the land was taken up by Government under the Land Acquisition Act, and the compensation money was paid to C. A attached this sum as a debt due to B and sold it in execution, and it was purchased by the plaintiff. The plaintiff now sued C to recover the amount of the debt:

Held, that the suit was governed by Limitation Act, sched. II, art. 120, and not by art. 62, and that the plaintiff was entitled to recover without regard to the terms of Transfer of Property Act, s. 135.

SECOND APPEAL against the decree of A. Thompson, Acting District Judge of South Malabar, in appeal suit No. 570 of 1890, confirming the decree of T. V. Anantan Nayar, Principal District Munsif of Calicut, in original suit No. 708 of 1889.

The plaintiff's case was that one Ayyan Chetti obtained a money decree against Kelu in original suit No. 512 of 1885, and attached the Maligakandi paramba in satisfaction thereof; the present defendant Cherukutti Perachan then put in a claim petition and his claim was allowed on 16th February 1886. Ayyan Chetti brought a suit No. 89 of 1887 to declare the liability of the Maligakandi paramba to sale in execution of his decree and obtained a decree as prayed. Meanwhile Government took up the Maligakandi paramba under the Land Acquisition Act and paid compensation for it to the defendant Perachan. Ayyan Chetti then attached this sum as a debt due by Perachan to his (Ayyan Chetti's) debtor, Kelu. This debt was sold on 13th April 1889 in Court auction for Rs. 65 and bought by plaintiff who filed this suit on 9th October 1889 to recover the amount of the debt.

* Second Appeal No. 775 of 1891.

The District Munsif dismissed the suit and his decree was affirmed on appeal in the District Court. The District Judge observed that it was the plaintiff's case that the defendant received the money on behalf of Kelu, the original judgment-debtor, and ruled that the case was governed by Limitation Act, sched. II, art. 62, and that, since the decree in original suit No. 89 of 1887 did not constitute a fresh starting point for limitation, see *Hanuman Kamut* v. *Hanuman Mandur*(1), the suit was barred by limitation.

The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Sankara Menon for respondent.

JUDGMENT.—We do not think that the money can be considered as having been received by the defendant for the plaintiff's use, so as to make article 62 applicable; nor is the case one coming within any other special article of schedule II of the Limitation Act. It is, therefore, one for which no period of limitation is provided elsewhere, and consequently falls within article 120, which gives a period of six years from the date when the right to sue accrued *Nund Lall Bose* v. *Meer Aboo Mahomed*(2) and *Gurudas Pyne* v. *Ram Narain Sahu*(3). This suit having been brought within six years from date of receipt of the money by defendant is therefore not time-barred.

The Lower Appellate Court has found to be valid the sale at which plaintiff acquired a right to the money in question. In this finding we concur. As, by section 2 of the Transfer of Property Act, clause (*d*), transfers in execution of decrees and unaffected by the provisions of section 135 of the same Act, we give plaintiff a decree for Rs. 579-6-1 with interest at 6 per cent. per annum from date of suit to date of payment. Each party to pay proportionate costs throughout.

(1) I.L.R., 15 Cal., 51. (2) I.L.R., 5 Cal., 597. (3) I.L.R., 10 Cal., 860.

APPELLATE CIVIL.

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

1892. February 16.

LAKSHMINARASIMHAM (DEFENDANT), APPELLANT,

v.

SOMASUNDARAM (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, ss. 514, 521—Enlargement of time for award.

A suit was referred to an arbitrator, who did not make his award within the period limited for that purpose. After that period had expired, an application was made for its extension, both parties consenting; the application was granted and the award was made within the time so extended, and a decree was passed in its terms:

Held, that the order extending the time was not illegal, and the party dissatisfied with the decree was not entitled to have the award and the decree made upon it set aside.

PETITION under Civil Procedure Code, s. 622, praying the High Court to revise the proceedings of G. T. Mackenzie, District Judge of Kistna, in original suit No. 3 of 1886, in which he had passed a decree in accordance with the terms of an award. The period fixed for the award had expired, but had subsequently been extended with the consent of both parties, and the award was made within the extended period.

The District Judge said:—"The award bears a date which "has been altered from 5th to 6th March. If the award was "made on 5th March, it is invalid under the decision in *Simson* "v. *Venkatagopalam*(1). The High Court held in *Kula Nagabu-* "*shanam* v. *Kula Seshachalam*(2) that when five arbitrators signed "a rough draft, that was a final award although a fair copy was "made afterwards. In the present case the arbitrator's petition "of 6th March shows that the award was then unfinished, and "I have no evidence that the award had been completed before "that date.

"The application for extension was made after the time had "expired, and the question is whether that vitiates the award. "If the application had been made within the time, the award "would be valid, *Suppu* v. *Govindacharyar*(3). I can see nothing

* Letters Patent, Appeal No. 21 of 1891.

(1) I.L.R., 9 Mad., 475.
(2) 1 M.H.C.R., 178.
(3) I.L.R., 11 Mad., 85.

"in section 514 that forbids an application to be made after the "time had expired.

"Moreover, both parties consented to the application. They "did not then know how the award would be. Plaintiff, finding "the award against him, now objects to the extension for which "he himself applied."

The plaintiff preferred this petition.

Rama Rau for petitioner.

Bhashyam Ayyangar for respondent.

SHEPHARD, J.—I think there is no doubt that the power to extend the time within which an award is directed to be made can only be exercised before the time limited has expired. The language of section 514 giving power to "enlarge the period" shows that this is the case, and I am further confirmed in this view by the decision in *Simson* v. *Venkatagopalam*(1). Consent cannot alter the matter, for the reference derives its force from the order of the Court and not the will of the parties. I think the District Judge was wrong, and that the decree must be set aside with costs. The District Judge will proceed to try the case.

The defendants preferred an appeal under Letters Patent, section 15, against the above judgment of SHEPHARD, J.

The appeal came on for disposal before MUTTUSAMI AYYAR and BEST, JJ.

Bhashyam Ayyangar for appellant.

Ramachandra Rau Saheb and *Venkatarama Sarma* for respondent.

JUDGMENT.—There is nothing in the wording of section 514 to limit the period within which the time may be extended by the Court to the period mentioned in the previous order, nor would it be reasonable to so limit it. In the case reported as *Simson* v. *Venkatagopalam*(1) no order extending the time had been obtained before the award was given. The award in that case was, therefore, properly held to be invalid under the express terms of section 521. All that was decided in *Suppu* v. *Govindacharyar*(2) was that, as the application for extension of the period had been made within the time originally fixed, the mere fact of the order having been passed after such time did not invalidate the award. It was not then necessary to consider the point now raised. But so far as

(1) I.L.R., 9 Mad., 475.
(2) I.L.R., 11 Mad., 85.

LAKSHMI-NARASIMHAM v. SOMA-SUNDARAM.

that decision goes, it supports the contention of the present appellant, that the real test is whether the time was in fact extended so as to validate the award which the arbitrators would otherwise have had no jurisdiction to make at the time when they made it. The award in the present case was made after the time had been enlarged and within the time so enlarged.

The dictum in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*(1) that the Court had the fullest power to enlarge the time under the section (514), so long as the award was not completed, supports the appellant's contention. The construction put by the Privy Council on section 549 in *Budri Narain* v. *Mussummat Sheo Koer*(2) also favors the same view. As there stated the intention must be held to be to confer on the Court a power to enlarge the time "according to any necessity which may arise, when it is just and proper that the Court should do so."

For the above reasons we allow the appeal, and, setting aside the order appealed against, dismiss the civil revision petition No. 32 of 1890 with costs in this appeal and in the revision petition and restore the decree of the District Judge.

APPELLATE CIVIL—FULL BENCH.

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

1891. October 13.

REFERENCE UNDER STAMP ACT, s. 46.*

Stamp Act—Act I of 1879, *s.* 3, *cl.* 16, *s.* 7, *sched. I, art.* 50 (*e*)—*Power-of-attorney—Trust.*

Ten mirasidars of a village executed an instrument authorizing the person therein mentioned to recover for them from their former agent the perquisites and other communal income appertaining to their mirasi rights, to cultivate their maniems, to distribute to them proportionately to their shares the profits of certain common land, &c. :

Held, that the instrument was a power-of-attorney and should bear a stamp of Rs. 5.

REFERENCE by the Board of Revenue under Stamp Act, 1879, s. 46.

(1) L.R., 18 I.A., 55. (2) L.R., 17 I.A., 1.

* Referred Case No. 21 of 1891.

REFERENCE UNDER STAMP ACT, s. 46.

The instrument in question bore Rs. 5 stamp. Its terms were as follows :—

"General power-of-attorney executed this 2nd day of July "1890, in favour of O. P. Rangasami Iyengar, Brahmin, Vishna-"vite, occupation—servant, aged 25, residing in Orathi village, "No. 118, attached to the sub-district of Madurantakam, in the "district of Chingleput, jointly by ten pangu mirasidars of the "same village, viz. :

[here follow names.]

"As Appan Vijayaragavachari, Brahmin, Vishnavite, mirasi-"dar and servant, aged 45, and a resident of the above-mentioned "village, who was appointed an agent to collect and distribute "among us all swatantrams, and profits of samudayam belonging "to pangu mirasi of the village, has not, for the last three years, "given us each his share of the profits and swatantrams, as he "has not properly accounted to us for these incomes or shown "accounts, and, as a notice has now appeared in the *District* "*Gazette* prohibiting village officers from collecting swatantrams "and profits on behalf of pangu mirasidars of the village, we "have appointed you our general agent for recovering, from "the said Appan Vijayaragavachari, by instituting against him "suits in civil and revenue courts all pangu, incomes, and samu-"dayam profits, as well as all incomes of nunja, punja, maniems "enjoyed in common, except nunja maniems enjoyed according "to shares; for signing on behalf of us vakalats, plaints, state-"ments, &c., and conducting affairs in our behalf in connection "with the institution of suits and proceedings in civil, criminal, "revenue, &c., courts *re* all other rights, incomes, honors, &c., "belonging to mirasi; for signing public records and receiving "incomes, &c., due to us; for collecting swatantram, &c., due to "mirasidars for payment to Government at the rate of 2 annas "in the rupee from the mirasidars and payakaris of the village; "for putting in objection-petitions and taking proper measures in "connection with durkhasts, which may be presented by pangu-"mirasidars and payakaris for land required for the common "benefit of several mirasidars and payakaris; for acting as agent to "the devastanums, and protecting from being misappropriated by "others the nunja, punja, maniem, house-site and other property "belonging to them, as also the nunja, punja, maniem, house-site "and other property of the Parasuram Easwara temple which have

REFERENCE UNDER STAMP ACT, s. 46.

"been resumed, there being no worship; for continuing without "interruption the worship carried on in the temples from time "immemorial with the incomes of the devastanams; for letting "out under lease, &c., the different samudayam trees, and col-"lecting and distributing the produce to us according to shares; "for getting the samudayam nunja, punja, maniems cultivated or "letting them out and collecting and distributing the tirva; for "distributing to us each his share of the profits of fishery, vilal, "korai, &c., grass, vattam, &c., produce, which we have been "enjoying from time immemorial; for protecting our rights to "turns of dung, cattleherd, oil-mill, weaving, *katta pai* right to "water in times of scarcity, irrigation turns; and you are "requested to co-operate with us and act up to the opinion of the "majority of the shareholders. If you fail to distribute to us "each year swatantram, profits of produce, &c., which may be "collected by you as stated above, this general power-of-attorney "will be cancelled, and the dues, together with costs, recovered "by proceeding against your person and property. Otherwise it "will not be cancelled. You are required to advance out of your "pocket all sums required for conducting the suits, &c., referred "to above, and, after rendering to us proper accounts, recover "them from the profits and distribute the remainder among us.

"This general power-of-attorney was executed in these terms "at our own free will and consent."

The question referred for the opinion of the High Court was whether the stamp was sufficient. It had been impounded by a Sub-Registrar as being chargeable as an instrument of trust. The Sub-Collector of Chingleput reported on the instrument as follows:—

"The document, which was impounded by the Sub-Registrar "of Madurantakam, is a power-of-attorney executed by ten "mirasidars of the village of Orathi in favour of the petitioner, "and authorizes him to recover for them the swatantrams and "other communal income appertaining to their mirasi rights, to "cultivate or lease out their nunja and punja maniems, as also "the rents of fisheries, &c., and to divide the income between them "in proportion to their shares. The words 'எங்கள் பாகாசாரம்' "(according to our shares) which occur in several places in the "document, clearly show that each of the executants has a distinct "and separate interest. Ten separate powers-of-attorney should,

REFERENCE UNDER STAMP ACT, s. 46.

"therefore, have been executed, each bearing a stamp of Rs. 5 "(*vide* Board's Proceedings, dated 6th November 1877, No. 4930; "and Board's Proceedings, dated 29th July 1885, No. 2222; and "article 50 (*c*) of sched. I of Act I of 1879). The document "is therefore chargeable under section 7 of the Act with the "aggregate amount of the duties with which separate instruments "are chargeable."

V. C. Desikachariar for Rangasami Ayyangar.

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

JUDGMENT.—We are of opinion that the document is a power-of-attorney and must be stamped with a five rupees stamp.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Subramanya Ayyar.

1892. Jan. 28, 29. Feb. 4, 12.

SUBBARAYUDU (DEFENDANT No. 1), APPELLANT,

v.

KOTAYYA AND OTHERS (PLAINTIFFS AND DEFENDANTS Nos. 2 AND 3), RESPONDENTS.*

Civil Procedure Code, ss. 292, 311—Suit to set aside Court sale—Duty of vakil purchasing at Court sale—Fraud—Parties—Assignment of religious trusteeship.

A hereditary dharmakarta of a temple, who had assigned his office to a Zamindar and consented to a decree being passed on the footing of such assignment, is competent nevertheless to bring a suit to set aside a Court sale of temple lands, treating such assignment as a nullity.

A mortgagee having obtained a decree on her mortgage brought the mortgage property to sale; and her vakil bid through an agent at the Court sale and became the purchaser. It appeared that the vakil had not informed his client that he intended to bid nor obtained the sanction of the Court, but he had been instructed by his client and had obtained the permission of the Court to bid on her account, and he was found to have acted in an underhand manner towards her. In a suit to set aside the sale, brought by the mortgagor, who had sought unsuccessfully to obtain the same relief by means of a petition under section 311 in which fraud was not alleged against the purchaser:

Held (on its appearing that the vakil had not discharged the burden which lay on him of proving that the transaction was free from suspicion), that the sale should be set aside.

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* Appeal No. 100 of 1891.

SUBBARAYUDU v. KOTAYYA.

APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in original suit No. 23 of 1890.

Suit to set aside a Court sale of certain land attached in execution of a decree on the ground of fraud of the purchaser. The District Judge passed a decree as prayed and the defendant preferred this second appeal.

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

Mr. *Michell* and Mr. *Ramasami Raju* for appellant.

Pattabhirama Ayyar for respondents Nos. 1 and 2.

JUDGMENT.—This is an appeal from the decree of the District Judge of Kistna in original suit No. 23 of 1890. The appellant is the first defendant, a first-grade Pleader, who became the purchaser in Court auction of the village of Devarapalli. The plaintiff, as trustee of the temple of Sriranganayakaswami, sues to set aside the sale alleging fraud on the part of the first defendant. The District Judge found that first defendant's purchase was tainted with fraud, and set aside the sale.

The first question is whether the first plaintiff is the dharmakarta of the temple, and as such entitled to maintain the suit. The village of Devarapalli originally formed part of the zamindari of Vallur, but in July 1847 it was assigned by the then Zamindar in favour of first plaintiff's grandfather Koppula Seetaya Naidu, as an endowment of the temple of Sriranganayakaswami, which had been erected by Seetaya Naidu. The village was sub-divided from the zamindari, and a peishcush of Rs. 541 fixed for it by the Collector and the village was handed over to Seetaya Naidu on his agreeing to pay the peishcush. He was succeeded by his son Pattabhiramaswami Naidu on whose death the village was registered in the name of his widow Subbamma, and his nephew Koppula Kotaya, the first plaintiff. In 1881, the Zamindar of Vallur instituted a suit (original suit No. 52 of 1881) against Subbamma and Koppula Kotaya to establish his right as dharmakarta. In June 1881, there was a razinamah decree in favour of the Zamindar, the defendants relinquishing their rights to the dharmakartaship of the temple and to the village of Devarapalli. It was argued in the Lower Court that the transfer was invalid, but the District Judge without actually deciding that the transfer was invalid, found on the evidence that the transfer was a mere paper transaction nominally executed to salve the pride of

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the Zamindar, that the actual management of the temple and its endowment, the village of Devarapalli, never passed out of the hands of the Koppula family, and he therefore held that the objection taken to plaintiff's right to maintain the suit could not be supported. Here it is argued that as the dharmakarta is the only person who can maintain a suit for the recovery of temple lands, and as by the decree in original suit No. 52 of 1881, third defendant, the Zamindar of Vallur, was declared to be the dharmakarta, the plaintiffs cannot sue to set aside the sale and recover the temple lands until they have set aside the razinamah decree. We have been referred to certain documents, road-cess accounts, dowles and jamabundy accounts, as showing that the transfer was not nominal but real, and that the management has since the transfer been with the Zamindar. A great many of these documents have not been proved, and should not have been placed upon the record, and the others do not establish the Zamindar's management. The plaintiff's oral evidence goes to show that the Koppula family has always performed the duties of dharmakarta. The first plaintiff was sued as dharmakarta in the suit in which the sale now in question took place, and was recognised as proprietor of the village of Devarapalli by the Collector in 1890. The plaintiffs being members of the family in which the trusteeship of the temple is hereditary and in virtue of their position trustees, the first plaintiff was incompetent to delegate his office or his duties and the transfer of 1881 was therefore invalid. The Privy Council have held (*Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty*(1)) that a person holding a religious trust is incapable of transferring it and the ruling has been followed in many cases of this nature. The transfer being invalid the Zamindar acquired no title by the razinamah decree of 1881, and the plaintiffs are entitled to treat it as a nullity and to sue as dharmakartas.

It is then argued that the fraud with which plaintiffs charge first defendant ought to have been set forth in the petition which first plaintiff put in under section 311 of the Code, that having had his opportunity of setting aside the sale on the ground of fraud, and failed to take advantage of it, the Court is now precluded from dealing with it. In support of this argument reliance is placed on the case of *Siva Pershad Maity* v. *Nundo Lall Kar*

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

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Mahapatra(1). That case, however, is not in point, for there the question was whether a suit will lie on the ground of fraud notwithstanding the provisions of section 244. That section has no application to the present case, as the first defendant was neither a party nor the representative of a party to the suit. The legal objection to the charge of fraud cannot therefore be sustained.

The next question is whether the fraud of the first defendant has been made out and whether under the circumstances of the case the sale should be set aside. We concede that fraud and dishonesty are not to be assumed upon conjecture, however probable the conjecture may appear, but that fraud must be affirmatively made out. The facts are as follows.

In original suit No. 972 of 1884 the present second defendant obtained a decree against the Zamindar of Vallur (third defendant), the first plaintiff, the father of the second plaintiff, and four other members of the Koppula family, on a mortgage executed by first plaintiff as dharmakarta. The decree rendered the property liable. The village was attached and advertised for sale for 11th March 1889. The first defendant who for the last 20 years has appeared as pleader for the family of second defendant represented her in the suit, appeal and execution proceedings. He applied for and obtained (on 11th March 1889) leave to bid for and purchase the mortgaged property on behalf of the judgment-creditor. On the day of sale the third defendant's pleader applied for an adjournment for one week in order that he might discharge the decree debt. Without giving notice to the other side the Munsif ordered the sale to be stayed for eight days, and granted third defendant a certificate under section 305. Later on in the day the first defendant applied for a reconsideration of the *ex parte* order, but consented to an adjournment for seven days. His petition was rejected. Nothing further was done until June when a fresh proclamation of sale was issued and the 29th July fixed for the sale. That the second defendant was not kept informed of what was going on is apparent from two letters which first defendant received on his return from Madras about the 27th July. One was from second defendant's son-in-law asking the date of sale, and whether third defendant had paid the money, and urging the vakil to see that some one bid on behalf of the second defendant

(1) I.L.R., 18 Cal., 139.

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so that she might receive the full amount of her decree. The other was from second defendant herself, dated 25th July, inquiring whether the sale had taken place, stating that the money was urgently needed, and telling him to obtain permission to bid for her. On the day of sale third defendant's pleader applied for an adjournment on the ground that terms of compromise were under consideration, and that the people in the town did not know of the auction. It is evident and, considering the denial of the first defendant as to the receipt of a letter on this day from second defendant, significant, that first defendant also applied for an adjournment, for the order of the Court runs thus "At the request of both parties the sale is ordered to continue for five days." On the 3rd August third defendant's pleader again applied for an adjournment of the sale. His application was opposed by first defendant and the sale proceeded. First defendant bid Rs. 1,250 on behalf of the judgment-creditor. The bidding was then taken up by Sama Sastrulu who had been secretly instructed by first defendant to bid for him and he bid Rs. 1,275. There were only two other bidders, neither of whom has been called as a witness and the village was at 7 P.M. knocked down to Sama Sastrulu for Rs. 5,010. On the 31st August the third defendant's pleader and on the 4th September the first plaintiff's pleader put in petitions objecting to the sale on various grounds. On the 31st October first defendant as vakil for Sama Sastrulu put in a petition maintaining the validity of the sale. Witnesses appear to have been examined, for on the 4th November second defendant's son-in-law gave evidence, and stated that he had instructed first defendant to agree to the sale being set aside as the defendants offered the decree amount. On the 10th November the first defendant entered into correspondence with the third defendant, who expressed great pleasure at receiving a letter from first defendant, and invited him to come to Bezwada on the 17th and see him. The first defendant went and returned with a letter from the Zamindar to his vakil directing him to withdraw the objection petition. This was done, and on the 22nd November orders were passed confirming the sale. The same day Sama Sastrulu put in a petition stating that he had purchased on behalf of first defendant, and asking that sale certificate might issue in first defendant's name.

The fraud charged against the first defendant consists (1) in his failing to act according to the instructions of his client on

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the 3rd August and in his pressing on with the sale in order to purchase the village himself, (2) in his preventing bidders from being present at the sale by falsely representing to them that the sale had been adjourned, and (3) in his stifling enquiry by causing the third defendant to withdraw his petition for cancellation of the sale. The District Judge added another charge, viz., one of making disparaging remarks to the District Munsif during the course of the sale and appears to consider it proved. It was not set up in the plaint and rests on the evidence of one witness alone. If true it should have been proved by the District Munsif who was not called. We do not consider this charge sustainable.

As to the first charge we think that it is fully made out. We see no reason to doubt that second defendant did write a letter on the 29th July to the first defendant directing him to apply for an adjournment; and we are unable to understand first defendant's absolute denial of the receipt of any such letter. As already remarked his application for an adjournment on that date is only explicable on the assumption that he had second defendant's instructions. The witnesses who prove the despatch and receipt of the letter of the 29th July also speak to the oral message of the 3rd August. They appear to us to be independent and reliable witnesses and we see no reason to suppose that they have entered into a base conspiracy to ruin the first defendant. The names of the second, third, fourth, fifth, sixth, and sixteenth witnesses who now depose as to the letter and the message are to be found in the list of witnesses put in by third defendant in support of his objection petition. It is true that in that petition the blame is not thrown upon the first defendant but upon the judgment-creditor (second defendant) who is accused of having induced the belief that the sale would be postponed, in consequence of which intending bidders stayed away. It is not apparent whether the fact that first defendant was the real purchaser was known on the 31st August by the third defendant and his legal adviser, and there is nothing on the record to throw light upon this part of the case. The tenth witness T. Venkat Reddi who drew up the petition after consulting the third defendant was not questioned as to his instructions and the third defendant has not been examined. All that can be said is that in that petition of the 31st August the judgment-creditor's promise to communicate with her pleader and get the auction stopped is

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distinctly set forth, and the low price at which the village was knocked down is attributed to the belief that no sale would take place having kept bidders away. To turn to the witnesses who depose on this point. There can be no doubt that the first witness, Vallabhachari, is a dependent of the second defendant, and that she employs him to take messages, &c., is apparent from exhibits xxxiii and xxi. The second witness, Narasimhacharlu, who was present when the verbal message was delivered to first defendant is an Inamdar. No valid reason has been assigned why his evidence should not be relied on. The third witness, Seshacharlu, is the archaka of the temple. He would naturally be anxious that the village which forms the endowment of the temple should not pass out of the hands of the dharmakarta, and that he at all events visited second defendant on the morning of the 3rd August with the intention of obtaining a postponement of the sale is clear from exhibit xxiv. This is the document on which first defendant relies in support of his assertion that he was not only not directed to obtain an adjournment but actually directed to push on with the sale. The letter is written by second defendant's uncle (defendant's second witness) and we have no doubt it was concocted for the purpose of being used in this suit. The second defendant denies having given any instructions to Bashiakarlu in connection with the suit or sale and exhibits xxxiii and xxxiv render probable her statement that she had ceased to employ him in her affairs. The witness admits that he lives apart from second defendant in consequence of some quarrel and that he had not second defendant's instructions to write the letter. There is every probability that witnesses Nos. 4 and 5, P. Gopalakrishnamma and S. Nagabushanam, did attempt to get the sale postponed seeing that the father of the fourth witness had spent Rs. 9,000 in erecting a matam in the temple, and that fifth witness was at that time the gumastah of the third defendant. It is true that the relatives of the fourth witness have come forward in support of the second charge, but if their evidence on that point is not reliable we are unable on that account to discredit the evidence of the fourth witness corroborated as it is by what seems to us unimpeachable testimony.

We are unable to agree with the Judge in thinking the second charge satisfactorily made out. Witnesses Nos. 7, 8, 9 and 11 are related to one another and to Gopalakrishnama. The only

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witness whose name is to be found in the list put in by third defendant on the 31st August is Tatayya (seventh witness). Now if the evidence of this witness is to be credited he in the presence of the Acting District Munsif and many others openly charged the first defendant with having fraudulently sent bidders away, and this only a few days after the sale. It is impossible to believe that if this were true, such an allegation would not have found a place in the petition in support of which seventh witness was cited to give evidence. Although the name of the twelfth, the only apparently independent witness, is not to be found in the said list the names of two persons who he says were with him, but who have not been called, are entered. The evidence given by these witnesses is evidence which it is very difficult to test, or to prove false, but considering it as a whole we do not think it worthy of credit and must acquit first defendant of the second charge.

With reference to the third charge there can be no doubt that the Zamindar withdrew his objection petition immediately after an interview with the first defendant, and it is difficult if not impossible to resist the conclusion that the withdrawal was the consequence of first defendant's representations. It would appear from exhibit ix, the petition of withdrawal, that it was the prospect of obtaining the large amount which would remain over after discharging the judgment-creditor's debt, that induced the Zamindar to withdraw his opposition. The first defendant has endeavoured to make out that it was the Zamindar who applied to him for advice, but from exhibit xxv it appears that it was in consequence of a letter written by the first defendant on the 10th November, a letter which gave great pleasure to the Zamindar, that first defendant was invited to pay a visit to the Zamindar at Bezwada. As to what took place at that interview we have only first defendant's uncorroborated statement. He returned to Masulipatam with a letter to the Zamindar's pleader authorising him to withdraw the petition, and when he delivered it to the seventh witness first defendant asked the pleader to withdraw the petition *at once*. It was not until after the petition had been withdrawn that first defendant came forward publicly as the purchaser and we cannot but look upon his conduct in connexion with the withdrawal as dishonest.

On behalf of the appellant it is argued that the decision

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in *Alagirisami* v. *Ramanathan*(1) covers this case, that appellant purchased *quâ* vakil, and that he did not occupy any fiduciary position with reference to his client, his duty being only to see that the village did not sell for less than the amount of her decree, and that having secured that he was at liberty to purchase on his own behalf.

All that the Court held in the case of *Alagirisami* v. *Ramanathan*(1) was that a vakil was not an officer of Court within the meaning of section 292 of the Code of the Civil Procedure, and that purchase of property in Court auction by a vakil of the plaintiff was not illegal as being prohibited by section 292.

In England the law treats the mortgagee (as to any benefit acquired by him at the expense of the mortgagor, and by taking advantage of his position as mortgagee) as one in a position analogous to that of a person standing in a fiduciary relation. Consequently the solicitor or agent of the mortgagee is under the same restrictions as the principal, so far as any acts done by them on behalf of the principal are concerned. Hence the rule that purchase at a Court sale by a mortgagee directly, or through his agents, without the leave of the Court is liable to be set aside by by mortgagor. The law is the same in India (Act II of 1882, s. 90, and section 294, Civil Procedure Code). But the English law goes further and makes a purchase by the solicitor or agent of the mortgagee for the benefit of the solicitor or agent himself voidable (*Martinson* v. *Clowes*(2) and *Guest* v. *Smythe*(3)). The general rule of Equity is that a man cannot place himself in a situation in which his interest conflicts with his duty. The cases show that that principle is acted upon whenever a person occupying the position of solicitor to a mortgagee acquires a benefit, however honest the transaction may be in itself, on the ground that it is often very difficult, if not impossible, to find out how the advantage was gained (see *Greenlaw* v. *King*(4)).

There being no legislative enactment bearing on the present question, and no decided cases having been pointed out, we think that we must decide according to the rules of Equity and good conscience. The first defendant had as the agent of the mortgagee or judgment-creditor obtained leave from the Court to purchase on

(1) I.L.R., 10 Mad., 111.
(2) L.R., 21 Ch. D., 857.
(3) L.R., 5 Ch., 551.
(4) 3 Beav., 49.

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behalf of his client. We are unable to agree with Mr. Michell that he was only authorized, and required to raise the bids so as to secure the amount of the decree. We think that he was bound, if possible, to purchase the village on behalf of his client. That being so he deliberately placed himself in a position in which his interest was in direct conflict with his duty. It was his interest to get the village knocked down to himself at as low a price as possible, and his conduct showed an utter disregard of his client's interests, and of the duty which he as the vakil for the mortgagee bidding for her at the sale owed to the mortgagor. In the case above referred to (*Alagirisami* v. *Ramanathan*(1)) the vakil purchased in his own name and was not instructed to purchase for his client and in these respects the present case is clearly distinguishable. In the case of *Greenlaw* v. *King*(2) the Master of the Rolls said "The question is not whether there was fraud or no fraud, but whether the Court will permit a person standing in the fiduciary and confidential situation in which B was, to make himself an interested party in the very transaction which he as trustee was bound most vigilantly to superintend." The words appear to us to apply most aptly to this case. We do not say that the pleader was under an actual incapacity to purchase, but we think that the rule which the Court should impose upon persons in his position is that the *onus* lies heavily on them to prove the transaction free from all suspicion, and we do not think that the first defendant has done that. He should have given his client information that he intended to bid and have obtained the permission of the Court instead of acting, as he did, in an underhand manner.

For all these reasons we think that the sale must be set aside.

We do not understand the finding of the Judge on the 5th issue. There is evidence to show that the income of the village has been improved recently by the extension of irrigation and that an income of Rs. 1,500-2,000 may now be expected. It lay upon first defendant to prove that the sum of Rs. 5,010 was a fair price and we do not think he has shown that.

The appellant is clearly liable for mesne profits and we shall not interfere with the order of the Lower Court.

The sale amount must be refunded by the second and third defendants who are third and fourth respondents. The third

(1) I.L.R., 10 Mad., 111.

(2) 3 Beav., 49.

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defendant only will pay interest at 6 per cent. on the money drawn by him from the date of receipt to date of repayment. With this modification we confirm the decree of the District Judge and dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

1891. December 4.

KRISHNAYYA (PETITIONER), APPELLANT,

v.

UNNISSA BEGAM (COUNTER-PETITIONER), RESPONDENT.*

Civil Procedure Code, ss. 234, 368—Execution of decree—Death of judgment-debtor after attachment and before sale—Representatives not joined.

A decree-holder attached land of the judgment-debtor in execution of his decree and a sale proclamation was made; the judgment-debtor died and his legal representatives were not brought on to the record, but the execution proceeded to sale:

Held, that the sale should be set aside.

APPEAL under letters patent, section 15, against the judgment of Shephard, J., on civil revision petition No. 92 of 1889.

The above-mentioned petition was preferred under Civil Procedure Code, s. 622, and prayed the High Court to revise the proceedings of G. T. Mackenzie, District Judge of Kistna.

The decree-holder in original suit No. 391 of 1882, on the file of the District Munsif of Bezwada, attached land belonging to the judgment-debtor on 9th September 1887; the sale proclamation was ordered on 27th September 1887; the judgment-debtor died shortly afterwards, but the execution proceeded to sale. The daughter of the judgment-debtor claimed to be entitled to the land in question, and presented a petition to the District Munsif, praying that the sale, which was alleged to have fetched a very low price, be set aside. The District Munsif rejected this petition, but on appeal the District Judge made an order setting aside the sale, which was the order sought to be revised.

The District Judge expressed a doubt whether the provisions in the Civil Procedure Code regarding the death of a party

* Letters Patent Appeal No. 25 of 1889.

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applied to execution proceedings, as to which he referred to *Gulabdas* v. *Lakshman Narhar*(1), *Dulari* v. *Mohan Singh*(2), but he considered that the case came within the rule in *Ramasami* v. *Bagirathi*(3), on the authority of which he made an order as above.

The auction purchaser preferred the above petition, which came on for disposal before SHEPHARD, J.

Subbayya Chetti for petitioner.

Respondent was not represented.

SHEPHARD, J.—This is not a mere case of irregularity in the conduct of the sale. Here the judgment-debtor was no longer alive at the date of the sale, and no representative had been placed on the record. The decision in *Ramasami* v. *Bagirathi*(3) is binding on me, notwithstanding the judgment in *Stowell* v. *Ajudhia Nath*(4). I must dismiss the petition.

The auction-purchaser preferred this appeal against the judgment of SHEPHARD, J.

Subbayya Chetti for appellant.

Respondent was not represented.

JUDGMENT.—We agree with the learned judge that the decision in *Ramasami* v. *Bagirathi*(3) was right, and see no reason why we should refer this case to the Full Bench because of the decision in *Stowell* v. *Ajudhia Nath*(4). In that case the contest was between two mortgagees, the second mortgagee having been the first purchaser. After the sale to him the first mortgagee attached and brought the property to sale, and the mortgagee died prior to the sale. The second mortgagee had, however, purchased his interest subject to the first mortgagee's claim, and the death of the original owner could not affect the proceedings in any way. The remark of Oldfield, J., was not concurred in by Straight, J., and both Judges were agreed that the question whether the sale might be voidable at the instance of the legal representative did not arise for decision.

The property might be liable in the hands of the legal representatives, but the right, title and interest of a deceased person could not be sold. The sale without notice to him of property belonging to a person not a party to the suit was a material irregularity and must necessarily cause him substantial injury.

The appeal is dismissed.

(1) I.L.R., 3 Bom., 221.
(2) I.L.R., 3 All., 759.
(3) I.L.R., 6 Mad., 180.
(4) I.L.R., 6 All., 255.

APPELLATE CIVIL.

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

1892. Feb. 25.

UKKU (PLAINTIFF), APPELLANT,

v.

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

Malabar law—Ottidar's right of pre-emption—Suit to redeem kanom.

In a suit to redeem a kanom of 1874, it was found that the plaintiff's predecessor in title had purchased the jenm title to the land in question at a sale, held in execution of a decree which was binding on the jenmi's tarwad; but it appeared that the defendant (the kanomdar) held an otti on the land, dated 1870, and had not waived his right of pre-emption as ottidar. A decree was passed providing for payment by the defendant of the purchase money to the plaintiff and the execution by the latter of a conveyance, and in default for redemption by the plaintiff on his paying to defendant the amount of the otti:

Held, that the decree was right.

SECOND APPEAL against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 479 of 1890, reversing the decree of V. Kelu Eradi, District Munsif of Pynad, in original suit No. 168 of 1890.

Suit to redeem a kanom, dated 1874. It was alleged in the plaint that the land subject to the kanom was the jenm of one Ramothy Kitavu who demised it on kanom for Rs. 100 to the defendant in 1874, and that the interest of Ramothy Kitavu was sold in execution of a decree passed against him in 1880 and purchased by the anandravan (since deceased) of the plaintiff. The defence was that the land was the jenm of the tarwad of Ramothy Kitavu who demised it to the defendant on otti for Rs. 325 in 1870, a further sum of Rs. 400 being then advanced by the defendant; that the decree above referred to was not binding on the tarwad of the judgment-debtor, and that the purchase by the plaintiff's anandravan was not binding on the defendant who had the right of pre-emption as an ottidar.

The District Munsif held that the execution sale was binding on the tarwad of the judgment-debtor, but he found that the defendant held an otti on the land as alleged by him and held that

* Second Appeal No. 961 of 1891.

UKKU v. KUTTI.

the plaintiff had accordingly obtained no valid title against him since he had not waived his right of pre-emption as ottidar. Upon these findings the District Munsif dismissed the suit.

On appeal the District Judge who expressed no dissent from the findings of fact recorded by the District Munsif reversed his decree. He said —

"I find that defendant is entitled to receive the otti amount, "Rs. 325, and the amount of further charge, viz., Rs. 100.

"The equitable course to pursue under these circumstances "seems to be to allow defendant an opportunity to pay to plaintiff "the auction price and take a conveyance, and on his failing to do "so, to allow plaintiff to redeem the suit land on payment of "Rs. 425, and I accordingly reverse the Lower Court's decision "and decree that on defendants paying to plaintiff in two months "from this date Rs. 96, the auction price of item No. 2 in "exhibit A, plaintiff shall convey his interest to defendant and "that on defendants failing to pay the above amount in the time "specified, plaintiff shall recover the suit land on payment to "defendant within four months from this date of Rs. 425, with "interest at 6 per cent. on Rs. 100 from 6th March 1869 till date "of payment."

The plaintiff preferred this second appeal and the defendant filed a memorandum of objections to the decree so far as it was against him.

Sankaran Nayar for appellant.

Narayana Rau for respondent No. 1.

JUDGMENT.—The Judge finds that the sale is valid, but that the purchaser is under an obligation to convey the property to defendant on the latter paying the purchase money in the exercise of his right of pre-emption. This is in accordance with the principle laid down in *Vasudevan* v. *Keshavan*(1).

It is then argued that though the defendant may enforce his right of pre-emption by instituting a suit, he cannot resist a suit for redemption on this ground. This is opposed to the decision in *Kanharankutti* v. *Uthotti*(2) and *Cheria Krishnan* v. *Vishnu*(3).

Whatever right he can assert as plaintiff is also available to him as a ground of defence.

The appeal therefore fails and is dismissed with costs.

(1) I.L.R., 7 Mad., 309. (2) I.L.R., 13 Mad., 490. (3) I.L.R., 5 Mad., 198.

UKKU v. KUTTI.

As regards the memorandum of objections it is argued that the suit should have been dismissed and that the decree passed by the Judge is bad in law. But the decree passed appears to us to be just and proper. It gives effect to the right of pre-emption and in case of this right not being exercised within a given time allows redemption. In *Vasudevan* v. *Keshavan*(1) this point was raised and considered.

We also disallow the objections with costs.

APPELLATE CIVIL.

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

CHATHAPPAN (COUNTER-PETITIONER), APPELLANT,

v.

PYDEL (PETITIONER), RESPONDENT.*

1891. April 6.

Civil Procedure Code, ss. 13, 206—Res judicata—*Amendment of decree—Subsequent execution.*

In a suit for money against the karnavan and two anandravans of a Malabar tarwad, the judgment directed a "decree for the plaintiffs as prayed," but the decree ordered payment by one anandravan only. Property of the tarwad was attached and sold. The decree was then amended and brought into conformity with the judgment. Other members of the tarwad sought to have the sale set aside, but it was found that the judgment debt had been contracted for proper tarwad purposes, and that suit was dismissed. Application was now made for the attachment of other property of the tarwad in further execution of the amended decree:

Held, that the members of the tarwad were not entitled to contend that the decree was not binding on them that matter being *res judicata*.

Quære:—Whether the rule in *Sundara* v. *Subbanna*(2) as to the amendment of decrees is correct.

APPEAL against the order of J. P. Fiddian, Acting District Judge of North Malabar, on civil miscellaneous petition No. 536 of 1889, reversing the order of A. Chatu Nambiar, District Munsif of Nadapuram, on miscellaneous petition No. 1272 of 1889.

The facts of the case are stated above sufficiently for the purposes of this report.

The petitioner before the District Munsif was the decree-holder and he applied for the attachment and sale of property of the

(1) I.L.R., 7 Mad., 309.

* Appeal against appellate order No. 26 of 1890.

(2) I.L.R., 9 Mad., 354.

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judgment-debtor's tarwad in execution of his decree. The District Munsif dismissed the application after referring to *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(1), *Parvathi* v. *Kamaran*(2), *Gopalan* v. *Valia Tamburatti*(3), *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan*(4).

The District Judge reversed the order of the District Munsif on the authority of *Sundara* v. *Subbanna*(5) and granted the application of the decree-holder.

The counter-petitioner preferred this appeal.

Sankara Menon, for the appellant, pointed out that the ruling referred to by the District Judge had been dissented from in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan*(4) and cited *Arunachellathudayan* v. *Veludayan*(6), *Chowdhry Wahid Ali* v. *Mullick Inayot Ali*(7), *Ram Charan Bysak* v. *Lakhi Kant Bannik*(8), and especially observations of Mitter J., at page 714 of the report. *Kistokinker Ghose Roy* v. *Burrodacaunt Singh Roy*(9), *Noor Ali Chowdhuri* v. *Koni Meah*(10), *Bhanushankar Gopalram* v. *Raghunathram Mangalram*(11), *Daulat* and *Jagjivan* v. *Bhukandas Manekchand*(12).

Sankaran Nayar for respondent.

JUDGMENT.—The question whether the decree, as amended, is binding on the appellant, was decided in the affirmative as between them and the decree-holder in *Pydel* v. *Chathappan*(13). The matter is, therefore, *res judicata*, as it is the same decree which is now under execution, though the property attached is different. The decision, *Parthasaradi* v. *Chinnakrishna*(14), does not apply. It has been further argued that the decree amended was not the final decree passed in original suit No. 162 of 1878, and the decree of the Appellate Court was the one which should have been amended. We are referred to several decided cases in support of this contention, and especially to the decision, *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan*(4), in which the decision in *Sundara* v. *Subbanna*(5) was dissented from.

(1) I.L.R., 2 Mad., 328.
(2) I.L.R., 6 Mad., 341.
(3) I.L.R., 7 Mad., 87.
(4) I.L.R., 11 All., 267.
(5) I.L.R., 9 Mad., 354.
(6) 5 M.H.C.R., 215.
(7) 6 B.L.R., 52.
(8) 7 B.L.R., 704.
(9) 10 B.L.R., 101; s.c. 14 M.I., 465.
(10) I.L.R., 13 Cal., 13.
(11) 2 Bom., H.C.R., A.C., 101.
(12) I.L.R., 11 Bom., 172.
(13) I.L.R., 14 Mad., 150.
(14) I.L.R., 5 Mad., 304.

CHATHAPPAN v. PYDEL.

Were the question not *res judicata* for the purposes of the execution of the amended decree we should have been inclined to refer to the Full Bench the question of the correctness of the ruling in *Sundara* v. *Subbanna*(1).

We must dismiss the appeal, but under the circumstances we will make no order as to costs in this Court.

ORIGINAL CIVIL.

Before Mr. Justice Wilkinson.

AZIMULLA SAHEB (PLAINTIFF),

v.

SECRETARY OF STATE FOR INDIA (DEFENDANT).*

1892. March 16.

Costs of Government Solicitor—Taxation of, against unsuccessful litigant.

The Government Solicitor, who receives a monthly salary as such, receives no further payment from Government in respect of any costs of litigation to which Government is a party, except "out fees" or actual payments made by him on behalf of Government, and pays no fees when he instructs the Advocate-General; but, under his arrangement with Government, he is entitled to retain the costs decreed to Government, if recovered, and he then pays to the Advocate-General the fees of counsel allowed by the taxing officer:

Held, that when a suit against Government is dismissed with costs, costs should be taxed in the usual way, and the taxing officer cannot enquire into the arrangement as to remuneration of its law officers by Government.

APPLICATION for review of the taxation of the defendant's costs in reference to certain items which had been allowed by the taxing officer in civil suit No. 128 of 1891. That was a suit brought by the plaintiff against the Secretary of State for India in Council in which a decree had been passed whereby it was dismissed with costs. The items in question related to the fees of the Advocate-General who appeared, and the costs of the Government Solicitor who acted for the Secretary of State.

Mr. *Norton* for the plaintiff.

The principle which we contend for is this:—That where Government is represented by the Government Solicitor, Government is entitled to recover no costs in case the other side is unsuccessful,

(1) I.L.R., 9 Mad., 354.

* Civil Suit No. 128 of 1891.

AZIMULLA SAHEB v. SECRETARY OF STATE FOR INDIA.

except in respect of such sums as are actually paid by the Government Solicitor.

We admit that, as regards any sums actually paid by the Government Solicitor on behalf of Government and, as regards any liabilities incurred by Government to their solicitor in the matter of the suit, Government would have a right on taxation to recover them from the plaintiff, upon the footing that the Solicitor might sue Government to recover them. But in respect of costs which do not come under either of these heads, there can be no taxation or recovery of costs in any suit where Government is a successful party. There is a contract made between Government and the Government Solicitor to pay the latter so much a month, litigation or no litigation, to keep his services at the disposal of Government, and to do all their work. Government further undertaking to pay him any sums actually expended by him as out-fees. The Advocate-General is in a position precisely similar to that of the Government Solicitor. He is bound to undertake and conduct in the City of Madras all civil litigation, in which he may be required to appear on behalf of Government. The fees are not paid to either unless and until the Government succeed, and then they are not paid by Government. It is only after costs are recovered from the unsuccessful party that fees are received by the law officers of Government. The principle involved and which governs the awarding of costs, I submit is this—costs are not given by way of penalty as against an unsuccessful party nor by way of *bonus* to the successful party. Costs are the actual amount of loss in money computed according to the rules of taxation, to which the successful party has been put by his opponent, and nothing more or less. The test then in this case is—what is the exact sum of money which represents the loss of the defendant? If this is the right view it is illegal that Government should recover from the plaintiff sums of money, practically by way of fine, which they have never paid and are not bound to pay to the Government Solicitor or the Advocate-General.

It must be remembered that the Government law officers are not retained in a case. The salary given them is not a retaining fee, but payment for the work to be done by them. If it were paid merely for the purpose of retaining them, it would be another matter. The Government Solicitor cannot turn round and say to the unsuccessful plaintiff "I am going now to charge you, not

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"upon the contract as it really exists as between the Government "and myself, but upon some supposititious contract which does "not exist, but which puts the Government and me, for the pur-"poses of this suit, upon the footing of client and attorney." What fractional part of the time that he is bound to give to Government, does the Government Solicitor's work in any particular case represent? I contend that the Government Solicitor can in no case recover any sum other than that which represents a payment, which Government are bound to recoup. *Re Gedye*(1), *Gambrell* v. *Earl Falmouth*(2), *Barnes* v. *Attwood*(3). The test is clearly laid down in *Harrold* v. *Smith*(4), viz., that the actual pecuniary disadvantage to which the person who has been successful has been put is that which determines the question of the relationship between solicitor and client. Thus in the case of a contract between a vakil and his client for the payment of a specified amount, a decree for costs would carry no more than such fixed sum, even though the costs allowable exceed it in amount. The Statute 18 and 19 Vic., c. 90, provided for the recovery of its costs by Government, and that the money recovered should be paid into the Exchequer; it was not made a present of to the solicitor, but went into the Consolidated Fund, out of which the Crown officers are paid.

The Advocate-General (Hon. Mr. *Spring Branson*) *contra.*

The High Court rules relating to vakils' costs, apply only to pleaders and vakils and not to attorneys. It would be impossible for an attorney to give such a certificate as is required of a vakil. A vakil is not paid for each bit of work done by him, and where he undertakes to accept from his client a smaller sum than would ordinarily be allowed on taxation he can only recover the amount for which he contracted.

In *re Gedye*(1) there was contract with a solicitor, and as between the attorney and client the remuneration of the former was necessarily governed by that contract.

In *Gambrell* v. *Earl Falmouth*(2) again, there was a contract. In that case a contract was entered into with one and the same attorney and in relation to one transaction by two clients, the parties thereto, and the Court held, in reviewing the taxation, that the attorney being but one, there was but one contract and one

(1) 23 Beav., 347. (2) 5 Ad. & E., 403. (3) 5 C.B., 164. (4) 6 Jurist, N.S., 254.

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set of costs. In *Barnes* v. *Attwood*(1) there was a fraud upon the taxing master who was misled thereby. With regard to *Harrold* v. *Smith*(2), it is necessary to remember that it was held for some time that where the Crown was a party it neither paid costs nor received them, but this view of the rights and liabilities of the Crown in the matter of costs changed, and the Courts held that costs could be recovered by the Crown in the same way as by private individuals. See also *Attorney-General* v. *Corporation of London*(3). It is said that costs are not a penalty. But the giving of costs is entirely in the discretion of the Court. Even where a plaintiff is successful he may be deprived of his costs. What is that but a penalty?

As to the arrangement between Government and their law officers, see Morgan and Wurtzburg, p. 417. In *Raymond* v. *Lakeman*(4) the taxing master allowed the company their solicitors' costs, notwithstanding that those solicitors were employed by them on a fixed salary. On review of taxation the Master of the Rolls held that the defendant could not have the benefit of the arrangement between the company and its standing solicitors. In the cases cited on behalf of the plaintiff here, the contest was between attorney and client. The client may successfully set up a contract controlling and limiting his liability to pay his solicitor's costs, but it is not open to his opponent to set up such contract when costs are taxed under the decree awarding them. In England the Statute 18 and 19 Vic., c. 90, declares that costs payable to the Crown shall, when recovered, be paid into the Consolidated Fund. Here, in India, Government choose to allow their law officers to receive, in addition to a salary which is in the nature of a retaining fee, the costs ordinarily allowed to solicitor and counsel. When the Accountant-General in 1877 demanded that all costs awarded to Government and recovered should be paid into the Treasury, it was pointed out by the Government Solicitor that that was not the practice, but that, on the other hand, it was a recognised thing, sanctioned by the Supreme Government, that the fees marked by the Government Solicitor on the brief of the Advocate-General and the costs of the Government Solicitor should be retained by those officers.

(1) 5 C.B., 164.
(2) 6 Jurist, N.S., 254.
(3) 19 L.J., N.S., Ch., 314.
(4) 34 Beav., 584.

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In the Proceedings of Government, dated 18th December 1877, No. 2945, paragraph 2, it is stated that "it was not the intention "of Government in G.O., dated 20th October 1877, No. 2553, to "deny the claim of their law officers to their fees in any suit where "costs are awarded to the Government against the opposite parties "and are recovered. The contrary practice is distinctly sanctioned "in the orders of Government of India quoted in the letter already "referred to and is shown by two letters handed in by him to "prevail both at Calcutta and Bombay."

Whether the Government have to pay any fees whatever to their law officers or not is a matter which does not concern the other side. The plaintiff has no right to set up or the taxing officer to enquire into any arrangement between Government and their law officers relating to fees. Section 256 of the Civil Procedure Code says "all costs incurred." "Incurred" and "expended" are not synonymous terms. The contention that the costs of the Advocate-General and the Government Solicitor have not been "incurred" by Government is based on the erroneous assumption that the party liable to pay costs can enquire into, and take advantage of the arrangement existing between Government and their law officers.

Mr. *Norton*.—Section 256 of the Civil Procedure Code lays down the very test for which I contend—namely "all costs *incurred*." I say that the Government are not liable to their law officers for costs of attorney and counsel, therefore, as to such costs Government has "incurred" no liability, and consequently cannot recover anything. Has the Government Solicitor incurred any professional liability to pay the Advocate-General? If he paid that officer counsel's fees, could he recover them from Government? Could he maintain a suit against Government for the recovery of his own costs if not paid by Government?

WILKINSON, J.—This is an application to review the taxation of the defendant's bill of costs in the above suit, to set aside the allocation of the taxing officer, and to lay down the mode in which and the principle on which the bill should be taxed.

The suit was one by a private individual against the Secretary of State. At the first hearing the Secretary of State was represented by the Advocate-General instructed by the Government Solicitor, and the suit was dismissed, the plaintiff being ordered to pay the costs of the Secretary of State.

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The taxing officer's notes show that before him the plaintiff objected to defendant's bill of costs on the ground that defendant had incurred no costs, "unless for the time of their officers" (whatever that may mean). The Government Solicitor replied that the taxing officer was not at liberty to go behind the order to tax, that costs were given as a penalty, and that it had for more than thirty years been the invariable practice of the Court to tax Government bills of costs in the same way as other bills of costs. The taxing officer accepted the plea of the Government Solicitor and taxed the costs as between party and party.

Mr. Norton appears for the plaintiff and argues that as Government pay the Government Solicitor a fixed monthly salary to do its legal work, the Secretary of State, the defendant in this case, cannot be said to have incurred any costs: that as the Government Solicitor cannot recover from the Government the items mentioned in the bill of costs, Government cannot recover them from the plaintiff, and that the principle upon which the Court ought to proceed in fixing costs is to ascertain what was the actual damnification caused to the successful party and to award to him the sum which he is actually out of pocket. Mr. Norton's argument proceeds on the assumption that the plaintiff is entitled to the benefit of any arrangement entered into by the Government with the solicitor, whose services the Government see fit to retain by the payment of a monthly salary. I do not think that he is. The principle applicable in cases like the present appears to be that laid down in the case relied on by the Advocate-General—*Raymond* v. *Lakeman*(1). In that case the taxing master allowed a company which employed standing solicitors at a fixed salary such costs as the company *would be bound to pay* to their solicitors. It was argued before the Court that as the standing solicitors were paid a fixed salary, the company had no right to charge the unsuccessful party more than their own standing solicitors could have charged them. The Master of the Rolls maintained the order of the taxing master, holding that the unsuccessful party could not have the benefit of any private arrangement between the solicitor and the company as to costs. The case appears to me on all fours with the present case. The unsuccessful party, the plaintiff, has been ordered to pay to the defendant the costs

(1) 34 Beav., 584.

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incurred by him. The defendant asserts that costs have been incurred by the employment of a solicitor to receive the summons, to instruct counsel, put in written statement, &c. It is not denied that the costs, which the present defendant claims to recover from the plaintiff, are such as any other defendant must have incurred in defending the suit and would be bound to pay to his solicitor. But it is argued that unless the Government Solicitor proves that he can recover the costs from Government, Government cannot recover them from plaintiff. This is entirely beside the question, which is one between plaintiff and defendant, not one between plaintiff and the Government Solicitor as Mr. Norton suggests. The plaintiff has no right to assume that the defendant has not expended those sums, nor is he entitled to call upon the defendant to prove the nature of the contract between him and his solicitor. The case of *Barnes* v. *Attwood*(1) is not really in point, as there the taxing officer had been induced by false affidavits to allow a larger sum as expenses to commissioners than had actually been paid. It is true that Mr. Norton's whole argument proceeded on the assumption that the bill of costs put in by the defendant in this case represents absolutely fictitious transactions as between the Government Solicitor and the Government. But it is unnecessary to consider that question. The only question is, has the defendant incurred any, and if so, what costs? The answer is, the defendant has employed a solicitor, who has done certain acts and is entitled to charge for his time and work, and the defendant is liable to remunerate the solicitor. Whether Government chooses to do by a fixed salary and whether the costs if recovered go to the Government Treasury or into the solicitor's pocket, is not a matter into which the taxing officer is competent to enquire.

The petition must be dismissed with costs.

Branson & Branson—Attorneys for plaintiff.

Barclay—Government Solicitor.

(1) 5 C. B., 164.

APPELLATE CIVIL.

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

1892. Feb. 18, 23.

KASTURI (DEFENDANT No. 2), APPELLANT,

v.

VENKATACHALAPATHI (PLAINTIFF), RESPONDENT.*

Evidence Act—Act I of 1872, *s.* 115—*Estoppel—Civil Procedure Code—Act XIV of* 1882, *s.* 237—*Prior encumbrance—Notice to executing decree-holder.*

A hypothecation bond executed in 1878 by the husband (deceased) of defendant No. 1 to secure a debt due by him to a partner of the plaintiff was assigned to the latter in 1888. In 1882 the plaintiff, who was aware of the existence of this instrument, brought the land comprised in it to sale in execution of a money decree obtained by him against the executant, and defendant No. 3 became the purchaser. At the time of the sale the plaintiff gave no notice of the existence of the encumbrance. In a suit to recover the principal and interest due on the hypothecation bond:

Held, that the plaintiff was estopped from recovering the secured debt against the land.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 474 of 1890, affirming the decree of A. Kuppusami Ayyangar, District Munsif of Kumbakonam, in original suit No. 449 of 1889.

Suit to recover principal and interest due on a hypothecation bond, dated 20th August 1878, and executed by the husband (deceased) of defendant No. 1 in favour of one Aundi Chakrapani Chetti, who transferred it to the plaintiff by an instrument dated 23rd June 1888. The plaintiff's assignor, who was his partner, was not joined in this suit.

It appeared that the plaintiff sued the late husband of defendant No. 1 in original suit No. 556 of 1878 in the Court of the District Munsif of Kumbakonam and obtained a personal decree against him, in execution of which he brought the land comprised in the above-mentioned hypothecation bond to sale in 1882, and defendant No. 2 then became the purchaser, and was now in possession of it. The plaintiff at that time was aware of the

* Second Appeal No. 875 of 1891.

existence of the hypothecation bond, but he gave no notice of it at the time of sale.

The District Munsif passed a decree for the plaintiff declaring the amount of the decree a charge on the land in the possession of defendant No. 2, and the District Judge on appeal affirmed this decree, referring to the fact that at the time of the sale the High Court had made no rules under Civil Procedure Code, section 287: and the plaintiff preferred this second appeal.

Parthasaradhi Ayyangar for appellant.

Ramasami Mudaliar for respondent.

JUDGMENT.—There can be no doubt that if plaintiff himself had been the holder of the prior encumbrance when he brought the property to sale, he would be subsequently estopped from enforcing the lien of which he had given no notice. See *Agarchand Gumanchand* v. *Rakhma Hanmant*(1), followed by this Court in *Jaganatha* v. *Gangi Reddi*(2), *Nursing Narain Singh* v. *Roghoobur Singh*(3), *Tinnappa* v. *Murugappa*(4). The decision in *Banwari Das* v. *Muhammad Mashiat*(5) is not in conflict with these decisions, since in that case it was not attempted to be shown that the provisions of section 287 of the Code of Civil Procedure had not been complied with (*vide* judgment of Edge, C.J., page 702). All that was urged was that plaintiff as a bidder had not personally announced his encumbrance.

It is urged in this suit that it was not plaintiff but Aundi Chakrapani Chetti who held the prior mortgage. It is admitted, however, that this man was plaintiff's partner, and that plaintiff was aware of the existence of the prior mortgage of which he took an assignment some years after the sale.

It appears to us to be immaterial that a suit by Chakrapani Chetti himself might have been successful. The ground of decision is that it was plaintiff himself who led intending purchasers to believe that the property was offered for sale free of encumbrances, and that plaintiff by concealing the existence of a lien, of which he was aware, led the purchaser to pay full value for the property. He is, therefore, estopped from now denying that the sale took place free of encumbrances (section 115, Indian Evidence Act). Under section 237 of the Code of Civil Procedure

(1) I.L.R., 12 Bom., 678. (2) I.L.R., 15 Mad., 303. (3) I.L.R., 10 Cal., 609. (4) I.L.R., 7 Mad., 107. (5) I.L.R., 9 All., 690.

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the plaintiff as execution-creditor was bound to specify the judgment-debtor's interest so far as he had been able to ascertain it. *Tinnappa* v. *Murugappa*(1).

On this ground the decrees of the Courts below must be reversed so far as second defendant is concerned and the plaintiff's suit dismissed with costs throughout.

APPELLATE CRIMINAL.

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

1892. February 24. March 1.

HAYES

v.

CHRISTIAN.*

Indian Penal Code—Act XLV of 1860, *s.* 499—*Defamation—Privilege of party—Appeal from the Resident's Court, Bangalore—Limitation.*

A person who was being defended by counsel on a criminal charge interfered in the examination of a witness and made a defamatory statement with regard to his character. He was now charged with defamation and convicted in the Resident's Court at Bangalore.

On an appeal to the High Court, preferred more than sixty days after the conviction:

Held, (1) that the appeal should be admitted;

(2) that the occasion was not privileged and the words complained of were uttered maliciously and the conviction was right.

APPEAL against the judgment and sentence of the Assistant to the Resident at Mysore and Justice of the Peace for the Town of Bangalore in Criminal Revision Case No. 1 of 1891.

The facts of the case are stated in the judgment of the High Court sufficiently for the purposes of this report.

The sentence appealed against was pronounced on 10th October 1891 and this appeal was filed on 6th January 1892.

The appeal having come on before a single Judge for admission, it was referred to a Bench of two Judges with reference to the question as to whether or not it was barred by limitation

It then came on before *Collins*, C.J., and *Parker*, J.

(1) I.L.R., 7 Mad., 107

* Criminal Appeal No. 11 of 1892.

HAYES v. CHRISTIAN.

Sundara Ayyar for appellant contended that the Criminal Procedure Code had no application to this appeal, which was preferred to the High Court under the Extradition Act. He referred to *Gazette of India* notifications No. 2252 I, dated 7th August 1883, and No. 178 J, dated 23rd September 1874, and cited *Ward* v. *The Queen*(1).

Their Lordships passed an order admitting the appeal.

Sundara Ayyar for appellant.

Complainant in person.

JUDGMENT.—The appellant, Mr. J. W. Hayes, a Barrister by profession, appeals against a conviction for defamation under section 500 of the Indian Penal Code.

It appears that on the 2nd September 1891 Mr. Hayes was prosecuted for defamation, the complainant being Mr. Christian, who is described as being a Minister of the Gospel. Mr. Hayes was represented by counsel, and when Mr. Christian was in the witness box Mr. Hayes said to him "you cheated people at Hyderabad and had to leave the ministry." For using this expression Mr. Hayes was prosecuted before the Court of the First Assistant to the Resident of Mysore and convicted under section 500 of the Indian Penal Code. Mr. Hayes through his counsel admitted that he used the defamatory words complained of, but contended that, being an accused person, he was privileged. It is argued before us that an accused person is absolutely privileged as to any statement he makes or any words that he utters during the progress of the case, and that no proceeding can be taken against him either civilly or criminally for any defamatory statement that he makes, and a number of English cases are cited in support of that proposition, *Munster* v. *Lamb*(2) being especially relied on. The utmost extent to which the English cases go is that "No action of libel or slander lies whether against "Judges, counsel, witnesses, or parties for words written or spoken "in the *ordinary course* of any proceeding before any court or "tribunal recognized by law." See *Dawkins* v. *Lord Rokeby*(3). Although we are not bound to follow the English cases cited, yet we fully recognize the great importance of allowing the utmost freedom to counsel, parties, and witnesses during the progress of a case, and if the counsel for Mr. Hayes, or Mr. Hayes if he

(1) I.L.R., 5 Mad., 33. (2) L.R., 11 Q.B.D., 588. (3) L.R., 8 Q.B., 255.

HAYES v. CHRISTIAN.

had been defending himself, had asked Mr. Christian in cross-examination whether in consequence of cheating people at Hyderabad he had not been turned out of the ministry, the question could not have been made the subject of a civil action, nor would any criminal proceeding lie for defamation under section 500 of the Indian Penal Code. It must be borne in mind that in India Act I of 1872 gives the Court power to decide whether the witness shall be compelled to answer questions affecting the credit of such witness by injuring his character, and the Court has also power to prevent any question being put to a witness merely for the purpose of giving him annoyance. See sections 146 to 152 of Act I of 1872.

In the case before us it is not contended that the words are true, and it appears that Mr. Hayes at the time he uttered the words was not defending himself, neither was he called upon by the presiding Magistrate to answer or explain the charge made against him. Mr. Hayes, therefore, although appearing by counsel, chose to interfere during the examination of a witness, and to make grossly defamatory remarks respecting the character of such witness, it cannot, therefore, be said that Mr. Hayes used the words complained of in the *ordinary course* of any legal proceeding. We think, therefore, that even under the English cases cited the occasion on which Mr. Hayes used the words were not privileged. Mr. Hayes is, however, charged under section 500 of the Indian Penal Code, and we hold that the words are clearly defamatory, and, therefore, fall within the section. We hold further that the occasion was not privileged, that the words were not uttered in good faith but maliciously, and that Mr. Hayes is not protected by any of the exceptions to section 499 of the Indian Penal Code. We therefore dismiss the appeal and confirm the conviction and sentence.

APPELLATE CIVIL.

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

SAMINATHA (DEFENDANT No. 2), APPELLANT,

v.

MUTHAYYA (PLAINTIFF), RESPONDENT.*

1892. February 29.

Limitation Act—Act XV of 1877, s. 22—Amendment of plaint.

The creditor of a deceased trustee of a temple sued two persons, as his successors in office, to recover the amount of the debt. One of the defendants died; the other, who was the brother of the deceased, pleaded that other persons were joint trustees with him, and should have been impleaded with him, he also alleged that the debt in question was a private debt, and had not been incurred by the deceased as a trustee. The persons named were joined as defendants, and they repeated the above allegation. The plaintiff, thereupon, amended the plaint and prayed for a personal decree against the original surviving defendant, and the others were removed from the record. The amendment took place more than three years after the date when the debt was payable, but the suit had been instituted within that period:

Held, that the claim was not barred by limitation.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 463 of 1890, confirming the decree of T. Ramasami Ayyar, District Munsif of Tiruturaipundi, in original suit No. 80 of 1889.

Suit for money payable on 30th May 1886 to the plaintiff by a trustee of a temple now deceased. Defendants Nos. 1 and 2 were impleaded as his successors. Defendant No. 1 died. Defendant No. 2, the brother of the deceased debtor, pleaded that there were other trustees of the temple who should be joined as defendants. These persons were joined, and they pleaded that the debt had been incurred by the deceased in his individual capacity, and not as a trustee of the temple. The plaintiff then, viz., on 8th October 1889, amended the plaint and prayed for a personal decree against defendant No. 2, and the other defendants were removed from the record.

The Lower Courts passed decrees in favour of the plaintiff, and the defendant preferred this second appeal.

Mr. *Subramanyam* for appellant.

R. Subramanya Ayyar for respondent.

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* Second Appeal No. 1035 of 1891.

SAMINATHA v. MUTHAYYA.

JUDGMENT.—The only question is whether the suit is barred by limitation. The plaintiff brought the suit against first and second defendants as representatives of one Kailasanadha (Pandara Sannadhi) the adhinastom or trustee of the temple at Vedaranyam, stating that the money was due on account of certain land purchased by Kailasanadha for the benefit of the temple. First defendant having died, the suit was proceeded with against second defendant alone as trustee of the temple. He pleaded that there were also other trustees who should be included as defendants, alleging, at the same time, that the property was purchased by Kailasanadha for the benefit of his own family. Under orders of the District Munsif, the others named by second defendant were made co-defendants. They also pleaded that the property was bought by Kailasanadha for his own benefit, and not for the temple. Thereupon plaintiff, with the permission of the Court, amended the plaint and prayed for defendants Nos. 3 to 8 being removed from the suit, and for a personal decree against second defendant alone.

Second defendant then contended that the suit, as amended, was time barred, and relied on section 22 of the Limitation Act.

We observe that the second defendant was a party on the record from the very commencement, and the question, whether the amendment ought to have been allowed or not, is not an objection taken.

The effect of the amendment was not to add a new person as defendant, but to alter the ground on which a person, already a defendant, was to be held liable, plaintiff accepting the defendant's contention that the purchase had been made on behalf of his own family, and not on behalf of the temple.

Having regard to section 22, we are of opinion that it is not intended to apply to a case in which the ground on which the original defendant is sought to be made liable is merely shifted, without new persons being included as defendants, the intention being not to take away from a person newly brought in as a defendant the benefit which the Act would give him were a suit instituted against him on that date. The decision in *Ganpat Pandurang* v. *Adarji Dadabhai*(1) tends to support this view, see page 321 of the Report.

We dismiss this appeal with costs.

(1) I.L.R., 3 Bom., 312.

APPELLATE CIVIL.

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

KARUPPASAMI (PLAINTIFF), PETITIONER,

v.

PICHU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1891. September 9. 1892. March 1.

Succession Certificate Act,—Act VII of 1889, *ss.* 4, 6—*Suit by assignee of a debt due to a deceased creditor.*

One Suppammal lent a sum of money to the defendant and died, leaving an adopted son, who assigned the debt to the plaintiff. Neither the plaintiff nor his assignor obtained a certificate under Act VII of 1889. The plaintiff now sued to recover the amount of the assigned debt:

Held, that the plaintiff was not entitled to recover, no certificate having been obtained under Act VII of 1889.

PETITION under Provincial Small Cause Courts Act of 1887, s. 25, praying the High Court to revise the proceedings of V. P. de Rozario, Subordinate Judge of Palghat, in small cause suit No. 879 of 1889.

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

The Subordinate Judge dismissed the suit and the plaintiff preferred this petition.

Sankaran Nayar for petitioner.

Desikachariar for respondents.

JUDGMENT.—This is a petition presented under section 25 of Act IX of 1887. As plaintiff in small cause No. 879 of 1889 on the file of the Subordinate Court at Palghat, petitioner sued to recover from the first counter-petitioner money lent to the latter by one Suppammal since deceased. His case was that, after Suppammal's death, her adopted son, second counter-petitioner, assigned the debt to him, but it appeared that neither the assignee nor the assignor had obtained a certificate under Act VII of 1889. The Subordinate Judge called upon the petitioner to produce a certificate and granted him two months' time for doing so. Petitioner, however, failed to produce the certificate, and contended that, as the debtor had agreed to pay the debt to him, he was entitled

* Civil Revision Petition No. 229 of 1890.

KARUPPASAMI v. PICHU.

to recover it without producing a certificate. The Subordinate Judge disallowed the contention and dismissed the suit with costs. It is argued before us that Act VII of 1889 is applicable only to the representatives of deceased persons, and not applicable to their assigns. We think the decision of the Subordinate Judge is correct. It is not inconsistent with the language of section 4 of Act VII of 1889, for a person claiming a debt under an assignment made by the creditor's heir certainly claims part of the effects of such creditor. There is nothing in the section to show that the title derived from the heir is not as much within its purview as the right to succeed set up by the heir himself. It would further be unreasonable to hold that the assignee is in a better position than the assignor. If it were so held, the heir might assign the debts due to the deceased person to others and thereby evade the statutory duty imposed upon him by section 4. The intention was to afford protection to parties paying debts owing to deceased persons, and the construction suggested for the petitioner would frustrate that intention. The heir of a deceased person cannot by his own act deprive the debtors of the protection guaranteed to them by the Act. We may also observe that a certificate may be obtained under the Act in respect of particular debts due to a deceased person as contra-distinguished from probate or letters of administration, which create in representatives title to recover all the effects of such person. It is true that the Act is called the Succession Certificate Act, and that it does not refer in terms to assigns of the heirs of deceased persons; but it does not follow that the right of succession is not the primary basis of the claim to recover the debt when it is made by the assignee of the heir, who has to prove not only the assignment, but also the assignor's right of succession.

The petition is therefore dismissed with costs.

APPELLATE CIVIL.

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

CHINNAMMAL AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

VENKATACHALA (PLAINTIFF), RESPONDENT.*

1891. November 23. December 15.

Hindu law—Inheritance—Paternal aunt—Maternal grandfather.

Under the Hindu law obtaining in the Madras Presidency, the maternal grandfather of a deceased Hindu succeeds to him in preference to his paternal aunt.

SECOND APPEAL against the decree of H. H. O'Farrell, Acting District Judge of Trichinopoly, in appeal suit No. 24 of 1889, modifying the decree of V. Swaminatha Ayyar, Additional District Munsif of Trichinopoly, in original suit No. 123 of 1888.

Suit on a hypothecation bond, dated 22nd December 1886, and executed by one Rangammal (deceased) in favour of the plaintiff.

The last male holder of the land, the subject of the hypothecation, was Krishnasami Naick, who was the son of Rangammal's brother. On Krishnasami Naick's death, Rangammal entered on the land as his heiress; the inheritance was then contested by his maternal grandfather and grandmother, who, having entered on her death, were joined as defendants in this suit. That contest was not finally determined in the lifetime of Rangammal, and the same question was now raised by the defendants, who pleaded that the charge purported to have been created by Rangammal was invalid, no title to the land having vested in her.

The Lower Courts passed decrees for the plaintiff, against which the defendants preferred this second appeal.

Krishnasami Ayyar for appellants.

Ambrose for respondent.

JUDGMENT.—The only question is, who is the nearest heir to the last male owner—his father's sister or his mother's father? The Lower Courts have decided in favour of the father's sister, on the ground that she being related through a male must be held to be more closely related to Kuppusami than the defendants, the

* Second Appeal No. 235 of 1891.

CHINNAMMAL v. VENKATA-CHALA.

parents of Kuppusami's mother, who are related through a female. It is argued here that, in virtue of the rule excluding females in favour of male heirs, the maternal grandfather has the preference—*Narasimma* v. *Mangammal*(1). On the other side, it is contended that the father's sister comes in under the father's brother, as the sister is included in the term brethren. This construction of the text of the Mitakshara has not been approved by commentators and has been rejected by the Privy Council—*Thakoorain Sahiba* v. *Mohun Lall*(2). A father's sister cannot be a gotraja sapind, because as soon as a female marries, she passes into a different gotra, but she is a bandhu, and the son of the paternal aunt ranks higher than any maternal bandhu (Mayne, § 535, fourth edition); but it does not follow that his mother is a bandhu of the same class. The son takes by his own independent merit, not through her (Mayne, § 492). The maternal uncle has been recognized as a bandhu (*Gridhari Lall Roy* v. *The Bengal Government*(3)) and the maternal grandfather ranks higher than the maternal uncle. (See Mayne, § 535, and *Krishnayya* v. *Pichamma*(4)). His right therefore as an undoubted male heir must prevail over that of the paternal aunt. The decrees of the Lower Courts must be reversed and the suit dismissed with costs throughout.

APPELLATE CIVIL.

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

1892. February 29.

RAGHUPATI (DEFENDANT No. 2), APPELLANT,

v.

TIRUMALAI (PLAINTIFF No. 1), RESPONDENT.*

Hindu law—Suit by reversioner to establish invalidity of a sale by a widow—Daughter of last male holder not joined.

Under the Hindu law obtaining in the Madras Presidency a reversioner is entitled to sue to establish the invalidity of a sale by the widow of the last male holder, notwithstanding the fact that he left a daughter, who was alive at the date of suit, but was not joined as a party.

(1) I.L.R., 13 Mad., 10. (2) 11 M.I.A., 386. (3) 12 M.I.A., 448. (4) I.L.R., 11 Mad., 287.

* Second Appeal No. 1428 of 1891.

RAGHUPATI v. TIRUMALAI.

SECOND APPEAL against the decree of W. R. Weld, District Judge of Kurnool, in appeal suit No. 2 of 1891, affirming the decree of D. Venkoba Rau, District Munsif of Markapur, in original suit No. 47 of 1890.

Suit to declare the plaintiffs' title as reversioners to certain land, the property of the husband (deceased) of defendant No. 1, and to declare a sale-deed executed in respect of it by defendant No. 1 to defendant No. 2 on 15th November 1881 to be void as against the plaintiffs.

The plaintiffs claimed to be the nearest sapinda gnatis of the late husband of defendant No. 1, who died, leaving a daughter, his only child. The daughter was not a party to the suit.

The District Munsif struck the name of the second plaintiff off the record and passed a decree as prayed in favor of plaintiff No. 1, and this decree was affirmed on appeal by the District Judge.

Defendant No. 2 preferred this appeal.

Subramanya Ayyar for appellant.

Ranga Rau for respondent.

JUDGMENT.—The only question argued before us is whether first plaintiff was entitled to maintain the suit notwithstanding the existence of the daughter of Appala Reddi, the last male owner, and our attention has been drawn to *Rani Anund Koer* v. *The Court of Wards*(1). That case decided that the party entitled to sue is, as a general rule, the nearest reversionary heir. No question then arose as to whether the existence of a daughter while the property was in possession of the widow would bar a suit by the next male reversioner. The other decisions to which we are referred are *Bhikaji Apaji* v. *Jagannath Vithal*(2), *Madari* v. *Malki*(3), *Balgobind* v. *Ramkumar*(4) and *Raghu Nath* v. *Thakuri*(5). The decision in *Balgobind* v. *Ramkumar*(4) is a clear authority against the appellant's contention, and we agree with the conclusion at which the learned Judges arrived therein. An estate taken by a daughter being a qualified heritage like that of a widow, we see no reason why the existence of a daughter should bar a suit by a reversioner any more than would the existence of a co-widow.

(1) L.R., 8 I.A., 14. (2) 10 Bom. H.C.R., 351. (3) I.L.R., 6 All., 428. (4) I.L.R., 6 All., 431. (5) I.L.R., 4 All., 16.

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In the other cases referred to this point did not arise, or was not so fully considered. Such suits are allowed for the purpose of enabling the reversioner to protect his interest against alienations made by persons in possession with a limited interest. We are of opinion that the appeal must fail and we dismiss it with costs.

APPELLATE CIVIL.

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

1892. January 4, 5. March 2.

THE MOST REVEREND JOSEPH COLGAN AND ANOTHER (DEFENDANTS NOS. 4 AND 5), APPELLANTS,

v.

ADMINISTRATOR-GENERAL OF MADRAS AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1—3), RESPONDENTS.*

Perpetuities, rule against—Superstitious uses—Trust for masses—Executor, assent of—Vesting of bequest.

An Armenian died in Madras in 1836, leaving a will whereby she appointed executors and bequeathed a certain sum "that the income thereof be given for perpetual masses for the benefit of my soul and for the souls in purgatory," and she also bequeathed, *inter alia*, Rs. 42,000 to her grand-daughter for life and provided that in the event of her marrying and having children she could bequeath to them the said Rs. 42,000, but in the event of her dying without issue, Rs. 14,000 out of the said Rs. 42,000, should be subtracted and given to her husband, and the remaining Rs. 28,000 should be added to the first-mentioned bequest and the income thereof be similarly given for masses. The executor with probate gave effect to the first-mentioned legacy. By a settlement made in contemplation of the marriage of the grand-daughter, the subject of the second legacy was settled as provided in the will except as to the Rs. 14,000, as to which it was declared that in the event of there being no issue of the marriage, and of the wife surviving the husband and dying without marrying again, it should be divided between the residuary legatees of the testatrix. The husband was a party to the settlement, as also was the executor of the testatrix who was one of the trustees of the settlement. The marriage having taken place, a suit was brought by the husband and wife against the trustees, and a decree was passed under which the trustees were relieved of their office, and the trust funds paid into Court with the direction that interest accruing thereon be paid to the wife until further order. The husband died without issue and subsequently in 1890 the wife died not having re-married. The Administrator-General of Madras took out letters of administration to administer the estate left

* Appeal No. 22 of 1891.

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unadministered of the testatrix, and the Rs. 42,000 above referred to were paid over to him:

Held by Shephard, J., that the sum of Rs. 14,000 by reason of the settlement, but not otherwise, fell into the residue of the estate of the testatrix:

Held by Collins, C.J., *and Handley*, J., *affirming Shephard*, J.

(1) that the sum of Rs. 28,000 formed unadministered assets of the estate of the testatrix;

(2) that the bequest for masses was void as infringing the rule against perpetuities.

APPEAL against the decree of Mr. Justice Shephard sitting on the original side of the High Court, in civil suit No. 325 of 1890.

Suit by the Administrator-General of Madras, to whom had been granted letters of administration of the property and credits, left unadministered by John Arathoon, deceased, of Hosannah Arathoon who died on 10th August 1836. There were annexed to the letters of administration the will of Hosannah Arathoon, dated 5th August 1836, and a postscript or codicil thereto, dated 7th August 1836, which were as follows:—

"This is my last will and testament.

"*Firstly.*—I leave eight thousand pagodas or twenty-eight "thousand rupees, that the income thereof be given for perpetual "masses for the benefit of my soul and for the souls in purgatory.

"*Secondly.*—I leave to my beloved grand-daughter Maria "Hosannah Chambers twelve thousand pagodas or forty-two "thousand rupees, that the same be secured or settled on her, and "that she enjoy the income of the said sum as long as she lives. "Should my said grand-daughter marry and have children, she "can will away and bequeath to her children the said secured "or settled twelve thousand pagodas or forty-two thousand "rupees. But should my said grand-daughter die without issue, "then four thousand pagodas or fourteen thousand rupees of this "secured or settled sum is to be subtracted and given to her "husband, and the residual eight thousand pagodas or twenty-"eight thousand rupees I will that it go and be added to the "foregoing bequest which is in the first paragraph of my will, "that the income of this eight thousand pagodas added to the "income of that eight thousand pagodas be given for perpetual "masses for the benefit of my soul and for the souls in purgatory.

"*Thirdly.*—I leave one thousand rupees to my sister's grand-"daughter Jane Maria Marooth, that it be given to her at the "time of her marriage.

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"*Fourthly.*—I leave five hundred rupees to be equally divided "amongst my three old servants, who are Jenny and Podika "and Chorrymuthoo.

"*Fifthly.*—I leave the entire residue of my estate, whatever "it may be, to be equally divided amongst my beloved daughter "Hosannah Chambers and my beloved sons John and Asteal "Satur Peter Arathoon, whom I nominate and appoint my resi-"duary heirs.

"*Sixthly.*—I, under these presents, appoint and denote my "beloved sons John and Asteal Satur Peter Arathoon to be the "sole executors of this my will. In testimony of the above my "writings I have signed and sealed this at Madras this fifth day "of August in the year of The Lord one thousand eight hundred "and thirty-six.

[Here follow signature and attestation.]

"*Postscript.*—This is a part of my above will. Should it "so happen that my grand-daughter Maria Hosannah Chambers "died unmarried, then the said four thousand pagodas or four-"teen thousand rupees which I have left to be given to her hus-"band, considering the possibility of her being married and dying "without issue, I will that the said four thousand pagodas or "fourteen thousand rupees be equally divided amongst my three "residuary heirs at Madras the 7th of August 1836."

Probate of the above will and codicil was granted on 8th October 1836 to John Arathoon. Leave was reserved to the other executor named in the will to come in and prove, but he never did so.

The first defendant in this suit was the sole surviving executor of John Arathoon. The second defendant was the Official Assignee of Madras, and as such the assignee of the estate and effects of the second son, A. S. P. Arathoon, who was adjudicated an insolvent in 1851 and died in 1854, having previously obtained his personal discharge, but was not shown to have obtained a final discharge. The third defendant was the Administrator-General of Madras, who was the administrator of the estate and effects (left unadministered) of the daughter Hosannah Chambers, deceased. The fourth and fifth defendants were, respectively, the Roman Catholic Archbishop and the Vicar-General of Madras.

As to the legacy in the first paragraph of the will, John Arathoon in his lifetime transferred a Government promissory note

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of the value of Rs. 28,000 (representing the amount thereby bequeathed) to his sons, by whom it was ultimately transferred to the fourth and fifth defendants to hold to the uses therein mentioned. At the settlement of issues it was decided by HANDLEY, J., that this promissory note and the question of the validity of the above-mentioned legacy did not come within the scope of the suit.

As to the legacy in the second paragraph of the will, John Arathoon invested the sum of Rs. 42,000 thereby bequeathed in a Government promissory note, which was subsequently brought into settlement by a deed, dated 25th April 1840, made in contemplation of the marriage of Maria Hosannah Chambers, the grand-daughter, with James Supple, and executed among others by James Supple and by John Arathoon who was one of the trustees thereof. By the terms of that deed, it was provided that the said Government promissory note be held from and after the then intended marriage in trust as to the interest and income thereof for Maria Hosannah Chambers for life to her separate use and upon her death in trust as to the interest and income thereof for her husband, the said James Supple, for his life, and on the death of the survivor of them if there should be children of the marriage, for such children, respectively, as therein mentioned: and it was further provided, if there should be no child of the said marriage and the said James Supple should survive the said Maria Hosannah Chambers, then the said trustees should pay and dispose of the sum of Rs. 14,000, part of the said sum of Rs. 42,000, to the said James Supple for his own use and benefit and that the said trustees should stand and be possessed of the sum of Rs. 28,000, being the balance of the said sum of Rs. 42,000 in trust, that the same should be added to the charitable use and bequest contained in the will of the said Hosannah Arathoon, but that if the said Maria Hosannah Chambers should survive her husband, the said James Supple, and should depart this life without marrying again, then upon the further trust that the said trustees should pay and dispose of the said sum of Rs. 14,000, part of the said sum of Rs. 42,000, into and amongst the several residuary heirs and legatees of the said Hosannah Arathoon named in her said will and codicil and should pay and dispose of the said sum of Rs. 28,000, being the balance of the said sum of Rs. 42,000, so that the same should be added to the said charitable use and bequest therein before mentioned.

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James Supple and Maria Hosannah Chambers were married on 27th April 1840. In 1860 they filed a bill of complaint on the equity side of the Supreme Court of Judicature at Madras against the trustees of their marriage settlement. Under the decree passed by that Court the trustees were released from their office as such, and the promissory note in question was brought into Court and it was ordered that the interest thereon be paid to Mrs. Supple until further order. James Supple died without issue on 28th November 1872 and Mrs. Supple died on 17th March 1890 without marrying again.

The Administrator-General applied for letters of administration in pursuance of an order made in the equity suit above referred to.

It was pleaded by defendants Nos. 4 and 5 that John Arathoon had, by reason of his accepting the trusts of the above marriage settlement, assented to the legacy bequeathed and all the provisions contained in the sixth paragraph of the will and that nothing was left unadministered by him of the estate of the testatrix. With reference to the effect of the marriage settlement, a further question was raised as to whether or not the next of kin of James Supple were entitled to the sum of Rs. 14,000, part of the trust funds. Notice of the suit was given to his next of kin, but they did not desire to be joined as parties and the above question was raised on their behalf by the Administrator-General.

The following issues were framed :—

First.—Is the bequest of Rs. 28,000 by the will of Hosannah Arathoon given on the death of her grand-daughter Maria Hosannah Chambers without issue void as being for superstitious uses on the ground of uncertainty or as being contrary to the rule against perpetuities ?

Second.—Has the sum of Rs. 14,000, directed by the will of Hosannah Arathoon to go to the husband of her grand-daughter Maria Hosannah Chambers, lapsed and become part of the residuary estate of the said Hosannah Arathoon ?

Third.—If James Supple, the husband of the said Maria Hosannah Chambers, took a vested interest in the said sum of Rs. 14,000, has the said sum by virtue of the Indenture of settlement of 25th April 1840 become part of the residuary estate of the said Hosannah Arathoon ?

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Fourth.—How are the said two sums of Rs. 28,000 and Rs. 14,000 to be paid and distributed ?

Fifth.—Whether the said sum of Rs. 28,000 is part of the estate of the said Hosannah Arathoon to be administered having regard to the said settlement of 25th April 1840 ?

Sixth.—Was Hosannah Arathoon a Roman Catholic by religion and an Armenian in nationality and domiciled in Madras as alleged by fourth and fifth defendants ?

Mr. *K. Brown* for the plaintiff.

The Wills Act XXV of 1838 was enacted after the death of the testatrix accordingly it has no application to this case. The repealing sections in that Act are, however, indirectly of importance because they raise an inference that up to its enactment the statutes there referred to were in force in India, and that others of the same periods including those of the Tudor reigns, which have not been repealed are still in force. The Statute of Edward VI. expressly refers to "Masses satisfactory for the dead" such as are attempted to be made the purposes of a trust by the will now in question; and it is submitted that these trusts are bad under the effect which has been given to that statute and on general grounds of public policy, as being superstitious. That they would fail in England is plain from *Cary* v. *Abbot*(1), *West* v. *Shuttleworth*(2), *In re Blundell's Trusts*(3), *Heath* v. *Chapman*(4), *Morice* v. *Bishop of Durham*(5), and see 1 Jarman on Wills, p. 505.

The question next arises is whether or not this was part of the law brought by the English into India: see *Mayor of Lyons* v. *East India Company*(6), *Gardiner* v. *Fell*(7), *Freeman* v. *Fairlie*(8), *Ruckmaboye* v. *Lulloobhoy*(9), *Advocate-General of Bengal* v. *Ranee Surnomoye Dossee*(10). That question has been answered in the negative as far as regards Hindus in *Advocate-General* v. *Vishvanath Atmaram*(11), and as regards Christians in *Andrews* v. *Joakim*(12).

The last named case was decided by one Judge only, Phear, J., following a decision of Norman, J., also sitting alone. Neither of these decisions can be regarded as settling the question, nor were

(1) 7 Ves., 490. (2) 2 My. & K., 684. (3) 30 Beav., 360.
(4) 2 Drewry, 417. (5) 10 Ves., 526. (6) 1 M.I.A., 274.
(7) 1 M.I.A., 304. (8) 1 M.I.A., 343. (9) 5 M.I.A., 234.
(10) 9 M.I.A., 387. (11) 1 Bom., H.C.R., App., 9. (12) 2 B.L.R. (O.C.), 148.

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they so regarded in *Judah* v. *Judah*(1), which though it was decided on the ground of uncertainty merely, is sometimes referred to as an authority pointing the same way as the judgment of Phear, J. The earlier cases, it should be observed, were decided without express reference at any rate to the rulings above quoted on the extent to which English Law was introduced into India; and they fail to give effect to the principle of those rulings. Again it is impossible to gather from the judgments what law other than the English was supposed to be applicable in this country to Christians, who have no personal law like those of Hindus, Muhammadans, &c., safeguarded by the charters and regulations. Moreover, the bequests in each of these cases were clearly impeachable on the ground that they violated the rule against perpetuities and for that reason, if for no other, the decisions are wrong.

The trusts in the present case are also bad for the reason that they violate the rule against perpetuities. Since *Yeap Cheah Neo* v. *Ong Cheng Neo*(2) it must be taken as settled that that rule as a rule of public policy is applicable in India: and it is violated here, for the performance of the trust for masses, would effect and was intended to effect no public benefit so as to bring it into the class of charitable trusts. Compare *Rickard* v. *Robson*(3), *Hoare* v. *Osborne*(4), *Hunter* v. *Bullock*(5), and see *Broughton* v. *Mercer*(6), *Fatmabibi* v. *The Advocate-General of Bombay*(7), *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*(8). The case cannot be put upon the footing of the gift of a Hindu for religious purposes as Armenian Roman Catholics have no personal law.

(SHEPHARD, J., referred to *Lopez* v. *Lopez*(9).)

That ruling in that case, which arose upon a question of matrimonial law, cannot be applied here. Moreover, even if it could be applied, there is no evidence what is the customary law of the class to which the testatrix belonged. And if such law when ascertained were found to conflict with the rules of public policy, effect could not be given to it since it has not been safeguarded by the charter or the regulations. A rule against perpetuities is

(1) 5 B.L.R. (O.C.), 433. (2) L.R., 6 P.C., 381. (3) 31 Beav., 244.
(4) L.R., 1 Eq., 585. (5) L.R., 14 Eq., 45. (6) 14 B.L.R., 442.
(7) I.L.R., 6 Bom., 42. (8) I.L.R., 11 Bom., 441. (9) I.L.R., 12 Cal., 706.

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in fact recognised in many cases to which the Hindu law is applicable; it is a different rule from that enforced in other cases, but it has, however, the same object. See *Arumugam Mudali* v. *Ammi Ammal*(1), *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*(2), *Krishnaramani Dasi* v. *Ananda Krishna Bose*(3), *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore*(4). Even if the trust could be regarded as charitable in any sense, it is not a public charitable trust; and also the uncertainty affecting it would suffice to render it invalid.

With reference to the Rs. 14,000 payable to the husband of Maria Hosannah Chambers, I contend that under the terms of the will it was a vested interest; in the events which happened it has not been divested and it passed to his next of kin. *Phipps* v. *Ackers*(5).

As to the insolvent, there is no evidence that he obtained a discharge in the nature of a certificate nor indeed that he was a trader. See Insolvent Act, ss. 59, 60. His interest accordingly would pass to the Official Assignee.

Mr. *R. F. Grant* for first defendant argued that the power under the will to appoint among the children of the grand-daughter had been exceeded in the settlement, which accordingly should be treated in the present suit as a nullity and that the sum of Rs. 14,000 bequeathed to the man whom the grand-daughter might marry had fallen into the residue.

Mr. *Michell* for second defendant.

As to the question of the bequest for pious uses, the assent of the executor is immaterial. Moreover, it is clear that the Armenians as such have no personal law founded on their religion, and consequently the English law is applicable to them: see *Secretary of State* v. *Administrator-General of Bengal*(6), *Broughton* v. *Pogose*(7), *Barlow* v. *Orde*(8). It is erroneous to consider the rule of perpetuity as an exceptional restraint on a man's power of disposition of property. On the contrary it is the right of a man to tie up property after his death that should be regarded as a matter of exception—a privilege recognised late in the development of the law. See, as well as the cases already cited, *Maclean*

(1) I.L.R., 12 Cal., 400. (2) 2 B.L.R. (O.C.), 11, 32.
(3) 4 B.L.R. (O.C.), 231, 277, 293. (4) 4 B.L.R. (O.C.), 103.
(5) 9 Cl. & F., 583. (6) 1 B.L.R., 87.
(7) 12 B.L.R., 74. (8) 13 M.I.A., 277.

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v. *Cristall*(1), *Cocks* v. *Manners*(2). The argument as to the uncertainty of the trust is fortified by *Judah* v. *Judah*(3), *Sandial* v. *Maitland*(4), *Advocate-General* v. *Damother*(5), Jarman on Wills, p. 213. The argument as to the vesting of Supple's interest in the sum of Rs. 14,000 is unsound. *Phipps* v. *Ackers*(6), *Finch* v. *Lane*(7), *In re Jackson's Will*(8), *Sturgess* v. *Pearson*(9) are distinguishable from the present case; in those cases there was a direct bequest, but in the present case there is none, but only a direction to convey on the happening of an event which must be considered a condition precedent to vesting. But even if it were otherwise, he disposed of his interest by concurring in the marriage settlement; so that in either case this sum forms part of the residuary estate of the testatrix.

Mr. *Powell* for third defendant argued that the trust for pious uses was bad, if for no other reason, because no beneficiary was named and referred to *Lloyd* v. *Lloyd*(10), *In re Williams*(11), *In re Birkett*(12).

Mr. *E. Norton* (Mr. *Kernan* with him) for fourth and fifth defendants.

Our clients claim both under the will and also under the marriage settlement. In fact there were no assets of the testatrix left unadministered, and the assent of the executor to the trusts in the will was evidenced by his payment over of the first sum of Rs. 28,000 and the provisions in the marriage settlement relating to the second sum.

As to the main question, Roman Catholics are as much entitled to settle money for the trusts of their religion as are the Hindus; their religion was established before the English occupation and the statute of Edward VI. was never made applicable to India. See Whitley Stokes' Codes of Substantive Law, p. 9.

That effect is to be given to the Canon law, as the personal law of Roman Catholics appears from the Full Bench decision of the High Court of Bengal in *Lopez* v. *Lopez*(13), and there is nothing in *Yeap Cheah Neo* v. *Ong Cheng Neo*(14) to prevent effect from being given to it in the present case, for the Judicial Committee

(1) Perry's Or. Cases, 85. (2) L.R., 12 Eq., 574. (3) 5 B.L.R., 433.
(4) 1 Fulton, 475. (5) Perry's Or. Ca., 526. (6) 9 Cl. and F., 583.
(7) L.R., 10 Eq., 501. (8) L.R., 13 Ch. D., 189. (9) 4 Madd., 411.
(10) 2 Sim. (N.S.), 255 (11) L.R., 5 Ch. D., 735. (12) L.R., 9 Ch. D., 576.
(13) I.L.R., 12 Cal., 706. (14) L.R., 6 P.C., 381.

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was there dealing with a settlement of land by foreigners in a country which was uninhabited at the commencement of the English occupation. See as to the introduction of English law into the English dependencies *Advocate-General of Bengal* v. *Ranee Surnomoye Dossee*(1).

The will then must be construed in accordance with the rule of equity and good conscience and that has been held to validate such trusts as those now in question. *Das Merces* v. *Cones*(2), *Judah* v. *Judah*(3), *Advocate-General* v. *Vishvanath Atmaram*(4), *Andrews* v. *Joakim*(5) and compare *In re Michel's Trusts*(6), *Townsend* v. *Carus*(7), *Baker* v. *Sutton*(8). Moreover, the present trusts are charitable; there is a spiritual advantage, and also to the priests a material advantage. Compare *Kusalchand* v. *Mahadevgiri*(9).

As to the ordinary rule of perpetuity, it is to be observed that even under the Transfer of Property Act the rule is not as restricted as is the English rule. See also as to its application in India *Goberdhun Bysack* v. *Sham Chand Bysack*(10), *Mullick* v. *Mullick*(11), *Ananthatirtha Chariar* v. *Nagamuthu Ambalagaren*(12), *Maniklal Atmaram* v. *Manchershi Dinsha Coachman*(13), *Abdul Cadur Haji Mahommed* v. *Turner*(14), *Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*(15).

Falle v. *Godfray*(16), *Pickering* v. *Stamford*(17), *Attorney-General* v. *The Iron Monger's Company*(18), *Stafford* v. *Stafford*(19) were also referred to.

Mr. *K. Brown* in reply.

SHEPHARD, J.—This is a suit in which the Administrator-General submits to the decision of the Court certain questions which have arisen in the administration of the estate of the late Hosannah Arathoon. Hosannah Arathoon died on the 1st August 1836, having first duly executed a will, whereby, among other bequests, she left Rs. 28,000 directing "that the income thereof be given for perpetual masses for the benefit of my soul and for

(1) 9 M.I.A., 387. (2) 2 Hyde., 65. (3) 5 B.L.R., (O.C.,) 433.
(4) 1 Bom. H.C.R., App. ix. (5) 2 B.L.R. (O.C.), 148. (6) 28 Beav., 39.
(7) 3 Hare, 257. (8) 1 Keen, 232. (9) 12 Bom. H.C.R., 214.
(10) Bourke, 290. (11) 1 Knapp, 245. (12) I.L.R., 4 Mad., 200.
(13) I.L.R., 1 Bom., 269. (14) I.L.R., 9 Bom., 158. (15) I.L.R., 11 Bom., 441.
(16) 14 App. Ca., 70. (17) 2 Ves., 272. (18) 2 M. & K., 576.
(19) 1 De., G. & J., 202.

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the souls in purgatory" and bequeathed to her grand-daughter, Maria Hosannah Chambers, Rs. 42,000 to enjoy the income during her life, directing that in the event of her dying without issue (which event happened) Rs. 14,000, part of the said sum, should be subtracted and given to her husband, and the residue, Rs. 28,000, should be added to the first-mentioned bequest, so that the income of the two sums should be given for perpetual masses, for the benefit of her soul and for the souls in purgatory. The will further contained a gift of the entire residue of the estate to her three children Hosannah Chambers, John and Asteal Satur Arathoon, the two last being appointed executors. Probate of the will was granted to John only, and he acted in the administration of the estate until his death on the 17th of March 1875. His brother, the other executor, predeceased him. It is alleged in the plaint that, in the course of administration, John transferred to his sons Albert John and Samuel, a Government promissory note for Rs. 28,000, representing the first-mentioned legacy, to be held by them on the trusts of a deed, dated in or about August 1872. The execution of this deed is denied by the first defendant, grandson of the testatrix, who, however, admits that the promissory note was transferred by John to Albert John, and further admits that after John's death, he and Albert John, the other executor of John's will executed a deed of declaration, dated 9th May 1877. It is recited in that deed that John had handed over the Government promissory note to Albert John, to be held by him upon the trusts of Hosannah's will and that it had since been transferred into the names of Stephen Fennelly, Joseph Colgan and Alfred Peter (the first defendant), and it is declared that these three persons shall hold the said note upon the trusts created by the will. The promissory note seems to have been in the hands of the first defendant till 1884, but admittedly was held by him as co-trustee with Archbishop Colgan. With a letter of the 26th February 1884, he hands over the note to the Archbishop and retires from the trust. Previously to this, the other trustee, Dr. Stephen Fennelly, had died and accordingly, in 1890, a fresh declaration of trust was executed, whereby the note became vested upon the original trusts in the Archbishop and the Very Revd. Theophilus Meyer, the fourth and fifth defendants. From the statement of the facts, it appears that John, the executor, appointed under Hosannah's will and the two executors of John's will, to

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whom the entire representation of the testatrix was transmitted, not only consented to the bequest of Rs. 28,000, but did all that was required to give effect to the directions of the testatrix. As far as this sum is concerned, I must hold that it is not part of the estate of Hosannah left unadministered and that, therefore, no question with regard to it has to be decided in this suit. The other bequest stands on a different footing, because the grand-daughter, Maria Hosannah, who, under the will, enjoyed the income of the entire sum of Rs. 42,000 during her life, did not die till the 17th March 1890, and the Government promissory note in which that sum was invested is in the hands of the Administrator-General as administrator *de bonis non* of the estate of the testatrix. Questions arise with regard to Rs. 14,000, part of this sum and a separate question with regard to the remaining Rs. 28,000. After the death of the testatrix the legatee, Maria Hosannah, intermarried with one James Supple and a deed in contemplation of marriage was executed by them and certain other persons on 25th April 1840. There were no children of the marriage and Supple predeceased his wife, dying in 1872. Provision is made for this event in the settlement, for in case of Maria Hosannah surviving her husband and afterwards dying, the trustees are directed to pay Rs. 14,000, part of the sum of Rs. 42,000 brought in the settlement, to the residuary heirs and legatees of Hosannah. In my opinion, the case is within the principle recognised in *Phipps v. Ackers*(1) and *Finch* v. *Lane*(2), and I think that the husband took a vested interest in the Rs. 14,000 and therefore, apart from the settlement, that sum would not form part of the residuary estate of Hosannah. Under the settlement, however, the sum is treated as a part of her residuary estate and, as such, came into the hands of the Administrator-General. By the decree in an equity suit of 1860, the trustees of the settlement were discharged, and it was under an order made in that suit that the Administrator-General took out letters of administration and became possessed of the fund, out of which the Rs. 14,000 has to be paid. If I am wrong in holding that Supple took a vested interest in the sum, it is clear that it must fall into the residue and be administered accordingly. In either view I hold that it must be treated by the Administrator-General as part of the residuary estate of Hosannah.

(1) 9 Cl. & F., 583. (2) L.R., 10 Eq., 501.

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No question is expressly raised by the issues as to the persons who now represent the residuary legatees, but it was argued with regard to one of them, Asteal Satur, that any interest to which he or his estate might be entitled was vested in the Official Assignee. I think this contention is sound, for it is shown that he filed his petition in the Insolvent Court in 1851, and it is not shown that he obtained any order of discharge except a personal one. I have now dealt with the second and third issues and all the questions argued with regard to the Rs. 14,000. The remaining question, relating to the sum of Rs. 28,000, is whether the bequest of this sum made in Hosannah's will is a valid one. The validity of the gift has been impugned on the ground of uncertainty and as infringing the rules against perpetuities. This latter point is the more important one and it is one as to which, but for an authoritative ruling of the Privy Council (*Yeap Cheah Neo Ong* v. *Cheng Neo*(1)), I should have entertained great doubt, and inclined to the opinion that the gift being made for a religious purpose might be upheld. The will made by a Chinese testatrix, contained a devise of a house for the performance of religious ceremonies to her late husband and himself. "The dedication of the house," the Judicial Committee observes, "bears a close analogy to "gifts to Priests for masses for the dead. Such a gift by a "Roman Catholic widow of property for masses for the repose "of her deceased husband's soul and her own, was held in *West* "v. *Shuttleworth*(2) not to be a charitable use, and, although not "coming within the statute relating to superstitious uses, to be "void." The Judicial Committee proceed to say that the Judge below was right in holding that the devise, being in perpetuity, was not protected by its being for a charitable use. This decision not only lays down the principle in which the present case must be decided, but also re-affirms what was held in *West* v. *Shuttleworth*(2), viz., that a gift of this particular class now in question cannot be deemed to be a gift for a charitable purpose. The principle in question is that which is expressed in the rule against perpetuities, a rule founded on considerations of public policy from which an exception, also on grounds of public policy, is allowed in favour of gifts for purposes useful and beneficial to the public and which in a wide sense are called charitable uses.

(1) L.R., 6 P.C., 381.

(2) 2 Myle & K., 684.

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I do not think that the principle is the less applicable because in the present case it was money and not, as in the case cited, land which is sought to be dedicated to the performance of masses. That a gift for that purpose is not a charitable gift so as to take the case out of the rule and bring it within the exception is distinctly held by the Judicial Committee, and I think I am bound to follow that ruling and, therefore, to disregard the cases decided in this country to the contrary effect. It, therefore, becomes unnecessary to consider those cases in detail or the other cases cited by Counsel on both sides. I must hold that the bequest now under consideration was void and that the money, therefore, falls into the residue and must be distributed accordingly.

Defendant Nos. 4 and 5 preferred this appeal against the judgment of SHEPHARD, J.

Mr. *Kernan* (Mr. E. *Norton* with him) for appellants.

We contend that the estate is fully administered. Bringing the money into settlement prevented it from being part of the estate.

[COLLINS, C.J.: Why? Some one made a settlement in accordance with the will. No one had power to take it out of the estate or alter the subsequent bequest if it was good.]

The settlement vested the whole in the trustees of it.

[COLLINS, C.J.: It was impossible. No one could do it.]

The contrary would appear from Lewin on Trusts, 8th edition, p. 204, where a case is cited in which the executor severed the fund and became a trustee for the trusts of the will.

[COLLINS, C.J.: Assume that was done.]

Here the executor did more for he put it all into settlement, the administration accordingly is over, and the Administrator-General cannot come in.

[COLLINS, C.J.: Who can?]

No one but a *cestui que trust*.

[HANDLEY, J.: The Administrator-General has the money, he has a right to come for directions.]

He should pay it into Court and let others come in.

As to the effect to be given to the trusts, the bequest is valid as a charitable bequest. Transfer of Property Act, section 17, would not exclude it even if the rule against perpetuities applies, for the trust is beneficial for the public in the advancement of religion—

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compare Succession Act, ss. 104–5. The law of superstitious uses does not apply in India, and there is no reason why the rule against perpetuities should, in such a case as the present. For similar cases of bequests for masses, see *Das Merces* v. *Cones*(1) followed by *Andrews* v. *Joakim*(2), *Judah* v. *Judah*(3), *Kusalchand* v. *Mahadevgiri*(4), see also *Cary* v. *Abbot*(5).

[COLLINS, C.J.: We are disposed to agree that the rule of superstitious uses does not apply in India. But you must argue it is a charitable use. If not, how can you get over the Privy Council case? Public policy is the same everywhere.]

That case is inapplicable on the ground that Singapore was uninhabited before the English occupation, and the case, I shall show, is otherwise distinguishable. As to the alleged applicability of the rule against perpetuities, see *Broughton* v. *Pogose*(6), *Advocate-General* v. *Vishvanath Atmaram*(7), *Kusalchand* v. *Mahadevgiri*(8).

In support of my argument that if the trust is not bad as superstitious it is good as being charitable, I refer to the Southcote case, *Thornton* v. *Home*(9), and *Whicker* v. *Hume*(10). But the rule against perpetuities is clearly inapplicable in India, because (1) endowments of temples and idols are permitted; (2) there are decisions of the Privy Council on appeal from India inconsistent to *Yeap Cheah Neo* v. *Ong Cheng Neo*(11). As to that case it has already been pointed out that Singapore was an uninhabited island, there was accordingly no *lex loci*; moreover there real estate and not personalty was in question.

As to the importance of the distinction of the case in *Yeap Cheah Neo* v. *Ong Cheng Neo*(11) on the ground that there was no *lex loci* there, see *Mayor of Lyons* v. *East India Company*(12) proceeding on the reasoning in the Grenada case. See also *Lopez* v. *Lopez*(13), as to the law applicable to oriental Christians. *Yeap Cheah Neo* v. *Ong Cheng Neo*(11), is also distinguishable as having merely followed *West* v. *Shuttleworth*(14) which is not law in India where the rule of superstitious uses does not obtain.

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(4) 12 Bom. H.C.R., 214. (5) 7 Ves., 495. (6) 12 B.L.R., 74.
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(13) I.L.R., 12 Cal., 706. (14) 2 My. & K., 694.

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[HANDLEY, J.: The bequest here is an absolute one: does not that case support the argument as to the rule against perpetuities?

It is not rightly understood.

[COLLINS, C.J.: How does the trust here differ from a trust for a tomb? I cannot see it tends to advancement of religion.]

[HANDLEY, J.: Is it an advantage to people who are alive?]

It is submitted that it tends to the advancement of religion generally. See *Breeks* v. *Woolfrey*(1) showing the Master of the Rolls went wrong as to prayers of the dead in *West* v. *Shuttleworth*(2) which was followed in *Heath* v. *Chapman*(3) and in *re Blundell's Trusts*(4).

As showing that the English rule is not applied by the Privy Council to cases arising in India, see *Mullick* v. *Mullick*(5), *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen*(6) *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee*(7), *Juggut Mohini Dossee* v. *Mussumat Sokheemoney Dossee*(8), *Rajender Dutt* v. *Sham Chand Mitter*(9), *Alami* v. *Komu*(10), and compare *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*(11), *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore*(12), *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore*(13).

Mr. *K. Brown* for first respondent. The Administrator-General took out letters of administration in pursuance of an order of Court and it is submitted that no unauthorized dealing by the executor with this fund which was in Court until it was paid to the Administrator-General under his letters can divest it of its character as assets of the testatrix. The validity of the bequest is questionable on the various grounds mentioned in the third issue. I do not propose to adduce any argument on the rule of superstitious uses, because it is sufficient to show that the bequest not being charitable is bad for uncertainty and as infringing the law against perpetuities. The question of perpetuity is in fact concluded by the authority of *Yeap Cheah Neo* v. *Ong Cheng Neo*(14), and for the application of the rule in that case it is immaterial that the property now in question is money and not land. The rule of perpetuity is of general applicability

(1) 1 Curties, 880. (2) 2 My. & K., 684. (3) 2 Drewry, 417.
(4) 30 Beav., 360. (5) 1 Knapp., 245. (6) 2 M.I.A., 390.
(7) 8 M.I.A., 66. (8) 14 M.I.A., 289. (9) I.L.R., 6 Cal., 106.
(10) Appeals Nos. 80 and 105 of 1886. (11) 2 B.L.R., O.C., 11.
(12) 7 B.L.R., 103. (13) 9 B.L.R., 377. (14) L.R., 6 P.C., 381.

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(1) 2 Hyde, 65.
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(5) 7 Ves., 495.
(6) 12 B.L.R., 74.
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(9) 31 Beav., 14.
(10) 14 Beav., 509.
(11) L.R., 6 P.C., 381.
(12) 1 M.I.A., 274.
(13) I.L.R., 12 Cal., 706.
(14) 2 My. & K., 694.

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[HANDLEY, J.: The bequest here is an absolute one: does not that case support the argument as to the rule against perpetuities?

It is not rightly understood.

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(1) 1 Curties, 880.
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and is founded on public policy. 1 Jarman on Wills, pp. 205–6. The present case cannot be brought within the exception made in favour of charitable trusts, for the present trusts are of benefit to no part of the public. See Jarman, pp. 208–10 and see Indian Succession Act, section 105, and Whitley Stokes' note to that section.

HANDLEY, J.—The Privy Council follow *West* v. *Shuttleworth*(1): did not that proceed on the law of superstitious uses ?]

That law no doubt came in question; but the Court considered whether or not the uses impugned as superstitious were charitable, and so within the exception to the rule against perpetuities which in fact was the foundation of the judgment. Had the uses been held to be charitable and so not within that rule, they would not have failed altogether, but effect would have been given to them cy-près, although they could not have been carried out as the settlor desired. *West* v. *Shuttleworth*(1) is an answer to the contention on the other side that these trusts were in fact charitable as tending to the advancement of religion. My argument is that they are not more so than are trusts for the maintenance of tombs which have frequently been held invalid. See *Hoare* v. *Osborne*(2) and *Limji Nowroji* v. *Bapuji*(3).

[COLLINS, C.J.—Would a trust for a public service in a church be invalid ?]

These masses are understood not to be public services but are read in a private chapel. All the evidence about them is that of Father Meyer who said :—

"According to Canon law a gift of money for masses for "souls in purgatory is valid—and not void.

"Bequest for masses for a particular person is good. It makes "no difference whether it is for souls in general or individual.

"If an individual is concerned, there is no difference except in "intention—there is no mention of name. If one soul does not "require the mass, it goes for the benefit of others."

[COLLINS, C.J.—There appears to be no further evidence on this part of the case.]

The dangers against which the rule against perpetuities is directed are equally pressing and important here and in England, and even apart from direct authority it would still seem to be part

(1) 2 My. & K., 684. (2) L.R., 1 Eq., 585. (3) I.L.R., 11 Bom., 441.

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of the English law brought into this country under the rule in *Mayor of Lyons* v. *East India Company*(1), *Freeman* v. *Fairlie*(2), *Ruckmaboye* v. *Lulloobhoy Mottichund*(3), *The Advocate-General of Bengal* v. *Ranee Surnomoye Dossee*(4), *Varden Seth Sam* v. *Luckpathy Royyee Lallah*(5). In fact, however, the rule with the exception in favour of charities has been applied in this country as in England, *e.g.*, in *Broughton* v. *Mercer*(6), although in some of the early Calcutta cases of pious uses it was overlooked.

Of course the applicability of the rule is subject to any special customary law reserved whether by the Charter or the Regulations to, *e.g.*, Hindus. Hindu Law, however, comprises a law against perpetuities of its own which the Courts are careful to protect (see *Tagore case*(7) and *Sookhmoy Chunder Dass* v. *Srimati Monohurri Dasi*(8), *Alami* v. *Komu*(9)) subject to exceptions of its own in favour of devadayam and debutter trusts, see *Soorendronath Roy* v. *Mussamut Heeramonee Burmoneah*(10), *Advocate-General* v. *Vishvanath Atmaram*(11), *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*(12), *Rajender Dutt* v. *Sham Chand Mitter*(13).

Thus there is no inconsistency between the decision of the Judicial Committee in the case I rely on, and the cases cited on the other side, on this part of the argument.

It has not been shown that Roman Catholic Armenians have any personal law, and certainly the legislature has reserved to them no special custom of their own, nor has it been shown what is the law relied on on the other side. *Lopez* v. *Lopez*(14) does not go as far as is contended, and there are many cases in which English law as such has been applied to Armenians; see *Sarkies* v. *Prosonomoyee Dossee*(15) and the cases therein cited and *Naoroji Beramji* v. *Rogers*(16), *Lopes* v. *Lopes*(17).

Mr. *E. Norton* in reply.

JUDGMENT.—This appeal relates only to the sum of Rs. 28,000, part of the sum of Rs. 42,000 bequeathed by the testatrix Hosannah

(1) 1 M.I.A., 200. (2) 1 M.I.A., 343. (3) 5 M.I.A., 251.
(4) 9 M.I.A., 429. (5) 9 M.I.A., 303. (6) 14 B.L.R., 442.
(7) 4 B.L.R., 103. (8) L.R., 12 I.A., 103.
(9) Appeals Nos. 80 and 105 of 1886. (10) 12 M.I.A., 81, 103.
(11) 1 Bom. H.C.R., App. 9. (12) 2 B.L.R., (O.C.,) 11. (13) I.L.R., 6 Cal., 106.
(14) I.L.R., 12 Cal., 706. (15) I.L.R., 6 Cal., 794. (16) 4 Bom. H.C.R., 21.
(17) 5 Bom. H.C.R., 172.

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Arathoon to her grand-daughter Maria Hosannah Chambers, afterwards Mrs. Supple, and her children, which sum of Rs. 28,000 in the event, which has happened, of Maria Hosannah Chambers dying without issue, testatrix directed should go and be added to the therein-before mentioned sum of Rs. 28,000, so that the income of the last-mentioned sum of Rs. 28,000 should be added to the income of the former Rs. 28,000 and be given to perpetual masses for the benefit of her (testatrix's) soul and for the souls in purgatory. The first point raised in appeal is that this sum of Rs. 28,000 does not form part of the estate of Hosannah Arathoon and therefore that the Administrator-General has nothing to do with it, because, by the settlement made upon the marriage of Maria Hosannah Chambers with Mr. Supple, the Government promissory note, then representing the sum of Rs. 42,000, of which this Rs. 28,000 is part, became vested in the trustees of that settlement upon the trusts thereby declared. We think there is nothing in this point. The settlement could only deal with the interest which Maria Hosannah Chambers took under the will and could not affect the dispositions of the will which were to take effect in the event of her dying without issue. The disposition of the sum of Rs. 42,000, in the events which have happened, is governed by the will and the Government promissory note representing that sum having through the proceedings in the equity suit got into the hands of the Administrator-General, he is right in asking the Court for directions as to its proper application under the will of his testatrix.

The other and most important question argued in this appeal is as to the validity of the gift over of this sum of Rs. 28,000 on the death of Maria Hosannah Chambers without issue. The point has been argued very fully by Counsel on both sides and a number of authorities bearing on the question have been cited. On a careful consideration of the arguments and the cases quoted, we must agree with the learned Judge in the Court below that the case is concluded by authority and that the bequest in question is void as violating the rule against perpetuity.

That a bequest for the performance of masses, according to the forms of the Roman Catholic religion, whether the masses be for the testator's own soul or for souls generally, would be void if the case occurred in England, is admitted. The cases of *West* v. *Shuttleworth*(1), *Heath* v. *Chapman*(2), *in re Blundell's Trusts*(3) are sufficient authorities for that position. But it is argued for appellants that these and other analogous cases were decided upon the English law of superstitious uses which has no application to this country. *West* v. *Shuttleworth*(1) certainly was decided on the law of superstitious uses. There the testatrix gave legacies to certain Roman Catholic priests and chapels for the benefit of their prayers and masses for the repose of her soul and that of her husband. The Master of the Rolls, after quoting with approval the observation of Sir W. Grant in *Cary* v. *Abbot*(4) that there was no statute making void superstitious uses generally and that the statute of Edward VI. related only to superstitious uses of a particular description then existing, goes on to say:—"The legacies "in question are not therefore within the terms of the statute of "Edward VI., but that statute has been considered as establishing "the illegality of certain gifts; and, amongst others, the giving "legacies to priests to pray for the soul of the donor has in many "cases collected in Duke, been decided to be within the super-"stitious uses intended to be suppressed by that statute. I am "therefore of opinion that these legacies to priests and chapels are "void." The other cases following *West* v. *Shuttleworth*(1) seem also to have been decided on the law of superstitious uses. This law has, in several cases in the Calcutta High Court, been held to have no application to this country. *Das Merces* v. *Cones*(5), *Andrews* v. *Joakim*(6), *Judah* v. *Judah*(7). As far as we know, the question has never been decided in this Court, but we see no reason for dissenting from the view taken by the Calcutta High Court. But this is not sufficient to establish the validity of bequests such as those in question in this suit. There is another ground on which they may be invalid, viz., that they infringe the rule against perpetuities. On this ground many bequests have been held invalid by the English Courts, *e.g.*, gifts for the keeping in repair monuments or tombs. *Rickard* v. *Robson*(8), *Fowler* v. *Fowler*(9), *Fisk* v. *Attorney-General*(10), *Dawson* v. *Small*(11).

The general rule is that all gifts, whether of real or personal property, which purport to appropriate property to a certain

(1) 2 My. & K., 684. (2) 2 Drewry, 417. (3) 30 Beav., 360.
(4) 7 Ves., 490. (5) 2 Hyde, 65. (6) 2 B.L.R., (O.C.,) 148.
(7) 5 B.L.R., O.C., 433. (8) 31 Beav., 244. (9) 33 Beav., 616.
(10) L.R., 4 Eq., 521. (11) L.R., 18 Eq., 114.

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purpose in perpetuity, are void as contrary to public policy unless the purpose be a charitable one. What is a charitable purpose so as to make the gift a valid gift, although it purports to create a perpetuity, has been the subject of very many decisions of the English Courts, which have taken as their guide the preamble of the Statute 43 Eliz., Cap. 4, which enumerates various charitable purposes, though the Courts have not confined themselves to the charitable purposes there enumerated, but have included as charitable other purposes analogous thereto. The general principle appears to be that a charitable purpose must be one for the benefit of the public or a section of the public, and not for the private benefit of the donor or his family or of certain individuals. It is not necessary, however, in the present case to discuss the question whether on general principles gifts for masses for the soul of the donor or those of others, should be considered to be for charitable purposes so as to exempt them from the rule against perpetuities. The contrary has been decided in many cases by which we consider we are bound. In the case of *West* v. *Shuttleworth*(1) before quoted, though the gift was held void on the ground that it was for superstitious uses, it became necessary to decide the question whether the purpose was a charitable one in order to determine what was to become of the void legacies, for if the purpose was a charitable one, the duty of appropriating the amount of the legacies to other charitable purposes devolved upon the Crown, if on the contrary the purpose was not charitable the next of kin took. The Master of the Rolls held that the purpose of the legacies was not charitable and therefore that they went to the next of kin. In *Heath* v. *Chapman*(2) trusts were declared by a will for certain Roman Catholic chapels for saying masses and requiems for the soul of the donor and for other souls and for the souls of the "pious dead" and for other pious purposes. The gift for masses, &c., was held to be void as being for superstitious uses and as the pious uses could not be separated from the void uses, the whole gift was held bad and the purpose not being a charitable one, the property was decreed to go to the residuary legatees. A similar decision was passed *in re Blundell's Trusts*(3). In the case of *Yeap Cheah Neo* v. *Ong Cheng Neo*(4), a Chinese

(1) 2 My. and K., 684.
(2) 2 Drewry, 417.
(3) 30 Beav., 360.
(4) L.R., 6 P.C., 381.

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woman resident in Penang by will directed (*inter alia*) that a house termed "Sow Chong" for performing religious ceremonies to the testatrix's deceased husband and herself should be erected. It was held by the Judicial Committee that the devise was void being in perpetuity and not for a charitable purpose. Their Lordships quote with approval the decision of the Chief Justice Sir P. Benson Maxwell in the case of *Choah Choon Nioh* v. *Spottiswoode*(1) that whilst the English Statutes relating to superstitious uses and to mortmain ought not to be imported into the law of the Colony, the rule against perpetuities was to be considered a part of it and go on to observe :—"This rule which "certainly has been recognised as existing in the law of England "independently of any statute, is founded upon considerations "of public policy, which seem to be as applicable to the condi-"tion of such a place as Penang as to England, viz., to prevent "the mischief of making property inalienable, unless for objects "which are useful or beneficial to the community." And further on in the judgment they observe, speaking of the ceremonies to be performed in the Sow Chong House :—"Although it certainly "appears that the performance of these ceremonies is considered "by the Chinese to be a pious duty, it is one which does not seem "to fall within any definition of a charitable duty or use. The "observance of it can lead to no public advantage and can benefit "or solace only the family itself. The dedication of this Sow "Chong House bears a close analogy to gifts to priests for masses "for the dead. Such a gift by a Roman Catholic widow of pro-"perty for masses for the repose of her husband's soul and her "own was held in *West* v. *Shuttleworth*(2) not to be a charitable "use, and, though not coming within the statute relating to "superstitious uses, to be void. The learned Judge was therefore "right in holding that the devise being in perpetuity was not "protected by its being for a charitable purpose. It is to be "observed that in this respect a pious Chinese is in precisely the "same condition as a Roman Catholic who has devised property "for masses for the dead or as the Christian of any Church who "may have devised property to maintain the tombs of deceased "relatives. All are alike forbidden on grounds of public policy "to dedicate lands in perpetuity to such objects." It is sought

(1) Wood's Oriental Cases.
(2) 2 My. and K., 684.

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to distinguish this case from the present on two grounds—(1) that the gift there was of immoveable property; (2) that the rule against perpetuities does not exist in India, where dedications of property in perpetuity for the performance of religious ceremonies, maintenance of tombs and other purposes not allowed by English law to be charitable, have always been held lawful amongst Hindus and Muhammadans.

As to the first point we observe that the rule against perpetuities has always been held to apply equally to gifts of personal as to those of real property. The cases as to monuments and tombs quoted above were all of them cases of money bequests.

As to the second point we think it is not a correct statement of the law applicable to India to say that because certain dispositions of property in perpetuity not allowed by English law are allowed to Hindus and Muhammadans, therefore the rule against perpetuities has no application to India. The rule being founded on public policy must be a part of the territorial law of England in all her Colonies and Dependencies. But Hindus and Muhammadans have had their respective personal laws preserved to them by the Charters of the High Courts and by the Regulations. The personal law of the Hindus is intimately connected with their religion, and therefore allows of gifts in perpetuity to religious objects to a much greater extent than the English law. Thus absolute gifts of land or money in perpetuity to an idol and for other religious purposes have been recognised by many decisions. See *Mullick* v. *Mullick*(1), *Juggut Mohini Dossee* v. *Mussumat Sokheemoney Dossee*(2). In his judgment in *Alami* v. *Konnu*(3) Mr. Justice Muttusami Ayyar observes:—"Neither the English law which "forbids bequests for superstitious uses, nor the rule which pro- "hibits the creation of perpetuities is applicable to gifts to idols in "this country;" so the Muhammadan law of Wakf or appropriation founded on the Muhammadan religion, allows of the appropriation of property in perpetuity for the performances of religious services, the maintenance and repair of tombs and other purposes not held to be charitable by the English law. See the judgment of West, J., in *Fatmabibi* v. *The Advocate-General of Bombay*(4). The Armenian or other Roman Catholic has no personal law

(1) 1 Knapp, 245.
(2) 14 M.I.A., 289.
(3) Appeals Nos. 80 and 105 of 1886.
(4) I.L.R., 6 Bom., 42.

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reserved to him and we fail to see how he is in any different position with regard to his power to dispose of property for charitable purposes from the subject of the decision in *Yeap Cheah Neo* v. *Ong Cheng Neo*(1). The principles laid down in that decision have been held by the High Court of Bombay to apply to Parsees —*Limji Nowroji Banaji* v. *Bapuji Ruttonji Limbuwalla*(2), and, in our opinion, they are equally applicable to the members of the community to which the testatrix whose will is in question in this suit belonged. Were the matter *res integra* we are inclined to think that either the rule against perpetuities, which is founded on considerations of public policy, should be applied in the same manner to all classes of the community in India, or the relaxation of the rule which has been allowed to Hindus and Muhammadans should be allowed also to those professing other religions. Upon general principles there seems to be no reason why a Hindu or Muhammadan should be allowed to dedicate property in perpetuity for the services of his religion or the maintenance of the tombs of his family, and a Christian should be forbidden to do the same. But we conceive that we are not at liberty to extend the relaxation of the rule against perpetuities conceded to Hindus and Muhammadans by virtue of the reservation of their personal law, to other inhabitants of India to whom no personal law has been reserved. It may be that legislation in the direction of placing all Her Majesty's subjects in India upon a more equal footing in this respect is desirable. The decisions of the High Court of Calcutta before quoted—*Das Merces* v. *Cones*(3), *Andrews* v. *Joakim*(4) are no doubt express authorities in favour of the validity of gifts such as that in question in this suit, but the question of the rule against perpetuities was not raised in them; they were decided solely on the ground that the law against gifts for superstitious uses was not applicable to India. So far as they are authorities for the validity of gifts for the performance of masses they must be taken to be overruled by *Yeap Cheah Neo* v. *Ong Cheng Neo*(1). We must agree with the learned Judge in the Court below in holding that the bequest in question was void and that the legacy falls into the residue. We think, however, that the fourth and fifth defendants, the Roman Catholic Archbishop and Vicar-General of Madras are entitled

(1) L.R., 6 P.C., 381.
(2) I.L.R., 11 Bom., 441.
(3) 2 Hyde, 65.
(4) 2 B.L.R., (O.C.,) 148.

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to their costs out of the fund throughout. The litigation was caused by the will of the testatrix, and they could not well have done otherwise than come forward and support the legacy given for purposes recognized as lawful and beneficial by their religion. We shall modify the decree of the Lower Court by directing that the costs of fourth and fifth defendants of this suit be paid by the Administrator-General out of the estate of Hosannah Arathoon. In other respects, we confirm the decree of the Lower Court and dismiss this appeal. We also direct that the costs of all parties to this appeal be paid out of the estate.

Laing, Solicitor for appellants.

Barclay Morgan & Orr, Solicitors for respondents.

ORIGINAL CIVIL.

Before Mr. Justice Handley.

1892. March 17.

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v.

MONEY AND OTHERS.*

*Will, construction of—Trust fund to be called after testator's name—Perpetuities, rule against—Creation of fund, and dispositions except directions for making it a perpetuity, held valid—*Personæ designatæ, *bequest to persons as—Vesting of legacy, time of—Income of fund, gift of, carries corpus—Tenancy in common created, not joint tenancy—Advancement out of minor legatee's share for his benefit, power of—Vested interest, liable to be divested by condition subsequent—Precatory trust, expression of wish held not to create—Patent deficiency as to objects of bequest—Failure of legacy—Charitable uses, void bequest to—Succession Act*, ss. 68, 84, 98, 101, 105, 106, 125, 159.

Where by his will a testator directed the establishment in the Bank of Madras by the executor and trustee of the will of a fund, to be called, after the testator's name, the "Garratt Trust Fund," and directed "that such trust fund shall never be removed from deposit in the said Bank of Madras at Madras so long as that bank shall exist," and "that 'The Garratt Trust Fund' shall be a continuing fund to all time," and that the interest therefrom should be enjoyed by certain legatees and "the same shall be inherited by any child or children of them hereafter from time to 'time and from one generation to another in accordance with all legal rights:"

Held, that there was nothing illegal about the creation of this fund, except the direction that the securities representing it should never be received from deposit

* Civil Suit No. 73 of 1891.

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in the Bank of Madras, which, as an attempt to create a fund in perpetuity, was invalid; but that this did not prevent the intention of the testator to create and endow the fund from being carried out, and that the legatees took an absolute interest.

The testator bequeathed "to my grandchildren by my said late daughter E. W., also to my grandson F. W. M. and to his step-brother G. W. M." in equal shares a certain fund:

Held, that this was a bequest to the testator's grandchildren by his late daughter E. W. not as a class, but to them individually as *personæ designatæ*.

Held also that, under the terms of the will, the testator's said grandchildren by the late E. W., and F. W. M. and G. W. M. took vested interests in their respective shares in the said fund from the death of the testator; that the gift to them of "the benefit, interest and profit" of the fund was a gift of the *corpus* of the fund by virtue of s. 159 of the Indian Succession Act; that they took as tenants in common, not as joint tenants; and that under a power given to the executor to make disbursements from the said fund for certain purposes for the benefit of F. W. M. in connection with his going to and returning from England the executor was not authorized to apply, towards those purposes, more than F. W. M.'s one-ninth share in the said fund, as it was not the intention of the testator to give F. W. M. a benefit out of that fund over and above that share, and that the executor, in making disbursements for the purposes specified, was only empowered to trench upon the principal of that share if the income, as applied under the power of disbursement for F. W. M.'s support and maintenance in England, were not sufficient.

Held also, that under the terms of the devise in the third and fourth clauses of the will of a certain house and premises to F. W. M., the devisee took on the testator's death a vested interest in that property, liable to be divested in the event of his dying under the age of twenty-one years.

Held also, that under the terms of the devise in the fifth and sixth clauses of the will of a certain house and premises and furniture to the children of the testator's late daughter E. W. (who was dead at the date of the will), there was an absolute gift to the children of E. W. of the testator's whole interest in that property, and that such gift was not controlled by the directions in the latter part of the fifth clause that the house should not be sold until the youngest grandchild attained the age of eighteen years, which must be regarded merely as an expression of the wish of the testator and not as a precatory trust, and was of no legal effect; and that the children of E. W., who were living at the testator's death, did not take as joint tenants, but took as *personæ designatæ*, each an equal share in the property which vested in them on the death of the testator, and therefore the share of one of them, E. G. W., who had survived the testator, but died subsequently, having vested in E. G. W., passed to E. G. W.'s representative, the ninth defendant.

In the sixteenth clause of the will the testator directed his executor and trustee out of a certain sum of Rs. 500 to "disburse various petty pensions to some poor people who have been mentioned to him" (the executor and trustee) "by me:"

Held, that there was a deficiency on the face of the will as to the objects of this bequest, and by s. 68 of the Indian Succession Act no extrinsic evidence could be admitted as to the intention of the testator, and that this legacy therefore failed and fell into the undisposed of residue.

Held also, that the bequest in the seventeenth clause of the will of Rs. 10,000 to the support of the testator's Temperance and Reading rooms for European

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pensioners and the Poor Widows' Quarters attached thereto, being a bequest to charitable uses, was void under s. 105 of the Indian Succession Act, as the testator had nearer relatives than nephews, and the will was executed less than twelve months before his death.

SUIT by the Administrator-General of Madras for the directions of the Court as to the construction of the following will :—

"I, William Garratt, of Cleveland Town in the Civil and "Military Station of Bangalore, hereby revoke all wills, codicils "and testamentary dispositions heretofore made by me and declare "this to be my last will.

"*First.*—I hereby direct that all my just debts and funeral "and testamentary expenses be paid and discharged by my execu-"tor hereinafter named.

"*Second.*—I hereby nominate and appoint as executor to this "my last will and testament M. W. Walker, Esquire, Agent of "the Bangalore Bank (Limited), residing in the Civil and Mili-"tary Station of Bangalore.

"*Third.*—I hereby give, devise and bequeath to my grandson "Frank William Money, now a minor, absolutely my house and "premises known as the 'Eastern Castlet,' in the Mount Road, "Madras, and I direct that the title-deeds thereof shall from the "period of my demise be lodged in the Bank of Madras at Madras "for safe keeping until the said Frank William Money, if living, "shall attain the age of twenty-one years, after which period they "shall be made over to his personal custody and control to do with "as he may see fit.

"*Fourth.*—I hereby direct that in the event of the death of "the said Frank William Money prior to his completing twenty-"one years of age, the said 'Eastern Castlet' shall be sold by "my executor and trustee and the sale-proceeds thereof shall be "deposited in the Bank of Madras at Madras to the credit of 'The "Garratt Trust Fund' hereinafter mentioned to be invested in "Government of India securities and for the purposes of the said "trust.

"*Fifth.*—I hereby give, devise and bequeath absolutely my "house and premises called 'Beresford Lodge' at the junction of "Lal Bagh Road and Fort Road, Bangalore, together with all the "household furniture supplied by me therein and thereto belong-"ing to the children of my late daughter Elizabeth Wilkins, "now deceased, jointly share and share alike, and which I wish

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"should be a house for them or any of them in Bangalore, not to "be disposed of until the youngest of my said late daughter's "children surviving shall attain the age of eighteen years, when "the said house and premises 'Beresford Lodge' may be sold by "them, or the survivor of them, through the medium of my execu-"tor and the sale-proceeds thereof shall be divided between them "in equal shares share and share alike.

"*Sixth.*—I hereby direct that the title-deeds of the said "'Beresford Lodge' shall be deposited for safe keeping in the "Bank of Madras at Madras until such time as the property may "be sold as stated in the fifth paragraph herein, and I hereby "further direct that if the said children be at any time all "removed from the said house, that my executor and trustee shall "at once take charge of the house, premises and all the furniture "therein supplied by me and belonging thereto, and shall let the "property, furnished, to any tenants, collect and receive the rents "thereof, and pay the same, less expenses for repairs and assess-"ment according to his discretion, towards the benefit, support "and education of my said late daughter's surviving children.

"*Seventh.*—I hereby direct that if my grandson Frank "William Money desires to go to England to qualify for any pro-"fession, that my executor and trustee shall have full power to "disburse from and out of the principal of the 'Garratt Trust "Fund' hereinafter mentioned sufficient money for his passage to "and from England and for his suitable outfit and other inci-"dental expenses as my executor and trustee shall deem just "and proper for such purpose.

"*Eighth.*—I hereby direct that all other house properties and "lands belonging to me in Bangalore, together with all my house-"hold furniture in 'Hope Lodge' or other houses in 'Cleveland "Town,' shall, within the period of one year from the date of "my death, be all sold by my executor and trustee, and the sale-"proceeds thereof shall be deposited in the Bank of Madras at "Madras to the credit of the 'Garratt Trust Fund' for investment "in Government of India securities for the purpose of the trust.

"*Ninth.*—I hereby give, devise and bequeath to my grandson "Frank William Money absolutely my gold watch and chain, "which may be made over to him for immediate use at the time "of my death.

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"*Tenth.*—I hereby direct that all other movable property of "value that may be found in 'Hope Lodge,' consisting of silver "or plated ware, gold or silver jewels, precious stones, also horses, "ponies, cows, cattle and other live stock whatsoever, together with "carriages, coaches or other conveyances, and all or any other "sundry articles of any description, be all sold by my executor and "trustee within one year from the date of my death, and the sale-"proceeds thereof shall be deposited in the Bank of Madras at "Madras to the credit of the 'Garratt Trust Fund' for investment "in Government of India securities for the purposes of the said "trust.

"*Eleventh.*—I hereby give, devise and bequeath to my grand-"children by my said late daughter Elizabeth Wilkins, also to "my grandson Frank William Money, and to his step-brother "George William Money (the latter now in England) in equal "shares, the benefit, interest and profit that shall arise and accrue "from and out of the 'Garratt Trust Fund,' which my executor "and trustee shall draw and disburse quarterly. The share in "such for my grandson Frank William Money shall be disbursed "by my executor and trustee as he shall think proper, and, if "necessary, for the support and education of the said Frank "William Money in England.

"*Twelfth.*—I hereby direct that the shares from and out of "the interest or profit of the 'Garratt Trust Fund' for the "children of my said late daughter Elizabeth Wilkins shall be "paid quarterly by my executor and trustee to their father "E. S. Wilkins, Esquire, Barrister-at-Law, for their support and "education on obtaining from him on each occasion his receipt for "the amount expressing the purpose for which the payment is "received, and subject at all times to the condition which I hereby "direct that my executor and trustee shall always be fully satisfied "that the monies so paid away to him are made proper use of "exclusively for the benefit, support and education of the said "children, and I hereby direct that my said executor and trustee "shall at all times see to their continued welfare until they attain "majority, after which period my executor and trustee shall make "direct payments to each of such children who attains majority "and obtain receipt of such child for each payment so made.

"*Thirteenth.*—I hereby direct that all bank shares in the "Bangalore Bank (Limited) or any other bank that I may be

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"possessed of at the time of my death shall be all sold by my "executor and trustee within one year from the date of my death, "and the sale-proceeds shall be deposited in the Bank of Madras "at Madras to the credit of the 'Garratt Trust Fund' for invest-"ment in Government of India securities for the purposes of the "said trust.

"*Fourteenth.*—I hereby direct that all monies outstanding and "due to my estate at the time of my demise shall, when recovered "by my executor and trustee, be deposited in the said Bank of "Madras to the credit of the 'Garratt Trust Fund' to be "invested in Government of India securities for the purposes of "the said trust.

"*Fifteenth.*—I hereby direct that all or any gold mining "shares and all other interest in gold mining lands at Shemoga "District in the province of Mysore or others that I may possess "at the time of my death shall come under the control of my exe-"cutor and trustee in view to recovering the value thereof at his "discretion, and he shall deposit whatever value he may obtain in "the Bank of Madras at Madras to the credit of the 'Garratt Trust "Fund' for the purposes of the said trust.

"*Sixteenth.*—I hereby direct that my executor and trustee shall, "from and out of my monies that he may receive, retain in his "hands and control a sum of rupees five hundred, out of which he "will disburse various petty pensions to some poor people who "have been mentioned to him by me.

"*Seventeenth.*—I hereby give, devise and bequeath in support "of my Temperance and Reading rooms for European pensioners, "and also the Poor Widows' Quarters attached thereto, the sum of "rupees ten thousand, which amount shall be invested as my exe-"cutor may deem most profitable, and the interest or profit arising "therefrom shall be paid monthly by my executor to the Chairman "for the time being of the Wesleyan Mission at Bangalore, who "shall be considered the trustee for the said premises, and will see "to the management and up-keep of the same and the repairs "thereof and any assessment payable thereon.

"*Eighteenth.*—I hereby give, devise and bequeath absolutely "to P. Cole rupees eight hundred, to Pauline Cole rupees eight "hundred, and to Bessy Cole rupees five hundred respectively.

"*Nineteenth.*—I hereby give, devise and bequeath absolutely

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"to each of my domestic servants a payment of three months' "salary at the rate of their wages per mensem.

"*Twentieth.*—I hereby give, devise and bequeath absolutely to "my executor and trustee M. W. Walker, Esquire, the sum of "rupees one thousand, provided he undertakes the office and duties "of my executor and trustee under the directions set forth in this "my last will.

"*Twenty-first.*—I hereby direct that my executor and trustee "shall, from and out of my estate, furnish himself with ready "money in a sum of not less than five thousand rupees to be "placed to his own credit in the said Madras Bank, and I hereby "empower him to draw against such amount from time to time as "may be necessary for any urgent expenses, including taking out "probate hereof and otherwise administering to my estate, all "remaining portion (if any) of such sum shall be ultimately paid "over to the credit of the 'Garratt Trust Fund' for the purposes "of the trust.

"*Twenty-second.*—I hereby direct that my executor and trustee "shall, as soon as may be practicable, having regard to payment "of bequests, &c., cause a certain Trust Fund to be commenced and "established in the said Bank of Madras at Madras, to be called "the 'Garratt Trust Fund,' and all monies that shall be paid to "the credit of that fund shall be invested in Government of India "securities and be kept in the said bank for safe custody for the "purposes of the trust to be so created. I direct that such trust "fund shall never be received from deposit in the said Bank of "Madras at Madras so long as that bank shall exist.

"*Twenty-third.*—I hereby direct that the 'Garratt Trust Fund' "shall be a continuing fund to all time, and that the interest "and profit derived therefrom shall be received and enjoyed as "expressed in this will, not only to the legatees to whom such has "herein been bequeathed by me, but the same shall be inherited by "any child or children of them hereafter from time to time and "from one generation to another in accordance with all legal "rights.

"*Twenty-fourth.*—I hereby nominate and appoint as my trus-"tee for the purposes of the 'Garratt Trust Fund' M. W. "Walker, Esquire, whom I have nominated and appointed my "executor to this my last will, and I hereby declare that the "power of appointing any new trustee or trustees of this my will

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"and of and in respect of the 'Garratt Trust Fund' shall be "exercisable by the said M. W. Walker, Esquire, and hereafter "be exercisable by the surviving or continuing trustee for the "time being, or the acting executor or executors, administrator or "administrators of the last surviving or continuing trustee or by "the last retiring trustee, and upon such appointment the num-"ber of trustees may be increased, and upon every such appoint-"ment the trust premises shall be transferred that the same may "become vested in the new trustee or trustees jointly with the "surviving or continuing trustee or trustees, and every such new "trustee shall, as well before or after the said trust premises "shall have become vested as herein directed, have the same "powers, authorities and directions as if he had been hereby "originally appointed a trustee, and that the said trustees for "the time being may respectively reimburse themselves out of the "trust premises all expenses incurred in or about the execution "of the aforesaid trusts and powers.

"In witness whereof," &c.

The issues in the suit were as follows:—

(1) What interest does the first defendant take in the house mentioned in paragraphs 3 and 4 of the will?

(2) What interest do the children of Elizabeth Wilkins take under paragraphs 5 and 6 of the will?

(3) Is the creation of the "Garratt Trust Fund" valid to any, and to what extent?

(4) How are the various directions of the will, with reference to the said trust fund, to be interpreted?

(5) Are the bequests of pensions in clause 16 of the will valid to any, and to what extent? If void, what becomes of the money directed to be paid in such pensions?

(6) Is the charitable bequest in clause 17 of the will void? If so, does it become undisposed if residue or does it form part of the "Garratt Trust Fund"?

Mr. *Subramanyan*, for the plaintiff, opened the case pointing out the several difficulties with reference to which the issues were framed, and argued that the bequest in clause 16 was necessarily invalid under the Succession Act, s. 68, as evidence would be inadmissible for purpose of supplying the names of the persons therein referred to.

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Mr. *E. Norton* (Mr. *Kernan* with him) for the eighth defendant, George William Money.

Our client is the step-son of Mrs. Money, the late daughter of the testator. He claims under the will alone, and would not take under an intestacy. Our contention is that the charitable bequests fail, and the funds go to increase the "Garratt Fund." This fund is created by clauses 22 and 23, and it is fed contingently by clauses 4, 8 and 10, and also by clauses 13, 14, 15 and 21. In the *corpus* of this fund, my client has a vested interest under clause 11 of the will and Succession Act, s. 159. I concede that effect cannot be given to clauses 22 and 23 as they stand, but the will, as a whole, indicates two main intentions. First to perpetuate the name of the testator and the fund which he has created; and, secondly, to place the eighth defendant on the same footing with the testator's grandchildren. The first intention cannot be carried out, but the ordinary result of an intestacy does not ensue by reason of the expression of the second of these intentions. Where a testator desires to effect two objects of which the law invalidates one only, the Court should eliminate what is illegal and give effect to the rest. See *Agnew* v. *Matthews*(1); see also *Kally Prosonno* v. *Gopee Nath*(2), which shows that provisions bad for perpetuity do not operate to vitiate the whole will. Again, *Atkinson* v. *Hutchinson*(3) is an authority for the proposition that even in a deed where the words employed are susceptible of a twofold construction, the Court must adopt that which maintains the general intention of the instrument. Similarly the Lord Chancellor in *Martelli* v. *Holloway*(4) observed that a clause in a will obnoxious as tending to create a perpetuity according to one construction should, if possible, be construed otherwise in order to maintain the general intention of the testator. Succession Act, s. 71 contains a rule in the same sense.

[HANDLEY, J.—Are there two possible constructions in the case of clause 23?]

Yes, the last words referring to all legal rights mean "my intention is to be carried out as far as possible." Compare *Christie* v. *Gosling*(5).

In this view the clauses in the will now in question might have two possible effects, first that the beneficiaries should take

(1) 1 M.H.C.R., 17. (2) 7 Cal. L.R., 241. (3) 3 P. Wms., 259
(4) L.R., 5 H.L., 532. (5) L.R., 1 H.L., 290.

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the *corpus* absolutely, or, secondly, that they should take a life interest with remainder to their children. The second effect seems to be precluded by Succession Act, s. 100. My client, therefore, claims to be entitled with the grandchildren to an absolute interest in the whole fund.

[HANDLEY, J.—Do you contend that there would be no intestacy on the expiration of the life interest if there were no gift over?]

The answer to that question is to be found in Succession Act, s. 159. Here there appears no contrary intention to exclude the rule. Compare also *Mannox* v. *Greener*(1), where it was held that the bequest of the income of the estate passed the fee, *In re Johnson's Trusts*(2) and see Succession Act, ss. 74 and 84 with the illustrations. In further illustration of the rule in section 84, see *Garth* v. *Baldwin*(3), and *Butterfield* v. *Butterfield*(4), *Re Andrew's Will*(5).

[HANDLEY, J.—With reference to the illustration to section 74, is this not a gift for life only?]

That would be better than nothing, but I contend that the Court must look to the general intention of the testator, and that clause 11 is sufficient to carry the *corpus*. See *per* Page Wood, V.C., *In re Johnson's Trusts*(2). As to the last words in clause 23 "in accordance with all legal rights," I refer in support of the construction already contended for to *Carver* v. *Bowles*(6), where the words in question were "so far as I lawfully or equitably, legally can." *Church* v. *Kemble*(7), in which the words in question were "in case they have power to do so under the will;" see also *Harrington* v. *Harrington*(8). The subsequent words will not cut down the prior gift which so becomes absolute; see *Carver* v. *Bowles*(6), *Blacket* v. *Lamb*(9), *Kämpf* v. *Jones*(10), *Stephens* v. *Gadsden*(11), *Gerrard* v. *Butler*(12), *Courtier* v. *Oram*(13). Effect may sometimes be given to the general intention of the testator at the expense of a particular intention: *Monypenny* v. *Dering* (14), in which the *cy-près* doctrine was applied; and compare

(1) L.R., 14 Eq., 456. (2) L.R., 2 Eq., 716. (3) 2 Ves., 645.
(4) 1 Ves., 133. (5) 27 Beav., 608. (6) 2 Russ. & Mylne, 306.
(7) 5 Sim., 525. (8) L.R., 3 Ch. App. 564, affimd. in L.R., 5 H.L., 87.
(9) 14 Beav., 482, 488. (10) 2 Keen, 756. (11) 20 Beav., 463.
(12) 20 Beav., 541. (13) 21 Beav., 91. (14) 2 De G.M. & G., 145.

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Hampton v. *Holman*(1), and see notes to *Caddell* v. *Palmer*, *Tudor's Real Property Cases*, page 489.

Mr. *R. Grant* (Mr. *W. Grant* with him) for first defendant, Frank William Money.

Our contention is that the first defendant's interest in the fund referred to under the fourth and fifth clauses of the will is an absolute interest. Under clause 21 it would appear to be divested on his death, but, on the true construction of clause 23, it becomes absolute in the full sense of the word, for the provision for divesting is bad. As to my contention that the interest is vested, see Succession Act, s. 106; compare also section 118, and illustration (*a*) as to bequests conditional on the happening of an uncertain event. The original bequest is not affected by the invalidity of the second, see section 120 and illustration (*c*). The first defendant's interest accordingly is a vested interest, and is free from the condition precedent, so that if he dies a minor his representatives will take. See *Whitter* v. *Bremridge*(2) and *Ring* v. *Hardwick*(3). The second issue does not affect my client. As to the third issue there may, perhaps, be an intestacy if the provisions of clause 23 are bad for perpetuity under Succession Act, s. 101. The present case does not come exactly under the terms of that section, but it does come under the rule of remoteness as stated in Jarman on Wills. If the creation of the "Garratt Trust Fund" fails, all the paragraphs relating to the Trust Fund become invalid, a result which can only be obviated by an application of the doctrine of *cy-près*, and this would have the result of obviating an intestacy. See Succession Act, ss. 69, 74, 84 and *Monypenny* v. *Dering*(4). The intention of the testator, as expressed in the will, indicates that the descendants of the first beneficiaries are distinct objects of the testator's bounty, as to which see Succession Act, s. 84, illustration. The ultimate beneficiaries are there said to take at once on the death of the first takers, so the first takers cannot take an absolute interest. The argument of the eighth defendant depends greatly on the construction that has been placed on Succession Act, s. 159. That section, however, has no applicability here, for, as has already been shown, there is a clearly expressed intention of the testator to exclude the rule. As to

(1) L.R., 5 Ch. D., 184.
(2) L.R., 2 Eq., 736.
(3) 2 Beav., 352.
(4) 16 M. & W., 428.

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Agnew v. *Matthews*(1), the decision of the learned Judges is open to question: it is not in accord with the judgment of Wilson, J., in *Kally Prosonno* v. *Gopee Nath*(2), and see *Ex-parte Wynch*(3). The Madras decision is, however, distinguishable from the present case, for the words there employed are technical words and the rules of real property were so rendered applicable, although the property was in fact personalty. Here there is no technical phraseology to prevent the Court from determining what was really meant by the terms employed. As to the expression in clause 23 "according to all legal rights" it may mean if the whole of my will cannot be carried out, let my estate be administered according to law, *i.e.*, according to the law of intestacy; see clause 7, which indicates that the provision for the first defendant is to be a first charge on the *corpus*. Clauses 16 and 17 both fail, accordingly an intestacy results in respect of the property there dealt with.

Mr. *R. B. Michell* (Mr. *K. Brown* with him) for defendants Nos. 2 to 7, the children to the testator's daughter, Mrs. Wilkins.

On the third issue.—In so far as the testator directs (in clause 22 of the will) that the "Garratt Trust Fund" shall never be removed from deposit in the Bank of Madras so long as that bank shall exist, and (in clause 23) that that fund shall be a continuing fund to all time, the will transgresses the rule against perpetuities; but the whole of the directions in the will for the creation and disposal of this fund are not on that account invalid. The creation of such fund is perfectly valid, and so are the directions as to its disposal, so far as they do not overstep the law against perpetuities. If the legatees mentioned in the eleventh clause of the will take an absolute interest in that fund by the terms of the will, as it is submitted they do, the directions as to the disposal of the fund will so far be valid, and even if it should be held that those legatees only take an interest for life, those directions will hold good at least to the extent of such life-interests.

On the fourth issue.—I contend that the gift to the legatees mentioned in clause 11 of the will is absolute. That clause must be read with clause 23. The direction in the latter clause that the interest and profit of the fund shall be "inherited" by any child

(1) 1 M.H.C.R., 17.
(2) 7 Cal. L.R., 241.
(3) 5 De G.M. & G., 208.

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or children of those legatees is inconsistent with the view that there is a distinct gift to them, and is consistent with the view that the child or children were only intended to take by inheritance according to law from those legatees, to whom an absolute estate of inheritance was given; and the words "from generation to generation" and "in accordance with all legal right" also confirm this latter view. In other words, the words in clause 23 referring to the issue of the legatees are to be construed as words of limitation, not of purchase (Succession Act, s. 84). There is no provision in clause 23 (nor elsewhere in the will) as to how the children or remoter descendants of those legatees are to take, whether *per stirpes* or *per capita*, or whether equally or otherwise, as presumably there would have been if there was a gift in remainder to them. Compare *Appleton* v. *Rowley*(1), *Alger* v. *Parrott*(2), *Avern* v. *Lloyd*(3). If it is to be collected from the whole of the will that it was the testator's intention to create estates tail in the "Garratt Trust Fund," or that the legatees mentioned in clause 11 and their descendants from generation to generation in perpetual succession should enjoy life interests in that fund, the result will be the same, for in the first place an estate tail in personalty cannot be created and words which in the case of realty would confer such an estate would in the case of personalty confer an absolute interest [*Elton* v. *Eason* (4)], and in the second place a gift of a life-interest in a fund to A, and after his death successive life-interests to his children and remoter issue, or to his heirs in succession, will be construed as a gift of an absolute interest to A [*Britton* v. *Twining*(5), *Agnew* v. *Matthews*(6)]. In the present case the fund is given to the legatees mentioned in clause 11 not for life, but absolutely, and an absolute interest so given is not cut down to an interest for life by a gift over, unless the gift over can itself take effect [*Green* v. *Harvey*(7), *Winckworth* v. *Winckworth*(8), *Ring* v. *Hardwick*(9)]. The bequest in that clause of "the benefit, interest and profit that shall arise and accrue from and out of the "Garratt Trust Fund" is a bequest of the fund itself (Succession Act, s. 159, and illustration (*b*) thereto). Nor is the absoluteness of the gift affected

(1) L.R., 8 Eq., 139.
(2) L.R., 3 Eq., 338.
(3) L.R., 5 Eq., 383.
(4) 19 Ves., 73.
(5) 3 Merivale, 176.
(6) 1 Mad. H.C.R., 17.
(7) 1 Hare, 428.
(8) 8 Beav., 576.
(9) 2 Beav., 352.

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by the directions in clause 12 as to the application of the interest or profit of the fund during the minorities of the testator's grandchildren, nor by the directions in clause 7 as to advancement out of the principal of the fund for the benefit of the first defendant for the purposes therein mentioned, which advances, it is submitted, can only be made out of his share of the principal.

The legatees mentioned in clause 11 of the will take the fund as joint tenants, not as tenants in common; that this was the intention of the testator is shown by the direction in clause 12 to make direct payments "to each of such children who attains majority" [*Agnew* v. *Matthews*(1) was referred to].

On the first issue.—Inasmuch as the creation of the "Garratt Trust Fund" is not invalid, the condition subsequent in the fourth clause of the will whereby the first defendant's interest in the "Eastern Castlet" is liable to be divested if he should die before attaining twenty-one years of age is valid.

On the second issue.—The devise of "Beresford Lodge" is a devise of it absolutely under the terms of the first portion of clause 5 of the will, and the expression of the testator's wish as to the property being sold, in the latter portion of the clause, does not create a precatory trust, and is inoperative legally: *In re Diggles: Gregory* v. *Edmondson*(2): *In re Adams & The Kensington Vestry*(3) (especially judgment of Cotton, L.J., at page 410), *Lamb* v. *Eames*(4), *Mussoorie Bank* v. *Raynor*(5), *Kumarasami* v. *Subbaraya*(6), Jarman on Wills, 360.

The gift of the rent of the property in clause 5 carries the property itself [*Mannox* v. *Greener*(7)].

The devisees of "Beresford Lodge" take as joint tenants, not as tenants in common; this is shown by the word "jointly," by the words "not to be disposed of until the youngest of my said late daughter's children *surviving*," &c., and by the words "when the said house and premises Beresford Lodge, may be sold by *them*" in clause 5 of the will: "them" evidently refers to the surviving children. The intention to create a joint tenancy is also shown by the wording of clause 6; and especially by the direction therein

(1) 1 Mad. H.C.R., 17.
(2) L.R., 39 Ch. D., 258.
(3) L.R., 37 Ch. D., 394.
(4) L.R., 6 Ch., 597, 599.
(5) L.R. 7 App. Ca., 321, 330.
(6) I.L. R., 9 Mad., 325, 326.
(7) L.R., 14 Eq., 456.

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to pay the rents of the premises, if let, "towards the benefit, support and education of my said daughter's surviving children." Throughout the testator speaks of his daughter's children only, and evidently did not contemplate or intend the issue of a deceased child of his daughter taking anything. But even if the daughter's children took as tenants in common, they so took with benefit of survivorship: *Doe d. Borwell* v. *Abey*(1); 2 Jarman on Wills, 700.

On the fifth issue.—The bequests in clause 16 of the will of Rs. 500 for the payment of "various petty pensions to some poor people, who have been mentioned to him by me," is void for uncertainty, and also for a patent deficiency (Indian Succession Act, ss. 76, 68).

On the sixth issue.—The bequest in clause 17 of the will of Rs. 10,000 "in support of my Temperance and Reading rooms for European pensioners, and also the poor widows' quarters attached thereto," is void, as the testator had grandchildren living at his death, and the will was executed less than twelve months before his death (Indian Succession Act, ss. 105, 21-24).

Mr. *Smith* for the ninth defendant, the administrator to the estate of a child of Mrs. Wilkins, who died since the death of the testator.

The provisions for constituting the "Garratt Trust Fund" are invalid as transgressing the rule against perpetuities, and, therefore, the fund itself failing, all the provisions relating to the disposal and application of that fund, or the income arising therefrom, must fail also. The testator's only object in creating that fund clearly was to perpetuate his name [*Ibbetson* v. *Ibbetson*(2)]. There is accordingly an intestacy as to the properties from which the will directs that fund to be formed.

The gift of "Beresford Lodge" in clause 5 is a gift to a described class, of whom the testator's grand-daughter, of whose estate the ninth defendant is administrator, and who survived the testator, was one, and her share in the property therefore vested in her at the testator's death (Indian Succession Act, s. 98, and illustration (*b*) thereto). It is only the payment of the sale-proceeds that is postponed (by directions contained in clauses 5 and 6, supposing those directions to be binding) not the vesting of the property. [*In re Edmondson's Estate*(3); 1 Jarman on

(1) 1 M. & Sel., 428. (2) 10 Sim., 495. (3) L.R., 5 Eq., 389.

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Wills, 842. The donees of "Beresford Lodge" take as tenants in common, not as joint tenants, under the terms of clause 5: *Joliffe* v. *East*(1); *Heathe* v. *Heathe*(2), *Perry* v. *Woods*(3), 2 Jarman on Wills, 259]. *Agnew* v. *Matthews*(4) differs materially from the present case, because in the former case the interest of the grandchildren did not vest till they attained their majority. I adopt Mr. Michell's argument as to their being no precatory trust, and also as to the gift being of an absolute interest and not an interest for life only. The principle of section 159, Succession Act, applies as well in the case of the bequest of the "Garratt Trust Fund" as in the case of the gift of "Beresford Lodge."

Mr. *Kernan* for the eighth defendant in reply.

The "Garratt Trust Fund" is the residuary fund. It does not matter what the testator chooses to call it. If any of the dispositions of it are valid, as not transgressing the rule against perpetuities, there is no reason why they should not be carried into effect. Even if the words "shall be inherited by any child or children," &c., in clause 21 are words of purchase and not of limitation, at all events the life interests to the primary legatees are valid. Those words are to be construed as words of limitation; if the testator had intended them to be words of purchase, he would have expressly made the estates of the primary legatees' estates for life only, but he has nowhere done so, but merely directed periodical payments of interest and profits.

HANDLEY, J.—This is a suit by the Administrator-General to obtain the decision of the Court upon certain questions arising upon the construction of the will of William Garratt, who died at Bangalore in August 1888. Testator appointed Michael William Walker his executor and trustee, but Mr. Walker, after partly administering the estate by paying the debts and some of the legacies, transferred the remaining assets of the testator to the Administrator-General under the provisions of section 31 of the Administrator-General's Act, Act II of 1874.

The first defendant, F. W. Money, a minor, is the son of a daughter of the testator, who predeceased him. Defendants 2 to 7, also minors, are children of another daughter of testator, Mrs. Wilkins, who also predeceased him. The eighth defendant, G. W.

(1) 3 Br. C.C., 25. (2) 2 Atk., 122. (3) 3 Ves., 204. (4) 1 Mad. H.C.R., 17.

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Money is a half-brother of first defendant, that is, a son of first defendant's father by another wife than the testator's daughter. Ninth defendant is the Administrator-General as the administrator of the estate of Elizabeth Gertrude Wilkins, a daughter of testator's daughter, Mrs. Wilkins, who has died since the death of testator.

First defendant, defendants 1 to 7, eighth defendant and ninth defendant, respectively, are separately represented by counsel, their interests being conflicting.

It is to eighth defendant's interest to uphold all the provisions of the will so far as they relate to him, for he would take nothing under an intestacy, not being one of testator's next-of-kin. First defendant would gain by an intestacy as to part of the will, for he would take an equal share in the undisposed of estate with the children of Mrs. Wilkins as a class, and they are therefore interested in maintaining that there is no intestacy. And both first defendant and defendants 1 to 7 are interested in shutting out eighth and ninth defendants from any benefit under the will. The case has been very fully argued, and my attention has been drawn to all the authorities bearing upon the various questions that arise, which, however, have mainly to be decided under the provisions of the Indian Succession Act, which, it is admitted governs the case. The most important and difficult questions to be decided are those raised by the third and fourth issues as to what the testator calls the "Garratt Trust Fund," and, as some of the other questions depend, to some extent, upon these, I shall consider them first. Paragraph 22 of the will is as follows: "I "hereby direct that my executor and trustee shall, as soon as "conveniently may be practicable, having regard to payments "of bequests, &c., cause a certain trust fund to be commenced "and established in the said Bank of Madras at Madras to be "called 'The Garratt Trust Fund,' and all monies that shall be "paid to the credit of that fund shall be invested in Government "of India securities and be kept in the said bank for safe custody "for the purposes of the trust to be so created. I direct that such "trust fund shall never be received from deposit in the said Bank "of Madras as long as that bank shall exist."

By paragraphs 8, 10, 13, 14, 15 and 21, testator endows this trust fund by directing that the proceeds of sale of certain immoveable and moveable properties and the outstandings to be

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recovered for the estate, and the balance of a sum of Rs. 5,000, which the executor is empowered to retain to meet probate and other expenses, shall be credited to it. These directions, together with the preceding legacies, practically exhaust the testator's assets, though there is no specific residuary bequest. Paragraph 4 provides that, if first defendant dies under twenty-one years of age, a house devised to him shall be sold and the proceeds be carried to this fund. So far there is nothing unusual or illegal about the creation of this fund, except the direction that the securities representing it shall never be received from deposit in the Bank of Madras, which, as an attempt to create a fund in perpetuity, is invalid and cannot be carried out. But this does not, I think, prevent the intention of the testator to create and endow this fund being carried out. I regard it merely as an attempt to fetter the power of the executor to deal with the fund which cannot be enforced, and, disregarding this, there remains only what amounts to no more than the usual direction for sale and conversion into money of the estate and investment thereof for the purpose of carrying out certain trusts. It is when we came to the trusts, which the testator declares of this fund, that the real difficulty begins. These are contained in paragraphs 7, 11, 12 and 23. Paragraph 7 makes a provision for the payment of the passage to England, outfit and other incidental expenses of first defendant, if he wishes to go to England for the purpose of being educated there. I shall consider this later on, when dealing with first defendant's interest in this fund.

Paragraphs 11, 12, and 23 are as follows:—

"Para. 11. I hereby give, devise and bequeath to my grand-"children by my said late daughter, Elizabeth Wilkins, also to my "grandson, Frank William Money, and to his step-brother, George "William Money (the latter now in England), in equal shares, "the benefit, interest and profit that shall arise and accrue from "and out of 'The Garratt Trust Fund' which my executor and "trustee shall draw and disburse quarterly. The share in such "for my grandson, Frank William Money, shall be disbursed by "my executor and trustee as he shall think proper, and, if neces-"sary, for the support and education of the said Frank William "Money in England.

"Para. 12. I hereby direct that the shares from and out of "the interest or profit of 'The Garratt Trust Fund' for the

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"children of my said late daughter, Elizabeth Wilkins, shall be "paid quarterly by my executor and trustee to their father, E. S. "Wilkins, Esquire, Barrister-at-Law, for their support and edu-"cation on obtaining from him, on each occasion, his receipt for "the amount, expressing the purpose for which the payment is "received and subject at all times to the condition, which I hereby "direct, that my executor and trustee shall always be fully "satisfied that the monies so paid away to him are made proper "use of exclusively for the benefit, support and education of the "said children, and I hereby direct that my said executor and "trustee) shall, at all times, see to their continued welfare until "they attain majority, after which period my executor and trustee "shall make direct payment to each of such children who attains "majority and obtain receipt of such child for each payment so "made.

"Para. 23. I hereby direct that 'The Garratt Trust Fund' "shall be a continuing fund, to all time, and that the interest and "profit derived therefrom shall be received and enjoyed as ex-"pressed in this will, not only to the legatees to whom such has "herein been bequeathed by me, but the same shall be inherited "by any child or children of them hereafter from time to time "and from one generation to another, and in accordance with all "legal rights."

The first thing to be noted in paragraph 11 is that, as to the bequest to the children of Mrs. Wilkins, it is a bequest not to a class but to them individually. This, I think, is clear from the fact that the testator names the other two objects of the bequest, F. W. Money and his stepbrother, G. W. Money, and, though he does not name the children of Mrs. Wilkins, he speaks of them "as my grand-children" and must be taken to have had, in his mind's eye, such grand-children as were then living. The children of Mrs. Wilkins, therefore, who survived testator, would take as *personæ designatæ* a vested interest on the death of the testator in what is bequeathed to them by paragraph 11.

What is bequeathed to them, in equal shares with F. W. Money and G. W. Money is "the benefit, interest and profit that shall arise and accrue from and out of the 'Garratt Trust Fund,' which my executor and trustee shall draw and disburse quarterly."

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Assuming the word "benefit" to be no wider than "interest and profit," as would appear from the words "which my executor and trustee shall draw and disburse quarterly," this bequest of the interest would, by section 159 of the Indian Succession Act, carry the *corpus* as well as the interest, unless the will affords an indication of an intention that the enjoyment of the bequest should be of limited duration. Such indication, if it exists at all, must be found in paragraph 12 or 23. Paragraphs 11 and 23 must, I think, be read together, for they contain the whole of the directions as to the devolution of the "Garratt Trust Fund." It is argued by those who contend for an intestacy that the effect of the two paragraphs is to direct payment of the income to the legatees during their lives, and, after their death, to their children and descendants "from generation to generation" as the testator expresses it, and that the whole bequest is, therefore, void as an attempt to create a succession of life interests in perpetuity. On the other hand it is argued, by those who support the will, that the words in paragraph 23, referring to the children of the legatees, are words of inheritance and not of purchase, and that their effect is to give an absolute interest in the fund to the legatees. In my opinion the latter is the correct construction, having regard to the intentions of the testator to be gathered from the whole will. It is to be observed, that there is no direct bequest in paragraph 23 to the children of the legatees, on the contrary the testator speaks of the legatees "to whom such (the interest and profit of the fund) has been bequeathed by me," and he goes on to say that "the same shall be *inherited* by any child or children of them hereafter from time to time and from one generation to another and in accordance with all legal rights." This, coupled with paragraph 11, is in effect a gift to the legatees and their children as their heirs. The word inherited must mean inherited from the legatees. I think, therefore, that the disposition contained in paragraphs 11 and 23, read together, comes within the meaning of section 84 of the Indian Succession Act as a bequest to a person, with the addition of words which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, in which case by that section the object of the bequest is entitled to the whole interest of the testator therein. No doubt the testator did intend that the fund should be enjoyed by the legatees and their descendants for all time. This is shown

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by the words in paragraph 22 making the fund a perpetual fund, and by the words The "'Garratt Trust Fund' shall be a continuing fund to all time" and the words "from generation to generation" in paragraph 23. In fact he wished to create an estate tail in the fund. This he could not do, and so far his intention must fail; but that does not, I think, affect the validity of the gift to the legatees and their children, which has by law the effect of giving the legatees an absolute interest. It is merely an attempt to cut down, by a direction in the will, the absolute interest which the words used have given to the legatees. Such an attempt must fail and the legatees take an absolute interest—see the cases of *Carver* v. *Bowles*(1), *Blacket* v. *Lamb*(2), *Kampf* v. *Jones*(3), *Stephens* v. *Gadsden*(4), *Gerrard* v. *Butler*(5), the principle of which is embodied in section 125 of the Indian Succession Act.

To sum up. The construction, which I would put upon paragraphs 11 and 23 of the will read together, is this. The gift to the children of Mrs. Wilkins and to F. W. Money and G. W. Money is a gift to them as *personæ designatæ*, and they took a vested interest in their shares from the death of the testator. The gift to them of the "benefit, interest and profit" of the fund is a gift of the whole fund by virtue of section 159 of the Indian Succession Act, because the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration; but, on the contrary, paragraph 23 contains words of inheritance which have the effect, by section 84 of the Indian Succession Act, of giving to the legatees the whole interest of the testator in the fund. The attempt to limit this absolute interest by directions that the fund shall continue to all time and shall be enjoyed by the legatees' children, from generation to generation, is void and there remains an absolute gift of the fund to the legatees in equal shares. And the directions in paragraph 12 as to the manner in which the interest in the shares of the children of Mrs. Wilkins shall be paid during their minority and after it ceases does not, I think, prevent their taking a vested interest in their shares on the testator's death. See explanation to section 106 of the Indian Succession Act. The above construction is, I think, a possible and not unreasonable one to put upon the words of the will, and, if so, it is to be preferred

(1) 2 Russ. & Mylne, 301. (2) 14 Beav., 482. (3) 2 Keen, 756. (4) 20 Beav., 463. (5) 20 Beav, 541.

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to any other, as it avoids an intestacy and carries out the obvious intention of the testator to provide equally for his grand-children and for G. W. Money, the half-brother of one of them.

With regard to ninth defendant, who represents the estate of a daughter of Mrs. Wilkins, who died since testator, it is argued by those who would exclude that daughter from a share in the "Garratt Trust Fund" that the gift to the legatees was a gift to them as joint tenants and not as tenants in common, and various authorities are quoted on either side of this question.

The general result of the authorities seems to be that the tendency of the Court is to lean against joint tenancy, especially in the construction of a will. As I have said above, in my view, the gift to the legatees by paragraph 11 was a gift to F. W. Money, G. W. Money and the children of Mrs. Wilkins as *personæ designatæ*, and the words "in equal shares" would, I think, make them tenants in common. And this construction is also in accordance with the intention of the testator evidenced by paragraph 23 that the children of the legatees should take after them, which intention, though it cannot be carried out as testator meant it to be carried out, yet may be used as a guide to his wishes in construing other parts of the will. In my opinion, therefore, the deceased daughter of Mrs. Wilkins took upon testator's death a vested interest in one-ninth part of the "Garratt Trust Fund" which has passed to her representative, ninth defendant, the Administrator-General. A case, *Agnew* v. *Matthews*(1), was cited in argument, where it was held, upon a somewhat similar bequest to the children of certain persons with an invalid gift over to their heirs, that the children only took a contingent interest on their attaining twenty-one. But that case is clearly distinguishable from the present, for there was no direct gift to the children as here, but only a direction to the executors to pay them a share of the interest of the fund on their respectively attaining twenty-one.

One other question arises as to this "Garratt Trust Fund," and that is with regard to the provisions of paragraphs 7 and 11 of the will as to sending F. W. Money to England for education. Paragraph 7 is as follows: "I hereby direct that if my grandson, Frank William Money, desires to go to England to qualify for any profession, that my executor and trustee shall have full power to

(1) 1 M.H.C.R., 17.

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disburse from and out of the principal of 'The Garratt Trust Fund' hereinafter mentioned sufficient money for his passage to and from England and for his suitable outfit and other incidental expenses as my executor and trustee shall deem just and proper for such purpose." And the last clause of paragraph 11 is as follows: "The share in such for my grandson, Frank William Money, shall be disbursed by my executor and trustee as he shall think proper, and, if necessary, for the support and education of the said Frank William Money in England." Reading these two clauses together, and bearing in mind that testator did intend to tie up the share of each legatee so that it might descend to his or her children, I think the meaning of paragraph 7 must be taken to be to allow the executor in the case of this legatee only to trench upon the principal of his share for the purpose indicated, if the income, as applied under the last clause of paragraph 11, were not sufficient. Having regard to the intention of the testator to benefit the legatees equally by this fund, it cannot, I think, have been his meaning in paragraph 7 to give F. W. Money a benefit out of the fund over and above his share. In the view that I have taken of the combined effect of paragraphs 11 and 23, that F. W. Money took a vested interest at testator's death in one-ninth of the fund, the effect of paragraph 7 is only to authorize the executor to apply his share towards the expense of his journey to England and other expenses connected with his residence and education there.

I find therefore upon the third and fourth issues that the creation of the "Garratt Trust Fund" is valid as far as it provides a fund for distribution between testator's grandson, F. W. Money, his half-brother, G. W. Money, and the children of testator's daughter, Mrs. Wilkins, but is invalid so far as it seeks to make the fund a perpetual fund. That F. W. Money, G. W. Money, and the children of Mrs. Wilkins, who survived the testator, took an absolute vested interest each in one-ninth of the fund, and that ninth defendant, as the administrator of the estate of testator's deceased grand-daughter, Elizabeth Gertrude Wilkins, is entitled to receive her one-ninth share.

I have next to consider the question raised by the first issue as to paragraphs 3 and 4 of the will. They are as follows:—

Para. 3. "I hereby give, devise and bequeath to my grandson, "Frank William Money, now a minor, absolutely my house and

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"premises, known as the 'Eastern Castlet' on the Mount Road, "Madras, and I direct that the title-deeds thereof shall from the "period of my demise be lodged in the Bank of Madras at Madras "for safe keeping until the said Frank William Money, if living, "shall attain the age of twenty-one years, after which period they "shall be made over to his personal custody and control to do "with as he may see fit."

Para. 4. "I hereby direct that in the event of the death of the "said Frank William Money prior to his completing twenty-one "years of age, the said 'Eastern Castlet' shall be sold by my "executor and trustee and the sale proceeds thereof shall be "deposited in the Bank of Madras at Madras to the credit of "'the Garratt Trust Fund' hereinafter mentioned to be invested "in Government of India securities and for the purpose of the "said trust."

There can be no doubt that under this bequest first defendant took on the death of the testator a vested interest in the property subject to be divested by his dying under twenty-one years of age. But it is contended for him that the creation of the Garratt Trust Fund being invalid as an attempt to create a perpetuity, the gift over fails and he takes an absolute interest in the property to which paragraphs 3 and 4 relate. I have already held that the creation of the Garratt Trust Fund is only invalid so far as it is attempted to make it a fund in perpetuity. As a fund to provide for the legatees under paragraphs 11 and 23 it is well created, and is, in fact, nothing more than the usual fund directed by a testator to be created by sale of his property. There is, therefore, nothing illegal in the direction in paragraph 4 that in the event of F. W. Money dying under twenty-one years the property bequeathed to him by paragraph 3 shall be sold and the proceeds go to the Garratt Trust Fund. I must hold upon the first issue that under paragraphs 3 and 4 of the will first defendant, F. W. Money, took upon the death of the testator a vested interest in the property mentioned in these paragraphs liable to be divested in the event of his dying under the age of twenty-one years, in which event the property is to be sold and the proceeds carried to the Garratt Trust Fund.

The second issue relates to the bequest by paragraphs 5 and 6 of the will of testator's house at Bangalore called 'Beresford Lodge' and the furniture in it to the children of Mrs. Wilkins,

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Paragraphs 5 and 6 are as follows:—Paragraph 5. "I hereby "give, devise and bequeath absolutely my house and premises "called 'Beresford Lodge' at the junction of Lal Bagh Road and "Fort Road, Bangalore, together with all the household furniture "supplied by me therein and thereto belonging to the children of "my late daughter Elizabeth Wilkins, now deceased, jointly share "and share alike, and which I wish should be a home for them "or any of them in Bangalore, not to be disposed of until the "youngest of my said late daughter's children surviving shall "attain the age of eighteen years, when the said house and "premises 'Beresford Lodge' may be sold by them or the sur-"vivors of them, through the medium of my executor, and the "sale-proceeds thereof shall be divided between them in equal "shares share and share alike."

Para. 6. "I hereby direct that the title-deeds of the said "'Beresford Lodge' shall be deposited for safe keeping in the "Bank of Madras at Madras, until such time as the property may "be sold as stated in the fifth paragraph herein, and I hereby further "direct that if the said children be at any time all removed from "the said house, that my executor and trustee shall at once take "charge of the house, premises and all the furniture therein sup-"plied by me and belonging thereto, and shall let the property "furnished to any tenants, collect and receive the rents thereof and "pay the same less expenses for repairs and assessment according "to his discretion towards the benefit, support and education of my "said late daughter's surviving children." This is, I think, an absolute gift to the children of Mrs. Wilkins of testator's whole interest in the property, and is not controlled by the directions in the latter part of paragraph 5 that the house shall not be sold until the youngest grand-daughter attains eighteen years of age, which must be regarded merely as an expression of the wish of the testator and not as a precatory trust. See section 125 of the Indian Succession Act and the cases before quoted. Here also it is contended on behalf of defendants 2 to 7 that the gift is to the daughters of Mrs. Wilkins as joint tenants, and therefore that the ninth defendant as representing the deceased daughter Elizabeth Gertrude Wilkins takes nothing, but her share passes to defendants 2 to 7 by survivorship. In my opinion, this being an absolute gift to the children of Mrs. Wilkins share and share alike, and the subsequent direction that the property shall not be

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sold until the youngest attains eighteen years of age being of no legal effect, the children who survived the testator took each an equal share in the property which vested in them on the death of the testator. The daughter Elizabeth Gertrude Wilkins who died since the death of the testator took a vested interest on his death in one-seventh share in the property bequeathed by paragraph 5 and her share is to be received by her representative ninth defendant. The postponement of the power of disposition over the property being of no legal effect there remains only the absolute gift to the children of Mrs. Wilkins 'jointly share and share alike.' Here again as in the gift of the Garratt Trust Fund, I think the children of Mrs. Wilkins take as *personæ designatæ* and as they all survived the testator they took a vested interest in their shares, and the share of the daughter, who died after testator, passed to her representative. I find on the second issue that the children of Mrs. Wilkins, who survived the testator, each took a vested interest in one-seventh share of the property mentioned in paragraphs 5 and 6 of the will, and that the share of the daughter Elizabeth Gertrude Wilkins passed to her representative, ninth defendant.

An additional issue was raised at the hearing as to the legacies given by paragraphs 16 and 17 of the will.

Paragraph 16 is as follows:—"I hereby direct that my executor "and trustee shall from and out of any of my monies that he may "receive, retain in his hands and control a sum of rupees five-"hundred, out of which he will disburse various petty pensions to "some poor people, who have been mentioned to him by me." There is here a deficiency on the face of the will as to the objects of this bequest, and by section 68 of the Indian Succession Act no extrinsic evidence can be admitted as to the intention of the testator. This legacy must, therefore, fail and fall into the undisposed of residue.

Paragraph 17 is as follows:—"I hereby give, devise and be-"queath in support of my temperance and reading rooms for "European pensioners, and also the poor widows' quarters attached "thereto, the sum of rupees ten thousand which amount shall "be invested as my executor may deem most profitable and the "interest or profit arising therefrom shall be paid monthly by my "executor to the Chairman for the time being of the Wesleyan "Mission at Bangalore, who shall be considered the trustee for "the said premises, and will see to the management and upkeep of

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"the same and the repairs thereof, and any assessment payable "thereon."

This is a bequest to charitable uses, and the will was executed less than twelve months before testator's death. The legacy is therefore void by section 105 of the Indian Succession Act and falls into the undisposed of residue.

There will be a decree declaring the right of the parties in accordance with the above findings. All parties will have their costs out of the estate. Costs to be taxed as between attorney and client and to be paid in the first place out of the undisposed of residue.

Wilson & King, attorneys for plaintiff.

D. Grant, attorney for defendant No. 1.

Branson & Branson, attorneys for defendants Nos. 2 to 7.

Laing, attorney for defendant No. 8.

Barclay, Morgan & Orr, attorneys for defendant No. 9.

APPELLATE CIVIL.

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

1892. March 25.

NARASAYYA (DEFENDANT No. 1), APPELLANT,

v.

RAMABADRA AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 2 AND 3), RESPONDENTS.*

Civil Procedure Code, s. 525—Suit on an award—Alternative claim on original consideration—Withdrawal of claim on award.

The plaintiff lent money to two of the defendants, who were partners with the third defendant, for the purposes of the partnership and obtained promissory notes from them. Disputes which arose between them, were referred to arbitrators, who made an award. An application by the plaintiff to have the award made a rule of Court was opposed by defendant No. 1, and the plaintiff was referred to a regular suit. He now brought his suit in the alternative on the award and on the promissory notes. The award was found to be unenforceable. The plaintiff then declared himself satisfied to withdraw his suit as far as the award was concerned, and the Court passed a decree for plaintiff on the merits. Defendant No. 3 alone having appealed, the Court of first appeal held that the plaintiff must succeed or

* Second Appeal No. 1113 of 1890.

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fail on the award, and that the withdrawal of the prayer for a decree on the award altered the nature of the suit, and finding that there was no evidence of misconduct on the part of the arbitrators, he passed a decree in the terms of the award. On a second appeal preferred by defendant No. 1:

Held, that this procedure was right.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 132 of 1889, modifying the decree of M. B. Sundara Rau, Acting Subordinate Judge of Ellore, in original suit No. 30 of 1887.

Suit to recover principal and interest due by the defendants to the plaintiff. The plaint was summarised by the Subordinate Judge as follows:—

"The plaint set forth that the defendants Nos. 1, 2 and 3 were "joint contractors in certain contracts with the Public Works De-"partment and other public bodies; fourth defendant (Gangayya), "was undivided father, and the fifth undivided brother of the "first; that the plaintiff lent to the firm, consisting of first, "second and third defendants for its common purposes, Rs. 2,000 "once on a promissory note marked A, dated 11th December "1885, executed by the first defendant, and another Rs. 2,000, "on three promissory notes marked B, C and D, executed by "the second on the 5th and 21st October and 2nd December 1885, "respectively, at an interest of 12 per cent. per annum; that "defendants had not paid the amount due to him, notwithstand-"ing several demands made by plaintiff; that the joint contracts "carried on by the first defendant were for the benefit of the joint "family of defendants Nos. 1, 4 and 5; that the cause of action "for the promissory notes arose on the dates of the notes; that "the said disputes between the plaintiff and the defendants Nos. 1, "2 and 3 were referred to an arbitration, and the arbitrators by "the award found the defendants severally liable in sums men-"tioned in the award filed with the plaint, and that plaintiff's "application for filing the award under section 525 of the Civil "Procedure Code was rejected by this Court on the first defend-"ant's objection."

The further facts of the case are stated above sufficiently for the purposes of this report.

Defendant No. 1 preferred this second appeal.

Pattabhirama Ayyar and *P. Subramanya Ayyar* for appellant.

Subramanya Ayyar and *Sundara Ayyar* for respondent No. 1.

Srirangachariar for respondents Nos. 2 and 3.

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JUDGMENT.—We think that the preliminary objection raised by the plaintiff (respondent) must prevail and that first defendant, who did not appeal against the decree of the Court of First Instance, is not entitled to argue that the suit ought to have been dismissed. It is then contended for the first defendant (appellant) that the procedure adopted by the District Judge was irregular and illegal. The facts are as follows:—Plaintiff lent money on promissory notes to defendants Nos. 1 and 2. They, with third defendant, were partners or joint contractors, and the money was advanced for their work. Disputes having arisen, the matters in dispute were referred to arbitrators who made an award. Plaintiff applied to the Court under section 525 of the Code. First defendant objected and the then Subordinate Judge referred the plaintiff to a regular suit. Plaintiff then instituted the present suit and prayed in the alternative either for a decree on the award or on the promissory notes. The first defendant pleaded that, as there was an award, no suit would lie on the merits and contended that the award was bad for misconduct of the arbitrators. Defendants Nos. 2 and 3 pleaded that the award was binding. An issue was accordingly framed as to the validity of the award. At the hearing, the Subordinate Judge appears to have been of opinion that the award "could not be held a valid decision for enforcement," and the plaintiff thereupon was content to withdraw his suit, so far as the award was concerned. First defendant then maintained that plaintiff could only succeed upon the award. The Subordinate Judge, however, decided the case on the merits and gave the plaintiff a decree against all three defendants. From that decree, third defendant alone appealed on the ground that the withdrawal of the prayer for a decree on the award altered the nature of the suit, and that he had always maintained that the plaintiff must succeed or fail on the award. The District Judge took this view, and the first defendant having adduced no evidence as to the misconduct of the arbitrators, amended the decree of the Court of First Instance by giving plaintiff a decree in the terms of the award. We think that the procedure of the Judge was perfectly regular. The plaintiff could not be allowed to withdraw that portion of his prayer which related to the award, so long as any of the defendants objected to his doing so. The decision of the Judge was correct. As to costs, we think that the Judge was right in

making first defendant liable for all the costs hitherto incurred, as it was entirely due to his conduct that the suit was instituted and remanded. The second appeal fails and is dismissed with costs, two sets.

APPELLATE CIVIL.

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

GNANAMBAL (DEFENDANT), APPELLANT,

v.

PARVATHI (PLAINTIFF), RESPONDENT.*

1892. March 23, 29.

Civil Procedure Code, ss. 13, 279, 280, 283—*Party to proceedings in execution—Order in execution—Estoppel*—Res judicata.

A claim in execution to a house which had been attached was dismissed, and the claimant now sued the decree-holder to establish her title to it. It appeared that the house had been previously attached in execution of another decree obtained against the same judgment-debtor and his father (since deceased); that the present plaintiff had then preferred a claim, which was allowed; that the judgment-debtor had taken no steps to have the order allowing the claim set aside; and that a suit filed by the decree-holder with that object had been dismissed:

Held, that the plaintiff's claim was not *res judicata*, and the defendant was not estopped from contesting it.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 577 of 1890, reversing the decree of A. Kuppusami Ayyangar, District Munsif of Kumbakonam, in original suit No. 447 of 1889.

Suit for a declaration that a certain house was the property of the plaintiff, and that it was not liable to be sold in execution of the decree in original suit No. 325 of 1888 in the Court of the District Munsif of Kumbakonam obtained by Gnanambal Ammal, the present defendant, against Rangasami Ayyan. The plaintiff had preferred a claim in execution without success. It appeared that Rangasami Ayyan was the plaintiff's husband, and that his father Subbayyan (deceased) was her maternal grandfather. The above decree was obtained on a bond executed by Subbayyan.

In original suit No. 31 of 1884 in the Court of the District Munsif of Kumbakonam, one Naranappa obtained a decree against

* Second Appeal No. 1050 of 1891.

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Subbayyan and Rangasami Ayyan, and; in execution, attached the house in question in the present suit. The present plaintiff then preferred a claim, which was allowed by an order, dated 25th October 1884 and filed in this suit as exhibit F. Subbayyan had notice of the plaintiff's claim, and he was named as one of the parties in the heading to that order, and he took no steps to contest it. The decree-holder then filed a suit (original suit No. 331 of 1885) to have that order set aside, but it was dismissed.

The District Munsif held that the order (exhibit F) created no estoppel and dismissed the suit on the merits. His decree was reversed, on appeal, by the District Judge, who held that the "defendant is estopped from setting up Subbayyan's right, because it is *res judicata* by the order (F), dated 25th October 1884."

The defendant preferred this second appeal.

Ramachandra Ayyar for appellant.

R. Subramanya Ayyar for respondent.

BEST, J.—The question for decision in this appeal is whether the District Judge is right in holding the suit to be barred as *res judicata* by the order (F), dated 25th October 1884.

This order (F) allowed a claim preferred by the present respondents to this same house on its being attached in execution of a decree obtained by one Naranappa (in original suit No. 31 of 1884) against Subbayyan and Rangasami Ayyan, the former of whom is this respondent's maternal grandfather and also father-in-law, being the adoptive father of the latter (Rangasami Ayyan), who is respondent's husband. It appears that, on respondent's claim to the house being allowed as above, the then plaintiff brought a suit under section 283 of the Code of Civil Procedure (original suit No. 331 of 1885) which was dismissed (see exhibit G).

The present appellant does not claim through the former plaintiff (Naranappa). She obtained her decree in original suit No. 325 of 1888 against Subbayyan's son (Rangasami Ayyan respondent's husband) for a debt on a bond executed by Subbayyan. On appellant's attaching the house in execution of this decree, respondent again put in a claim to the house under section 378 which was dismissed, and she thereupon brought the present suit under section 283.

The District Munsif dismissed the suit, but, on appeal by the present respondent, the District Judge, without going into the

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merits, set aside the District Munsif's decree and passed a decree in the respondent's favour on the simple ground that the defendant (now appellant) is estopped from setting up Subbayyan's right, because it is *res judicata* by the order (F).

He explains, it was then decided that Subbayyan had no claim to the property and the suit brought by the then claimant against that order was dismissed. Subbayyan himself did not contest the order, and it is now too late for him to do so, more than a year having elapsed since it was made, and, that being the case, the defendant can have no right to attach the property as Subbayyan's, while Subbayyan himself has lost his right to it.

Even assuming that the fact of Subbayyan having had notice of his daughter-in-law's claim in 1884 is sufficient to make him a party, against whom that order was passed, and to debar him or his legal representatives from now denying the respondent's right to the house, I am unable to agree with the District Judge in holding that the appellant is equally bound by that order, to which she was no party; and the mere fact of her being the creditor of Subbayyan is not sufficient to constitute her his legal representative. Her suit is, therefore, not affected by section 283 of the Code of Civil Procedure or by the limitation of one year prescribed for such suits.

Without considering, therefore, whether Subbayyan or his son would or would not be barred by the order (F) from disputing the respondent's right to the house in question, I am clearly of opinion that the appellant is not barred by that order.

I would therefore allow this appeal, and, setting aside the Lower Court's decree, remand the case to the Lower Appellate Court for replacement on the file of appeals and disposal according to law.

I would further direct respondent to pay appellant's costs of this second appeal.

MUTTUSAMI AYYAR, J.—I am also of opinion that the claim is not *res judicata* either by reason of the order (F) or of decree in suit No. 331 of 1885. To neither the present defendant Gnanambal was a party, and, though the plaintiff was a party, that circumstance is not sufficient to create the identity of parties necessary to sustain the plea of *res judicata*, as there is no mutuality, and, as without mutuality, there can be no estoppel. Assuming that both Subbayyan and his son were parties to the order (F) and

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that neither could now sue to set it aside, the present defendant is not under the same disability. Though she attached it as the property of Subbayyan or his son, she did so, not as their privy or representative, but by virtue of a right inherent in her to attach what was really their property at the date of attachment. It would be open to her to show that Subbayyan and his son were in collusion with the plaintiff. There is nothing on the record to indicate that the notice of claim was served on Subbayyan's son. However this may be, the defendant is not their representative. This circumstance distinguishes this case from the cases cited by the District Judge.

I therefore concur in the order proposed by my learned colleague.

APPELLATE CIVIL.

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

1892. April 11, 12.

AMMOTTI HAJI (PLAINTIFF), APPELLANT,

v.

KUNHAYEN KUTTI (DEFENDANT), RESPONDENT.*

Malabar law—Ottidar, right of pre-emption of—Waiver—Election not to purchase.

An ottidar in Malabar loses his right of pre-emption if he refuses to bid at a Court-sale of the land comprised in his otti, held in execution of a decree against the karnavan and senior anandravan of the tarwad, in which the jenm right is vested, after having been specially invited to attend and exercise that right, and makes no offer to take the property for a long time after the Court-sale.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 432 of 1891, affirming the decree of V. Kelu Eradi, District Munsif of Pynad, in original suit No. 163 of 1891.

Suit by an ottidar, alleging that the lands comprised in his otti had been purchased by the defendant for a sum of Rs. 161 at a sale held in execution of a decree against the jenmi, and praying for a declaration that the jenm right should vest in him on payment by him to the defendant of the sum of Rs. 161. It appeared that a notice had been sent to the plaintiff at the date of the sale, calling on him to exercise his right of pre-emption, and

* Second Appeal No. 1772 of 1891.

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that the plaintiff attended the sale but did not make any bid. The Lower Courts passed decrees dismissing the suit.

The plaintiff preferred this second appeal.

Sankaran Nayar for appellant.

Sankara Menon for respondent.

MUTTUSAMI AYYAR, J.—The question for decision in this appeal is whether an otti-holder in Malabar loses his right of pre-emption in consequence of his refusal to bid at a Court-sale on the invitation of the purchaser at such sale. The contention for the appellant is that he abstained from bidding, because he was under the apprehension that the junior members of the judgment-debtor's tarwad might contest the validity of the Court-sale on behalf of their tarwad. The decision must, I think, depend on the further question how far an invitation to bid at a Court-sale is equivalent to an offer to sell from the jenmi or the real owner. There is no reason to doubt that, if the decree is binding on the tarwad, the otti-holder is bound to elect either to bid at the Court-sale, or to relinquish his right of pre-emption. In the present case, the decree was one against the karnavan and the senior anandravan of the tarwad, and, as such, it was *primâ facie* binding on the tarwad, and no valid ground of objection is shown by the appellant to have existed to the validity of the sale in its execution as against the tarwad. It is then said that appellant abstained from bidding, because he feared that some members of the judgment-debtor's tarwad might contend that the decree was not binding on it. The decree-holder had a right to bring the property to sale, and the otti-holder had a right of pre-emption. All that the former was bound to do was to give the latter an opportunity to elect either to exercise his right or not, and, if the latter did not choose to do so, he must be taken to have relinquished his right. The facts found do not indicate that he made any inquiry, or had a reasonable objection to the decree being treated as one binding on the tarwad. The case is one of election, and the Court-sale created a necessity for appellant's electing either to buy or not to buy, and, after once electing not to buy, he cannot again be permitted to change his mind and assert his right for pre-emption. I am of opinion that this second appeal must fail and be dismissed with costs.

BEST, J.—The question is whether the Lower Courts are wrong in holding that plaintiff has forfeited the right of pre-emption

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which he possessed as ottidar of the property which was purchased by the respondent on its being sold by Court in execution of a decree for money obtained by a third party against the jenmi.

The findings of the Lower Courts are (1) that notice was sent by the decree-holder to the appellant of the date of the sale, calling upon him to exercise his right of pre-emption if so minded, and (2) that appellant was himself present at the sale, but would not bid, saying that the otti to himself was given by nine persons of the tarwad, whereas the decree, under which the sale was being held, was against two only, and that he was afraid there might be a suit by the others to set aside the sale.

It was no doubt held in *Cheria Krishnan* v. *Vishnu*(1) that the mere fact that the *public notice* was given of the intended sale, at which therefore the ottidar might have come and bid was not sufficient to deprive him of his right of pre-emption. That does not appear, however, to be a case in point, for here there was something more than the public notice. There was special notice sent to the ottidar himself; and it is found, as a fact, that he was present at the sale and declined to bid for fear his doing so might involve him in litigation.

It appears that the validity of the sale is in fact disputed, but without success, and it is only after this that appellant comes into Court, offering to purchase the property in the exercise of his right of pre-emption.

It was held by the Calcutta High Court in *Abdul Jabel* v. *Khelat Chandra Ghose*(2) that, when property is sold by public auction at a sale in execution of a decree and the person having a right of pre-emption has the same opportunity to bid for the property as other parties present in Court, the law of pre-emption does not apply. This is certainly not quite in accordance with the *dictum* in *Cheria Krishnan* v. *Vishnu*(1) "that the pre-emptor is entitled to be fully informed what price he is to pay before he makes up his mind to pay and should not be driven to give any fancy auction price at an auction." But even taking this *dictum* to be authority for holding that appellant did not forfeit his right of pre-emption by not bidding at the auction, as soon as the auction sale ended, the price for which the property had been

(1) I.L.R., 5 Mad., 198. (2) 1 B.L.R., A.C., 105.

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knocked down was a "sum ascertained" for which he could have offered to take the property, instead of waiting for nearly a year without even making the offer.

No doubt the Limitation Act gives a period of one year for the purpose of *instituting a suit to enforce* a right of pre-emption, but the question before us is not whether the suit is in time, but whether, by his conduct, the appellant waived his right. Both the Lower Courts have found that he did, and I agree with them.

I therefore agree in dismissing this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramanya Ayyar and Mr. Justice Best.

1892. February 12.

UKKANDAN (PLAINTIFF), APPELLANT,

v.

KUNHUNNI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Malabar law—Karnavan, disqualification for office of—Blindness.

A blind man sued, as the karnavan of a Malabar tarwad, to recover certain land. One of the defendants, who claimed but was not admitted to be a member of the tarwad, and who asserted a right as kanomdar to the land in question, pleaded that the plaintiff was not competent to act as karnavan, or consequently to maintain the suit by reason of his blindness:

Held, that the defendant was not entitled to raise this plea.

SECOND APPEAL against the decree of J. P. Fiddian, Acting District Judge of North Malabar, in appeal suit No. 303 of 1890, affirming the decree of V. Kelu Eradi, District Munsif of Pynad, in original suit No 82 of 1890.

The facts of the case are stated above sufficiently for the purposes of this report. The Lower Courts dismissed the suit, holding that the plea of the defendant, above referred to, should prevail.

The plaintiff preferred this second appeal.

Ryru Nambiar for appellant.

Sankara Menon for respondents.

JUDGMENT.—The decision in *Kanaran* v. *Kunjan*(1) goes no further than that a blind man is not a fit person to be karnavan

* Second Appeal No. 644 of 1891. (1) I.L.R., 12 Mad., 307.

UKKANDAN v. KUNHUNNI.

of a tarwad against the wishes of the other members of the tarwad. The reason given is that the ruin of the tarwad would be the likely result. It is therefore for the members of the tarwad to object to such a man being their karnavan and not for strangers. Defendant No. 2, who has raised the objection in the present case, no doubt, claims to be a member of the tarwad, but this claim of his is denied by the plaintiff; and other members of the tarwad have put in a petition, recognising plaintiff as their karnavan, and asking that the suit may be proceeded with in his name. If defendants desire, these petitioners might also be included as plaintiffs in this suit. The mere fact of plaintiff's blindness does not appear to be a valid ground for dismissal of the suit. The decrees of both the Lower Courts are, therefore, set aside and the suit remanded for replacement on the file of the District Munsif and disposal according to law.

Plaintiff's costs in the Lower Appellate Court, and in this Court, must be paid by second and third defendants. The rest of the costs incurred hitherto will follow and abide the result.

APPELLATE CIVIL.

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

1892. April 25. May 4.

AYYAPPA (DEFENDANT'S REPRESENTATIVE), APPELLANT,

v.

VENKATAKRISHNAMARAZU (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, *s.* 3—*Registered zamindar—Zamindari held in coparcenary.*

A registered holder of a zamindari sued under the Rent Recovery Act to enforce the acceptance of a patta and execution of a muchalka by the defendant, a tenant on the estate. It was pleaded, in defence, that the zamindari was the undivided property of the plaintiff and his coparceners in whose name a patta and muchalka had already been exchanged:

Held, that the plaintiff, as being the registered zamindar, was entitled to maintain the suit alone.

SECOND APPEAL against the decree of H. T. Ross, District Judge of Godavari, in appeal suit No. 429 of 1880, reversing the decision

* Second Appeal No. 1079 of 1891.

AYYAPPA v. VENKATA-KRISHNAMA-RAZU.

of J. Walker, Acting Head Assistant Collector of Godavari, in summary suit No. 18 of 1890.

Suit under the Rent Recovery Act to enforce the acceptance of a patta and execution of muchalka by the defendant. The plaintiff was the registered zamindar of Gundepalli. The defendant admitted that he was a tenant of the zamindari, but stated that the plaintiff was a member of an undivided family, together with three other persons, and that the defendant had already accepted patta and executed a muchalka made out in the names of the plaintiff and his two coparceners. It appeared that the patta in question in the present suit had been duly tendered by the defendant. The Head Assistant Collector dismissed the suit, and his decision was reversed by the District Judge, who found that the relation of landlord and tenant was subsisting between the parties to the suit.

The defendant having died, his legal representative preferred this second appeal.

Sankaran Nayar for appellant.

Bhashyam Ayyangar and *Venkataramayya Chetti* for respondent.

JUDGMENT.—We think that the Acting District Judge was right in holding that the plaintiff, as the registered zamindar, had a right under Act VIII of 1865 to compel defendant to accept a patta. The decision in *Valamarama* v. *Virappa*(1) is an authority for the proposition that in a zamindari the only zamindar is the registered zamindar, and we do not think that, upon this point, the authority of that decision has been shaken by the decision in *Subbu* v. *Vasanthappan*(2). In a zamindari the only landholder entitled to proceed under Act VIII of 1865 against the tenants of the zamindari must be the zamindar, and the only zamindar for the time being is the registered zamindar.

We dismiss this second appeal with costs.

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(1) I.L.R., 5 Mad., 145. (2) I.L.R., 8 Mad., 351.

APPELLATE CIVIL.

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

1892. March 10, 11.

KANNAMMAL (PLAINTIFF), APPELLANT,

v.

VIRASAMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Evidence Act—Act I of 1872, s. 115—Estoppel by conduct—Hindu Law—Adoption.

A Hindu widow, professing to have authority from her husband to do so, took the second defendant in adoption, brought him up as her adopted son, and permitted him to perform the funeral ceremonies of her husband. Land to which she otherwise would have been entitled was attached in execution of a decree against defendant No. 2. She now sued to release the attachment, alleging the adoption was bad, as having been unauthorized:

Held, that the plaintiff was estopped from raising this contention.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, confirming the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in original suit No. 95 of 1883.

Suit to release from attachment property which had been attached by defendant No. 1 in execution of a decree obtained by him against defendant No. 2. Defendant No. 2 claimed to be the adoptive son of the plaintiff, and it was admitted that if he had been validly adopted by her, which she denied in this suit, alleging that she had no authority from her husband to make the adoption, her claim must fail.

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

Plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Desikachariar* for appellant.

Krishnasami Ayyar for respondent No. 1.

Subramanya Ayyar for respondent No. 2.

JUDGMENT.—The only question which had to be decided in this suit was that of estoppel. It is not denied that the plaintiff did represent to the parents of the second defendant in 1876 that she had the authority of her husband to adopt; that

* Second Appeal No. 260 of 1891.

acting upon the belief that such representation was true, they gave the second defendant in adoption; and that the plaintiff then brought up the second defendant as her adopted son, and, as such, married him to the girl of her choice, and as her adopted son he, for years, performed funeral ceremony of her husband. Having so acted, she cannot now be heard to deny that the adoption was valid. We have been referred to the decisions in *Chitko* v. *Janki*(1) and *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai*(2), in both of which it was held that the conduct of the person who actively participated in the adoption estopped him from disputing the validity of the adoption. It seems to us that this is just such a case as section 115 of the Evidence Act was framed to meet, and we are unable to assent to the argument of the appellant's pleader that estoppel only refers to cases of contract.

This second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

1892. April 13.

SUBBAN (DEFENDANT No. 1), APPELLANT,

v.

ARUNACHALAM (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, s. 85—Parties to a mortgage suit—Objection in written statement as to non-joinder.

In a suit by a mortgagee against two of his three mortgagors, the defendants objected in their written statement that the suit was bad for non-joinder of the third mortgagor, and also alleged that subsequent encumbrances on the mortgage premises had been created with the concurrence of the plaintiff. It appeared that the third mortgagor, as a witness, renounced interest in the greater part of the mortgage premises. On second appeal:

Held, that the suit should be remanded to the Court of First Instance for disposal after joinder of the third mortgagor and the subsequent encumbrancers.

SECOND APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Madura (West), in appeal suit No. 661 of 1890,

(1) 11 Bom. H.C.R., 199. (2) I.L.R., 11. Bom., 381.

* Second Appeal No. 1477 of 1891.

SUBBAN v. ARUNACHALAM.

confirming the decree of K. Rangamannar Ayyangar, District Munsif of Dindigul, in original suit No. 336 of 1890.

Suit to recover principal and interest due upon a mortgage, dated 17th October 1885 and executed to the plaintiff by the defendants, Nos. 1 and 2, and their brother, Lakshumanan Chetti. The plaintiff alleged that Lakshumanan Chetti had paid a sum of money on account of his share for the secured debt and prayed for a personal decree against both defendants, Nos. 1 and 2, and, in default, for the sale of the property comprised in the mortgage.

The defendants, among other pleas, objected that the suit was bad for the non-joinder of Lakshumanan Chetti, and alleged that they had created further charges on the property with the assent of the plaintiff subsequent in date to the mortgage sued on.

The District Munsif passed a personal decree against the defendants and provided for its realization by the sale of their interest in the mortgage premises. His decree was affirmed on appeal by the Subordinate Judge, who said, with reference to the plea of non-joinder,—

"Under section 85, Transfer of Property Act, plaintiff should "have made Lakshumanan Chetti a defendant, since he had an "interest in the mortgaged property. This Act is to be read as "part of the Contract Act, and, therefore, he should have been "made a defendant strictly speaking. I find, however, from the "record, that he was examined as defendants' third witness, and, "he says, that he has no interest in the items of property mort-"gaged, save item 4. Plaintiff might have been refused the right "to sell this property, but I see no warrant for absolutely dismiss-"ing the suit in the circumstances disclosed. At best, the decree "for sale of item 4 may not bind Lakshumanan Chetti.

"It is said in appeal that the subsequent encumbrancers should "have been made parties to the suit. It appears from the evi-"dence of plaintiff and other witnesses that some properties were "sold or mortgaged with plaintiff's consent to others and the sums "realized were received by plaintiff. He would and could not, "therefore, proceed against such portions of the property as were "mortgaged or sold with his concurrence."

Defendant No. 1 preferred this second appeal.

Bhashyam Ayyangar and *Thiruvenkatachariar* for appellant.

Krishnamachariar for respondent.

JUDGMENT.—We think that, under section 85 of the Transfer of Property Act, it is necessary to make Lakshumanan Chetti a party, as he has an interest in the property comprised in the mortgage, even though the plaintiff may not ask for a personal decree against him. He is, at any rate, interested in item 4.

The subsequent encumbrancers must also be made parties unless the items of property sold or mortgaged to them have been excluded from the properties against which plaintiff seeks a decree. It may be that sales or mortgages made with plaintiff's concurrence have excluded such items from liability, but, if so, they must be excluded from the suit. It is not clear that such is the case. The decrees of the Courts below must be reversed and the suit remanded to the Court of First Instance for disposal.

We will give the appellant the costs of this appeal and the other costs will abide and follow the result.

APPELLATE CIVIL.

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

1892. March 23.

SAMBAYYA AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

GOPALAKRISHNAMMA (PLAINTIFF), RESPONDENT.*

Practice—Variance between pleadings and proof—Relief not asked for.

The plaintiff, alleging that a certain lane was his property and that he had been obstructed by the defendants from building a door upon it, sued for an injunction and for damages. The Court held that the plaintiff's title to the land was not established, but passed a decree declaring that both the plaintiff and the defendants were entitled to use the lane by right of easement:

Held, that this declaration, which had not been asked for, should not have been made, and that the suit should have been dismissed for want of proof of the title alleged by the plaintiff.

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 468 of 1890, reversing the decree of Y. Janakiramyya, District Munsif, Ellore, in original suit No. 17 of 1890.

* Second Appeal, No. 1026 of 1891.

SAMBAYYA v. GOPALA-KRISHNAMMA.

The plaint stated that a certain lane was the property of the plaintiff, who had erected the frame of a door across it, and that the defendants wrongfully removed the door frame, and prayed for an injunction and for damages. The District Munsif dismissed the suit, on the ground that the lane was not the property of the plaintiff. On appeal, the Subordinate Judge upheld this finding, but passed a decree, declaring that the plaintiff and defendants had both a right of easement over the lane, and decreed "that they should use it only as a passage, in such a way as they may not interrupt each other from using it."

The defendants preferred this second appeal.

Gopalasami Ayyangar for appellants.

Venkatarama Sarma for respondent.

JUDGMENT.—The suit brought by respondent was for restraining the appellants from obstructing him in raising a door across the lane in dispute, on the ground that the lane was his exclusive property.

The Subordinate Judge has found that the lane does not belong to the respondent.

Instead of dismissing the suit on that finding, he has declared that both plaintiff and defendants have rights of easement by long use over the lane, and has decreed that neither party should interfere with the other in the exercise of this right.

In a suit brought to establish a right of ownership of property, it is not competent to the Court to enter into, and decide the question of right to an easement over the same.

Though, as observed in *Virasvami Gramini* v. *Ayyasvami Gramini*(1), the Courts are bound to take into consideration all the rights of the parties to a suit, both legal and equitable, and give effect thereto by their decrees, as far as possible, they are not at liberty to grant a relief either not prayed for in the plaint, or that does not naturally flow from the ground of claim as stated in the plaint.

Neither the pleadings nor the issues in the present case suggest a right of easement and the parties cannot be fairly presumed to have proceeded to trial with reference to such right.

We therefore set aside the decree of the Subordinate Judge and restore that of the District Munsif, without prejudice, however, to plaintiff's right to establish his claim of easement, if any by fresh suit.

Respondent will pay appellants' costs of this appeal, and also in the Lower Appellate Court.

(1) 1 M.H.C.R., 477.

SAMBAYYA v. GOPALA-KRISHNAMMA.

APPELLATE CIVIL.

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

1892. April 11.

CHATHU (DEFENDANT No. 3), APPELLANT,

v.

VIRARAYAN (PLAINTIFF) RESPONDENT.*

Limitation Act—Act XV of 1877, *s.* 19—*Acknowledgment in writing—Evidence Act—Act I of* 1872, *ss.* 65, 91—*Secondary evidence.*

Limitation Act, s. 19, must be read with Evidence Act, ss. 65 and 91, and does not exclude secondary evidence in cases where such would be admissible under s. 65.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 911 of 1889, reversing the decree of T. V. Anantan Nayar, District Munsif of Calicut, in original suit No. 531 of 1888.

Suit to recover possession of certain lands with arrears of rent. The District Munsif held that the claim was barred by limitation and dismissed the suit. His decree was reversed, on appeal, by the Subordinate Judge, who passed a decree as prayed, holding that the suit was not barred by reason of an acknowledgment in writing, which had been filed as exhibit VIII in a previous suit. This document was not filed in the present case, and it appeared to be in the possession of defendent No. 3. Secondary evidence of its contents, however, was given upon which the Judge relied.

Defendent No. 3 preferred this second appeal.

Mr. *D'Rozario* for appellant.

Sankara Nayar for respondent.

JUDGMENT.—It is conceded that, if secondary evidence of the contents of the document filed as exhibit VIII in original suit No. 747 of 1878 on the file of the District Munsif of Calicut is

* Second Appeal No. 1121 of 1891.

CHATHU v. VIRARAYAN.

admissible under section 19 of the Limitation Act, the present claim will not be barred, but it is contended that, on the true construction of paragraph 2 of section 19, such evidence is not admissible, even though the document may be lost, destroyed or even withheld by the opposite party. We are unable to accept this contention. We agree with the Calcutta High Court for the reasons mentioned in *Shambhu Nath Nath* v. *Ram Chandra Shaha*(1), that section 19 of the Limitation Act must be read with sections 65 and 91 of the Evidence Act and that it does not exclude secondary evidence of contents of documents in cases in which such would be admissible under section 65.

This second appeal fails therefore and is dismissed with costs.

APPELLATE CIVIL.

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

1892. March 6, 30.

ANANDA RAZU (PLAINTIFF), APPELLANT,

v.

VIYYANNA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, *sched. II, art.* 120—*Suit for the apportionment of assessment on land.*

In a suit by the holder of one share against the holders of other shares in inam land, included in a single patta and assessed in an entire sum, for apportionment of the assessment, it appeared that the plaintiff had asked for the apportionment to be made more than six years before suit:

Held, that the suit was not barred by limitation.

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 436 of 1890, confirming the decree of V. Krishnamurthi, District Munsif of Tanuku, in original suit No. 114 of 1890.

The plaintiff and the defendants were the holders of various shares of land comprised in a single patta, on which an entire sum was assessed by way of kattubadi. The plaintiff now sued for an apportionment of this assessment. It appeared that more than six years before suit, the plaintiff had asked for such apportionment,

(1) I.L.R., 12 Cal., 267.

* Second Appeal No. 965 of 1891.

ANANDA RAZU v. VIYYANNA.

and, on this ground, both the Lower Courts held that the suit was barred.

The plaintiff preferred this second appeal.

Bashyam Ayyangar for appellant.

Venkataramayya for respondents.

JUDGMENT.—The question for decision in this appeal is whether the Lower Courts are wrong in dismissing the suit as barred by article 120 of schedule II of the Limitation Act. The suit was brought for the apportionment of kattubadi and quit-rent payable on the land in possession of the plaintiff.

Plaintiff's case is that of an entire area of 164 acres charged with Rs. 516-6-6 as kattubadi and quit-rent. He is in possession of 128·92 acres as purchaser from, and of 7·32 acres as tenant under eighth defendant, that defendants Nos. 2 to 7 are in possession of the remainder in several portions as purchasers, that the average amount payable for each acre is Rs. 3-2-4½, but that defendants Nos. 1 to 5 have been paying less than the amount so calculated on the acres 18·22 in their possession, which has, in consequence, been levied from plaintiff since 1882. Hence this suit to have the kattubadi and quit-rent apportioned in the several shares and for the recovery of the excess amount of Rs. 55-5-3 (at Rs. 18-7-1 per annum) levied from plaintiff during the three faslis immediately preceding the suit, and interest thereon.

First defendant disclaimed all interest in the property in question and defendants Nos. 6, 7 and 8 supported the plaintiff's claim, while defendants Nos. 2 to 5 pleaded that the apportionment was rightly made by the Head Assistant Collector in August 1881 on the taram rent or sists of the lands, and that they have been paying accordingly ever since, and no fresh apportionment is necessary. They further pleaded that the suit is time-barred, as the Lower Courts have found. Hence this appeal.

We do not agree with the Courts below that the claim for apportionment is barred by limitation. The parties to the suit hold distinct portions of the inam, subject to payment of the kattubadi under one and the same inam patta. Their position is therefore analogous to that of joint pattadars, who have to bear a common burden as between themselves and Government. So long as the joint liability lasts, each is entitled to claim an apportionment and such claim can no more be time-barred than can a claim for rent so long as the title to the land is not extinct. If the order of the

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Head Assistant Collector, referred to by the defendants, was made under any legal authority, and could as such, be held to be binding, it might bar the suit, but we are not referred to any legal enactment which would justify our treating the order as being conclusive. The mere fact that such an order was made can have no greater force than the expression of an opinion by a revenue officer.

The decision in *Durga Pershad* v. *Ghosita Goria*(1) is only authority for the proposition that article 120 of schedule II of the Limitation Act is applicable to a suit by a tenant against his landlord for apportionment of the rent payable to such landlord for the portion of land obtained by him on partition, out of what had theretofore been held by the tenant under all the co-shares jointly.

The present is not a suit between tenant and landlord, but by a proprietor against other proprietors for apportionment of the assessment on lands included in a single patta. The decision in *Durga Pershad* v. *Ghosita Goria*(1) is therefore not in point.

In allowance of this appeal, we set aside the decrees of both the Courts below and remand the suit to the District Munsif for replacement on his file and disposal according to law.

The costs of this appeal and in the Lower Appellate Court will be paid to the plaintiff by defendants Nos. 2 to 5.

APPELLATE CIVIL.

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

1891. Dec. 10, 11. 1892. February 24.

KUNJI AMMA AND OTHERS (PLAINTIFFS Nos. 2 to 5, 7 to 15, 17 to 19, 22 to 47), APPELLANTS,

v.

RAMAN MENON AND OTHERS (DEFENDANTS Nos. 5, 7, 3, 8 to 60), RESPONDENTS.*

Civil Procedure Code, s. 13—"Res judicata"—*Court of competent jurisdiction—Act X of* 1877, *s.* 433—*Suit against a Sovereign Prince.*

A suit for a declaration of the title of the plaintiffs' tarwad to certain land was filed in a District Court against the Maharaja of Cochin and others, including the

(1) I.L.R., 11 Cal., 284.

* Appeal No. 156 of 1890.

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trustees of a devasom. It appeared that the same land was the subject of suit instituted in a Subordinate Court on the 6th August 1877, to which the representatives of both the plaintiffs' tarwad and the devasom were parties, and that the land was then found to be the property of the devasom and a decree was passed accordingly. It was contended that the present claim was not *res judicata* by reason of that decree, because, under the provision of Act X of 1877, s. 443, which came into operation during the pendency of that suit, no Sovereign Prince could be sued in any Court subordinate to a District Court, and the Court which passed that decree was not therefore "a Court of jurisdiction competent to try" the present suit within the meaning of Civil Procedure Code, s. 13:

Held, that, although these words must be taken to refer to the jurisdiction of the Court at the time the suit was heard and determined, yet the present claim was *res judicata* since the title to the land was a matter in issue within the cognizance of the Subordinate Judge and was adjudicated on by him.

APPEAL against the decree of L. Moore, District Judge of South Malabar, in original suit No. 2 of 1883.

Suit against the Maharaja of Cochin and others for a declaration that certain land was the property of the plaintiffs' tarwad and for other reliefs.

In 1874, the then karnavan of the plaintiffs' tarwad, executed a kychit to the Vadakunathan devasom, whereby he acknowledged property now in suit to be the jenm of the devasom. The plaintiffs now alleged that this kychit was executed in fraud of their tarwad and was not binding on it. In original suit No. 28 of 1877, on the file of the Subordinate Court, Calicut, a suit was brought against the then karnavan of the plaintiffs' tarwad on the footing of this document and a decree obtained on behalf of the devasom. Act X of 1877 came into operation during the pendency of that suit. Defendants Nos. 1, 2 and 3 in this suit were the successors in office of plaintiffs Nos. 1 and 2, in the suit of 1877, and the plea was now raised that the present claim was *res judicata* by reason of that decree. This contention was upheld by the District Judge who dismissed the suit.

The plaintiffs preferred this appeal.

Ramachandra Ayyar for appellants.

Sadagopachariar and *Sankaran Nayar* for respondents.

JUDGMENT.—The only question we are called upon to determine in this appeal is whether the Court, which tried original suit No. 28 of 1877, was competent to try the present suit within the meaning of section 13 of the Civil Procedure Code.

Original suit No. 28 of 1877 was a suit instituted in the Court of the Subordinate Judge on behalf of the Vadakunathan

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devasom to recover certain property from the family of the plaintiffs in the present suit. The main question for decision in that suit, as it is in the present suit, was whether the land in suit was the jenm of the devasom or of the tarwad to which the plaintiffs belong. That was a suit on behalf of the devasom, this is a suit against the devasom. It is argued that, inasmuch as the Raja of Cochin is a party-defendant in the present suit, the Subordinate Court, which tried original suit No. 28 of 1877, was not "a Court of jurisdiction competent to try" the present suit, and that therefore section 13 has no application.

Original suit No. 28 of 1877 was instituted in the Subordinate Court on the 6th August 1877, but it was not heard and determined until January 1878. Act X of 1877 came into force on the 1st October 1877, and, by section 433, it was enacted that a Sovereign Prince or ruling chief could not be sued in any Court subordinate to a District Court. It is in consequence of this provision of law that the present suit was instituted in the District Court.

It has been argued that, as, at the time when original suit No. 28 of 1877 was instituted, there was no provision of law which prohibited the entertainment of a suit against a Sovereign Prince by the Subordinate Court, the present suit was one which might have been instituted in the Court of the Subordinate Judge. The words of section 13 are "Court of jurisdiction competent to try such subsequent suit," and we are of opinion that the only reasonable construction, which can be placed upon these words, is that they must be held to refer to the jurisdiction of the Court at the time when the suit was heard and determined. This is also the view of the Calcutta High Court in *Gopi Nath Chobey* v. *Bhugwat Pershad*(1) and *Raghunath Panjah* v. *Issur Chunder Chowdhry*(2).

Are we then to hold that, because, the Subordinate Court was not competent to entertain the present suit by reason of the Raja at Cochin being a party-defendant, it is not a Court of jurisdiction competent to try such within the meaning of section 13? We think not. Those words have been interpreted by their Lordships of the Privy Council to mean a Court having concurrent jurisdiction with the Court trying the subsequent suit, whether as regards the

(1) I.L.R., 10 Cal., 697. (2) I.L.R., 11 Cal., 153.

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subject matter of the suit or the pecuniary limits of its jurisdiction. *Misir Raghobardial* v. *Sheo Baksh Singh*(1).

It is not and cannot be contended that the Court of the Subordinate Judge has not concurrent jurisdiction with the District Court, both as regards the subject matter of the present suit and the pecuniary limit of its jurisdiction, for the jurisdiction both of the District Judge and of the Subordinate Judge extend to all original suits and proceedings of a civil nature (section 12, Act III of 1873).

It is the "matter in issue" in the suit that forms the essential test of *res judicata* (*Pahlwan Singh* v. *Risal Singh*(2)). The matter in issue in the present suit, viz., the title of the tarwad or of the devasom was one within the cognizance of the Subordinate Court, and, it having been decided in the former suit, we do not think that the plaintiffs are entitled, by merely adding the Raja of Cochin as a party-defendant, to call upon the District Court to decide an issue which has already been decided by a Court of concurrent jurisdiction.

We are fortified in this opinion by the ruling of the Privy Council, in the case of *Soorjomonee Dayee* v. *Suddanund Mohapatter*(3).

That was a judgment with reference to the second clause of Act VIII of 1859 which corresponded with section 13 of the present Act. Their Lordships were of opinion that the term cause of action in that section was to be construed with reference rather to the substance than to the form of action.

This appeal therefore fails and must be dismissed with costs.

(1) I.L.R., 9 Cal., 439. (2) I.L.R., 4 All., 55. (3) 12 B.L.R., 304.

APPELLATE CIVIL.

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

1891. October 29. 1892. March 2.

VENKATARAGHAVA (PLAINTIFF), APPELLANT,

v.

RANGAMMA (DEFENDANT), RESPONDENT.*

Civil Procedure Code, s. 13—"Res judicata"—*Court of competent jurisdiction—Hindu law—Power of guardian to alienate land—Compromise of litigation.*

In 1882, the daughter of a deceased Hindu brought a suit in the Court of a District Munsif for a declaration that the defendant was not the adopted son of her father (deceased) as he claimed to be. It was found that the alleged adoption was valid and the suit was dismissed.

The then defendant now brought, in 1889, a suit in the same Court to recover possession of land from the then plaintiff, alleging that it had been wrongfully transferred to her by way of gift by his adoptive mother. The defendant denied the adoption and asserted that the transfer was valid as having taken place in accordance with an arrangement made by her father in his lifetime. It was admitted that the value of the whole property, to which the plaintiff was entitled by virtue of his adoption, if it was a valid adoption, exceeded Rs. 2,500.

The Court of First Appeal held that the question of the adoption was not *res judicata*, and observed that the transfer to the defendant was apparently made to induce her to abandon her litigation as to the adoption:

Held, (1) that the defendant was not at liberty to question the plaintiff's adoption;

(2) that the Court should try whether the transfer was made *bonâ fide* by the plaintiff's mother as his guardian for his benefit.

APPEAL against the order of M. B. Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 208 of 1890, remanding for retrial original suit No. 184 of 1889 in the Court of the District Munsif of Ellore.

Suit to recover possession of certain land. The plaintiff alleged that, during his minority and after the death of his adoptive father, his adoptive mother, in fraud of his rights, conveyed the land by way of gift to the defendant, who was her daughter. The defendant pleaded, *inter alia*, that the plaintiff has not been validly adopted, and that the property had been delivered to her in accordance with an arrangement made by her father.

* Appeal against orde No. 131 of 1890.

The District Munsif held that the question of the plaintiff's adoption was *res judicata* by reason of the decree of his Court passed in a suit (original suit No. 315 of 1882) brought by the present defendant against the present plaintiff to declare the adoption invalid, in which the issue relating to the validity of the adoption was determined in favour of the present plaintiff. It was conceded that the whole property, to which the plaintiff would be entitled by right of his adoption, exceeded Rs. 2,500; and the District Munsif rested his decision partly on the ground that the then plaintiff was estopped from denying the competency of the Court to adjudicate on the matter. He further held that the alienation of the land to the defendant was invalid; and, on these findings, he passed a decree as prayed.

The Subordinate Judge, on appeal, held that the question of the adoption was not *res judicata*; and, as to the second point, he directed the District Munsif to try the following issue:—

"What are the circumstances which led plaintiff's adoptive mother to execute the deed of gift to defendant, and whether or not, she did so, in her capacity as a guardian for minor plaintiff."

The plaintiff preferred this appeal.

Subramanya Ayyar for appellant.

Bhashyam Ayyangar for respondent.

JUDGMENT.—This is an appeal from the order of remand made by the Subordinate Court of Ellore in appeal suit No. 208 of 1890. It is first urged that the Subordinate Judge erred in holding that respondent was at liberty to question the appellant's adoption, though it was upheld as between them in original suit No. 315 of 1882 on the file of the District Munsif of Ellore. We think that this objection must prevail.

In support of his opinion, the Subordinate Judge observes that, prior to the decision in *Ganapati* v. *Chathu*(1), there was an erroneous notion, even among District Munsifs, that a declaratory suit might be instituted, whatever was the value of the property to which it related, in the Court of a District Munsif, and that the respondent's ignorance of law on the subject was excusable, and relies further on the decision of the Privy Council, referred to in *Ganapati* v. *Chathu*(1), and on section 44 of the Indian Evidence Act.

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

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But we are unable to agree with the Subordinate Judge that ignorance of law is a valid excuse. Nor do we consider that the decision of the Privy Council has application in a case in which both the prior and the present suits were instituted in the Court of the District Munsif. As for section 44 of the Evidence Act, it does not exclude the operation of the doctrine of equitable estoppel. As plaintiff, the present respondent instituted original suit No. 315 of 1882 in the District Munsif's Court to set aside appellant's adoption and thereby put the Court into motion and the decision pronounced therein is conclusive as to the *factum* and validity of the adoption. The decision of the Subordinate Judge to the effect that respondent is at liberty to re-open the question in the present suit must be set aside.

Another objection taken in this appeal is that the Subordinate Judge was wrong in deciding that the present suit is not governed by the twelve years' rule. It was brought by the appellant to recover certain land from the respondent on the ground that, during his minority, his adoptive mother bestowed it in gift upon the latter, her daughter, without any necessity for so doing, and in view to benefit her at his expense. The right to sue having thus accrued during his minority, the statutory period is twelve years from the date of the gift, under section 7 of the Act of Limitation, unless it expires within three years from the date on which he attained his majority. In this point also the decision of the Subordinate Judge must be set aside and that of the District Munsif restored.

The next question considered by the Subordinate Judge is as to the validity of the gift made to the respondent. If, as observed by him, the transaction was substantially not a mere voluntary act, but one concluded *bonâ fide* by the appellant's mother, as his guardian, in view to adjust the litigation then pending about his adoption, it might be valid. It was, therefore, open to the Subordinate Judge to have stated an issue and remitted it for trial. The issue, however, referred by him must be amended by inserting the words "*bonâ fide*" after the words "did so," and the words "the benefit of" between the words "for" and "the minor plaintiff."

We set aside the order of remand and direct the Subordinate Judge to restore the appeal to his file and to remit for trial an issue amended as indicated above and to dispose of the appeal

with reference to the result of the finding thereon and on the eighth issue.

The respondent will pay the appellant the costs of this appeal.

APPELLATE CIVIL.

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

IBRAYAN KUNHI (PLAINTIFF), APPELLANT,

v.

KOMAMUTTI KOYA AND OTHERS, (DEFENDENTS), RESPONDENTS.*

1891. Sept. 2. 1892. April 7.

Civil Courts Act (Madras)—Act III of 1873, s. 12—Declaration of membership of a tarwad—Valuation for the purposes of jurisdiction.

The plaintiff, alleging that he was karnavan of the defendant's tarwad, sued in a Subordinate Court for a declaration that he was a member of it, adding no prayer for consequential relief. It appeared that the tarwad property exceeded Rs. 26,000, in value, but that the proportionate share of each member, computed as on an equal division, was less than Rs. 900. The Subordinate Judge held that the suit was within the jurisdiction of a District Munsif and rejected the plaint:

Held, that the order was wrong and should be set aside.

APPEAL against the order of C. Gopala Menon, Subordinate Judge of North Malabar, refusing to admit a plaint presented for a declaration that the plaintiff was a member of the defendant's tarwad, and a petition under Civil Procedure Code, s. 622, praying the High Court to revise his order.

It appeared that the tarwad possessed property worth Rs. 26,605 and that it comprised 30 members and it was alleged in the plaint that the plantiff was the karnavan of the tarwad. The Subordinate Judge held the suit was within the pecuniary jurisdiction of a District Munsif, and, on this ground, refused to admit the plaint and returned it for presentation in a proper Court, on the view that the suit should be valued for the purposes of jurisdiction as if it were for a share of the aliquot portion of the tarwad property, which would be allotted to the plaintiff if a partition were made by common consent.

Plaintiff preferred this appeal.

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* Appeal against Order No. 49 of 1890 and Civil Revision Petition No. 193 of 1890.

IBRAYAN KUNHI v. KOMAMUTTI KOYA.

Sankaran Nayar for appellant.

Desikachariar for respondent.

JUDGMENT.—The question, which we have to decide in these cases, is how is a suit brought by one of the members of a Malabar tarwad to obtain a declaration of his status as a member of that tarwad to be valued for purposes of jurisdiction. The tarwad concerned in this litigation consists of 30 members, including the plaintiff and the value of its property is Rs. 26,605. According to the Marumakkatayam usage, no member of a tarwad can enforce a partition of tarwad property at his pleasure, though such partition can be made with the consent of all its members. In the case before us, the Subordinate Judge held that the value of the share, which would ordinarily be allotted to the plaintiff if a partition were effected by common consent, viz., Rs. 886-13-4, was the value of the present suit and that he had no jurisdiction to entertain it, and, in support of his opinion, he relied on the decisions of the High Court in *Komappan* v. *Chathu*(1) and *Krishnan* v. *Chathu*(2). It is contended before us that tarwad property, not being partible, its aggregate value is the proper value of the suit and that the District Munsif was right in holding that he had no jurisdiction. Our attention is drawn to the case in *Ganapati* v. *Chathu*(3) in which it was decided that a suit brought to obtain a declaration of title to specific property should be instituted in that Court in which a suit to recover its possession ought to be filed on the ground of title. The point for consideration is what is the subject matter of the present suit, and what is its value within the meaning of section 12 of Act III of 1873. The status of a member of a Malabar tarwad carries with it four distinct rights, viz., (1) a right to be maintained in the tarwad house, (2) a right to see that tarwad property is not alienated otherwise than in accordance with law, (3) a right to become the tarwad karnavan, when he becomes the senior male member, and (4) a right to a share if a partition were made and the tarwad broken up by common consent. In the case before us the plaintiff sued as karnavan and the declaration he desires to obtain carries with it a recognition of his right to present possession of the tarwad property. It is therefore governed by the principle laid down in *Ganapati* v. *Chathu*(1). The plaintiffs in the cases on which the Subordinate Judge relies sued as mere anandravans, the first defendant in each case being the karnavan.

(1) Second Appeal No. 442 of 1883 unreported.
(2) Appeals Nos. 135 of 1885 and 131 of 1886 unreported.
(3) I.L.R., 12 Mad., 223.

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The order of the Subordinate Judge must be set aside and he must be directed to entertain the plaint and deal with it in accordance with law. The respondents will pay appellant's costs. No order as to costs in civil revision petition No. 193 of 1890.

PRIVY COUNCIL.

P.C.*
1892.
May 12, 13, and 31.

GAJAPATHI RADHIKA (PLAINTIFF),

and

VASUDEVA SANTA SINGARO (DEFENDANT).

[On appeal from the High Court at Madras.]

Appellant not allowed to raise in appeal a contention inconsistent with the case relied upon in the Courts below.

An appeal cannot be maintained upon a ground inconsistent with the case insisted on in the Courts below, notwithstanding that the new ground may be one that might have been brought forward, in the first instance, as an alternative.

In a suit between the widows of two brothers deceased, the plaintiff's title rested on this, that her and the defendant's late husbands, respectively, having been the sons of the same father, had, therefore, been sapindas to each other; so that the plaintiff as the widow of the one would be the heir of the other, expectant on the death of his widow. In this character she sued to have set aside an adoption made by the defendant. The Courts, however, found that the plaintiff's husband was an illegitimate son, and not a sapinda, and the suit was dismissed. The plaintiff, now appellant, on findings of fact that both the sons were illegitimate, urged that, though they could not inherit from their father, they yet could succeed to the estate of one another:

Held, that this contention was so inconsistent with the case made below that it was now inadmissible.

Sreemutty Dossee v. *Ranee Lalunmonee*(2) referred to and followed.

Also, the opinion had been expressed by the Court below that, by the law prevailing in Madras, a widow is not in the line of succession to her husband's male collateral relations.

(1) I.L.R., 12 Mad., 223.
(2) 12 M.I.A., 470.

* *Present*: Lords WATSON, HOBHOUSE and MORRIS, Sir RICHARD COUCH, and Lord SHAND.

GAJAPATHI RADHIKA v. VASUDEVA SANTA SINGARO.

APPEAL from a decree (16th April 1888) of the High Court affirming a decree (16th August 1886) of the District Judge of Ganjam.

The subject of this appeal was the inheritance of one half of the Tekkali taluk in the Ganjam district, formerly held by Padmanabha Deo as zamindar, the common ancestor of all the parties to the suit. He was of the Kshatriya caste. He died in 1832, leaving two illegitimate sons, Krishna Chandra, deceased in 1854, and Gopinadha, deceased in 1856. The right to the estate was adjudicated on by this Committee in 1870 in *Sri Gajapathi Radhika Patta Maha Devi Garu* v. *Sri Gajapathi Nilamani Patta Maha Devi Garu*(1). Each of the above sons left an illegitimate son. Gopinadha's son was Hari Krishna, whose claim to share in the estate was disallowed in the above appeal. Krishna Chandra's son was Brindavana, who was plaintiff in a suit against the same defendants that were sued in this, and the suits were heard together in the Courts below (*Brindavana* v. *Radhamani*(2)); but he had no concern in the present appeal.

S. G. Radhika, plaintiff in this suit, and now appellant, was the wife of Gopinadha. The defendants were S. G. Radhamani, wife of the late Krishna Chandra, and Vasudeva Santa Singaro, now respondent, whose adoption the plaintiff sought to set aside. Radhamani died in January 1890 pending this appeal. The suit was brought as that of the widow of one brother suing to have set aside the adoption made by the widow of another brother, and was based on her presumptive title to succeed as reversionary heiress, as soon as the death of the widow, to whose husband the plaintiff's husband had been a sapinda, should occur.

The state of things at the institution of the appellant's suit, on the 13th October 1885, appears in the judgment of the High Court given below, in which also the suit of Brindavana, brought on the 22nd September 1885, (claiming as reversionary heir to Krishna Chandra's estate) is referred to as appeal No. 148 of 1886 (2). In that suit it was found that Krishna Chandra was of illegitimate birth and an ugra by caste, and in the present suit that Gopinadha was also illegitimate, the evidence filed in the one having been received in the other.

(1) 13 M.I.A., 497. This was heard on an appeal from *Krishna Devi Garu* v. *Maha Devi Garu* (2 M.H.C.R., 369).
(2) I.L.R., 12 Mad., 72.

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The proceedings in the Courts below are stated in their Lordships' judgment.

That part of the judgment of the High Court, COLLINS, C.J., and MUTTUSAMI AYYAR, J., which does not relate only to the inquiry as to the facts, was as follows :—

"That Padmanabha Deo was a Kshatriya is a fact admitted "on both sides. Upon his death each of his sons alleged that "the other was illegitimate, and a disagreement arose between "them. This difference continued for several years, until it was "terminated by a compromise, whereby each agreed to take a "moiety of his father's estate. On that footing, an agreement "was made in 1838 between Gopinadha Deo on the one part and "Nila Patta Maha Devi on the other, the guardian of Krishna "Chandra, who was then a minor under her protection. Krishna "Chandra since attained his majority and the agreement was "ratified and supplemented in 1844 by the two brothers. The "appellant and the first respondent are both Kshatriyas by birth, "and they married respectively Gopinadha and Krishna Chandra. "The latter died in 1854, and the former did not long survive "him. The widows of neither of the brothers had legitimate "sons; but both brothers left illegitimate sons by their concubines. "After the death of the brothers, there was a dispute in the family "as to the right of succession, and the present appellant was "placed in possession of the whole estate by the Revenue "authorities as the widow of the survivor of the two brothers. "This led to litigation in the family, which commenced in 1861 "and ended finally in 1877. The result was that the rights of "the brothers were adjusted in accordance with the agreements "between them of 1838 and 1844: and that the first respondent "and her co-widow got Krishna Chandra's moiety, and the "appellant was left in possession of her husband's moiety. In "the course of that litigation, the High Court came to the con-"clusion that Gopinadha was illegitimate, but its decision rested "upon the terms of the compromise evidenced by the agreements "of 1838 and 1844. The Privy Council, in deciding the case, "observed, in advertence to the compromise, that it proceeded "on the basis of legitimacy, and that it effected a division of the "estate in two equal shares between the brothers. The history "of this family, and of the various stages of the dispute between

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"the brothers, is fully set forth in the decision reported in 13 "Moore's Indian Appeals, 497.

"Soon after 1877, the first respondent succeeded to the entire "moiety of the estate, which belonged to her husband, owing to "the death of her co-widow. In September 1879, she adopted "the second respondent, her brother's son, with the consent of five "of Padmanabha's sapindas. The suit which has given rise to "this appeal was instituted by the appellant to set aside the "adoption and to establish her right as reversioner. She alleged "that her husband and Krishna Chandra were the legitimate sons "of Padmanabha, and that she was entitled to succeed to the first "respondent as her nearest gnati. The respondents denied that "Gopinadha was legitimate, and contended that the adoption of "the second respondent was valid. The parties proceeded to trial "on three issues, viz., (i) Was Gopinadha a sapinda of Krishna "Chandra? (ii) If so, is Radhika, as sapinda, entitled to succeed "to Krishna Chandra? (iii) Is the adoption valid? The District "Judge decided the first and second issues against the appellant "and dismissed the suit with costs. It is urged in appeal (i) that "the respondents are estopped from denying the legitimacy "of Gopinadha; (ii) that it is established by satisfactory evidence; "(iii) that the appellant is entitled to bring this suit to set aside "the adoption.

"The principal question of fact which we have to determine "in appeal is whether Gopinadha and Krishna Chandra were the "legitimate sons of Padmanabha. In appeal suit No. 148 of 1886 "we have come to the conclusion that, although a Gandharva "marriage was alleged in 1834 to have taken place between "Padma Mala and Padmanabha, and some doubt was then enter-"tained by the Revenue authorities as to Krishna Chandra's "illegitimacy, yet, it was not shown that any marriage took "place, and that even if a Gandharva marriage took place, it was "not a valid marriage. As regards Gopinadha the antecedent "facts of the case show that from 1834 he was regarded by Pad-"manabha's family and the Revenue authorities as illegitimate."

The Judges then went through the evidence, and stated that the appellant's pleader desired in the Court below that the evidence taken in No. 148 should be taken in this case. And they added:— "The conclusion to which we come is that

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"Gopinadha was the illegitimate son of Padmanabha. It is "then said by the appellant's pleader that after the decision of "the Privy Council in 13 Moore's Indian Appeals, 497, the "respondents are estopped from denying Gopinadha's legitimacy, "and he relies on the observation made in that case that the "compromise evidenced by the agreements of 1838 and 1844 "proceeded on the basis of legitimacy. But the Judicial Com-"mittee observed that 'Whether both sons were legitimate, or only "one was legitimate, and to whichever of the two that status "might really attach, was a question no longer material to the "consideration in the rights devolving to persons taking under "that compromise or family settlement by which the status "assumed was to be taken as the real status of the family.' It "is clear that the observation was made with reference to persons "claiming under the compromise and rights founded upon it, while "the present claim is based on Hindu Law and depends on the "actual relationship between Gopinadha and Krishna Chandra as "sapindas. The assumed status was the real status only for the "purpose of carrying out the provisions of the compromise, and no "further, and the contention as to estoppel cannot be supported. "Even on the view that both Gopinadha and Krishna Chandra "were legitimate, the appellant must fail. According to the "Mitakshara Law as administered in this presidency, a brother's "widow is not in the line of heirs, and as to the contention that the "appellant is a Gotraja sapinda and therefore Krishna Chandra's "reversionary heir, it was already decided by the Full Bench of "this Court in *Mari* v. *Chinnammal*(1), that the wives of collateral "male relations who are Gotraja sapindas are not in the line of "heirs under the Mitakshara. It is also in evidence in the cognate "case that five persons authorized the adoption of the second by the "first respondent as the sapindas of Padmanabha, and though some "witnesses in this case say that they are so remote that no pollution "is observed with reference to them, their evidence is by no means "satisfactory. If there are, then, sapindas of Padmanabha, the "appellant cannot claim as a bandhu or a remote relation.

"We are, therefore, of opinion that this appeal cannot be sup-"ported, and dismiss it with costs."

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

(1) I.L.R., 8 Mad., 126.

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the facts as found by the Courts below, relied upon them as supporting the argument that the brothers Gopinadha and Krishna Chandra being precluded by their illegitimacy from inheriting by descent, could, nevertheless, succeed to one another's estate. It was a just inference that they were on an equality, and it had been found in the case of their cousin Brindavana that a son born as they had been belonged to an intermediate caste, lower than that of their father, but higher than that of their mother. The caste assigned to the son of a Kshatriya by a Sudra woman was termed ugra as stated in the judgment in *Brindavana* v. *Radhamani*(1). The general principle of the law on this subject was that the illegitimate sons of the man of high caste took by succession collaterally to one another as brothers, though not inheriting from their father. The High Court had, by finding the facts, supplied the appellant with a title to succeed, as the only reversionary heir, through her late husband, to the deceased Krishna Chandra, although the High Court had not applied the law appropriate to the case. It was submitted that this should be done now. It could hardly be said that the question involved a contradiction of what had been raised below, for the contention had been that the plaintiff was in the line of heirs as the wife of a Gotraja sapinda, or at least as a bandhu of Krishna Chandra. It certainly would be nothing new that, although consistency with what had been raised by the pleadings and proceedings below must be observed, this Committee should act upon a view of the law not presented to the Courts in India. As to adherence to the facts put forward and the questions raised by the pleadings, and what was open in appeal, reference was made to *Bank of New South Wales* v. *O'Connor*(2), *Eshen Chunder Singh* v. *Shamachurn Bhutto*(3), and *Collector of Trichinopoly* v. *Lekkamani*(4).

Mr. *R. V. Doyne*, for the respondent, was not called upon.

Afterwards, on May 31st, their Lordships' judgment was delivered by Lord HOBHOUSE.

JUDGMENT.—The only question on which their Lordships have heard any argument is whether the appellant, who is the plaintiff in the suit, shall be permitted to open a case which she did not

(1) I.L.R., 12 Mad., 72.
(2) L.R., 14 Ap. Ca., 273.
(3) 11 M.I.A., 7.
(4) L.R., 1 I.A., 282.

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bring before either the Court of First Instance or the Court of Appeal below. The material facts are as follows.

Padmanabha, talukdar of Tekkali, had two sons by different women. The plaintiff is the widow of one of them named Gopinadha. The first defendant, Radhamani, is the widow of Krishna the other son, and the second defendant is a boy whom Radhamani has purported to adopt. The plaintiff alleges that the adoption is invalid, and that, as the widow of Gopinadha, she is the heir of Krishna, subject to his widow's interest. She has brought this suit to set aside the adoption. It is plain therefore that she cannot obtain a decree unless, setting aside the adoption, she would stand next to Radhamani in the line of succession to Krishna.

For the defence it is alleged that Krishna and Gopinadha were not sapindas to one another. Krishna, as the defendant has pleaded, was the son of a Kshatriya woman married to Padmanabha, who was himself a Kshatriya, whereas Gopinadha was born to Padmanabha by a woman of some inferior caste.

On these pleadings issues were settled, the first being whether Gopinadha was a sapinda of Krishna. The District Judge found that Gopinadha was of illegitimate birth, and therefore was not a sapinda, and on that ground he dismissed the suit. He did not come to any finding on the other issues in the suit; but he intimated an opinion adverse to the plaintiff on the question whether she could claim to succeed to the collaterals of her husband.

The plaintiff appealed to the High Court, insisting on the legitimacy of her husband, but the High Court agreed with the District Judge on this point. They also expressed an opinion that, by the law prevalent in Madras, a widow is not in the line of succession to her husband's male collaterals. The appeal therefore was dismissed.

Connected with this suit, both in the original Court and in the High Court, was another suit to set aside the adoption, brought by one Brindavana, an illegitimate son of Krishna, claiming to be his heir according to the law applicable to the Sudra caste. The plaintiff was no party to this suit, but the defendants were the same as in her suit. The two were tried simultaneously, and the evidence in one was admitted in the other.

In Brindavana's suit the District Judge found that Krishna

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was not a Sudra, and that an illegitimate son could not succeed to him, and on appeal the High Court took the same view. That view, of course, was fatal to the suit, which was dismissed. The High Court also expressed an opinion that Krishna was an illegitimate son of Padmanabha, a point which does not appear to have been put directly in issue, but which was discussed as incidental to the question of caste, and was treated by the District Judge as of no moment and not requiring a decision. They further held that the adoption was lawful and valid.

As the plaintiff's case has been opened on this appeal, she now takes the ground that if, as has been conclusively decided, her husband was illegitimate, so also it has been held by the High Court that Krishna was illegitimate, and her Counsel contend that the two illegitimate sons, neither of whom could inherit from their father, can yet inherit from one another.

Their Lordships will assume for the present purpose that the plaintiff is entitled to avail herself of the finding of the High Court in Brindavana's suit to establish the illegitimacy of Krishna. And of the legal inference which is put forward, as they have not heard the argument for it, they will only say that it does not command assent at first sight. But they do not further examine it, because they think that the appeal cannot be maintained on a ground so inconsistent with all the previous proceedings in the case.

In both the Courts below, and indeed up to the moment when her case was lodged in this appeal, the plaintiff has been insisting on the legitimacy of her husband and his brother. It may be conceded that she might originally have framed her case in the alternative, so as to claim heirship if the disputed issue of legitimacy was decided against her. Then the case would have been tried with reference to that contention, and all facts ascertained, and researches into the law conducted accordingly. Possibly she might, on application to the High Court, have obtained some indulgence enabling her to amend the record and try the question. Mr. Mayne has urged that the question he submits is one of pure law, which he says this Committee may decide upon the facts found by the Courts below. No doubt there are cases in which the Court of Appeal will entertain questions of law not argued below, but which are raised by the facts stated in the pleadings. It is impossible to lay down any precise rule for

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such cases. But Mr. Mayne could not, after time for search, find any case in which this Committee had allowed a plaintiff to rest his appeal upon a legal theory never presented to the Courts below, and rested on a state of facts inconsistent with the facts on which he had previously rested his case. In the judgment of this Committee in *Sreemutty Dossee* v. *Ranee Lalunmonee*(1) it is said :—"Their Lordships cannot but feel that it would be "most mischievous to permit parties, who had had their case upon "one view of it fairly tried, to come before this Board, and to "seek to have the appeal determined upon grounds which have "never been considered, or taken, or tried in the Court below. "It is obvious that if they wished to make the case which they "now make they would, by their answer, have put the case in "the alternative."

Indeed in cases of this kind, which may involve subtle and difficult questions of personal status, it is not easy to say what matters of fact would have to be ascertained for the proper decision of each proposition of law. One may be specified. There is no issue and no finding by either Court as to Gopinadha's caste. And yet it is impossible to suppose that the question whether two brothers can inherit from one another, because they are equal in point of illegitimacy, could be properly tried without knowing how they stand relatively in point of caste. It is indeed clear that to lay down a rule of inheritance between rival claimants without a trial of the case in view of that rule may involve serious risk of miscarriage.

But even viewing the question as one of abstract law, the rule now propounded is of a very peculiar kind, so unfamiliar as not to have occurred to the plaintiff's advisers in India, though they must have been quite awake to the possibility that both brothers might be found illegitimate. It is part of a law of inheritance confined to Hindus; perhaps, if we may judge by the utterances of the Courts below, confined to Madras, and certainly varying with the caste of the persons concerned. It is not right that Her Majesty in Council should be asked to decide such a point without any assistance from the Courts in India.

It is clear to their Lordships that this new contention cannot properly be heard by them on this appeal: and, considering the

(1) 12 M.I.A., 470.

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length of this litigation, and the fact that another appeal is awaiting the result of this one, it would be wrong to give the plaintiff any indulgence by way of amending the record.

They will humbly advise Her Majesty to dismiss the appeal, and the appellant must pay the costs.

Appeal dismissed.

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

Solicitors for the respondent—Messrs. *Pemberton & Garth*.

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