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THE INDIAN LAW REPORTS.

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CONTAINING

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AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT.

REPORTED BY

Privy Council	...	...	...	C. BOULNOIS, <i>Middle Temple.</i>
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Puisne Judges.

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

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APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Napier.

J. KRISHNA ROW, APPELLANT,

v.

THE PRESIDENT, MUNICIPAL CORPORATION, MADRAS,
RESPONDENT.*

Madras City Municipal Act (III of 1904), sec. 150—"Kept," meaning of—Vehicle under repair is one kept and taxable.

Even a vehicle that is under repair and therefore unfit for immediate use is a vehicle "kept" within the meaning of section 150 (1) of the Madras City Municipal Act (III of 1904) and so becomes liable to be taxed under that section. The word "kept" is not qualified by the words "for hire." It is not necessary that the owner should have possession of the vehicle in order to make it taxable.

CASE stated under section 176 of the Madras City Municipal Act (III of 1904) by C. B. N. PELLY, Chief Presidency Magistrate, Egmore, in Calendar Case No. 9747 of 1915.

The facts of this appear from the following letter of Reference of the Chief Presidency Magistrate, Egmore, to the High Court:—

"At the request of the President, Corporation of Madras, I have the honour to submit, under section 176 of the Madras City Municipal Act (III of 1904), the following case for the decision of the High Court:—

"A gentleman Mr. Krishna Row bought a motor-car in August 1914. Immediately after purchase, it was handed over to a firm of Motor-car Repairers, as it was not then in running order. It was returned to him after repair only on the 9th September 1914; on these facts, the Corporation assessed Mr. Krishna Row on his motor-car for the half-year ending 30th September 1914, viz., Rs. 25. This assessment was based on section 152(2) of the said Act which lays down that the tax shall be payable 'so soon as a vehicle has been for thirty days kept or let out for hire or used within the city.' The Corporation contends that the car having been purchased in August 1914 was kept for more than thirty days.

* Referred Case No. 5 of 1915.

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MUNICIPAL
CORPORATION.

On appeal, this Court held that to keep a car was something more than to own a car and that though Mr. Krishna Row owned the car from August 1914, he kept a car only from the 9th September 1914 when the car was handed over to him by the repairers.

If the interpretation placed by this Court on the expression 'to keep a vehicle or animal' is not upheld a further question raised by the appellant will have to be considered, i.e., whether it was the keeping of a car or the keeping for hire that is referred to in section 150 as a condition necessary for rendering a person liable to the tax.

A copy of the order passed by this Court on appeal is enclosed.

The necessary cost of reference will be deposited by the Corporation on intimation."

R. N. Ayyangar for the appellant.

P. Duraiswami Ayyar for the respondent.

AYLING, J.

AYLING, J.—In my opinion the three phrases "kept," "let out for hire" and "used" in section 150 of the Madras City Municipal Act are employed distinctively, and the word "kept" is not qualified by the words "for hire." If the mere possession of a car which is never used does not bring the possessor within the scope of section 150, it is difficult to imagine what is the object of the exemption clause, section 151 (f).

I can see no ground for holding that a car ceases to be "kept" within the meaning of section 150, because it is under repair and for that reason unfit for immediate use.

I would set aside the order of the Magistrates cancelling the tax and ordering refund.

NAPIER, J.

NAPIER, J.—I agree. Three points are argued. First, that a car under repair is not a vehicle. I cannot take this argument seriously. Second, that the word "kept" must be read with the words "for hire," and private persons who do not use for thirty days are not taxable. Section 151 (f) clearly negatives this argument. Thirdly, that as the owner had not the car in his possession, he was not "keeping." The section does not require the car to be in the possession of the owner. Any vehicle that is under some one's control is undoubtedly kept.

It has not been argued that if it was kept the owner need not pay and the argument would be impossible as long as the

owner had control—vide section 150 (2) of the Madras City Municipal Act. The assessment by the Corporation is correct.

N.R.

KRISHNA
ROW v.
MADRAS
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CORPORATION
NAPIER, J.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Phillips.

C. B. SWAMI CHETTY (DEFENDANT), APPELLANT,

v.

S. T. ETHIRAJULU NAYUDU AND ANOTHER MINOR BY
THEIR NEXT FRIEND AND BROTHER (PLAINTIFFS), RESPONDENTS*

1916.
April 4.

Registration Act (XVII of 1908), sec. 49—Mortgage by deposit of title-deeds—
Agreement to mortgage—Document, containing agreement to mortgage—
Registration of, if necessary—Admissibility of document for any purpose.

Where the plaintiff, who had executed a mortgage by deposit of title-deeds, executed a promissory note to the defendant and agreed that the latter should pay off the mortgage and recover the title-deeds from the mortgagee and retain them himself as additional security, and the terms of the agreement were embodied in two documents which were not registered.

Held, that the documents required to be registered and were inadmissible in evidence in respect of any of the terms contained therein under section 49 of the Registration Act (XVII of 1908).

Moore v. Culverhouse (1860) 27 Beav., 639; New v. Pennel (1863) 2 H. & M., 170, followed.

Kedarnath v. Shamloll Khettry (1873) 11 B.L.R., 405, distinguished.

APPEAL from the judgment of KUMARASWAMI SASTRIYAR, J., in Civil Suit No. 144 of 1914.

The plaintiffs had effected a mortgage by deposit of title-deeds with one Vijiarangam Pillai. Subsequently the plaintiffs executed two promissory notes in favour of the defendant and arranged with him that he should pay the amount of the note to the mortgagee and recover the title-deeds from the mortgagee and retain them himself as additional security for the amount due under the promissory notes. The abovesaid arrangement was embodied in two documents which were not however registered. The documents contained a provision for payment of compound interest in case the interest payable under the

* Original Side Appeal No. 56 of 1915.

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NAYUDU.

promissory notes was not paid every month as stipulated therein. The plaintiffs sued to redeem the mortgage on payment of the amount due under the promissory notes. The defendant pleaded *inter alia* that he was entitled to compound interest under the two later agreements. The learned Trial Judge held that the defendant was not entitled to compound interest as the documents were inadmissible in evidence for want of registration. The defendant preferred an appeal against the judgment of the learned Trial Judge.

G. S. Ramachandra Ayyar and T. Pattabhirama Ayyar for the appellant.

Dr. K. Krishna Pandalai for the respondents.

WALLIS, C.J.

WALLIS, C.J.—Exhibits V and VI both contain agreements about effecting an equitable mortgage by deposit of title-deeds. Similar documents have been held in England to affect land and require registration under the statute of 7 Anne relating to Middlesex in *Moore v. Culverhouse*(1), *Neve v. Pennel*(2). *Kedarnath v. Shamloll Khettry*(3) is distinguishable. The learned Judge was therefore right in holding that Exhibits V and VI required registration and were inadmissible under section 49 of the Registration Act, even as regards the stipulation for compound interest on the equitable mortgages.

The appeal is dismissed with costs.

PHILLIPS, J.

PHILLIPS, J.—The question for decision in this appeal is whether Exhibits V and VI are admissible in evidence although they are not registered. Plaintiffs had effected an equitable mortgage by deposit of title-deeds with a third party and then arranged with the defendant to pay off this mortgagee and to mortgage the property to him. They accordingly executed two promissory notes for the mortgage amount and executed the two agreements Exhibits V and VI. These documents set out the terms of the contract and authorized the defendants to receive the title-deeds from the previous mortgagee. There is further an agreement that the terms of the promissory notes should be modified by a provision for compound interest. There is no other evidence of agreement to pay compound interest and consequently defendant's claim thereto has been disallowed on

(1) (1860) 27 Beav., 639; s.c., 54 E.R., 254. (2) (1863) 2 H. & M., 170.
(3) (1873) 11 B.L.R., 405.

the ground that Exhibits V and VI are inadmissible in evidence. If Exhibits V and VI are to be excluded for want of registration, defendant cannot support his claim for compound interest. This question of whether a document executed contemporaneously with a mortgage by deposit of title-deeds requires registration is one not without difficulty and the answer depends upon the effect of the document, that is, whether it is a mere memorandum or narrative of facts constituting the mortgage or whether it sets forth the terms of the contract in such a way that the terms of the contract can be said to have been reduced to the form of a document (vide Shephard and Brown on Transfer of Property Act, page 255, and Ghose on Mortgage, page 158). That the distinction is a very narrow one is shown by the opposite conclusion arrived at in the cases reported in *Dwarkanath Mitter v. Sarat Kumari Dasi*(1) and in *Kedarnath v. Shamloll Khettry*(2). In the present case, however, I think that the facts of the case and the terms of Exhibits V and VI show that those documents are more than mere memoranda of facts. When the promissory notes were executed no deposit of title-deeds was effected and consequently the subsequent deposit cannot be connected with the loan without some connecting link of evidence and without that link there would be no evidence of a mortgage. That link is supported by Exhibits V and VI and it is really those documents which evidence the mortgage and it is only under them that the compound interest agreed to be paid becomes chargeable upon the property. Those documents accordingly purport to create a charge on and thus affect immoveable property and are consequently compulsorily registered. It is further contended that Exhibits V and VI should be treated as mere agreements to mortgage, but I cannot accede to this contention for after execution of Exhibits V and VI the mortgages were completed so far as the mortgagors were concerned and the mortgagors had no further act to perform nor document to execute to complete the mortgage. Being unregistered they are inadmissible in evidence and there is then no proof of defendant's claim to compound interest.

I agree in dismissing this appeal with costs.

Solicitors for the respondents—Messrs. Rencontre and Tirumalai Pillai.

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(1) (1871) 7 B.L.R., 55.

(2) (1873) 11 B.L.R., 405.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Phillips.

1916.
April 16 and
17.

P. RADHAKRISHNA MUDALIAR (DEFENDANT), APPELLANT,

v.

P. SUBRAYA MUDALIAR (PLAINTIFF), RESPONDENT.*

Indian Succession Act (X of 1865), sec. 50—Will of a marksman—Mark not affixed by the testator himself but by another, not a due execution—Absence of two attesting witnesses besides the person affixing the mark, not a due attestation.

Where with a view to execute a will the testator, who was a marksman, touched the pen and gave it to another who affixed to the will a mark and wrote against it the testator's name and added beneath it his own name as the person who affixed the mark, and the will did not contain attestations of two other persons besides that of the person so affixing the mark:

Held that the will was invalid as not complying with the provisions of section 50 of the Indian Succession Act.

As a *marked* will it was invalid, as the mark was not affixed by the testator himself, as required by the section.

Considered as a *signed* will, as it might be, it was equally invalid as the testator's signature was put by another and there were not two other attestors besides the one so signing.

APPEAL from the judgment and Order of BAKEWELL, J., in the exercise of the Ordinary Original Testamentary Jurisdiction of the High Court, in Testamentary Original Suit No. 2 of 1915, in Original Petition No. 110 of 1914.

This was a suit to obtain letters of administration with the will annexed in respect of a will alleged to have been executed on 7th January 1914 by one Papathi Ammal, the mother of the plaintiff. The will, after the usual preliminary and disposing clauses, concluded as follows:—

"This x the mark of Papathi Ammal.

This mark was taken by D. V. Doraiswami Aiyangar.

Witnesses.—Janakirama Mudaliar.

This was written by D. V. Doraiswami Aiyangar.

7th January 1914."

Overruling the objection of another son of the testator, the caveator, that the alleged will did not in law amount to a will,

Mr. Justice BAKEWELL held it by the following judgment to be a duly executed and duly attested will satisfying the requirements of section 50 of the Indian Succession Act:—

"The evidence as to the execution of the will is that the testatrix touched the pen and gave it to Doraiswami Aiyangar, the second witness for the plaintiff who put the mark and wrote 'This is the mark of Papathi Ammal. This mark was taken by D. V. Doraiswami Aiyangar.' This witness and one Janakirama Mudaliar were both present at the time and Janakirama Mudaliar signed his name on the will under the word 'சாட்சிகள்' (witnesses). Doraiswami Aiyangar also wrote at the bottom of the will 'This was written by D. V. Doraiswami Aiyangar, 7th January 1914.' It has been argued that the will was not properly executed by reason of the fact that the person who put the mark is also one of the witnesses and also on the ground that this man Doraiswami Aiyangar did not sign the will as an attesting witness. I think the fact that the testatrix touched the pen and gave it to Doraiswami Aiyangar for the purpose of marking it amounts to an affixture of her mark to the will. The words of the first clause of section 50 of the Succession Act are 'the testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.' I think that the placing of the mark upon the paper in her presence and by her direction is an affixture by her of her mark to the will within the meaning of section 50. The third clause of the same section provides that 'the will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator.' Those words show that if some person other than the testator signs the will on his behalf the execution by that person must be witnessed by two other witnesses, and it has been accordingly held in *In the matter of the petition of Hemlota Dabee* (1), that it is not sufficient if one of the attesting witnesses is the person who signed on behalf of the testator. The provision with regard to affixture of the mark is not the same as that with reference to the writing of the testator's signature by a third party. All that is necessary under section 50 is that the will should be attested by two witnesses each of whom must have seen the testator affix his mark to the will, or must have received from the testator a personal acknowledgment of his mark, and each of the

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witnesses must sign the will in the presence of the testator. I have already held that the testatrix did in fact affix her mark to the will. It is quite clear that each of the persons, Janakirama Mudaliar and Doraiswami Aiyangar, signed the will in her presence and the gesture of touching the pen and handing it to the witness is a sufficient acknowledgment by the testatrix of her mark. I think it is clear on the face of the will itself that both of these persons meant to sign as witnesses. In the first place the word 'witnesses' is in the plural, and secondly Doraiswami Aiyangar states specifically in the will that the mark of the testatrix was taken by him. I hold that the document propounded is the last will and testament of the testatrix and that she was of sound disposing mind at the time of its execution. Letters of administration will be directed to issue to the petitioner—plaintiff and the defendant will pay all costs of the suit."

T. R. Venkatarama Sastriyar with V. Raghunatha Sastriyar for the appellant.

The question in this case is whether the will in question is duly executed. Under section 50 of the Indian Succession Act when the will purports to bear a mark instead of a signature of the testator, the marking must be by the testator himself and not by any one else on his behalf. In this case somebody else has affixed the mark for the testator in the presence of the testator putting the name of the testator against the mark and signing his own name thereunder in token of his having affixed the mark. This is a case of signing a will by another and not of marking. If it is a case of signing by another then the will is invalid under section 50 of the Act as there are not two "other" persons who have seen the testator sign the will. The word "other" has been held to mean one other than the testator or the person who signs for the testator: see *Arabai v. Pestonji Nanabhai*(1) and *In the matter of the petition of Hemlota Dabee*(2).

C. V. Anantakrishna Ayyar with V. Sivaprakasa Mudaliar for respondent. The word "sign" in the last part of section 50 of the Indian Succession Act means something other than marking. If a third person signs for the testator then the two attesting witnesses must be different from the person who signs for the testator. But if a mark alone is put

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another for the testator, then the person who put the mark can be an attesting witness. I submit this case can be construed as one of marking by the testator. A man who used to sign every document by getting his servant to put his rubber stamp was held to have signed his testament himself, when his servant put his rubber stamp to the same: see *Nirmal Chunder Bandopadhyaya v. Saratmoni Debya*(1). Similarly the mark is the testator's even if it is put by another: *Wilson v. Beddard*(2) a case of marking by the testator aided by another.

[WALLIS, C.J.—That is not disputed; but there there was a marking by the testator though with another's assistance.]

This is the practice in India.

[WALLIS, C.J.—We can't construe a section wrongly to suit a practice.]

Handing the pen is equal to marking. See *Jarman on Wills*, Volume I, page 114, and *Fernandez v. Alveo*(3).

[WALLIS, C.J., referred to *Shamu Patter v. Abdul Kadir Ravuthan*(4). *Shamu Patter v. Abdul Kadir Ravuthan*(5) for the meaning of the word "attest."]

The cases under the English Wills Act (1 Vict., cap. 26, section 9) are collected in *Chitty's Statutes*, Vol. 15, under the heading of "Signature to wills." They show that an attesting witness in England can sign for the testator. See also *Krishnachar v. Vadichi Gounden*(6) which shows that handing over a pen to another to put a mark is execution. An attesting witness can mark: see *In the Goods of Wynne*(7). An initial amounts to signature—*Ammayee v. Yelumalai*(8).

[WALLIS, C.J.—There it was held that marking by an attester will not do.] I refer to *Mukta Nath v. Jitendra Nath*(9).

[WALLIS, C.J.—That is against you as in that case there was a contact of the testator's hand with the paper.]

Moreover there is an acknowledgment by the testatrix of her mark to the attestors.

[PHILLIPS, J.—No, that is not your case; the marking and attestation were all at the same time.]

(1) (1898) I.L.R., 25 Cal., 911. (2) (1841) 69 E.R., 1041; s.c., 12 Sim., 28.
(3) (1879) I.L.R., 3 Bom., 882. (4) (1912) I.L.R., 35 Mad., 607 (P.C.).
(5) (1908) I.L.R., 31 Mad., 215. (6) (1896) 6 M.L.J., 209.
(7) (1874) 13 B.L.R., 392. (8) (1892) I.L.R., 15 Mad., 281.
(9) (1916) 22 C.L.J., 262.

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The following judgment of the Court was delivered by WALLIS, C.J.—This is an appeal from a judgment of BAKEWELL, J., and raises a question of some importance as to whether under section 50 of the Indian Succession Act, when the testator is a marksman or unable to sign his name, his mark as distinct from his signature may be affixed by any one but himself. The Wills Act XXV of 1838, which in this respect reproduced the provisions of the English Wills Act of 1 Vict., did not contain any express provision as to signature by means of affixing a mark where the testator was unable to write but merely required the will to be signed “by the testator or by some other person in his presence and by his direction.” It was, however, well settled that under these provisions a testator unable to write might sign by affixing his mark. In section 50 of the Indian Succession Act, probably on account of the great number of illiterate people in India, it was thought desirable to provide expressly for execution by affixing a mark, and in that section three ways of execution are provided. “The testator shall (1) sign or (2) shall affix his mark to the will or (3) it shall be signed by some person in his presence and by his direction.” And it is next provided “The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.” It is expressly provided that it is the testator who is to affix his mark, and while the section goes on to provide for the will being signed by some other person in his presence and by his direction, there is no corresponding provision about the testator’s mark being affixed by some other person in his presence and by his direction. Further the language of the following rule as to “the signature or mark of the testator, or the signature of the person signing for him” clearly shows that what was contemplated was that the mark should be affixed by the testator himself. As already mentioned this section for the first time contained a separate provision for execution by affixing a mark, and the decisions on the Statute of Frauds and the Wills Act, according to which affixing a mark was a mode of signature, are therefore inapplicable. It was, in our opinion, clearly the intention of the Legislature that to satisfy the provisions of the section as to execution by affixing a mark the mark must be affixed by the testator himself. We are therefore with great respect unable to

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agree with the learned Judge that the placing of the mark upon the paper in the presence of the testatrix and by her direction is an affixture by her of her mark to the will within the meaning of section 50. In *Nirmal Chunder Bandopadhyaya v. Saratmoni Debya*(1) all that was decided was that the affixing by a servant of the testator under his direction of the name stamp of the testator was a signature by some other person in the testator’s presence and by his direction, and not the affixing of a mark, and there is nothing in the case to suggest that the learned Judges considered that the affixture of a mark at the direction of the testator would be sufficient. In *Mukta Nath v. Jitendra Nath*(2), it was held that the section was sufficiently complied with where the mark was actually affixed by the testator though with the assistance of another person, but there the testator took an active part in affixing the mark. In this case according to the finding of the learned Judge the testatrix touched the pen and gave it to Doraiswami Aiyangar who wrote in Tamil :

This mark × Papathiammal.

This mark taken. —

D. V. Doraiswami Aiyangar.

This may amount to a signature by some other person in her presence and by her direction within the meaning of the section, and if attested by two witnesses other than the signatory would be sufficient, but the mere handing the pen to Doraiswami Aiyangar who affixed the mark in her presence is not, in our opinion, an affixture of her mark by the testatrix such as is required by the section. It is said truly that touching the pen and handing it to some one to sign for one is a very common form of signature in this Presidency, but this cannot affect the construction of the section, and in the recent attestation case *Shamu Patter v. Abdul Kadir Ravuthan*(3), with reference to this and similar sections their Lordships of the Judicial Committee observed that they could not agree with what had been said by the learned Judges of another High Court regarding the policy of placing a larger construction on the word “attest” in consequence of the social institutions of the country. This observation appears to apply equally to the present case.

(1) (1898) I.L.R., 25 Cal., 911.

(2) (1916) 22 C.L.J., 262.

(3) (1912) I.L.R., 35 Mad., 607 (P.C.).

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If the signature, as distinct from the mark of the testatrix, is taken to have been affixed by Doraiswami Aiyangar in her presence and by her direction, the will fails for want of due attestation, as the section requires that the will should be attested by two or more witnesses each of whom must have seen the testator sign or affix his mark, or have seen some other person sign the will in the presence and by direction of the testator. The language of the section is perfectly plain, and it is unnecessary to refer to decided cases to show that the person who signed by direction of the testator cannot be one of the two attesting witnesses required by the section. The appeal is allowed and the suit and the petition dismissed with costs throughout.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

1916.
July 14.

THE KING-EMPEROR, APPELLANT,

v.

MUSA AND ANOTHER, ACCUSED.*

*Madras Towns Nuisance Act (III of 1889), sec. 3 (10)—“Gaming” and
“public place,” meaning of.*

The accused in this case held for stakes a game called “Ring” in an open space in the compound of a Hindu temple. In convicting the accused under section 3 (10) of the Madras Towns Nuisance Act (III of 1889) on the grounds that the place was a public place and the game was a game within the meaning of the above section as it was played for stakes,

Held: (a) “Gaming,” generally and in section 3 (10) means “playing for stakes;”

(b) a public place is one where the public go whether they have a right to or not; it is sufficient to constitute a place a public one even if only a section of the general public such as Hindus have a right to go to it;

and (c) The character of the game as one of skill or chance is not material under the section

Hari Singh v. Jadu Nanian Singh (1904) I.L.R., 31 Cal., 542, followed.

APPEALS under section 417 of the Code of Criminal Procedure (Act V of 1898) against the acquittal of the abovenamed accused

* Criminal Appeals Nos. 658 and 659 of 1915.

by A. SAMUEL PILLAI, the President of the Bench of Magistrates of Coimbatore, in Summary Cases Nos. 957 and 958 of 1915.

The accused who was the proprietor of a game called “Ring play” conducted it in an open space within the compound of a Hindu temple in the town of Coimbatore at a festival held therein; and on a prosecution for gaming he was acquitted of the charge of gaming in a public place, an offence punishable under section 3 (10) of the Madras Towns Nuisance Act by the Bench of Magistrates of the town of Coimbatore on the grounds that the game was mainly one of skill and not of chance and that the place was not a public place. The Public Prosecutor thereupon preferred this appeal to the High Court.

The game was played as follows :—On a flat or slanting table covered with a cloth coins such as a rupee, half rupee, quarter rupee and two-anna pieces are pasted at some distance from each other. Players wishing to secure one or other of these coins are to buy rings from the proprietor of the game at three pies a ring and if any ring thrown by a player from a distance of about three yards from the table encircles any coin, the coin is won.

C. Sidney Smith for the Public Prosecutor for the Crown. The accused was not represented.

OLDFIELD, J.—The accused have been acquitted on a charge OLDFIELD, J. of an offence punishable under section 3 (10), Act III of 1889, because the lower Court was not satisfied on two points, that (1) the game was a game of chance, not skill and (2) it was being played in a place of public resort.

As regards the second point, the lower Court was moved by the fact that only a section of the general public, the Hindu community, has a right to go to the place and that others can go there only with the permission of the Dharmakarthas of the adjoining temple. It is in evidence that the place, a small open space, is in no way closed by gates or otherwise; and there is no evidence that the Dharmakarthas’ alleged right of exclusion is ever exercised. The definition of a public place as one where

Section 3 of Madras Towns Nuisance Act III of 1889 runs as follows :—

Whoever in any public street, road, thoroughfare or place of public resort commits any of the following offences shall be liable on conviction to fine not exceeding fifty rupees or to imprisonment of either description not exceeding eight days.

(10) “Whoever is found gaming with cards, dice, counters, money or other instruments of gaming or publicly fighting cocks or taking part in such gaming or cock-fighting.”

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the public go, whether they have a right to or not, in *R. v. Wellard*(1) has been adopted in this country. *Hari Singh v. Jadu Nandan Singh*(2). In accordance with it, the lower Court's decision on this point cannot be sustained.

The description of the game played given in the lower Court's judgment is not demurred to by the Public Prosecutor or the accused, who unfortunately is not represented. There is then the finding that the game is one of skill, since the only element of chance in it is constituted by the possibility, which enters into almost all games, that an unskilful player may occasionally be successful. Such a finding was no doubt treated as decisive in accused's favour in *Hari Singh v. King-Emperor*(3). But those proceedings were under Bengal Act II of 1867, by section 10 of which games of mere skill are excepted from the general prohibition; and it is therefore unnecessary to consider the validity of the further distinction drawn in *Ram Newaz Lal v. Emperor*(4) that the skill in question is that of two competing parties, not, as here, that employed by the competitors against the accused, by whom the game was carried on. The real objection to this part of the lower Court's decision is that the character of the game as one of skill or chance is not material under Act III of 1889, with which we are concerned.

Section 3 (10) of that Act under which these proceedings are taken renders liable any person found in a public place "gaming with instruments of gaming"; and the question is what "gaming" includes. It has not been shown that the expression can be interpreted, simply etymologically, as equivalent to "playing a game." In the Imperial Dictionary, it is defined as "to use cards or other instruments according to rules with a view to win money or other things waged upon the issue of the contest"; and in Murray's Dictionary (1901), as the action of "playing at games for stakes." It is clear from these citations that the existence of a stake, not the character of the game as one of skill or chance, is regarded as constituting the distinction between playing a game and gaming. And this is supported by legal authority. No doubt Wharton's Law Lexicon defines "gaming" as the act or practice of playing and following any game, particularly those of chance; and in

(1) (1884) 14 L.R., Q.B.D., 63.
(3) (1907) 6 C.L.J., 708.

(2) (1904) I.L.R., 31 Cal., 542.
(4) (1914) 23 I.C., 484.

the Indian cases already referred to and in English cases decided under 36 and 37 Vict., cap. 38, section 3, for instance *Redgeway v. Famdale*(1) the presence of an element of chance was treated as material. But that was because of the explicit reference to it or to skill in the statutes in question. The English cases, moreover, such as *Fielding v. Turner*(2) which were decided under 17 and 18 Vict., cap. 38, section 4, do not assist us, because they deal with "unlawful gaming." We have, however, an Indian case—*Ram Pratap Nemani v. Emperor*(3)—in which the meaning of "gaming" pure and simple was in question, its definition as "playing at any game for money, which is staked on the result of the game, i.e., which is to be lost or won according to the success or failure of the person, who has staked. So also in *Hari Singh v. Jadu Nandan Singh*(4) where the distinction between gaming and betting was in question and the game had been held to be one of chance, STEPHEN, J., incidentally distinguished "gaming" from mere card playing or racing according as they were or were not accompanied by stakes or betting on the result. I respectfully adopt the view taken in these cases.

The fact that accused paid the players after they had been successful, and did not stake before they played, cannot affect his responsibility, since he induced them to play on an implicit understanding that he would pay, if he lost. I must accordingly hold that he was found "gaming" and convict him of an offence punishable under section 3 (10) of Act III of 1889. The Public Prosecutor does not press for a substantial sentence. Accused will pay a fine of Re. 1 or will, in default, suffer one day's simple imprisonment.

SADASIYA AYYAR, J.—I entirely agree with the judgment just now pronounced by my learned brother though I add a few observations on the points raised in the case and especially with reference to the character of an ordinary Hindu temple; section 8, clause (10) of the Madras Towns Nuisances Act III, of 1889 provides penalties for "gaming with cards, dice, counters, money or other instruments of gaming in any public street, road, thoroughfare or place of public resort."

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(1) (1892) 2 Q.B., 309.

(2) (1903) 1 K.B., 866.

(3) (1912) I.L.R., 39 Cal., 968.

(4) (1904) I.L.R., 31 Cal., 542.

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In Webster's Dictionary revised in 1864, I find "game (v.i.)" is given three meanings: (1) "To play at any sport or diversion, (2) to play for a stake or prize; to use cards, dice, billiards or other instruments, according to certain rules with a view to win money or thing waged upon the issue of the contest; (3) to practise playing for money or some other stake; to gamble." If the first definition is taken then "gaming" need not involve the idea of any stake or prize. But the English language is not a stationary language, and according to Murray's Dictionary, the word "game" when used as a verb seems always to involve the idea of the winning or the losing of a stake or prize as the result of the game. I therefore take it that the word "gaming" in Act III of 1889 is used in the sense of playing a game for a stake or a prize or for money or other thing waged upon the issue of the game.

Another question is whether the word 'game' and its verbal grammatical forms necessarily involve the idea of chance wholly or to a larger extent than skill. I do not think that the question of chance or skill enters into the connotation of the verb.

As regards *Emperor v. Ahmad Khan*(1), *Hari Singh v. King-Emperor*(2) and similar cases, they seem to turn upon the language of Acts from the operation of whose provisions games of "mere skill" are excluded. Hence they throw no useful light on the meaning of the word "gaming."

In the present case, the game in question is a modification of what is called the "ring game" and, as I said above, it is immaterial whether the game is a game of mere skill or whether it is a game of combined skill and chance whichever predominating. Games of mere chance are comparatively very few, even in a throw of dice long practice might probably introduce an element of skill. I am inclined to think on the evidence in this case that the game in question is more a game of chance than of skill.

As regards the nature of the place, where the game in dispute was carried on, that is, whether it was a place of public resort, that phrase occurs also in the Madras City Police Act III of 1888 and it was held in *Crown Prosecutor v. Moonosamy*(3) that a licensed arrack shop is a place of public resort. And it has

(1) (1912) I.L.R., 34 All., 98.

(2) (1907) 6 C.L.J., 708.

(3) (1910) I.L.R., 33 Mad., 83.

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been also decided that an open space to which the public has easy access is a "public place" within the meaning of section 159 of the Indian Penal Code: see *Hari Singh v. Jadu Nandan Singh*(1). In *High Court Proceedings No. 1140, dated 5th August 1879*(2), the entrance to a Hindu temple was decided to be a public place. I shall assume that the place in dispute in this case is part of the compound of a Hindu temple, and not part of the street. Even so, I think it is a place of public resort though other religionists might be excluded from its precincts, just as a mosque can be called a place of public worship though only Mussalmans are allowed to enter it to pray therein. It is not necessary, I think, that every member of the public should have a right of access to a place in order to make it a place of public resort. Most Hindu public temples do not allow entrance to members of the depressed classes, but they do not in my opinion fall out of the category of public places and do not become private buildings on that account.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

VENKATA CHETTY (PLAINTIFF), APPELLANT,

v.

AIYANNA GOUNDAN (DEFENDANT), RESPONDENT.*

Evidence Act (I of 1872), sec. 116—Estoppel—Landlord and tenant—Tenant not let into possession by the landlord—Whether estopped from denying the landlord's title to the property.

Held by the Full Bench (Seshagiri Ayyar and Phillips, JJ., Abdur Rahim, Offg. C.J., dissenting), that a tenant who has executed a lease but has not been let into possession by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion.

(1) (1904) I.L.R., 31 Cal., 542.

(2) (1879) 1 Weir, 68.

* Second Appeal No. 2177 of 1914 (F.B.).

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Per ANDUR RAHIM, Offg. C.J.—A tenant who was let into possession is estopped from denying a landlord's title. A tenant who was not let into possession by the person seeking to eject him, is not estopped from denying the plaintiff's title; he may show that the title is in some third person or in himself. But the execution of a lease or payment of rent by the defendant is *prima facie* proof of the plaintiff's title which the Court dealing with the evidence will ordinarily treat as conclusive in his favour unless the fact is sufficiently explained. In most cases of this nature the presumption in favour of the plaintiff can only be displaced by the defendant showing that the attornment was made by him in ignorance of the plaintiff's title or was induced by fraud, misrepresentation or coercion.

SECOND APPEAL against the decree of K. SUNDARAM CHETTIYAR, the Acting Subordinate Judge of Coimbatore, in Appeal No. 56 of 1914, preferred against the decree of S. RANGASWAMI AYYANGAR, the District Munsif of Erode, in Original Suit No. 172 of 1912.

The facts of the case appear from the order of reference of COUTTS TROTTER, J.

K. V. Krishnaswami Ayyar for T. M. Krishnaswami Ayyar for the appellant.

V. C. Seshachariyar for the respondent.

This Second Appeal came on for hearing in the first instance before COUTTS TROTTER and SESHAGURI AYYAR, JJ., who delivered the following ORDERS OF REFERENCE to a FULL BENCH.

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COUTTS TROTTER, J.—In this case the plaintiff sued for the recovery of possession of lands and mesne profits. His case is that he purchased the suit lands from one Subbier, the former owner, under a sale-deed of 1909, and that the defendant was his tenant under a lease granted to him later in that year who has failed to pay rent or to quit upon notice. The defendant's case is that neither the plaintiff nor Subbier, his alleged vendor, had any title in the land, and that he himself and his brothers have been in adverse possession for over twenty years. The only other material fact is that at the end of 1909 the defendant brought a suit against the plaintiff seeking to have the lease set aside on the ground that he executed it by mistake and was induced to do so by the fraud or coercion of the plaintiff. That suit failed and was dismissed. It is admitted that the defendant was not put into possession by the plaintiff, but was rightly or wrongly in possession at the date when the lease was executed. The plaintiff alleges that since the defendant is his tenant under a lease, he is estopped from denying the title of the plaintiff, his lessor. The defendant's contention is that the principle that a tenant is estopped from denying his landlord's

title unless he surrenders possession only applies to cases where the tenant has been let into possession by the landlord, and that is the short point for decision.

Section 116 of the Indian Evidence Act is as follows:

No tenant, of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immoveable property.

The words "at the beginning of the tenancy" obviously do not conclude the matter, as a tenancy can have a beginning by many other methods than by the landlord's letting the tenant into possession, as by attornment or payment and acceptance of rent and the like. But there are undoubtedly decisions of this Court which appear to lay down the doctrine that the estoppel is confined to cases where the tenant was let into possession by the landlord. *Annayyan v. Chinnan*(1) and *Viswanadha Row v. Chinnakolandai Nainar*(2) seem to imply this and there is no doubt that in *Yerraguntla Seshacharlu v. Mukkumalla Chinniah*(3) it is expressly so decided. On the other hand, in *Ketu Das v. Surendra Nath Sinha*(4) a different view is taken. Without disrespect to the Madras decisions it must be said that the expressions of opinion contained in them are brief and the question is nowhere discussed at any length, whereas in *Ketu Das v. Surendra Nath Sinha*(4) there is a careful process of reasoning and the grounds of the decision are set out at length. I see no reason to suppose that section 116 of the Evidence Act intended to make a conscious alteration of the English law upon the subject, and I therefore propose briefly to examine some of English authorities. In *Gregory v. Doidge*(5) it was held that where tenant had attorned to his landlord in ignorance of the defect in the landlord's title, he might show that as he had come into possession under a former owner, the landlord to whom he had attorned had no title. Similarly in *Dood Harvey v. Francis*(6), PATTESON, J., laid down the law in these words: "that where a tenancy is attempted to be established by mere evidence of payment of rent, without any proof of an actual demise, or of the tenant's having been let into possession by the

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(1) (1910) I.L.R., 33 Mad., 366.

(3) (1914) 25 I.C., 721.

(5) (1826) 3 Bing., 474; s.c., 130 E.R., 593.

(2) (1914) 1 L.W., 197.

(4) (1903) 7 C.W.N., 598.

(6) (1837) 2 Moody and Rob., 57.

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person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent, and to show on whose behalf such payment was received." In *Cooper v. Blandy*(1), TINDAL, C.J., said: "It is not pretended here that any other person is entitled to the rent; and after two successive tenants, under whom the plaintiff comes into possession, have admitted the defendant's title, we are called upon to say he has none. Before calling on us to come to any such conclusion the plaintiff should at least show that he paid the rent to the defendant by mistake, and that some other person is entitled to receive it." The law is well summarized in the judgment of CAVE, J., in *Carlton v. Bowcock*(2). In the course of that judgment he says as follows: "A tenant of a house who pays rent to one who claims to be assignee of the reversion is not estopped from denying the title of the assignee in the same way that he is estopped from denying the title of his lessor by whom he has been let into possession. Receipt of the rent is *prima facie* evidence of title as assignee of the reversion of the person to whom it is paid; but the tenant may show, if he can, that there is a third person who is in fact the assignee of the reversion and that he paid the rent by mistake or in ignorance of the facts relating to the title." Again later, "I think the conclusions to be drawn from these cases are: (1) that where a person claiming to be assignee of the reversion obtains payment of rent from the tenant by fraud, or misrepresentation, such payment is no evidence of title, but that receipt of the rent is *prima facie* evidence of title where there is no such fraud or misrepresentation, (2) that where rent is paid by the tenant under such circumstances as to amount to *prima facie* evidence of title, the person receiving the rent is in as good a position as if he were actually in possession" (*id est* by the tenant) "and that although it is open to the tenant to prove, if he can, that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion, yet he must show such a title in that third person as would entitle him to a verdict in ejectment, and that it is not enough to show that the person to whom the rent was paid has no title, his receipt of the rent being sufficient until a better title is shown." Of course

(1) (1834) 1 Bing. (N.C.), 45; s.c., 131 E.R., 1034. (2) (1884) 51 L.T.N.S., 659.

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the case of a tenant executing a lease is on exactly the same footing as that of a tenant who has paid rent. The result of the English authorities then seems to be this: Where the tenant has been let into possession by the landlord the estoppel is complete. Where the relation of landlord and tenant is evidenced by the execution of a lease, by attornment, by payment of rent or the like, and the landlord has not put the tenant into possession, the estoppel will operate against the tenant unless he can show that the act of his relied upon as an admission of the landlord's title was done by him in ignorance of who the real owner was or was procured by the fraud or misrepresentation of the person alleging himself to be the landlord. The matter is dealt with at length in *Foa on Landlord and Tenant* (fifth edition, pages 459 ff.). The distinction between the two classes of cases is obviously logical, and I see nothing in the sections of the Evidence Act to preclude its being drawn in India. What alone according to English law is open to the tenant in a case like the present to prove, this defendant has essayed to prove in the former suit where he set up fraud and coercion and failed. He cannot of course pretend that he executed the lease in ignorance of the defect that he now alleges in the plaintiff's title, because his case was and is that he himself has been in possession for upwards of twenty years. I find myself in agreement with the reasoning of the learned Judges in *Ketu Das v. Surendra Nath Sinha*(1) as does my brother SESHAGIRI AYYAR, J. But in the face of the decisions of the Madras High Court to which I have alluded I think that the matter had better be settled authoritatively for this Presidency by a Full Bench decision. The question to be referred to the Full Bench is this: "Whether a tenant who has executed a lease but has not been let into possession by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion?"

SESHAGIRI AYYAR, J.—I agree in thinking that the question raised before us should be referred to a Full Bench. The defendant executed a counter-part of a lease in favour of the plaintiff

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(1) (1903) 7 C.W.N., 596.

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on the 3rd June 1909. Immediately after, he instituted a suit (Original Suit No. 1737 of 1909) to set aside the lease on the ground that he was induced to execute it by undue influence and coercion. It was found by the Court of First Instance, by the Appellate Court and finally by the High Court that the case set up by the defendant was not true. The present suit was brought by the plaintiff on the lease to recover possession. The defendant pleaded that he was induced by fraud to execute the lease deed, and that the title to the property in suit really vested in himself. The Munsif as well as the Subordinate Judge came to the conclusion that it was not open to the defendant to plead fraud as that must be deemed to have been decided against him in the previous litigation. Upon the question whether the defendant was estopped from denying the title of the plaintiff, the Munsif held that he was so estopped. The Subordinate Judge took a different view and came to the conclusion that it is open to the defendant to plead want of title in the plaintiff. The argument of Mr. Seshachariyar in support of the judgment of the Subordinate Judge is that if possession was not given by the lessor, the lessee is not estopped from denying the landlord's title before surrendering possession. It is found by the Subordinate Judge that the defendant was in possession of the lands for several years prior to the lease (Exhibit A). The simple question for decision is, whether if the tenant is not let into possession by the landlord, it is open to him to deny the landlord's title without surrendering possession.

Before dealing with the decided cases, I shall examine the language of section 116 of the Indian Evidence Act to see whether this contention is supported by it. The conditions which the section requires are that the person must be a tenant and that he should not during the continuance of the tenancy deny that the landlord had title at the beginning of the tenancy. Tenancy can be created not only by letting the tenant into possession, but also by getting the tenant to attorn to the landlord, by obtaining from him a deed evidencing the tenancy, or by accepting payment of rent from him as tenant: *Trimbak Ramchandra v. Shekh Gulam Zilani*(1). There is nothing in the section itself to limit the estoppel to cases where the tenant is let

(1) (1910) I.L.R., 34 Bom., 329.

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into possession by the landlord. There are some Madras cases which on the face of them support the contention raised by the learned vakil for the respondent: *Annayyan v. Chinman*(1), *Viswanadha Row v. Chinnakolandai Nainar*(2) and *Yerraguntla Seshacharlu v. Mukkumalla Chinniah*(3). On the other hand, the decision of the Calcutta High Court in *Ketu Das v. Surendra Nath Sinha*(4), is distinctly against the view taken in Madras. In this state of authorities, I have tried to examine the English law on the subject; and it seems to me that the position taken up in Madras does not derive any support from the English decisions. In *Cole on Ejectment*, the law is thus summarized at page 215: "A title by estoppel is established by proof of the lease, or agreement, or license (whether in writing or otherwise), and of the entry or possession by virtue thereof." *COCKBURN, C.J.*, in *Delaney v. Fox*(5) said, that it is "the common law principle that one who derives possession of land under another, shall not be permitted to question his right to give him possession." All that the English decisions lay down is that the tenant, so long as he retains possession is estopped from proving that at the time of the demise the lessor had no legal right or title to the property: *Barwick v. Thompson*(6). In England a distinction is drawn between cases where a tenant was let into possession by the landlord or the tenant had executed a lease to the landlord, and cases where the tenancy is established otherwise. In the former class of cases the estoppel is regarded as very stringent, whereas in the latter class of cases it is open to the tenant to prove that there has been either fraud or mistake. This distinction is very clearly stated by *PATTERSON, J.*, in *Dood Harvey v. Francis*(7). The learned Judge says: "where tenancy was attempted to be established by mere evidence of payment of rent, without any proof of an actual demise, or of the tenant's having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent, and to show on whose behalf such rent was received." In *Cole on Ejectment*, page 218, the proposition is enunciated thus: "If the claimant be not the person from

(1) (1910) I.L.R., 33 Mad., 383.

(2) (1914) 1 L.W., 197.

(3) (1914) 25 I.O., 721.

(4) (1903) 7 C.W.N., 596.

(5) (1857) 2 O.B. (N.S.), 768 at p. 774.

(6) (1798) 7 T.R., 488.

(7) (1837) 2 Moody and Rob., 57.

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whom the possession was originally obtained, but there has been an attornment to him, or a renewed tenancy, or a payment of rent, or a distress submitted to, the defendant may sometimes show that the claimant really had no title, and that the attornment or payment, etc., was by mistake or in ignorance of material facts." *Rogers v. Pitcher*(1) and *Brook v. Biggs*(2) are quoted in support of this view. In my opinion the rule as stated in *Cole on Ejectment* is in accordance with the law of contracts, and with the rules of evidence contained in the Evidence Act. For example under section 92 of the Evidence Act where there has been a contract which has been reduced to writing it is open to the executant to show that there has been fraud, intimidation, illegality, want of due execution, want of capacity, failure of consideration or mistake of fact or law. Under the Indian Contract Act it can be shown that any contract into which a party has entered is vitiated either by coercion, undue influence, misrepresentation, fraud or mistake. The principle of estoppel should not be held to override these provisions of the law of contract. Therefore it is open to a party to prove that the contract is not binding upon him for any of the reasons which are open to him under the Contract Act. In this case, the party did take advantage of that right as he sued to have the contract set aside on the ground of coercion and fraud. Having failed in that, it must be taken that the tenancy between him and the landlord was completely established by virtue of the lease deed which he executed in favour of the landlord. It is not open to him after the termination of that litigation to plead that the landlord had no title at the time when his tenancy commenced. The decision in *Bilas Kunwar v. Desraj Ranjit Singh*(3) relied on by Mr. Seshachariyar only lays down that if a tenant was let into possession, he should not be allowed to deny the landlord's title until he surrenders possession. It is no authority for the position that if a tenant was not let into possession the title can be denied.

I am of opinion that the decisions of this Court which hold that unless the tenant was let into possession, section 116 of the Evidence Act would not estop him from disputing the landlord's title, must be reconsidered. I therefore agree in

(1) (1815) 6 Taunt., 202. (2) (1836) 2 Bing. (N.C.), 572; s.c., 132 E.R., 223.
(3) (1915) I.L.R., 37 All., 557 (P.C.).

referring for the opinion of a Full Bench the question proposed by my learned brother.

On this Reference.

T. M. Krishnaswami Ayyar for the appellant.

V. C. Seshachariyar for the respondent.

This Second Appeal coming on for hearing on the question referred for the decision of the Full Bench, the Court expressed the following OPINIONS :—

ABDUR RAHIM, OFFG. C.J.—The question referred to us is in these terms:—*Whether a tenant who has executed a lease but has not been let into possession by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion?* Mr. JUSTICE COURTS TROTTER, one of the learned Judges who made the reference, is of opinion that a tenant is altogether estopped from denying the title of the landlord who has let him into possession. So far there can be no doubt as to the law in India or in England. Section 116 of the Indian Evidence Act which says: "No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property" is quite clear on the point. It does not recognize any exception exempting from the operation of estoppel cases in which the tenant was either ignorant of his landlord's title or was induced by fraud or misrepresentation to enter upon the tenancy. It is only when the tenancy ceases, that he is free to deny the landlord's title, but not till then. Their Lordships of the Privy Council in *Bilas Kunwar v. Desraj Ranjit Singh*(1) say: "Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title however defective it might be, so long as he has not openly restored possession by surrender to his landlord."

But it has been argued before us on behalf of the plaintiff landlord, firstly, that section 116 is not confined to cases where

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(1) (1915) I.L.R., 37 All., 557 (P.C.), at p. 557.

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the tenant has been let into possession by the landlord whose title he seeks to deny, and alternatively, in the next place, that the section is not exhaustive of the law of estoppel between tenant and landlord. As to the first contention, I entertain no doubt that the landlord whose title the tenant is estopped from denying is only the person from whom the tenant derived his tenancy and not his predecessor in title. Does the section then apply to a case where the tenant has been in possession of the land before the date of the acquisition of his title by the landlord? The words "at the beginning of the tenancy" do not, in my opinion, refer to the commencement of the particular lease or contract between the tenant and the landlord, but to the beginning of the occupation of the land by the tenant or by the person through whom he claims. If I am right in thinking that the estoppel enunciated in section 116 is absolute in its nature and we were to apply it in favour of a landlord who has a derivative title and did not let the tenant into possession but to whom the tenant attorned either by executing a lease or paying rent, then we should be laying down a proposition which goes further than the law on the subject in England. In Woodfall's Law of Landlord and Tenant, page 249, 19th edition, the law in England is thus stated: "The rule that a tenant may not dispute his landlord's title applies only to the title of the landlord who let him in," and that is how I understand the observation of the Judicial Committee in *Bilas Kunwar v. Desraj Ranjit Singh*(1) as to the scope of section 116.

The argument that section 116 is not exhaustive on the question of tenant's estoppel cannot, in my opinion, be accepted. In *Sarat Chunder Dey v. Gopal Chunder Laha*(2) the Judicial Committee dealing with a case of estoppel by conduct has ruled that the question must be determined with reference to section 115 of the Evidence Act though they proceeded to point out that it did not enact anything different from the law in England. But however useful it might be to refer to English decisions to explain the principle underlying the enactments of the Evidence Act, it is from the Evidence Act alone that the law on the subject is to be gathered.

(1) (1915) I.L.R., 37 All., 557 (P.C.) at p. 567.

(2) (1893) I.L.R., 20 Cal., 296.

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Bearing this in mind, I shall advert briefly to some of the English cases. In *Carlton v. Bowcock*(1) CAVE, J., held: "where a person claiming to be the assignee of the reversion receives rent from the tenant by fraud or misrepresentation, such payment is no evidence of title, but where there is no fraud or misrepresentation, such payment is *prima facie* evidence of title and the tenant can only defeat that title by showing that he paid the rent in ignorance of the true state of the title and that some third person is the real assignee of the reversion and entitled to maintain ejectment." Here clearly there is no allusion to any rule of estoppel such as is dealt with in section 116 of the Indian Evidence Act, the question before the learned Judge being treated as one of appreciation of evidence in support of the landlord's title and of onus of proof. Much reliance is, however, placed on another passage in the judgment of CAVE, J., where he observes: "A tenant of a house who pays rent to one who claims to be assignee of the reversion is not estopped from denying the title of the assignee in the same way that he is estopped from denying the title of the lessor by whom he has been let into possession."

Reading the two passages together, I am not satisfied that the learned Judge intended to formulate a modified form of estoppel in cases like the one before him. Apart from any technicalities of pleading to which we attach very little importance in India, the effect of the so-called rule laid down in *Carlton v. Bowcock*(1) in its practical operation would amount to this:—the fact of payment of rent or execution of a lease is *prima facie* proof of title in the person who receives the rent or in whose favour the lease is executed, and if the tenant is unable to get rid of the effect of these facts by showing that he was acting in ignorance and that the title was in some person other than the persons to whom he paid the rent, he would have no defence to a suit for rent or in ejectment. It is perfectly clear from the authorities cited in the judgment of Mr. Justice CAVE that it is open in such cases to the tenant to prove that the title is in fact in some third person. It will be seen that in the other English cases also cited in the ORDER OF REFERENCE, the fact of payment of rent to a person who did not let the tenant into possession is really treated as proof of the existence of relationship of landlord

(1) (1884) 51 L.T.N.S., 659.

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and tenant and naturally as a conclusive proof in the absence of adequate explanation.

Coming to the Indian decisions, the view that has found favour in this Presidency is that estoppel applies only where the tenant has been let into possession by the landlord in question, *Usman Koya v. Chidriamokkusa Akoth*(1), *Yerraguntla Seshacharlu v. Mukkumalla Chinniah*(2), *Annayyan v. Chinnan*(3) and *Viswanadha Row v. Chinnakotandai Nainar*(4). The same view was expressed in *Lal Mahomed v. Kallanus*(5) though that case was sought to be distinguished in *Ketu Das v. Surendra Nath Sinha*(6) where MITTER and BRETT, JJ., gave effect to the modified form of estoppel suggested in the ORDER OF REFERENCE. In *Lodai Mollah v. Kally Dass Roy*(7) also, it was held, after reviewing the English decisions *Rogers v. Pitcher*(8), *Claridge v. Mackenzie*(9) and *Gregory v. Doidge*(10), that, "where the plaintiff claims by a derivative title, and the defendant has attorned to him, the defendant is not thereby estopped from showing that the title is really not in the plaintiff but in some other person." I entirely agree in that proposition.

I would therefore answer the question in this way:—A tenant who was let into possession is estopped from denying a landlord's title. A tenant who was not let into possession by the person seeking to eject him is not estopped from denying the plaintiff's title; he may show that the title is in some third person or in himself. But the execution of a lease or payment of rent by the defendant is a *prima facie* proof of the plaintiff's title which the Court dealing with the evidence will ordinarily treat as conclusive in his favour unless the fact is sufficiently explained. In most cases of this nature the presumption in favour of the plaintiff can only be displaced by the defendant showing that the attornment was made by him in ignorance of the plaintiff's title or was induced by fraud, misrepresentation or coercion.

The answer to the question referred to us will be in the affirmative as proposed by my learned brothers SESHAGIRI AYYAR and PHILLIPS, JJ.

- (1) (1903) 15 M.L.J., 363. (2) (1914) 25 I.C., 721.
(3) (1910) I.L.R., 38 Mad., 363. (4) (1914) 1 L.W., 197.
(5) (1885) I.L.R., 11 Cal., 519. (6) (1903) 7 C.W.N., 596
(7) (1882) I.L.R., 8 Cal., 238. (8) (1815) 6 Taunt., 202.
(9) (1842) 4 M. & G., 143. (10) (1826) 3 Bing., 474 a.c.; 130 E.B., 56.

SESHAGIRI AYYAR, J.—I have the misfortune to differ from the learned CHIEF JUSTICE in this case.

The question has been argued more fully than on the last occasion and some fresh light has been thrown upon some of the points. I consider it therefore desirable that I should re-state my conclusions.

The facts were fully stated by me in the ORDER OF REFERENCE and it is not necessary to recapitulate them here. The question whether the Indian law of evidence is exhaustive need not be discussed, as I am of opinion that section 116 is general in its terms and does not preclude the consideration of English decisions to understand its import. It is only where the law is silent on some points, the question whether it should be supplemented by principles deducible from English authorities can arise. That is not the present case.

I shall first deal with the section itself. The chapter dealing with Estoppel comprises three sections. The first one, section 115, enunciates the general rule and prescribes no limit before or after which parties can recede from their relationship. Section 116 which deals with a particular species of *estoppel in pais* introduces limitations regarding its operation. It is not as stringent as the general estoppel, and gives freedom to parties to resile from their position under certain circumstances. Section 117 deals with a particular class of *estoppel by deed* and imposes some limitations on its applicability. In English textbooks, it is pointed out that *estoppel in pais* may spring from (1) Livery of Seisin, (2) Entry, (3) Acceptance of rent, (4) Partition, or (5) Acceptance of an Estate. There is no reason to suppose that the framers of the Indian Evidence Act were not legislating for all kinds of tenancy when they were dealing with the relationship of landlord and tenant, in section 116. In my opinion, all the first three classes of *estoppel in pais* were intended to be comprised in the rule indicated in section 116. There is nothing in the section to lead to the contrary conclusion. All tenants, including those who have attorned by deed to the landlord, must have been in the contemplation of the Legislature, because there is no indication that any were to be excluded. *Prima facie*, therefore, the section applies to tenants who have been let into possession as well as to those who have acknowledged the landlord by executing a deed, by paying rent

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or otherwise. The words "at the beginning of the tenancy" do not spell that only persons let into possession are within their connotation. There must be a beginning of the tenancy in all cases where the relationship of landlord and tenant can be predicated. I do not see any reason for narrowing their applicability to tenants to whom first possession is given.

One other point may be mentioned before dealing with the decided cases. The rule of law enunciated in all the sections of this chapter is subject to the general proposition that they would not avail against any statute. There have been numerous cases on this point under section 115. The latest is *Vaikuntarama Pillai v. Authimoolam Chettiya*(1). This doctrine would apply equally to section 116. Therefore, if the estoppel pleaded can be proved to contravene the law, e.g., the law of contracts, the estoppel will not be given effect to. That is the foundation of the rule that the tenant in avoiding the estoppel can show that he has been induced by coercion, undue influence, misrepresentation, fraud or mistake (ignorance will be included in this last term). To put it shortly, the contract of tenancy can be avoided if it is subject to any of the infirmities which the Indian Contract Act has enumerated in sections 13 to 20 of the Act. This is the general rule.

There is an apparent exception to this rule in the case of tenancies which commence with the tenant being let into possession. The basis of the distinction is this. A person cannot both approbate and reprobate. If he has got into possession with the consent of another, he is bound to vacate and surrender possession, before he can be heard to say that that other had no right to put him in possession. He should not be allowed to use the privilege given to him to attack the man who conferred it. That is the reason why a person who is let into possession is required to give it up before he disputes the title of the person who put him in. As a matter of fact, I find nothing in section 116 to the effect that there should be a surrender of possession before title is disputed. But that is the law in England; and that has been read as being within the meaning of section 116: *Bilas Kunwar v. Desraj Ranjit Singh*(2). Subject to this further reservation in favour of the

(1) (1915) I.L.R., 38 Mad., 1071. (2) (1915) I.L.R., 37 All., 557 (P.C.).

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landlord, I am of opinion that section 116 deals with estoppels of every kind as between landlord and tenant and that there is no justification for narrowing its scope.

On one point, my mind was fluctuating a great deal during the course of the argument, and it is this: whether, when we speak of the estoppel in section 116 being dependent upon proof that the contract is not vitiated by the infirmities to which all contracts may be subjected, it is not a mere question of burden of proof. After consideration, I incline to the view that the term *estoppel* is not misapplied in such cases. What is meant is, that it is open to a tenant to raise the preliminary issue that the contract is void or voidable. If the preliminary issue is in his favour, the relationship is not established. If it is found against him he will be precluded from agitating the broader question that the landlord had no title when the relationship came into existence. Even where stricter estoppel operates, which compels a party to surrender possession first, there may be a preliminary issue whether the tenant was first let into possession by the landlord. After all, in a sense, all rules of estoppel are rules of evidence and the fact that in the case of ordinary contracts of tenancy, the tenant is allowed more scope to impeach the relationship is not a ground for saying that on the question of the disproof of title there is no estoppel.

I have made these general remarks, as, in my opinion, the rules of English law to which I referred in the Order of Reference, are consistent only with the considerations I have above set forth.

As regards decided cases, it is clear that the preponderance of authority is in favour of the view that the section applies also to tenancies other than those in which the tenant was first let into possession. In Madras, we have *Madras Hindu Mutual Benefit Permanent Fund v. Ragava Chetti*(1) and *Kottayi Kanaran v. Ganapathi*(2) and *Gavarayamma v. Dandi Seetharamaswamy*(3). In Calcutta there is the authority of *Ketu Das v. Surendra Nath Sinha*(4), which fully and elaborately considers the question: see also *Bhyro Singh v. Raja Leelanund Singh*

(1) (1896) I.L.R., 10 Mad., 200.
(3) (1914) I.L.W., 821.

(2) (1911) 21 M.L.J., 550.
(4) (1903) 7 C.W.N., 590.

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Bahadur(1). In Allahabad, the current of decisions is all one way; *Girdhari Lal v. Kalloo Mestri*(2) and *Ganpat Rai v. Multan*(3) and the cases cited in it. In Bombay also, the view has been that the section is comprehensive enough to cover all cases of tenancy: *Vasudev Daji v. Babaji Ranu*(4) and *Trimbak Ramchandra v. Shekh Gulam Zilani*(5). On the other hand, *Annayyan v. Chinnan*(6) and those that follow it, namely, *Viswanadha Row v. Chinnakolandai Nainar*(7) and *Yerraguntla Seshacharl v. Mukkumalla Chinniah*(8), take the narrower view and they purport to follow the earlier Calcutta decision in *Lal Mahomed v. Kallanus*(9). As I said before, the view which I have been suggesting is more widely accepted in this country than the other one.

As regards English cases, Mr. Seshachariyar has not drawn our attention to any which is in conflict with those that were cited by me and by Mr. Justice COULTS TROTTER in the ORDER OF REFERENCE. I do not propose to refer to them again. I may however refer to a few more cases and to the conclusions stated by text-writers on this subject. In *Cooke v. Loxley*(10) the tenant was already in possession under another and acknowledged the new landlord by paying him rent. Lord KENYON, C.J., held that the tenant cannot give evidence of want of title in the landlord. In *Cooper v. Blandy*(11) the predecessors in title of the plaintiff were put in possession by the landlord. The plaintiff succeeded them and disputed the title of the landlord. In a very strong judgment, TINDAL, C.J., points out that a person, although not put in possession by the landlord, will be estopped from denying his title if he has been in occupation of the premises. To the same effect is the decision in *Panton v. Jones*(12).

Coming to the recognized text-writers, I find Woodfall in his book states the proposition thus: "If the defendant has expressly attorned to the plaintiff, he will thereby be estopped from

(1) (1874) 21 W.R., 153.

(3) (1916) I.L.R., 38 All., 226.

(5) (1910) I.L.R., 34 Bom., 329.

(7) (1914) 1 L.W., 197.

(9) (1885) 1 L.R., 11 Calc., 519.

(11) (1824) 1 Bing. (N.C.), 45; s.c., 131 E.R., 1034.

(12) (1813) 3 Campb., 372.

(2) (1914) 22 I.C., 213.

(4) (1871) 8 Bom. H.C.R., 175 (A.C.J.).

(6) (1910) I.L.R., 33 Mad., 366.

(8) (1914) 25 I.C., 721.

(10) (1792) 5 T.R., 4.

disputing the plaintiff's title, unless such attornment be proved to have been obtained by fraud, or through some mistake of facts."

In Fawcett's book on Landlord and Tenant, page 77, after a full discussion of the cases bearing on the question, it is stated, "where a person in possession of land recognizes a subsisting tenancy under another, whether by payment of rent, by submission to distress, or otherwise, he is similarly estopped from disputing the title of that other, although he did not originally receive possession from him." Foa is equally explicit: see page 425 in the third edition. Bigelow in his book on Estoppel says, that "payment of rent is evidence of permissive occupation, and when unaccompanied by fraud or mistake establishes the relation of landlord and tenant, and is the ordinary evidence upon which the estoppel arises, though it is by no means the only evidence upon which the estoppel may be founded." I do not think it necessary to multiply citations any further. In my opinion, the estoppel of the tenant under section 116 is not confined to cases where possession was originally obtained from the landlord but extends to all cases of tenancy. I would therefore answer the questions referred to us in the affirmative.

PHILLIPS, J.—I agree generally with the judgment that has just been delivered by my learned brother SESHAGIRI AYYAR, J., but I have a few words to add. The question referred for our consideration is in a somewhat restricted form, and assumes that when a tenant has not been let into possession by his landlord he is not absolutely estopped from denying his landlord's title but can plead ignorance of the defect of title, fraud, misrepresentation or coercion and we are asked to decide whether when such pleas have failed such a tenant can prove that his landlord's title is defective.

The proposition that a tenant not admitted into possession by his landlord is not absolutely estopped from denying his landlord's title and could raise the pleas just above mentioned is laid down in *Ketu Das v. Surendra Nath Sinta*(1) and is in accordance with the decision in *Lodai Mollah v. Kally Dass Roy*(2) and *Girdhari Lal v. Kalloo Mestri*(3). It has also been held that

(1) (1903) 7 C.W.N., 596.

(2) (1882) I.L.R., 8 Cal., 238.

(3) (1914) 22 I.C., 213.

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section 116 of the Evidence Act is not applicable to a tenant who has not been let into possession by his landlord: *Lal Mahomed v. Kallanus*(1) and *Yerraguntla Seshacharu v. Mukkumalla Chinniah*(2) and *Annayyan v. Chinnan*(3). A contrary view has been taken by OLDFIELD, J., in *Gavarayamma v. Dandi Seetharamaswamy*(4) following *Madras Hindu Mutual Benefit Permanent Fund v. Ragava Chetti*(5). Section 116 of the Evidence Act does not specifically make any reference to a tenant being let into possession, but it states that he is estopped from denying his landlord's title "at the beginning of the tenancy." These words have been interpreted in different ways and it has been held that "the beginning of the tenancy" means "the time when the tenant was first let into possession," but it appears to me that this is an unnecessarily narrow interpretation to put upon the words. It seems that the question as to whether a tenancy begins at a certain time depends upon whether there was any agreement between the tenant and the landlord which constitutes a new tenancy. It may be that the tenant was in possession before the new tenancy began; but it may happen that in attorning to a new landlord he executes a lease which constitutes a new tenancy on terms differing from the previous one. Can it be said in such a case that this attornment was not the beginning of a new tenancy? I think not. On the other hand, a tenant may continue to hold on the strength of the subsisting lease and, on the death of his original landlord, may continue the payment of rent to the person purporting to be his landlord's successor. In such a case when there is no specific agreement between the new landlord and the tenant, it cannot be said that a new tenancy has arisen. The tenant holds under his old lease and is merely continuing payment of rent in accordance with the claim put forward by his supposed landlord. The payment of rent is no doubt evidence of the payee's title as landlord but is not in itself sufficient to create a new tenancy. It therefore seems to me that the question to be decided under section 116 of the Evidence Act is not so much whether a tenant has been let into possession or not, but whether a new tenancy has arisen. If it is proved that there is a new tenancy, then under

(1) (1885) I.L.R., 11 Cal., 519.

(2) (1914) 25 I.C., 721.

(3) (1910) I.L.B., 33 Mad., 366.

(4) (1914) 1 L.W., 821.

(5) (1896) I.L.R., 19 Mad., 200.

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the words of the section, the tenant is estopped during the continuance of that tenancy from denying his landlord's title at the beginning of the tenancy and in such a case, I am of opinion that he is absolutely estopped and cannot even raise the pleas of fraud, misrepresentation, etc., which would ordinarily render the contract voidable, and I would hold this on the principle that a person cannot approbate and reprobate. He has taken advantage of the supposed title of his landlord to obtain his lease and therefore so long as he wishes to hold the property under that lease, he cannot be heard to say that his landlord had no right to grant it. What he must do before he denies the landlord's title is to deliver up possession of the property. This proposition is laid down clearly in *Bilas Kunwar v. Desraj Ranjit Singh*(1) in which their Lordships of the Privy Council say: "Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord." Here, we find the words "let into possession," but it does not appear to me that any emphasis is laid upon these words and the principle would be the same whether a man was let into possession or whether he was continued in such possession by a specific agreement between himself and his landlord. Under section 111 of the Transfer of Property Act a lessee is bound to deliver possession at the end of the tenancy, and consequently if he wishes to support the title of a third party, he can only do so after he has surrendered the lease to his original landlord.

In the cases of a tenant who has not been let into possession or has not been continued in possession under the terms of a new tenancy, the position is somewhat different and that seems to be the case which has been referred to us. Such a tenant is not in the same position as the tenant with whose case I have already dealt. He has not obtained the lease on the strength of an agreement with the new landlord and consequently he may set up pleas, which are always available to a person who has made a contract, such as fraud, misrepresentation, or mistake; but

(1) (1915) I.L.R., 37 All., 557 (P.C.).

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unless he is able to prove one of these pleas, he is bound by his contract; and in the same way, I think, the tenant by payment of rent having impliedly made a contract with his landlord is bound by it unless he can prove these pleas. The case referred to us assumes that these grounds for avoiding the contract do not exist and consequently, I would hold that such a tenant is estopped from denying his landlord's title. It seems to me to be unnecessary to consider the question whether sections 115 to 117 of the Evidence Act are exhaustive, for in the present case there is no reason to go beyond the provision in section 116 of the Evidence Act which undoubtedly reproduces the English law on the subject. In *Sarat Chunder Dey v. Gopal Chunder Laha*(1), the Privy Council remark that section 116 of the Evidence Act was not different from the English law of estoppel and that there was no warrant for adding qualifying conditions and we find a similar remark in *Asmatunnessa Khatun v. Harendra Lal Biswas*(2). English cases may no doubt be referred to for ascertaining the principles which underlie the provisions of the section; but certainly in a case like the present, I think we should be guided by the words of the section itself.

C M.N.

(1) (1893) I.L.R., 20 Cal., 296 (P.C.). (2) (1908) I.L.R., 35 Cal., 904.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Srinivasa Ayyangar.

A. R. P. NARAYANAN CHETTIAR AND SEVEN OTHERS (PLAINTIFFS AND SIXTH DEFENDANT), APPELLANT,

1916.
August
14 and 16.

v.

K. P. V. R. VEERAPPA CHETTIAR AND FOUR OTHERS
(DEFENDANTS NOS. 1 TO 5), RESPONDENTS*

Bankruptcy—Straits Settlements Bankruptcy Ordinance—Debt contracted by a Hindu in Singapore—Adjudication of bankruptcy and discharge by the Singapore Court operating to discharge debt—Non-maintainability of a suit in India for the balance of the debt against the bankrupt or his undivided son—Liability of an undivided Hindu son, not a joint liability.

A Hindu who was domiciled in India but who carried on trade in Singapore was adjudicated a bankrupt by the Supreme Court at Singapore for debts incurred at Singapore and he eventually obtained at Singapore an order of discharge under the Straits Settlements Bankruptcy Ordinance. The plaintiff who, as one of the creditors, proved his debt and received two of the dividends due to him, was a party to the order of discharge. Under the above Ordinance a discharge operated as an extinguishment of the debt:

Held, that the extinguishment of the debt by the Bankruptcy Laws of Singapore operated as a discharge of it everywhere and the creditor had no right to sue in India the debtor and his undivided sons for the balance of the debt as if it was still subsisting.

Under the Hindu Law a Hindu son is not "jointly bound" with his father to pay the debts contracted by the father. Hence the said Ordinance under which a discharge of a bankrupt does not discharge a person "jointly bound" with him does not affect the undivided son.

Two brothers, namely, the first and third defendants in the suit, who were domiciled in India and who carried on trade in Singapore owed nearly 14,000 dollars to the firm of the plaintiffs and sixth defendant as a result of money dealings carried on at Singapore between the two parties. The two brothers were on their petition adjudicated bankrupts under the Straits Settlements Bankruptcy Ordinance by the Supreme Court at Singapore and were finally discharged on 8th August 1913. The plaintiffs and the sixth defendant proved their claim in

* Appeal No. 41 of 1915.

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bankruptcy proceedings, received two dividends in respect of their claim and were parties to the final order of discharge. Afterwards the plaintiffs brought this suit in the year 1913 against these two brothers, defendants Nos. 1 and 3, and their sons defendants Nos. 2, 4 and 5, in the temporary Subordinate Judge's Court of Sivaganga in this Presidency for realizing about Rs. 32,000, stating it to be the unrealized balance of their debt and alleging that the defendants had properties in India and that the bankruptcy proceedings of Singapore did not affect these properties. Defendants Nos. 1 to 5 raised the plea that the plaintiffs' claim was included in the schedule of debts and that the discharge by the Supreme Court of Singapore operated as a discharge of the debt everywhere, by virtue of clauses (3) and (4)* of section 30 of the Ordinance. They also pleaded that the receiving order made by the Singapore Court vested in the Official Assignee of that Court the moveable and immoveable properties situated in India also and that the same cannot, therefore, be proceeded against for the suit debt. Defendants Nos. 2, 4 and 5, the sons of defendants Nos. 1 and 3, pleaded in addition that they were not liable as sons to pay the suit debt as the discharge operated also in their favour as an extinguishment of the debt. The sixth defendant remained *ex parte*. A preliminary issue was raised as follows: "Whether this suit was not maintainable owing to the result of insolvency proceeding at Singapore referred to in the pleadings." The Subordinate Judge found this issue against the plaintiffs. He also held that the sons were not bound to pay the father's debts and that they were not *jointly* bound with their fathers to pay the suit debt within the meaning of clause (5)† of section

* Clause (3) of section 30 of the Straits Settlements Bankruptcy Ordinance, 1888: "An order of discharge shall release the bankrupt from all other debts provable in bankruptcy."

Clause (4): "An order of discharge shall be conclusive evidence of the bankruptcy and of the validity of the proceedings therein and in any proceeding that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the cause of action occurred before his discharge and may give this Ordinance and the special matter in evidence."

† Clause (5): "An order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made any joint contract with him or any person who was surety or in the nature of a surety for him."

30 of the Ordinance. The suit was accordingly dismissed and the plaintiffs preferred this appeal.

A. Krishnaswami Ayyar for the appellants.

C. P. Ramaswami Ayyar and P. S. Vaidyanath Ayyar for the respondents.

JUDGMENT.—The facts are fully stated in the judgment of the Lower Court and it is unnecessary to restate them. Two points are taken for the appellant in the appeal—

First it is contended that the discharge of the bankrupts under Straits Settlements Bankruptcy Ordinance by the Singapore Court does not operate as a discharge from the debts in this country. It is conceded that the discharge operates as an extinguishment of the debt and not merely as a bar of the remedy so far as Singapore is concerned. The plaintiffs and the defendants are trading at Singapore. The debts were contracted there and were payable there. The plaintiffs proved their debts under the bankruptcy, received dividends and were really parties to the order of discharge. In these circumstances a release of the debt under the Bankruptcy Law of Singapore is a discharge of it everywhere. The fact that the parties have their domicile in this country and the defendants have some property here is immaterial. The rule is, we think, accurately stated in rule 115 of Mr. Dicey's book on the Conflict of Laws.

The next point is equally baseless and it is this: The first defendant and his brother the third defendant were adjudicated bankrupts. The second defendant is the son of the first and defendants Nos. 4 and 5 are the sons of the third. All the five are members of a joint Hindu family and they have some family property here. The contention is that the effect of the discharge is only to release the father from liability but that does not affect the Hindu Law liability of the sons to pay the debts of the father and that the creditor is entitled to sue the sons and recover the debt from out of their shares of the joint family property. This, it is said, follows from clause (4) of section 30 of the Bankruptcy Ordinance which like section 28 of the English Bankruptcy Statute declares the effect of an order of discharge. The material portion of the clause is as follows: "An order of discharge shall not release any person who at the date of the receiving order was *jointly bound* or had made any joint contract with him." The question is whether a Hindu son is *jointly bound*

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with his father to pay the debts within the meaning of the section. We think not. The liability of a Hindu son to pay the debts of his father not being illegal or immoral (Avyavaharika) has been developed by judicial decisions from his pious obligation to save the father from sin, as laid down by the Hindu Law Texts. This liability as now developed is certainly not a joint liability, nor a joint and several liability as ordinarily understood in English Law; in fact it is difficult to bring it under any particular legal category of the English Law. In *Ramasami Nadan v. Ulaganatha Goundan*(1), which for the first time settled that the son could also be joined with the father in a suit to recover the father's debt, Sir V. BHASHYAM AYYANGAR, in his interesting argument, repeatedly admitted that the son was not jointly liable with the father. In his judgment in the Full Bench case *Periasami Mudaliar v. Seetharama Chettiar*(2), BHASHYAM AYYANGAR, J., treats it as settled law that the son could not be sued alone, during his father's lifetime, for recovery of a debt due by the father, though the father can be sued alone without the son. It is also settled that after the father's death a suit can be instituted on the original cause of action though judgment had been recovered against the father. These positions show clearly that a Hindu son is not jointly bound with his father.

The joinder of the son with the father in a suit to enforce payment of the father's debt is for the purpose of enabling the Court to exercise the power which the father had of selling family property including his son's share, to pay his own private debts provided they were not illegal or immoral, and to prevent the son from questioning the nature of the debt, in execution, in the event of the decree against the father being executed by attachment and sale of the family property including the son's share. There were also processual difficulties which have been removed by the present Code in case the father died before the execution of the decree and the son was not a party to the decree.

The matter may also be viewed in another way. The effect of the discharge was undoubtedly to release the defendants Nos. 1 and 3, and no suit could have been instituted against

(1) (1898) I.L.R., 22 Mad., 49.

(2) (1903) I.L.R., 27 Mad., 243 (F.B.).

them. If, as already stated, no suit can be instituted against the sons alone, at any rate so long as the father is alive and the family undivided even though the father's liability is subsisting, the present suit against the sons alone must *a fortiori* be bad. This, we think, is the necessary result of the extinction of the liability of the father, for it is only so long as the liability of the father subsists that the pious obligation of the son lasts.

It was argued with some force that the power of the father to sell the shares of his sons for the payment of his debts is not a power which can vest in the assignee under a bankruptcy and it is hard on the creditors that they should be deprived of all remedy to make the shares of the sons available for the payment of the debts. Whether such a power would vest in the assignee or trustee in bankruptcy if the adjudication had been made by the forum of the domicile, it is unnecessary to consider, as that would depend on the language of the particular statute: see *Nunna Setti v. Chidara Boyina*(1). It is, however, clear that the adjudication and assignment of the bankrupt's property under the Straits Settlements Ordinance in this case does not operate as an assignment of immoveables, or even of moveables in India. This is really no hardship, for presumably the Singapore creditors looked to the assets there for payment. The appeal therefore fails and must be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Krishnan.

V. C. T. N. CHIDAMBARAM CHETTIAR (PLAINTIFF),

v.

AYYASAWMI THEVAN (DEFENDANT).*

Paper Currency Act (Indian Act II of 1910), sec. 26—Promissory note payable to a person or order or bearer, legality of—Right of suit on the note.

A promissory note payable to a person or order or bearer is illegal and void under section 26 of the (Indian) Paper Currency Act (II of 1910) and a bearer cannot be given any decree for money in a suit on such a note.

(1) (1902) I.L.R., 26 Mad., 214.

* Referred Case No. 3 of 1916.

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Jetha Parkha v. Ramachandra Vithoba (1892) I.L.R., 16 Bom., 689, referred to.
Obiter: If there is an obligation apart from the one under the note it may be enforced and the fact that the loan and the note are contemporaneous is not conclusive of the non-existence of such an obligation.

Shanmugnatha Chettiar v. Srinivasa Ayyar (1916) 4 M.L.W., 27; s.c., 31 M.L.J., 138, referred to.

CASE stated under Order XLVI, rule 1 of the Code of Civil Procedure (Act V of 1908) by M. R. SANKARA AYYAR, the Principal District Munsif of Dindigul, in Small Cause Suit No. 14 of 1916.

The questions of law referred to the High Court by the Principal District Munsif of Dindigul under Order XLVI, rule 1, Civil Procedure Code, were as follow:—

(1) Whether a promissory note payable to a person or order or bearer, is illegal and void and whether the lender can be given a decree for money in a suit upon it.

(2) If the answer is against the lender, whether he can be given a decree apart from the promissory note for the money lent upon the note and if so, for what amount.

Section 26 of the Paper Currency Act (II of 1910) is as follows:—

No person in British India shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer (a) on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand, of any such person:

Provided that cheques or drafts, payable to bearer on demand or otherwise, may be drawn on bankers, shroffs or agents by their customers or constituents, in respect of deposits of money in the hands of those bankers, shroffs or agents and held by them at the credit and disposal of the persons drawing such cheques or drafts.

Hon. Mr. S. Srinivasa Ayyangar, the Acting Advocate-General, O. S. Venkatachariyar and K. S. Ganapathi Ayyar for the plaintiff.

B. Sitarama Rao, *amicus curiæ*, for the defendant.

OLDFIELD, J.

OLDFIELD, J.—The first question referred to us is whether a promissory note payable to a person or order or bearer is illegal and void and whether the lender can be given a decree for the money in a suit on it.

There is no doubt that under section 26, Paper Currency Act II of 1910, the making of such a note as that referred to is illegal. The argument that, because it is to order or bearer in the

alternative, it cannot be within the mischief of an act, which forbids the making of notes payable to bearer, does not commend itself. The question then is whether such a note is void or can be the basis of a decree. The material fact is the provision in section 1 of the Negotiable Instruments Act, that nothing in the Act affects section 21 of the Indian Paper Currency Act (III of 1871), which is identical with section 26, Act II of 1910 above referred to. The consequence is that the various references in the Negotiable Instruments Act to notes payable to bearer must refer to notes in which a time is fixed for payment and which are not payable on demand, section 19, so far as it relates to promissory notes being explicable as fixing the interpretation of those in which no time is specified for payment, without affecting the prohibition against them contained in the Paper Currency Act. It does not seem to me possible to hold that a suit can be maintained on a document, the making of which has on public grounds been constituted an offence. I would therefore answer the second portion of the District Munsif's first question in the negative.

The second question referred to us is whether the lender can be given a decree apart from the note for the money lent upon the note. It is not possible to answer this question without further knowledge of the facts. For it is impossible on the information given by the District Munsif to decide whether there was any obligation apart from the note, the fact that the loan and the note were contemporaneous not being decisive on the point.

KRISHNAN, J.—The Principal District Munsif of Dindigul has referred to us under Order XLVI, rule 1 of Act V of 1908, the following two questions for decision, viz.:—

(1) Whether a promissory note payable to a person or order or bearer is illegal and void and whether the lender can be given a decree for money in a suit upon it.

(2) If the answer is against the lender, whether he can be given a decree apart from the note for the money lent upon the note and if so for what amount.

The decision of the first question turns upon the effect of section 26 of the Paper Currency Act II of 1910 which provides *inter alia* that no person in British India shall . . . make any promissory note . . . payable to bearer on demand. "The object of this provision was to secure to the Government

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of India the monopoly for the issue and circulation of currency notes which are, in form, promissory notes payable to bearer on demand; and the section therefore interdicts every one from making such an instrument. An instrument so made is clearly one prohibited by law and therefore invalid. It matters not how it was made whether in pursuance of a contract between parties or otherwise: the instrument as such is invalid and no rights can be enforced under it. The questions whether there was a contract and whether it was itself lawful are irrelevant questions in this connection.

It was argued that as the Paper Currency Act itself provides for a penalty under section 27 for the transgression of the rule in section 26 and as the Negotiable Instruments Act refers to promissory notes "payable to bearer" in several sections such as sections 4, 9, 13 and 47, the note itself should be treated as valid *inter parties* though it is opposed to section 26. It is difficult to understand how an instrument the creation of which is prohibited by law can be held to be valid because there are also specific penalties attached to its creation. The provisions of the Negotiable Instruments Act cannot be used to control the effect of section 26 as that Act expressly provides in section 1 thereof that nothing in the Act shall affect section 21 of the earlier Act, which is now section 26 of the present Act. Further, promissory notes payable to bearer may be payable on demand or otherwise than on demand. Section 26 deals only with former kind, when not made by Government. The Negotiable Instruments Act is a general Act which deals with all the various kinds of negotiable instruments known to law: and the general provisions in it cannot be relied on to validate instruments which are invalid.

It was further argued that the note in suit did not fall within section 26 as it was a note payable not only to bearer but to a person or his order also. This addition can make no difference as the note is still a note payable to bearer on demand. See *Jetha Parkha v. Ramachandra Vithoba*(1), the observations of FARRAN, J., on the point. The note is therefore within the scope and the mischief of the section and it is invalid and no suit can be maintained on it as such.

(1) (1892) I.L.R., 16 Bom., 639.

Section 120 of the Negotiable Instruments Act was referred to as creating an estoppel. Though the question does not arise on this reference, it may be observed that this suit is by the payee on a note which is on the face of it illegal and not therefore by "any holder in due course."

I agree that the second question cannot be answered in the present state of the record, as it depends on facts which have not yet been tried and found. If there is an obligation apart from one under the note *itself* it may clearly be enforced. The fact that the "loan and the note are contemporaneous" is not conclusive on the non-existence of such obligation. Attention may be drawn to the observations of SRINIVASA AYYANGAR, J., in *Shanmuganatha Chettiar v. Srinivasa Ayyar*(1).

I therefore agree in answering the first part of question (1) in the affirmative and the second part in the negative understanding it as referring to a decree upon the note itself. I decline to answer the second question.

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AYYASAWMI
THEVAN.
KRISHNAN, J.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

Re MATURI VENKATASUBBAYYA (ACCUSED), PETITIONER.*

1916.
October 3.

District Municipalities Act (IV of 1884), ss. 188, cl. (5) and 189—Application for license to boil paddy—Refusal of license, more than thirty days after application—Boiling paddy subsequent to refusal—Charge under section 189 of the Act—Conviction, if legal.

Where a petitioner applied to the Chairman of a municipality for the continuance of a license for boiling paddy at a certain place during the next financial year, but the license was refused more than thirty days after the receipt of the application by the Chairman, and the applicant used the place for boiling paddy notwithstanding the refusal;

Held, that the petitioner was not guilty of an offence under section 189 of the District Municipalities Act, as the place in question should be held to be duly licensed for the financial year for which the license was sought under section 188, clause (5) of the Act.

(1) (1916) 4 M.L.W., 27; s.c., 31 M.L.J., 138.

* Criminal Revision Case No. 451 of 1916.

Re VENKATA-
SUBBAYYA.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the order of W. H. H. CHATTERTON, the Sub-Divisional Magistrate of Gudivada, in Summary Trial No. 2 of 1916.

The petitioner held a license for boiling paddy at a particular place within a municipality; the period of the license expired on the 30th April 1915; he applied for a fresh license on the 4th May 1915 for the next financial year, but no order was passed granting or refusing a license until the 6th September 1915, when his application was refused by the Chairman of the Municipality. He appealed to the Municipal Council against the refusal, but the appeal was dismissed. The petitioner was charged under section 189 of the District Municipalities Act (IV of 1884) with having used the place for boiling paddy on the 29th September 1915, without having a license therefor, and convicted and fined Rs. 100 by the Sub-Divisional Magistrate of Gudivada. The petitioner preferred a revision petition to the High Court against the conviction and sentence of the Sub-Divisional Magistrate.

B. Narasimha Rao for the petitioner.

E. R. Osborne, Acting Public Prosecutor, for the Crown.

OLDFIELD
AND
SESHAGIRI
AYYAR, JJ.

ORDER.—The petitioner has been convicted of an offence punishable under section 189, Act IV of 1884; that is boiling paddy in an unlicensed place.

There is no dispute as to the facts. The offence is alleged to have been committed on 29th September 1915. The petitioner's last license expired on 30th April 1915. He applied for a fresh license on 4th May 1915, but received no order granting or refusing one until 6th September 1915, when his application was refused. He subsequently appealed against the refusal unsuccessfully. But that is not material, because he argues that under section 188 (5), if a license is not refused within thirty days of its being applied for, the place in question shall be held to be duly licensed for the financial year, for which the license was sought.

This argument is justified by the wording of section 188 (5), for we cannot accept the learned Public Prosecutor's suggestion that it should be read subject to the reference to the refusal of the license in section 189. If it were so read, section 188 (5) would to a large extent be deprived of necessity. We set aside

the decision of the Sub-Divisional Magistrate, acquit the accused and order that the fine, if paid, be refunded.

Re VENKATA-
SUBBAYYA.
K.R. OLDFIELD
AND
SESHAGIRI
AYYAR, JJ.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice
Seshagiri Ayyar.

Re VENKATAKRISHNAYYA AND ANOTHER (ACCUSED
Nos. 4 AND 5).*

1916.
October
17 and 24.

Criminal Procedure Code (Act V of 1898), sec. 413—Joint trial of several accused—Appealable sentence on some and non-appealable sentence on others—No right of appeal for the latter—Section 408 of Criminal Procedure Code, no guide to the interpretation of section 413 of Criminal Procedure Code.

Section 413 of Criminal Procedure Code prohibits an appeal by a person against whom a non-appealable sentence has been passed even though appealable sentences have been passed against others jointly tried with him.

Though for convenience a joint trial of several accused persons under certain circumstances is allowed, on conviction each accused must be deemed to have been convicted in a separate case of his own for the purposes of section 413 of Criminal Procedure Code.

The analogy of section 408, Criminal Procedure Code, cannot be extended to section 413 of Criminal Procedure Code.

PIGGOT, J.'s view in *Emperor v. Lal Singh* (1916) I.L.R., 38 All., 395, not followed.

Palani Koravan v. Emperor (1907) 17 M.L.J., 248, distinguished.

Reg. v. Muliya Nana (1868) 5 Bom. H.C.R., 24 (Cr. C.) and *Reg. v. Kalubhai Meghabhzi* (1870) 7 Bom. H.C.R., 35 (Cr. C.), referred to.

It does not follow as a matter of course that because some of the accused tried along with others are acquitted on the merits on appeal by them, others should necessarily have the benefit of the finding of the Appellate Court.

Citation of the rulings of the Chief Court of Burma disallowed.

CASE taken up by the High Court to revise the order of acquittal by H. R. BARDSWELL, the Sessions Judge of Kurnool, in Criminal Appeals Nos. 41 and 42 of 1916, preferred against the conviction of the Joint Magistrate of Nandyal in Calendar Case No. 4 of 1916.

* Criminal Revision Case No. 553 of 1916.

Re VENKATA-
KRISHNAYYA.

In this case five people were accused and tried jointly. The Joint Magistrate of Nandyal convicted third and fourth accused of offences under sections 193, 465 and 471 of Indian Penal Code and first, second and fifth accused of abetment of the same, and accorded to accused Nos. 1 to 4 appealable sentences and sentenced fifth accused to a fine of Rs. 50. Accused Nos. 1 to 4 preferred appeals to the Sessions Court of Kurnool and the Sessions Judge disbelieving the story of the prosecution as regards all the five accused acquitted these four. Accused No. 5 preferred a separate appeal to the Sessions Court (No. 42 of 1916) and the Sessions Judge acquitted him on the merits, holding at the same time that he had a right of appeal as others sentenced with him and who had appealed were accorded appealable sentences. The High Court called for the records being of opinion that the action of the Sessions Judge in interfering on the appeal of the fifth accused was illegal.

E. R. Osborne, the acting Public Prosecutor, for the Crown.

The fifth accused in respect of whom this reference was made, neither appeared in person nor was represented.

The following order of the Court was delivered by

OLDFIELD
AND
SESHAGIRI
AYYAR, JJ.

OLDFIELD AND SESHAGIRI AYYAR, JJ.—The point for decision is whether an appeal lies to the Sessions Judge or the District Magistrate at the instance of a person against whom a non-appealable sentence has been passed, on the ground that appealable sentences have been passed against others jointly tried with him. Section 413 of the Code of Criminal Procedure speaks of an "appeal by a convicted person in cases in which a Court of Session or the District Magistrate or other Magistrate of the first class passes a sentence of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only." The argument is, that if in the case there is an appealable sentence against any one, the whole case is appealable. In our opinion, although for the sake of convenience, the Code, under certain restrictions, provides that there can be a joint trial, it must be taken that there is a separate case as against each of the accused dealt with in the joint trial. Therefore the reference in section 413 to a case is not to what in ordinary language is regarded for statistical and other purposes as one case, but to the adjudication as against each of the accused. There can be no question that each of

the convicted accused is entitled to prefer a separate appeal. There can be a number of appeals in that way. The moment that sentences are passed against each of the accused, the one case is split up into a number of cases within the meaning of section 413 of the Code.

Re VENKATA-
KRISHNAYYA.

OLDFIELD
AND
SESHAGIRI
AYYAR, JJ.

Piggott, J., has taken the view in *Emperor v. Lal Singh*(1), that if there is a single appealable sentence in the case, the whole case is appealable. The learned Judge refers to section 408 of the Code. The operative portion of that section provides that each of the persons convicted by an Assistant Sessions Judge shall have a right of appeal to the Court of Session. Proviso (b) says that if a sentence of or more than four years is passed in the case, the appeal shall lie to the High Court. It is noteworthy that, whereas the operative portion speaks of persons, the proviso speaks of cases. It was held in *Palani Koravan v. Emperor*(2) that when any one of the accused jointly tried with others is sentenced to imprisonment for four years, the appeal in the case of all the accused would lie to the High Court. The case, although decided long ago, has not been ordered to be reported in the authorized reports. However that may be, we do not think the same considerations apply to section 413. We are not prepared to extend the analogy of section 408 to section 413 as Piggott, J., has done.

Some rulings of the Chief Court of Burma were sought to be quoted before us. This Court has consistently refused to allow such cases to be quoted; and we think it is a wholesome rule.

In Bombay, it has always been held that only persons on whom appealable sentences are passed, have the right of appeal: see *Reg. v. Muliya Nana* (3) and *Reg. v. Kalubhai Meghabhai* (4).

In this Presidency also, the practice has been the same. We see no reason to depart from it now. The matter should be dealt with by the Legislature, if so advised.

We are, therefore, of opinion that the procedure of the Sessions Judge is wrong. On looking into the record, we think that the accused should be discharged. At the same time, we must point out that it does not follow as a matter of course, that

(1) (1916) I.L.R., 38 All., 395.

(2) (1907) 17 M.L.J., 245.

(3) (1868) 5 Bom. H.C.R., 24 (Cr.C.).

(4) (1870) 7 Bom. H.C.R., 35 (Cr.C.)

Re VENKATA KRISHNAYYA, because some of the accused tried along with others are acquitted on the merits, others should necessarily have the benefit of the finding of the Appellate Court.

OLDFIELD
AND
SESHAGIRI
AYYAR, JJ.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Abdur Rahim, Mr. Justice Oldfield, Mr. Justice Srinivasa Ayyangar and Mr. Justice Phillips.

1916.
September
13 and 25
and
November
27 and 30.

KUNHALLOOR PUTHIA VEETIL RAYARAPPA ATIOTI
(FIRST DEFENDANT'S LEGAL REPRESENTATIVE), APPELLANT,

v.

VATHUKOILOTH PARKUM PUNISSERI KELAPPA KURUP
AND THREE OTHERS (PLAINTIFFS NOS. 1 AND 2 AND DEFENDANTS
Nos. 12 AND 58), RESPONDENTS. *

*Malabar compensation for Tenants' Improvements Act (Madras Act I of 1900), sec.
19—Claim, subsequent to Act—Contract before the Act fixing rate of compensation, enforceability of.*

Contracts entered into between a Malabar tenant and his landlord before the 1st January 1886, according to which compensation is payable at certain rates therein specified are valid and binding, whether the rates are more or less favourable to either party than the rates prescribed by the Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900); and when the question of the rate of compensation comes up for determination at a date after the introduction of the Act, it is not open to either party to the contract to elect to have the rates fixed according to the Act in preference to the rates mentioned in the contract.

Koshikot Braemana Vikraman v. Modathil Ananta Patter (1911) I.L.R., 34 Mad., 61, *Paru Amma v. Kunhikandan* (1913) I.L.R., 36 Mad., 410 and *Kochu Babia v. Abdurahman* (1915) I.L.R., 38 Mad., 589, overruled.

SECOND APPEAL against the decree of D. RAGHAVENDRA RAO, the Subordinate Judge of North Malabar, in Appeal No. 370 of 1912, preferred against the decree of L. R. ANANTANARAYANA AYYAR, the District Munsif of Badagara, in Original Suit No. 714 of 1910.

* Second Appeal No. 838 of 1914 (F.B.).

The suit was brought in 1910 for redemption and recovery of certain items of land held by the first defendant under a registered marupat executed by his karnavan to the fifty-eighth defendant's karnavan in the year 1898 in renewal of demises of the same lauds of the year 1876. In 1909 the fifty-eighth defendant granted a *melcharath* to the plaintiff. Defendants Nos. 2 to 57 were subtenants under the first defendant. The defendants Nos. 1 to 57 claimed in the suit to be paid the value of the improvements effected on the lands in their possession at the rates specified in the Malabar Compensation for Tenants' Improvements Act. The demises of the year 1876, which were renewed in 1898, contained provisions for the payment of the value of the improvements which then existed as well as of the improvements which were thereafter to be made at certain specified rates. The contract specifying such rates was made prior to the Malabar Compensation for Tenants' Improvements Act; the improvements in dispute were also made prior to the Act. The plaintiff contended that, in respect of such improvements, the defendants were only entitled to the rates specified in the contract aforesaid, while the defendants claimed the higher rates specified in the Act. Both the lower Courts upheld the contention of the plaintiff and awarded the contract rate. The legal representative of the first defendant preferred a second appeal to the High Court on the question of the rate of compensation for the improvements due to the defendants.

T. Eroman Unni for C. V. Anantakrishna Ayyar for the appellant.

C. Madhavan Nair for the first respondent.

The other respondents did not appear.

The case came on for hearing in the first instance before SPENCE and PHILLIPS, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

The question for determination in this case is whether the compensation for improvements is to be paid for at the rates stipulated for in the demises of 1876 or in accordance with the provisions of the Malabar Compensation for Tenants' Improvements Act. In the Full Bench ruling *Randupurayil Kunhisore v. Neroth Kunhi Kannan* (1) it was held that in the case of a

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(1) (1909) I.L.R., 32 Mad., 1 (F.B.).

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contract made prior to 1st January 1886, the rate of compensation is governed by the terms of the contract. In a subsequent case *Kozhikot Sreemana Vikraman v. Modathil Ananta Patter*(1), BENSON and KRISHNASWAMI AYYAR, JJ., expressed an opinion (*obiter*) that if a contract as to the rate of compensation is unfavourable to the tenant even though it has been entered into before 1st January 1886, he is entitled to claim compensation under section 5 of the Act at the rates prescribed in sections 9—18, and remarked that this opinion was not opposed to the Full Bench ruling in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(2) as the question therein answered was whether the making of the improvements after 1886 disentitled the tenants to the rates fixed by the contract before that date. This, we think, hardly expresses the matter correctly. Although the question in dispute in the suit was as to the rate payable for improvements made after 1886, the question referred to the Full Bench was couched in general terms as follows:—

“In the case of a contract made prior to 1st January 1886, is the rate of compensation which a tenant is entitled to receive governed by the terms of the contract or by the provisions of the *Malabar Compensation for Tenants' Improvements Acts of 1887 and 1900?*,” and the answer given was that in the case of a contract made prior to 1st January 1886, the rate of compensation is governed by the terms of the contract. This being so, we do not think that the facts of the case can warrant us in reading into the answer a modification that is not there, for the decision of the Full Bench is merely an answer to the question propounded and is not, unless expressly so stated, to be considered as a decision which must be construed as governed by the facts of the case in which the reference is propounded, when no reference is made to those facts in the question referred to the Full Bench. The same view of the law was followed by another Divisional Bench (BENSON and SUNDARA AYYAR, JJ.) in *Paru Amma v. Kunhikandan*(3) and it was held that section 19 of the Act referred only to contracts which took away or limited the right of a tenant both to make improvements and to claim compensation for them in accordance with the provisions of this

(1) (1911) I.L.R., 34 Mad., 61.

(2) (1909) I.L.R., 32 Mad., 1 (F.B.). (3) (1913) I.L.R., 36 Mad., 410.

Act, and not to contracts which merely regulated the amount of compensation that they could claim. In *Kocku Rabia v. Abdurahman*(1) two other learned Judges of this Court (SADASIVA AYYAR and TYABJI, JJ.) thinking that the decisions in *Kozhikot Sreemana Vikraman v. Modathil Ananta Patter*(2) and in *Paru Amma v. Kunhikandan*(3) were not in accordance with the Full Bench ruling in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(4) and that the distinction drawn between the right of a tenant to make improvements and to claim compensation for them and his right to claim under an agreement which does not expressly refer to his power to make improvements was somewhat hypercritical, referred the following questions to a Full Bench:—

(1) “Whether a contract which is made prior to the 1st January 1886 and which regulates the rates of compensation claimable by the tenant for improvements or provides for methods of fixing the amount of compensation due to him (such rates or methods not being in accordance with the provisions in sections 5 and 6 of the said *Malabar Compensation for Tenants' Improvements Act*) but which does not expressly refer to the tenant's right to make improvements, is not binding on him if such a contract is less favourable to him than sections 5 and 6 of the Act, and whether the tenant is entitled to repudiate the contract and to claim compensation according to the provisions of the Act, and whether section 19 of the Act affects such contracts.”

(2) “Whether *Kozhikot Sreemana Vikraman v. Modathil Ananta Patter*(2) and *Paru Amma v. Kunhikandan*(3) have correctly interpreted the Full Bench decision in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(4).”

The reply of the Full Bench to the first question was that the contract mentioned therein was not binding on the tenant if it is less favourable to him than sections 5 and 6 of the Act. In reply to the second question, the Court was of opinion that, having regard to the question which the Court had to consider in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(4), there was no inconsistency between the judgment in that case and the judgments in *Kozhikot Sreemana Vikraman v. Modathil Ananta Patter*(2)

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(1) (1915) I.L.R., 38 Mad., 589.
(3) (1913) I.L.R., 36 Mad., 410.

(2) (1911) I.L.R., 34 Mad., 61.
(4) (1909) I.L.R., 32 Mad., 1 (F.B.).

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and in *Paru Amma v. Kunhikandan*(1), and remarked in conclusion "we are not prepared to say that the last two cases were not rightly decided." It will thus appear that the prior ruling in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(2) was not dissented from, and as regards *Kozhikot Sreemana Vikraman v. Modathil Ananta Patter*(3) and *Paru Amma v. Kunhikandan*(1) it was held that they were not wrongly decided. In *Kozhikot Sreemana Vikraman v. Modathil Ananta Patter*(3) the case was decided quite apart from the opinion expressed *obiter* which the learned referring Judges in *Kochu Rabia v. Abdurahman*(4) considered to be in conflict with the ruling in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(2) and in *Paru Amma v. Kunhikandan*(1) the contract under consideration was of a peculiar nature and did not merely regulate the rates of compensation. It would appear therefore that both the Full Bench rulings, i.e., in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(2) and in *Kochu Rabia v. Abdurahman*(4) are still in force and are binding on us. The question for decision in the case before us now is whether the rate of compensation which the tenants are entitled to receive is to be governed by the contracts of 1876 or by the provisions of the Malabar Compensation for Tenants' Improvements Act. According to the decision in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(2) the tenants are entitled only to the rate of compensation contained in the contract. The question might, however, be put in the form of the first question referred to the Full Bench in *Kochu Rabia v. Abdurahman*(4) and according to the opinion expressed in that case the answer must be that the contract is not binding on the tenant if it is less favourable to him than sections 5 and 6 of the Act and consequently the tenants would be entitled to the higher rates provided in the Act. These two answers in the present case are directly conflicting, and as both the rulings are binding on us, the latter one not having in any way dissented from the former, we are in doubt as to which ruling to follow and think that the question should be again referred to a Full Bench. No doubt in *Abdulla Routhan v. Rujah Vasudeva Ravi Varma*(5) one of the referring Judges in *Kochu Rabia v. Abdurahman*(4), SADASIVA AYYAR

(1) (1913) I.L.R., 36 Mad., 410. (2) (1909) I.L.R., 32 Mad., 1 (F.B.).
(3) (1911) I.L.R., 34 Mad., 61. (4) (1915) I.L.R., 38 Mad., 589.
(5) (1915) 29 M.L.J., 316.

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and NAPIER, JJ., interpreted the ruling on their reference as holding that the decision in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(1) should not be construed as negating the tenant's right to claim compensation according to the Act if the terms of the agreement are less favourable to him, but we are unable to trace such a ruling in *Kochu Rabia v. Abdurahman*(2), where it is only stated that *Kozhikot Sreemana Vikraman v. Modathil Ananta Patter*(3) and *Paru Amma v. Kunhikandan*(4) were not inconsistent with *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(1) and were rightly decided. As we have pointed out *Kozhikot Sreemana Vikraman v. Modathil Ananta Patter*(3) was decided on quite a different point, and *Paru Amma v. Kunhikandan*(4) related to a contract of a somewhat peculiar nature unlike the usual contract regulating the rate of compensation. As regards the provisions of section 19 of the Act and the opinion held in *Kozhikot Sreemana Vikraman v. Modathil Ananta Patter*(3) and in *Paru Amma v. Kunhikandan*(4) that the section only refers to contracts limiting the right to make improvements and to claim compensation and not to contracts merely regulating the rate of compensation payable, we would like to identify ourselves with the remarks made by the referring Judges in *Kochu Rabia v. Abdurahman*(2) and would also add a further observation which seems to have escaped notice in the cases referred to above. Section 19 of the Act prescribes that contracts of a certain class made after 1st January 1886 shall be inoperative, but it is not apparent that the provisions of the section affect in any way contracts made before that date. Any contracts made before that date whether of the class referred to in section 19 or of any other nature, must be considered and their validity determined according to law apart from any consideration of section 19, which does purport to be retrospective in effect. In the case therefore of a contract regulating the rate of compensation payable and entered into before 1st January 1886, the question for determination does not seem to us to be, whether it is a contract of the nature contemplated in section 19, but whether it is a contract which is valid and binding according to law, and more

(1) (1909) I.L.R., 32 Mad., 1 (F.B.). (2) (1915) I.L.R., 38 Mad., 589.
(3) (1911) I.L.R., 34 Mad., 61. (4) (1913) I.L.R., 36 Mad., 410.

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especially the law as contained in section 28 and other provisions of the Contract Act. If prior contracts of the nature specified in section 19 are rendered invalid by reason of the passing of the Tenants' Improvements Act or are invalid in law for any other reason, section 19 would appear to be superfluous, for contracts after 1st January 1886 would be invalid for the same reason and there is no reason for declaring their invalidity by a special provision of the Legislature.

We therefore again refer the following questions for determination by a Full Bench as they are questions which are constantly cropping up and in many cases, as in the present one, large sums of money are involved:—

(1) *When a contract has been entered into between a Malabar tenant and his landlord before 1st January 1886, according to which compensation is payable at certain rates therein specified, is such contract valid and binding on them, whether the rates are more or less favourable to either party than the rates prescribed by the Malabar Compensation for Tenants' Improvements Act?*

(2) *When the question of the rate of compensation comes up for determination at a date after the introduction of the Act, can either party to a contract entered into before 1st January 1886 elect to have the rates fixed according to the Act in preference to the rates mentioned in the contract?*

On this reference—

C. V. Anantakrishna Ayyar for the appellant.

O. Madhavan Nair for the first respondent.

The other respondents neither appeared in person nor by pleader.

WALLIS, C.J.,
ABDUR
RAHIM,
OLDFIELD,
SRINIVASA
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PHILLIPS, JJ.

OPINION.—The decision of the Full Bench of four Judges in 1892 in *Kerala Varmah Valia Raja v. Ondan Ramunni*(1) proceeded upon the footing that the intention of the Legislature was that contracts made before the date mentioned should stand unaffected by the Act, in other words that sections 5 and 6 (corresponding) to sections 4 and 5 of the earlier Act did not apply to cases governed by such contracts. This was expressly decided in *Viru Mammai v. Krishnan*(2). If this contention was not in

accordance with the intention of the Legislature, it would hardly have refrained from putting the matter right when repealing and re-enacting the Act with modifications in 1899. In 1908 it was again held by a Full Bench in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(1) that section 19 (formerly 7) did not affect the validity of contracts made prior to the 1st of January 1886 whether the improvements were made before or after the coming into force of the Act of 1887. In 1910 BENSON and KRISHNASWAMI AYYAR, JJ., in *Kozhikot Sreemana Vikraman v. Modathil Ananta Patter*(2), whilst disposing of the case on another ground, suggested that, while prior contracts dealing with right to make improvements and claim compensation for them were saved under the Act, this was not the case with prior contracts dealing only with the rates at which compensation was to be paid. This view was adopted in *Paru Amma v. Kunhikandan*(3) in 1911 by BENSON and SUNDARA AYYAR, JJ., who refused to give effect to a contract made prior to January 1886 which did not restrict the tenant's right to make improvements but only the rates payable for such improvements. In 1913 SADASIVA AYYAR and TYABJI, JJ., referred to a Full Bench the questions whether such contracts were enforceable, and whether the two last mentioned decisions were consistent with the Full Bench decision in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(1). The Full Bench answered, without assigning reasons, that such contracts were not enforceable if less favourable to the tenant than sections 5 and 6 of the Act, and that the decisions in *Kozhikot Sreemana Vikraman v. Modathil Ananta Patter*(2) and in *Paru Amma v. Kunhikandan*(3) were not inconsistent with the Full Bench ruling in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(1). The question has again been referred to a Full Bench by SPENCER and PHILLIPS, JJ., on the ground that the Full Bench decision in *Kochu Rabia v. Abdurahman*(4) is inconsistent with the earlier Full Bench decision in *Randupurayil Kunhisore v. Neroth Kunhi Kannan*(1) and that they are in doubt which to follow, and has now come before a bench of five Judges.

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(1) (1909) I.L.R., 32 Mad., 1 (F.B.).

(2) (1911) I.L.R., 34 Mad., 61.

(3) (1913) I.L.R., 38 Mad., 410.

(4) (1915) I.L.R., 38 Mad., 589.

(1) (1910) I.L.R., 33 Mad., 218 (F.B.). (2) (1898) I.L.R., 21 Mad., 149.

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OLDFIELD,
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AYYANGAR
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PHILLIPS, JJ.

After hearing the whole question reargued we agree with the referring Judges in *Kochu Rabia v. Abdurahman*(1) and in the present case that the view advanced in *Kozhikot Sreemana Vikraman v. Modathil Ananta Patter*(2) and adopted in *Paru Amma v. Kunhikandan*(3) and accepted by the Full Bench in *Kochu Rabia v. Abdurahman*(1) cannot be supported. Section 19 (formerly 7) which deals in terms with future contracts cannot, in our opinion, be construed as dealing only with contracts which take away or limit the right of a tenant to make improvements and also limit his right to claim compensation for them under the Act, but applies equally to contracts which take away or limit either of these rights. It is, we think, clear that the Legislature intended to prohibit all future contracts taking away or limiting either or both of these rights. It is well settled that the word "and" may be read as "or" where it is necessary to do so in order to carry out the obvious intention of the Legislature (Maxwell on Statutes, 331, 3rd edition). The existence of a proviso excluding from the operation of the section a particular class of contracts dealing with the compensation payable under the Act, and the insertion of the word "to" before "claim" when the original section 7 was re-enacted as section 19 also support this view. If, as we hold, contracts, affecting only the right to claim compensation, come within the section, the suggested distinction fails, and we are bound, following the uniform course of decisions in this Court, to answer the first question referred to us in the affirmative and second in the negative.

K.R.

(1) (1915) I.L.R., 38 Mad., 589. (2) (1911) I.L.R., 34 Mad., 61.
(3) (1913) I.L.R., 36 Mad., 410.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Abdur Rahim, Mr. Justice Oldfield, Mr. Justice Srinivasa Ayyangar and Mr. Justice Phillips.

THE RAJA OF COCHIN (REPRESENTED BY THE DIWAN
MR. J. W. BHOORE, I.C.S.) (PLAINTIFF), APPELLANT,

v.

KIZHAYIL KOTHANATH KITTUNNI NAIR (KARNAVAN
AND TWELVE OTHERS) (DEFENDANTS), RESPONDENTS.*

1916.
January
31, February
2 and 18,
November
27 and
December
12.

*Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900), sec.
19—Lease—Stipulation for payment of fee in respect of trees cut down.*

A stipulation in a Malabar lease for the payment of *kuttikanam* (customary fee) to the landlord in respect of trees cut down is not necessarily contrary to the provisions of section 19 of the Malabar Compensation for Tenants' Improvements Act (Madras Act I of 1900).

It is a question of fact to be determined in each case whether the cutting down of trees is an improvement or not, and whether the fee stipulated is reasonable or so unreasonable as to be prohibitive of the cutting down of trees at all.

Semble: A customary fee of eight annas per tree is not unreasonable.

Vasudevan Nambudripad v. Valia Chathan Achan (1901) I.L.R., 24 Mad., 47 (F.B.), considered.

SECOND APPEAL against the decree of V. K. DESIKA ACHARIAR, the Subordinate Judge of South Malabar at Palghat, in Appeal No. 276 of 1914, preferred against the decree of A. V. RATHNAVELU PILLAI, the District Munsif of Alatur, in Original Suit No. 464 of 1912.

The facts of the case are sufficiently stated in the ORDER OF REFERENCE to the Full Bench by COUTTS TROTTER, J.

C. V. Anantakrishna Ayyar for the Appellant.

T. Eroman Unni for respondents Nos. 1 and 2.

The other respondents did not appear.

This Second Appeal came on for hearing in the first instance before COUTTS TROTTER and SESHAGIRI AYYAR, JJ., who made the following ORDERS OF REFERENCE to a Full Bench:—

COUTTS TROTTER, J.—This is a suit brought by the acting Diwan of Cochin, and the properties in question in the suit

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* Second Appeal No. 217 of 1915 (F.B.).

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belong in jenm to the Cochin State. They were let on a *pattam* chit to the first defendant. The material term of the *pattam* chit is as follows: "The teak, rosewood, jack and such kinds of trees which now exist, and may in future be produced, in the properties mentioned in the schedule are not to be cut down and removed without the permission of the State and without paying the *kuttikanam*, but if they are so cut and removed, I am liable for paying up either the fine imposed by the State or the value of the trees." There is no doubt that the defendants cut several trees without the permission of the State. The *kuttikanam* is a sort of due said to be commonly levied on Malabar tenants in respect of trees cut and the effect of the evidence is that the ordinary rate is eight annas a tree. The value of the trees probably varies from Rs. 15 to double that amount. The action is finally brought to recover the value of the trees cut down without permission. But Mr. Anantakrishna Ayyar is willing to take a decree, if he can get it, at the *kuttikanam* rate and no more. The contention for the defendants is that the clause in the lease which I have set out is rendered invalid by the provisions of section 19 of the Malabar Compensation for Tenants' Improvements Act. That section is in these terms: "Nothing in any contract made after the first day of January 1886, shall take away or limit the right of a tenant to make improvements and to claim compensation for them in accordance with the provisions of this Act." It is quite clear that the cutting of trees may, in accordance with the recognized principles of forestry, of itself be an improvement. Moreover any fetter on the right of cutting trees planted by the tenant may be regarded as necessarily a fetter on his right to plant them. It is, I think, impossible to say that it is not a limitation of the tenant's right to make improvements to compel him to obtain the landlord's permission as a condition precedent to cutting the trees. Can it be said that it is no limitation to require him to make payment to the landlord in respect of improvements effected by him, which I have already pointed out cutting down trees may in many cases be? It seems to me impossible to hold that it is not a limitation of the rights of a tenant to make improvements. It is argued for the landlord that to impose a customary fee is not limiting the right to make improvements, but only attaching a condition to it. Section 20 of the Act which preserves certain customary rights

expressly limits them to improvements other than those dealt with under the Act. So far from assisting the plaintiff the section seems to me by implication to abolish any customary rights relating to improvements which are dealt with by the Act, and in any event the plaintiff's claim must be under the express clause of this lease and not under any custom *expressum facit cessere tacitum*. Speaking for myself, I see no answer to the argument that to make the tenant's right to carry out an improvement depend upon his making a payment to his landlord is of necessity to put a limitation upon that right.

As my brother SESHAGIRI AYYAR takes a different view and as his view has been shared by other Judges of this Court, I think it will be best to have the matter settled by referring it to a Full Bench. The question referred will be, this:—

"Whether a provision in a Malabar lease that a tenant shall pay *kuttikanam* or some fee to his landlord in respect of trees cut down is contrary to the provisions of section 19 of the Malabar Compensation for Tenants' Improvements Act."

SESHAGIRI AYYAR, J.—The short question in this case is whether the provision in Exhibit E which the plaintiff, the Raja of Cochin, wants to enforce against the defendants, his tenants, is obnoxious to section 19 of the Malabar Compensation for Tenants' Improvements Act. The provision is in these terms: "The teak, rosewood, jack and such kinds of trees which now exist, and may in future be produced in the properties mentioned in the schedule, are not to be cut down and removed without the permission of the State and without paying the *kuttikanam* fee, but if they are so cut and removed, I am liable for paying up either the fine imposed by the State or the value of the trees." The suit is brought for the value of the trees as the tenant cut and carried away certain trees without paying the *kuttikanam* fee and without obtaining the previous sanction of the landlord. The document may be stated to contain the following conditions: (1) the tenants must before cutting the trees obtain the permission of the Sircar; (2) he should also pay the *kuttikanam* fee in respect of the trees cut and (3) if they are cut and removed without obtaining the permission and without paying the fee, the tenant must pay either the value of the trees or such damages as the landlord may fix. I am prepared to concede that the provision for obtaining the permission of the landlord before

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cutting the trees is not enforceable. Similar provisions in pattas granted by the landlords in the East Coast have been regarded as invalid. At the same time, I am not prepared to say that this provision for obtaining the permission of the landlord contravenes section 19 of the Compensation for Tenants' Improvements Act. Even granting that this provision is opposed to section 19, the only effect of its inclusion would be to make this particular provision infructuous, and not to render other conditions which may be perfectly legitimate invalid. As regards the next condition for the payment of *kuttikanam* fee, I am unable to see objection to it. In Logan's Malabar Manual, it is described as being in the nature of a seigniorage or a stump fee; and it is said by this writer who had considerable experience of Malabar that it was a customary fee paid by tenants to landlords for cutting trees whether planted by the landlord or the tenant. Such a condition does not, in any way, take away or limit the right of a tenant to make improvements. It only lays claim to a small payment which, according to Mr. Logan, is eight annas for each tree cut. This would leave the tenant full liberty to make whatever improvements he liked upon the property. As pointed out by the Full Bench in *Vasudevan Nambudripad v. Valia Chathu Achan*(1), if conditions are embodied in a document which are consistent with a customary law of the country, they should not be regarded as being in contravention of section 19 of the Tenants' Improvements Act. In *Sreedevi v. Biyyakutti Ummah*(2) DAVIS, J., held that a provision for the payment of *kuttikanam* fee is not opposed to section 19 of the Act. In *Sreemana Vikraman v. Kuttiyammu*(3) the same view was taken by BENSON and MUNRO, JJ. It is true that in neither of the cases the respondent was represented; but as the learned Judges who decided these cases had considerable experience of Malabar, I am inclined to attach importance to their pronouncements, especially as I am of opinion that this provision would not affect or limit the right of a tenant to make any improvements he pleases upon the property.

The next provision for the payment of any damages that may be fixed by the landlord or the value of the trees is undoubtedly

(1) (1901) I.L.R., 24 Mad., 47 (F.B.) at p. 55.

(2) Civil Revision Petition No. 122 of 1905.

(3) Second Appeal No. 1076 of 1905.

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penal in its character. Under section 74 of the Indian Contract Act the Court may refuse to enforce such a provision and may fix such damages as, in its opinion, may legitimately compensate the landlord for the injury done. But the introduction of such a clause is not a reason for holding that the provision about the *kuttikanam* fee should be regarded as being opposed to law. It is well known that a contract may contain provisions, some of them legitimate and valid and others invalid and unenforceable. It does not follow that a valid provision should not be given effect to because it is coupled with an invalid provision. I am not satisfied that the provision for the payment of *kuttikanam* fee is opposed to the statute, and that the landlord is not entitled to some reasonable compensation for the tenant having cut and carried away the trees without paying him that fee.

But as the question is one of importance, I agree that the question proposed by my learned brother be referred to a Full Bench.

On this reference—

C. V. Anantakrishna Ayyar for the appellant.

T. Eroman Unni for respondents Nos. 1 and 2.

The other respondents did not appear.

The Second Appeal again coming on for hearing the Court expressed the following OPINIONS:—

WALLIS, C.J.—In considering whether a kanomdar had a right to cut and carry away trees planted by himself the Full Bench in *Vasudevan Nambudripad v. Valia Chathu Achan*(1) held that, whether the case was treated as governed by the Transfer of Property Act or not, the kanomdar had such a right in the absence of a contract or custom to the contrary and that Madras Act I of 1900 did not deprive him of it by requiring him to keep the trees upon the holding and have compensation assessed upon them. The case contains no reference to section 19, and there was no occasion for the learned Judges to consider whether a contract not to cut and remove trees without the landlord's permission and to pay a fee when such permission was granted was invalid under that section as taking away or limiting the tenants' right to make improvements. That section was no doubt intended to secure the

(1) (1901) I.L.R., 24 Mad., 47 (F.B.).

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tenants' right to make improvements as well as to claim compensation for them, and strikes at all attempts by contract to limit these rights either directly or indirectly. At the same time it must be construed strictly, and not extended to cases which cannot have been in the contemplation of the Legislature. Before the passing of the Act it was open to a landlord, when letting land suitable for planting trees and in consideration of the use and enjoyment of his land by the tenant, to stipulate either for payment of an annual rent or in some other way or for a payment of an annual rent plus a *kuttikanam* or stump fee according to a very general practice on the West Coast. I do not think that the section was intended to affect stipulations for the payment of a moderate fee such as the *kuttikanam* claimed in the present case, or that such a stipulation can be regarded as limiting the tenants' right of making improvements by planting trees, or by cutting them down to make a clearance. If the trees planted by the tenant are left on the land at the determination of the tenancy, the tenant is only entitled under section 10 to three-fourths of their value. The suggestion in *Vasudevan Nambudripad v. Valia Chathu Achan*(1) that this allowance was made to the landlord on the ground that his purchase of the trees is compulsory fails to take account of the fact that no such allowance is made under section 9 as regards improvements generally. When the subject was before the Legislature in 1887 and 1899, *Vasudevan Nambudripad v. Valia Chathu Achan*(1) had not been decided and the respective rights of the landlord and tenant in trees planted by the tenant were still matters of controversy. In these circumstances there is considerable force in the contention urged upon us that one-fourth of their value was allowed to the landlord in recognition of the fact that the trees had been raised on his land.

If the stipulation is not open to objection as limiting the tenant's right to plant trees, still less can it be so as limiting his right to cut trees by way of clearance. In such a case the tenant, when cutting and carrying away the trees, gets far more after paying the *kuttikanam* than he would be entitled to as compensation on the determination of the tenancy which would only be three-fourths of their value in the case of trees planted by

(1) (1901) I.L.R., 24 Mad., 47 (F.B.).

himself and those through whom he claims and only the cost of support and maintenance in the case of other trees. Further it must be borne in mind that it must be a question of fact in each case whether such felling is an improvement within the meaning of the Act.

Confining myself to the case before us, I would answer that a stipulation in a Malabar lease for the payment of *kuttikanam* to the landlord in respect of trees cut down is not contrary to the provisions of section 19 of the Act. Other cases may be dealt with when they arise. In the meantime it may be sufficient to say that the Courts will not countenance attempts on the part of landlords to appropriate to themselves by means of contracts the interests in improvements which the Act was intended to secure to the tenants.

ABDUR RAHIM, J.—I agree in the answer proposed by the learned Chief Justice. The cutting of trees as suggested by Courts Trotter, J., in the Order of Reference may of itself be an improvement, but whether it is so or not must depend on the facts of each case, taking into consideration the nature of the holding, the kind and the number of the trees that are cut and the use that is sought to be made of the land. But this is not to be assumed as a general proposition as the question referred to us seems to do, and it may be mentioned that it was stated to us at the bar that no such case was sought to be made by any of the parties concerned in the present litigation.

Supposing a case when the cutting of trees would be an act in the nature of improvement within the meaning of the Malabar Compensation for Tenants' Improvements Act it does not follow that a contract for the payment of "some fee" to the landlord must necessarily limit the right of the tenant to make improvement and claim compensation. If the trees were on the land at the time of the commencement of the tenancy and therefore belonged to the landlord [*Vasudevan Nambudripad v. Valia Chathu Achan*(1)]. There is nothing in the Act which would justify us in holding that the tenant is entitled to appropriate their value, if it was found necessary to cut them in the course of making improvements. Even if the trees grew or were planted by the tenant after the grant of the lease there is

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nothing in the Act debarring the landlord from contracting for payment of a certain sum for each tree which the tenant may cut for the purpose of making improvements, provided the payment demanded is not so unreasonable as to be prohibitive of the cutting of trees at all. Here the *kuttikanam* stipulated for is the customary fee of eight annas per tree while the value of each tree is about Rs. 15 and it cannot be said that such a demand is likely to deter any reasonable tenant from improving the holding if he be so inclined.

The Act however far it goes in order to encourage the tenants in making improvements on lands in Malabar, cannot be presumed to affect in any way the proprietary rights of jenmis or to interfere with contracts for payment of rents or other dues for the use and occupation of their lands. Its object is to assure to the tenants the right to make improvements and to obtain at the time he leaves the land the full value of the improvements which he may have made. If the arguments put forward on behalf of the tenant were sound it would logically follow, if pushed to their full lengths that even an ordinary contract for the payment of rent is necessarily a limitation of the tenants' right to make improvements. Such a payment as that referred in the question leaves the tenant as pointed out by SESHAGIRI AYYAR, J., full liberty to make whatever improvements he likes upon the property and is not therefore contrary to the provisions of section 19 of the Act.

OLDFIELD, J. OLDFIELD, J.—I concur in the answer to the reference proposed by the learned Chief Justice for the reasons given by him and ABDUR RAHIM, J.

SRINIVASA
AYYANGAR, J. SRINIVASA AYYANGAR, J.—I agree with the learned Chief Justice.

PHILLIPS, J. PHILLIPS, J.—This reference has been made on two grounds, one that the cutting down of trees may in itself be an improvement within the meaning of the Act, and the other that a charge levied on the cutting down of trees may be deemed to be a limitation of the right to plant those trees. In the present case it is conceded that the cutting down of the trees is not in itself an improvement, and judging from my experience of Malabar I should think that it can only be in very exceptional cases that the cutting down of valuable trees such as teak, rosewood and jack, with which alone we are concerned in the

present case, would be an improvement. Such cases must necessarily be so rare that it seems unnecessary to deal with the question beyond saying that if such cutting is found to be an improvement it is quite possible that the limitation of such cutting might be a limitation of the right to make improvements, and such exceptional cases must be dealt with on their merits. The second proposition that a charge levied on the cutting down of valuable trees may be a limitation of the right to make improvements seems to me to be based on a confusion between the right to make improvements and the right to enjoy them when made. If a tenant plants a tree he is not bound to cut it down before the end of the tenancy. If it is in existence at the end of the tenancy, he is entitled to compensation, but not otherwise, and if he chooses to enjoy the benefit of the tree by cutting it down during the tenancy, no question of compensation arises, and consequently it is difficult to see how an agreement to pay some fee for each tree cut can limit the right of a tenant to make improvements and to claim compensation for them within the meaning of section 19 of the Act. If the tenant cuts down a tree he gets the full value of it less the fee imposed, but as he need not cut down the tree the fee imposed can in no way prevent him from growing it except possibly when the fee is unreasonably large, a case which we need not consider now.

I therefore agree with the answer given by the learned Chief Justice.

C.S.S.

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APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Ayyangar.

1916.
September
20 and 25,
October 11,
November
28 and 29 and
1917.
January
16.

BOIDYO GAURANGA SAHU (DEFENDANT IN SECOND APPEAL
No. 1643 OF 1914—PLAINTIFF IN SECOND APPEAL No. 1644 OF 1914),
APPELLANT,

v.

SUDEVI MATA (PLAINTIFF IN SECOND APPEAL No. 1643 OF 1914—
DEFENDANT IN SECOND APPEAL No. 1644 OF 1914), RESPONDENT.*

*Religious endowment—Failure of the line of trustees—Right of heirs of founders
of the institution to create a new line of trustees.*

Held, by the Full Bench (SRINIVASA AYYANGAR, J., *contra*), that it is competent to an heir of the founder of a shrine, in whom the trusteeship has vested owing to the failure of the line of the original trustees, to create a new line of trustees.

Per SRINIVASA AYYANGAR, J.—In the absence of any such power in the deed of trust, the Court alone has the power to appoint a trustee; such a power of nomination is equivalent to an alienation of the office of trustee, which is illegal.

SECOND APPEAL against the decree of T. JIVAJI, the Temporary Subordinate Judge of Ganjām at Rajahmundry, in Appeals Nos. 22 and 19 of 1913 preferred against the decrees of E. J. S. WHITE, the Principal District Munsif of Berhampur, in Original Suits Nos. 412 and 455 of 1911 respectively.

The facts are given in the first three paragraphs of the ORDER OF REFERENCE.

A. Krishnaswami Ayyar for the appellant.

V. Ramesam for the respondent.

SESHAGIRI
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AND
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AYYANGAR,
JJ.

These Second Appeals coming on for hearing in the first instance before SESHAGIRI AYYAR and SRINIVASA AYYANGAR, JJ., they made the following ORDER OF REFERENCE to a Full Bench.

The facts found are these: The grandfather and the father of the plaintiff, Bavuri and Brundavan, acquired certain properties on *darkhast* and dedicated them to a shrine which they consecrated in or about the year 1887. The plaintiff

was admittedly born during the lifetime of the grandfather. When the shrine was established, one Gangadhara Doss Bavaji was appointed to perform the *puja* in the shrine. The grandfather died about 1893. The father made his will in 1908. He has therein prescribed the course of devolution regarding the trusteeship of the shrine. The plaintiff questions the validity of the disposition in the will.

Before dealing with the main question argued in the case, we might dispose of the minor contentions. Mr. Krishnaswami Ayyar's contention that under the will the plaintiff is the trustee, is opposed to the plain language of the document. It is clear that the testator intended Sudevi Mata and her disciples to be the trustees. Mr. Ramesam's contention that the dedication was not complete during the lifetime of the father cannot be accepted. We think the finding of the Subordinate Judge, "that Bavuri and Brundavan (the grandfather and the father) were joint founders of the mutt," is supported by evidence. The dedication must be taken to have been completed in the grandfather's lifetime.

The main contention related to the powers of the father to prescribe the course of devolution for the management of the trust. It was contended that as the *pujari* trustee appointed originally died, the right of nomination reverted to the joint founders and their heirs, and that it was open to Brundavan to have created a line of trustees. In the first place, if this right is exercisable by the heirs, the father alone is not competent to exercise the right, as the son was admittedly alive at the time. But the more serious question is, whether the right of nomination accrues to the heirs of the founders.

Under English Law, there can be no question that after dedication, the founder or his heirs would have no right to be or to appoint trustees. Is the law different in India? It was held in *Mussamat Jai Bansi Kunwar v. Chattar Dhari Singh*(1), that where the line of trustees had become extinct, the trusteeship would vest in the founder's family. No usage is referred to in the judgment, nor is any text of Hindu Law quoted in support of this position. However, this view has been regarded as

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* Second Appeals Nos. 1643 and 1644 of 1914.

(1) (1870) 5 B.L.R., 181; s.c., 13 W.R., 396.

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unassailable by a long course of decisions. The Judicial Committee of the Privy Council have recognized the soundness of this rule: *Gossami Sri Gridharaji v. Romanlalji Gossami*(1), *Maharaja Jagadindra Nath Roy Bahadur v. Rani Hemanta Kumari Debi*(2) and *Mohan Lalji v. Gordhan Lalji Maharaj*(3). In none of the cases before the Privy Council, was there any suggestion that the right of nomination would vest in the founder's heirs. But the Allahabad High Court in *Sheoratan Kunwari v. Ram Pargash*(4) and *Sheo Prasad v. Aya Ram*(5), have laid down that proposition, on the basis of the ruling of the Privy Council in *Gossami Sri Gridharaji v. Romanlalji Gossami*(1).

In Calcutta, the exact question did not arise for decision; but in *Sital Das Babaji v. Protap Chandra Sarma*(6) Mr. Justice MOOKERJEE apparently regarded the right of nomination as appurtenant to the right of management. There are some observations in *Raj Krishna Dey v. Bipin Behari Dey*(7), to the same effect.

In Madras, until very recently, there has been no definite pronouncement on the question. In *Sathappayyar v. Periasami*(8), Mr. Justice MUTTUSWAMI AYYAR had to deal with the right of appointing to the office of trustee claimed by the zamindars of Sivaganga. The learned Judge whose knowledge of these questions was unique, held that the founders had only the right to offer suggestions for filling up the vacancy and that the power of appointment was in the Civil Courts. As some doubt was felt regarding this position, we sent for the decree in the suit and we are satisfied that under the decree, the only right reserved to the founder's family was to offer advice. When we remember that the learned Judge had to consider elaborately the right of advice as opposed to the right of appointment in the Tiruppanandal Mutt case—*Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran*(9), it is clear that he advisedly held in *Sathappayyar v. Periasami*(8), that the founder had not the right of appointment. Reference may be made to another case

(1) (1890) I.L.R., 17 Calc., 3 (P.C.).

(2) (1904) 31 I.A., 203.

(4) (1896) I.L.R., 18 All., 227.

(6) (1910) 11 C.L.J., 2.

(8) (1891) I.L.R., 14 Mad., 1.

(3) (1913) I.L.R., 35 All., 283 (P.C.).

(5) (1907) I.L.R., 29 All., 663.

(7) (1913) I.L.R., 40 Calc., 245 at p. 257.

(9) (1877) I.L.R., 10 Mad., 375.

decided in this Court. In *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami*(1), BHASHYAM AYYANGAR, J., enumerates the classes of persons who would have the right of appointing in case there is a vacancy. The founder and his heirs are not among those mentioned. More recently the learned CHIEF JUSTICE and COURTS TROTTER, J., have held that the reverter of trusteeship carries with it the right of appointment. With all deference, we are of opinion that this position requires reconsideration.

By the Indian Trust Act, section 73, the power to appoint new trustees is reserved to "the author of the trust, if he be alive and competent to contract." The heirs of the author of the trust are not among those to whom the power of appointment is given. The vesting of the power in the author of the trust is in itself a departure from the rule of English law. The exercise of the power by the founder's heirs will lead to difficulties. Is the right to be exercised by all the members, or at a family council or by the senior in age for the time being? If the manager exercises the function and dies, are his brothers or the direct lineal heirs to possess that right? The introduction of the principle of primogeniture in such case was vetoed in *Sethurama Swamiar v. Meruswamiar*(2).

A further question would be whether the right of appointment is a species of property. We must take it that the right of trusteeship is property. Can the same be said of the power of appointment?

We think that in the interests of the trust itself, the safer rule will be to leave the power of appointment in Courts and not to vest them in the founder's family. Both reason and convenience are in favour of this position. But having regard to the recent decision already referred to, we think it desirable to refer the following question for the decision of a Full Bench:—

"Whether it is competent to an heir of the founder in whom the trusteeship has vested owing to the failure of the line of the original trustees, to create new line of trustees?"

On this reference—

A. Krishnaswami Ayyar for the appellants.—In the absence of any power reserved in the deed of trust neither the founder nor

1) (1904) I.L.R., 27 Mad., 435 at p. 457.

(2) (1911) I.L.R., 34 Mad., 470.

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his heirs have any power to nominate a new trustee or to create a new line of trustees. Under such circumstances Courts alone have the power to nominate new trustees. This is the law generally as regards trusts in England and America; see Perry on Trusts, sections 287, 294 and section 34 of the Trustees and Mortgagees' Powers Act. Section 73 of the Indian Trusts Act gives such a right only to the author of the trust and not to his heirs. Even the founder has no such right as regards religious institutions; see Mayne's Hindu Law, 8th edition, section 440. The Privy Council cases quoted in the Order of Reference lay down only that the trusteeship vests in the heirs of the founder and not that there is a right of nomination. The exercise of the right of nomination by the heirs is equivalent to an alienation of the office, which has been condemned by the Privy Council as early as 1876 in *Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty*(1). The right of the heirs of the founder to the trusteeship does not necessarily give them a right to nominate. The Allahabad and Calcutta cases quoted in the Order of Reference have wrongly understood the Privy Council cases (which only declared the rights of the heirs to the trusteeship), as clothing them with a right of nomination as a necessary consequence. Though a right to trusteeship may be "property," a right of nomination is not. Recognition of hereditary right has been condemned as it involves no guarantee of fitness for the office. If a hereditary right to nominate is to be recognized it leads to various practical difficulties. If there are several heirs the question will arise whether the senior or all of them are to nominate. If again the senior dies the further question will arise as to whether the brother or the son of the senior is to appoint. Again, if a widow is the heir, the question will be whether she alone can nominate without the consent of the reversioners. *Sathappayyar v. Periasami*(2) was referred and explained.

S. K. Parthasarathi Ayyangar for V. Ramesam for the respondent.—Founder's heirs have the power to nominate. For the earliest statutory recognition of this power, see sections 10 and 11 of the Madras Regulation VII of 1817, which lay down that the local agents should ascertain whether on a vacancy the

(1) (1876) I.L.R., 1 Mad., 235.

(2) (1891) I.L.R., 14 Mad., 1.

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founder or founder's heirs have nominated anybody: vide *Teetarappa Moodelly v. Soondararajen*(1). The right of a founder is not merely that of trusteeship. He has also the right of nomination at any time during his life: see *Gossami Sri Gridharaji v. Romantlalji Gossami*(2). Such a right is inherent in the founder; and all his rights descend to his heirs. See *Gobind Prasad v. Gomati*(3) and *Sukhbir Singh v. Nihal Singh*(4), where a widow, founder's heir, is held to have a right to nominate. If there are two founders, the survivor can nominate; Perry on Trusts, volume 2, section 505, and sections 44 and 76 of the Trusts Act. The estate vests in the heirs subject to conditions subsequent if any.

A. Krishnaswami Ayyar in reply.—There is no case which makes any distinction between the founder and his heirs as regards the power of nomination; *Mohan Lalji v. Gordhan Lalji Maharaj*(5) was referred to.

The Full Bench delivered the following OPINION:—

WALLIS, C.J.—The institution of the hereditary office of trustee *WALLIS, C.J.* of religious and charitable endowments is in accordance with the custom of the country recognized in Madras Regulation VII of 1817 and Act XX of 1863 and is too firmly established to be altered without legislation. It affords, however, no guarantee of fitness for the exercise of the office, and may be held largely responsible for the numerous cases of waste and misappropriation of these endowments which come before the Court, and, it is to be feared, for a still larger number which are never brought before it. The exercise and enjoyment of the office in the event of the successive partitions to which families in India are liable also present difficulties which are illustrated by *Ramanathan Chetti v. Murugappa Chetti*(6) which was affirmed by the Privy Council in *Ramanathan Chetti v. Murugappa Chetti*(7). In these circumstances it would perhaps be better if it had never been held that on failure of the line of devolution prescribed by the founder the trusteeship reverted as an hereditary office to the heirs of the founder. But, as observed in the Order of

(1) (1861) Mad., Sud. Dec., 57.

(2) (1890) I.L.R., 17 Cal., 3 at p. 21 (P.C.).

(3) (1908) I.L.R., 30 All., 288. (4) (1913, 18 I.C., 232.

(5) (1913) I.L.R., 35 All., 233 at p. 288 (P.C.).

(6) (1904) I.L.R., 27 Mad., 192. (7) (1906) I.L.R., 29 Mad., 233 (P.C.).

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Reference, this view has been regarded as unassailable by a long course of decisions, and I do not feel at liberty to differ from them. This being so, there is, I think, much to be said for the view of the Allahabad and Calcutta Courts recognizing the right of the founder's heirs to make fresh arrangements for the devolution of the trust instead of leaving it to devolve, as otherwise it must, in the family of the founder, subject to the difficulties as to its exercise and enjoyment to which I have already alluded. The institution of hereditary trusteeship is held to rest on the intention of the donor either expressed in the instrument of trust or to be presumed from usage, and the doctrine of reverter to the heirs of the donor on failure of the line of devolution prescribed by him must also, it seems to me, rest on his presumed intention. This being so, I do not see much difficulty in presuming an intention that the heirs should be at liberty to make fresh arrangements for the devolution of the trust instead of leaving it to devolve in the family, a result which the founder had shown himself anxious to avoid. In *Ramanathan Chetti v. Murugappa Chetti*(1), BENSON and BHASHYAM AYYANGAR, JJ., were of opinion, that, when the office of trustee devolved upon the members of a Hindu family, it was open to them to settle a scheme for the enjoyment and exercise of the office in rotation, and their decision was upheld in *Ramanathan Chetti v. Murugappa Chetti*(2) by their Lordships of the Judicial Committee who held that the arrangement was one which the parties interested were competent to make without applying to the Court. That no doubt was not a case in which the trusteeship had reverted to the heirs of the founder on failure of the line prescribed by him. But in such an event also it seems to me more convenient and more in accordance with the presumed intention of the founder to allow fresh arrangements to be made instead of leaving the office to devolve on the heirs. It might, I agree, be still better if it were open to us in such a case to exclude the heirs of the founder altogether and leave a scheme to be settled by the Court. The right of nomination in such circumstances appears to have been recognized by the Court of Sudder Adalat, *Lutchmee Ummal v. Rookmanee Ummal*(3). The decision of MUTTUSWAMI AYYAR, J., in *Sathappayyar v.*

(1) (1904) I.L.R., 27 Mad., 192.

(2) (1906) I.L.R., 29 Mad., 283 (P.C.).

(3) (1857) Mad. Sud. Dec., 152.

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Periasami(1), does not, in my opinion, help either side. What the learned Judge did was to recognize a right of appointment, not in the plaintiff as heir of the founder or in the Court, but in the plaintiff and his family as the beneficiaries under the trust. At page 13 the proper decree is said to be to declare the respondent's right to appoint a person qualified to discharge the peculiar trusts as new trustee with the concurrence of the members of the family. The statement as to the decree in the Order of Reference was made under a misapprehension, as what the decree does is to declare the right of the plaintiff to nominate with the concurrence of his family and to direct the properties to be handed over to the person so nominated, and in default of nomination to dismiss the suit, and this appears to me to have given effect to the intention of the learned Judges. The other cases are sufficiently dealt with in the Order of Reference and the opinions of my learned brothers and it is unnecessary to refer to them. I would answer the question in the affirmative.

ABDUR RAHIM, J.—To my mind the question whether the right of nominating a trustee to a Hindu religious endowment vests in the heirs of the founder in the absence of failure of a specific provision in the deed of endowment or where there are no especial usages or circumstances indicating a different mode of devolution is concluded by authority and must be answered in the affirmative. It is not suggested that there is any text of Hindu Law bearing on the point, but the question has been the subject of unanimous rulings of this Court as well as the Allahabad and Calcutta High Courts, the later decisions being mainly founded on the pronouncement of the Judicial Committee in *Gossami Sri Gridharaji v. Romanlalji Gossami*(2).

To begin with the earlier cases. Of the two Madras Sudder Dewany decisions cited by Mr. Mayne in his Hindu Law (paragraph 440) as negating the right of nomination by the heirs of the founder, all that was decided in *Teetarappa Moodelly v. Soondararajen*(3) was that the heirs of a founder were not entitled to recover possession of the endowed properties from a trustee who had been properly appointed or to demand accounts from him. The statement that "it is obvious that in the

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(1) (1891) I.L.R., 14 Mad., 1.

(2) (1890) I.L.R., 17 Calc., 8 at p. 20 (P.C.).

(3) (1851) Mad. Sud. Dec., 57.

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management of charitable institutions, the heirs of the founders can have no legal right to interfere unless under some especial powers given to them by the founder" should not be given a wider application. *Lutchmee Ummal v. Rookmanee Ummal*(1) clearly ruled that on the death of the first *dharmakartha* appointed by the founder the latter's heir had the right to appoint a fresh trustee. In 1870 a Division Bench of the Calcutta High Court of which DWARKANATH MITTER, J., an eminent authority on Hindu Law, was a member, held in *Peet Koonwar v. Chuttur Dharee Singh*(2), same case—*Mussamat Jai Bansi Kunwar v. Chatter Dhari Singh*(2), that where the mutawalli of an endowment dies without nominating a successor, the management must revert to the heirs of the person who endowed the property. The endowment in question in that case, it may be mentioned, was made by a Hindu for an idol though the words mutawalli and waqfae (Muhammadan Law terms for trustee and deed of endowment respectively) were used in connection with the dedication.

The principle of the decision in *Peet Koonwar v. Chuttur Dharee Singh*(2) was affirmed by the Judicial Committee in *Gossami Sri Gridhariji v. Romanlalji Gossami*(3), where they lay down: "According to Hindu Law, where the worship of Thakur has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution." It was so held also in *Surendro Keshub Roy v. Doorgasoodry Dossee*(4), and the rule was re-affirmed in *Jagadindra Nath Roy v. Hemanta Kumari Debi*(5), their Lordships saying that in the absence of evidence as to the terms or conditions of the foundation the legal inference is that the title to the property, or to the management and control of the property, as the case may be, follows the line of inheritance from the founder. In *Mohan Lalji v. Gordhan Lalji Maharaj*(6), they made it clear that the rule enunciated in *Gossami Sri*

(1) (1857) Mad. Sud. Dec., 152.

(2) (1870) 5 B.L.R., 181 ;s.c., 13 W.R., 396.

(3) (1890) I.L.R., 17 Cal., 3 at p. 21 (P.C.).

(4) (1892) I.L.R., 19 Cal., 513 at p. 532.

(5) (1905) I.L.R., 32 Cal., 129 at p. 139. (6) (1913) I.L.R., 35 All., 283 (P.C.).

Gridhariji v. Romanlalji Gossami(1) was subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship.

It is contended that the right of the heirs of the founder is limited to their holding the office themselves and does not include the power to nominate or appoint a trustee. No such limitation has, however, been recognized by the Courts and I am not persuaded that it was ever within the contemplation of the Judicial Committee. Soon after the judgment of the Privy Council in the case in *Gossami Sri Gridhariji v. Romanlalji Gossami*(1), MUTTUSWAMI AYYAR, J., had to consider in *Sathappayyar v. Periasami*(2) the precise question now raised before us with reference to a mutt. He laid down at page 18: "In the absence of a qualified disciple in whom the right of succession has already vested, the beneficiaries, who are the members of the zamindar's family, are the only persons interested in the appointment and entitled as such to express an opinion regarding the fitness of the proposed new trustee for the office. The case is then analogous to that of a vacancy arising from the death of a *paradesi* without appointing his successor. The proper decree is to declare the respondent's right to appoint a person qualified to discharge the peculiar trusts as new trustee with the concurrence of the rest of his family, to direct him to do so within a given time, and, upon his doing so, to confirm such appointment after notice to the other members of the respondent's family, and to direct that upon such confirmation the properties in dispute be made over to the person newly appointed to be administered so as to carry out the trusts of the institution in accordance with its usage." On referring to the decree passed in accordance with the above direction it is evident that the suggestion made in the Order of Reference that the decree drawn up by the High Court only declared the right of the heir of the founder "to offer advice" was based on a clear misapprehension. In fact that was the important point on which the decree of the lower Court was modified by the High Court, the modification consisting in declaring the right of the Raja to appoint or nominate the *paradesi* subject to confirmation by the Court.

(1) (1890) I.L.R., 17 Cal., 3 (P.C.).

(2) (1891) I.L.R., 14 Mad., 1.

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Then, I am unable to draw from the passage in *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami*(1), alluded to in the ORDER OF REFERENCE, any conclusion that Mr. Justice BHASHYAM AYYANGAR intended to negative the right of the heirs of the founder to make nomination in the case of a vacancy. If he intended to lay that down, one would have expected him to do so in express terms especially as he was one of the vakils who argued the case before MUTTUSWAMI AYYAR, J. The learned CHIEF JUSTICE and COUTTS TROTTER, J., in *Doraisami Pillai v. Sandanathamall*(2), on the other hand, held that on failure of the provision originally made by the founder for management of a charitable trust, the right to provide for succession to the trust reverted to him.

In *Sheoratan Kunwari v. Ram Pargash*(3) the law is taken to be well settled that in the absence of provision for the nomination of a trustee, the right to nominate vests in the founder of the endowment and continues to his heirs and the ruling of the Privy Council in *Gossami Sri Gridharaji v. Romanlalji Gossami*(4) is referred to as having accepted the principle. The rule is followed in *Chandranath Chakrabarti v. Jadabendra Chakrabarti*(5), *Sheo Prasad v. Aya Ram*(6), *Gobind Prasad v. Gomati*(7) and *Sukhbir Singh v. Nihal Singh*(8).

That has also been the course of decisions in Calcutta. In *Ranjit Singh v. Jagannath Prasad Gupta*(9), it was held by NORRIS and GHOSE, JJ., following *Peet Koonwar v. Chuttur Dharee Singh*(10), that on failure of the provision for the appointment of a shebait or manager, the office reverted to the heirs of the founder. BANERJI, J., a very learned Hindu lawyer, stated in *Jagannath Prasad Gupta v. Ranjit Singh*(11), the rule as enunciated in *Peet Koonwar and another v. Chuttur Dharee Singh*(10) and *Gossami Sri Gridharaji v. Romanlalji Gossami*(4), in general terms to the effect that when there is no other provision for the appointment of shebait the management of the endowment must revert to the heirs of the founder. The same view of the law is

(1) (1904) I.L.R., 27 Mad., 435 at p. 457.

(2) (1915) M.W.N., 479.

(3) (1896) I.L.R., 18 All., 227 at p. 232.

(4) (1890) I.L.R., 17 Cal., 3 (P.C.). (5) (1906) I.L.R., 28 All., 689.

(6) (1907) I.L.R., 29 All., 663. (7) (1908) I.L.R., 30 All., 283.

(8) (1913) 18 I.C., 232. (9) (1886) I.L.R., 12 Cal., 375 at p. 380.

(10) (1870) 5 B.L.R., 181; s.c., 13 W.R., 396.

(11) (1898) I.L.R., 25 Cal., 354.

upheld by MOOKERJEE, J., in *Sital Das Babaji v. Protap Chandra Sarma*(1), and *Raj Krishna Dey v. Bipin Behari Dey*(2).

In the face of these authorities I feel myself bound to hold that the question referred to us is no longer an open one. Up to now there has been no expression of judicial dissent from the view of the law expressed in the above decisions.

I may mention that Mr. A. Krishnaswami Ayyar referred us to *Narayanan Chettiar v. Lakshmanan Chettiar*(3) where it was held that an alienation of the office of trustee by the hereditary trustee of a temple is absolutely void. But it does not seem to me that nomination of a trustee by the heirs of the founder who on the failure of the line of trustees indicated by the deed of endowment would themselves be entitled to act as trustees is *ipso facto* the same thing as alienation of the office of a trustee by the hereditary trustee. It is no more an alienation of the office, properly speaking, than the provision for appointment of a trustee when made by the founder himself.

Nor can it be said that the nomination of a trustee by the heirs of the founder would not be in accordance with the genesis of the Hindu Law relating to trusts. That system recognizes the hereditary principle with reference to trusteeships, such office is liable to partition like ordinary joint family property and it has been held to be capable of being acquired by prescription. It would doubtless be more in accordance with modern legal notions to release the office of trustee from the domination of the joint family and hereditary principles relating to tenure of property and the arguments of convenience probably preponderate in the same direction. At the same time I am not convinced that there are really insuperable difficulties in working out the view which upholds the right of the heirs of the founder to nominate and appoint trustees. Such of them as arose in actual cases have apparently been solved.

SRINIVASA AYYANGAR, J.—The argument before the Full Bench in which however nothing new was said and the further consideration which I have given to this matter have in no way changed the opinion which Mr. Justice SESHAGIRI AYYAR and myself expressed in the Referring Order. It is remarkable that in support of the doctrine of reversion of the management of

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(1) (1910) 11 C.L.J., 2.

(2) (1913) I.L.R., 40 Cal., 245.

(3) (1914) 28 M.L.J., 571.

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trusteeship to the founder or his heirs which is applicable only to charities founded by Hindus, no Hindu Law text or commentary was cited; and in *Mussamat Jai Bansi Kunwar v. Chatter Dhari Sing*(1), in which the doctrine was first formulated, the learned Judges do not treat it as one based on Hindu Law or usage. They say that as one of the provisions of the trust, that which related to the management failed, and as the idol cannot manage the property, the managership must revert to the heirs of the person who endowed the property. I am unable to see why it *must*; in the absence of any person nominated for the purpose of appointing new trustees by the deed of endowment and in the absence of a statutory power, the Court will appoint a person to carry out the trusts: Perry on Trusts, section 294.

A Hindu who makes a gift to an idol or founds a charity does not resort to the machinery of trusts, but makes a direct gift to the charitable object which is conceived of as a juridical person; and there is no need of incorporation either. In such a case where he does not appoint another person to manage the properties so given, or settle a scheme for such management, as he is entitled to do at the time of the endowment as a part of the same transaction, the natural presumption or the legal inference is, that he intends to manage the property himself on behalf of the charity or reserves the management to himself. Such management may pass to his heirs by inheritance, just as a legal estate of inheritance may pass in England. That is the utmost extent to which the decisions of the Privy Council take us, though no doubt in *Gossami Sri Gridharaji v. Romanlalji Gossami*(2), *Peet Koonwar v. Chuttur Dharee Singh*(1) was approved. It is to be observed, however, that the principle of Hindu Law—it is here for the first time it is said to be a principle of Hindu Law—which their Lordships lay down is, “that when the worship of a Thakoor has been founded the shebaitship is held to be vested in the heirs of the founder in default of evidence that he has disposed of it otherwise or there has been some usage course of dealing or some circumstance to show a different mode of devolution.” In a very recent case, *Mohan Lalji v. Gordhan Lalji Maharaj*(3), their Lordships explained that the vesting of

the management in accordance with the rules of inheritance applicable to private property “must from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship.” It seems to me fairly clear from the above observations that whatever other rights the founders’ heirs may have, they had no right of nomination; for even if they were incompetent to perform the sheba or worship, they were not incompetent to nominate persons qualified to perform the worship; and their Lordships do not appear to contemplate the existence of a power of nomination at all, which power is certainly not necessarily appendant to the trusteeship or shebaitship as is assumed in the Allahabad cases.

The only case in which the foundation of this doctrine of reversion of management or the power of nomination is examined is *Sital Das Babaji v. Protap Chandra Sarma*(1). There MOOKERJEE, J., after stating the two propositions, both of them well established, namely (1) that the devolution of the management of the trust depends upon the terms of its original constitution whether they are proved by direct evidence as for example the production of a deed of endowment or by proof of usage, (2) that the office of shebait is held to be vested in the founders’ heirs in default of evidence that he has disposed of it otherwise, proceeded to lay down a third proposition and said that “from these propositions it necessarily follows that when a shebait appointed by a founder fails to nominate a successor in accordance with the condition or usage of the endowment the management reverts to the representative of the founder.” As I have said already I am unable to see the necessity. Where a founder commits the management of the charity to a trustee, the presumption raised or the legal inference drawn in case where he makes no arrangement for the management, does not arise; and there is no presumption under the Hindu Law, any more than under the English Law, that he reserves any right of interference or reversion of management after he has once definitely placed the properties given by him in the possession and management of third parties. In a later case *Raj Krishna Dey*

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(1) (1870) 5 B.L.R., 181; s.c., 13 W.R., 896.

(2) (1890) I.L.R., 17 Cal., 3 (P.C.). (3) (1913) I.L.R., 85 All., 293 (P.C.).

(1) (1910) 11 C.L.J., 2.

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v. *Bipin Behari Dey*(1), that same learned Judge after stating the above three propositions held that on the failure of the scheme of management originally provided by the founder at the time of the foundation, it became incumbent on the representatives of the founder to make an appointment of a shebait. Why the shebaitship did not vest in all the representatives of the founder according to his third proposition is not clear. If it did the decree should be for settlement of a scheme providing for the actual exercise of the functions of the shebait, by the numerous persons in whom that office vested as suggested in *Ramanathan Chetti v. Murugappa Chetti*(2), and not for the appointment of a trustee. It appears to me that these cases treat the trusteeship or shebaitship as a species of private property which is vested as an absolute estate of inheritance in the founder, an estate in fee simple if I may borrow an expression from the English Law or Real Property, from out of which the founder is entitled to carve out a particular estate retaining the reversion which again becomes an estate in possession vesting in him or his heirs as the case may be, on the determination of the particular estate, the founder or his heirs being entitled either to enjoy it themselves or again to carve out a particular estate therefrom. This is to some extent natural if we remember that in Northern India private religious endowments, as for instance to family idols, are very common. That certain kinds of "shebaitships" are treated as private property capable of being transferred by act of parties, and of being actually divided into shares is clear from *Mohan Lalji v. Gordhan Lalji Maharaj*(3), where a devise of shebaitship was without question assumed to be valid and from *Kunjamoni v. Nikunja Behari Doss*(4), where its partibility was assumed. It need scarcely be pointed out that the office of trustee, as we have in this case, is inalienable and cannot be delegated, and any notion of their alienability is contrary to the express decisions of the Privy Council as regards the trusteeship of Hindu religious endowments and religious offices. In several cases in this Court alienation of the trustee office which could have been supported as an exercise of the power of nomination if any such existed were held to be wholly void.

(1) (1918) I.L.R., 40 Cal., 245 at p. 257.

(2) (1904) I.L.R., 27 Mad., 192.

(3) (1913) I.L.R., 35 All., 283 (P.O.).

(4) (1915) 22 C.L.J., 404.

The assumption made in the Allahabad cases that a power of nominating new trustees is a right appendant to trusteeship, appears to me, with all respect, to be equally contrary to settled principles. An appointment of new trustees by the existing trustee or trustees is in effect nothing less than the transfer of the trusteeship, and a power to appoint new trustees cannot exist unless given by the founder at the time of foundation: see Perry on Trust, section 287.

MOOKERJEE, J., also compared the rights of the Hindu charitable donor or his heirs to the rights of the founder of eleemosynary corporations. In the first place the establishment of an idol, the building of temple, mutt or chattram or the endowment of property for their upkeep and maintenance may not be a "foundation" at all and the principle of Hindu Law laid down by the Privy Council does not appear to be confined to charity corporations. Further though I have no precise notion of the nature of the rights of patronage and visitation vested in the private founder and his heirs, so far as I understand it, such rights cannot, from the nature of the case, include a right of nomination of trustees: see Lord Holt's opinion in *Philips v. Burn*(1) *et seq.*

It remains now to consider the decisions of this Court. In appeal No. 50 of 1850 the Sudder Court held in general terms with reference to a *katali* in the famous temple at Madura that the founders' representatives—I am using the term "founder" in this judgment generally in the sense of donor of property to charity—had no right to interfere in any way in the management, unless a power was reserved at the time of the gift. In appeal No. 52 of 1857 a right to appoint was upheld as such a power was found on the evidence to have been given by the founder.

The most important case in this Court, however, is *Sathappayyar v. Periasami*(2). That was a case of a private religious endowment called the Sathappayyar Mutt which was first established by one of the Zamindars of Sivaganga. The position of the head of the mutt towards the endowment was not merely that of a secular trustee; he was himself a beneficiary under the endowment, he being entitled to the income of the properties

(1) (1788) 2 T.R., 848 at p. 852.

(2) (1891) I.L.R., 14 Mad., 1.

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subject to certain disbursements. The Sivaganga Zamindars and the members of their family were beneficiaries only in a spiritual sense. The mode of succession prescribed by the original endowment was, for each head of the mutt called Satharppayyar, to appoint his successor. The last Satharppayyar who so succeeded was found guilty of breach of trust and was removed and there was a vacancy which could not be filled in accordance with the prescribed mode. The Zamindar of Sivaganga, the sole heir of the founder,—Sivaganga is an impartible zamindari—prayed for possession of the endowed properties in order that they may be delivered over to another guru to be appointed by him. It is not clear from the plaint whether he claimed the reversion of management or a right of appointment. The right of the plaintiff zamindar is discussed in several places in the judgment. At page 7 of the report MURTHUSWAMI AYYAR, J., than whom no one knew more of the religious and charitable institutions of this part of the country, said that "Exhibit I, the deed of endowment, "shows that the land in dispute was given for a specific religious "purpose in order that the purpose might be carried out in "perpetuity for the benefit of the grantor's family, and the "respondent, as the representative of that family for the time "being, is entitled to step forth when that purpose is neglected "and the produce of the land is misapplied, and to ask the Court "to prevent the misappropriation, and to see that the income "of the endowment is applied to its legitimate purposes." This passage does not necessarily mean that as representative of the founder the plaintiff was only entitled to invoke the power of the Court, but that that evidently was his opinion will be clear from other portions of his judgment. At page 12 he expressly negatived the right of reversion of management and the reason which he gives, viz., that on the construction of the deed of endowment no such right can be deduced, conclusively shows that that very learned Judge never imagined that under the Hindu Law there was any such reversion on the failure of the original line of trustees. The next paragraph is equally important. The first Court's decree which is set out at page 3 of the report declared that a trustee would be appointed by the Court after consulting the wishes of the plaintiff the zamindar and the defendant the dismissed trustee. The zamindar the respondent insisted that the dismissed trustee should have no

voice in the appointment, and that was allowed. He further claimed that the power of appointment vested in the zamindar for the time being, that is, the heir of the founder. This again was negatived, for the right of nomination allowed to him was in his capacity of one (though the most important) of the beneficiaries, and the concurrence of all the other beneficiaries was required. Even this right of nomination conceded to the beneficiaries, not, be it noted, to the heirs of the founder, appears to be nothing more than a consultation of their wishes, though the decree is in a more positive form; in fact the learned Judge at page 12 states in terms that the only right which the plaintiff had was the right of a beneficiary under a private trust which is declared in section 60 of the Indian Trusts Act. That that was the opinion of BAST, J., is clear; for he agreed in dismissing the memorandum of objections of the plaintiff zamindar except in so far as it related to the dismissed trustee having a voice in the appointment of a new trustee. The reference to the decree in order of reference was however made under a misapprehension.

I have dealt with this case at some length as I consider that this decision is authority against the propositions laid down by MOORE, J., though it is cited by him as supporting those propositions. For the same reasons I am unable to agree in the judgment in *Doraiswami Pillai v. Sandanathammal*(1) on this point where moreover the right of nomination of fresh trustees was conceded to a Christian settlor. I would therefore answer the question in the negative.

N.R.

(1) (1915) 2 L.W., 577.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

IYAPPA NAINAR (PETITIONER), APPELLANT,

v.

MANICKA ASARI (RESPONDENT), RESPONDENT.*

Provincial Insolvency Act (III of 1907), ss. 43 (2) (b) and 46 (1) and (2)—Creditor's petition to inquire into commission of an offence—Inquiry and refusal to frame a charge—Appeal, right of.

In the course of a proceeding in insolvency, a creditor filed a petition alleging the commission of an offence by the insolvent and asking the Court to take action against him under section 43, clause (2) (b) of the Provincial Insolvency Act (III of 1907). The Judge inquired into the petition but dismissed it, refusing to frame a charge.

Held, that the creditor had no right of appeal, as he is not a "person aggrieved" within the meaning of section 46 of the Act.

APPEAL against the order of F. H. HAMNETT, the District Judge of South Arcot, in Insolvency Appeal No. 421 of 1912, in Insolvency Petition No. 7 of 1911.

The facts of the case appear from the judgment.

T. M. Krishnaswami Ayyar for the appellant.

T. Narasimha Ayyangar for the respondent.

SADASIWA
AYYAR AND
NAPIER, JJ.

JUDGMENT.—This is an appeal under section 46, clause (2) of the Provincial Insolvency Act, from an order of the District Judge of South Arcot dismissing a petition put in by a creditor asking the Court to take action against an insolvent under section 43, clause (2) (b) of the Act. A preliminary objection is taken that a creditor has no right of appeal in that he is not "a person aggrieved" by the order within the meaning of section 46 (1). In *Kadir Baksh v. Bhawani Prasad*(1), a Judge of a Small Cause Court refused to take action under section 359 of the Code of Civil Procedure against an insolvent and a revision petition was entertained by the High Court against the order at the instance of a creditor. This however does not assist the appellant as in revision the Court acts *suo motu*. It

* Civil Miscellaneous Appeal No. 190 of 1913.

(1) (1892) I.L.R., 14 All., 145.

has been held in the matter of *Rash Behari Roy v. Bhughwan Chunder Roy*(1), under the Insolvent Act 11 & 12 Vict., cap. 21, that section 50 should be administered as the criminal law is administered and specific charges framed, and this has been the practice of this Court. What the Court has done in effect is that it has taken cognizance, inquired into an allegation of a criminal offence and refused to frame a charge. Under no principle of criminal law is a complainant entitled to appeal against such refusal as, in all criminal proceedings, the Crown is in theory the prosecutor, and we see no reason why a different principle should prevail where the criminal jurisdiction is exercised by a Civil Court. Under the Bankruptcy Act, 1883, the Court has power to commit—vide section 165. Section 164 (2) gives an appeal in bankruptcy matters "at the instance of any person aggrieved." Section 73 of the Indian Insolvent Act gave an appeal by way of petition to the Supreme Court from any proceeding of the Commissioner at the instance of any person "who shall think himself aggrieved." We have not been referred to any case under either of these Acts or earlier Bankruptcy Acts in England, where a creditor has been held "a person aggrieved" by the refusal of the Court, nor can we find any such case. The absence must be attributable to the principle above stated, and in that view the preliminary objection must be upheld and the appeal dismissed with costs.

N.R.

(1) (1890) I.L.R., 17 Calc., 209.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice
Seshagiri Ayyar.

1915.
August 31
and
September
1 and 8.

KARUTURI GOPALAM (MINOR BY HIS NEXT FRIEND ABBUR
VENKATARAYUDU) (FIRST DEFENDANT), APPELLANT,

v.

KARUTURI VENKATARAGHAVULU (PLAINTIFF),
RESPONDENT.*

*Hindu Law—Partition between an adopted son and a subsequently born aurasa son
of a Sudra—Share of adopted son—Marriage expenses of unmarried members—
Provision for, in partition-decrees.*

Among Sudras, on a division of the family properties between an adopted
son and a subsequently born aurasa son, the adopted son is only entitled to one-
fifth of the estate.

The obiter dictum to the contrary in *Raja v. Subbaraya* (1884) I.L.R., 7
Mad., 253 at p. 263, not followed.

The *Dattaka Chandrika* is not an authority on Inheritance or Partition.

In partition-decrees provision should be made for the marriage expenses of
the unmarried members of the family. But such a provision should be made
only for persons who are of the same degree of relationship as those who have
been married at the expense of the family.

The decision of the majority in *Srinivasa Ayyengar v. Thiruvengadathaiyengar*
(1915) I.L.R., 38 Mad., 556, followed.

Narayana v. Ramalinga (1916) I.L.R., 39 Mad., 587, not followed.

APPEAL against the decree of A. SAMBAMURTHI AYYAR, the
temporary Subordinate Judge of Rajahmundry, in Original Suit
No. 41 of 1911.

Plaintiff was adopted in 1898 by one Venkanna, a Sudra, who
died in 1902 leaving him surviving the first defendant, his *aurasa*
son, born in 1901 and his widow the second defendant. During
the minority of the plaintiff and the first defendant, the second
defendant managed the estate. Plaintiff attained majority in
1907 and brought this suit in 1910 for partition and delivery to
him of half of the family estate alleging mismanagement and
misappropriation by the second defendant of portions of the
family estate for the benefit of her son the first defendant.
Plaintiff claimed also an account of the management of the estate

* Appeal No. 98 of 1913.

by the second defendant. The first defendant pleaded *inter alia*
that the plaintiff was, as adopted son, only entitled to a fifth
share of the estate, that he himself was, as *aurasa* son, entitled
to the remaining four-fifths and that in addition to his four-fifths
share, provision should be made in the partition-decree for the
expenses of his future marriage, as the plaintiff had his marriage
performed at the expense of the family. The second defendant
denied mismanagement and misappropriation of the estate. The
Lower Court decreed to the plaintiff a half share in all the family
properties and finding malversation of the estate by the second
defendant directed half of the amounts misappropriated by the
second defendant to be paid to the plaintiff out of the share of
her son, the first defendant. The Lower Court disallowed the
first defendant's claim for a provision in the decree for his future
marriage. The first defendant appealed.

V. Ramados for the appellant.—The main question in the
appeal is what is the share of a Sudra's adopted son when a
natural son is afterwards born. I submit he is entitled to only
one-fifth of the estate. In *Raja v. Subbaraya*(1) the point did
not arise at all. This is a case of Sudras, which is specifically
dealt with in *Ayyavu Muppanar v. Nelayathakshi Ammal*(2).
That case decides in favour of the position I contend for. This is
followed in *Giriapa v. Ningapa*(3): see also *Raghubanund Doss v.*
Sadhu Churn Doss(4) and *Bachoo v. Nagindas*(5): see *Mitakshara*
(Setlur, page 32). *Dattaka Mimamsa*, in section 5, *placitum* 40,
prescribes a quarter share: see also section 10, *placitum* 1; *Sircar*
on Adoption, page 402; *Macnaughten's Hindu Law*, pages 120
and 233; *Ghose's Hindu Law*, second edition, page 612; *Mayne*,
pages 223 and 224 and *Bhattachary*, pages 458–459. The
Dattaka Chandrika is the only authority against my position:
see section 5, paragraphs 24, 25, 29 and 32 (in Setlur,
page 445). That book prescribes a half share to an adopted son
of good qualities. The reasoning of the *Dattaka Chandrika* is
that he must be likened to an illegitimate son and must hence get
half the estate. This reasoning no longer applies as decisions
such as *Chellammal v. Ranganatham Pillai*(6), have held that

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(1) (1884) I.L.R., 7 Mad., 253.

(2) (1882) 1 M.H.C.R., 45.

(3) (1893) I.L.R., 17 Bom., 100 at p. 105.

(4) (1879) I.L.R., 4 Calc., 425.

(5) (1914) 16 Bom. L.R., 263.

(6) (1911) I.L.R., 34 Mad., 277.

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an illegitimate son gets half of what a legitimate son would get. Secondly, provision for marriage must be made among Sudras: *Kameswara Sastri v. Veeracharu*(1) and *Gopalakrishnamraju v. Venkatanarasaraju*(2). Even in the case of Brahmins, provision for marriage must be made: *Srinivasa Ayengar v. Thiruvengadathaiyangar*(3).

P. Narayanamurthi for the respondent.—Among Sudras the adopted son gets an equal share. The Dattaka Chandrika is a special treatise on Adoption and is the paramount authority in Southern India: see *The Collector of Madura v. Mootloo Ramalinga Sethupathy*(4).

[Court.—All the other texts are against the view taken by the Dattaka Chandrika.]

The reason is given in the Dattaka Chandrika in chapter 5, *placitum* 13 and *placitum* 42; "If an illegitimate son of a Sudra gets an equal share with a legitimate son, why not an adopted son": see also the Dattaka Mimamsa, chapter 5, *placitum* 43; Mayne on Hindu Law, pages 223 to 224 and Strange on Hindu Law, volume I, page 99. In *Ayyavu Muppanar v. Nilayathakshi Ammal*(5), the dispute was not between a fourth share or a half share but the adopted son himself claimed as plaintiff only a fourth share. Moreover the Dattaka Chandrika is not quoted. In *Giriappa v. Ningappa*(6) it is not shown that the parties were Sudras and no question arose as to whether half or a fourth share should be given: *Raja v. Subbaraya*(7) was relied on. No provision can be made in a partition for marriage expenses: see the latest case of *Narayana v. Ramalinga*(8).

V. Ramadoss in reply.—The question relates to partition, and not adoption: so the Dattaka Chandrika is no authority. In *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*(9), the Privy Council has observed that the Dattaka Chandrika is not to be followed when it adds to or varies from Smritis; similar observation as to Dattaka Mimamsa is found in *Puttu*

(1) (1911) I.L.R., 34 Mad., 422.

(2) (1912) M.W.N., 903.

(3) (1915) I.L.R., 38 Mad., 556.

(4) (1868) 12 M.I.A., 436.

(5) (1862) 1 M.H.C.R., 46.

(6) (1892) I.L.R., 17 Bom., 100 at p. 105. (7) (1884) I.L.R., 7 Mad., 252.

(8) (1916) I.L.R., 39 Mad., 587.

(9) 1899) I.L.R., 22 Mad., 898 at p. 412 (P.C.).

Lal v. Parbati Kunwar(1): see also Balambatta's opinion in Setlar, page 711 and Kātyāyana, at page 700.

SESHAGIRI AYYAR, J.—One Venkanna adopted the plaintiff in 1898. The first defendant was subsequently born. Venkanna died in 1902. The second defendant, the natural mother of the first defendant and the adoptive mother of the plaintiff managed the estate during the minority of the two sons. The suit is for partition for a half share in the family properties. The main contention of the first defendant is that the plaintiff is only entitled to a fifth share. The Subordinate Judge, relying on an observation in *Raja v. Subbaraya*(2), has held that the two sons were entitled to equal shares.

The question has been argued at great length before us. I am unable to agree with the Court below. The parties in this case are Sudras. In *Raja v. Subbaraya*(2) the dispute was between the natural son of a brother and the adopted son of another. It is settled law in Madras, notwithstanding *Raghubanund Doss v. Sadhu Churn Doss*(3) and *Giriappa v. Ningappa*(4) to the contrary, that by right of representation the adopted son would take the share of his father in competition with the natural son of another member of the joint family. That was the only question that arose for decision in the Madras case. At the end of the judgment, the learned Judges say:

"If there be such a special rule as is suggested, it is not applicable at all events to Sudras, among whom the adopted son is declared entitled to take an equal share with a legitimate son who is born subsequently to the adoption."

Apart from the text of Vridha Goutama commented on in the Dattaka Chandrika to which I shall presently refer, I have not been able to find any authority for this statement. On the other hand, *Ayyavu Muppanar v. Nilayathakshi Ammal*(5) gave the adopted son only a fifth share in the family properties. Apparently this decision was not brought to the notice of the learned Judges. In Bombay and Calcutta, subject to the special doctrine which denies the right of representation to the adopted son in a joint family, it has been held that the share of the adopted son among Sudras is only a fourth of that of the natural

(1) (1915) I.L.R., 37 All., 359 at p. 367.

(2) (1884) I.L.R., 7 Mad., 252.

(3) (1874) I.L.R., 4 Calc., 425.

(4) (1892) I.L.R., 17 Bom., 100.

(5) (1862) 1 M.H.C.R., 46.

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son: see *Raghubanund Doss v. Sadhu Churn Doss*(1), *Giriapa v. Ningapa*(2) and *Bachoo v. Nagindas*(3).

On the authority of the Rishis and of the Smrithi Writers, I feel no hesitation in holding that the adopted son is not entitled to share equally with the natural son. (1) The well-known text of Vasishta is in chapter XV, *sloka* 9:

"Where a son has been adopted, if a legitimate son be (afterwards) born, the adopted son shares a fourth part."

(2) Kātyāyana is quoted in the Dāyabhāga and in Colebrooke's Digest, Volume III, page 348, as saying:

"A son of the body being born, the adopted sons of the same class take one-third as their portion."

But in the Madanaparijatha and Viramitrōdaya, the sage is quoted as allotting only a fourth part. (3) Boudhāyana takes the same view as Vasishta: see Dattaka Mimamsa, section I, *sloka* 42. (4) Manu in chapter IX, *sloka* 163, says:

"The *aurasa* son alone is the sole heir of his father's wealth; but as a matter of compensation he may give maintenance to the rest."

The Mitakshara interprets this passage as applying to the other class of sons "who are devoid of good qualities" and says that the general rule as to a fourth share is not affected by Manu's text.

As against these Smrithi writers, we have the authority of Vridha Goutama, who gives an equal share to the adopted son with the natural born son. It is not necessary to consider whether this text of the sage is an interpolation as surmised by Messrs. Golap Chander Sircar and Ghose. Mr. Shyama Charan Sircar in his Vyavastha Chandrika inclines to the view that the text is obsolete. The preponderance of authority, therefore, is in favour of the view restricting the rights of the adopted son to a fourth share.

Coming next to the commentators, the majority of them enunciate the same rule. It is curious that Vignaneswara does not even mention Vridha Goutama as an authority on this subject. This marked omission is significant. He refers to a number of Smrithis and propounds the rule, that the adopted son's share is a fourth of the *aurasa* son's (Mitakshara, chapter I, section XI, *placitum* 24 *et seq.*). Jimuta Vahana, the author

(1) (1879) I.L.R., 4 Cal., 425. (2) (1893) I.L.R., 17 Bom., 100.

(3) (1914) 16 Bom. L.R., 263.

of Dāyābhāga, in discussing the share of the adopted son in chapter X does not mention the authority of Vridha Goutama. The Madanapārijātha and the Viramitrōdaya adopt the rule given in the Mitakshara. The Saraswati Vilāsa after a full discussion concurs in the same view. The author does not refer to Vridha Goutama. The first note of dissent is to be found in the Dattaka Chandrika, section V, paragraphs 24 to 32. The author reconciles the text of Vridha Goutama with the others by restricting its application to Sudras alone. The text itself is general. But the commentator refers to the fact that among Sudras, illegitimate sons are given at least a third share in competition with legitimate sons, and argues that adopted sons should not be in a worse position. It is permissible to point out that whatever may be the social status of an illegitimate son, the fact that he is of the same flesh and blood as the person whose property he seeks a share in, may account for the favourable position assigned to him. The same considerations do not always apply to an adopted son. The other reason given by the author with reference to Manu's text about a man having a hundred sons, does not commend itself to me. It is curious that the Dattaka Chandrika in interpreting Vridha Goutama's text, does not properly explain the words "Yatha Jathe." The author of Dattaka Mimamsa translates the words as "possessing good qualities." Shyama Charan Sircar in his Vyavastha Chandrika gives the same meaning. In Ghose's Hindu Law, the quotation from Vridha Goutama contains the words "Thatha Jathe." Whatever may have been the exact words, their literal meaning is "existing as above." The reference apparently is to the quality which a person to be adopted is expected to possess. Manu in chapter IX, *sloka* 169, describes an adopted son thus: "He is considered as a son made or adopted, whom a man takes as his own son; the boy being equal in class, endued with filial virtues, acquainted with the merit of performing obsequies to his adopter, and with the sin of omitting them." That is the reason why such an erudite scholar as Nandapandita translates Vridha Goutama's text in the way I have mentioned. I am of opinion that Goutama's rule is an exception to the general law. It would be impossible to administer such a rule by Courts, as the determination whether a man . . . possesses good qualities would lead to endless conflict of views. The author of

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Dattaka Mimamsa after examining Vridha Goutama's text carefully, inclines to the view taken by Vignaneswara and the other commentators. Thus, we see that with the exception of the Dattaka Chandrika, all the commentators agree in not giving an equal share to the adopted son. Mr. Narayanamurti contended that as the Dattaka Chandrika is a special treatise on adoption, its conclusions are entitled to greater weight than those of the other commentaries; he quoted *The Collector of Madura v. Mootoo Ramalinga Sethupathy*(1) for this position. In the first place, the question that has to be decided does not relate to the qualification of the adopted son or to the ceremonies relating to the adoption. It is a question of inheritance. It is well settled that in matters relating to inheritance, the Mitakshara is paramount in Madras. Moreover as pointed out by Mr. Ramadoss, the authority of the Dattaka Chandrika should not outweigh the sayings of the Rishis: see *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*(2) and *Puttu Lal v. Parbati-Kunwar*(3). Further the Dattaka Mimamsa, another special authority on adoption, takes a different view. I am, therefore, of opinion that the view taken by the Dattaka Chandrika is not binding on us and that the dictum in *Raja v. Subtaraya*(4) based on this authority should not be followed.

Writers on Hindu Law have unanimously accepted the view taken by the Mitakshara. Messrs. Golap Chandra Sarkar, Ghose and Siromani Battacharya are unhesitatingly for a fifth share: Messrs. West and Bakler are of the same opinion. Mr. Mayne expresses no definite opinion on the question. He says that in Ceylon, the adopted son shares equally with the *aurasa* son. On the other hand the precedent quoted by Macnaughton in page 184, show that the practice is different in India. On all these grounds, I hold that the plaintiff is only entitled to a fifth share in the family properties.

Another point argued in the appeal relates to the direction in the decree that the first defendant's share should be held liable for monies not accounted for by the second defendant. This is clearly wrong. The first defendant may never benefit by the misconduct of his mother: see *Sonu v. Dhondu*(5).

(1) (1868) 12 M.I.A., 436. (2) (1899) I.L.R., 22 Mad., 898 at p. 411 (P.C.).
(3) (1915) I.L.R., 37 All., 359 at p. 357. (4) (1884) I.L.R., 7 Mad., 253.
(5) (1904) I.L.R., 28 Bom., 330.

The last point relates to the provision for marriage expenses. In *Srinivasa Ayengar v. Thiruvengadathaiyangar*(1), SPENCER, J., agreeing with SUNDARA AYYAR, J., held that in partition-decrees, provision should be made for the marriage expenses of the unmarried members of the family. On the other hand SANKARAN NAYAR and OLDFIELD, J.J., in *Narayana v. Ramalinga*(2) have taken a different view. The practice in Madras seems to be in consonance with the view taken in *Srinivasa Ayengar v. Thiruvengadathaiyangar*(1): see Strange's Manual of Hindu Law, pages 190 and 191. Sir Thomas Strange in chapter VIII refers to the opinion of pandits to that effect. *Jairam v. Nathu*(3) supports the appellant. Such a provision should be made only for persons who are of the same degree of relationship as those who have been married at the expense of the family.

In reversal of the decree of the Subordinate Judge, we direct that the plaintiff be allotted a fifth share in the properties found to belong to the family, that in passing the final decree a provision be made for the marriage expenses of the first defendant, and that that portion of the decree declaring the first defendant's share liable for malversation made by the second defendant, be omitted. Appellant is entitled to his costs from the first respondent in this appeal.

WALLIS, C.J.—I agree.

N.R.

WALLIS, C.J.

(1) (1915) I.L.R., 38 Mad., 556.

(2) (1916) I.L.R., 39 Mad., 587.

(3) (1907) I.L.R., 31 Bom., 54.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastriyar and
Mr. Justice Phillips.

1915,
December 8,
9 and 22.

A. L. A. R. RM. ARUNACHALLAM CHETTIAR (THROUGH
HIS AUTHORIZED AGENT M. SUBRAMANIA AYYAR),
et al (DEFENDANTS), APPELLANTS,

v.

MANGALAM et al (PLAINTIFFS), RESPONDENTS.*

Estates Land Act (Madras Act I of 1908), ss. 4, 27, 73 and 143—Levy of fee (kanganam) for supervision of harvest, legality of—Right of landlord to enter land and make experimental harvest—Liability of tenant to pay compensation for loss of crops by theft or cattle—Liability to pay rent for fallow lands, in the absence of custom—Right of tenant to obstruct flow of rain water into the landlord's irrigation channel—Liability to pay wet rate when water insufficient—Remission of rent, legal right to.

Where the landlord is entitled to a share of the produce, the levy of a fee (called *kanganam*) by the landlord on the tenant for supervising the harvest in order to protect his interests is not illegal, and it is not opposed to section 73 or 143 of the Estates Land Act.

Devanai v. Raghunatha Row (1913) M.W.N., 886 and *Karri Peddi Reddy v. Receiver of Nidadavole and Medur Estates* (1915) 18 M.L.T., 171, followed.

A landholder entitled to a specific share of the produce is not entitled to enter upon the land and make an experimental harvest of a small portion of the land with a view to throw on the tenant the burden of proving that the yield of the other portions was not equal to that of the experimental harvest. A landlord is not entitled to levy a fee (called *Panchamati*) as compensation for the loss caused to the crop by cattle, theft etc., as the tenant is not an insurer and is not liable for acts beyond his control.

Raja Parthasarathi Appa Row v. Chevendra Chinna Sundara Ramayya (1904) I.L.R., 27 Mad., 543, followed.

In the absence of a custom to charge rent for lands left fallow by the tenant, no rent is claimable in respect of such lands. Section 4 of the Estates Land Act should be read subject to section 27 of the Act.

Segu Rowthen v. Alagappa Chetty (1914) 26 M.L.J., 269, *Arunachellam Chettiar v. Muthayanai Thevan* (1914) 26 M.L.J., 575 and *In re Arunachalam Chettiar* (1915) 2 M.L.W., 828, followed.

Appalaswami v. Raja of Vizianagram (1913) 25 M.L.J., 50, distinguished.

In the absence of a custom to that effect, a tenant owning dry land within the bed of an irrigation tank, has no right to obstruct the flow of rain water into the tank by putting up ridges on his land so as to retain for his cultivation

* Second Appeal No. 1782 of 1912, etc.

the water so obstructed. If he so obstructs the flow of water, he is liable to pay the higher rate called *Sarasari* as for wet crops.

A tenant is liable (a) to pay *Sarasari* wet rate, if he raises on his wet land dry crops, when he can raise wet crops and (b) to pay only the usual dry rate, if he raises only dry crops owing to insufficiency of water.

Remission of rent is a matter of grace and not of right.

Alagappa Chettiar v. Tirunagavalli (1903) 13 M.L.J., 377, followed.

SECOND APPEALS against the decrees of A. C. DUTT, the District Judge of Ramnad at Madura, in Appeals Nos. 431, 432, 434 to 444, 447, 454, 457, 459 to 528 of 1911 and Nos. 198 to 203 and 205 to 209 of 1912, preferred respectively against the decree of S. V. KALLABIRAN PILLAI, the Special Deputy Collector of Ramnad, in Summary Suits Nos. 9, 10, 12 to 14, 16, 17, 19 to 21, 65 to 67, 70, 77, 80, 86, 116 to 134, 140 to 150, 205 to 224, 290 to 294, 296 to 308 and 631 of 1910 and against those of the Sub-Collector of Ramnad Division, in Summary Suits Nos. 1434, 1438, 1440, 1441, 1443, 1445, 1451 to 1453, 1455 and 1456 of 1911.

The facts of the case appear from the judgment

The defendant, the landholder, preferred these Second appeals.

S. Srinivasa Ayyangar, R. Krishnamachariar and S. Sundararaja Ayyangar for the appellants.

C. Madhavan Nair, C. S. Venkatachariar, G. S. Ramachandra Ayyar and K. Sundara Rao for the respondents.

JUDGMENT.—Defendant is the appellant. The questions raised in these appeals relate to the propriety of the terms of the *patta* as settled by the Special Deputy Collector and varied in appeal by the District Judge.

The first question relates to the *kanganam* fee which the defendant wants to levy. *Kanganam* is, in effect, a contribution paid by the tenant to reimburse the landlord for the cost of the supervision of harvest out of which *melvaram* has to be delivered to the landlord. The Special Deputy Collector found that this was an item included in the total *jama* of the Ramnad taluk at the time of the Permanent Settlement and formed one of the items of assets in fixing the *peshkash*, that it was not an illegal cess so as to bring it under section 143 of the Estates Land Act and that it was being paid for a series of years. He, however, was of opinion that it could not be levied after the Estates Land Act came into force, as it was a charge for supervision not allowed by the Act which removes all restraints on harvesting

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by the tenant on the part of the landholder. The District Judge on appeal confirmed the judgment of the Special Deputy Collector, on the ground that the service for which the fee was paid was no longer required. We are of opinion that on the facts found by the Special Deputy Collector, *kanganam* fee falls under section 3 (ii), clause (a) of the Estates Land Act as being a sum payable by a ryot as such in addition to the rent due by him in respect of the land held by him. As the landlord is entitled to a share of the produce, the necessity for supervision is obvious. It is difficult to see how there can be any restraint on the harvest, simply because the landlord employs a person to watch his interests.

Section 73, clause (2), provides that though the tenant may be in exclusive possession of the produce until it is divided, he must not remove it from the threshing-floor, so as to prevent the due division thereof at the proper time and clause (3) provides that he should, before commencing to cut or gather the crops, give reasonable intimation to the landholder or his authorized agent of his intention to do so.

Section 74 contemplates the presence of the landholder or his agent at the time when the division is to be made.

The only change introduced by the Estates Land Act is to prevent the landlord from claiming that the tenant should not harvest without getting his permission to do so or from fettering the discretion of the tenant as to when he should harvest the produce. Supervision is just as necessary now as it was before the Act came into force. *Kanganam* was being paid by the ryots even before the Permanent Settlement and ever since, and, unless there is something in the Estates Land Act to render the payment illegal, we see no reason why it should not be included in the *patta*.

Section 28 of the Act provides that in all proceedings under this Act, the rent or rate of rent for the time being, lawfully payable by a ryot, shall be presumed to be fair and equitable until the contrary is proved.

At the date when the Act came into force, *kanganam* was being paid and, unless the Act explicitly takes away from the *zamindar* the right to collect it, it must be presumed that it is a fair and proper charge to be levied.

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In *Devanai v. Raghunatha Row*(1), it was held that *russums*, which were being paid by the ryots to the *mittadars* from the beginning of last century and as to which there was no evidence that they were not paid at any time, constituted a charge or fees payable with the rent according to established usage. It appeared in this case that *russums* were sometimes incorporated with the rent in the *rosewari chitta* although they were shown separately in the *pulli tirva*.

A similar view was taken in *Karri Peddi Reddy v. Receiver of Nidadavole and Medur Estates*(2), where it was held that fees payable with the rent can be included in the *patta* and that under section 3 (11), such fees are included in the term "rent."

Our attention has been called to *Chidambaram Chetty v. Ayyavu*(3), where *kanganam* was disallowed; but the facts of that case show that the *kanganam* claimed there, was not in respect of wet crops but was in respect of dry crops as to which a fixed money rent was payable. In such cases, the *kanganam* fee can only be voluntary, for no supervision is necessary.

We are of opinion that both the Lower Courts were wrong in refusing to allow *kanganam*.

The next item refers to the claim of the *zamindar* to enter upon the land for the purpose of forming an estimate of the outturn.

It is difficult to see what right the landlord has under the Act to enter upon the land of the tenant for the purpose of making what has been described by Mr. Srinivasa Ayyangar as "an experimental harvest." The object seems to be to arrive at an arbitrary figure by harvesting a small portion of the crops and to throw upon the tenant the burden of showing that the actual crop was not equal to the experimental harvest.

We are of opinion that such a right is clearly opposed to the provisions of section 73 of the Act and that both the Lower Courts were right in disallowing this claim.

The next item refers to *panchamati* or compensation for loss caused to the crop by cattle, theft or clandestine removal.

What the landlord really wants to do is, to make the tenant an insurer and, to cast on him the burden of making good loss

(1) (1913) M.W.N., 886.

(2) (1915) 18 M.L.T., 171.

(3) (1914) 29 M.L.J., 746.

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caused by acts beyond his control. We do not think that the Act casts on the tenant any such liability.

Sections 73 to 76 of the Act prescribe the rights of the landlord. If the loss is caused by the negligence of the tenant in the custody or preservation of the crops cut, he would be answerable in a suit for damages; but it is difficult to see how the tenant can be placed in a worse position than a bailee so far as the landlord is concerned simply because the Act allows him to be in exclusive possession of the crops until they are divided.

In *Raja Parthasarathi Appa Row v. Chevendra Chinna Sundara Ramayya*(1), it was held that a term in the *patta* making the tenant responsible for theft of crops is improper. No doubt this decision was under the Rent Recovery Act of 1865, but we do not think that the present Act has made any difference in the liability of the tenant for theft of or damage to crops owing to circumstances beyond his control.

The next point is as regards taxes on palmyra trees. The Deputy Collector found on the evidence that palmyra trees which were not tapped for toddy were not taxed although they were bearing fruit, that no palmyra trees were taxed in the villages of Vallam, Sirugudi, Vaniavallam, Thuliyadikottai, Nallirukkai and Koneri, that only 102 trees were taxed in Karadandagudi and that only the trees that were tapped for toddy, were liable to be taxed.

On appeal the District Judge was of opinion that it has been proved that in addition to the trees taxed in Karadandagudi, two trees were taxed in Nallirukkai village and that the only palmyra trees that were ever taxed were 102 trees in Karadandagudi and two trees in the village of Nallirukkai.

It has been argued in appeal that the custom has been to tax all palmyra trees when they are tapped: but we do not think that we can go behind the findings of both the Lower Courts that the custom has not been proved. Both the Courts found it proved from the documents that, although there were numerous trees in the *samin*, 102 trees have been uniformly taxed in one village and that except two trees in Nallirukkai village, no other

(1) (1904) I.L.R., 27 Mad., 543.

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trees have been taxed in the whole of the suit villages. It is difficult to accept the explanation now given by Mr. Srinivasa Ayyangar that the tax was not levied because the fact that the trees in the other villages were tapped escaped the notice of the village servants. The custom pleaded has not been proved and we do not think that we can disturb the finding of fact arrived at by the District Judge in the matter.

The next question relates to *Nanjatharam Punja* and *Punja*.

The Deputy Collector found that no rent was payable in respect of waste land and that it was proved that from time immemorial only cultivated extents were being charged and not lands left uncultivated. The District Judge on appeal confirmed the decision of the Deputy Collector and held that the evidence showed that the custom in the zamindari had been not to charge for dry waste. These findings of fact are binding on us in Second Appeal. It is argued by Mr. Srinivasa Ayyangar, that under section 4 of the Act, the landholder is entitled to collect rent in respect of all ryoti land in the occupation of the ryot, and that it does not make this liability subject to any custom but only subject to the other provisions of the Act.

Mr. Srinivasa Ayyangar states that he does not press his objection as regards wet land which has been left waste owing to want of water or irrigation facilities but argues that, as regards dry waste where money assessment is fixed, land, if left waste, can only be so, owing to the default of the tenant.

It is argued by Mr. Madhavan Nayar for the respondent that both the Courts have found that the custom is not to tax dry waste, that section 4 should be read with sections 27 and 28 of the Act, and that, where there is a custom to exclude dry waste, rent, as defined in section 3 (11) of the Act, can only mean whatever is lawfully payable for the remaining portion of the land.

There is considerable force in the argument of Mr. Srinivasa Ayyangar that section 4 of the Act does not refer to any custom as governing its provisions, and that where it was the intention of the legislature that any of the provisions of the Act should be subject to any custom it has been stated in the sections of the Act. We, however, think that the question is covered by authority and we are not prepared to dissent from the judgments of several Benches of this Court.

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In *Segu Routhen v. Alagappa Chetty*(1), the CHIEF JUSTICE was of opinion that section 4 would not help the plaintiffs where the parties meant and intended that rent should not be charged for waste. He observed :

"The plaintiffs relied upon section 4 and the definition of 'rent' contained in section 3, sub-section 11. Section 4 says that the landlord is entitled to collect rent in respect of all ryoti land in the occupation of a ryot. *Prima facie* it is so; but, if the evidence shows that it was not the intention of the parties that he should collect rent in respect of all land in occupation of the ryot, but should collect rent only in respect of the land in fact cultivated by the ryot, of course, the intention of the parties overrides the provisions of the Act. This section of the Act merely lays down the general rule and, in my opinion, can be displaced by evidence as to what the parties meant and intended."

Mr. Justice TYABJI was of opinion that in such cases the charging by the landlord of rent in respect of cultivated and uncultivated land would really be an enhancement which was prohibited by the Act.

In *Arunachellam Chettiar v. Muthayana's Thera*(2), it was held that,

"section 4 of the Estates Land Act should be read subject to the provisions of section 27 and a custom of paying rent on the basis of only the cultivated area in the holding is not illegal."

Their Lordships observe :

"But the Lower Courts found that by immemorial custom, one of the conditions appertaining to the holdings in the plaint *mittah* is that no rent should be charged for lands left fallow, in other words, the rent for the whole holding in any particular *fasli* should be calculated only on the cultivated area. We think that condition is not against the statutory provision in section 4 of the Estates Land Act, as section 4 by its opening clause saves such and similar conditions. Our view, we think, is supported by the judgment of this Court in Second Appeal No. 2034 of 1910."

This was a case between the present appellant and another tenant in the same *zamindari*.

In *Udayal v. Arunachella Chettiar*(3), it was held that

"a tenant is entitled to take advantage of a custom in a *zamindari* that no rent should be charged for lands which are allowed to lie fallow by him."

(1) (1914) 28 M.L.J., 269. (2) (1914) 26 M.L.J., 575. (3) (1915) M.W.N., 190.

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This is a case which relates to the Rāmnād *zamindari* and the respondent therein is the appellant in the present case. It was found by the Sub-Collector that it was a custom in the Rāmnād *zamindari* not to charge any rent for lands which were allowed to lie fallow by the tenants.

As regards the argument that section 4 applied, Their Lordships observe :

"In the argument before us, section 4 of the Estates Land Act was relied upon as indicating that the tenant is bound to pay the rent upon every portion of his holding whether he cultivates it or not. This general provision is subject to any custom that may be proved to exist in particular localities."

In *In re Arunachellam Chettiar*(1), it was held that

"section 4 of the Madras Estates Land Act does not debar a tenant from claiming that by agreement and custom he is not liable to pay rent for the portion of his holding left fallow."

Appalasawmi v. Raja of Vizianagaram(2), which has been cited by Mr. Srinivasa Ayyangar does not affect the present question, as, in that case, the tenant had built upon a portion of the land demised to him and claimed exemption from paying rent on the ground that it was not used for agricultural purposes. All that was there held was that it was not necessary that the ryot should actually use the land for purposes of agriculture. No agreement or custom was set up in that case whereby lands built upon were not to be charged.

In the present case, the findings of fact are clear and the cases referred to show that in the Rāmnād *zamindari* there was a custom whereby only cultivated lands were to be charged with rent. It is not suggested by Mr. Srinivasa Ayyangar that it was the practice to exclude such lands from the *pattas* so as to entitle the landlord to let the lands to third persons if he chose. The custom, as found by both the Courts, is that, though the land was included in the holding, rent was not charged for it. We confirm the judgment of the District Judge on this point.

The next point for consideration is the right to levy *sarāsari* where *kulankorvai* lands (lands in the tank-beds) are cultivated.

It is not disputed that for purposes of cultivating these lands, ridges were raised and the contention for the appellant is that,

(1) (1915) 2 M.L.W., 828.

(2) (1918) 25 M.L.J., 50.

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as the ridges obstruct surface rain water from flowing to the tank and thereby reduce the wet ayacut, the plaintiffs should not build ridges at all, or, if they do so, they should pay *sarāsari*. *Kulankorvai* is land in the bed of tanks just within the limits of the full water spread which is cultivated with paddy, and it is not disputed that such lands are classed as *punja* lands. The Deputy Collector was of opinion that, while the landlord had a right to the flow of rain water into the bed of the tank free from obstruction, the tenants had an equal right to catch such rain water as fell on their *kulankorvai* lands and to cultivate the lands with the help of such water. He decreed that the usual rates should be charged so long as the tenants did not put up ridges, or if they put them up, so long as the ridges did not exceed one span in height and that *sarāsari* should be charged if the height exceeded one span.

On appeal the District Judge was of opinion that the ridges which were being put up by the tenants would obstruct the flow of rain water into the tank, that it was unreasonable to permit the ryots to retain tank water by putting up ridges on their land to the detriment of legitimate wet area without paying any extra charge for it and that no uniform custom had been made out by either side in the matter, though the balance of evidence was in favour of the *zamindar*. He was also of opinion that the ryot ought not to be liable to pay *sarāsari* simply because he utilized rain water falling on his land. He tried to reconcile the interests of both the parties by directing that the tenants were not to construct ridges on their lands so as to divert from the tank any water other than rain water falling on their respective holdings and that, if the rule was contravened and paddy crops were raised, *sarāsari* should be charged.

It is difficult to see how this direction can be enforced by either party. In the absence of proof of any custom by the tenants to put up ridges, we think that the landlord has got the right to prevent tenants from putting up ridges on lands in the tank-bed so as to prevent the tanks having the full benefit of the rain water flowing into them. It is proved by Exhibits 39, 40, 42, 56, 56 (b), 58 (a), 81 series and 85 series, that the right of the tenants to put up ridges on *kulankorvai* land was not upheld. As against these exhibits our attention has been called by the respondent's counsel to Exhibit CC (judgment in Summary

Suits Nos. 245 to 262 of 1900) where the right of the tenants to put up ridges was found by the Head Assistant Collector.

As pointed out by the District Judge the balance of evidence is in favour of the contention raised by the *zamindar* that the tenants have no right to obstruct the free flow of rain water into the tank by putting up ridges. The Deputy Collector's restriction that the height of ridges should be one span does not seem to be based on any intelligible basis, and the direction of the District Judge is unworkable because when there are ridges and the land has been submerged by tank water, the ridges must reduce the volume of tank water when the level of the tank subsides below the level of these ridges as the ridges retain water which should otherwise go into the tanks.

We are of opinion that the plaintiff is bound to pay *sarāsari* if he should put up ridges and cultivate *kulankorvai* lands.

This disposes of all the points taken by the vakil for the appellant.

The respondent has filed a memorandum of objections.

The first objection is as regards dry crops raised on *nanja* lands without permission. The Deputy Collector was of opinion that *sarāsari* should only be charged if the tenant raised dry crops on *nanja* lands when there was water in the tank sufficient for a wet crop but that it should not be charged where a dry crop was raised in adverse season for want of sufficient supply of water in the tank. The District Judge on appeal held that *sarāsari* should be charged whether there was water or not so long as the tenant raised dry crop on wet land.

It is difficult to see on what principle the tenant should pay "wet *sarāsari*" if, owing to want of water in the tank, he is unable to raise a wet crop. The effect of the District Judge's judgment will be to compel the tenant either to leave the land waste when there is insufficiency of water or to penalise him if he raised a dry crop as the only possible means of raising something on the land. It stands to reason that if a tenant, having water in the tank and therefore means of raising a wet crop, chooses to raise a dry crop, this should not affect the right of the landlord to charge wet rates but where, owing to want of water, a wet crop could not be raised, there is no reason why the landlord should still be entitled to charge wet *sarāsari* rates.

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We vary the decree of the District Judge by declaring that plaintiffs will be liable to pay *sarāsari* wet rates if they raise dry crops while they could have raised wet crops and to pay the usual dry rates if they raise dry crops owing to insufficiency of water.

The next point is about remissions in respect of *punja savi nanjatharam punja savi*.

The Deputy Collector allowed the tenants' right to claim remission but the District Judge was of opinion that the tenants were not as a matter of right entitled to any remission.

Remission is a matter of grace and it would require very strong evidence to show that remission can be claimed as a matter of right. Section 38 of the Estates Land Act refers only to remissions owing to permanent reduction in the yield and, so far as we can see, there is no provision for forcing the landlord to grant temporary remissions. There is no satisfactory evidence as to usage in the present case nor was any issue raised as to the right of the tenants to claim remissions. The Deputy Collector seems to have based his decision solely on a passage at page 337 of the Rāmṇād Manual.

We think that the District Judge was right in holding that the right to remission has not been proved in respect of dry lands. As pointed out in *Alagappa Chettiar v. Tirunagavalli*(1), there can be no legal right to obtain a remission of rent.

We confirm the decision of the District Judge on this point.

Subject to the modifications mentioned above we dismiss the second appeals and the memorandum of objections. As neither party has succeeded on all the points raised by him we order that each party do bear his own costs.

Second Appeals Nos. 311 to 316 and 319 to 322 follow the decision in the above appeals and are dismissed with costs.

Second Appeal No. 318 is dismissed without costs.

Second Appeals Nos. 1792 and 1852 abate as respondents are dead and no legal representatives have been brought on record.

N.R.

(1) (1903) 18 M.L.J., 877.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

ATYAM VENKATASUBBARAYADU AND TWO OTHERS
(RESPONDENTS IN LETTERS PATENT APPEALS NOS. 26
AND 28 OF 1912), PETITIONERS,

1915.
December,
21.

v.

SRI RAJAH VELUGOTI GOVINDA KRISHNA YACHEN-
DRULU VARU BAHADUR, ZAMINDAR GARU (APPELLANT IN
THE LETTERS PATENT APPEALS).

RESPONDENT.*

Review—*Appeals under clause 15 of the Letters Patent—Petitions for review in, maintainability of.*

It is competent to the High Court to review judgments in appeals preferred under clause 15 of the Letters Patent.

Petitions praying the High Court to review the judgment of BENSON AND SUNDARA AYYAR, JJ., in *Sri Raja Krishna Yachendralu Bahadur v. Venkatasubbarayudu*(1), preferred against the order of ABDUR RAHIM, J., in Second Appeals Nos. 1107 and 1109 of 1911, respectively, preferred against the decrees of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore, in Appeals Nos. 218 and 220 of 1910 preferred against the decree of K. RAGHAVA AYYANGAR, the District Munsif of Ellore, in Original Suits Nos. 432 and 430 of 1908, respectively.

THE facts necessary for this report are given in the judgment.

S. Subrahmanya Ayyar for P. Narayanamurti for the petitioners.

T. R. Ramachandra Ayyar for the respondent.

The following judgment of the Court was delivered by SESHAGIRI AYYAR, J.—Mr. Subrahmanya Ayyar has taken the preliminary objection that the High Court cannot entertain a Review in appeals preferred under section 15 of the Letters Patent. The question is practically *res integra* as the decision in *Hafiz Muhammad Moshin v. Sheo Prasad*(1) in which the point was directly raised, gives no reason for the conclusion arrived at.

SESHAGIRI
AYYAR, J.

* Civil Miscellaneous Petitions Nos. 1234 and 1683 of 1913.

(1) Letters Patent Appeals Nos. 26 and 28 of 1912.

(1) (1904) 1 A.L.J., 509.

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After hearing the matter fully argued by the learned vakils on either side, we are of opinion that there is no force in the objection. Clause 44 of the Letters Patent says that the provisions are subject to the legislative powers of the Governor-General in Council. As at present advised, we are in agreement with Mr. Subrahmanya Ayyar that this provision would not enable Courts, by implication, to supplement the Letters Patent by importing into it all acts *ejusdem generis* passed by the Governor-General in Council and that the provision is only intended to empower the Governor-General in Council to legislate with a view to supplement omissions in the Letters Patent. Even in this view, we think that by section 117 of the Code of Civil Procedure (Act V of 1908), the Governor-General may and did incorporate into the Letters Patent the provision for review. It was then argued that the Review section, section 114 of the Code (Act V of 1908), cannot apply as it provides only for the review of decrees or orders passed under the Code of Civil Procedure. We are not impressed by this argument. In the first place, decrees are passed in appeals heard under the Letters Patent only under the Code of Civil Procedure. In the second place, clause (b) of section 114 does not require that orders and decrees should have been passed under the Code. Further the word *decree* or *order* includes a *judgment*: *Krishen Doyal v. Irshad Ali*(1). Mr. Subrahmanya Ayyar relies on *Sabhpathi Chetti v. Narayanasami Chetti*(2) for the proposition that section 15 of the Letters Patent is not controlled by the Code of Civil Procedure. All that was decided in that case was that as section 15 had given an unlimited power of appeal against every judgment of a single Judge, the Governor-General in Council should not be understood to have taken away by implication that power of the litigant by making section 540 of the Code (Act XIV of 1882) applicable to Chartered High Courts. This does not contravene the principle that it is competent to the Governor-General in Council to supplement the remedy of *et ary* by giving an additional remedy by way of review to the *ldants*. The decisions in *Babaji bin Pulloji v. Babaji bin Mahffs* as *Lala Pryag Lal v. Jai Narayan Singh*(4) and *Nana bin Sheku bin Andu*(5), only lay down that a self-contained(2).

(1) (1915) 22 C.L.J., 525.

(2) (1902) I.L.R., 25 Mad

(3) (1891) I.L.R., 15 Bom., 650.

(4) (1895) I.L.R., 22 Cal

(5) (1908) I.L.R., 32 Bom., 337.

should not be added to by the provisions of the Code of Civil Procedure. This does not affect the present question.

Mr. Ramachandra Ayyar has referred us to two reported cases and to an unreported decision in which reviews under similar circumstances were entertained. Apparently the practice of this High Court has been in favour of allowing reviews to be filed in appeals under the Letters Patent.

It was pointed out by the Judicial Committee in *Ravi Veeraghavulu v. Venkata Narasimha Nailu Bahadur*(1), that even though a strict construction of the law may not permit of the entertainment of appeals, a longstanding practice of the Court would not be lightly departed from in that respect. What applies to appeals, applies *mutatis mutandis* to reviews also. We must therefore overrule the preliminary objections. If we are to interfere in review in these cases, it can only be on the basis of the facts as set out in the appeal arrived. We are not prepared to adopt the procedure.

The petitions are dismissed with costs.

N.B.

(1) (1914) I.L.R., 37 Mad., 443 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter and Mr. Justice
Seshagiri Ayyar.

1916.
January
5, 10 and 25
and
February 1.

RAMA ROW AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KUTTIYA GOUNDAN *alias* MARAPPA GOUNDAN *et al*
(DEFENDANTS), RESPONDENTS.*

*Hindu Law—Inheritance—‘Samanodaka’ meaning of—Reversioner, claim by—
Onus of proof.*

According to Mitakshara and the view prevalent in Southern India, *samanodaka* relationship is confined to such of the *gothrajas* as are within fourteen degrees from the common ancestor. It is incumbent on a plaintiff to succeed to property as an heir, affirmatively to establish the part relationship which he puts forward. He is also bound to satisfy the court that, to the best of his knowledge, there are no nearer heirs. It is for the claim that their kinship is nearer than that of the plaintiff, to prove relationship.

Secretary of State for India v. Subraya Karantha (1915) M.W.N., 962, fo

A *gothraja* who is unable to trace his descent from a common ancestor cannot be preferred to a *bandhu*.

SECOND APPEAL against the decree of R. ANNASWAMI AYYAR, Temporary Subordinate Judge of Trichinopoly, in A.S. Nos. 265, 325 and 385 of 1912, preferred against the decree of A. V. RATNAVELU PILLAI, the District Munsif of Karaikal. Original Suit No. 628 of 1910.

The facts appear from the first four paragraphs of the judgment.

K. R. Rangaswami Ayyangar (with C. V. Anantakrishnan Ayyar) for the appellant.—The burden of proving the negation, namely, that there are no nearer heirs than the plaintiffs claim as *bandhus* of the deceased, has been wrongly placed on the plaintiffs by the Lower Court. It is for those who claim to be nearer heirs than the plaintiffs to prove the same: see *Secretary of State for India v. Subraya Karantha* (1). The defendants who set up Rangaiyer as a nearer heir than the plaintiffs being a *samanodaka*, have not proved his exact relationship to the common ancestor: *Kedarnauth Doss v. Protap Chunder Doss*

Samanodaka relationship does not extend to all *gothrajas* but is confined only to such of the *gothrajas* as are within fourteen degrees from the common ancestor: see the judgment of the Judicial Commissioner of Oudh in *Kalka Prasad v. Mathura Prasad* (1) and *Sarvadhikari on Inheritance*, page 686.

T. R. Ramachandra Ayyar, T. R. Venkatarama Sastriyar, N. Rajagopalachariar and K. S. Ganesa Ayyar for the respondents.—Plaintiffs who claim as heirs must prove by positive evidence that they are the nearest heirs of all persons claiming to be heirs of the deceased: see *Gridhari Lall Roy v. The Bengal Government* (2). *Samanodaka* includes all *gothrajas*, and all *gothrajas* even though beyond fourteen degrees from the common ancestor are entitled to succeed—*Bai Devkore v. Amritram Jamiatram* (3), *Ram Baram Rui v. Kamta Prasad* (4), *Bhyah Ram Singh v. Bhyah Ugur Singh* (5), *Manu* IX, 187 and V, 60; *Setlur's Mitakshara*, page 787 and *Sarvadhikari*, pages 639, 659 and 684. Plaintiffs, at the worst, are *gothrajas* and therefore preferable to *bandhus*.

K. R. Rangaswami Ayyangar replied.

The following JUDGMENT of the Court was delivered by

SESHAGIRI AYYAR, J.—The suit is by the plaintiffs as reversioners to recover possession. The last male owner was Venkataramana Ayyar, who died some forty years ago. His widow Tulasi Ammal died in September 1908. The plaintiffs claim to be the sister's sons of Venkataramana Ayyar.

The defendants are alienees from Tulasi Ammal. They denied the plaintiffs' relationship to the last male owner and pleaded that one Rangaiyer was the nearer heir, being a *dayadi*. They also claimed that some of the properties were Tulasi Ammal's self-acquisition and that as regards the others, their alienation was for justifiable purposes.

The District Munsif held that there were no nearer heirs than the plaintiffs whom he found to be the sister's sons of the deceased male owner and that most of the alienations were not binding on them. He gave a decree for the major portion of the properties in the suit.

(1) (1908) I.L.R., 30 All., 510. (2) (1868) 12 M.I.A., 448 at p. 469.
(3) (1886) I.L.R., 10 Bom., 372. (4) (1910) I.L.R., 32 All., 594.
(5) (1876) 13 M.I.A., 373 at pp. 380 and 393.

* Second Appeal No. 2386 of 1913.

(1) (1915) M.W.N., 962.

(2) (1881) I.L.R., 6 Cal., 626.

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On appeal, the Subordinate Judge, without determining whether the plaintiffs were heirs, was of opinion that the plaintiffs should prove affirmatively that there were none nearer than themselves. He discussed the oral evidence given for the plaintiffs and the defendants and stated :—

"On the above evidence of defendants' witnesses Nos. 1 to 3 and the admissions of plaintiffs' witnesses Nos. 2, 3, 6, 8, 10, 13 and 14, I hold that it is made out that Rangaiyer and others are *dayadis* of the deceased Venkataramana Ayyar."

It should be mentioned that this Rangaiyer has not gone into the witness box to prove his relationship. The conclusion of the Subordinate Judge is :—

"As I find that the plaintiffs have not proved that there are no *dayadis* of Venkataramana Ayyar now alive, whereas it is proved on defendants' side that Rangaiyer and others of Pallapalayam are Venkataramana Ayyar's *dayadis* and are alive, the first point should be found in the negative and against the plaintiffs."

In the result, the decree of the District Munsif was reversed. Hence this Second Appeal.

In the first place, we are unable to agree with the Subordinate Judge in his view of the burden of proof. It is no doubt incumbent on a plaintiff seeking to succeed to property as a reversioner, to establish affirmately the particular relationship which he puts forward. He is also bound to satisfy the Court that to the best of his knowledge there are no nearer heirs. He cannot be expected to do anything more. It is for those who claim that their kinship is nearer than that of the plaintiffs to prove that relationship. The decision in *Gridhari Lall Roy v. The Bengal Government*(1) which is relied on as compelling plaintiffs in similar circumstances to prove by positive evidence that by process of elimination they are the only possible claimants, has been very much misunderstood. If the facts of that case are fully understood, no such proposition can be deduced from it. We agree with the view taken by one of us on this question in a recent case: *Secretary of State for India v. Subraya Karantha*(2). We think the Lower Appellate Court was wrong on this point.

It was argued by Mr. Venkatrama Sastriar that the finding of the Subordinate Judge amounts to saying that Rangaiyer and

(1) (1868) 12 M.I.A., 448.

(2) (1915) M.W.N. 902.

the others referred to, exclude the plaintiffs as *samanodakas*. On examining the evidence relied on by the Subordinate Judge, we find that no definite relationship is deposed to and that beyond saying that bathing pollution was observed, no tangible circumstance is spoken to as establishing the relationship. Mr. Rajagopalachariar who followed, ventured to argue that *samanodakaship* connoted all *gothrajas* and that as there is evidence on which the Court below is entitled to find on this point, we should not interfere with the finding. As this argument raised an issue of considerable importance, we allowed the learned pleaders on both sides a further opportunity to examine the Hindu Law Texts bearing on the question.

We are indebted to Mr. Ramachandra Ayyar for the succinct summary he has given us of the authorities on the second occasion. There can be no question that Manu included in the term "*samanodaka*" all persons belonging to the same *gothra* :

"The *sapinda* relationship is extinguished in the seventh generation; *samanodaka* relationship lasts for all eternity, being extinguished only when the name and *gothra* are not known."

Yagnavalkya in *sloka* 135 says that the *gothrajas* come before the *bandhus* :

"The wife, daughters, both parents, brothers and likewise their sons, *gothrajas* (gentiles); *bandhus* (cognates); a pupil and a fellow-student."

Vignaneswara in his commentary (Mitakshara, chapter II, section 5, *placitum* 6) says :

"If there be none such, the succession devolves on *samanodakas* and they must be understood to reach to seven degrees beyond *sapindas*, or else as far as the limits of knowledge as to birth and name extend. Accordingly Manu says: 'The relation of the *sapinda* ceases with the seventh person; and that of *samanodakas* extends to the fourteenth degree; or as some affirm, it reaches as far as the memory of birth and name extends'. This is signified by *gothra*."

It is clear from the above passage that neither Vignaneswara nor Brihat Manu gave their own sanction to extending the meaning of the term *samanodakas* to descendants beyond the fourteenth degree. The strong inclination towards unlimited agnatic heirship which characterised the writings of Manu and the Rishis did not find equal favour with the commentators. These latter who understood the sentiments of the people attached considerable importance to the customs that

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had grown up since the ancient Rishis gave the law. It is no wonder therefore that Vignaneswara makes a halting allusion to what others say on the definition of the term *samanodaka*. He knew that persons belonging to the same *gothra*, would not necessarily trace their descent from a common ancestor. It is common knowledge that persons of the same *gothra* belong to different *sakhas*. Some may be *Yajur Vedis*, some *Rig* or *Sama Vedis*. Further, Vignaneswara must have felt that people were more inclined to favour nearer blood relationship than descent in the same agnatic line, however remote. We are therefore of opinion that the Mitakshara does not enunciate the theory that *samanodaka* relationship extends beyond the fourteenth degree, and as that authority is paramount on questions of inheritance in Southern India, we must hold that this relationship ceases with the fourteenth. Vaidyanatha Dikshitar, an author of great repute and weight in Southern India, in the *Asoucha Kanda* restricts the term *samanodaka* to persons who come within fourteen degrees from the common ancestor. This author lived within 500 years and is held in great veneration all over the Presidency; and he apparently gives expression to the traditions of the people among whom he lived.

There is another point on which our conclusion against the view of the Subordinate Judge may be sustained. Even accepting the interpretation which Brihat Manu ascribes to 'others,' it is clear that unless a person is able to point to a common ancestor in the line of *gothrajas*, he is not entitled to come before *bandhus*. Both Manu and Yagnavalkya speak of *Janma* and *Namna*, i.e., the *gothra* and the *name*. In the Telugu countries of Madras, the name is indicated by the house name or the *intiperu*. This is not in vogue in the Southern districts. Even there, people speak of the *vamsam* to which they belong. This would lead to tracing descent to a common ancestor. It would be something specific to go by. In this case no attempt has been made to show that Venkatarama Ayyar and Rangaiyer and the others who gave evidence had either the same house name or belonged to the same *vamsam*.

As regards the decided cases, *Bai Devkore v. Amritram Jamiatram*(1) is the only one which in any way supports the

(1) (1886) I.L.R., 10 Bom., 872.

respondent's contention. In that case, the common ancestor was traced. This view of the Bombay Judges apparently did not find acceptance in Madras. We have ascertained that SUBRAHMANYA AYYAR and BODDAM, JJ., did not follow it in *Srimat Vedanta Desika Charulu v. Sri Raja Rangayya Appa Row Bahadur*(1). The observations of the Judicial Committee in *Bhyah Ram Singh v. Bhyah Ugur Singh*(2) are very general. Their Lordships had not to consider the meaning of the term *samanodaka* in that case. *Kutti Ammal v. Radhakrishna Aiyar*(3) and *Gridhari Lall Roy v. The Bengal Government*(4), only lay down that before the property escheats to the Crown, all possible relations should be exhausted. The exact point at which *samanodaka* relationship ceases, was not in question in these cases. *Ram Baram Rai v. Kamla Prasad*(5) is only authority for the way in which the fourteen degrees are to be computed. On the other hand in the case from which *Kalka Prasad v. Mathura Prasad*(6), was the appeal heard by the Judicial Committee, the view taken was that *Bai Devkore v. Amritram Jamiatram*(7) had gone too far. *Narain Kuar v. Chandihin*(8) upholds the restricted construction of the term *samanodaka*.

Among the text writers, the general tendency is to confine the relationship to the fourteenth degree, although some would have it that so long as there is a possibility of a common ancestor being traced, the *gothrajas* would exclude the *bandhus*. It has to be remembered that this indefinite extension of the meaning of the term is calculated to induce parties to place before the Court evidence of a very dubious and unreliable character.

On the whole we are of opinion that on authority and for reasons of expediency, it is not desirable to extend the meaning of term *samanodaka* to persons beyond the fourteenth degree of relationship to the deceased; and that under no circumstances should a *gothraja* be preferred to a *bandhu* when the former is unable to trace his descent from a common ancestor.

As the Subordinate Judge has disposed of this case on a wrong view of the burden of proof, his decree must be reversed

(1) Appeals Nos. 120 and 124 of 1902.

(2) (1876) 13 M.I.A., 373 at pp. 390 and 393.

(3) (1875) 8 M.H.C.R., 88.

(4) (1868) 12 M.I.A., 448.

(5) (1910) I.L.R., 32 All., 594.

(6) (1908) I.L.R., 30 All., 510.

(7) (1886) I.L.R., 10 Bom., 872.

(8) (1887) I.L.R., 9 All., 487.

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and the appeal should be remanded to the permanent Subordinate Judge of Trichinopoly for disposal on the merits with reference to the foregoing observations. Costs to abide the result.

N.R.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice and Mr. Justice
Srinivasa Ayyangar.*

1918.
February
8 and 9.

AMANCHI SESHAMMA (DEFENDANT), APPELLANT,

v.

AMANCHI PADMANABHA RAO (PLAINTIFF), RESPONDENT.*

Hindu Law—Adoption by one adjudged a lunatic under the Lunatic Act (XXXV of 1858), valid only if of sound mind at the time—Presumption of continuity of unsound mind—Onus of proving the contrary.

The effect of an adjudication under the Lunatic Act (XXXV of 1858) that a person is a lunatic is to raise a presumption that he continued to be of unsound mind until the contrary is shown.

Van Grutten v. Foxwell (1897) A.C., 658 and *Snook v. Watts* (1848) 11 Beaven 105, followed.

Though the effect of an order under the Act appointing a manager for the properties of a lunatic is not to incapacitate him from making an adoption till the order is set aside; still, unless it is proved that the lunatic was of sound mind at the time he is alleged to have made the adoption, the adoption is invalid.

Semble: Adoption is not an act which amounts to an alienation of property. It affects status and it has in the opinion of Hindus, religious efficacy and it would not be right for a Court to hold that a Hindu is deprived by any statute of the power of making an adoption unless there are clear unambiguous words therein to that effect.

APPEAL against the decree of J. W. HUGHES, the District Judge of Nellore, in Original Suit No. 18 of 1913.

One Krishna Rao was adjudged a lunatic in December 1903, under the Lunatic Act (XXXV of 1858) by the District Court of Nellore and one A. Bhima Rao (the natural father of the present plaintiff) was appointed the guardian of his person and the

* Appeal No. 376 of 1914.

lunatic's mother and another were appointed guardians of his property. Krishna Rao, the lunatic, died in July 1912. The plaintiff, a minor boy and brother of the second wife of the deceased, brought this suit for a declaration that he was entitled to the suit properties, which once belonged to the deceased, as the adopted son of the deceased, alleging that he was adopted in 1907 by the deceased and his second wife. The defendant who was the first wife of the deceased, denied the fact and also the validity of the adoption, on the grounds that the deceased continued a lunatic at the time of the alleged adoption and that the adoption, if a fact, was brought about without the sanction of the District Court, by the undue influence exercised by Bhima Rao, the natural father of the plaintiff and father-in-law of the deceased. The District Judge found that the adoption was as a fact made, that the deceased was then of sound mind and that it was therefore valid. In the result the District Judge allowed the suit. Hence this appeal by the defendant.

T. V. Venkatarama Ayyar and *A. Venkatarayaliah* for the appellant.

B. Somayya for the respondent.

JUDGMENT.—The question in this case is whether the deceased Krishna Rao was capable of making an adoption. He had been found a lunatic under the Lunatic Act XXXV of 1858 in 1903 and the effect of that finding is to raise a presumption that he continued to be of unsound mind until the contrary is shown. We are altogether unable to accept the arguments presented by Mr. Venkatarama Ayyar for the appellant that the effect of an Order under that Act appointing a manager of the properties of the lunatic is to incapacitate the lunatic from making an adoption till the Order is set aside. No authority has been cited in support of that proposition. On the other hand, as pointed out by the District Judge, in the Courts of Wards Act I of 1902 in this Presidency, where it was desired to control the power of an incapacitated person under that Act to make an adoption, express provisions to that effect were inserted and a perusal of those provisions shows how very careful the legislature was and that all that it did was to provide that the Court of Wards should satisfy itself that the power of adoption was not being abused. We cannot accept the argument that an adoption is an act which amounts to alienation of property

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like a lease or mortgage. It affects the status and further than that, it has, in the opinion of Hindus, religious efficacy and it would not be right for the Court to hold that a Hindu was deprived by any statute of the power of making an adoption unless there were clear unambiguous words to that effect. We therefore disagree with that contention and it only remains therefore to see upon the evidence whether it is satisfactorily shown that the adoptive father was of sound mind at the time when he made the adoption.

As to the law on this question, we may refer to *Snook v. Watts*(1) where it is said :

"The finding of the jury upon a commission of lunacy that a party is lunatic, throws the burthen of proof on those who contend the contrary. The presumption is not then, as it would otherwise be, in favour of sanity or soundness of mind, but the contrary must be proved ; that is, they who allege the sanity of a person at a time subsequent to that at which he has been found lunatic under a commission, have the burthen cast on them of proving the soundness of mind of such person."

And the same question has recently been alluded to in *Hill v. Clifford*(2) where COZENS HARDY, M.R., cites *Van Grutten v. Foxwell*(3) in which case LOPES, L.J., is cited as saying :

"The inquisition affords no doubt *prima facie* but not conclusive evidence of Mary's insanity in October 1833, anterior to the execution of the disentailing deed, evidence which should be acted upon unless there is evidence the other way."

And RIGBY, L.J., said :

"The inquisition of 1843 is evidence that Mary was insane as from October 1833, though, so far from being conclusive, it is not even strong evidence of her being insane at the date of the disentailing deed, if a contrary case can be made out."

The result of these authorities is that it depends upon the facts of each case whether there is satisfactory evidence or not. In the present case, the general effect of the evidence is that Krishna Rao was a person of unsound mind. There is considerable evidence for the defendants that he generally conducted himself in a way that a man of sound mind would not do ; and this is corroborated by the petition put in on one occasion by

(1) (1848) 11 Beaven, 105.

(2) (1907) 2 Ch., App. 236 at p. 245.

(3) (1897) A.C., 658.

the present plaintiffs' father (plaintiffs' first witness) who really brought about the adoption and is in fact conducting the case for the plaintiff, by his statement in Exhibit III that

"It is not true that the lunatic has now ceased to be such and has been capable of taking care of himself and of his property. He is still subject to mental delusions and commits acts which a sane man would not think of doing. Some of such acts are tearing of clothes, bathing stark-naked in the presence of females and other things."

That is the same evidence of the sort that is now before us. That certainly goes to show, as I have said, that he was a man of unsound mind. Also, it is no doubt true, on the other side, that he could write Telugu well. I mean that he wrote a good Telugu hand. He could write an intelligent letter. But that of course is no conclusive test. The letter (Exhibit A) though it is grammatically expressed does not appear to be a letter of a man of sound mind. It appears to charge his old mother with misconduct and is couched in terms of extraordinary violence. All this evidence goes to show that he was of an unsound state of mind. And that is not rebutted. But what is even more important is what happened with reference to this very adoption. He had made a will giving his second wife, the defendant, power to adopt. At the time he made the will, he had been ill. But before the adoption he appears to have recovered and there was no occasion therefore for him to make an adoption. He was twenty-seven and his second wife with whom he was living was only sixteen. Not only therefore is the very fact of making the adoption suspicious, but looking at Exhibit H, which is a letter from the defendant's father to the mother of Krishna Rao, we see that the invitation was to an adoption to be made by the second wife under the authority given by Krishna Rao himself, and Exhibit F which is a report by the father of the boy to the Court says that the boy was adopted on the authority given by Krishna Rao to his second wife. Now both these documents suggest that the actual adoption was by the second wife under an authority given by the husband who was at that time alive. This is a very extraordinary circumstance. This witness was questioned and it does not appear that the question was put with reference to Exhibit F as to whether the adoption had been made by Krishna Rao or by his wife and he said then that it

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WALLIS, C.J., guardian of the person of the boy, and it certainly looks as if
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AYYANGAR, J. of Bhima Rao who was anxious to get the property for his son.

In these circumstances, we do not think that the presumption of unsoundness of mind which was raised by the finding that Krishna Rao was a lunatic has been satisfactorily rebutted, and we think it would be quite unsafe to support this adoption, and we are therefore constrained on this ground to differ from the conclusion arrived at by the District Judge and to allow the appeal with costs throughout.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter and Mr. Justice Srinivasa Ayyangar.

G. SAM (PLAINTIFF), APPELLANT,

v.

1916.
January
21 and 24
and
February 18.

T. RAMALINGA MUDALIAR AND FOUR OTHERS (DEFENDANTS -
Nos. 1, 3, 4, 5 AND 6 AND THIRD DEFENDANT'S LEGAL
REPRESENTATIVES), RESPONDENTS.*

Estates Land Act (Madras Act I of 1908), ss. 3 (2) (c) and 8—Meaning of "unsettled jaghir", as distinguished from ordinary inams—Jurisdiction of Civil Courts.

A personal grant for subsistence in no way differing from an ordinary *inam* is not an *unsettled jaghir* within the meaning of section 3 (2) (c) of the Estates Land Act, but an *inam*.

When the *inamdar* subsequently to the grant, acquires the *kudivaram* interest, the case comes under the exception in section 8 of the Act, and the Civil Courts have jurisdiction in ejectment.

SECOND APPEAL against the decrees of V. VENUGOPAL CHETTI, the District Judge of Chingleput, in Appeals Nos. 249 and 400

* Second Appeal No. 2037 of 1914.

of 1913, preferred against the decree of P. SUBRAYYA MUDALIYAR, the District Munsif of Poonamallee, in Original Suits Nos. 562 of 1908 and 476 of 1912.

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The facts appear from the judgment of SRINIVASA AYYANGAR, J.

S. Subrahmanya Ayyar, P. V. Ramachandra Raju and S. Ramachandra Ayyar for the appellant.

T. R. Venkatarama Sastriyar and A. S. Viswanatha Ayyar for the respondents.

SRINIVASA AYYANGAR J.—This is a suit for ejectment filed in the ordinary Civil Court. Defendants plead that a Civil Court has no jurisdiction as the village of Puliampattu in which the suit lands lie, is an *unsettled jaghir* within the meaning of clause (c) of sub-section (2) of section 3 of the Estates Land Act and that the lands are not the "private lands" of the landholder. The defendants are not mere trespassers. They are said to be tenants from year to year whose tenancy was put an end to, by a notice to quit which expired just before the Estates Land Act came into force. The learned pleader for the appellant scarcely contended that the suit lands were the "private lands" of the plaintiff, if he was a landholder. But his main contention was that the village of Puliampattu was only an ordinary "*inam*" and not an "*unsettled jaghir*." The short question for determination is whether the village of Puliampattu is an "*unsettled jaghir*." For the determination of the question at issue, it is necessary, first of all, to know the exact nature of the property, and the terms of the original grant, so far as they are ascertainable. The revenue of this and another village Numbal appears to have been granted towards the end of the eighteenth century by the Nabob of the Carnatic to a lady of his family. The villages were afterwards purchased by the Nabob himself, and were in 1782 assigned by him to an Armenian gentleman, the predecessor in title of the plaintiff (Exhibit V). At the time of the grant, the villages appear to have been *mirasi* villages. The *mirasi* rights were from time to time, acquired by the predecessors in title of the plaintiff, and long before 1843, they had become the owners of both the *kudivaram* and *melvaram* in the village of Puliampattu. It is found by both the Lower Courts that no occupancy right had been

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acquired before the coming into force of the Estates Land Act either by grant, custom or prescription by the defendant or any of his predecessors who were let in as tenants for the cultivation of the lands. If, of course, the lands are *ryoti* lands in an estate, the defendants may have acquired an occupancy right or may be in a position to acquire it under the Estates Land Act. These villages have not been settled under the Permanent Settlement Regulation, nor have they been confirmed or enfranchised under the Inam Rules. If the village is an *unsettled jaghir* within the meaning of clause (c), the fact that the *jaghir* has subsequent to the grant, acquired the *kudivaram* interest in the whole or any portion of the lands in the *jaghir*, cannot take the village out of the category of an estate, nor can by itself convert the ordinary *ryoti* lands in his *jaghir* into the private lands of the *jaghir*dar (cf. sections 8 and 185 and definitions of *ryoti* and *private land* in section 3 of the Madras Estates Land Act), for in *private lands* strictly so called, there is no division of interest as *melvaram* and *kudivaram*. It is unnecessary to decide the question (as to which there is some conflict of opinion in this Court) whether land which was once *ryoti*, can, except under the proviso to section 185, be converted into *private land*: see *Zamindar of Challapalli v. Rajalapati Somayya*(1): for the contention raised in the first Court that the suit lands were private lands, was abandoned in the first Court and the learned pleader for the appellant, as I have already said, scarcely argued the point here. His principal contention was, that although the plaintiff and his predecessors were called *jagirdars* and the suit village termed *jagir*, it was really an *inam* and was not an *unsettled jagir*. He contended, if I understood him right, that there are three classes of *jagirs*, one settled, another unsettled and a third kind which was neither settled nor unsettled, which is a species of *inam*. He says that all *jagirs* which paid or are liable to pay no land revenue to the Government, fall in the third class and its nature, i.e., whether it is an estate or not, can only be determined under clause (b) of sub-section (2) of section 3 of the Estates Land Act, and such lands cannot fall within clause (c). I confess, I find some difficulty in understanding this distinction.

(1) (1915) 27 M.L.J., 718.

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All lands are liable to pay land revenue unless they are exempted by statute or by any binding engagement between the Government and the landowner. The British Government were not bound to recognize the revenue free grants of the previous Governments, though in practice they did recognize them: *Baden-Powell, Land Revenue in British India*, page 54 and *Secretary of State for India v. Bai Rajbai*(1). I do not therefore think that the test formulated by the learned *vakil* for the appellant, affords a correct or satisfactory differentiation between an ordinary *inam* and a *jagir* for the purpose of the Act.

Jagir is a Muhammadan term and the *jagir* tenure is described in various places in *Baden-Powell's Land Tenures*. In volume 1, at page 189 he says:

"Whether the Muhammadan Government consciously imitated the Hindu system of appointing certain chief to manage special territories especially frontier and mountain tracts, I cannot determine; but at a very early stage, they adopted the plan of granting to Court favourites, to ministers of state, and to military officers, the right to collect the revenue of a certain area of country, and to take the amount collected, either to support their state and dignity, or in the case of military chiefs, to equip a body of troops, to be available for the royal service."

At page 190, he says:

"A great number of assignments of revenue in this way grew into landlord-tenures, very much as the '*zamindari*' estates did. This was much facilitated by the fact that the grantee was allowed, and indeed expected, in many cases, to conduct the revenue administration in his own way, and of course he had (or assumed) the full right to all unoccupied or waste land in the *jagir*."

Again at page 257 in which he deals with land revenue administration he says this:

"One other feature of the Mughal system should be mentioned. Just as the Hindus divided the whole country into the royal domains and chief's domains, so the Mughals apportioned their territory into '*khalsa*' and '*jagir*' lands. The '*jagir*' lands were divided into blocks or estates which were made over for life (the grants became hereditary at a later stage) to certain Military Commanders, Ministers and Courtiers, who took the revenues for their own support or that of a Military force which they were bound to maintain. Sometimes waste tracts were granted in *jagir*,

(1) (1915) L.R., 42 I.A., 229.

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and sometimes outlaying and troublesome districts. The *jagirdar* managed the whole, increased the cultivation and applied the revenue to his own support, and to expenses of the administration and the pay of troops".

Jagirs unlike *inams*, were usually for life though in course of time, they also became permanent and heritable. An *inam*, as its name imports, was a present, or gift either to an individual or for a public purpose, while *jagirs* generally implied conditions of service or a reward for service: Baden-Powell's Land Revenue, page 118. The distinction drawn by that learned writer (Land Revenue, page 116) that an *inam* implied a grant of land with a remission partial or total of the revenue, while a *jagir* was a grant merely of land revenue, is not one which is now accepted in this Presidency as an *inam* grant is also presumed to be a grant of land revenue only. At the same time it is difficult, if not impossible, to frame a definition or even give a description of a *jagir* so as to distinguish it from an ordinary *inam* as many *jagir* grants were mere presents to individuals, while many service grants are called *inams*. In an appeal from Bombay, the Judicial Committee in discussing the nature of a *Jagir* tenure (known as *saranjam* in the Mahratta country) say that "*inam*" is a term of mere generic significance applicable to a Government grant as a whole: *Raghoji Rao Sahib v. Lakshman Rao Sahib*(1). In fact, villages termed *jagirs* and *paliams* were settled by the Inam Commissioner under the Inam Rules: see classification of *inams* in the Inam Rules, page 181, volume 2, Board's Standing Orders, 1907; also Chingleput District Manual, page 346, where two *jagir* villages are classed under unenfranchised *inams*. The three *Kaliyarayan jagirs* in the South Arcot district were settled by Inam Commissioner and are included in the schedule to the Impartible Estates Act.

The word *jagir* occurs along with "*unsettled paliam*" in clause (c). There is a definition of an "*estate*" in identical terms in the Proprietary Estates Village Service Act and the Survey and Boundaries Act, and there also the same collocation occurs. Further in giving illustrations of permanently settled estates, a *zamindari*, *jagir*, *mitta* and *paliam* are mentioned. The *jagirs*, whether settled or unsettled, which are classed as

(1) (1912) I.L.R., 36 Bom., 653 at p. 659.

"estates," are presumably of the same character as *zamindaris*, *paliams* and the like, i.e., they are proprietary estates or as more correctly described by Baden Powell as "*zamindar* or landlord tenure over estates." It will be seen from the description given above of the origin and nature of *jagir* grants and the revenue policy which dictated them, that the *jagirdar* was in a large number of cases, exercising control over the tract assigned to him and was administering the same; he, in fact, was exercising governmental functions in subordination, it may be, to a superior, and was holding his *jagir* on condition of military or political service. There were cases, however, of *jagir* grants where the land revenue was assigned merely for private enjoyment as, for instance, subsistence, and these cases are now indistinguishable from ordinary *inam* grant; and as regards these I think the principle applicable to *inams* ought to be applied in determining their character, as estates, for the purpose of the Estates Land Act. It is only the first class of *jagir* grants that came subsequently to be classed along with ordinary *zamindaris* or *paliams*, and I think it is to such estates that clause (c) applies. In fact, it is said that a *jagir* differs from a *zamindari* in that the revenue or peshkash payable by the latter, was fixed at some proportion of the receipts about the time of the settlement, while a *jagirdar* pays merely a lump sum not expressly calculated on such a basis. In the case of the *Jagir* of Arni this payment was called a "*nuzzar*" or gift: see North Arcot District Manual, volume 1, second edition (1895), page 281.

It is clear in this case, that the original grant was only a personal grant for subsistence and in no way differed from an ordinary *inam*. It may be an "*estate*", if it comes under the class described in clause (d), but, it is not an *unsettled jagir* within the meaning of clause (c). I may mention that in one of the earliest documents on the record, the plaint village is described as an *inam* village: Exhibit B. In the Chingleput Manual, it is apparently classified under the heading of "*unenfranchised inams*" though described as a *jagir*. If therefore the villages of Numbal and Puliampattu do not form an *unsettled jagir*, within the meaning of clause (c), it is immaterial to determine whether they fall under clause (d), for if they do, so far as the suit lands are concerned, they ceased to form part of an estate

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by virtue of the exception to section 8. As I have already said the land revenue alone was given as *inam* to a person not then the *kudivaramdar*. The villages however have never been confirmed or enfranchised by the British Government. It is difficult to assign a precise meaning to the word "recognized" whether mere acquiescence is enough or whether something more is required is not clear. I should be inclined to think that recognition implies something more than mere acquiescence, something done by the Government, as, for instance, by acceptance of service, *jodi*, etc.: *Secretary of State for India v. Bhava-murthy*(1). In form, the title-deeds issued by the Inam Commissioner only recognize the title of the grantee, but the word "recognize" in the Act is not used in that sense is clear, for no title-deed is issued till after confirmation or enfranchisement. The word "enfranchised" is not to be found in clause (d); but as before enfranchisement, the *inam* is in a sense confirmed; the word "confirmed" was probably used to cover cases also of enfranchisement after proof of title.

The question whether ordinary Civil Courts have jurisdiction, even if the suit lands were lands in an estate, was not raised or argued. An answer to this question would depend on the precise effect of the exception contained in section 153 taken along with section 157; see *Ponnusamy Padayachi v. Karup-pudayan*(2). I therefore think that the appeal must be allowed and the decree of the Munsif restored with costs here and in the Court below.

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COUTTS TROTTER, J.—The sole question raised before us in this case is as to the jurisdiction of the Civil Court and the matter arises in this way. The defendants were tenants under the plaintiff and received from him a notice to quit which expired before the Madras Estates Land Act came into force, and on the strength of that notice, the plaintiff sued them in ejectment. If the lands in question formed an unsettled *jagir* within the meaning of section 3 of the Madras Estates Land Act, it is admitted that the ordinary Civil Court has no jurisdiction. The lands in question were granted by the Nawab of the Carnatic somewhere in the middle of the eighteenth century to a lady of his family for her subsistence. They afterwards reverted

to the Nawab, but at a date when he had ceased to be a ruling prince of the district. In 1782 he assigned them apparently by way of mortgage to a predecessor-in-title of the plaintiff. It is not disputed that the plaintiff and his predecessor-in-title have been in possession ever since and that for a very long time, probably nearly a century, they have been the owners both of the *kudivaram* and of the *melvaram* rights. The plaintiff and his predecessors-in-title have regularly described themselves as *jagirdars* and the term *jagir* has frequently been applied to the suit lands, though they have also been mentioned in official documents under the description of *inam*. *Inam* is the more generic term, and probably all *jagirs* are a species of *inam*, though there are many kinds of *inam* that are not *jagirs*. The subject is one with which I am unfamiliar and speak with extreme diffidence. But I have come to the conclusion that these lands, though so described, are not *jagirs* within the meaning of the Estates Land Act, but are merely an ordinary *inam*. I am assuming that what has to be looked at is the character imposed upon the land at the time of the original grant by the Nawab as Nawab to the lady; for his resumption and subsequent re-grant later on were not made at a time when he was the sovereign authority and could impose a tenure of a new character. The gift was made to the lady for her subsistence as a private person. We have been referred to works of learned writers on land tenure, such as Baden Powell's Land System in British India and Maclean's Manual of Administration of the Madras Presidency, and from their perusal I am led to the conclusion that in its origin a *jagir* was connected with some special public service such as the maintenance of troops and the like, or at least, if no such condition was imposed, was a reward for some service to the State conferred upon some State official in recognition of his position. I do not think that the mere use of the term *jagir* concludes the matter. The term *jagirdar* is one of some dignity likely to be usurped by the holders of lands which by the original grant were not conferred as *jagirs* but as ordinary *inams*. If these lands, therefore, as I hold, are not *jagir* lands, they are not unsettled *jagirs* within the meaning of section 3 of the Estates Land Act. As *inams* they fall within the exception to section 8, since the *kudivaram* and *melvaram* rights are

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(1) (1912) 24 M.L.J., 538.

(2) (1915) I.L.R., 38 Mad., 843.

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both vested in the same person. I am, therefore, of opinion that the Act does not apply to these lands and that the ordinary Courts of Law have jurisdiction over the suit.

The appeal must be allowed and the decree of the District Munsif restored with costs here and below.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Moore.

1916.
February,
28 and 29.

K. P. ALAGAPPA AYYANGAR (PETITIONER), APPELLANT,

v.

MANGATHAI AMMANGAR AND ELEVEN OTHERS (RESPONDENTS),
RESPONDENTS.*

Guardians and Wards Act (VIII of 1890), ss. 39 and 7—Appointment by a Hindu father of a guardian for the person and property of his undivided minor son—Validity of appointment of guardian of property—Will written under instructions of testator partly on blank sheets previously signed, validity of.

A Hindu father is entitled to appoint by will, a guardian of the person of his minor son, but not of the properties in which his minor son will have a right by birth. A will appointing a guardian of such properties being invalid, need not be set aside and cannot be set aside in an application made on behalf of the minor son under section 39 of the Guardians and Wards Act for removal of the guardian.

Dr. Albrecht v. Bathee Jellamma (1912) 22 M.L.J., 247 and *Kanakasabai Mudaliar v. Ponnusami Mudaliar* (1913) 21 I.C., 848, followed.

The appointment of a guardian of the properties being invalid, the mother as natural guardian becomes the guardian of the properties and if she be competent, there is no necessity for the Court to appoint her as such.

Properties attached to *Tirumaligais* (houses of religious preceptors) are private and not trust properties.

A will signed by the testator after completion on the sixth and seventh sheets is not invalid, because he signed some of the earlier sheets before the will was written on them.

* Appeal Against Order No. 363 of 1914.

Numbermal Chetty v. Pasumarthy Kantha Chetty (1915) 28 I.C., 959, followed.

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APPEAL against the Order of F. G. RICHARDS, the Acting District Judge of Tinnevely in Original Petition No. 513 of 1913.

One Athan Sadagopachariar, a religious preceptor and *guru* of some disciples of Vaishnava sect in Alwartirunagiri in Tinnevely district, died on 13th December 1911, leaving behind him, his widow, an undivided minor son and a daughter and bequeathing by means of a will, said to have been executed on 11th December 1911, his properties to all these persons and appointing by the will, four persons (*viz.*, his widow the first respondent and respondents Nos. 6, 7 and 8) as guardians of the minor's person and property. The petitioner in this case who was the widow's brother, filed this petition under sections 39, 10 and 7 of the Guardians and Wards Act (VIII of 1890) for removing respondents Nos. 6, 7 and 8 from the guardianship and for the appointment of either himself or the widow as the guardian of the person and property of the minor. The petitioner attacked the will as not genuine. He also charged the respondents Nos. 6, 7 and 8 with mismanagement of the estate. Respondents Nos. 6, 7 and 8 contended that the will was genuine, that their appointment by the testator as guardian was proper and beneficial to the minor, that their administration of the estate was proper and that the appointment either of the petitioner or of the widow as guardian was prejudicial to the minor. The first respondent, *viz.*, the widow, supported the petitioner. The District Judge found the will to be genuine and as the charges advanced against the management of the estate by respondents Nos. 6, 7 and 8 were withdrawn by the petitioner, he dismissed the petition. Thereupon the petitioner preferred this appeal to the High Court.

T. Rangachariar for the appellant.

Hon. Mr. S. Srinivasa Ayyangar acting Advocate-General and N. S. Rangaswami Ayyangar for the respondents Nos. 6, 7 and 8.

The others were not represented.

SADASIVA AYYAR, J.—This appeal has arisen out of an application filed in the District Court of Tinnevely under sections 39,

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10 and 7 of the Guardians and Wards Act of 1890. The petitioner in the District Court is the appellant before us. The prayers in the petition are:—(a) that the first respondent, namely, the mother of the minor boy, may be declared the sole guardian of the minor and his estate, removing respondents Nos. 6, 7 and 8 if they should be deemed to have been appointed by the minor's father; (b) that if necessary, the petitioner or the fourth respondent or any other fit and proper person may be appointed by the Court as guardian solely or with the first respondent for the minor's estate for both his person and estate, and (c) that other fit and necessary orders be made.

Now the minor's father died on the 13th December 1911 and the respondents Nos. 6, 7 and 8 set up that themselves and the first respondent have been appointed by a will executed by the minor's father on the 11th December 1911, as the guardians of the person and properties of the minor. That will is Exhibit I in the case. As section 7, clause (3), of the Guardians and Wards Act enacts that where a guardian has been appointed by will, an order under that section declaring another person to be guardian in his stead, shall not be made until the powers of the guardian appointed and declared by the will have ceased under the provisions of the Act, the learned District Judge first considered the question of fact whether the will was genuine or not. I think that on that question, the District Judge came to a correct conclusion, though I do not agree with some of his observations which seem to imply that the burden of proving that the will was not genuine lay in the first instance on the petitioner-appellant. Whoever puts forward a will as genuine and as supporting his contentions ought to prove it and cannot throw the burden of proving the negative on the opposite party: see *Krishnamachariar v. Krishnamachariar*(1). On the evidence, however, as I said, I agree with the learned District Judge that the will is genuine. It is attested (among several others) by the testator's sister's husband and his son-in-law. It was produced by the widow (first respondent), for registration to the Sub-Registrar and till the 28th June 1913 (see Exhibit VII),

(1) (1915) I.L.R., 38 Mad., 166.

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she admitted that it was a genuine and valid will. The evidence of the contesting respondents' witnesses Nos. 1 to 4, satisfactorily establishes the genuineness of the will and that it was read out to the testator while he was of sound mind before he signed it. From the papers, Exhibits F series, it, no doubt, appears that the testator signed some blank papers with a view to having his testamentary intentions written over those signatures. But it is proved that a draft will had already been prepared under the instructions of the testator and even if the first five sheets of the will, Exhibit I, had been signed in blank by the testator for the purpose of the fair will being written above those signatures and (if necessary) above the signatures in the Exhibits F series sheets, I am clearly satisfied that the will as a whole after it had been fair copied was submitted to the testator and was signed by him in at least the sixth and seventh sheets, after it had been completed and that is sufficient to make the will legally valid: see *Namberumal Chetty v. Pasumarthy Kannia Chetty*(1). The evidence of the petitioner's witnesses that the testator was too ill on the date of the will to understand its contents is absolutely worthless. The reason why the widow (first respondent) and the petitioner (who had himself admitted the validity of the will by his attestation of Exhibits VIII and IX and under whose advice Exhibits VIII and IX were presented to the police according to the evidence of the first respondent) now deny the validity of the will is clear from the statements in paragraphs Nos. 5 to 8 of Exhibit VII. The way in which the petitioner's first witness (a petty clerk of the testator and his widow) contradicted his own statements in Exhibits X and XI is also significant. I do not think it necessary to go into further details in respect of the evidence with regard to the genuineness of Exhibit I. The explanation for not having it registered during the testator's lifetime seems to me to be not at all unreasonable or suspicious and might be accepted under the circumstances.

The next question is whether Exhibit I is a will that has to be set aside under section 39 of the Guardians and Wards Act. It need not and could not be set aside if the testator had no legal power to appoint a guardian for the boy by will. Before going

(1) (1915) 28 I.C., 959.

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into that question there is a preliminary point for decision namely, whether the will did appoint guardians (a) for the minor's person and (b) for the minor's properties. After some hesitation, I have come to the conclusion that it does appoint the widow and the respondents Nos. 6, 7 and 8 as guardians for both the person and property of the minor. The testator calls them "guardians" in the will and as he directs them to maintain the boy, perform his *upanayanam* to instal him in the *acharya's* throne and so on, I do not think he meant to make any distinction between the guardians of the person and the guardians of the property by the terms of his will. Then comes the question as to whether the appointment is valid, first as regards the person and then as regards the properties. I think I ought to follow *Dr. Albrecht v. Bathee Jellamma*(1), where it was decided that a Hindu father has got the power to appoint by will a guardian for the person of his minor child. Next as regards the properties, there are two branches of the question to be considered. The first branch relates to the case where the properties disposed of by the will, are alleged to be the ordinary private ancestral properties of a Hindu father; and the second branch relates to the case where (as is alleged in the present will) the properties belong to a *mutt* or a religious institution. On the first branch of the question, there is a decision of this Court *Kanakasabai Mudaliar v. Ponnusami Mudaliar*(2), which clearly lays down that as regards properties which survive to the minor son of a Hindu Testator as ancestral family property on the death of the father, the father has no power to appoint a guardian. That case has been followed by a single Judge of this Court in *Krishna Aiyar v. Chakrapani*(3) though *Soobah Doorgah Lal Jhah v. Rajah Neelanund Singh*(4) which was followed in *Dr. Albrecht v. Bathee Jellamma*(1), seems to hold a different view. The actual decision in *Dr. Albrecht v. Bathee Jellamma*(1) established the validity of the appointment by the father of the guardian only of the person of his minor child. One of the learned Judges who was a party to the decision in *Dr. Albrecht v. Bathee Jellamma*(1), was also one of the Judges

(1) (1912) 22 M.L.J., 247.
 (3) (1915) 29 I.C., 475.

(2) (1913) 11 I.C., 848.
 (4) (1866) 7 W.R., 74.

who remanded *Kanakasabai Mudaliar v. Ponnusami Mudaliar*(1) for a finding to the lower Court on the issue as to self-acquisition, which finding would be required only on the view that as regards joint family properties, a Hindu father has no right to appoint a person by will to be the guardian of such properties on behalf of the minor son. I would therefore follow the decision in *Kanakasabai Mudaliar v. Ponnusami Mudaliar*(1) and hold that if these properties were the ancestral private properties of the testator, the appointment by will of a guardian of such properties was invalid. If they were, however, properties dedicated to a religious trust, then no question of guardianship at all arises and no question therefore of removing a testamentary guardian. I might however state that I am strongly of opinion that the properties belonging to this *tirumaligai* and the similar three other *athan tirumaligais* are private properties and not trust properties and I prefer to follow the decision of Sir SUBRAHMANYA AYYAR and DAVIES, JJ., in *Sadagopachariar v. Kuppar Aiyangar*(2) (filed as Exhibit I in this case) in preference to the decision (filed as Exhibit XVIII) in *Annaiyengar v. Puckle*(3).

Finally, there is the question "whether it is for the welfare of the minor" (see section 7 of the Act) that a guardian of his person or property or both should be appointed; and whether the guardian of the person appointed by the will (if such appointment is held valid) should be removed for the purpose of the appointment by the Court of a guardian according to section 7 of the Act. If the appointment of the guardian of the property by the will is invalid as I have held, the mother becomes the guardian of the properties and I see no necessity why the mother should be appointed again by the Court. The petitioner is clearly not a person fit to be the guardian both by reason of his character as appears from his evidence and by reason of his position in life as mentioned by the District Judge. Similar remarks apply to the suggested appointment of the fourth respondent. As the boy, I believe, is almost sure to become an *acharya* (preceptor) as soon as he gets his *upanayanam* performed, I do not think it necessary in his interests to appoint a guardian for his person or property so as to advance the age of majority

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(1) (1913) 21 I.C., 848. (2) Appeal No. 12 of 1903.
 (3) Appeal No. 101 of 1873.

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of the boy from 18 to 21. I would, in the result, dismiss the appeal with costs of the respondents Nos. 6, 7 and 8, the charges advanced against whose management of the estate were withdrawn in the lower Court.

MOORE, J.—I agree.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Moore.

1916.
 February
 24 and 29.

SESHAPPIER (PETITIONER, THIRD DEFENDANT), APPELLANT,
 v.

SUBRAMANIA CHETTIAR AND TWO OTHERS (RESPONDENTS—
 PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

*Limitation Act (IX of 1908), arts. 48 and 49—Suit for goods misappropriated—
 Contract Act (IX of 1872), ss. 108 and 178.*

A commission agent employed to sell a jewel belonging to the plaintiff wrongfully pledged it in 1907 for Rs. 175 to the defendant who lent the amount *bona fide* without any knowledge of the plaintiff's ownership. Plaintiff coming to know of the wrongful pledge in 1909, sued in 1911 for the recovery of the jewel or its value.

Held:

(1) that the suit was in time and article 48 and not article 49 of the Limitation Act was applicable and time began to run from 1909 when the plaintiff came to know in whose possession the jewel was, and

(2) that as the defendant was a pawnee in good faith from one who had juridical possession of the jewel, the plaintiff was not entitled to recover the jewel without paying the defendant the amount due to him on the pledge.

"Possession" in section 178 of the Contract Act (IX of 1872) means juridical possession and not custody.

Rameshar Chanbey v. Mata Bhikh (1883) I.L.R., 5 All. 341, *Ram Lal v. Ghulam Hussain* (1907) I.L.R., 29 All., 579 and the observations of BATCHELOR, J., in *Nandlal Thakersey v. The Bank of Bombay* (1910) 12 Bom. L.R., 316 at p. 335, followed.

APPEAL under clause 15 of the Letters Patent against the judgment of SESHAGIRI AYYAR, J., in *Seshappier v. Subramania Chettiar* (1).

The facts of the case are stated in the judgment.

K. S. Jayarama Ayyar for R. Kuppaswami Ayyar for the appellant.

* Letters Patent Appeal No. 217 of 1914.

(1) (1915) I.L.R., 38 Mad., 783.

T. V. Gopalaswami Mudaliyar for the respondents.

The following JUDGMENT of the Court was delivered by MOORE, J.—This is a Letters Patent Appeal against the judgment of Mr. JUSTICE SESHAGIRI AYYAR in *Seshappier v. Subramania Chettiar* (1).

The material facts are as follows:—

On 19th May 1907, the first respondent entrusted a jewel to one Kolandaisami Pathar (the husband of the second respondent and the father of the third respondent) who undertook to sell it on commission. Kolandaisami pledged the jewel with the appellant who is a money-lender for Rs. 175 on 20th May 1907. Kolandaisami died two or three months afterwards without having redeemed the pledge. On 15th December 1909, the appellant took the jewel to the first respondent's shop and asked him to sell it for him. The first respondent then came to know that the jewel had been improperly pledged and demanded its return. The appellant having refused to return it, the first respondent brought a Small Cause Suit on 29th June 1911 for the return of the jewel or its value Rs. 400 and in answer to the suit, the appellant contended that he acted in good faith in advancing money on the pledge of the jewel and that he was entitled to recover from the plaintiff the amount Rs. 175 which he had advanced with interest. He further pleaded that the suit was barred by limitation. The Subordinate Judge gave the first respondent a decree against the appellant for the return of the jewel or its value.

The appellant filed a Civil Revision Petition which was dismissed.

Two questions were argued before Mr. Justice SESHAGIRI AYYAR—

(1) Whether the suit was barred by limitation?

(2) Whether the appellant had a right to be paid back the money Rs. 175 which he had advanced before he could be called upon to deliver up the jewel?

The learned Judge agreeing with the Subordinate Judge held that the article applicable was article 48, schedule I of the Limitation Act, and not article 49, and that the suit having been brought within three years from the time (15th

(1) (1915) I.L.R., 38 Mad., 783.

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December 1909) when first respondent learnt that the jewel was in the appellant's possession was not barred by limitation.

We are of opinion that the learned Judge's decision on the question of limitation was right.

It is clear that the case was one of "conversion." The undertaking which Kolandaiswami gave to sell the jewel on commission, was not an unlawful one, and the property was not wrongfully taken from the owner's possession. It was only on 20th May 1907 when Kolandaiswami treated the property as his own and pledged it with the appellant, that he wrongfully converted it to his own use. *Rameshar Chanbey v. Mata Bhikh*(1) and *Ram Lal v. Ghulam Hussain*(2) go to show that where specific moveable property which was originally obtained lawfully is wrongfully detained, the proper article applicable is article 48: see also *Nandlal Thakersey v. The Bank of Bombay*(3) and *Nandlal Thakersey v. The Bank of Bombay*(4). It remains to consider the more difficult question whether the appellant can claim to be paid back the money for which the jewel was pledged with him before he is required to deliver it to the owner.

Mr. Jayaram Ayyar for the appellant relies on section 178 of the Indian Contract Act. Three things are required by that section: viz., (1) possession on the part of the pawnor, (2) good faith on the part of the pawnee and (3) lawful acquisition on the part of the pawnor. It is clear, we think, that the appellant acted in good faith when he advanced Rs. 175 on the pledge of the jewel, and that he had no reason to suppose that the pawnor was acting improperly when he pledged the jewel. His conduct in taking the jewel to the first respondent and asking him to sell it indicates his *bona fides*. The second proviso to the section also does not apply as the article pledged had not been obtained from the lawful owner by means of "an offence or fraud." It has been held that to create a valid pledge under section 178 of the Indian Contract Act, the pledger must be in "juridical" possession of the goods as distinguished from mere custody. So a servant entrusted by his master with the custody of the goods during his absence, or a wife in charge of her husband's articles of jewellery as custodian on his behalf, cannot make a valid pledge under the

(1) (1883) I.L.R., 5 All., 341.
(3) (1909) 11 Bom. L.R., 928.

(2) (1907) I.L.R., 29 All., 579.
(4) (1909) 12 Bom. L.R., 316.

section: see *Greenwood v. Holquette*(1), *Biddomoye Dabee Dabee v. Sittaram*(2) and *Seager v. Hukmakessu*(3).

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The learned Judge observes that he was

"satisfied that the statement in the plaint that Kolandaiswami was given the jewel only for the purpose of showing it to intending purchasers had been established, and that the sale price was to be settled in the presence of the plaintiff."

With all deference to the learned Judge, we do not think that there is any legal evidence to justify his finding.

In paragraph 1 of the plaint, it is no doubt stated that Kolandaiswami received the jewel "saying that he would show it and bring it back, and that if the purchaser liked the jewel he would settle the price in the presence of the plaintiff."

The evidence of the first respondent does not, however, bear out this statement. In his evidence he says: "Kolandaiswami used to sell jewels. I gave him the jewel to be sold. Kolandaiswami did not say how soon he would sell the jewel. He did not say with whom he had left the jewel. His commission was 6½ per cent." The first respondent says nothing in his evidence about the jewel being taken to be shown to intending purchasers or the price being settled in his presence. There is the following significant entry in first respondent's account book under date 19th May 1907:—"Debt to Kolandaiswami Pattar. To self one pair of Thodu set with English diamonds, Rs. 400." We think that the evidence leads only to one conclusion, namely, that Kolandaiswami was an agent for the sale of the jewel, and that the arrangement was that he was to sell the jewel which was valued by the owner at Rs. 400 and receive his commission.

In *Greenwood v. Holquette*(1), COUCH, C.J., held that the possession meant by section 178 of the Indian Contract Act was "that kind of possession which a factor or agent has" and this view was accepted in *Legeyt v. Harvey*(4). We agree with the observations of BATCHELOR, J., in *Nandlal Thakersey v. The Bank of Bombay*(5), that section 178 and exception to section 108 of the Contract Act deal with cases where the pledger has other than a limited interest and has lawful juridical possession "unconnected with and independent of any interest therein" that is

(1) (1873) 12 B.L.R., 42.

(2) (1878) I.L.R., 4 Cal., 497.

(3) (1900) I.L.R., 24 Bom., 458.

(4) (1894) I.L.R., 8 Bom. 501.

(5) (1910) 12 Bom., L.R., 316 at p. 335.

SESHAPPIER such juridical possession as a factor or agent has, in other words, such possession as is had by an agent entrusted as such, and ordinarily having as such agent, a power of sale or pledge. Reference may also be made to the judgment of Mr. Justice SUBRAMANIAMANYA AYYAR in *Naganada Davay v. Bappu Chettiar* (1), where the learned Judge points out the distinction between section 178 and section 179. In the present case we think that Kolandai-swami who was entrusted with the jewel as an agent for sale, had such "possession" as is contemplated by section 178 of the Contract Act, and that the appellant being a pawnee acting in good faith, is entitled to the protection afforded by the section.

We accordingly hold that the appellant is entitled to be paid Rs. 175 and interest due till date of suit as claimed by him before he can be required to return the jewel. We therefore allow the appeal. The decree of the Subordinate Judge will be modified accordingly. First respondent must pay appellant's costs in all Courts. Two months' time from the receipt of records by the Subordinate Judge is granted to the plaintiff to pay up the amount due to the appellant for redeeming the jewels.

N.R.

(1) (1904) 27 Mad., 424 at p. 426.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Napier.

MAHARAJAPURAM A. SUBRAMANIA AYYAR AND TWO
OTHERS (PLAINTIFFS), APPELLANTS,

1916.
March
7 and 9.

v.

PALLASANA GRAMAM S. SUBRAMANIA PATTAR
(DEFENDANT), RESPONDENT.*

Suit by assignee of a mortgage-bond — Mortgage — Set-off by the defendant of a decree-debt against the assignee — Equitable set-off, whether allowable — Transfer of Property Act (IV of 1882), ss. 3 and 132 — Actionable claim, nature of.

The doctrine of equitable set-off is always confined to unascertained sums arising out of the same transaction.

Subramanian Chettiar v. Muthusami Aiyangar (1907) 17 M.L.J., 481, dissented from.

Where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer, but not subject to any independent debt in no way connected with the mortgage.

Turner v. Smith (1901) 1 Ch., 742, followed.

Chinnayya Rowathan v. Chidambaram Chetti (1880) I.L.R., 2 Mad., 212, distinguished.

SECOND APPEAL against the decree of A. EDGINGTON the District Judge of South Malabar in Appeal No. 704 of 1913, preferred against the decree of T. NARAYANAN NAYAR, the Principal District Munsif of Calicut, in Original Suit No. 613 of 1912.

The plaintiffs sued the defendant in the Court of the Principal District Munsif of Calicut under a hypothecation bond executed by him to the mortgagees to secure the regular payments of subscriptions due from the defendant towards a *kuri* started by the mortgagees who assigned the bond to the plaintiffs. The defendant had obtained a money-decree against the mortgagees for money due to him on a promissory note in the Subordinate Court at Calicut. The defendant claimed to set off the decree-amount against the sum due to the plaintiffs. The Court of First Instance allowed the set-off and its judgment was confirmed by

* Second Appeal No. 1460 of 1914.

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the lower Appellate Court. The plaintiff preferred this Second Appeal.

C. V. Anantakrishna Ayyar for the appellants.

A. S. Venku Ayyar for the respondent.

NAPIER, J.

NAPIER, J.—This is an appeal from a judgment of the District Judge of Malabar in which he has allowed a decree-debt against an assignor to be set off against the claim by an assignee of the mortgage in a mortgage suit. It is admitted that the set-off is not one that is covered by Order VIII, rule 6 of the Code of Civil Procedure. But it is argued that it is a set-off of an equitable nature and that the Civil Procedure Code not being exhaustive as to rights of set-off, it is permissible. There is authority for that proposition in *Subramanian Chettiar v. Muthuswami Aiyangar*(1). With the greatest deference to the learned Judges, I doubt whether it is advisable to introduce under the name of equity cases which appear to be rather one of hardship on the facts. The doctrine that there is a right of equitable set-off is well founded, but has always been confined to unascertained sums arising out of the same transaction. To give the words, "equitable set-off" a wider meaning than this, appears to me to be very dangerous. But assuming that there could be a set-off of this nature, we have to consider whether there is any doctrine under which this equitable set-off can be pleaded as an equity attaching to the rights of the assignee. What seems to be conclusive against this argument is that under the express words of the Transfer of Property Act, an assignment of this nature is not an actionable claim within the meaning of section 132. The principle that transferees of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer is of course well founded on the original nature of the assignment of a chose-in-action under English Law, the principle being that a person cannot ignore his liability on a debt to another person and bring a suit to recover that person's debt to him simply by assigning that debt. Prior to the Judicature Act, such a suit could only be brought in the name of the original creditor and the debt due to the defendant in the suit could of course be set off. But section 3 of the

(1) (1907) 17 M.L.J., 481.

Transfer of Property Act contains this definition :

"Actionable claim means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property."

It is argued before us that although under the strict words of the Act, this equitable right of set-off could not be pleaded against an assignee of the mortgage, still, there remains available to the defendant a common law doctrine that it can be so set off, and that this doctrine even goes beyond the language of section 132 and makes the assignee liable not only to the equities at the date of the transfer but any debts due from the assignor to the mortgagor prior to notice having been given of this assignment by the assignee to the mortgagor. The authority relied on, in support of that proposition was *Norrish v. Marshall*(1). Whatever that case decides, however, the true doctrine is to be found in the language used by the Court of Appeal in *Turner v. Smith*(2), where it is said by Mr. Justice BYRNE :

"The effect in law of taking a transfer of a mortgage without the privity of the mortgagor, has been so recently summed up by COZENS HARDY, J., in *Dixon v. Winch*(3), that I cannot do better than adopt his words which are to be found at page 742 of the report: 'It is well settled that where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer.'"

This doctrine has been accepted by this Court in *Chinnayya Rawutan v. Chidambaram Chetti*(4). The language is, of course, very general, but I am unable to accept it as laying down that not only the state of account between the mortgagor and the mortgagee with reference to the mortgage is to be taken as against the assignee, but also any independent debt in no way connected with the mortgage, which has not been paid but is due from the mortgagor to the debtor. I know of no authority and the learned vakil has not been able to show any authority for this proposition. The theory that an assignee of a mortgage stood in English law in no better position than the assignee of an ordinary chose-in-action is opposed to the doctrine laid down

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(1) (1821) 5 Maddox, 475; s.c., 50 E.R., 977.

(2) (1901) 1 Ch., 742.

(3) (1901) 1 Ch., 213 at p. 219.

(4) (1880) 1 L.R., 2 Mad., 212.

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by the Court of Appeal in *Taylor v. The London and County Bank Company*(1):

"Although a mortgage debt is a chose-in-action, yet, where the subject of the security is land, the mortgagee is treated as having an interest in land,"

and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personality. The reason is thus stated by Sir WILLIAM GRANT in *Jones v. Gibbons*(2):

"A mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment"—that is, of the mortgage—"is absolute and complete, the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt."

I have heard nothing in the case quoted to us which is at variance with this doctrine which is laid down by the Court of Appeal. It therefore follows that in England, it has never been an accepted doctrine that an assignment of a mortgage is covered by the same rules that govern assignments of other choses-in-action. We have been pressed with the decision of the learned Chief Justice in *Dwarkanath Govardana Doss v. Danakoti Ammal*(3) and it is suggested that the reasons given for that decision narrow the rights of an assignee of a mortgage to the rights of an assignee of an ordinary chose-in-action. I do not think that the learned Judge's reasons bear that interpretation, but if they do, I should have to express my dissent from them in view of the broad language which I have quoted from the decisions of the Court of Appeal. It follows therefore that there is no doctrine under the common law of England which will support the case for the respondent outside the Transfer of Property Act. It is suggested that this set-off can be pleaded as a debt which was in existence at the time of the assignment. This is not the *ratio decidendi* of the Lower Court and, in my opinion, it is not open to the respondent to argue it here. The

(1) (1901) 2 Ch., 231 at p. 254.

(2) (1804) 9 Ves. J., 407.

(3) (1914) 15 M.L.T., 198.

judgment-debt which he seeks to set off, is undoubtedly one of a later date than the assignment. The original cause of action may have been prior to the assignment, but as that original cause of action has merged in the debt, I am clear that he cannot fall back on it and ignore the judgment-debt at the same time as he seeks to use the actual debt itself as the basis of the set-off. If he was able to ignore the judgment-debt, he would have to prove the original liability on which it is based, and that of course he has neither attempted to do nor could do with suit. It follows therefore that even giving the broadest construction to the language of the decisions in *Turner v. Smith*(1), he cannot set up this debt as coming within the phrase "state of account in existence at the date of the assignment."

Another objection was taken in the Lower Court to the maintainability of the set-off, namely one of jurisdiction. But we do not think it necessary to decide that point, as we are satisfied that there is no equitable right of set-off known to law which is a defence to this mortgage suit.

The appeal must therefore be allowed with costs.

AYLING, J.—I agree.

AYLING, J.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

NALLAVADIVA AMMAL (SECOND DEFENDANT), APPELLANT,

v.

SUBRAMANIA PILLAI AND EIGHT OTHERS (PLAINTIFF
AND DEFENDANTS NOS. 1 AND 3 TO 9), RESPONDENTS.*

1916.
April 6, 7
and 18.

Appeal in forma pauperis—Application to, filed in time—Dismissal of the application, effect of, on appeal—Granting time to pay court-fee and payment thereof in time, effect of, on appeal—Practice of pronouncing judgment on holidays deprecated.

An application for leave to appeal in forma pauperis accompanying an unstamped memorandum of appeal, filed in time, was rejected by a District

(1) (1901) 1 Ch., 742.

* Civil Miscellaneous Appeal No. 48 of 1916.

NALLAVADIYA COURT, some months afterwards, during the Christmas holidays. On the re-opening day, the appellant applied for and obtained from the Court, three weeks' time to pay the court-fee on the memorandum of appeal. The court-fee was paid within the time allowed.

Held:

(1) that the appeal was in time and must be deemed to have been filed as on the original date of presentation,

(2) that the dismissal of an application to appeal *in forma pauperis* does not necessarily lead to a dismissal of the memorandum of appeal and

(3) that an Appellate Court has under section 149, Civil Procedure Code, power to grant time to pay the requisite court-fee.

Bai Ful v. Desai Manorbhai (1898) I.L.R., 22 Bom., 880, followed.

Per SADASIVA AYYAR, J.—The practice of pronouncing judgments during the Christmas holidays for the purpose of swelling the statistics is to be deprecated. A statement in a judgment as to an admission made before the Court of First Instance, should not be doubted lightly by the Appellate Court, especially in the absence of an affidavit of the vakil who appeared in the Court of First Instance.

APPEAL against the order of A. EDGINGTON, the District Judge of Tinnevely, in Appeal No. 22 of 1915, preferred against the decree of K. S. GOPALARATNAM AYYAR, the District Munsif of Ambasamudram.

The facts appear from the second paragraph of the judgment of SADASIVA AYYAR, J.

L. A. Govindaraghava Ayyar and N. Kumaraswami Ayyar for the appellant.

K. R. Guruswami Ayyar for the respondents.

OLDFIELD, J.—The first question is whether the appeal to the Lower Appellate Court should have been dismissed as out of time. It was undoubtedly first filed with a proper stamp after the period allowed by the Limitation Act had expired. But appellant having failed on 31st December 1914 in his application for leave to appeal as a pauper, on 4th January 1915, obtained three weeks' time for payment of court-fee and paid it within that period. The delay from 31st December 1914 to 4th January 1915 may be disregarded, because the Court was closed on the days in question and the failure during them must be regarded as condoned by the subsequent order. The question is whether that order was legitimate.

I think that it was, and with reference to more direct considerations than those afforded by section 5, Limitation Act, on which the Lower Appellate Court has to some extent relied. It has further followed the reasoning of FARRAN, C.J., in

Bai Ful v. Desai Manorbhai(1) to the effect that the decision on the appellant's pauperism disposes only of his application for leave to appeal as a pauper and leaves undisposed of, the memorandum of appeal, which must accompany that application. The memorandum, though unstamped, is not a nullity and can be validated with effect from the date of presentation by the supply of the requisite stamp within a time fixed by the Court with reference to Order VII, rule 11 (c). I would respectfully adopt this reasoning, since it is consistent with the decisions of the Privy Council and this Court in *Skinner v. William Orde*(2) and *Patcha Sahib v. Sub-Collector of North Arcot*(3). It is of course open to the objection that appeal memoranda in pauper cases, are not usually dismissed by any order distinct from that passed on the pauperism application and are not in practice returned for payment of deficient duty, as ordinary memoranda would be. But there is nothing in the ordinary practice to prevent such return, where, as in this case, the appellant asks for it; and the anomaly, if any, is less than that involved in the alternative view of the law, that Order VII, rule 11 (c) is inapplicable and the dismissal of the pauper application in effect entails dismissal of the appeal, since time would hardly ever be left for its presentation after the dismissal proceedings.

Next, as to the merits, the Court of First Instance dismissed plaintiff's suit on the pleadings, and the Lower Appellate Court remanded it for trial in the order under appeal. In doing so, it, no doubt, made one mistake. For, it referred to the absence from the plaint, of any admission regarding the exclusion of the suit properties from the partition of 1910 as conclusive, although the Court of First Instance stated explicitly that such an admission had been made before it. As such an admission was contained in the subsequent answers to second defendant's interrogatories, we have no difficulty in assuming that one was made at the hearing. That mistake had however very little influence on the decision. Plaintiff, as appears from his affidavit in connection with the revision of the issues, tacitly abandoned his objections to the partition of 1876 at the hearing. Suing as divided from his father and first defendant, he could be entitled only by inheritance from the former to a half share in his

(1) (1898) I.L.R., 22 Bom., 849. (2) (1879) I.L.R., 2 All., 241. (P.C.).

(3) (1892) I.L.R., 15 Mad., 78.

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separate property. If, notwithstanding that the suit property was in second defendant's name, it had not really been conveyed to her before the father's death, the alternative is not, as the Court of First Instance held, only that it was the joint family property of the father and second defendant, which had been left undivided in 1910. It might, as matter of law, be argued in accordance with the principle implied in *Appovier v. Rama Subba Aiyar*(1) that, a separation in status having been intended, undivided items were held by the father and second defendant as tenants-in-common; or again that the suit items were in fact the father's separate property throughout. And, if either of these cases were established, plaintiff would be entitled by inheritance to a share, in the former case to half of the father's undivided half share, in the latter to half of the whole. The Lower Appellate Court's decision was correct on this point and must be confirmed.

There remains a minor matter, referred to in appeal ground 7, regarding which there is no dispute. It is admitted that the Lower Appellate Court should have allowed only Rs. 15, the amount certified by the pleader, not Rs. 43, for the plaintiff's costs before it. The Lower Appellate Court's decree must be amended accordingly. It is in other respects confirmed. The appeal has succeeded in respect only of an insignificant matter, which the Lower Appellate Court would probably have corrected, if application had been made to it. Second defendant will pay plaintiff's costs in this Court.

SADASIVA
Ayyar, J.

SADASIVA AYYAR, J.—The second defendant is the appellant before us, this being an appeal against an order of remand passed by the District Judge of Tinnevely, the District Munsif having dismissed the plaintiff's suit on the ground that the plaintiff's claim was legally unsupportable.

Mr. Govindaraghava Ayyar for the appellant employed much dialectical skill in the analysis of the plaint allegations. He argued that the plaint in the suit [which was one for partition of the plaint properties between the plaintiff and his step-brother (the first defendant)] contained expressly or impliedly the following statements:—

(1) that the plaintiff and his father Vadivel Arumugam Pillai had become divided in 1876 and continued divided from each other till the plaintiff's father's death (in 1910);

(1) (1866) 11 M.L.A., 75.

(2) that the plaintiff's step-brother (the first defendant) and the plaintiff's father were joint owners of the plaint properties at the plaintiff's father's death in 1910, though they had divided other properties a few months before the father's death and though the first defendant got for his share some of those other properties at that partition; and

(3) that notwithstanding the admission in statement H above, the prayer in the plaint was one for the partition of the plaint family properties on the basis that they were undivided joint family properties of the plaintiff and the first defendant.

Mr. Govindaraghava Ayyar thereupon argued that the plaintiff who became divided off in 1876 from his father, cannot become an undivided coparcener of his step-brother in 1910 in respect of the properties which belonged to the plaintiff's father and to the first defendant alone as members of a joint Hindu family; he further argued that even if the plaint properties did not belong to his client (the plaintiff's step-mother and the first defendant's mother who is the second defendant in the case) as contended by her, the first defendant (her son) became the sole owner by survivorship on the death of the father and the plaintiff had no share therein.

Mr. Guruswami Ayyar for the plaintiff (the contesting respondent) contended on the other side:—

(1) that one of the allegations on which the plaintiff based his claim was the plaintiff's continued status as a joint and undivided member of his father's family as the partition proceedings of 1876 under which the plaintiff was supposed to have come divided off from his father, were wholly futile as vitiated by fraud and illegality;

(2) that an alternative title was also disclosed in the plaint, namely, that the plaintiff and the first defendant as sons of Vadivelu were the only heirs of their said father to whom the plaint properties belonged as his (the father's) separate properties at his death;

(3) that neither the first defendant nor the second defendant having in their respective written statements, set up even in the alternative that the plaint properties belonged to the plaintiff's father and to the first defendant as coparceners till the division of 1910 or afterwards till the father's death, the

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argument based upon such a plea is not now open to the appellant (the second defendant); and (4) that the plaintiff contains neither expressly nor impliedly, any admission that the plaintiff's father and the first defendant were joint owners of the plaintiff properties at any time.

Mr. Guruswami Ayyar then argued that the plaintiff is entitled to a half share in the plaintiff properties on the alternative basis of (1) or (2) above;

and that the admission made in the written statements of defendants Nos. 1 and 2, that 15 cents of land belonging to the father were divided between the plaintiff and the first defendant after their father's death, precluded the first and the second defendants from denying to the plaintiff a like share in the plaintiff properties.

He further argued that when the first defendant became divided off in 1910 from his father, the plaintiff properties should be deemed to have fallen to the plaintiff's father's share alone and to have so become his separate property, even granting that the defendants Nos. 1 and 2 were entitled to argue against their written statements that the properties belonged before partition to the father and to the first defendant jointly.

Another argument of Mr. Guruswami Ayyar was that even if the properties be treated as having been left over for future division between the first defendant and the father, the status between the father and the first defendant having become a divided status by the partition of the other properties, the father's half share was held by him in common with the first defendant at the father's death and the plaintiff was entitled to half of that half as one of his two heirs and hence the Order of Remand by the District Judge was in any event right.

Then Mr. Kumaraswami Ayyar (the junior of Mr. Govindaraghava Ayyar) argued in his reply that the first defendant's written statement did contain some words from which the alternative case set up before us on behalf of the second defendant, namely, the joint right of the first defendant and his father in the plaintiff properties, the plaintiff properties having been left undivided at the partition of 1910, the properties having continued to be joint properties and not merely properties held in common after such partition, and the sole right of the first defendant by survivorship could be gathered. He also contended

that the plaintiff contained no statements from which it could be inferred that the plaintiff intended to set up an alternative case that the plaintiff properties were the father's separate properties at his death and were inherited by the plaintiff and the first defendant as his heirs.

It is unnecessary to deal in detail with all these numerous contentions advanced on both sides.

It is to be regretted that the Court of First Instance did not, at the time of the first framing of issues or subsequently when the first issue was modified at the plaintiff's instance, obtain and record definite allegations from both sides on some of the statements made in their pleadings. Those pleadings disclosed much ill-directed ingenuity on both sides and they left several matters vague and equivocal, evidently with an intention to future developments. We think, however, that, assuming that the plaintiff discloses two alternative claims, the plaintiff must be deemed to have given up the claim that he continued to be undivided till the death of the father notwithstanding the partition of 1876 and that at the time of the subsequent framing of the altered first issue by the District Munsif, the plaintiff restricted himself to the claim based on his being one of the two heirs to the property which belonged to his father as his separate property at his death. I am also not disposed to strictly confine the defendants to the allegations in their written statements so as to prevent them from raising legal defences which arise on the facts as admitted by the plaintiff or even as proved in the course of the trial. The questions again—(1) whether the plaintiff properties should be presumed to have been left undivided between the first defendant and his father at the partition of 1910 or they should be presumed to have fallen to the father's share and become his separate property at that division and (2) whether in the former alternative, the properties were held by them after the partition as joint tenants or tenants-in-common—are questions which should and could only be decided by the Court of First Instance on remand after taking the necessary evidence and cannot be dealt with by us at this stage: see *Kundum Venkatasami v. Baligadu*(1) and the Full Bench decision in *Pothu Naicker v. Naganna Naicker*(2).

(1) (1916) 3 L.W., 74.

(2) (1916) 3 L.W., 115 (F.B.).

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I am clearly of opinion that the plaint does contain statements indicating that the plaintiff (at least alternatively) claimed a share in the plaint properties as one of the two heirs of his father to whom they are alleged to have belonged at his death.

I do not take the judgment of the District Judge to have decided finally that the plaintiff would legally be entitled to a half share on the statements in the plaint and not to a lesser share. He has not, in my opinion, decided that the properties, on those statements, belonged solely to the father at his death and not to the father and to the first defendant as tenants-in-common. Nor do I take the District Judge's judgment to have finally expressed any opinion adverse to the first and second defendants on the question whether the first defendant could claim full rights in the properties by survivorship on the death of his father, assuming that the properties were reserved for future division in the partition of 1910. Mr. Govindaraghava Ayyar rightly brought to our notice what I consider to be a serious error made by the learned District Judge. The District Munsif stated in his judgment:

"It is admitted that the plaint properties did not form the subject-matter of the division between the plaintiff's father and the first defendant in 1910."

It is clear to my mind that the District Munsif referred to an admission made in the course of the arguments before him. The District Judge says in his judgment:

"The conclusion of the Munsif" (about the first defendant's right by survivorship) "appears to be vitiated by the fact that there is no admission by the plaintiff *in the plaint*" (italics mine) "that the property claimed did not form the subject-matter of the division between the father of the plaintiff and the first defendant in 1910."

The District Munsif did not state that the admission was made *in the plaint* and it is clear from subsequent statements of the plaintiff himself in answer to interrogatories, that the property did not form the subject-matter of the division referred to. A statement in a judgment as to an admission made before the Court of First Instance should not be doubted lightly by the Appellate Court, especially in the absence of an affidavit by the vakil who appeared in the Court of First Instance. But this error of the District Court does not affect the legal validity of its Order of Remand.

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Ayyar, J.

I shall now briefly consider the final weapon of attack employed by Mr. Govindaraghava Ayyar against the Lower Appellate Court's judgment, namely, that the appeal to that Court ought to have been dismissed by that Court as barred by limitation. The appeal memorandum was filed by the plaintiff in the District Court on 8th September 1914 within the thirty days granted by article 152 of the Limitation Act (excluding the time required for obtaining copies of judgment and decree). But he wished to appeal as a pauper and hence, he, in accordance with Order XLIV, rule 1, presented a separate application on the same date to be allowed to appeal as a pauper. His application was rejected on 31st December 1914 during the Christmas holidays. (I must here deprecate the practice of pronouncing decisions during the Christmas holidays for the purpose of swelling the statistics of disposal). On the re-opening day (4th January 1915), the plaintiff wanted time to pay the necessary court fees on the appeal memorandum and he was given time till 25th January 1915 and he complied with that order. Mr. Govindaraghava Ayyar argued that when the application to appeal as a pauper was rejected on 31st December 1914, the unstamped appeal memorandum also must be deemed to have been rejected, and there was no jurisdiction in the District Court to pass any orders relating to it on 4th January 1915. The chain of argument was somewhat as follows:

"Order XLIV, rule 1 states that the provisions relating to suits by paupers shall be applied, as far as possible, to applications to appeal as pauper. Order XXXIII, rule 15 provides that when an order is passed refusing to allow an applicant to sue as a pauper, he cannot file another application of the same nature and he can only bring a suit in the ordinary manner (which should, of course, on the date of its institution, fall within the limitation period prescribed for the suit). Hence, when the application to *appeal as a pauper* was rejected, the only remedy of the appellant was to file a fresh memorandum of appeal on the proper stamp subject to the law of limitation. When the plaintiff paid the proper stamp duty in January 1915, the old memorandum of appeal should be treated as a fresh memorandum presented in proper form on that day. But on that day, the appeal was barred by limitation."

I am unable to accept the validity of the above argument. In the first place, the provisions relating to pauper suits are to be applied to pauper appeals only "so far as those provisions are applicable" (Order XLIV, rule 1). While the plaintiff in a pauper

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suit forms an integral portion of the pauper application itself (see Order XXXIII, rule 2), the memorandum of appeal presented by an alleged pauper is a different paper in the Court's record from the application for permission to appeal as a pauper, though the two are to be presented together (see Order XLIV, rule 1). While it might therefore be legitimately argued that the rejection of the application to sue as pauper carries with it the rejection of the plaint contained in that application and hence Order XXXIII, rule 15 leaves to the applicant as sole remedy, the bringing of a fresh suit in the ordinary form, the rejection of the application to appeal as a pauper leaves the separate memorandum of appeal intact. It was, no doubt, unstamped and the duty of the Court is [as pointed out in *Achul Ramachandra v. Nagappa Bal Bolgga*(1)] to direct the appellant to pay the proper stamp duty within the time fixed by the Court [see also Order VII, rule 11, clause (c) and section 149 of the Civil Procedure Code corresponding to, but much wider in its terms as regards the discretion given to the Court than, the old section 582-A]. As pointed out by my learned brother during the course of the argument, if the rejection of the application to appeal as a pauper *ipso facto* carried with it the rejection of the memorandum of appeal, the right conceded as reserved to him to file a fresh memorandum of appeal on the proper stamp would be almost wholly illusory as the thirty days fixed for the filing of an appeal would have expired before the application is disposed of in the usual course after notice to the other side and to the Collector (where the suit itself was not brought by plaintiff as a pauper): see also observations in pages 929 and 930 of *Durgacharan Naikar v. Dookheram Naikar*(2) and *Bai Ful v. Desai Manorbhai*(3). The limitation periods for suits scale up to sixty years and a person who wishes to sue as a pauper, might be expected by the legislature to file his paper (containing the plaint allegations and the application for leave to sue as a pauper) in sufficient time before the expiry of the limitation period to permit his bringing a fresh suit within the limitation period if his application is finally rejected. This cannot be reasonably expected of a person who wishes to appeal as a pauper. I am therefore

(1) (1914) I.L.R., 38 Bom., 41.

(2) (1899) I.L.R., 26 Calo., 925.

(3) (1898) I.L.R., 22 Bom., 849 at p. 856.

prepared to follow the opinion of FARRAN, C.J., in *Bai Ful v. Desai Manorbhai*(1) that:

"the District Judge was under no legal obligation to dismiss the appeal presented by the appellant when he refused the appellant leave to appeal as a pauper."

This Court in *Marca Thangathammal v. Iravatheeswara Aiyar*(2) seems to have gone so far as to decide that even in the case of an application to sue as a pauper, the amendment of the plaint contained in the application to sue as a pauper does not prevent the Court from treating the unstamped amended plaint forming part of the application as a plaint filed on the original date of the presentation of the application and does not prevent the granting of time to pay the necessary court fees thereon so as to make the amended plaint become a validly stamped plaint presented on the original date. The distinction between the filing of the application for leave to appeal as a pauper and the filing of the appeal memorandum is further indicated by two separate articles of the Limitation Act (152 and 170) dealing with them. I would, in this connection, suggest that there might be a rule framed that whenever an application to appeal as a pauper is rejected, the Court should at once pass an order granting reasonable time to the appellant to pay the stamp duty due on the memorandum of appeal. I have no doubt that the District Judge would have passed such an order in this case on the date of the order rejecting the application if the matter had been brought to his notice.

The District Munsif ought to have taken evidence and come to a conclusion on the evidence (and on the law applicable) as to the extent and nature of the rights, if any, which the plaintiff's father owned in the plaint properties at his death and as to the plaintiff's right to inherit a share therein.

In the result I would dismiss the appeal except on the minor question of the vakil's fees to be allowed in the Lower Appellate Court. The appellant who has substantially failed must pay the respondent's costs.

N.B.

(1) (1898) I.L.R., 22 Bom., 849 at p. 857. (2) (1915) M.W.N., 228.

APPELLATE CIVIL.

Before Mr. Justice Napier and Mr. Justice Srinivasa Ayyangar.

1916.
April 14.

PAMULAPATI VENKATAKRISHNIAH (MINOR REPRESENTED BY
MOTHER AND NEXT FRIEND MANGAMMA) AND TWO OTHERS
(PLAINTIFFS), APPELLANTS,

v.

KONDAMUDI SUBBARAYUDU AND TWO OTHERS (DEFENDANTS),
RESPONDENTS.*

Limitation Act (IX of 1908), ss. 19 and 20—Endorsement of part-payment recorded by creditor and signed by debtor—Endorsement, good as an acknowledgment of liability under section 19.

A payment made by a mortgagor who was able to write, was recorded on the back of the mortgage bond by a servant of the creditor and signed by the debtor. The endorsement ran as follows:—"Rs. 378 paid towards this document, K. V. Subbarayudu." Nearly Rs. 1,500 was due on the date of payment. It did not appear whether the payment was made towards principal or towards interest.

Held, that the endorsement amounted to an acknowledgment of liability within the meaning of section 19 of the Limitation Act, though the payment was not good as a part-payment within the meaning of section 20 of the Act.

The scope of sections 19 and 20 pointed out.

Jaganadha Sahu v. Rama Sahu (1914) 17 M.L.T., 80, followed.

APPEAL against the decree of J. C. FERNANDEZ, the District Judge of Guntūr, in Appeal No. 2 of 1914, preferred against the decree of K. NARASIMHAM GARU, the District Munsif of Tenali, in Original Suit No. 1031 of 1913.

The defendant K. V. Subbarayudu, executed a mortgage deed for Rs. 1,590 on 8th January, 1896, in favour of plaintiff's father (deceased) and made two payments on 13th July, 1905 towards it. The payments were recorded on the back of the deed by the clerk of the plaintiff and were signed by the debtor. The endorsements of payments ran thus:—

"Rupees 378—13th July 1905. Rupees Three hundred and seventy-eight only have been paid towards this document by Subbarayudu.

(Signed) K. V. SUBBARAYUDU.

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Rupees 22. Again on the same day, Rupees Twenty-two only has been paid.

(Signed) K. V. SUBBARAYUDU."

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The mortgagee brought this suit in 1913 to recover the balance due on the document, viz., Rs. 1,528.

The Courts below found that the part-payments were made by the defendant, that the defendant was able to write and that the endorsements of payments were recorded by the plaintiff's clerk and signed by the defendant, who was however found able to write. The Lower Courts found that there was no intention to pay any interest as such and holding that the endorsements were not good as acknowledgments of liability; dismissed the suit.

Hence this Second Appeal by the plaintiff.

V. Viswanatha Sastriyar for the appellants.

T. V. Venkatarama Ayyar for the respondents.

NAPIER, J.—I adhere to the opinion expressed by me in *NAPIER, J. Jaganadha Sahu v. Rama Sahu* (1), on the same words as are in this document. I have no doubt that there is in this endorsement an acknowledgment. I cannot accept the argument, that section 20 of the Limitation Act IX of 1908 prevents the operation of section 19. It is argued that this is a special provision limiting the application of section 19 and taking part-payments out of section 19. I cannot treat these sections as being one general and the other special. Section 19 only operates as against the person making the acknowledgment, while section 20 makes the part-payment good in favour of any suit on that liability. The second difference is that an acknowledgment need not be addressed to the person entitled; while under section 20, the payment is, of course, not a payment unless made to the person entitled. It is clear, therefore, that section 20 has a wider operation and that would account for the Legislature requiring actual handwriting before giving full effect to the language; but where there is not the handwriting, but only the signature, its operation is limited.

The appeal is allowed and the case is remanded for disposal.

Costs in this case will be costs in this cause.

SRINIVASA AYYANGAR, J.—The short question in this appeal is whether the plaintiffs' suit is barred by limitation. The suit

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is one to enforce a simple mortgage by sale of the security and it is admitted that unless a payment of Rs. 400 in 1905 which is endorsed on the mortgage instrument saves the bar, the action will be barred. The payment is admitted to have been made for principal. Although the endorsement is signed by the debtor, the writing is not that of the debtor but that of the creditor. It is therefore clear that the payment is ineffective to give a fresh period of limitation under section 20 of the Limitation Act. But it is argued for the appellant that although the payment as part-payment of principal is useless to save the bar under section 20, the endorsement by the debtor on the bond signed by him is an acknowledgment under section 19. In a case exactly similar to this in *Jaganadha Sahu v. Rama Sahu*(1), my learned brothers NAPIER and SADASIYA AYYAR, JJ., held that such an endorsement, if it complied with the requirements of section 19, may be good as an acknowledgment. I respectfully agree. I have no doubt that the terms of the endorsement in this case, amount to an acknowledgment of liability. The debtor states in terms that he pays Rs. 378 towards the amount due on the bond and on the same day, made another payment of Rs. 22 and made another endorsement. I construe the endorsement as meaning that the debtor made a part-payment of the amount due on the bond (on that day over Rs. 1,500 was due as shown on the face of the bond) which is certainly an acknowledgment that more money was due.

It is contended by the learned pleader for the respondents, that sections 19 and 20 are mutually exclusive, that section 20 is a special section dealing with a particular species of acknowledgment (that is, by part-payment) and in such cases unless the case falls under section 20, that acknowledgment has no effect. I am unable to agree with this contention.

Acknowledgments under section 19 have an operation which is different from the operation of part-payments under section 20. The distinction between the effects of acknowledgments and part-payments has often been pointed out in England: see *Bolding v. Lane*(2) and *Lewis v. Wilson*(3)—and the same distinction appears to have been made in the enactment of sections 19

(1) (1914) 17, M.L.T., 80.

(2) (1863) 1 De G. J. Sm., 122; s.c., 46, E.R., 47. (3) (1886) 11 A.C., 639.

and 20. At any rate, it is impossible not to give effect to an acknowledgment which fulfils the requirements of section 19 though the acknowledgment may evidence also an ineffectual payment under section 20. The two sections deal with two different matters. They can be read together and there is no inconsistency. I think therefore that the appeal must be allowed and the suit remanded to the First Court for a trial of the other issues.

N.B.

APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastriyar and
Mr. Justice Phillips.*

BALLAPRAGADA RAMAMURTHY (OF BALLAPRAGADA
RAMAMURTHY & Co.), (PLAINTIFF), APPELLANT,

1916,
April, 28.

v.

THAMMANA GOPAYYA AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

*Limitation Act (IX of 1908), sec. 19—Letter of acknowledgment, construction of—
Conditional acknowledgment, operation of—Performance of condition, necessity
for—Contract not to plead limitation, legality of—Contract Act (IX of 1872),
sec. 23—Estoppel against statute of limitation.*

The plaintiff filed a suit on the 19th September, 1912, to recover damages for breach of an oral contract by the defendant, of which performance was due in 1906, and relied on a letter dated 20th September, 1909, written by the defendant to the plaintiff as saving the bar of limitation. The letter was to the effect that, if certain arbitrators should decide that the defendant should pay any amount he would immediately pay, but, if the arbitrators failed to decide, that the plaintiff might sue and that the defendant would not plead limitation. The arbitration failed. The plaintiff sued as aforesaid on the 19th September, 1912, but the defendant pleaded limitation in bar of the suit.

Held:

- (1) that the letter amounted only to a conditional acknowledgment;
 - (2) that where there is a promise to pay on a condition, that condition, in order that the promise may operate as an acknowledgment, must be fulfilled;
- In re River Steamer Company* (1871) L.R., 6 Ch. App., 822; *Maniram Seth v. Seth Rupchand* (1906) I.L.R., 33 Cal., 1047 and *Arunachella Row v. Rangiah Appa Row* (1906) I.L.R., 29 Mad., 519, referred to.

* Second Appeal No. 585 of 1915.

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(3) that the plaintiff was not entitled to a deduction of time which elapsed between the date of the agreement to refer to arbitration and the date of the failure of the arbitration ;

(4) that an agreement by a debtor not to raise the plea of limitation is void under section 23 of the Contract Act as it would defeat the provisions of the Limitation Act ; and

(5) that parties cannot estop themselves from pleading the provisions of the statute of limitation.

Sitharama v. Krishnasami (1915) I.L.R., 38 Mad., 374, referred to.

SECOND APPEAL against the decree of A. SAMBAMURTI AYYAR the Subordinate Judge of Rajahmundry in Appeal Suit No. 130 of 1914, preferred against the decree of E. J. S. WHITE, the District Munsif of Cocanada, in Original Suit No. 589 of 1912.

The following facts are taken from the judgment of the Lower Appellate Court :—

The plaintiff entered into an oral agreement with the defendants, for the purchase of 500 bags of boiled rice from them and paid an advance of Rs. 500. The time for performance of the contract was fixed to be 20th September, 1906. The delivery was not made. The parties charged each other with default. On the very last day when a suit for damages in respect of the breach could have been brought, both the parties agreed to refer the matter to certain arbitrators and exchanged between them letters (Exhibits B and I), dated 20th September, 1909. The material portion of Exhibit B which was the letter written to the plaintiff by the defendants was as follows :—

"As the business pertaining to the contract entered into between us for weighing boiled rice within the 20th September, is not settled up to date, and as you were making attempts to file a suit against me for the advance and as we both being reconciled, have referred the matter to Rajesri Nalem Ramalingayya, Bondada Lakshminarayana and Palukuri Venkatrajugarlu for their decision, I shall agree to the decision made by them. Without having to do anything with the limitation of time, if they decide that I should pay any amount to you, I shall pay it immediately to you. If, perhaps, for any reason, the said three mediators do not give their decision, it is settled that, on this letter, suit, etc., proper steps may be taken and conducted in the court without having anything to do with the time-bar."

"Please to consider.

(Signed) P. P. Tammana Gopiah,

(") T. Ramayya."

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The arbitrators did not decide the dispute, and the plaintiff, having given notice to the arbitrators not to proceed further, filed the present suit on the 19th September, 1912 claiming Rs. 860 being the amount of advance given to the defendant and interest thereon by way of damages. The defendants pleaded *inter alia*, limitation as a bar to the suit. The plaintiff relied on Exhibit B as an acknowledgment to save the bar of limitation and on the stipulation made in the same document not to plead the bar of limitation. The Lower Courts, holding that the suit was barred by limitation and that the agreement not to plead limitation was not valid in law, dismissed the suit. The plaintiff preferred a second appeal to the High Court.

G. Venkataramayya for the appellant.

P. Venkataramana Rau for the respondent.

JUDGMENT.—Plaintiff is the appellant. He sued in 1912 to recover damages for breach of a contract of which performance was due before the 20th September, 1906 and relied upon a letter dated 20th September, 1909 to save the bar of limitation. Both the Lower Courts dismissed the plaintiff's suit on the ground that the letter did not contain an acknowledgment of liability sufficient to bring the case within section 19 of the Limitation Act.

The letter (Exhibit B) signed by the defendants states that, as disputes about the contract were not settled and a suit was threatened, both parties agreed to refer matters to the arbitration of the persons mentioned therein. The material part of the document runs as follows :—

"I shall agree to the decision made by them (arbitrators) without having to do anything with the limitation of time, if they decide that I should pay any amount to you, I shall pay it immediately to you. If, perhaps, for any reason, the said three mediators do not give their decision, it is settled that, on this letter, suit, etc., proper steps may be taken and conducted in the court without having anything to do with the time bar."

It is argued for the appellant that the letter contains a promise to pay whatever may be found due on arbitration and that there is an acknowledgment of liability. It is also argued that the agreement to refer to arbitration and not to plead limitation as a bar if the arbitration fell through, is valid and binding on the parties amounting, as it does, to a covenant by one party not to sue till the arbitration was over and by the

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other not to plead limitation, should it be necessary to file a suit.

We do not think that the terms of Exhibit B amount to an unconditional undertaking by the defendants to pay the debt. The plaintiff was setting up a claim for damages and the defendants were denying that they were liable to the plaintiff. When a suit was threatened, the parties agreed to refer the dispute to arbitration. Exhibit B is a conditional promise to pay whatever the arbitrators may find to be due. What the defendants in effect state is :

" We deny that anything is due to you, but as you threaten a suit, we shall agree to refer matters to arbitration and if the arbitrators give an award holding us liable to pay any sum, we shall pay it to you."

In cases of conditional acknowledgments of liability, the law is clear that where there is a promise to pay on a condition, that condition in order that the promise may operate as an acknowledgment, must be fulfilled. In *In re River Steamer Company*(1) which has been approved of by their Lordships of the Privy Council in *Maniram Seth v. Seth Rupchand*(2), Lord Justice MELLISH observed that in order to take the case out of the statute of limitation, there must either be an acknowledgment of the debt from which a promise to pay may be implied, or an unconditional promise to pay the debt, or a conditional promise to pay the debt and evidence that the condition has been performed. This case was referred to and followed in *Arunachella Row v. Rangiah Appa Row*(3), where SUBRAHMANYA AYYAR and BENSON, JJ., were of opinion that the English and Indian Law are the same as regards conditional promises and that an acknowledgment of a conditional liability would not give a fresh start so long as the condition remained unfulfilled.

It is well settled law that to operate as an acknowledgment, a subsisting jural relationship of debtor and creditor must be admitted. A mere reference to arbitration which *prima facie* is only a mode of settling disputes and not an admission of any liability by the parties, does not import any such relationship. No authority has been cited for the proposition that the mere fact that parties agree in writing to refer matters to arbitration

(1) (1871) L.R., 6 Ch. App., 822. (2) (1906) I.L.R., 33 Calc., 1047 (P.O.).
(3) (1906) I.L.R., 29 Mad., 519.

amounts to an acknowledgment. The result of the English authorities seems to be that a mere submission to arbitration containing a promise to pay whatever the arbitrators decide, is not available as an acknowledgment if the arbitration proves abortive unless the submission contains an unqualified acknowledgment of the debt (Halsbury's Laws of England, volume 19, page 66 and Banning on Limitation, page 45.) There is nothing in section 19 of the Limitation Act to suggest that the law in India is different.

We do not think that the promise of the defendants not to raise the plea of limitation, should a suit have to be filed, is valid. It is argued that the effect of the clause is not to restrict the time but to extend it and that section 28 of the Contract Act which only applies to cases where time is limited has no application. Reference has been made to the observations of Sir Frederick Pollock in his commentaries of the Contract Act at page 179.

Whatever doubts may exist as to the applicability of section 28, we think that the case falls under section 23. The effect of the covenant is, in our opinion, to defeat the provisions of the Limitation Act and falls under section 23 of the Contract Act as being an agreement which defeats the provisions of the Limitation Act.

It has been argued that the period between the date of the agreement to refer and the date when the plaintiff knew that the proceedings became abortive, should be excluded.

It is difficult to see how a reference to arbitration though it may imply a covenant not to sue, would prevent the operation of the law of limitation when once the period commences to run. Though parties to a contract may agree to postpone the accrual of any rights under it, they cannot postpone the period of limitation in case a suit should have to be filed for its breach. In the present case the agreement to refer was long after the period when limitation for a suit on a breach of contract began to run and section 9 of the Limitation Act is clear, as it enacts that when once limitation begins to run, it cannot be stopped by anything that happens subsequently. The case does not fall within the provisions relating to stay of suits by injunction.

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As regards the argument that the defendants are estopped from pleading limitation, there can be no question of estoppel as the parties cannot estop themselves from pleading the provisions of the statute: *Sitharama v. Krishnaswami*(1).

We are of opinion that the decree of the Lower Courts are right and dismiss the Second Appeal with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

1916,
August, 14.

THE SOUTH INDIAN MILLS COMPANY, LIMITED (BY ITS
MANAGING DIRECTOR T. SRIMAN KANTHIMATHINATHA
PILLAI (RESPONDENT IN BOTH), APPELLANT IN BOTH,

v.

RAJA BAHADUR SHIVALAL MOTILAL BY AGENT
GOVINDALAL PITTIE (PETITIONER IN BOTH), RESPONDENT
IN BOTH.*

Indian Companies Act (VI of 1882), ss. 137 and 141—Appointment of Official Liquidator, after order for winding up company—Appeal by the Managing Director against order appointing official Liquidator, competency of.

A winding-up order terminates the appointment of directors except for certain special purposes, and a Managing Director is therefore not a competent person to file an appeal against a subsequent order appointing an official liquidator.

APPEALS against the orders of D. G. WALLER the District Judge of Tinnevely, in Insolvency Application No. 582 of 1915 in Original Petition No. 116 of 1911 and Insolvency Application No. 566 of 1914 in the said Original Petition No. 116 of 1911, respectively.

A company was ordered to be wound up by an order dated the 21st February, 1913. An Official Liquidator was appointed by the District Judge by an order dated 27th July, 1915. An application for a Review of the Order appointing the Official Liquidator was dismissed by the District Judge on the 6th

(1) (1915) I.L.R., 38 Mad., 374.

* Appeals Against Orders Nos. 265 and 266 of 1915.

August, 1915. The Managing Director of the Company preferred these appeals in the name of the company against the orders of the 27th July, 1915 and the 6th August, 1915.

M. D. Devadoss for the respondent took a preliminary objection that the appeal could not be heard having been filed by an incompetent person. In this case after the company was ordered to be wound up and an official liquidator was appointed by the Court, the Managing Director of the company purporting to act on behalf of the company, has preferred this appeal against the order appointing the Official Liquidator. The moment an order for winding is passed, the Court is in charge of the company. The old officials of the company have no *locus standi* in respect of any matter relating to the company; see section 136 of the Indian Companies Act (VI of 1882) and sections 172 and 144 of the new Act.

[SADASIVA AYYAR, J., referred to section 141 of the Act.]

Lindley on Companies, volume 2, page 967; Halsbury's Laws of England, volume 5, page 420. *Fowler v. Broad's Patent Night Light Company*(1), *Measures Brothers, Limited v. Measures*(2) and *In re Diamond Fuel Company*(3) were referred to.

S. T. Srinivasagopalachariyar for the appellant.—There is nothing in the Act prohibiting a Director from appealing. When the very objection taken is whether the liquidator has been properly appointed, the directors must have the power of appealing. Section 169 of the Act provides only a time-limit of two months. Section 96, Civil Procedure Code, gives a right of appeal to any person aggrieved by a decree. Though the corporate character of the company may have gone and the company cannot be carried on as a going concern, yet, for purposes of appeal, the aggrieved party must have a right of appeal. As an officer of the company liable to account to the company, the Managing Director had a right of appeal.

JUDGMENT.—The Appeal against Order No. 266 of 1915 is against an order appointing an official liquidator for the winding up of a company. Appeal against Order No. 265 of 1915 is against the Lower Court's order refusing a rehearing of these appointment proceedings. Both the appeals purport to be

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(1) (1893) 1 Ch. D., 724 at p. 730. (2) (1910) 1 Ch., 336.

(3) (1879) 13 Ch., 400 at p. 405.

THE SOUTH
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preferred by the company through its Managing Director. There is a preliminary objection to them that the company having been ordered to be wound up and the winding-up order having been confirmed by this Court, neither the company nor its director can prefer such appeals. The objection is, in our opinion, valid. Section 141 of Act VI of 1882, under which the proceedings took place, provides that, after an order for winding-up has been made until an official liquidator has been appointed, all the property of the company shall be deemed to be in the custody of the Court. Section 137 provides that the winding-up order shall be deemed to be notice of discharge to the servants of the company except (what is not in question here) when the business of the company is continued, and accordingly, the employment of the Managing Director had ended before the appeal was filed by him in this case. The general principle that directors cease to be such and cannot institute proceedings for the company after the winding-up order, is recognized in *Fowler v. Broad's Patent Night Light Company*(1) and *Measures Brothers, Limited v. Measures*(2), the special exceptions in favour of their appointments continuing for the purpose of appealing against the winding-up order and for the enforcement of their liability which are recognized in *Madeid Bank v. Bayly*(3), *In re Diamond Fuel Company*(4) and Halsbury on the Laws of England, volume 5, page 420, being irrelevant in the present connection. The Managing Director's appointment accordingly had ceased when he proposed to appeal, as such, on behalf of the company. The appeals have therefore been preferred by no competent person. They are dismissed with costs payable by the Managing Director personally.

N.R.

(1) (1883) 1 Ch. D., 724 at p. 730.
(3) (1868) 2 Q.B., 87.

(2) (1910) 1 Ch., 338.
(4) (1879) 13 Ch., 400 at p. 405.

PRIVY COUNCIL.*

PALANIAPPA CHETTY AND ANOTHER (DEFENDANTS),

v.

SREEMATH DEVASIKAMONY PANDARA SANNADHI
(PLAINTIFF).

1917,
February
1 and 2
and
March, 22.

[On appeal from the High Court of Judicature at
Madras.]

Hindu Law—Endowment—Power of shebait to grant permanent lease of endowed property—Necessity—"Benefit to estate"—Lease at fixed rent—Same principles apply to building site in village street as to agricultural lands—Question as to existence of ancient custom—Question of mixed law and fact—Concurrent findings—Privy Council, practice of—Error in form of finding of custom.

In this appeal it was held by their Lordships of the Judicial Committee that the grant, at a fixed rent, and on payment of a premium, of a permanent lease by a shebait of a portion of the lands dedicated to the worship of the idol of which he is a trustee, was invalid as against his successor in the shebaitship, as in their Lordships' opinion, the evidence did not establish that the shebait was constrained by any necessity to make such a lease, or that any benefit accrued to the estate from it.

Devasikamony Pandara Sannadhi v. Palaniappa Chettiar (1910) I.L.R., 34 Mad., 535, affirmed.

Where, as in this case, there is no deed of endowment forthcoming, the rules, according to which the endowed property and its income are to be dealt with in order to carry out the intention of the original endower, can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case:

Ram Parkash Das v. Anand Das (1916) I.L.R., 43 Cal., 707 at p. 716; s.c., L.R., 43 I.A., 73 at p. 78, referred to.

The rules must not be inconsistent with or repugnant to the very nature and purpose of the endowment. Both the worship of the idol and the preservation and use of the dedicated property to support and maintain that worship must be assumed to have been intended to be perpetual. A rule therefore which authorized the shebait arbitrarily at his own wish and pleasure to alienate any of the dedicated property, would be so repugnant to the whole purpose and object of the endowment that it could not be held to embody the original endower's intention.

A *debottar* estate may be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration.

Hunooman Persaud Panday v. Babooe Munraj Koonweree (1856) 6 M.I.A., 393 at pp. 423 and 424, *Prosunno Kumari Debja v. Golab Chand Baboo* (1875) 14 B.L.R., 450 at p. 469; s.c., L.R., 2 I.A., 145 at pp. 151 and 152 and *Konwar*

* Present:—Viscount HALDANE, Lord ATKINSON, Lord SHAW, Lord PARMOOR and Mr. AMEEB ALI.

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Doorganath Roy v. Ram Chunder Sen (1876) I.L.R., 2 Calo., 341 at pp. 352 and 353; s.c., L.R., 4 I.A., 52 at pp. 62 and 64, referred to.

In these cases there was to be found no indication as to what was in this connection, the precise nature of the things to be included under the description "benefit to the estate": and no definition of it applicable to all cases can be given.

It is a breach of duty on the part of a *shebait*, unless constrained by an unavoidable necessity, to grant a lease in perpetuity of *debottar* lands at a fixed rent however adequate that rent may be at the time of granting, by reason of the fact that by this means the *debottar* estate is deprived of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value, in the future, of the lands leased.

Maharanees Shibessouree Debia v. Mothooranath Acharjo (1889) 13 M.I.A., 270 at p. 275, *Mayandi Chettiar v. Chokalingam Pillay* (1904) I.L.R., 27 Mad., 291 at p. 299; s.c., L.R., 31 I.A., 83 at p. 88 and *Abhiram Goswami v. Shyama Charan Nandi* (1909) I.L.R., 36 Calo., 1003 at p. 1013; s.c., L.R., 36 I.A., 148 at p. 165, referred to.

These cases dealt with agricultural lands, but there was no reason why the principles they establish, should not apply to a building site in the street of a village as in the present case. No authority had been cited to show that a *shebait* is entitled to sell *debottar* lands solely for the purpose of investing the price of it so as to bring in an income larger than that derived from the *debottar* land itself.

Questions of the existence of an ancient custom are questions of mixed law and fact. Although therefore the two Courts had purported to find that a local custom modifying the law had been proved, there were no such concurrent findings of fact as according to the practice of the Board, it was bound to accept.

Neither of the Courts below, moreover, had stated its conclusion in a form which amounted to a finding that any ancient custom such as modified the law existed in the locality.

APPEAL No. 92 of 1914, from a judgment and decree (18th October 1910) of the High Court at Madras, which reversed a decree (10th August 1908) of the Additional Subordinate Judge of Madura, which in its turn had reversed the decree (30th June 1906) of the District Munsif of Sivaganga.

The facts of this case will be found sufficiently stated in the report of the appeal to the High Court (WALLIS and KRISHNASWAMI AYYAR, JJ.) in *Devasikamony Pandara Sannadhi v. Palaniappa Chettiar*(1), where the judgment appealed from is set out.

On this appeal—

De Gruyther, K.C. and *B. Dubé* for the appellants contended that the High Court had erred in holding that the

(1) (1910) I.L.R., 34 Mad., 535.

grant of a permanent lease by a *shebait* as a trustee was wholly invalid, because it was not proved that the grant was made under extreme necessity; and that the lease having been made in accordance with the local custom prevailing in the village and governing the powers of the *shebait*s of the temple, was binding on the respondent. The test laid down in *Prosunno Kumari Debya v. Golab Chand Baboo*(1), that an alienation by a *shebait* was not invalid if it was "warranted by the terms of the original endowment, or by usage, or was beneficial to the estate," justified, it was submitted, the grant of the lease in the present case. The evidence showed an established practice of the head of the endowment to grant permanent leases which gave rise to the inference that such a grant was in accordance with the intention of the founder: and there were concurrent findings of the existence of a local custom to that effect. The lease was made for a charitable purpose not inconsistent with the objects of the endowment. The *shebait* was in a position similar to that of the manager or guardian of minor's estate: see *Hunooman Persaud Panday v. Babooee Munraj Koonweree*(2). The lease was for the "benefit of the estate": the condition of the ruins on the site of the land was pronounced by the magistrate to be a nuisance, and it was necessary that money should be laid out to abate it; and the only practicable way of dealing with the land was to grant the lease. Reference was made to *Konwar Doorganath Roy v. Ram Chunder Sen*(3); *Maharanees Shibessouree Debia v. Mothooranath Acharjo*(4); *Mayandi Chettiar v. Chokalingam Pillai*(5) and *Abhiram Goswami v. Shyama Charan Nandi*(6). Under the circumstances of the case, and the findings of the Subordinate Judge, whose decision, it was contended, was correct, the respondent was not, in any event, entitled to possession of the land in dispute without payment of compensation to the appellants in respect of the buildings erected thereon.

Sir H. Erle Richards, K.C. and *Kenworthy Brown* for the respondent were not called upon.

(1) (1875) 14 B.L.R., 450 at p. 469; s.c., L.R., 2 I.A., 145 at p. 151.

(2) (1856) 6 M.I.A., 393 at pp. 423 and 424.

(3) (1876) I.L.R., 2 Calo., 341.

(4) (1869) 13 M.I.A., 270.

(5) (1904) I.L.R., 27 Mad., 291.

(6) (1909) I.L.R., 36 Calo., 1003.

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LORD ATKINSON.—This is an appeal against a decree of the High Court of Judicature at Madras, dated the 18th October 1910, which reversed a decree dated the 10th August 1908, of the Additional Subordinate Judge of Madura, and restored that dated the 30th June 1906, of the District Munsif of Sivaganga, pronounced in the Original Suit No. 10 of 1905.

In the village of Kunnakuddy, in the district of Madura, there are several Hindu temples; one of these, styled the Subrahmanyaswami Devasthanam, has been endowed, for the religious service of the idol, with certain lands in and about this village, including a building site situate in one of the streets of the village, upon which site, in and previous to the year 1897, some ruins stood. The *shebait* of this temple is represented by the respondent. Should the property, the subject of such an endowment as this, have been formally dedicated to the deity or the idol for worship in the temple by a deed of endowment, it would presumably contain directions as to the mode in which the property is to be used, and its income applied for the particular religious or charitable purposes mentioned in the instrument. But where, as in the present case, no deed of this kind is forthcoming, the rules according to which the property and its income are to be dealt with in order to carry out the intention of the original endower can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case of *Ram Parkash Das v. Anand Das*(1). But these rules, so to be inferred, must not in their Lordships' view be inconsistent with or repugnant to the very nature and purpose of the endowment. If, for instance, the worship of the idol in the temple be intended to be perpetual, as it could hardly fail to be, then the preservation and use of the dedicated property to support and maintain that worship must, they think, be assumed to have been similarly intended to be perpetual. A rule, therefore, which would authorize and empower the *shebait* of such a temple, arbitrarily, at his own mere will and pleasure to alienate the dedicated property, either bit by bit or *en bloc*, would be so repugnant to the whole purpose and object of the endowment that it could not, in their view, be rationally held to embody the intention of the original endower.

(1) (1916) I.L.R., 43 Cal., 707 at p. 714.

In the year 1897, no rent was received out of this site; the ruins upon it had become a nuisance. Proceedings before the magistrate to abate the nuisance, were either pending or about to be taken. It would, according to the report of one of the *shebait* officers, have cost more than 200 rupees to have had the site walled round so as to prevent access to it by the public. In that state of things, Palaniappa Chetti, one of the appellants, on the 6th April 1897, applied to the then *shebait* for the grant of a perpetual *cowle* of this site at the rent of Rs. 1-8-0 *per annum* for the purpose of erecting thereon buildings for an *annathanam mutt*. Other offers were apparently made for the acquisition of the site. They were, no doubt, considered by the existing *shebait*, and his advisers; but on the 14th April 1897, a perpetual *cowle* was, in consideration of the sum of Rupees 93-12-0 paid as a premium, granted to the two appellants for the purpose of erecting buildings thereon "for the said *Annathanam Matam* Charity." The charity contemplated was the erection of a kind of rest-house for pilgrims passing through the village, irrespective of the consideration from whence they came or where they were proceeding to, and equally irrespective of whether or not they worshipped in the temple, or desired so to do, or contributed in any way to its maintenance. It was, therefore, a charity not in any sense subsidiary to or connected with the temple or the religious services performed therein, but was an entirely separate and independent charity, of a wholly different kind and character, to the support or maintenance of which none of the dedicated property or its produce could as an act of charity be legitimately applied.

The suit out of which this appeal has arisen was instituted by the respondent, the present *shebait*, against the appellants impeaching the *cowle* so granted to them by his predecessor, and praying that, amongst other things, it might be declared to be invalid as being, in effect if not in form, an alienation of the absolute interest in a portion of the immoveable property dedicated to the services of the temple, for the purposes of an alien charity; and further praying that the appellants might be directed to demolish all the buildings erected by them upon this site, to remove all materials from it, to restore it to its original condition, and to deliver up possession of it when so restored to the respondent. In the Courts in India, the appellants made the case that

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they had acquired this site in the year 1880 from one *Samiar*, and that it was not the property of this *mutt* at all. That case was found by these tribunals to be false. Having regard to the documents proved in evidence, it could not well be found to be otherwise. That case was not put forward in argument on this appeal, so that the main question for the decision of the Board is whether the perpetual grant made by this *cowle* of the 14th April, 1897 was, having regard to the evidence given in the case and the findings of the Munsif and the Subordinate Judge thereon as against the respondent, a valid disposition of the described portion of the immoveable property of this *mutt*. Their Lordships did not understand Mr. De Gruyther to contend on behalf of the appellants that the *shebait* of the temple, such as that in this case, has, by virtue of his office, an absolute and unrestricted power to alienate the immoveable property with which the temple is endowed, arbitrarily at his own will and pleasure, under any or all circumstances. His contention, as their Lordships understood it, was this; that the *shebait* was not the owner of these lands, but stood towards them in a relation somewhat similar to that in which the guardian of an infant stands to the lands of the infant, and had similar powers of management and control; and that, accordingly, the *shebait* has power and authority to alienate the lands in cases of necessity or for the benefit of the estate of the *mutt*, and also power to carve derivative interests out of them. In support of this contention, he cited the three following authorities amongst others—*Hunooman Persaud Panday v. Babooee Munraj Koonweree*(1); *Prosunno Kumari Debya v. Golab Chand Baboo*(2) and *Konwar Doorganath Roy v. Ram Chunder Sen*(3).

It is necessary in order to ascertain the sense in which such general and elastic terms as “necessity” and “benefit of the estate” were used in these authorities, to examine the facts in reference to which the terms were used. In the first case, a certain mortgage executed by a Rani in her character, as was found, of the guardian of her infant son and manager of his estates, was impeached. By it, these estates were charged with the payment of a debt due by the deceased father of the infant to the mortgagee, and already secured upon the property; and

(1) (1856) 6 M. I.A., 393. (2) (1875) 14 B.L.R., 450; s.c., I.L.R., 2 I.A., 145.
(3) (1876) I.L.R., 2 Calc., 341.

also charged with the payment of a sum advanced by the mortgagee to be applied in payment of the arrears of revenue due to the Government in respect of these estates, and thus save them from sequestration. There was no suggestion that the debt of the infant's father was contracted for illegal or immoral purposes. It was not disputed that according to Hindu Law, a son is bound to pay his father's debts if not of this character, and that the ancestral property descending to the son, may be charged by him with payment of them. Well, it is clear that no greater benefit could well be conferred upon an estate than to save it from extinction by sequestration; the payment of the arrears of revenue by the mortgagee was therefore in the nature of salvage expenditure. The case was not finally decided by the Board. It was sent back to the Court below for further enquiry on some of the many points raised; but to prevent a further miscarriage Lord Justice KNIGHT BRUCE thought it right to state the general principles to be applied to its final decision. His words so much relied upon, reported at page 423 in *Hunooman Persaud Panday v. Babooee Munraj Koonweree*(1), run as follows:—

“The power of the manager for an infant heir to charge an estate not his own, is under the Hindu Law a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded.”

He continues at page 424 in *Hunooman Persaud Panday v. Babooee Munraj Koonweree*(1):—

“Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that, if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity, is not a condition precedent to the validity of his charge, and they do not think that under such circumstances, he is bound to see to the application of the money.”

(1) (1856) 6 M.I.A., 393.

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In that particular case in reference to which this language was used, the "necessity" for the loan would appear to be plain and imperative, the benefit to the estate, the preservation of its existence, obvious. Moreover, the transaction impeached was not an absolute alienation of property, but merely a pledge of it which might at any time be redeemed. The case in no way resembles the present case. In the second case, the Raja Baboo, the *shebait* of an idol, a man of profligate habits, having spent the income of the *debottar* property on his own pleasures, borrowed a sum of Rs. 4,000 from the respondent, and, by a bond and *razinama*, pledged the *debottar* property for the payment of this sum. In both these securities, it was stated that the money was borrowed for the services of the idol and the expenses of the temple. The *Zilla* Judge before whom the case was tried, held as a fact that the money had been borrowed and expended for these purposes. Two decrees were obtained by the respondent, the lender, against the *shebait*, each directing that the debt should be paid by the *shebait* personally, or else be realised out of the profits of the *debottar* land. The appellant the successor in office of Raja Baboo, instituted a suit to set aside these decrees and have the *debottar* property released from an attachment issued in execution of them. The point decided was that the decrees, being untainted by fraud or collusion, and having been passed after the necessary and proper issues had been raised and determined, had the force of judgments of a competent Court, and were binding on the appellant, the succeeding *shebait*, who was a continuing representative of the idol's property. Though the question was not raised whether the *debottar* lands themselves could be sold under the above-mentioned decrees, the passage from the judgment of Knight BRUCE, L.J., above extracted, was quoted and some observations were made by Sir MONTAGUE E. SMITH, who delivered the judgment of the Board, touching the alienability of *debottar* land, which have been relied upon. First, the learned Judge said :—

"There is no doubt that, as a general rule of Hindu Law, property given for the maintenance of religious worship and of charities connected with it, is inalienable," and then after quoting a passage from the judgment of Lord CHELMSFORD in a case to be presently referred to, he, at page 151,

proceeds thus in *Prosunno Kumari Debya v. Golab Chand Baboo*(1) :—

"But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion competent for the *shebait* of property dedicated to the worship of an idol, in the capacity as *shebait* and manager of the estate to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power however to incur such debts, must be measured by the existing necessity for incurring them. The authority of the *shebait* of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir as defined in a judgment of this Committee delivered by Lord Justice KNIGHT BRUCE."

On the next page he adds :—

"It is only in an ideal sense that property can be said to belong to an idol; the possession and management of it must, in the nature of things, be entrusted to some person as *shebait* or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them."

In the last case, the grandmother of the appellant executed a *mokurruri pottah* to a certain person, predecessor in title of the respondents, of certain lands, receiving a premium of Rs. 1,900 and reserving the substantial rent of Rs. 325 per month. She subsequently, by an instrument styled in the judgment, a bill of sale, in consideration of the sum of Rs. 1,700, conveyed to a person therein named, Rs. 300 per month, portion of the rent so reserved. In the first of these documents, it is in effect stated that the temple named was out of repair and the premium paid was required by the grantor to put it into repair, and to procure various other things requisite for the service of the idol. And in the second, it was stated that the Rani, the grantor, had, "agreeably to the instructions of her late husband, commenced to build certain temples named in the

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deed and others, but being in want of funds, was unable to carry out her husband's instructions." The suit was brought to have these instruments set aside, on the ground that the land alienated was *debottar* property.

Whether it was so or not, was the main issue in the case. It was held by this Board that it was not *debottar* property at all. No proof whatever was given that the statements contained in the deeds were true in fact, and the observations contained in the judgment of the Board at pages 62 and 64 of the report in *Konwar Doorganath Roy v. Ram Chunder Sen*(1) are based upon the suppositions that the land granted was in fact *debottar* land and that the aforesaid statements were in fact true. On these assumptions, the alienations were considered to be justifiable. At page 64 of the report, the following passage will be found :—

"Here, it cannot be said that the grant of a *mokurruri pottah* was an improvident way of raising money, if it were necessary to do it at all. It still left a rent for the sustentation of the idol, and if the transaction be *bona fide*, the subsequent sale of part of the rent was justified by the imperious necessity of finishing the temple which had been commenced."

So that the only specific point touching the present case actually decided in these three authorities was this: that a *debottar* estate may be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration. No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description "benefit to the estate." It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not. Three authorities have been cited which establish that it is a breach of duty on the

(1) (1876) I.L.R., 2 Calc., 341 at pp. 352 and 353; s.c., L.R., 4 I.A., 52 at pp. 62 and 64.

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part of a *shebait*, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of *debottar* lands at a fixed rent, however, adequate that rent may be at the time of granting, by reason of the fact that by this means the *debottar* estate is deprived of the chance it would have if the rent were variable of deriving benefit from the enhancement in value in the future of the lands leased. These authorities are *Maharane Shibessouree Debia v. Mothooranath Acharjo*(1), *Mayandi Chettiar v. Chokalingam Pillay*(2) and *Abhiram Goswami v. Shayama Charan Nandi*(3).

No doubt, these cases dealt with agricultural lands, but no reason can be suggested why the principles they establish should not apply to a building site situate in the street of a village, as is the site in the present case. It may appreciate in value just as the land may. Moreover, if for the reasons above-mentioned, the grant of a lease in perpetuity of *debottar* lands at a fixed rent, requires to be justified by unavoidable necessity, it is difficult to see why an absolute alienation in perpetuity of the same kind of land in consideration of a premium, should not equally require to be justified by the same kind of necessity, since it brings about quite as completely the same prejudicial results. It has been urged on behalf of the appellants that the premium of Rs. 13-12-0, if lent or invested at interest in India would bring in an income of Rs. 10 *per annum*; that a rent of Rs. 10 *per annum* would be quite an adequate rent for this site; that the *coule* of the 14th of April, 1897, must therefore be regarded as a grant in consideration of a sum equal to the capitalized value of this adequate rent, and that the charity will therefore be benefited by a transaction which put at the *shebait's* disposal, a sum capable of being so profitably used. But attractive and lucrative as money-lending may be in India, it is needless to point out that a *shebait* would not be justified in selling *debottar* land solely for the purpose of getting capital to embark in the money-lending business. And no authority has been cited giving any countenance to the notion that a *shebait* is entitled to sell *debottar* lands solely for the purpose

(1) (1869) 13 M.I.A., 270 at p. 275.

(2) (1904) I.L.R., 27 Mad., 291 at p. 299.

(3) (1909) I.L.R., 36 Calc., 1003 at p. 1018.

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of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the *debottar* land itself.

So much for the "benefit to the estate" of the charity alleged to result from this transaction. Next, as to the imperative necessity constraining the *shebait* to enter into it. There is not a suggestion that he needed this sum of Rs. 93-12-0 for any of the purposes of the charity he managed. Neither is there any proof that any effort was made to lease this site for a term, or even grant it in perpetuity, at a variable rent.

From the letter of the first appellant, dated the 6th April, 1897, it would appear that he was quite willing to pay an annual rent for it. No doubt, the rent offered was very small, apparently because he bound himself to use the building to be erected for an *Annathanam Mutt*. But as that was a charity separate and distinct from, and unconnected with, the temple and the worship of its idol, this obligation could not furnish any proper ground for accepting from him a lesser rent or a smaller premium than should be demanded from one not so bound, because a *shebait* is not entitled to alienate part of the endowment of his own charity to enrich another and altogether separate and alien charity. The grant of the *cowls* may have been an easy and convenient way of getting the nuisance upon the site abated; but in their Lordships' view, the evidence does not establish that the *shebait* was constrained by any necessity (as that term is in such a connection understood) to make this grant, or that any benefit accrued to the charity estate from the making of it. If the matter stood thus, their Lordships would be clearly of opinion that the *cowls* was, as against the successor in office of the grantor, invalid, and that the appeal must fail.

It is contended, however, that the Munsif has found that there prevails in this village, and presumably in the surrounding district, at all events in this village, a local custom authorizing and empowering a *shebait* to do as against his successor what the ordinary law, as settled by the above-quoted authorities says he cannot legally do, namely, alienate *debottar* lands at a fixed rent or in consideration of a premium, whether he be constrained so to do by some necessity or the contrary, and

whether the alienation be a benefit to the *debottar* estate or not. This is a custom entirely modifying the law. Their Lordships are of opinion that no such custom has been established here.

It has, however, been pressed on behalf of the appellants that there are two findings: one by the Munsif and one by the Subordinate Judge, who agrees with him that the ancient custom relied upon has been proved, and that, as that is an issue of fact, it must be accepted. No doubt two findings upon questions of pure fact must be accepted by this Board, but questions of the existence of ancient custom are generally questions of mixed law and fact; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact. The second answer is that neither of these Judges has found that any ancient custom such as modifies the law, existed in this locality. The Munsif sets out the finding he arrived at in these words:—

"I must find that for a very long time, permanent leases of temple land are being granted, and that the alienees are in undisputed possession thereof."

The Subordinate Judge states his finding in these words:—

"If custom were needed to justify such a grant, the District Munsif has found upon the evidence (and I agree in his finding) that such local usage does obtain in the village in question. The custom is perfectly reasonable, and is not opposed to public policy."

There could scarcely be a more glaring instance of the misapplication of the word "custom," or a more remarkable instance of forgetfulness of essentials of a custom which modifies the ordinary law.

Their Lordships are clearly of opinion on all the points raised that the decision appealed from, was right and should be affirmed, and this appeal be dismissed; and they will humbly address His Majesty accordingly.

The appellants must pay the costs here and below.

Appeal dismissed.

Solicitor for the appellants: *Douglas Grant.*

Solicitors for the respondent: *Chapman, Walker and Shephard.*

J.V.W.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Seshagiri Ayyar.

ARUNACHELLA AMBALAM AND OTHERS (DEFENDANTS),
APPELLANTS,

v.

R. G. ORR AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Limitation Act (XV of 1877), sec. 22—Assignment of original plaintiff's rights—Addition of assignee as plaintiff—Section 22, inapplicable—Jungle or forest lands in zamindari—Presumption of ownership of kudivaram in the zamindar—Onus of proving contrary, on ryots.

The presumption, as regards waste land, jungle or forest land in a zamindari, is that the zamindar is the owner not only of the melvaram but also of the kudivaram and the onus is on the ryots to show that the kudivaram right is vested in them.

Section 22 of the Limitation Act (XV of 1877) does not apply to a case where a plaintiff is added in the course of a suit, in consequence of assignment of rights from the original plaintiff, but is confined to cases where the new plaintiff is added or substituted in his own right so that he may himself be considered to be instituting a suit to enable him to litigate a right for himself independently of the rights of the original plaintiff.

APPEAL against the decree of C. KRISHNASWAMI RAO the temporary Subordinate Judge of Madura, in Original Suit No. 2 of 1908.

The fourth plaintiff in the suit is the zamindar of Sivaganga. Plaintiffs Nos. 1 to 3 are lessees from him of the zamindari. This suit was brought for the recovery of certain land from the defendants as on trespass and for demolition of certain houses built thereon by the defendants. The defendants pleaded that the lands were not included in the lease of the plaintiffs, that they were let to them by a previous zamindar long prior to the plaintiffs' lease and that the plaintiffs were by their conduct estopped from demolishing the houses. The Lower Court held that the lands belonged to the plaintiffs, that they were entitled to recover the same, that they were mostly jungle and forest lands, that they were trespassed upon by the defendants in 1893, that the houses were built on them by the defendants with the knowledge of the plaintiffs and that plaintiffs must pay compensation before demolishing the houses. During the course of the suit, plaintiffs Nos. 1 to 3 sold their right to the fifth plaintiff and

* Appeal No. 77 of 1909.

he was added on 4th April 1908 as a supplemental plaintiff. But the Lower Court gave a decree only in favour of plaintiffs Nos. 1 to 4 holding that fifth plaintiff who was added as a party more than twelve years after the trespass, was barred by limitation. The defendants preferred this appeal, and plaintiffs Nos. 1 to 5 preferred a memorandum of cross-objections.

T. R. Ramachandra Ayyar and T. R. Krishnaswami Ayyar for appellants Nos. 1, 2, 4 and 8.

C. S. Venkatachariyar for appellants Nos. 1, 2, 4 to 34.

T. Rangachariyar for respondents Nos. 4 and 5.

C. V. Anantakrishna Ayyar for the sixth respondent.

R. Narayanaswami Ayyar for the sixteenth respondent.

WALLIS, C.J.—We have already given judgment as to the boundary question which arose between the villages of Karakudi and Sekkalakottai and have now to deal with so much of the appeal as relates to the claim of the Kottaiyur ryots to the kudivaram rights in the Sekkalakottai village in which, we have decided, the suit lands are situated.

It is admitted that the suit village is one of the villages of the Sivaganga zamindari and, as such, the zamindar is entitled to the melvaram rights in the village and it is not now suggested that he has been dispossessed of these melvaram rights. It is said, however, that the onus is on him to show that he was in possession of the kudivaram rights within twelve years of suit. Now, as will abundantly appear from the exhibits to which it will be necessary to refer, the suit land was waste land or jungle and mostly forest; and with regard to land of this character in a zamindari, the presumption is that the zamindar owns the kudivaram as well as the melvaram rights, and, therefore, the onus is on the ryots of the village to show, if they can, that the kudivaram right is vested in them.

* * *

On the whole, we have come to the conclusion that, on the evidence in this suit, as regards the suit lands, the Kottaiyur ryots have not shown that they were possessed of the kudivaram rights.

It is perfectly true that we find assertions by such ryots of the kudivaram rights from time to time since 1877—assertions which they endeavoured to give effect to by the conveyances which I have mentioned. As I have already said, the suit lands

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were very eligible sites for the extension of the Karaikudi village and for building houses by the Chettis and it is very natural that the Kottaiyur ryots should be anxious to establish their claim to valuable pieces of property.

But we are satisfied that the possession both of the *melvaram* and the *kudivaram* rights of what was originally jungle land, was originally in the *zamindar*. We are not satisfied that he was ever effectively dispossessed of them by the Kottaiyur ryots, although they no doubt made claims to the *kudivaram* from time to time. In the result we agree with the conclusion of the Subordinate Judge and dismiss this appeal with costs.

As regards the question raised by Mr. T. Rangachariyar that the fifth plaintiff to whom an assignment was made by the other plaintiffs in the course of this suit, ought to have been given a decree, I am unable to accept the appellants' contention that the suit though instituted in time, is barred under section 22 of the Limitation Act as against the fifth plaintiff, the assignee from the other plaintiffs of their cause of action, who was allowed to continue the suit under section 372, Civil Procedure Code, because the period of twelve years had expired when he was brought on the record. The Limitation Act deals with the institution of suits and section 22 should, in my opinion, be confined to cases in which the new plaintiff is added or substituted in his own right so that he may be considered to be instituting a suit, and not to cases in which a suit properly instituted is allowed to be continued by an assignee under section 372, Civil Procedure Code. That section was not like section 32, made subject to the provisions of the Limitation Act, and to hold it to be so subject is, in my opinion, to defeat its object and bring about the undesirable situation which it was enacted to avoid. Both sections must be read consistently, if possible, and I think section 22 may properly receive the restricted construction, I have mentioned. The authorities in this Court which will be referred to by my learned brother do not preclude us from so holding.

As regards the memorandum of objections the Subordinate Judge has found that the *zamindar* and his lessees are not entitled to recover possession of the buildings on the suit lands without compensation on the ground that they encouraged the owners to build there. As I have mentioned already, the effect

of the evidence is that in 1891 objection was taken and when those who claimed under Ulagappa Chetti's grant built the buildings, but they were not further interfered with. In these circumstances, we are not prepared to differ from the conclusion at which the Subordinate Judge has arrived.

For the reasons given, the decree will be amended by giving the fifth plaintiff a decree and otherwise the appeal will be dismissed with costs. The memorandum of objections will be dismissed without costs.

SESHAGIRI AYYAR, J.—I agree that the appeal should be dismissed. I would add a few words on the question of law argued by Mr. T. Rangachariyar.

He asks us under Order XLI, rule 33 of the Code of Civil Procedure, to amend the decree of the Subordinate Judge by giving a decree to the fifth plaintiff for possession along with plaintiffs Nos. 1 to 4. Plaintiffs Nos. 1 to 4 assigned their rights to the fifth plaintiff in June 1908, when the suit was pending. The decree was passed in December 1908; and as the new Limitation Act of 1908 came into force only in January 1909, this question has to be decided under the Act of 1877. Mr. C. S. Venkatachariyar contends that, under section 22 of that Act, the claim of the fifth plaintiff was barred by limitation, as he was added as plaintiff in the suit more than twelve years after the accrual of the cause of action in 1893. The language of the section on the face of it covers all cases of addition and substitution of parties. But as contended by Mr. T. Rangachariyar, the proviso to the section shows the classes of cases contemplated by it. I think he is right in his contention that the application of the section should be restricted only to cases where the substituted or added plaintiff asks that his own right should be adjudicated upon in the suit, and to cases where the original plaintiffs were not entitled to the reliefs claimed in the plaint in their own rights. This view is strengthened by the amendment of the Act which places the assignee in the same position as the legal representative of the plaintiff. To hold otherwise would be practically to ignore section 372 of the old Code of Civil Procedure. That section enables the Court to permit an assignee of the rights of the original plaintiff to continue the suit. It would be anomalous to hold that the assignee who has the right to continue the litigation is not

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entitled to obtain a decree in his favour. I am of opinion that section 22 of the Limitation Act applies only to cases where the added or substituted plaintiff wants to litigate a right for himself independently of the rights of the original plaintiff. Mr. C. S. Venkatachariyar relied very strongly upon the Full Bench decision of the Calcutta High Court in *Abdul Rahman v. Amir Ali*(1). In that case, the referring Judges and Mr. Justice HARRINGTON were of opinion that the bar of section 22 will apply only to the substitution of a plaintiff and not to the addition; and the only question referred for the opinion of the Full Bench was, whether a case of substitution came within the mischief of section 22. I am unable to see how the case of addition can stand on a different footing from that of substitution. I must respectfully dissent from the Full Bench ruling in so far as it lays down that where a new plaintiff is substituted under section 372, he will be affected by a period of limitation different from that which is applicable to the original plaintiffs. The view of the learned Judges in *Rai Charan v. Biswa Nath*(2) lends support to the view I have taken. Mr. Justice WILSON in *Subodini Debi v. Cumar Ganoda Kant Roy Bahadur*(3) came to the same conclusion. *Chunni Lal v. Abdul Ali Khan*(4) is another authority for the same position. The decision in *Fatmabai v. Purbhai Virji*(5) is not opposed to this view. Mr. Justice MILLER in *Subbaraya Iyer v. Vaithinatha Iyer*(6), expresses a doubt regarding the correctness of the view taken by Mr. Justice WILSON in *Subodini Debi v. Cumar Ganoda Kant Roy Bahadur*(3). Mr. Justice SANKARAN NAYAR who took part in that case apparently does not share this doubt. On principle, I am of opinion the right view is to hold that where a plaintiff is added in consequence of the assignments of rights from the original plaintiffs, his right to a decree is not affected by section 22 of the Limitation Act. The decree should be amended by giving the fifth plaintiff a decree for possession along with plaintiffs Nos. 1 to 4.

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(1) (1907) I.L.R., 34 Cal., 612 (F.B.). (2) (1915) 20 C.L.J., 107 at p. 109.
(3) (1887) I.L.R., 14 Cal., 400. (4) (1901) I.L.R., 23 All., 331.
(5) (1897) I.L.R., 21 Bom., 580. (6) (1910) I.L.R., 33 Mad., 115.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice
Srinivasa Ayyangar.

M. R. P. R. S. SHANMUGANATHA CHETTIAR AND TWO
OTHERS (PLAINTIFFS NOS. 2 TO 4), APPELLANTS,

1916,
March, 22.

c.

K. SRINIVASA AYYAR AND ANOTHER (DEFENDANTS
NOS. 6 AND 7), RESPONDENTS.*

Partnership—Borrowing for partnership purposes—Promissory note, executed by two of three partners—No indication in promissory note of execution on behalf of partnership—Liability of the partner who was not a party to the note.

A promissory note was executed by two out of three partners of a firm for money then advanced to the executants for purposes of the firm. The promissory note did not contain any indication that it was executed on behalf of the firm. In a suit on the note by the promisee,

Held, that even the third partner who did not execute the note was liable.

Per SRINIVASA AYYANGAR, J. (*obiter*). An endorsee of the note cannot recover against the partner not executing the note.

Karmali Abdulla v. Karimji Jivaji (1915) I.L.R., 39 Bom., 261 (P.C.), followed

Somasundaram v. Krishnamurthi (1907) 17 M.L.J., 126, and *Muthu Sastrigal v. Viswanatha Pandhara Sannadhi* (1914) 26 M.L.J., 19, distinguished.

APPEAL against the decree of D. VENKOBIA RAO the Subordinate Judge of Coimbatore, in Original Suit No. 93 of 1912.

The first defendant (the father of defendants Nos. 2 to 4) and the fifth defendant (the brother of the defendants Nos. 6 and 7) borrowed from plaintiffs on four dates between February and May, 1910, various sums amounting to Rs. 7,000 and then and there, executed four promissory notes in respect of the amounts borrowed. Plaintiffs brought this suit against defendants Nos. 1 to 4 who were members of one family and against defendants Nos. 5 to 7 who were members of a different family on the grounds that the two families traded jointly in rice and tobacco, that the moneys were borrowed for the joint trade and that the members of both families were liable for the amounts, having derived the benefit of the joint trade.

* Appeal No. 118 of 1915.

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Defendants Nos. 1 to 5 substantially admitted their liability, while the defendants Nos. 6 and 7 pleaded that the fifth defendant was not the manager of their family, that their family was not a partner and that they were not liable as the promissory note was not executed by them. The first defendant became an insolvent and his estate was represented by the Official Receiver. The Subordinate Judge found that the amounts were borrowed for the partnership, that the fifth defendant was not the manager of the family of the defendants Nos. 5 to 7 and that the defendants Nos. 6 and 7 also were partners; and he gave a decree for the amount sued for, as against the fifth defendant personally, against the properties of the first defendant in the hands of the Official Receiver and against the joint family properties of defendants Nos. 2 to 4. The Subordinate Judge held that the defendants Nos. 6 and 7 were not liable on the notes as they did not execute the same. Thereupon the plaintiffs preferred this appeal against defendants Nos. 6 and 7 claiming a decree against them also.

A. Krishnaswami Ayyar and *M. Subbaraya Ayyar* for the appellants.

T. R. Ramachandra Ayyar and *T. B. Krishnaswami Ayyar* for the respondents.

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ABDUR RAHIM, J.—The learned Subordinate Judge of Coimbatore has found that the execution of the promissory notes in question has been proved and also that consideration was paid for them. These notes were executed by the first defendant, father of defendants Nos. 2, 3 and 4, and by the fifth defendant. Defendants Nos. 5, 6 and 7 are brothers and members of a joint Hindu family. They have nothing to do with the first defendant except so far as this business is concerned.

There can be no doubt that there was a joint business carried on in rice and tobacco by the defendants Nos. 1, 5 and 6. But so far as the liability of the seventh defendant goes, the evidence does not show with sufficient clearness that he was a partner in the joint business carried on by the defendants Nos. 1, 5 and 6. Exhibit W which was relied on by the Subordinate Judge in order to make out that the seventh defendant was a partner does not prove anything of the kind. Nor does Exhibit R. Exhibit R apparently refers to some business other than the one which is under consideration in this suit. Then

we have the evidence of the plaintiffs' first witness with regard to the liability of the seventh defendant. No doubt, he seeks to make out that the seventh defendant was interested in the joint trade in question. On the other hand, the plaintiffs' second witness, who was the first defendant and who cannot be said to be prejudiced in any way in favour of the seventh defendant and whose knowledge as to who were the partners cannot be disputed, distinctly states that the seventh defendant was not a partner. It must be held that the evidence does not make out that the seventh defendant was interested in the business carried on by the defendants Nos. 1, 5 and 6.

The fifth defendant's liability cannot be disputed because he was one of the two executants of the promissory notes. It is strongly contended on behalf of the sixth defendant that inasmuch as he did not execute the promissory notes, and these notes do not purport to have been executed on behalf of the firm so as to make the firm liable, he cannot be held liable in this action at all. It is argued that the present suit is on the promissory notes and not for recovery of the debt evidenced by those notes. The position taken up is this:—that where money is borrowed on a promissory note, it should be held that the debt became merged in the promissory note and a suit would lie only on the note, at any rate, unless there is evidence of intention that the defendants were to be liable for the debt as well. Strong reliance is placed in support of this contention on *Somasundaram v. Krishnamurthi*(1) and *Muthu Sastrigal v. Visvanatha Pandhara Samadhi*(2). As regards the latter case which is a decision of SADASIVA AYYAR and SPENCER, JJ., the learned Judges (at least SADASIVA AYYAR, J.), based the decision mainly on the provisions of section 91 of the Indian Evidence Act. The promissory note on which action was brought in that case, was inadmissible in evidence as it was an unstamped note. The view taken by the learned Judges was that as the suit was based on the note and that was inadmissible in evidence, the suit must fail. In that case, there was no question of the liability of the partners on account of the debt evidenced by the promissory note. In *Somasundaram v. Krishnamurthi*(1) that question did arise. It does not seem quite clear whether the learned Judges, SUBRAHMANYA AYYAR, J., and the present CHIEF

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(1) (1907) 17 M.L.J., 126.

(2) (1914) 28 M.L.J., 19.

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JUSTICE intended to lay down that, if the suit was so framed as to make the defendants liable on their original obligation for the debt, the action could not be maintained because of the existence of the promissory note. The proposition contended for on behalf of the respondents amounts to nothing less than this; that if a member of a firm who is authorized to borrow money borrows it and executes a promissory note, the firm will not be held liable for the debt at all, though it would be liable if he had not executed the note. This is *prima facie* untenable and I think the matter is concluded by a recent decision of the Privy Council—*Karmali Abdulla v. Karimji Jivaji*(1). In that case, each of the two partners who were found to have been carrying on a joint venture drew bills of exchange for his share and the plaintiff who accepted those bills afterwards sought to make the partner who did not execute the bill in question, also liable. The High Court of Bombay in reversing the decision of the trial Judge, pointed out that the suit was not based on the bill, but their Lordships held that it was erroneous to treat the question as purely a question of liability on the bill. Then, having found that, as a matter of fact, there existed the relationship of partners between the two defendants and that the money which was paid on the bill, was required and utilized in the partnership business, they held that the partner who did not draw the bill, was also liable.

It is true that the question whether, the bills having been drawn and accepted, the suit could be maintained against a partner who did not take any part in drawing the bill, was not discussed before the Board; but the decision could not be explained unless the Judicial Committee were of opinion that although the person sought to be made liable was not the drawer of the bill, still he was liable because the money was raised for and used in the partnership business. Apparently no contention was raised to the contrary *apparently* because no question could be raised with any chance of success as to the liability of a partner for a debt properly incurred on behalf of the partnership simply because a promissory note had been executed for the debt. There is no doubt so far as it appears from the authorities referred to at the bar, that where there exists an antecedent debt and a promissory note is executed for such a debt, a suit on

the promissory note failing, an action on the debt would lie. The whole contention is that because the advance of money and the execution of the promissory note were simultaneous, a suit would lie only on the promissory note and not on the debt evidenced by it. There seems to be nothing in reason in support of such a distinction. It may be open to the parties to show that it was intended that the debt should become merged in the negotiable instrument executed for it. But no such case was sought to be made here. I think therefore that the sixth defendant's liability is made out. It is pointed out by Mr. T. R. Ramachandra Ayyar the learned pleader for the respondents, that the Subordinate Judge has allowed interest on Rs. 7,000, the principal amount borrowed on the promissory notes from the date of the institution of the suit, while that sum, as a matter of fact, included Rs. 167-8-0, the amount of interest taken in advance. Interest therefore ought to be allowed only on Rs. 6,832-8-0 from the date of the suit instead of on Rs. 7,000. The decree of the Lower Court will be modified by declaring that the seventh defendant is not liable and by calculating the interest payable in the manner I have indicated. The sixth defendant will bear the costs of the appellants and the appellants will pay the costs of the seventh defendant.

SRINIVASA AYYANGAR, J.—I agree. There is a distinction between liability on the bill or the note and liability on the consideration for the bill or the note. This is clearly brought out in cases in England where an infant executes a note or gives a bill for what are called necessities. In these cases, he is not liable on the bill or the note, but is liable for the consideration which he gets in the shape of necessities. If the bill or note is endorsed, the endorsee cannot recover anything, because the endorsement does not pass title to the consideration, but only to the bill or the note. That is one illustration.

So far as I am able to see, there is absolutely nothing in the Negotiable Instruments Act to prevent A from promising to pay B's debt or from promising to be jointly liable along with B either as a partner or otherwise, so that in cases of partnership, where one partner borrows for the benefit of the joint trade, the other partner agrees to make himself liable for the debt, though he may not be liable on the bill or the note which was executed by the other partner, unless, of course, his signature appears on

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the face of the bill either as signed by him or his agent duly authorized to sign his name. Unless therefore there is any particular restriction, express or implied, in respect of any liability to be incurred by one partner with regard to a bill or promissory note which may be executed by the other partner, I really do not see how he can escape liability for a partnership debt. If, no doubt, the bill or note is endorsed to a third party, it may be that the endorsee will not be able to bring an action on that bill or note against the other partner or even on the debt against the other party. Except for that difference, the debt is certainly payable by the partner who did not sign the bill. That distinction is clearly brought out in a recent decision of the Privy Council in *Karmali Abdulla v. Karimji Jivaji*(1). In that case, the first defendant firm and second defendant firm were found upon a construction of the agreement between them and from other evidences, to be partners in a certain sugar trade. The plaintiff was financing that trade, and the arrangement was that the bills drawn either by the first defendant firm or the second defendant firm with respect to the sugar shipped by them, should be honoured by the plaintiff by accepting them. By so accepting those bills, if they were issued by the second defendant firm, the second defendant firm will be liable and if issued by the first defendant firm, that will be liable on the bills. It so happened in that case that the bills which were drawn by the first defendant firm had all been retired, while those drawn by the second defendant firm had not been, and the second defendant firm had become insolvent. The first defendant firm made itself liable for the debts borrowed by the second defendant firm for the purpose of the partnership transactions. In these circumstances, an action was brought to recover the balance due on these acceptances by the plaintiff on behalf of the second defendant firm of bills drawn by it after crediting the value of the goods sent along with the bills. The suit as against the first defendant firm was put in as an action for the balance of the debt; it is called an action of accounting against it in the course of the judgment. The first defendant firm was held liable for the money due on account of the acceptance by the plaintiff of the bills drawn by the second defendant firm.

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(1) (1915) I.L.R., 39 Bom., 261 (P.C.).

APPELLATE CIVIL.

Before Mr. Abdur Rahim the Officiating Chief Justice, Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

KOVVURI BASIVI REDDI AND FIVE OTHERS (LEGAL REPRESENTATIVES OF THE FIRST DEFENDANT), APPELLANTS IN ALL,

v.

1816.
July 17
and
August 7.

NIDUMOORI RAMAYYA *et al* (PLAINTIFFS AND SECOND DEFENDANT), RESPONDENTS.*

Limitation Act (IX of 1908), art. 11—Attachment and sale of moveables—Dismissal of claim petition—Suit for declaration and value of moveables, within one year of dismissal of claim petition but more than a year after attachment, governed by art. 11 of the Limitation Act—Civil Procedure Code (Act V of 1908), O. XXI, r. 63, nature of suits brought under.

The plaintiff, whose moveable property was attached in execution of a decree against a third party, was unsuccessful in his claim petition and then filed the present suit more than one year after the date of the attachment but within one year of the date of the order dismissing his claim petition. In his plaint, he prayed for a decree establishing his right to his moveables and directing the first defendant at whose instance the moveables were attached, to pay him the value thereof:

Held, that the suit was within time, that it was a suit contemplated by Order XXI, rule 63, Civil Procedure Code, and that it was governed by article 11 of the Limitation Act;

Held further, that the words "to establish the right which he claims to the property" which occur both in article 11 and in Order XXI, rule 63, Civil Procedure Code, are wide enough to cover not only a suit for a declaration, but also one for relief consequential on such declaration.

Nature of suits under Order XXI, rule 63, considered.

Kishori Mohun Rai v. Hursook Dass (1886) I.L.R., 12 Cal., 696 and *Kunhi-amma v. Kunhunni* (1893) I.L.R., 16 Mad., 140, followed.

Phul Kumari v. Ghanshayam Misra (1908) I.L.R., 35 Cal., 292 (P.C.), distinguished.

The plaintiff, whose moveables were attached in execution of a decree against a third party, was unsuccessful in his claim petition and then filed the present suit more than one year after the date of the attachment, but within one year of the date of the order dismissing his claim petition. In his plaint, he prayed for a decree establishing his right to the goods and directing the first defendant, at whose instance the goods were attached and

* Letters Patent Appeals Nos. 270 to 273 of 1914.

BASIVI REDDI v. RAMAYYA. subsequently sold, to pay him the value thereof. Upholding the defendants' plea that the suit was barred by limitation, the Court of First Instance dismissed the suit. But the Lower Appellate Court reversed the same, holding the suit to be within time and remanded the suit for disposal according to law. An Appeal * filed against this Order by the first defendant in the High Court was heard by WALLIS and OLDFIELD, JJ. (*vide* judgments below). The first defendant then appealed under clause 15 of the Letters Patent against the judgment of WALLIS, J., who differed from OLDFIELD, J. The judgments in the Letters Patent Appeal are printed in page 739 *et seq.*

Appeals against Orders Nos. 118, etc., of 1912.

Rao Sahib G. Venkataramayya, P. Narayanamurti and P. Somasundaram for the appellants.

T. Prakasam for the respondent.

WALLIS, J. WALLIS, J.—The plaintiff, whose goods were attached in execution of a decree against a third party, was unsuccessful in his claim petition, and then filed the present suit more than one year after the date of attachment, but within one year of the date of the order dismissing his claim petition. In his plaint, he prayed for a decree establishing his right to the goods and directing the first defendant to pay him the value thereof. But the Lower Appellate Court held that this is a suit under Order XXI, rule 63, of the new Code of Civil Procedure corresponding to section 283 of the old Code “to establish the right which he claims to the property in dispute” and is governed by article 11 of the Limitation Act, which allows an unsuccessful claimant one year from the date of the order dismissing his claim for a suit “to establish the right which he claims to the property comprised in the order.” This is admittedly the special article provided for suits by such a claimant to establish a right which he claims to the property in dispute under Order XXI, rule 63, of the Code of Civil Procedure, and the only question is whether a suit such as the present, can be said to be such a suit. I think the Lower Appellate Court was right and that the point is covered by authority.

* Appeals against the orders of V. C. MASCARENHAS the Subordinate Judge of Kistna at Ellore, in Appeals Nos. 220, 161, 177 and 210 of 1911, preferred against the decrees of T. S. KRISHNA AYYAR the Principal District Munsif of Narasapur, in Original Suits Nos. 588, 589, 579 and 591 of 1908, respectively.

In *Shiboo Narain Singh v. Mudden Ally*(1), it was held by BASIVI REDD. GARTH, C.J., and McDONELL, J., that

“Section 283 of the Code enables a party to bring a suit to establish his rights, whatever they may be: but it says nothing of the nature of the suit, or the Court in which it is to be brought,”

and again at page 612:

“A person whose goods are illegally sold under an execution does not lose his right to them, although he may have claimed them unsuccessfully in the execution proceedings. He may follow them into the hands of the purchaser or of any other person, and sue for them or their value without reference to anything which has taken place in the execution proceedings, except that, under article 11 of the Limitation Act, he must bring his suit within a year from the time when the adverse order in the execution proceedings was made.”

So far as I know this has never been doubted until the present case. In *Kishori Mohun Rai v. Hursook Dass*(2), CUNNINGHAM, J., expressed a similar view as to the nature of the claimant's suit to establish the right which he claims in the property in dispute and this was not questioned when the case came before the Privy Council on appeal in *Kissorimohun Roy v. Harsukh Das*(3).

In *Sadu bin Raghu v. Ram bin Govind*(4) the nature of the suit was again carefully considered, and at page 614, TELANG, J., says:

“If he sued to obtain a declaration of his right, and also the consequential relief to which he may be entitled, he does still ‘sue to establish his right,’ even construing that phrase in its narrowest sense.”

He goes on to observe with reference to the suit before him:

“But if the phrase is more largely construed, as it may well be, then it is plain that his right by law being a right to obtain partition and separate possession of his share in the family property whensoever he pleases, a suit praying for such partition and separate possession, may not inaptly be described as a suit to establish his right.”

Apart from authority, I cannot see why a suit to establish the right which he claims in the property in dispute, should no

(1) (1881) I.L.R., 7 Calc., 608.

(2) (1886) I.L.R., 12 Calc., 696.

(3) (1891) I.L.R., 17 Calc., 436 (P.C.).

(4) (1892) I.L.R., 16 Bom., 608.

BASIVI REDDI mean a suit to establish it effectively by obtaining appropriate relief for the infringement of his right. I think it was the intention of the Legislature to give the claimant such an effective suit and to give him one year from the date of the order dismissing his claim in which to bring it.

The suggestion that a suit like this should be regarded as a suit to establish the right claimed in the property under rule 63 of Order XXI of the Code of Civil Procedure and also for other relief governed by another article under which time runs from the date of seizure, seems to me inadmissible. It is not necessitated by the language of the rule and appears to introduce unnecessary complications and to be opposed to the policy of the Limitation Act. That Act does not make time begin to run until in the opinion of the Legislature it is time to sue. I do not think the Legislature contemplated that any suit should be filed during the pendency of a claim petition and, after it has been decided, the unsuccessful party is expressly debarred from bringing any suit except the statutory one to establish his right until he has succeeded in that suit.

Of course different considerations arise where, as in *Murugasa Mudaliar v. Jattaram Davy*(1) and *Narasimha Rao v. Ganga Raju*(2), the unsuccessful claimant in his statutory suit only prays for a declaration and then brings another suit for substantive relief. The latter suit is clearly outside the scope of article 11 of the Limitation Act and must be brought under some other article. But, as pointed out by PINKNEY J., in *Narasimha Rao v. Ganga Raju*(2), that is not the fault of the Legislature, but of the party who failed to ask for substantive relief in his statutory suit.

The appeal fails and is dismissed with costs.

OLDFIELD, J. — I regret that I am constrained to differ from my learned colleague in these cases. The plaint averments in each are that the plaintiff's movables were attached in execution and brought to sale, after he had failed in claim proceedings. All the plaintiffs sue for declarations of their right to the property and not for its release from attachment, but for its value. The question is whether their suits are in time. It is admitted that they can be so, only if they are covered by

article 11 of schedule II of the Limitation Act, which makes time run from the date of the order in the claim proceedings.

The Lower Appellate Court held, and plaintiffs have argued that this article covers every suit in respect of property, a claim to which has been disallowed, whatever the nature of the relief asked for. But the article in terms covers only suits "to establish the right which the plaintiff claims to the property comprised in the order" on the claim petition, or in the words of the complementary provision of the Code of Civil Procedure, Order XXI, rule 63, "to the property in dispute." The "right which the plaintiff claims" must then be that which he is permitted to claim by the connected provisions, rules 58 and 60 of the same Order. Consideration of all these provisions justifies two conclusions:—

(1) The procedure authorized in them is special and self-contained. It, including the provision in rule 63 for a suit, can be applied only as a whole and to the circumstances specified, that is, before sale, and whilst release from attachment is still the appropriate relief. The suit contemplated must therefore be one for that relief, not (as here) for compensation, which can be claimed only after a sale has taken place.

(2) Rule 63 refers only to a suit to establish the claimants' right to the attached property; and neither it nor the connected rules contain anything authorizing, directly or indirectly, a suit for other relief, such as compensation for its seizure or loss. The argument that the purchase money in the decree-holder's hands represents the property and that a suit, such as the present, is therefore in effect one to establish right to it, is beside the point. For plaintiffs are suing for the value of the property, not for the purchase money: the amount of the latter not being stated in the plaints and its inadequacy as a measure of the former being involved in the averment that the prices realized were affected by the sales, being improperly conducted. All this negatives the extended construction of Order XXI, rule 63 and article 11 of the Limitation Act, for which plaintiffs contend.

Of the cases referred to, *Narasimha Rao v. Ganga Raju*(1) does not deal with article 11 directly. But all three judgments

(1) (1900) I.L.R., 23 Mad., 621.

(2) (1908) I.L.R., 31 Mad., 431.

(1) (1908) I.L.R., 31 Mad., 431.

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OLDFIELD, J. treat the suit referred to in section 283 of the former Code of Civil Procedure (now Order XXI, and rule 63) as one for a declaration of title and release of the property from attachment; and it is in defendants' favour that they treat the cause of action in a suit for compensation as accruing from the date of the seizure of the property, *PINHEY, J.*, expressing his inability to see how the special period allowed by article 11 could affect the limitation fixed by other articles. *Shiboo Narain Singh v. Mudden Ally*(1) was not directly concerned with limitation and it would in any case be impossible to follow it in preference to the decision of the Court above referred to. In two cases—*Kishori Mohun Rai v. Hursook Dass*(2) and *Sadu bin Raghu v. Ram bin Govind*(3)—it was no doubt held that the relief asked for in a suit under section 283 of the Code of Civil Procedure need not be confined to a declaration of title. But the question in them was of misjoinder of causes of action, not limitation, the dates given in both cases showing that the suits were in any case in time.

Something has been said of the hardship imposed on plaintiffs and the multiplicity of suits entailed by a restricted construction of rule 63, reference being made to the observation at page 613 in the last decision cited:—

“In every case of a claim to attached property being unsuccessful, the claimant, in order to obtain his full rights, must first have a suit for a declaratory decree, and afterwards another and a separate suit for whatever consequential relief he may be entitled to.”

But the inconveniences alleged are involved by the argument as to misjoinder rejected in that decision, not by the present argument as to limitation, with which they have no necessary connection. There is no reason why a plaintiff, proceeding with due regard to limitation, should be driven to more than one set of proceedings. He can sue for damages or he can adopt the claim procedure; or if time permits, he can combine these two courses. If he chooses the cheap and summary remedy, by claim, he has only himself to thank if (through disregard of limitation) his subsequent suit for damages

(1) (1881) I.L.R., 7, Cal., 608.

(2) (1886) I.L.R., 12 Cal., 696.

(3) (1892) I.L.R., 16 Bom., 608.

is too late or if through his failure to obtain an interim injunction (the course suggested by *PINHEY, J.*, in the judgment already referred to) he allows the property to be sold and his prayer for its release from attachment to become abortive. Holding that the suits are out of time, I would allow the appeals, set aside the Lower Court's decision and dismiss the suits with costs throughout.

The Court:—Under section 98 of the Code of Civil Procedure, the appeals are dismissed with costs.

Letters Patent Appeal.

P. Narayanamurti and *P. Somasundaram* for the appellants.
T. Prakasam for the respondents.

ABDUR RAHIM, OFFG. C.J.—The question in these Letters Patent Appeals is whether the suits instituted to establish the plaintiff's right to certain moveable property attached by the judgment-creditors of a third person and for recovery of its value the property having been sold in execution within a year of the date of the order dismissing the plaintiff's claims preferred under the provisions of the Civil Procedure Code but more than a year from the date of attachment and of sale, is governed by article 11 of the Limitation Act. The answer depends on whether recovery of the value of the property comes within the scope of a suit to “establish the right which the plaintiff claims to the property in dispute” within the meaning of rule 63 of Order XXI, Civil Procedure Code, and of article 11 of the Limitation Act.

It is contended that the only relief which can be given in such a suit is what the Court which heard the claim could have granted under rule 60, *i.e.*, to release the property from attachment. In fact it is argued that the suit authorized by rule 63 is merely in the nature of an appeal.

In the first place, it cannot be said that the words “to establish the right” in their ordinary grammatical sense necessarily mean the obtaining of a mere declaration of the plaintiff's title to the property and exclude all consequential reliefs. If the Legislature had intended to limit the relief that might be given in such a suit to a mere declaration of title they would be expected to use that expression with which the Indian

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Legislature is quite familiar. Then it is difficult to conceive of any good reasons why the owner of the attached property who being unsuccessful in securing recognition of his claim in the execution proceedings, is permitted to institute a regular suit to establish his rights should not obtain the full reliefs to which he might be entitled. If, on the other hand, he was to be confined, to a mere declaration of his title, he would in many cases, such as when the goods attached have been sold, be driven to a second suit, although there might be no contested question for trial. The plaintiff might no doubt apply for an injunction restraining the sale of the property but in many cases, such as where the property attached is of a perishable nature, an injunction like that would not be in his interest. Further the Court might well take the view that injunction should not be granted in the circumstance of the case. The wider view of the scope of suits of this class has been taken in a number of cases notably in *Kishori Mohun Rai v. Hursook Dass*(1) which decision was subsequently confirmed by the Privy Council without their Lordships expressing any dissent from the opinion expressed by the learned Judges of the Calcutta High Court on this point, in *Sadu bin Raghu v. Ram bin Govind*(2) where the matter is very fully discussed by JARDINE and TELANG, JJ., and by this High Court, in *Kunhiamma v. Kunhunni*(3). On the other hand no decisions to the contrary directly covering the point have been brought to our notice. But an attempt was made to support the narrower construction by referring to certain expressions in the judgments of the Judicial Committee in *Phul Kumari v. Ghanshyam Misra*(4), where, in considering the amount of court-fee payable, they say that a suit of this class was in the nature of an appeal from the order of the executing Court disallowing the claim. They could not, however, be taken to have meant that in their Lordships' view the Court hearing the suit could grant only such relief as the executing Court could have given for *ex concessis* the former could give a declaration of title binding upon the parties while that is not within the scope of the proceedings in execution.

(1) (1886) I.L.R., 12 Calc., 696.

(2) (1892) I.L.R., 16 Bom., 608.

(3) (1893) I.L.R., 16 Mad., 140.

(4) (1908) I.L.R., 35 Calc., 202 at p. 202 (P.C.).

I agree in the judgment of WALLIS, C.J., and would dismiss the Letters Patent Appeal with costs.

SESHAGIRI AYYAR, J.—I agree. There are two matters on which I like to say a few words. In the first place, the language employed in article 11 is comprehensive enough to include not only a prayer for a declaration but also the consequential reliefs, if any, dependent on the declaration. The establishment of the right to the property comprised in the order involves the granting of all the prayers relating to the property. It was held in *Kunhiamma v. Kunhunni*(1) that a suit under section 283 should include a prayer for possession also, if that is outstanding. A second suit for possession would be obnoxious to Order II, rule 2.

The second point is whether in a suit brought under Order XXI, rule 63, the Legislature contemplated different periods of limitation for the different reliefs claimed. I concede that there is nothing unusual in one of the reliefs in a suit being within time and the other being barred by limitation. But as in the majority of cases, the claim for consequential relief can be ascertained only after obtaining a declaration, the remedy by suit will prove infructuous if the shorter period of limitation were applied to the consequential relief. The suggestion that during the pendency of the claim proceedings, a suit for an injunction should be instituted, is ingenious, but wholly impracticable. I doubt whether any Court would entertain such a suit and put it off indefinitely to await the result of the claim proceedings.

The decision of the Judicial Committee in *Phul Kumari v. Ghanshyam Misra*(2) relied on to show the nature and scope of the suit under rule 63, does not conclude this question. That was a suit where no consequential relief was necessary, as the party was in possession. Their Lordships had to consider only the question of the court-fees. I do not think that that decision compels us to hold that the suit contemplated by article 11 can only be a declaratory suit. I am of opinion, therefore, that the view taken by the learned Chief Justice (WALLIS, C.J.) is right.

PHILLIPS, J.—In addition to the authorities quoted by WALLIS, J. (now Chief Justice) in his judgment, we have the

(1) (1898) I.L.R., 16 Mad., 140.

(2) (1908) I.L.R., 35 Calc., 202 (P.C.).

BASIVI REDDI authority of the Privy Council for holding that when a claim in execution proceedings has been dismissed and the claimant brings a suit for a declaration of his right to the property and for an injunction restraining the decree-holder from executing his decree against it, the suit is one under section 283 of the Civil Procedure Code of 1882 : *Phul Kumari v. Ghanshyam Misra*(1). The question no doubt did not arise under the Limitation Act but under the Court-fees Act but that cannot alter the principle of the ruling. It seems to me quite clear that the words of Order XXI, rule 63, cover a suit like the present one. The words of the rule are "a suit to establish the right which he claims to the property in dispute" and these words are wide enough to cover not only a mere suit for declaration but also one for relief consequential on such declaration. To "establish" a right means something more than to "declare" a right and would seem to me to imply everything that is necessary to secure the proper enjoyment of the right. The fact that the plaintiff also claims damages caused by the subsequent sale, does not affect the nature of the suit, which is clearly one to establish his right to the property claimed. If Order XXI, rule 63, is only to be applied to a suit for a mere declaration, the claimants would afterwards have to file a subsidiary suit for possession, and this would be in contravention of Order II, rule 1. I think therefore that the present suits should have been brought within one year of the order dismissing the claim, the limitation article applicable being article 11, and agree in dismissing the appeals.

N.R.

(1) (1908) I.L.R., 35 Cal., 202 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim, Officiating Chief Justice
and Mr. Justice Burn.

SHANMUGA CHETTY (MINOR BY HIS NEXT FRIEND MEENAKSHI
AMMAL) (PLAINTIFF), APPELLANT,

1916,
October, 4.

v.

C. K. NARAYANA AYYAR (DEAD) AND NINE OTHERS (DEFENDANTS
AND FIRST DEFENDANT'S LEGAL REPRESENTATIVE), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), O. 1, r. 10—Plaintiff described as a minor,
really a major—Bona fide mistake of next friend—Dismissal of suit, if proper—
Procedure to be adopted.*

Where a plaintiff was described in the plaint as a minor but had really attained majority some four days before the plaint was filed by his next friend who was under a bona fide belief that he was still a minor when she filed the suit on his behalf as his next friend,

Held, that the suit ought not to be dismissed but that the proper procedure to be adopted in the case was to return the plaint for presentation after making the necessary amendments by striking off the description of the plaintiff as a minor suing through his next friend and making other consequential alterations in the plaint.

Taqi Jan v. Obaidulla (1894) I.L.R., 21 Cal., 866, followed.

Sheorania v. Bharat Singh (1898) I.L.R., 20 All., 90, referred to.

APPEAL against the decree of H. MOBERLY, District Judge of South Arcot, in Original Suit No. 18 of 1912.

The facts appear from the judgment.

V. R. Ponnuswami Ayyangar, M. C. Parthasarathy Ayyangar and M. Srinivasachariyar for the appellant.

A. Kirshnaswami Ayyar and A. N. Sitharama Sastriyar for the second respondent.

Diwan Bahadur M. O. Parthasarathi Ayyangar and N. C. Vijayaraghavachariyar for the third respondent.

V. Viswanatha Sastriyar for the fourth respondent.

T. V. Muttukrishna Ayyar for the ninth respondent.

JUDGMENT.—We think that it is clear that Shanmuga Chetty who is described in the plaint as a minor had in fact attained majority four days or so before the plaint was filed. His grandmother apparently made a bona fide mistake that Shanmugam

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* Appeal No. 89 of 1913.

BRANMUGA CHETTY v. NARAYANA AYYAR. — ABDUR RAHIM, OFFG. C. J. AND BURN, J. was still a minor when she filed the suit on his behalf as his next friend. The learned District Judge was asked for leave to amend the plaint by striking off the description of Shanmugam, the plaintiff, as a minor suing through his next friend and for other consequential amendments. The learned Judge following the ruling in *Sheorania v. Bharat Singh*(1) has dismissed the suit. We think however that the decision in *Taqi Jan v. Obaidulla*(2) lays down the law correctly. That was also a similar case and the learned Judges of the Calcutta High Court held that the proper procedure to adopt in a case of this nature, was to return the plaint so that it might be presented after making the necessary amendments. Rule 10 of Order I of the Code of Civil Procedure, 1908, which is practically the same as Order XVI, rule 2, of the Rules of the Supreme Court seems to be wide enough to cover a case of this nature. It says that if a suit is instituted in the name of a wrong person, the right person may be substituted. Here the suit was instituted by the right person, but through another person purporting to act as his next friend. The ruling in *Taqi Jan v. Obaidulla*(2) seems to us to be right and the plaint ought to have been allowed to be amended.

We therefore allow the appeal. The plaintiff will be allowed to amend the plaint. Costs will be costs in the cause.

K.B.

(1) (1898) 1 L.R., 20 All., 90.

(2) (1894) 1 L.R., 21 Cal., 868.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Burn.

BALASWAMY AYYAR AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

VENKATASWAMY NAICKEN AND TWENTY-SEVEN OTHERS
(DEFENDANTS), RESPONDENTS.*

1916,
September,
28 and 29
and October,
2 and 19.

Hindu Law—Mutt, head of—Power of, to grant permanent lease—Limitation Act (IX of 1908), art. 134—Permanent lease, a transfer within the article.

Although the head of a mutt is entitled to appropriate part of the income of the properties of the mutt to his own maintenance, he is only a trustee in respect of those properties, and he is ordinarily incompetent to grant a permanent lease of the mutt properties. A permanent lease for an annual rent is a transfer for a valuable consideration within article 134 of the Limitation Act (IX of 1908) and the transferee acquires an indefeasible title to the permanent lease by possession for 12 years as provided by the article.

Knowledge that the title of the transferor is only a limited one cannot by itself disentitle the transferee to the benefits of article 134.

Ram Parkash Das v. Anand Das (1916) 1 L.R., 43 Cal., 707 (P.C.), *Subbaya Pandaram v. Mahammad Musthapa Maracayar*, Appeal No. 13 of 1916 and *Ram Kani Ghose v. Raja Sri Hari Narayan Singh Deo Bahadur* (1905) 2 C.L.J., 548, followed.

APPEAL against the decree of S. MAHADEVA SASTEYAR, the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 61 of 1914.

The facts are given in the first paragraph of the judgment of BURN, J.

A. Krishnaswami Ayyar for the appellants.

S. Muthia Pillai for the first respondent.

S. R. Muttuswami Ayyar for the second respondent.

B. Sitarama Rao for the respondents Nos. 3 and 28.

T. Narasimha Ayyangar for the twenty-seventh respondent.

BURN, J.—The facts of this case, as far as it is necessary to state them, are as follows:—

On 17th March 1891, the second plaintiff obtained a permanent lease (Exhibit A) of certain land within the limits of Madura town from the *Matathipathi* of Sri Vyasaraaya Mutt the seat of which is in the State of Mysore. The second

* Appeal No. 52 of 1915.

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was still a minor when she filed the suit on his behalf as his next friend. The learned District Judge was asked for leave to amend the plaint by striking off the description of Shanmugam, the plaintiff, as a minor suing through his next friend and for other consequential amendments. The learned Judge following the ruling in *Sheorania v. Bharat Singh*(1) has dismissed the suit. We think however that the decision in *Taqi Jan v. Obaidulla*(2) lays down the law correctly. That was also a similar case and the learned Judges of the Calcutta High Court held that the proper procedure to adopt in a case of this nature, was to return the plaint so that it might be presented after making the necessary amendments. Rule 10 of Order I of the Code of Civil Procedure, 1908, which is practically the same as Order XVI, rule 2, of the Rules of the Supreme Court seems to be wide enough to cover a case of this nature. It says that if a suit is instituted in the name of a wrong person, the right person may be substituted. Here the suit was instituted by the right person, but through another person purporting to act as his next friend. The ruling in *Taqi Jan v. Obaidulla*(2) seems to us to be right and the plaint ought to have been allowed to be amended.

We therefore allow the appeal. The plaintiff will be allowed to amend the plaint. Costs will be costs in the cause.

K.R.

(1) (1898) I.L.R., 20 All., 90.

(2) (1894) I.L.R., 21 Cal., 866.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Burn.

BALASWAMY AYYAR AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

VENKATASWAMY NAICKEN AND TWENTY-SEVEN OTHERS
(DEFENDANTS), RESPONDENTS.*

1916,
September,
28 and 29
and October,
2 and 19.

Hindu Law—Mutt, head of—Power of, to grant permanent lease—Limitation Act (IX of 1908), art. 134—Permanent lease, a transfer within the article.

Although the head of a mutt is entitled to appropriate part of the income of the properties of the mutt to his own maintenance, he is only a trustee in respect of those properties, and he is ordinarily incompetent to grant a permanent lease of the mutt properties. A permanent lease for an annual rent is a transfer for a valuable consideration within article 134 of the Limitation Act (IX of 1908) and the transferee acquires an indefeasible title to the permanent lease by possession for 12 years as provided by the article.

Knowledge that the title of the transferor is only a limited one cannot by itself disentitle the transferee to the benefits of article 134.

Ram Parkash Das v. Anand Das (1916) I.L.R., 43 Cal., 707 (P.C.), *Subbaiya Pandaram v. Mahammad Musthapa Maracayar*, Appeal No. 13 of 1916 and *Ram Kani Ghose v. Raja Sri Hari Narayan Singh Deo Bahadur* (1905) 2 C.L.J., 546, followed.

APPEAL against the decree of S. MAHADEVA SASTRIYAR, the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 61 of 1914.

The facts are given in the first paragraph of the judgment of BURN, J.

A. Krishnaswami Ayyar for the appellants.

S. Muthia Pillai for the first respondent.

S. R. Muttuswami Ayyar for the second respondent.

B. Sitarama Rao for the respondents Nos. 3 and 28.

T. Narasimha Ayyangar for the twenty-seventh respondent.

BURN, J.—The facts of this case, as far as it is necessary to state them, are as follows:—

On 17th March 1891, the second plaintiff obtained a permanent lease (Exhibit A) of certain land within the limits of Madura town from the *Matathipathi* of Sri Vyasarayya Mutt the seat of which is in the State of Mysore. The second

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* Appeal No. 52 of 1915.

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plaintiff was a near relative of the grantor. The rent reserved was a fixed sum, Rs. 24 *per annum*. The grantor died shortly after the execution of Exhibit A. His successor held office till 1906 when the twenty-sixth defendant became head of the *mutt*. In 1902, the second plaintiff sublet (Exhibits D and D 1) to first defendant for a period of ten years, and in 1905, the second plaintiff and his son the third plaintiff sold their rights, under Exhibit A to first plaintiff (Exhibit E). From 1905, the properties controlled by the heads of the *mutt* were managed by the Diwan of Mysore, under powers of attorney executed by the *matathipathis*, and the Diwan in turn empowered defendant's first witness to conduct the management. In 1908, defendant's first witness visited Madura and it was then only that he became aware of the nature of the lease granted to the second plaintiff. He at once objected to it and tried to induce first defendant to attorn to him. This first defendant at that time refused to do. In November 1911, however, first and second defendants took a lease of the land for 17 years from defendants' first witness (Exhibit V). At the end of September 1912, the term fixed in the lease deed (Exhibit D) expired. The rent for the whole period had been paid in advance. Defendants Nos. 1 and 2 are admittedly in possession of the land and claim to hold it under Exhibit V. In 1908, defendant's first witness objected to the lease of 1891 on the ground that it was not competent to the head of the *mutt* to grant a permanent lease of the kind. He tried to get first plaintiff to come to terms but in vain. Certain payments were made by first plaintiff after 1908 and the effect of these is a subject of controversy between the parties. First plaintiff seeks (amongst other reliefs) a declaration that he is the permanent lessee of the property and a direction to the defendants to deliver up possession of it.

The main contentions on behalf of first plaintiff are: (1) that the permanent lease is binding on the grantor and his successors, (2) that a valid title has been acquired under the provisions of the Limitation Act, and (3) that the defendants are estopped from denying the first plaintiff's title. The findings of the learned Subordinate Judge are against the plaintiff's appellants on all these points. With regard to the first point there is no doubt that the head of a *mutt* cannot in the absence

of necessity bind his successors in office by a permanent lease at a fixed rent for all time. This would be so, even if the rent had been adequate in 1891: *Maharanees Shibessourees Debia v. Mothooranath Acharjo*(1). There is no allegation much less proof, of any such necessity. The first contention must be rejected.

In connexion with the second point, a question arises as to the nature of the endowment and the position of the head of the *mutt* in relation to it. The exact terms of the original grant are not in evidence. It was conceded in argument that the grant was made by one of the Naicken dynasty of Madura. The case for the appellants is that the endowment was for a specific purpose, *i.e.*, for the worship of Gopalakrishna Swami who is described by defendant's first witness as the "Titular-deity of the *mutt*." The evidence does not support this contention and it has been found against in the Lower Court. A statement made by a local agent of the *mutt* during the Inam Commission inquiries is relied upon for the appellants. It was apparently unsupported by any documentary evidence. The description of the *inam* as given at the close of the inquiry, is that it was granted "for the support of Vyasaraya Madam" (Exhibit L): compare also description in Exhibit F. The evidence for the defendants is that the income from this property is not appropriated to any particular purpose but forms part of the general funds of the *mutt*. I think the grant must be held to have been made for the general purposes of the *mutt*.

What then is the position of the head of the *mutt* in relation to the general endowments of the institution? In *Sammantha Pandara v. Sellappa Chetti*(2), there is a description of the nature of the generality of such institutions and the incidents of the property which is devoted to their maintenance. The property is stated to be,—

"in a certain sense, trust property; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution."

(1) (1869) 13 M.I.A., 270.

(2) (1879) I.L.R., 2 Mad., 175.

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In *Giyanasambandha Pandara Sannadhi v. Kundasami Tambiran*(1), a description is given of how the endowments of *mutts* were acquired and this description appears to fit the case now under consideration in so far as the facts have been ascertained. The judgment then proceeds to lay down that the head of the *mutt* came to own its endowments:—

“On trust for the maintenance of the *mutt* for his own support for that of his disciples, and for the performance of religious and other charities in connexion with it according to usage.”

In *Vidyapurna Tirthaswami v. Vidyaniidhi Tirthaswami*(2), a different view was taken as to the position of the head of a *mutt* towards its endowments. It is this ruling which forms the basis of the judgment of the Lower Court on the point now under consideration. The question was again examined by a Full Bench in *Kailasam Pillai v. Nataraja Tambiran*(3). As I read the judgments in the last mentioned case it was held that no general rule could be laid down and that each case must be judged on the particular facts. SANKARAN NAIR, J., appears to accept the statement of the law in *Giyanasambandha Pandara Sannadhi v. Kundasami Tambiran*(1), as strictly accurate with regard to the endowments there referred to [*vide Kailasam Pillai v. Nataraja Tambiran*(3)], which seem to me similar in kind to the endowment now in question.

It is not in my opinion, necessary to discuss these cases in detail, because in my opinion, the matter is now governed by the decision of the Privy Council in *Ram Parkash Das v. Anand Das*(4). The nature of the interest of the head of a *mutt* in the *mutt* property is declared in clear terms:—

“The whole assets are vested in him as the owner thereof in trust for the institution itself” (page 713).

Again at page 714—

“the nature of the ownership is, as has been said, an ownership in trust for the *mutt* or institution itself, and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning *Mahant* this trust does exist and must be respected.”

And at page 732, in referring to the retirement of the head of the *mutt*, it is said:

“The *Mahant*, in their Lordships’ opinion, is not only a spiritual preceptor but also a trustee in respect of the *mutt* over which he presides.”

(1) (1877) L.R., 10 Mad., 375 at p. 386. (2) (1904) L.R., 27 Mad., 435.
(3) (1910) I.L.R., 38 Mad., 265 (F.B.). (4) (1916) I.L.R., 43 Calc., 707 (P.C.).

Their Lordships seem to me to lay this down as a rule of general applicability, for whereas in the matter of succession to the headship, the usage and custom of a *mutt* have to be considered, in each case this is expressly stated. It is true that the point to be decided in the case related to the office of superior of the *mutt* and not to the management of the other property and that the latter decision of this Court does not seem to have been referred to. The judgment however opens with a considered pronouncement as to the position of the head of a *mutt* as to his functions and his legal position with regard to the endowments. The fact that certain decisions of this Court may not have been referred to does not make the ruling any the less binding.

There do not appear to be any circumstances peculiar to the present case which would exclude it from the operation of the general rule. It seems to me therefore that the sole beneficiary is the *mutt*. This is not an instance in which there is any individual interest in the head of the *mutt* independently of the institution itself. He is no doubt entitled to appropriate part of the income to his own maintenance on account of his position in the *mutt*, but his rights in this respect are the same in kind as those of others connected with the *mutt* who are entitled to be supported from its funds. In this view it is unnecessary to consider the bearing on the question of limitation of the cases, where it has been held that the head of the *mutt* had a personal interest in the property alienated: e.g., *Abhiram Goswami v. Shyama Charan Nandi*(1) and *Narsaya Upada v. Venkataramana Bhatta*(2). The decision in *Muthusamier v. Sree Sreemethanithi Swamiar*(3) proceeds on the footing that the position of the head of a *mutt* is that enunciated in *Vidyapurna Tirthaswami v. Vidyaniidhi Tirthaswami*(4); but as already stated, this view appears to be overruled by the decision of the Privy Council.

I think, therefore, that the alienor held the property simply as a trustee. It has been held in *Rameswar Moalia v. Sri Sri Jin Thakur*(5), that a permanent lease is a transfer within the meaning of article 134 of the Limitation Act of 1908. The same decision and *Narsaya Upada v. Venkataramana Bhatta*(2) are

(*) (1909) I.L.R., 36 Calc. 1003 (P.C.) (2) (1912) 23 M.L.J., 260.
(3) (1915) I.L.R., 38 Mad., 358. (4) (1904) I.L.R., 27 Mad., 435.
(5) (1916) I.L.R., 43 Calc., 34.

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authorities for holding that the annual rent is a valuable consideration. The requirements of the article would therefore seem to be fulfilled.

It has however been urged that the appellants are not entitled to take advantage of the article, because the second plaintiff was aware at the time he obtained the lease of the position of his lessor. The plaint alleges that the *matathipathi* was a trustee and the second plaintiff in his evidence describes him as a "trustee merely". There is nothing in the actual wording of section 10 of the Act or in article 134 to support the contention. It is however argued that this has been held to have been the meaning of the provision in the Act of 1877 and that these rulings are not affected by the changes in wording made in 1908: *vide, Tholasinga Mudali v. Nagalinga Chetty*(1). The rulings relied on appear to rest on the remarks of Lord CAIRNS in delivering the judgment of the Privy Council in *Radanath Doss v. Gisborne*(2). In that case, the actual finding was that the transaction was consistent with the view that the alienee intended to take only such interest as the transferor was competent to alienate (*vide* pages 17 and 19). This decision has been explained by MOOKERJEE, J. in *Ram Kani Ghose v. Raja Sri Hari Narayan Singh Deo Bahadur*(3) and quite recently by AYLING and SRINIVASA AYYANGAR, JJ. in *Subbaiya Pandaram v. Mahammad Musthapa Maracayar*(4). In the latter case, the later rulings of this Court have also been considered and distinguished. The fact of knowledge may be an important piece of evidence in judging of what interest the transferee contracted to take especially where (as in most of the cases cited) the transferor was a mortgagee; but such knowledge cannot by itself disentitle the transferee to the benefit of article 134 of the Act. In the present case, I entertain no doubt that it was the intention of the grantor to create a permanent lease and that second plaintiff intended to take and did take the lease as a permanent one. His subsequent dealings with the property support this view. The grantor died a few months after the execution of Exhibit A. During the fourteen years that his successor held office the second plaintiff continued to hold on the terms of the

(1) (1916) 3 M.L.W., 19.
 (2) (1905) 2 C.L.J., 548.

(2) (1871) 14 M.I.A., 1.
 (4) Appeal No. 13 of 1916.

lease deed. I would respectfully follow the view enunciated by MOOKERJEE, J. in the case referred to and hold that the second plaintiff perfected his title to a permanent lease, as more than twelve years elapsed since the grant. The lessor intended to grant and the lessee intended to acquire an interest greater than the transferor was competent to alienate and all the requirements of article 134 have been complied with.

The above finding is sufficient for disposal of the appeal and it is therefore unnecessary to consider the question of estoppel which is raised by the appellants.

The Subordinate Judge has given the first plaintiff a decree for Rs. 116-6-6 as damages against first defendant. A memorandum of cross-objections was filed but was not pressed and is dismissed.

There is a further claim for Rs. 500 as damages for breach of the agreement in Exhibit D prohibiting the letting of trees for tapping in the last two years of the lease. The Subordinate Judge recorded no finding on the point as he considered the claim unsustainable for reasons given in paragraph 29 of his judgment. The evidence adduced is of a very vague description and in my opinion insufficient to enable a conclusion to be come to as to whether any, and, if so, what amount is due to the first plaintiff on this account.

In the result, I think the appeal should be allowed and first plaintiff given a decree for possession of the property and a declaration that he is a permanent lessee. He will also be entitled to *mesne* profits from 1st October, 1912 till delivery. These profits will be recoverable from defendants Nos. 1 and 2 and will be determined by the Lower Court and embodied in a supplemental decree. Having regard to the uncertainty of the law in this Presidency prior to the judgment of the Privy Council, I think the parties should bear their own costs in both Courts.

SADASIVA AYYAR, J.—I agree.

N.B.

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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

P. V. ALLA PICHAI (PETITIONER), APPELLANT

c.

KUPPAI PICHAI ROWTHER AND FOUR OTHERS (COUNTER-PETITIONERS—CREDITORS Nos. 1 to 5), RESPONDENTS.*

Provincial Insolvency Act (III of 1907), ss. 2 (c) and (g), 22, 46 and 52—Dismissal of insolvency petition by Official Receiver—Application to District Court to revise, under section 22, whether an appeal—Official Receiver, whether a Court—Appeal to High Court from order of District Court, maintainability of.

A District Judge transferred a petition of a debtor to be adjudged an insolvent to the Official Receiver. The petition was dismissed by the Receiver on the grounds that the debtor had no realizable assets, that he might be concealing his assets, ready cash and outstandings, that he was not likely eventually to get his discharge and that therefore the petition was an abuse of process of Court. On an application by the debtor under section 22 of the Provincial Insolvency Act (III of 1907), the District Court confirmed the order:

Held, that an appeal lay to the High Court under section 46 of the Act, from the order of the District Court.

Held further, that the Official Receiver is not a Court subordinate to the District Court within section 46 (1) of the Act and that an application to the District Court under section 22 of the Act to revise the order of the Official Receiver, is not an "appeal" within section 46.

Held also, that the order of dismissal was based on a misconception of the Insolvency Procedure and should be set aside.

Jeer Chetti v. Rangaswami Chetti (1912) 22 M.L.J., 52, followed.

APPEAL against the order of Rao Bahadur W. L. VENKATARAMAYYA GARU, the District Judge of Rāmnād at Madura, in Civil Miscellaneous Appeal No. 21 of 1913, preferred against the Order of T. S. RAMASWAMI AYYANGAR, the Official Receiver of Rāmnād at Madura, in Insolvency Petition No. 17 of 1912.

The District Judge transferred the petition of a debtor to be adjudged an insolvent to the Official Receiver.

The Official Receiver on examining the petitioner, found that assets shown in the schedules of property were really no assets of the petitioner at all; and for this and other reasons appearing from the evidence of petitioner, the Receiver dismissed

* Civil Miscellaneous Appeal No. 4 of 1915.

the petition. He pointed out that in view of the provisions of section 44 (3) a, b, d, e, of the Act, there was no likelihood of the petitioner obtaining the final order of discharge; that no useful purpose would be served by adjudging him an insolvent; and that the application for adjudication as insolvent was a mere abuse of process.

An application was made by the Petitioner to the District Judge to revise the order of the Official Receiver under section 22 of the Provincial Insolvency Act (III of 1907).

The only point urged before the District Judge was that the Official Receiver was precluded at that stage of the proceedings from going into the question of the truth of the petitioner's averments as to his assets, but was bound to adjudge him an insolvent on proof that he had committed an act of insolvency, viz., petitioned to be adjudged an insolvent.

The District Judge dismissed the application.

The applicant preferred this appeal.

B. Sitarama Rao and S. R. Muthuswami Ayyar for the appellant.

K. Bhashyam Ayyangar for the respondents.

OLDFIELD, J.—This is an appeal against the Order of the District Judge, Rāmnād, rejecting an application under section 22, Provincial Insolvency Act, to revise the order of the Official Receiver of his district, dismissing the appellant's application to be adjudicated insolvent.

The preliminary objection has been taken that such an order is not appealable. The objection is supported on the ground that the Official Receiver is a Court subordinate to the District Court and that the decision of the latter in appeal from him is final under section 46 (1). The questions are: *whether the Official Receiver is a Court* and *whether an application under section 22 against his decision is an appeal*. If they are answered in the affirmative, it would, in my opinion, follow that he is a Court subordinate to the District Court. I deal with each question, as far as possible, separately, although they must be dealt with, to some extent, on common grounds.

As regards the first, it is greatly against respondents' contention that neither Official Receivers nor Receivers under the Act generally, are expressly included in any definition of Court, "the Court", or "the District Court" which the Act contains.

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If then they are to be treated as Courts, it must be by implication from the provisions regarding their duties and the character of their orders; an argument has accordingly been based on section 52 (2). That provision does not apply to one portion of the Official Receiver's duties, those which he performs in exercise of the powers, which an ordinary receiver possesses under section 20, which are merely the executive acts of an officer of the Court and which need no more be supposed subject to appeal (in the strict sense) than those of any receiver appointed under the Civil Procedure Code. The provision applies only to the exercise by the Official Receiver of the Court's powers, which can be delegated to him under section 52 (1). No doubt those powers, which include such a refusal to pass an order of adjudication as is in question before us, are of a judicial character; and the respondent relies on the fact that under section 52 (2), "an act done or order made in their exercise is to be deemed an act of the Court." But that wording seems to me rather to support the appellant's contention that the Official Receiver's judicial acts and orders have a judicially binding authority, not intrinsically, but only derivatively in consequence of the character attached to them by legal implication, as acts of the Court, not of a Court, as respondents' argument requires.

The wording of section 52 (2) reproduces with one qualification, to which I return, that of section 99 (1) of the English Bankruptcy Act of 1883, which was in force when the Provincial Insolvency Act was passed; and its effect is to make the decisions of the Official Receiver authoritative and appealable as the decisions of the Court under which he works, like those of the Registrars of Courts in England: *vide, Re Maughan*(1). The qualification above referred to, consists in the provision that the Official Receiver's decisions shall have this authoritative character, subject to the appeal to the Court, provided by section 22, the wording of which follows that of the English section 90. Section 90 however provides for a right of application to the Court in order to displace the acts or decisions only of the Official Receiver or trustee, which are of an executive character and, with one exception (the disposal of proofs of debts), they correspond with those of a receiver under the Indian section 20. The

(1) (1888) 21 Q.B.D., 21.

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conclusion is that in India, the Official Receiver with delegated powers, combines the functions of the English Official Receiver or trustee and registrar, and that the procedure under section 22, which in England is applied only to the acts or decisions of the former, has been applied by the Indian Act to those of an officer, who fills both capacities. When the procedure under section 22 was not in its origin of the nature of an appeal against a Court's order and when it need not be treated as providing one in cases in which the Official Receiver's proceedings under section 20 are in question, it is difficult to hold that its nature is changed, when it is applied to the decisions covered by section 52 (2). As the Bankruptcy Act contemplated no application to the Court against a Registrar's decision, direct English authority for this view is not to be expected. But the analogy between the decisions of an Official Receiver in India and those of an Official Referee with regard to the English Order XL, rule 6, is, as the respondent contends, close; and it was held in *Wynne Finch v. Chatter*(1) overruling *Daglish v. Barton*(2) cited by the respondent, that an application to displace the latter, was not an appeal.

Other support for the same conclusion is afforded to return to section 46 of the Provincial Insolvency Act, by the considerations that (1) section 22 occurs in a different portion of the Act from section 46 and is not referred to in it, although the period of limitation specified in the former differs from that in the latter and (2) if respondent's contention be accepted, section 46 provides in clause (1) for the anomaly of a second appeal to the District Court from the Official Receiver's decision without restriction of the grounds, on which it can be taken. There is on the other hand, no doubt the fact that an application under section 22 is referred to in section 52 (2) as an appeal. But the difficulties already referred to in the way of strict construction of the term are such that an interpretation of it in one of the ways enumerated by SUBRAHMANYA AYYAR, J., in *Chappan v. Moidin Kutti*(3) or, as it was used loosely by the learned Judges in *Daglish v. Barton*(2) must be preferred. The considerations referred to, especially that regarding limitation, in my opinion, justify a decision in the appellant's favour that an application under section 22 is not an appeal.

(1) (1903) 2 Ch., 475.

(2) (1900) 1 Q.B., 284.

(3) (1899) I.L.R., 22 Mad., 68.

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Indian authority also supports this view. In *Chidambaram v. Nagappa*(1), an application under section 22 is no doubt described as an appeal. But nothing turned on the description. In *Doraisami Iyyangar v. Meenakshisundara Ayyar*(2) and *Thakur Parsad v. Pamo Lal*(3), it was held that an application under section 48 was not an appeal. In these circumstances I hold that the preliminary objection is unsustainable and turn to the merits.

Appellant's application to be adjudicated insolvent was dismissed by the Official Receiver, and the Lower Court upheld the dismissal on the grounds that he had no realizable assets, that he might be concealing his accounts, some ready cash and some outstandings in the Straits Settlements, which he first mentioned in his examination, that he was not likely eventually to get his discharge and that therefore his petition was an abuse of the process of the Court.

This conclusion is, in my opinion, based on a misconception of the objects of insolvency procedure. It is supported by the Lower Court by reference to *Jeer Chetti v. Rangaswami Chetti*(4) in which *Girwardhor v. Jai Narain*(5) is followed. But both those decisions contemplate refusal of adjudication only in exceptional cases, the second referring explicitly to instances in which that course was upheld; and the present case in no way resembles any of them. In these circumstances the appeal must be allowed, and the orders of the Lower Court and Official Receiver be set aside, the latter being directed to restore the petition to file, pass an order of adjudication and take further proceedings in accordance with law. No order as to costs here or in the Lower Court.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—The District Judge of Rāmnād transferred the petition of a debtor to be adjudged an insolvent to the Official Receiver. The petition was dismissed. On appeal, the District Judge confirmed that order. The debtor has preferred this appeal to the High Court. Mr. Bhashyam Ayyangar took a preliminary objection on behalf of the respondent that the appeal does not lie.

His contention was that under section 46 of the Provincial Insolvency Act, the decision of the District Judge on appeal is

(1) (1915) I.L.R., 38 Mad., 15. (2) (1914) 16 M.L.T., 246.
(3) (1913) I.L.R., 35 All., 410. (4) (1912) 22 M.L.J., 52.
(5) (1910) I.L.R., 32 All., 645.

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final and that no second appeal is allowable. The point for decision is whether the appeal contemplated by section 46 covers one from the Official Receiver to the District Judge. The language employed in clause (2) of section 52 lends support to the contention of the learned vakil. But on turning to section 22, we find that an 'application' is spoken of to revise the order of the Receiver and not an 'appeal.' It looks as if the words "subject to the appeal to the Court provided for by section 22" in clause (2) of section 52, have been used *per incuriam*.

Mr. Sitarama Rao drew our attention to the fact that section 46 provides for an appeal by the person aggrieved against "an order made in the exercise of insolvency jurisdiction by a Court subordinate to the District Court." I do not think that an Official Receiver can be said to be a Court subordinate to the District Court. Section 2 (g) read with the proviso to section 3 (1), makes it clear that the Courts referred to in section 46, are those on whom the local Government had conferred insolvency jurisdiction.

Another argument of the learned vakil for the appellant related to the period of limitation provided by clause (4) of section 46. Thirty days and ninety days are respectively the period of limitation for appeals to the District Court or to the High Court as the case may be. If appeals from Official Receivers were within section 46, there can be no necessity for making a special provision in regard to them, as has been done in section 22 by shortening the period to twenty days. It is therefore clear that section 46 does not cover appeals from the Official Receiver. The language of section 86 of the Presidency Towns Insolvency Act confirms this conclusion. Unlike section 22 of the Provincial Insolvency Act, it speaks of an appeal from the decision of the Official Assignee. This is apparently because the legislature has given more powers to the Official Assignee and has clothed him with greater judicial responsibility than the Official Receiver. It is noteworthy that under the Insolvent Debtors Act, before the Presidency Towns Insolvency Act of 1909 was passed, an 'application' was spoken of to revise the Official Assignee's order and not an 'appeal'.

Further, under the notification of the Government, there can be an Official Receiver in a Munsif's Court. Under section 22

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this officer's orders are revisable by the District Munsif. Against that, an appeal would lie to the District Judge. Thus there will be a second appeal in such cases; whereas in the case of orders passed by an Official Receiver working under a District Judge, there can be only one appeal, if the contention of the respondent were upheld. I see no reason for imputing this inconsistency to the legislature.

As regards decided cases, in *Chidambaram v. Nagappa*(1) it seems to have been assumed without deciding that appeals would lie under section 46 from the orders of the Official Receiver. On the other hand, *Thakur Prasad v. Panno Lal*(2) holds that proceedings against the orders of the Official Receiver, are not by way of appeal. *Doraiswami Ayyangar v. Meenakshi Sundara Ayyar*(3) follows this decision. *Mul Chand v. Murari Lal*(4) is to the same effect. Mr. BHASHYAM AYYANGAR quoted *Daglish v. Barton*(5) for the position that where a case is referred to an Official Referee, an appeal would lie to the Court of Appeal from his decision. There is some analogy between that and the present case. But the analogy would only lead to the inference that the appeal from the Official Receiver should have been preferred to the High Court. Apart from this, in *Wynne Finch v. Chatter*(6) Lord Justice STIRLING, in a considered judgment of the Court of Appeal, points out that although the Official Referee had all the powers of the Court delegated to him, under Order XL, rule 6 of the Judicature Act, the proper procedure was to apply to set aside the judgment. The Court of Appeal refused to accept the dictum in *Daglish v. Barton*(7) as correct. The language of section 22 of the Provincial Insolvency Act is apparently based on Order XL, rule 6. Further it has been generally the practice in this Court to hear appeals from the decisions of the District Judges interfering with the order of the Official Receivers. That practice seems to me to be in consonance with law. I, therefore, agree in overruling the preliminary objection. On the merits, I am clear, for the reasons given by my learned colleague, the order of the District Judge is wrong. The order must, therefore, be set aside.

N.R.

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| (1) (1915) I.L.R., 38 Mad., 15. | (2) (1913) I.L.R., 35 All., 410. |
| (3) (1914) 16 M.L.T., 246 | (4) (1914) I.L.R., 36 All., 8. |
| (5) (1900) 81 L.T., 551; s.c., 1 Q.B., 284. | |
| (6) (1908) 2 Ch., 475. | (7) (1900) 1 Q.B., 284. |

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim, Mr. Justice Spencer and
Mr. Justice Srinivasa Ayyangar.

GANGADARA MUDALI (DEFENDANT), APPELLANT,

v.

SAMBASIVA MUDALI (PLAINTIFF), RESPONDENT.*

1916,
October, 3,
and
November, 1.

Registration Act (III of 1908), ss. 72 (1), 76 and 77—Refusal of Registrar to direct Sub-Registrar to register a document, whether a refusal to register it—Limitation—'Thirty days' in section 77—Time from which to be computed.

A document was presented for registration to the Sub-Registrar on the last day of the four months allowed for presentation, but the Sub-Registrar declined to receive it owing to pressure of other work. At the suggestion of the Sub-Registrar, it was presented the next day with an application to the Registrar to excuse the delay in presentation. On the refusal of the Registrar to excuse the delay, the Sub-Registrar refused to register the document. From this order an appeal was filed before the Registrar and it was dismissed. The present suit was filed within thirty days of the dismissal of the appeal under section 77 of the Indian Registration Act, but more than thirty days after the order refusing to extend time.

Held:

(1) that the order of the Registrar on appeal, refusing to direct the Sub-Registrar to register the document was a "refusal to register" within sections 77, 76 and 72 (1) of the Act and

(2) that the suit was filed in time, as the thirty days allowed for filing by section 77 must be counted from the date of the order on appeal and not from the date of the order refusing to extend time.

There is no distinction between a refusal to accept a document for registration and a refusal to register it.

Narasimha Nayanevaru v. Ramalingam Rao (1900) 10 M.L.J., 104 and *Sivarama Pattar Kariakar v. Krishnaiyar* (1914) 26 M.L.J., 307, followed.

Kunhimmu v. Viyyathamma (1884) 1 L.R., 7 Mad., 535, distinguished.

Ganguva v. Sayava (1897) I.L.R., 21 Bom., 699, *Balambal Ammal v. Arunachala Chetti* (1895) I.L.R., 18 Mad., 255 and *Veeramma v. Abbiah* (1895) I.L.R., 18 Mad., 99, not followed.

APPEAL under clause 15 of the Letters Patent against the judgment of SESHAGIRI AYYAR, J. (dissenting from BAKWELL, J.) in *Gangadhara v. Sambasiva*. SECOND APPEAL † against the decree of G. KOTHANDARAMANUJALU NAIDU, the Temporary Subordinate Judge of Tanjore in Appeal Suit No. 113 of 1914, preferred against the decree of C. VEERASWAMI REDDI the District Munsif of Tirutturaippundi in Original Suit No. 71 of 1913.

* Letters Patent Appeal No. 120 of 1916.

† Second Appeal No. 2348 of 1914.

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SAMBASIYA. The facts and arguments are stated in the judgment of
SESHAGIRI Ayyar, J.

Second Appeal No. 2348 of 1914.

A. V. Viswanatha Sastriyar for G. S. Ramachandra Ayyar
for the appellant.

K. S. Ramabadra Ayyar for the respondent, *amicus curiæ*.

SESHAGIRI
Ayyar, J.

SESHAGIRI AYYAR, J.—The facts are not in dispute in this case. The defendant executed a sale-deed to the plaintiff on the 3rd of September 1912. Owing to the non-payment of the consideration in full, the defendant refused to get the document registered. The plaintiff presented it to the Sub-Registrar for compulsory registration on the 3rd January 1913. On that day, according to the evidence of the Sub-Registrar, he was so busy that he was not able to find time to receive the document and to issue summons to the defendant. The Sub-Registrar therefore suggested that the document should be presented the next day with an application for excusing the delay in not having presented it earlier. This was done. The application for excusing the delay was lodged with the Sub-Registrar under section 25, clause (2) of the Registration Act to be forwarded to the Registrar. The Registrar did not excuse the delay. His order has not been put on the record. The Sub-Registrar passed final orders on the 14th January 1913 in these words:

"Inasmuch as no permission has been given for accepting the said document for registration under section 25 of the Registration Act, in Current Memo. No. 79 General, dated 11th January, current year, issued by the Registrar, the registration of this document is refused under sub-section (v) of section 24 of the Registration Rules"—(Exhibit E).

Thereupon an appeal was preferred to the Registrar. This was dismissed on the 1st February, 1913. The present plaint was presented under section 77 of the Registration Act on the 3rd of March, 1913. It was conceded before us that the suit was within thirty days of the order of the Registrar. The Sub-ordinate Judge differing from the District Munsif gave a decree to the plaintiff.

In this Second Appeal as the respondent was not represented, we requested Mr. Ramabadra Ayyar to assist us as *amicus curiæ*. We are indebted to him for his clear and able argument. The appellant's case was presented to us with equal ability and clearness by Mr. Visvanatha Sastri.

The main contention for the appellant was that this suit is not within the purview of section 77 of the Registration Act. Mr. Visvanatha Sastri argued that the order of the Sub-Registrar communicating the opinion of the Registrar that the delay in presentation will not be excused is not an order "refusing to admit a document to registration" as contemplated by section 72, clause (1) of the Act and that no appeal lay to the Registrar against that communication. Therefore the appeal to the Registrar and the order thereon (Exhibit F) were both incompetent and furnished no ground for a suit under section 77. Before dealing with the few cases cited in argument, I shall examine the sections. It is true that under section 25, the power to excuse the delay in presentation is vested solely in the Registrar. What the Sub-Registrar has to do is simply to send up the papers to the Registrar. The party is still before the Sub-Registrar; the final word has to be said by him although he is bound by the opinion of his superior. The next question: is did the Sub-Registrar "refuse to admit the document to registration?" The fact that he has no option in the matter does not affect the solution of the question. In his order, Exhibit E, he says that "the registration of this document is refused." Of course, if he had no power to pass the order, the words used by him will not avail the plaintiff. In my opinion, he has the power to pass an order whether he would register the document or not, and that order would be strictly within his rights. The Registration Act uses two or three expressions which have caused some confusion of thought. *Refusal to register, refusal to accept for registration and refusal to admit for registration*, are used in the body of the Act without indicating the difference in the meaning to be attributed to these expressions. In my view, the order of the Sub-Registrar is "a refusal to admit the document for registration" and as such is appealable. Mr. Visvanatha Sastri pointed to an anomaly which this interpretation would involve. By the appeal to the Registrar in such cases the officer is asked to review his own opinion given on the *ex-parte* representation of the Sub-Registrar. There is force in this argument. The only answer is that on the previous occasion when he passed orders on the papers sent to him by the Sub-Registrar, the Registrar was acting in his advisory capacity. My attention has not been drawn to any provision which enables a party who has lodged

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his application for excusing his delay before the Sub-Registrar to appear before the Registrar in support of his application ; but when he hears an appeal he is performing a judicial act and the parties have a right of audience. It may be that the Legislature intended that he should re-consider his decision for good cause shown. However that may be, I am unable to say that the order of the Sub-Registrar is not one refusing to admit the document to registration. An argument was founded on the use of a similar expression in section 58 and it was said that "admitting to registration" is a technical language which contemplates some preliminary steps. I am not convinced by this argument.

There is one other aspect of the question. Section 76, clause (1) (b) contemplates an original application to the Registrar to direct the registration of a document by a Sub-Registrar. No doubt such an application may be lodged with the Sub-Registrar for its being forwarded to the Registrar. But the language is not mandatory. Under clause (1) of section 25, it is competent to the Registrar if the delay does not exceed four months to excuse it on certain conditions and direct the registration of the document. There is nothing in the Act to prevent a party from applying direct to the Registrar to excuse the delay. Section 76, clause (1) (b) implies that such a direct application is competent. If this is correct, the appeal preferred by the plaintiff against the order of the Sub-Registrar may be regarded as an original application to the Registrar to excuse the delay. The fact that he expressed an unfavourable opinion when the papers were forwarded by him would not prevent his entertaining an original application. His dismissal of the appeal would be in effect refusing to direct the Sub-Registrar to register the document. Such a refusal would furnish a cause of action for a suit under section 77.

I have thus far avoided discussing the case-law on the point. The decision strongly relied upon is *Gangava v. Sayava*(1). In this case immediately on the receipt of the order refusing to excuse the delay, the suit under section 77 was filed. With all respect, I am unable to concur in the view that the refusal to excuse the delay is not a refusal to register. I am justified in

(1) (1897) I.L.R., 21 Bom., 699.

my opinion by the view taken in Madras in *Narasimha Nayane-varu v. Ramalingam Rao*(1) and *Sivarama Pattar Kariakur v. Krishnaiyar*(2), which seem to disapprove of the Bombay decision. The decision in *Kanhaya Lal v. Sardar Singh*(3) is in conflict with the Bombay decision, although it is not referred to in the judgment. The reasoning in *Kudrathi Begum v. Najibunesa*(4) is also in favour of the view I have taken. *Udit Upadhia v. Imam Bandi Bibi*(5) does not really touch this case.

For the reasons above given, I am of opinion that the suit was properly laid under section 77 of the Registration Act.

I would therefore dismiss the Second Appeal.

BAKEWELL, J.—For the purposes of this appeal it is necessary to examine the procedure prescribed by the Indian Registration Act, 1908, for the registration of documents. A party claiming under a document must present it at the proper registration office (section 32), and in certain cases, the registering officer is forbidden to accept it for registration: see sections 20 (1), 21 (1) (4), 23 and 71 (2). Sections 34 and 35 and Part VI prescribe the procedure to be followed upon the inquiry held by the registering officer when he has accepted a document for registration, and Part XI (B) deals with the procedure after this inquiry when he has decided to admit it to registration.

There are therefore three principal stages in the registration of a document: first its acceptance by the officer, secondly his inquiry as to its admissibility to the register and thirdly his placing it upon the register.

The Act is silent as to the effect of a refusal by the officer to accept a document for registration, except where the time limited for presentation has expired, in which case the principal registering officer has a discretion to enlarge the time (section 25); but possibly the Registrar might act under section 68 (2).

Section 73 provides for an application to the Registrar where, in the inquiry before a Sub-Registrar, a party has denied execution and section 72 provides an appeal to the Registrar where a Sub-Registrar has in other cases refused to admit a document to registration. Section 75 deals with the order of the

(1) (1890) 10 M.L.J., 104. (2) (1914) 26 M.L.J., 307.
(3) (1907) I.L.R., 29 All., 284. (4) (1898) I.L.R., 25 Calc., 93.
(5) (1902) I.L.R., 24 All., 402.

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BAKEWELL, J. Registrar in an inquiry by him as to the execution of a document by a party. Section 76 prescribes the procedure to be followed by the Registrar when he refuses to register a document or to direct its registration under section 72 or section 75. Section 77 provides a remedy by suit in a Civil Court in cases where the Registrar has refused to order a document to be registered under either of the last-mentioned sections. This section therefore provides in effect for a new trial of the question of admissibility of a document to the register after the inquiry directed by sections 34 and 35.

Section 34 prohibits the officer from registering a document unless the executants appear within the period limited by section 23 for the presentation of the document, and provides that in such cases an application may be made to the Registrar to enlarge the time.

There appears to be no remedy given by the Act in cases where the Registrar refuses to enlarge the time for presentation on inquiry under section 25 or section 34.

In the present case the respondent presented a document to a Sub-Registrar on the last day of the period fixed by section 23 and was advised by him to present a petition to the Registrar for further time, and the respondent accepted his advice and applied accordingly under section 25. It is clear that the Sub-Registrar should have accepted the document for registration, and that the party should then have applied to the Registrar under section 34. I think that it is equally clear that the Sub-Registrar did not refuse to accept the document for registration and did not consider whether it was admissible to the register, and therefore, did not refuse to admit it to registration, but merely offered advice. There was therefore no order refusing to admit the document to registration from which an appeal would lie under section 72, and no order of the Registrar refusing to direct registration under that section. Section 77 is expressly limited to orders of refusal under section 72 or section 76, and when there is no such order, a suit will not lie thereunder.

The subsequent proceedings by the respondent were taken after the expiration of the period limited by section 23, and after the order of the Registrar refusing to enlarge the time and the Sub-Registrar and Registrar were prohibited by that section from accepting the document for registration, and the orders

passed by them were therefore not orders refusing to admit a document to registration within the meaning of the Act.

If the respondent had followed the procedure prescribed by section 34, it would still have been within the discretion of the Registrar to refuse an enlargement of the time, and I do not think that the Act provides any means of revising such an order. If the action of the Sub-Registrar be taken as equivalent to an acceptance of a document for registration and a refusal to admit it to registration under section 34, it would seem that the respondent has not adopted the remedy prescribed by that section. If however the application for enlargement of time be regarded as made under section 34 and not under section 25, the Registrar has exercised his discretion by refusing further time.

If under the circumstances of this case, the Court passed a decree directing the document to be registered, it would in my opinion be either exercising a discretion expressly conferred upon the Registrar or revising his order refusing to enlarge the time for acceptance of a document, and the Act gives no such jurisdiction to the Court.

It is regrettable that the Sub-Registrar should have tendered and the respondent have accepted advice which was not in accordance with the provisions of the Act, but the Act does not appear to afford any remedy, unless the action of the Sub-Registrar be held not to fall within section 86.

I respectfully dissent from the dictum contained in *Narasimha Narayanevaru v. Ramalingam Rao*(1), which is not binding on this Court, and accept the ruling in *Gangava v. Sayava*(2), which draws a distinction between a refusal to accept and a refusal to register a document.

There has been no argument before us as to whether proceedings could be taken otherwise than under the Act against a Registrar or Sub-Registrar who has refused to accept a document for registration, but in the case of a Sub-Registrar I am inclined to the opinion that section 68 provides a remedy. I would allow this appeal and restore the decree of the District Munsif with costs throughout.

SESHAGIRI AYYAR, J.—As my learned brother has taken a different view, my judgment which confirms that of the lower Appellate Court prevails. In the result the Second Appeal is

(1) (1900) 10 M.L.J., 104.

(2) (1897) I.L.R., 21 Bom., 629.

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dismissed. As the respondent does not appear, there will be no order as to costs.

Thereupon this defendant preferred this appeal under the Letters Patent.

A. V. Viswanatha Sastri for G. S. Ramachandra Ayyar for the appellant.

K. S. Ramabhadra Ayyar for the respondent *amicus Curiae*.

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JUDGMENT.—We agree with SESHAGIRI AYYAR, J., that this case falls within section 77 of the Registration Act. This is in agreement with the interpretation adopted by our Court in *Narasimha Narayanavaru v. Ramalinganna Rao*(1) and *Sivarama Pattar Kariakar v. Krishnaiyar*(2), and we also may point out that the rules framed under the Act are in accordance with this view.

A contrary view, it is true, has prevailed in *Gangava v. Sayava*(3); but the fallacy of the reasoning in that case, if we may say so with respect, lies in thinking that there is any substantial distinction between refusal to accept a document for registration and a refusal to register within the meaning of section 77 read with sections 76 and 72. Here the District Registrar did in fact refuse to direct registration of the document and none the less so because he made no enquiry as to whether the document was executed or not, proceeding on the ground that the document was in his opinion presented out of time.

We may mention that a ruling (referred to at the bar) in *Kunhimmu v. Viyyathamma*(4), can be distinguished on the ground that the appeal to the Registrar in that case having been presented after the expiry of the prescribed period, it was considered as if there was no appeal and admittedly where there has been no appeal to the Registrar no suit will lie under section 77. There are also some observations in *Balambal Ammal v. Arunachala Chetti*(5) and *Veeramma v. Abbiah*(6) which might be taken to support the interpretation put upon section 77 in *Gangava v. Sayava*(3), but they are in the nature of *obiter dicta*.

(1) (1930) 10 M.L.J., 104.

(3) (1891) I.L.R., 21 Bom., 699.

(5) (1895) I.L.R., 18 Mad., 255 at p. 256

(2) (1914) 26 M.L.J., 307.

(4) (1884) I.L.R., 7 Mad., 535.

(6) (1895) I.L.R., 18 Mad., 99.

It is also argued that the suit is barred. But time should be computed from the order of the Registrar, dated 1st February, 1913, when on appeal, he refused to direct the registration and not from his previous order refusing to extend time.

The appeal is dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

PICHU VADHIAR (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 69—Sale by mortgagee—Surplus proceeds retained by mortgagee—Whether attachable under warrant under Criminal Procedure Code (V of 1898), sec. 386—Priority of Crown over attaching creditor.

A mortgagee sold the mortgaged property under a power of sale, and after discharging his own dues, retained the surplus sale-proceeds for payment to the mortgagor. The mortgagor was convicted and sentenced to pay a fine which, if recovered, was directed to be paid to the complainant. A warrant for recovery of the fine was issued under section 386 of the Criminal Procedure Code against the fund in the hands of the mortgagee who paid the amount to the bailiff. The plaintiff who had attached the mortgaged property in execution of a decree against the mortgagor, disputed the right of the Crown to proceed against the fund or at least in preference to him, and sued the Secretary of State for India and the complainant to whom the amount was paid;

Held:

(1) that the surplus amount retained by the mortgagee was money held in trust by him for the mortgagor under section 69 of the Transfer of Property Act;

(2) that a warrant could be issued for the levy of the fine by distress on the amount in the hands of the mortgagee under section 386 of the Criminal Procedure Code; and

(3) that the fine was a Crown debt which had priority over the plaintiff's debt, though the fine, if recovered, was directed to be paid to the complainant.

APPEAL against the decree of C. R. TIRUVENKATACHARYAR, the Madras City Civil Judge, in Original Suit No. 130 of 1915.

* City Civil Court Appeal No. 12 of 1916.

1916,
October, 27
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The facts material to this decision are set out in the judgment of SESHAGIRI AYYAR, J.

K. Jagannadha Ayyar for the appellant.

Hon. Mr. S. Srinivasa Ayyangar, the Acting Advocate-General and the Government Solicitor for the respondents.

K. Venkataraghava Achariyar for the second respondent.

AYLING, J.

AYLING, J.—The conclusions arrived at by the learned City Civil Judge in this case appear to me to be entirely correct. What the High Court Bailiff did was to seize under a distress warrant, issued under section 386 of the Criminal Procedure Code, a sum of money which was held by the Mylapore Hindu Permanent Fund on behalf of and in trust for Sivapatha Mudaliyar who was legally entitled to the same under section 69 of the Transfer of Property Act. The main contention of appellant's vakil before us has been that this was not a case of trust but of an ordinary debt, and that a debt cannot be made the subject of distress under section 386 of the Criminal Procedure Code as held in a recent case. *The Secretary of State for India v. Sengammal*(1) to the decision of which I was a party. That there is a trust in favour of the mortgagor in respect of all surplus sale-proceeds is, I think, clear in spite of the somewhat curious change of language in the last paragraph but two of section 69 of the Transfer of Property Act. This is the English Law (*vide*, Halsbury's Laws of England, volume 21, section 460) which was applied in India prior to the Transfer of Property Act (*vide*, *Rajah Kishendatt Ram v. Rajah Muntaz Ali Khan*(2)). I cannot accept the contention that section 69, Transfer of Property Act, was intended or operates to effect any change in that respect merely because the words "shall be held in trust to be applied" are not carried into the residue left after discharging the sale expenses and the mortgage claim. No authority is quoted in support of such an interpretation. The section specifically says that the residue shall be paid to the mortgagor: and I think the duty of payment thus cast on the mortgagee who brings the property to sale, is tantamount to a trust.

The only other contention on appellant's behalf, which has not been disposed of in the judgment of the Lower Court, is that the fine imposed on Sivapatha Mudali is not to be regarded

(1) Appeal Suit No. 154 of 1907.

(2) (1879) 6 I.A., 145, at p. 160.

as a Crown debt because there is a direction in the judgment imposing it under section 545 of the Criminal Procedure Code to the effect that on realization it should be paid over to the present second defendant. It is argued that the determining test is whether the debt, when recovered, falls into the coffers of the State and for this proposition, the appellant's vakil relies on *The Secretary of State for India v. The Bombay Landing and Shipping Co.*(1) and *Judah v. Secretary of State for India*(2). The underlying principle of the priority of crown debts appears to be that expressed in the maxim *detur digniori* and in the present case, it would seem that this fine or recovery should be treated as going, primarily at any rate, into the coffers of the State. Neither of the cases quoted, affords any support to the idea that the fact of its being earmarked for a specific purpose (in this case the compensation of one subject for a wrong inflicted by another) makes any difference. The decision in an English case—*In re Arthur Heavens Smith*(3)—is good authority for the contrary view. It was held that the amount of a recognizance given to the Crown by an appellant for respondent's costs should be treated as a Crown debt in spite of the fact that it was the invariable practice in such cases to hand over the amount on realization to respondent. The argument that this debt ceased to be a Crown debt because the Crown was not really and substantially interested was put forward and negatived.

All the other arguments advanced on appellant's behalf have been fully dealt with in the very careful and exhaustive judgment of the City Civil Judge.

I would dismiss the appeal with costs.

SESHAGIRI AYYAR, J.—I entirely agree.

The plaintiff obtained a money decree against one Sivapatha Mudaliyar and another in the Presidency Court of Small Causes on the 24th July 1914. The defendant Sivapatha Mudaliyar was convicted by the High Court of criminal breach of trust and was sentenced to rigorous imprisonment for one year and ordered to pay a fine of Rs. 500. The order says that the said fine "if recovered, be paid to the Mylapore Permanent Benefit Fund, Madras, as compensation." The plaintiff in

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(1) (1868) 5 Bom., H.C.R., 23.

(2) (1886) I.L.R., 12 Cal., 445.

(3) (1876) 2 Ex. D., 47.

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pursuance of the Small Cause Court decree obtained by him attached on the 13th October 1914 certain immoveable properties belonging to Sivapatha Mudaliyar which were subjected to two mortgages. Pending the said attachment the first mortgagee sold the property in pursuance of the power of sale reserved to him in the deed of mortgage. This was on the 19th December 1914. After satisfying the mortgages, the first mortgagee had in his possession a sum of Rs. 965-6-11 as surplus sale-proceeds of the property. On the bailiff of the High Court claiming the said amount under a warrant issued under section 386 of the Code of Criminal Procedure, the first mortgagee paid the surplus sale-proceeds to the said bailiff. The amount was lodged in the High Court. The plaintiff preferred a claim petition on the ground that he was entitled, as the attaching creditor, to be paid the amount due to him before the Crown claims any portion of the sale-proceeds. The claim was rejected. This suit has been brought to contest the order on the claim petition. The first defendant is the Secretary of State. The second defendant is represented by the liquidators of the fund to which the compensation was ordered to be paid at the Sessions.

The main contentions of the plaintiff are that under section 386 of the Code of Criminal Procedure the Crown is not entitled to attach the sale-proceeds in the hands of the first mortgagee and that as the fine imposed upon Sivapatha Mudaliyar was not intended to be realized by the Crown for its own benefit, the amount of the fine is not a Crown debt which is entitled to priority over the decree-debt of the plaintiff. The defence was that the surplus sale-proceeds in the hands of the first mortgagee must be regarded as moveable property and as such liable to distress under section 386 of the Code of Criminal Procedure; and that the Crown is entitled to priority over the claim of the plaintiff. The learned City Civil Judge in a well-written judgment came to the conclusion that the sale-proceeds were attachable under the Criminal Procedure Code and that the Crown had priority over the plaintiff. The plaintiff has appealed. Since the filing of the appeal, a judgment of my learned brothers AYLING and SRINIVASA AYYANGAR, JJ., has been pronounced holding that, under section 386 of the Code of Criminal Procedure, the Crown cannot attach an intangible claim like a debt. The learned

Judges held rightly, if I may say so with respect, that this language was inapplicable for the purpose of attaching incorporeal moveable properties. As a result of this judgment, the question which we have to consider is slightly different from what the learned City Civil Judge discussed in his judgment. If the surplus sale-proceeds retained by the first mortgagee, is a debt payable by him to the mortgagor, then under the ruling already referred to, it cannot be attached. If, on the other hand, it is money held in trust on behalf of the mortgagor, it can be distrained. The language of section 69 of the Transfer of Property Act which deals with the rights and liabilities of a mortgagee and the right of selling property under the deed of mortgage, is not very clear. After dealing with the way in which the sale has to be conducted, the section says:

"The money which is received by the mortgagee shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and secondly, in discharge of the mortgage money and costs or other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property."

It is open to argument, on the language I have quoted, that the trust relates only to the first two duties imposed upon the mortgagee and that the payment of the residue is not a trust binding on him. But the whole paragraph reads as one sentence and immediately after the second provision, comes a semi-colon in the same way as a semi-colon is inserted after the first provision, and it seems to me that the use of the expression "residue," is an indication that the balance bears the character of trust. If I may make a suggestion to the legislature, the third clause might run thus:—"and, thirdly, the residue of the trust money, if any, shall be paid, etc." The law both in India and in England has attached to the sale-proceeds in the hands of the mortgagee the character of trust money. In *Rajah Kishendatt Ram v. Rajah Muntaz Ali Khan*(1), their Lordships of the Judicial Committee held that a mortgagee clothed with the power of sale, held the surplus sale-proceeds in trust for the mortgagor; see observations at page 160. In *Haji Abdul*

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(1) (1879) 6 I.A., 145.

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Rahman v. Haji Noor Mahomed(1), the same view was taken. In Halsbury's Laws of England, volume 21, paragraph 460, the law is thus summarised :

"The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power of sale, a trustee of the surplus proceeds (if any) after satisfying his own charge, first, for the subsequent incumbrancers, and ultimately, for the mortgagor."

It is clear from this statement of law, that with respect to the amount remaining due to the mortgagor, the mortgagee is a trustee. The language of the Transfer of Property Act has been borrowed word for word from the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., cap. 41), section 21 (3), of the Act.

If on the language of the Conveyancing Act, it is held that the mortgagee is a trustee for the mortgagor as well, the same construction is applicable to section 69 of the Transfer of Property Act.

In *Hall v. Hall*(2), it was held that where the power of sale, whether express or statutory, provides that the surplus proceeds shall be held in trust for the mortgagor, the mortgagee becomes an express trustee of the surplus proceeds in his hands : see also *Banner v. Berridge*(3). Therefore, if my reading of section 69 of the Transfer of Property Act is correct, namely, that the first mortgagee under its provisions is clothed with the statutory responsibilities of a trustee, with reference to monies payable to the mortgagor, then he holds the surplus sale-proceeds as express trustee for the mortgagor.

Mr. Jagannatha Ayyar who appeared for the plaintiff (appellant) argued that although at its inception, the surplus sale-proceeds had the character of trust impressed on it, as the mortgagee retained for over a month the money in his hands and mixed it with other monies belonging to him, the character of trust money was lost. It was held that where a trustee mixes money vesting in him in trust with monies belonging to him in his private capacity, the trust will not suffer. JESSEL, M. R. says thus in *Re Hallett's Estate : Knatchbull v. Hallett*(4) :

(1) (1892) I.L.R., 16 Bom., 141 at p. 145.

(2) (1873) 8 Ch. App., 430.

(3) (1881) 15 Ch. D., 254.

(4) (1880) 13 Ch. D., 696.

"Supposing that trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag, could anybody suppose that a Judge in equity would find any difficulty in saying that the *cestui que trust* has a right to take 1,000 sovereigns out of that bag ? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it. It would make no difference if, instead of one sovereign, it was another 1,000 sovereigns ; but if instead of putting it into his bag, or after putting it into his bag, he carries the bag to his bankers, what then ?"

In *In re Oatway Hertslot v. Oatway*(1) this dictum was acted upon. In Perry on Trusts, volume 2 (sixth edition, section 828), it is stated that if the identity of the trust fund is lost, the *cestui que trust* will be in no better position than any other creditor. I find no express English decision on this question. However, in the present case, there is the finding of the learned City Civil Judge to this effect : "There is no reason also why money should be exempted when there is no dispute as to its identity," the implication being that the surplus proceeds were identifiable. The fact that this money was paid by the first mortgagee to the bailiff and deposited by him into Court shows that the sale-proceeds retained their identity and were traceable. I am therefore of opinion that this money retained its character of trust money at the time when the claim of the plaintiff was presented. The next question is whether this trust money can be the subject of distress. Mr. Jagannatha Ayyar on the strength of *Banbamdeo Prasad v. Tara Chand*(2), contended that notwithstanding the conversion of the immoveable property into money, the sale-proceeds still retained the character of immoveable property. It is enough to say, with reference to this contention, that what their Lordships of the Judicial Committee were considering in the case quoted, was the period of limitation applicable to a suit by a puisne incumbrancer. They held that he had twelve years under article 132 of the Limitation Act notwithstanding that his charge is only against the money and not against the immoveable property. I do not think this decision is any authority for the proposition that the surplus sale-proceeds remained immoveable property even after the sale of the property. On the other hand,

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(1) (1903) 2 Ch., 356.

(2) (1914) I.L.R., 41 Cal., 654.

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it is now well established, both with reference to the Indian Contract Act and the Limitation Act that the term "moveable property" includes money as well: see *Venkatachalam v. Narayan*(1) and *Madhusudan Sen v. Rakhal Chandra Das Basak*(2). This position receives support from section 60 of the Code of Civil Procedure which includes money among properties which can be attached. It was next suggested by the learned vakil for the appellant that there can be no distraint or sale of money and that consequently money should not be regarded as moveable property. I do not understand the provision in section 386 of the Code of Criminal Procedure as compelling the distrainer to bring the moveable property to sale. There may be cases in which the object can be gained by distress alone. There may also be cases in which the object can be obtained only by distress as well as by sale. Moreover, there is nothing incongruous in rupees or sovereigns which may be attached being brought to sale. They are of marketable value and can be the subject of sale. But apart from it, if there is tangible property which is capable of being physically seized, I fail to see how section 386 can be evaded by stating that as the distressed property is not ordinarily liable to be sold, there cannot be distraint. In Halsbury's Laws of England, volume 11, paragraph 246, it is stated that money under certain conditions can be the subject of distress: see also *Foa on Landlord and Tenant*, page 501. One other argument was advanced by Mr. Jagannatha Ayyar and that was that as the fine was not intended to go into the Government exchequer, it was not a Crown debt. There is a fallacy in this argument. The fine is realized not by the person to whom the compensation is made payable but by the Crown. It is the Crown that pays the compensation after realizing it from the accused. In this view, it is unnecessary to consider whether some of the observations in *The Secretary of State for India v. The Bombay Landing and Shipping Co.*(3) are not too widely expressed. In *Judah v. Secretary of State for India*(4), it was held that a judgment debt due for opium sales was a Crown debt.

The decision of Lord COLERIDGE, C.J. and POLLOCK, B., in *In re Heavens Smith*(5), is a very strong authority in favour of the

(1) (1916) I.L.R., 39 Mad., 376. (2) (1916) I.L.R., 43 Cal., 248.
(3) (1868) 5 Bom. H.C.R., 23 at p. 47. (4) (1886) I.L.R., 12 Cal., 445.
(5) (1876) L.R., 2 Ex. D., 47.

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respondent. A recognizance was executed in that case to the Crown for the costs of the respondent. It was argued that as the person intended to be benefited was the respondent, although the party realizing the money in the first instance may be the Crown, the debt was not a Crown debt. This contention was summarily rejected. This decision exactly covers the present case.

The learned City Civil Judge has quoted authorities for the position that a Crown debt takes precedence over ordinary contract debts. To the authorities cited by him *Bell v. The Municipal Commissioners for the City of Madras*(1) may be added where Justice BHASHYAM AYYANGAR has considered this question at some length.

For all these reasons, I am of opinion that the decision of the City Civil Judge is right and the appeal should be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

SUBBA NAICK (PLAINTIFF), APPELLANT,

v.

RAMA AYYAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Guardians and Wards Act (VIII of 1890), sec. 34—Order of appointment of guardian, conditional on giving security, when effective—Natural guardian's right to manage, pending appointment.

Where a guardian is appointed by a Court unconditionally, the order takes effect at once although under section 34 of the Guardians and Wards Act (VIII of 1890), he may be required to furnish security subsequently. But where the order is conditional upon the furnishing of security, it does not take effect until the security has been furnished. Such a conditional order does not therefore deprive the natural guardian of his or her power of management of the minor's estate till the condition is satisfied. Hence an enforcement of a negotiable

(1) (1902) I.L.R., 25 Mad., 457.
*Civil Revision Petition No. 981 of 1915

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6, 8 and 15.

SUBBA NAICK instrument belonging to the minor by the natural guardian before the condition is satisfied is not invalid.

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Defries v. Creed (1865) 34 L.J. (Ch.) 607, followed.

Semble: Rules 240 to 242 and Forms Nos. 92 and 93 of the Civil Rules of Practice which make the appointment of a guardian, take effect only on furnishing security, are not *ultra vires*.

The dictum of **SADASIVA AYYAR, J.**, to the contrary in *Gopamma v. Srinivasa Ayyangar* (1916) 30 M.L.J., 508, not followed.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887) praying the High Court to revise the decree of **T. SRINIVASA AYYANGAR**, the Temporary Subordinate Judge of Ramnad at Madura, in Small Cause Suit No. 332 of 1915.

The following facts are taken mainly from the judgment of the Lower Court:—

The suit is for the recovery of Rs. 210 on a promissory note executed in favour of the deceased father of a minor, **Dorai Rajah alias Gopalakrishnasami Naick**, by the first defendant endorsed over by the minor's mother in favour of plaintiff's endorser, who endorsed it to plaintiff.

The District Judge had appointed on 19th January, 1914, a guardian conditionally on his giving security and security was furnished on 26th September, 1914. The endorsement was made by the mother in May, 1914.

The pleas of the first defendant were that the minor's mother had no authority to endorse the plaint promissory note to plaintiff's endorser, as a guardian of the property of the minor had been appointed by the District Court under the Guardians and Wards Act long prior to the date of the endorsement by the minor's mother and that the said endorsement being null and void, could confer no title on the plaintiff's endorser or on the plaintiff.

Upholding the defendant's plea, the Subordinate Judge dismissed the suit. Hence this Revision Petition by the plaintiffs.

K. V. Krishnaswami Ayyar for the appellant.

P. S. Vaidyanatha Ayyar for the respondent.

The following judgment of the Court was delivered by

SESHAGIRI AYYAR, J.

SESHAGIRI AYYAR, J.—In this case the facts are that a promissory note belonging to a minor was endorsed over by his mother after it was decided in an application under the Guardians

and Wards Act that a third party should be appointed guardian of the said minor. In the proceedings above referred to, the District Judge of Ramnad, **Mr. Dutt**, held on the 19th of January, 1914 that the mother was not the proper guardian and that one **Srinivasa Ayyangar** should be appointed guardian of the minor's property. It seems clear that the statement in the body of the judgment that "I appoint **Srinivasa Ayyangar** accordingly," has been inserted incautiously. The subsequent proceedings place it beyond doubt that it was not the intention of the District Judge to make any appointment on the date of the order. **Srinivasa Ayyangar** was directed to furnish security. The successor of the District Judge passed proceedings on the 26th of September, 1914 accepting the security bond and issued an order of appointment to **Srinivasa Ayyangar**. The mother of the minor who undoubtedly was the natural guardian of her son, endorsed the promissory note in favour of the plaintiff in this case in May, 1914, that is, between the date of the order declaring that a stranger guardian should be appointed and the date on which the order entrusting the guardianship was actually issued to that stranger.

The question is whether the act of the mother is null and void. We are not concerned in this petition with the question whether the mother acted *bona fide* in endorsing the promissory note. We are only concerned with the bare legal question whether the endorsement was of no effect. Section 7, clause (2) of the Guardians and Wards Act, says that an order under clause (1) shall imply the removal of any guardian who had not been appointed by a will or other instrument, or appointed or declared by the Court. It was argued that the moment the District Judge held that the stranger should be appointed in the place of the mother, the latter was impliedly removed from her natural guardianship. It is clear that the new guardian would have had no power to manage the minor's properties until he had furnished the requisite security. The result of holding that the natural guardian was removed by the bare declaration of the Court that a new guardian should be appointed, would be to leave the minor's properties unprotected and uncared for during the interval. It was suggested that as the Court is charged with the welfare of the minor, it may be expected to administer the minor's estate during this period. But the Court would not

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SUBBA NAICK be recognizant of all the assets and effects of the minor and **RAMA AYYAR** would not be in a position to direct the institution of suits which are likely to become barred, unless there is some party who is in a position to supply the requisite information to the Court. Reliance was placed upon certain observations of **SADASIVA AYYAR, J.**, in *Gopammal v. Srinivasa Ayyangar*(1). The learned Judge points out that the rules framed by the High Court, namely, rules 240 to 242 and forms 92 and 93, are *ultra vires*. He says that the only provision for demanding security from the guardian is that contained in section 34 and that under that section, the security follows upon the appointment and does not precede it. With all respect, we do not think that section 34 compels us to hold that any rule which makes the appointment of a guardian to take effect only on furnishing security, would be *ultra vires*.

Section 7 gives an absolute discretion to the Court to appoint a guardian. The appointment may be absolute as in the case of persons well known and respected or it may be conditional as in the case of persons about whose solvency etc. the Court has no knowledge. Clause (a) of section 7 which speaks of a guardian being appointed, does not negative the suggestion that such an appointment may be made conditional upon the furnishing of security. Section 34 is a further provision which enables a Court to demand security even in the case of persons originally appointed unconditionally. It may be in the interests of the minor that there should be a prompt appointment of a guardian, and the Court may, after making the appointment to take effect at once, insist upon the guardian giving security. It is that class of cases that section 34 provides for. It does not take away the general power possessed by the Court of imposing conditions upon persons who are appointed guardians. The learned vakil for the respondent drew our attention to *Mungniram Marwari v. Gursahai Nand*(2). What was held in that case was that where there is an unconditional order of appointment, the fact that it is not issued to the appointee does not take away his rights of acting under that order. It is not an authority for the proposition that a conditional appointment is effective before the condition is satisfied.

(1) (1916) 30 M.L.J., 508.

(2) (1890) I.L.B., 17 Cal., 347 (P.O.).

There are certain observations in *Gopal Chunder Bose v. Subba Naick* ^{v.} *Gonesh Chunder Srimani*(1) which detached from the facts of **RAMA AYYAR** ^{v.} **SESHAGIRI AYYAR, J.** the case might lend some support to the contention of the counter-petitioner. But it is clear that what the learned Judge intended to lay down was that where an application was made before the ward attained the age of eighteen years and a guardian was appointed subsequently, the order took effect as if on the date of the application so as to prolong the period of minority to twenty-one years. The exact point which we are considering was not in the mind of the learned Judge in that case. The analogy of Order XL, rule 1, as to the appointment of receivers lends support to the view which is here stated. Mr. Justice **MOOKERJEE**, after a very elaborate examination of the case-law in India and in England, came to the conclusion in *Srinivasa Prosad Singh v. Kesho Prosad Singh*(2) that if a receiver is appointed without any direction as to security, the order takes effect at once and that he is validly in possession though no security has been given; but that if the appointment is conditional upon the furnishing of security the giving of security is a condition precedent, and that there would be no effective appointment till the security has been given. Applying that principle, we may say that where a guardian is appointed unconditionally, the order takes effect at once, although under section 34 of the Guardians and Wards Act, he may be required to furnish security subsequently. But where the order is conditional upon the furnishing of security, it does not take effect until the security has been furnished. That this is the view taken in England is clear from *Defries v. Creed*(3). In *Edwards v. Edwards*(4), Lord Justice **JAMES** says:—

“A receiver becomes such on giving security.”

In *In re Roundwood Colliery Company, Lee v. Roundwood Colliery Company*(5), Lord Justice **LINDLEY** says that the order of appointment would never be really effective until the security is furnished. That was followed in *Ridout v. Fowler*(6).

We see no difficulty in applying the analogy of these cases to a conditional order of appointment as guardian. In our opinion, therefore, the order appointing **Srinivasa Ayyangar**

(1) (1906) 4 C.L.J., 112.

(3) (1865) 34 L.J. (Ch.), 607.

(5) (1897) 1 Ch., 373 at p. 393.

(2) (1911) 14 C.L.J., 489.

(4) (1876) 2 Ch. D., 291 at p. 296.

(6) (1804) 1 Ch., 658 at p. 663.

SUBA NAICK became effective only in September, 1914 and as the promissory note was endorsed in May, 1914, it is not *prima facie* invalid.

The order of the Subordinate Judge dismissing the suit must be set aside, and he will restore the suit to file and dispose of it according to law. Costs up to date will be costs in the cause.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1916,
November.
13.

SOMASUNDARAM PILLAI (MINOR) AND ANOTHER (PETITIONERS—
DEFENDANTS NOS. 3 AND 4), APPELLANTS,

v.

CHOKKALINGAM PILLAI (RESPONDENT, ASSIGNEE DECREE-
HOLDER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), ss. 144 and 11, expl. IV, and 47, O. II, r. 2—Restitution, applications for—Execution applications—Successive applications—Res judicata—Rule of constructive res judicata, applicability of—Previous application for principal—Subsequent application for interest, whether barred.

Where a judgment-debtor who had applied for and obtained restitution of a sum of money recovered from him in execution of a decree which was subsequently reversed on appeal, filed a subsequent application for recovery of interest on the amount for the period during which the decree-holder had the use of the money:

Held, that the subsequent application was not barred by the rule of constructive *res judicata* under section 11, explanation IV, or by Order II, rule 2 of the Civil Procedure Code.

Unless the decision of the question subsequently raised was either expressly given or must be deemed to have been necessarily implied in the previous decision, the principle of *res judicata* should not be applied to execution proceedings.

Lakshminarayana v. Pallamaraju (1916) 4 M.L.W., 101, referred to.

Balasubramaniam Chetty v. Swarnammal (1915) I.L.R., 38 Mad., 199, followed.

An application for restitution is an application in execution under the new Code of Civil Procedure (Act V of 1908) as under the old Code (Act XIV of 1882).

Prag Narain v. Kamakhia Singh (1909) I.L.R., 31 All., 551 (P.C.), referred to.

* Appeal Against Order No. 354 of 1915.

APPEAL against the order of P. S. SESA AYYAR, the Subordinate Judge of Mayavaram, in Execution Petition No. 98 of 1915 in Original Suit No. 66 of 1905 on the file of Rao Bahadur C. KRISHNASWAMI RAO, the Subordinate Judge of Kumbakonam.

The decree-holder in this case applied in execution to recover a sum of money awarded to him for costs under the decree personally from the present appellants' father who was a co-judgment-debtors along with others. The application was granted and the amount was realized by the decree-holder. Subsequently the order granting execution against the appellants' father, was set aside on appeal to the High Court; the appellants applied for restitution of the amount realized from him but did not include in that application any claim for interest or damages in respect of the amount realized from him. An order was passed in favour of the appellants who recovered the amount specified in the application. The appellants subsequently filed the present application to recover a sum of money by way of interest on the amount realized from him for the period during which the decree-holder had the use of it. The decree-holder contended that the present application was barred by the rule of *res judicata* and by the provisions of Order II, rule 2, of the Civil Procedure Code (Act V of 1908). The Lower Court upheld the contention of the decree-holder and dismissed the application. The appellant preferred an appeal to the High Court.

K. Ramachandra Ayyar and *S. Panchapagesa Sastriar* for the appellants.

S. Muthiah Mudaliyar for the respondent.

The following JUDGMENT of the Court was delivered by SESHAGIRI AYYAR, J.—We are unable to agree with the Subordinate Judge that the application is barred as *res judicata*. The previous application was for the restitution of a sum of money recovered in execution in consequence of the decree having been reversed on appeal. The present application is for interest on the money for the period during which the counter-petitioner had the use of it.

We do not think that the principle of constructive *res judicata*, whether section 11, explanation IV, or Order II, rule 2 of the Code of Civil Procedure, is invoked in its aid, should be applied to execution proceedings as a matter of course. As

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we said recently in *Sundaram Chetti v. Varadaiyyar*(1) unless the decision of the question subsequently sought to be agitated, was either expressly given or must be deemed to have been necessarily implied in the previous decision, the principle of *res judicata* should not be applied to execution proceedings: see *Lakshminarayana v. Pallamraju*(2).

Mr. Muthiah Mudaliyar contended that an application for restitution is not in execution. He pointed to the change of language between section 583 of the previous Code of Civil Procedure and section 144 of the present Code. We are unable to see the difference. Section 144 of the present Code has been so framed as to enable the successful party in the Appellate Court to be placed in *statu quo ante*. The language of section 583 of the old Code was not wide enough to cover all cases of benefits arising from the reversal of a decree being fully realized by the successful party. Apart from this change, we see no ground for holding that the legislature intended to make any departure in the procedure by which restitution is to be obtained. Under the old Code, restitution was by way of execution: see *Prag Narain v. Kamakhia Singh*(3). The same rule applies to similar applications under the new Code. The language of section 47 of the Code would cover all cases of restitution. The party seeking the aid of the Court is agitating a question relating to the execution of the decree under which the other party deprived him of his property.

We entirely agree with the decision in *Balasubramania Chetty v. Swarnammal*(4), that Order II, rule 2 of the present Code of Civil Procedure does not govern restitution applications. The present application is really for damages for the appellant having been deprived of the use of his money during a particular period. We must, therefore, reverse the order of the Subordinate Judge. We think the appellant is only entitled to 6 per cent interest on Rs. 1,881-1-3 from the 8th of September, 1911 to the 28th of October, 1914. Parties will pay and receive proportionate costs in this and in the Court below.

K.B.

(1) Appeal Against Appellate Order No. 57 of 1916.

(2) (1916) 4 M.L.W., 101. (3) (1909) I.L.R., 31 All., 551 (P.C.)

(4) (1915) I.L.R., 38 Mad., 199.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice
Abdur Rahim and Mr. Justice Srinivasa Ayyangar.

A. S. RODERIGUES (RESPONDENT), APPELLANT,

v.

N. P. R. M. P. R. M. RAMASWAMI CHETTIAR AND THE OFFICIAL
RECEIVER OF TINNEVELLY (PETITIONER AND PARTY RESPONDENT
ADDED IN THE HIGH COURT), RESPONDENTS.*

*Provincial Insolvency Act (III of 1907), sec. 37—Surety for debt of insolvent
whether "creditor."*

A person who stands surety for the payment of a debt by the insolvent is a creditor within the meaning of that expression in section 37 of the Provincial Insolvency Act (III of 1907).

Nalam Viswanatham v. Official Assignee of Madras (1916) 32 I.C., 795, overruled.

APPEAL against the order of A. EDGINGTON, the District Judge of Tinnevely, in Insolvency Application No. 313 of 1915 in Insolvency Petition No. 3 of 1914.

The Official Receiver of Tinnevely was added as a party respondent by order of the High Court, dated 12th October 1916.

The facts material to the decision of this appeal are stated in the first paragraph of the ORDER OF REFERENCE.

M. D. Devadoss for the appellant.

T. M. Ramaswami Ayyar for the first respondent.

S. Ramaswami Ayyar for the second respondent.

This appeal coming on for hearing in the first instance before AYLING and SESHAGIRI AYYAR, JJ., the following ORDER OF REFERENCE to the Full Bench was delivered by

SESHAGIRI AYYAR, J.—Narayana Aiyangar, the insolvent was indebted to one Moideen Sahib. The appellant before us, Roderiques, stood surety for the payment of the debt. Narayana Aiyangar became heavily indebted after the date fixed for the payment of the debt. Thereupon Moideen sent a notice to Roderiques demanding payment. Roderiques in his turn applied to Narayana Aiyangar who executed a sale of the crops standing

1916,
November,
22 and 23,
December,
1 and 6.

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* Civil Miscellaneous Appeal No. 370 of 1915.

RODERIQUES on his land on the 24th of January 1914; a creditor petitioned the District Court to declare Narayana Aiyangar an insolvent, seven days after the sale. An application was made by the same creditor under section 37 of Act III of 1907 to set aside the sale of the crops as amounting to undue preference. The learned District Judge in a careful judgment has granted the prayer. Hence this appeal.

The main question argued before us by Mr. Devadoss was that the sale to Roderiques, who was only a surety, not being a conveyance to a creditor, section 37 has no application. Two other contentions were also raised: (a) that there was pressure upon Narayana Aiyangar and that consequently there was no voluntary preference and (b) that the District Court was not competent upon a creditor's application to set aside a sale. We shall first dispose of the two latter contentions before dealing with the main question.

On the question of pressure, the facts found are that the insolvent and Roderiques were neighbours and friends, that Roderiques was aware of the involved circumstances of the insolvent, that the sale-deed was taken on trust without even looking at the property conveyed and that there was no pressure brought to bear upon the insolvent to execute the sale-deed. On these facts, the District Judge was right in holding that the conveyance was clearly within the mischief of section 37. We entirely agree with him. We do not think it necessary to refer to the authorities quoted by the learned counsel on this point.

On the question of the right of a creditor to apply, we have the authority of *Khushhali Ram v. Bholar Mal*(1). The decision in *Venkatakrishnama Chetti v. Lakshmi Narasimham*(2) is also in favour of the position that a creditor can apply. It was said that the insolvent may be harassed by a number of applications, if one creditor is permitted to exercise such a right. The obvious answer to that is that it would be open to the insolvent to move the Court to bring the Receiver on the record on a creditor's application. We think it right to point out that Courts should ordinarily hear such applications only after giving notice to the Official Receiver, as that would safeguard the interests of the insolvent and of the general body of the creditors. No objection

(1) (1915) I.L.R., 37 All., 252.

(2) (1912) M.W.N., 1001.

on the score of the incapacity of the creditors to apply was raised before the District Judge. We see no ground, as at present advised, for entertaining the objection at this stage.

Upon the principal question, there is the direct authority of this Court in *Nalam Viswanatham v. Official Assignee of Madras*(1). The arguments addressed to us in this case however incline us to think that that decision should be reconsidered. The circumstances which have induced us to take a different view from the learned Judges who decided that case, may be briefly summarised thus:

(1) There is direct authority in England and in this country for the proposition that a surety is a creditor: *In re Paine, Ex parte Read*(2), *In re Blackpool Motor Car Company, Limited: Hamilton v. Blackpool Motor Car Company, Limited*(3) and *R. D. Sethna v. Kallianji*(4).

(2) The first two pronouncements are by Judges of great authority on the question at issue. The opinion of VAUGHAN WILLIAMS, J., as he then was, and of Lord Justice BUCKLEY should not be lightly departed from on questions affecting the Bankruptcy law.

(3) The authorities relied on for the contrary proposition are to be gathered only from certain *obiter dicta* of the Judges. In *In re Mills; Ex parte The Official Receiver*(5), the real question was, whether there could be fraudulent preference where the conveyance was made to a creditor, not for his own benefit, but with a view to secure the claims of the surety. In the course of the judgment, Lord ESHER and the other Lords Justices say that the surety was not a creditor. This statement was not necessary for the decision in the case. Whether the person intended to be benefited was a surety or an utter stranger would not have affected the decision in the case. The same remarks apply to *In re The Stenotyper, Limited: Hastings Brothers v. The Stenotyper, Limited*(6) and to *In re Warren Ex parte Trustees*(7).

(4) There are pronouncements by other judges which though not under the Bankruptcy law have a direct bearing on the question whether a surety is a creditor: *per SWINFEN EADY, J.*,

(1) (1916) 32 I.C., 795.

(2) (1897) 1 Q.B., 122.

(3) (1901) 1 Ch., 77.

(4) (1913) 15 Bom. L.R., 113.

(5) (1888) 5 Morrell, 55.

(6) (1901) 1 Ch., 250.

(7) (1900) 2 Q.B., 138.

RODERIGUES v. RAMASWAMI CHETTIAR. SESHAGIRI AYYAR, J. in *Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd.*(1) and Lord HALSBURY in *Sharp v. Jackson*(2). The first of these cases was under the Company's Act and the question was whether when a company goes into liquidation, a surety can prove his claim as a creditor.

(5) Text writers have almost unanimously held that a surety is a creditor: Halsbury's Laws of England, volume 2, page 231; May on Fraudulent Conveyances, page 36; Williams on Bankruptcy, page 301 and Wace on Bankruptcy, page 251.

(6) Sections 23 and 29 of Act III of 1907 distinctly lay down that a person to whom a debt is due on a contingency is a creditor. We fail to see why that principle should not be applied to the interpretation of the term "creditor" in section 37.

(7) Section 44 of the English Bankruptcy Act was amended in 1913 so as to specifically bring in a guarantor and a surety. Lord Justice VAUGHAN WILLIAMS in his book on Bankruptcy points out that the section has been so amended to remove the doubts which may be entertained consequent on the *obiter dicta* of Lord ESHER and the other judges in the cases already referred to.

These considerations and the weight and prestige attaching to a statement of law on this subject by Lord Justice VAUGHAN WILLIAMS have induced us to refer the consideration of the question decided in *Nalam Viswanatham v. Official Assignee of Madras*(3) to a Full Bench. The principle to be borne in mind is that the Insolvency law aims at securing equal rights to all persons who have been induced to come to the rescue of an insolvent and who have subsequently been affected by the application to declare him an insolvent. If a surety can prove his claim after bankruptcy, it is difficult to hold that he is not a creditor. Under the Indian Contract Act the liability of a surety is co-extensive with that of the principal debtor (section 128). His liability arises the moment that the right of the creditor to sue accrues: and at the same moment his right to be indemnified by the principal debtor also accrues. The liability is always existing, though it may not be enforced at once.

(1) (1909) 2 Ch., 401.

(2) (1899) A.C., 419.

(3) (1916) 32 I.C., 795.

Under these circumstances it seems to us that the better view would be to hold with VAUGHAN WILLIAMS, L.J., and BUCKLEY, L.J., that the surety is a creditor.

Having regard to the different view taken by SADASIVA AYYAR and NAPIER, JJ. in *Nalam Viswanatham v. Official Assignee of Madras*(1) and having regard also to the fact that the question is one of considerable importance we have resolved to refer the following question for the opinion of the Full Bench:—

"Whether a person who stood surety for the payment of a debt by the insolvent is a creditor within the meaning of that expression in section 37 of the Provincial Insolvency Act?"

On this Reference—

M. D. Devadoss for the appellants.

A. Krishnaswami Ayyar and T. M. Ramaswami Ayyar for the first respondent.

S. Ramaswami Ayyar for the second respondent.

M. D. Devadoss for the appellant.—The dominant motive must be to give some advantage to the creditor. If it be to benefit the debtor or a surety there will be no fraudulent preference. A surety is not a creditor. Section 37 of the Provincial Insolvency Act corresponds to section 48 of the Bankruptcy Act of 1883. The Act of 1883 was amended by section 27 of the Act of 1913 (3 & 4 Geo. V, cap. 34) when the words "or any surety or guarantor for the debt due to such creditor" were introduced into section 48. *Nalam Viswanatham v. Official Assignee*(1) is in my favour. The English decisions in order of time are *In re Mills*; *Ex parte The Official Receiver*(2), *Re Paine*; *Ex parte Reud*(3), *Sharp v. Jackson*(4), *Re Warren*(5), *Re Blackpool*(6) and *In re The Stenotyper, Limited: Hastings Brothers v. The Stenotyper, Limited*(7). Of these, *In re Mills*; *Ex parte The Official Receiver*(2), *Sharp v. Jackson*(4) and *Re Warren*(5) are in my favour.

R. D. Sethna v. Kallianji(8) is against me.

[WALLIS, C.J.—Cannot the surety prove in bankruptcy?]

(1) (1916) 32 I.C., 795.

(2) (1888) 5 Morrell, 55.

(3) (1897) 1 Q.B., 122.

(4) (1899) A.C., 419.

(5) (1900) 2 Q.B., 138.

(6) (1901) 1 Ch., 177

(7) (1901) 1 Ch., 250 and 255.

(8) (1913) 15 Bom. L.R., 113.

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The surety can prove for the debt he guarantees under section 28 of the Provincial Insolvency Act which corresponds to section 37 of the Bankruptcy Act of 1883. His right to prove is limited. If the creditor proves, he cannot prove. He can only hold his proof in suspense and has no remedy till called upon to pay. The question is whether the surety was a creditor at the time when the payment was made to him by the insolvent. "Creditor" is used in the Bankruptcy Act as one who can enforce his rights under the Act. It would be the same under the Provincial Insolvency Act. A surety is not a creditor for the purpose of petitioning. Sections 6 and 48 of the Bankruptcy Act of 1883 and section 44 of the consolidating Act of 1914 were referred to. Reference was also made to Robson on Bankruptcy, page 207 and Halsbury's Laws of England, volume 2, page 281.

A. Krishnaswami Ayyar with T. M. Ramaswami Ayyar for the respondent, referred to sections 24 and 28 of the Provincial Insolvency Act and contended that every person who proves under section 28, is a creditor.

He was stopped by the Court.

S. Ramaswami Ayyar for the second respondent was not called on.

WALLIS, C.J.,
ABDUR
RAHIM
AND
SRINIVASA
ATTANGAR
JJ.

OPINION.—This question has been decided in England under the corresponding section 48 of the Bankruptcy Act of 1883 in 1897 by VAUGHAN WILLIAMS, J., in *In re Paine : Ex parte Read*(1) and in 1900 by BUCKLEY, J. (now Lord WRENBURY, in *In re Blackpool Motor Car Company, Limited : Hamilton v. Blackpool Motor Car Company, Limited*(2). In the latter case, the learned Judge after considering all the authorities including the dicta in *In re Mills ; Ex parte The Official Receiver*(3), held following the earlier decision, that a surety being entitled to prove in bankruptcy, must be considered a creditor for the purposes of fraudulent preference, under section 48 of the Act of 1883. That decision has not since been questioned in England and may we think be accepted as settled law. This was apparently the view taken when the new consolidated Bankruptcy Act of 1914 was passed. The defect disclosed in section 48 of the Act of 1883 by the

(1) (1897) 1 Q.B., 122.

(2) (1899) A.C., 419.

(3) (1888) 5 Morrell, 55.

decisions in *In re Mills ; Ex parte The Official Receiver*(1), *In re Warren : Ex parte Trustees*(2) and *In re The Stenotyper, Limited, Hastings Brothers v. The Stenotyper, Limited*(3), was then remedied by amending the section renumbered 44 so as to include expressly payments made to a creditor with a view to prefer his surety. A similar amendment would no doubt have been made to meet the case of payments to the surety himself with this view, if it had not been considered that they were already within the section as construed in these two cases. Such payments are even more objectionable than payments to the creditor as they do not directly reduce the indebtedness of the estate.

We accordingly answer the question in the affirmative.

C.S.S.

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APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Napier.

Re NADDI CHENGADU (ACCUSED).*

1917,
March, 12.

Criminal Procedure Code (Act V of 1898), sec. 565—Notification as to residence or change of residence—Temporary absence for a night not notified—Whether an offence under Indian Penal Code (Act XLV of 1860), sec. 176.

Where all that was proved was that the accused who had been ordered to notify his residence and change of residence under section 565, Criminal Procedure Code (Act V of 1898), was absent from his house for a single night without notifying his absence,

Held, that such temporary absence did not amount to a change of residence and that the accused was not guilty of an offence under section 176, Indian Penal Code (Act XLV of 1860).

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure (Act V of 1898) by H. L. BRAIDWOOD, the District Magistrate of Chittoor, in his letter, dated 17th January, 1917 (Calendar Case No. 277 of 1916 on the file of the Second-class Magistrate of Puttur).

(1) (1889) 5 Morrell, 55

(2) (1900) 2 Q.B., 138.

(3) (1901) 1 Ch., 250.

* Criminal Revision Case No. 62 of 1917 (Referral Case No. 5 of 1917).

Re
CHENGADU.
AYLING AND
NAPIER, JJ.

The accused was not represented.

E. R. Osborne, the Public Prosecutor, on behalf of the Crown.

ORDER.—We agree with the District Magistrate that the conviction in this case is bad and must be set aside. A person against whom an order is passed under section 565 of the Criminal Procedure Code, is merely bound to notify his residence or change of residence after release. As long as he retains his residence in the same place, his temporary absence from home for a day or two does not require notification. Whether he retains his residence must always be a question of fact but provided a man leaves his family and house-hold effects in the house in which he was residing, he would ordinarily be considered to retain his residence there.

In the present case, all that is proved is that accused was absent from what was treated by the Police as his notified residence for a single night. There is nothing to indicate that the residence itself was changed.

We set aside the conviction and sentence and direct that the fine, if paid, be refunded.

G.S.S.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Napier.

SANTHAPPA SETHURAN AND ELEVEN OTHERS
(ACCUSED), PETITIONERS,

1916,
December, 19.

v.

GOVINDASWAMY KANDIYAR (COMPLAINANT), RESPONDENT. *

Criminal Procedure Code (Act V of 1898), sec. 528—Transfer of case—Power of District Magistrate, where Sub divisional Magistrate has previously refused to transfer on application by same party.

A District Magistrate is not precluded from exercising his power of transfer of a case under section 528 of the Criminal Procedure Code, on the application of a party, by reason of the fact that the Subdivisional Magistrate had previously refused to transfer the case at the request of the same party.

Thaman Chetti v. Alagiri Chetti (1891) I.L.R., 14 Mad., 399, followed.

Raghunatha Pandaram v. King-Emperor (1903) I.L.R., 28 Mad., 140, dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the order (D. Dis. No. 862/M. of 1916, dated 21st October 1916) of R. NARAYANA AYYAR, the Additional District Magistrate of Tanjore, transferring Calendar Cases Nos. 206, 208 and 210 of 1916, from the file of the Sub-Magistrate of Valangiman to that of the Sub-Magistrate of Papanasam.

The facts appear from the judgment.

V. Viswanatha Sastriyar for the petitioner.

Dr. S. Swaminathan for the respondent.

P. R. Narayanaswami Ayyar for *E. R. Osborne*, the Acting Public Prosecutor, for the Crown.

ORDER.—In this case, we are asked to revise an order of the Additional District Magistrate of Tanjore transferring three criminal cases at the request of a party from the file of the Second-class Magistrate of Valangiman to that of the Stationary Second-class Magistrate of Papanasam under section 528 of the Code of Criminal Procedure.

AYLING AND
NAPIER, JJ.

* Criminal Revision Case No. 847 of 1916 (Criminal Revision Petition No. 690 of 1916).

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The main ground put forward is that the Subdivisional Magistrate having previously refused to transfer the cases at the request of the same party, the District Magistrate was precluded from exercising his power of transfer. Petitioners' vakil admits that it would have been open to the District Magistrate to make the transfer on his own initiative, irrespective of any previous order of the Subdivisional Magistrate.

We can find nothing in section 528 of Criminal Procedure Code supporting petitioners' contention: and the judgment of a Bench of this Court in *Thaman Chetti v. Alagiri Chetti*(1) is distinct authority against him. Petitioners rely on the decision of BHASHYAM AYYANGAR, J., in *Raghunatha Pandaram v. King-Emperor*(2) which has been followed in a recent unreported case — *Narayanaswamy Ayyar v. Kuppuswamy Ayyar*(3). So far as appears the decision in *Thaman Chetti v. Alagiri Chetti*(1) was not brought to the notice of the learned Judge in *Raghunatha Pandaram v. King-Emperor*(2): and with great deference we are unable to agree in the view taken by him. The distinction in this respect between orders passed by the District Magistrate *suo motu* and orders passed on petitions by parties appears to us to be without foundation.

No other valid reason is shown for our interference: and we dismiss the petition.

K R.

(1) (1891) I.L.R., 14 Mad., 399. (2) (1905) I.L.R., 28 Mad., 140.
(3) Criminal Revision Case No. 487 of 1916.

PRIVY COUNCIL.*

BALAKRISHNA UDAYAR (PETITIONER),

v.

VASUDEVA AYYAR (RESPONDENT).

1917,
April, 26
and
May 21.

[On appeal from the High Court of Judicature at Madras.]

Religious Endowments Act (XX of 1863), sec. 10—Vacancy in Temple Committee—Jurisdiction of District Judge—Civil Procedure Code (Act V of 1908), sec. 115—Power of revision by the High Court—Duty of remaining members of the Committee—Failure to perform duty—Election held after expiration of the statutory time.

The High Court has jurisdiction under section 115 of the Civil Procedure Code, 1908, to revise an order of the District Judge made under section 10 of the Religious Endowments Act XX of 1863 on the occurrence of a vacancy in a Temple Committee declaring that an election by the remaining members of the Committee to fill up the vacancy was regularly held, and that the appointment of the person was valid.

No appeal lay under the Civil Procedure Code from such an order. In making the order the District Court was acting in a judicial capacity as a Court of law, and not merely in an administrative capacity.

The matter in which the order of the District Court was made was a "case" within the meaning of section 115 of the Civil Procedure Code, 1908. A "case" includes an *ex parte* application such as that made in this matter.

Minakshi Naidu v. Subramanya Sastri (1888) I.L.R., 11 Mad., 26; s.c. I.L.R., 14 I.A., 160, distinguished.

On the true construction of section 10 of Act XX of 1863 the power of the remaining members of the Committee to fill up the vacancy must be exercised within three months from the date of the occurrence of the vacancy. The District Court had no jurisdiction after the expiration of the three months to direct the remaining members of the Committee to fill up the vacancy by election, or to make an order purporting to validate the appointment of the person elected. If the Committee do not perform their duty by holding an election within three months to fill up the vacancy, a subsequent election by the remaining members after the expiration of three months is invalid: and this is so notwithstanding that such a construction would enable the remaining members of the Committee by their own default, to practically disfranchise the electors, and at the discretion of the Court possibly to procure the patronage for themselves. The only remedy for that is to alter the law, if wrong, by legislation. The Board can only declare the law.

APPEAL No. 39 of 1916 from a judgment and order (23rd September, 1913) of the High Court at Madras, which set aside an order (19th July, 1913) of the District Judge of Tanjore which

* *Present*:—Viscount HALDANE, Lord ATKINSON, Sir JOHN EDER, and Mr. AMEEB ALI.

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he purported to appoint the appellant a life-member of the Devasthanam (Temple) Committee of Negapatam.

The present appellant claimed to be a member of the Temple Committee constituted under the Bengal and Madras Religious Endowments Act (XX of 1863). His claim was negatived by the High Court on the ground that he had not been elected or appointed a member of the Temple Committee in the manner required by law.

The main question for determination on this appeal was whether or not the appellant had been properly elected or appointed on a vacancy occurring in the Temple Committee. Another question was whether this appeal was competent being not from a final order of the High Court, but from an order remanding the case for disposal in accordance with law.

The provision for filling vacancies in the Committee is section 10 of the Act of 1863, which is as follows:—

Section 10. "Whenever any vacancy shall occur among the members of a Committee appointed as above a new member shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the Committee shall as soon as possible give public notice of such vacancy and shall fix a day which shall not be later than three months from the date of such vacancy for an election of a new member by the persons interested as above provided under rules for elections which shall be framed by the local Government, and whoever shall be then elected under the said rules shall be a member of the Committee to fill such vacancy. If any vacancy aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court on the application of any person whatever may appoint a person to fill the vacancy or order that the vacancy be forthwith filled up by the remaining members of the Committee, with which order it shall then be the duty of such remaining members to comply, and if this order is not complied with the Civil Court may appoint a member to fill the said vacancy."

The facts of the case are sufficiently stated in the judgment of their Lordships of the Judicial Committee and the case on appeal to the High Court (SIR CHARLES ARNOLD WHITE, C.J., and OLDFIELD, J.) will be found in *Vasudeva Aiyar v. The Negapatam Devasthanam Committee*(1).

(1) (1915) I.L.R., 33 Mad., 594.

The District Judge held that appellant had been properly elected, and that order was set aside by the High Court.

On this appeal—

De Gruyther, K.C., and *Sproule* for the appellant contended that the High Court had no jurisdiction to bring the decision of the District Judge up on revision under section 115 of the Civil Procedure Code, 1908, which had no application to proceedings in a matter dealt with by section 10 of Act XX of 1863. The matter in which the order of 19th July, 1913 was made was not a "case" within the meaning of section 115 of the Code: a "case" meant a suit or proceedings in a suit *Subbaya v. Aday Naidu*(1). The making of the order by the District Judge was not a judicial act, but merely an act administrative or ministerial: *Minakshi Naidu v. Subramanya Sastri*(2). No appeal lay from his decision. When a vacancy on the Committee occurs, Act XX of 1863 makes it a duty on the remaining members to hold an election within three months from the occurrence of the vacancy and enacts that if they fail to discharge that duty, the jurisdiction of the Court in the first instance was limited to either itself appointing a person to fill the vacancy, or to make an order in the nature of a mandamus to compel performance of the duty, section 10 of the Act should not be construed so as to give the right of appointment to the Committee as a result of their own default in holding an election. The appellant's appointment, it was submitted, was validly made.

A. M. Dunne and *H. N. Sen* for the respondent were not called upon.

LORD ATKINSON.—This is an appeal from a judgment and order of the High Court of Madras, dated the 23rd September, 1913, setting aside an order of the District Judge of Tanjore, dated the 19th July, 1913, by which the appellant was appointed a life-member of the Devasthanam (Temple) Committee of Negapatam. This order of the District Judge purports to have been made, in the events which had happened, in exercise of the powers conferred upon him by section 10 of Act XX of 1863, the Bengal and Madras Native Religious Endowments Act.

That section runs as follows:—

"Whenever any vacancy shall occur among the members of a Committee appointed as above, a new member shall be elected to

(1) (1914) 20 Mad., L.J. 671.

(2) (1888) I.L.R., 11 Mad., 26; s.c., L.R., 14 I.A., 160.

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

By the second section the words "Civil Court" and "Court" are defined to mean

"The Principal Court of Original Civil Jurisdiction in the district in which the mosque, temple or religious establishment is situate relating to which or to the endowment whereof any suit shall be instituted or application made under the provisions of this Act."

It would appear that, if the endowments of the temple be situate in districts other than that in which the temple or religious establishment is itself situated, different Courts may in relation to it and its affairs be Civil Courts within the meaning of this definition. Moreover, it is to the Civil Court, and not to an individual Judge who may preside in or constitute the Civil Court, that jurisdiction is given.

A vacancy occurred in the above-mentioned Committee by the death on the 3rd May, 1912 of the Hon. Diwan Bahadur R. Raghunatha Rao, c.s.i. The Committee did not hold any election of a member to fill this vacancy. On the contrary, they on the 20th June, 1912 directed their managing member to request the then District Judge of Tanjore, Mr. A. F. G. MOSCARDI, to nominate, in exercise of the powers conferred upon him by the above-mentioned section, a person to serve upon the Committee. That request was duly made by the managing member by letter addressed to the District Judge on the 16th July, following.

The District Judge, having considered this letter, made an order on the 1st October, 1912, requesting the managing member to report,

"if there was any reason why the Court should not order that the vacancy should be filled up by election, as provided in section 10 of the Act."

It is clear from this letter that the District Judge considered he had under the statute jurisdiction to order the Committee to hold an election of a member in order to fill the vacancy; and though an order which he subsequently made upon the 6th January, 1913, is very guarded in its terms it has been assumed that he meant to exercise this jurisdiction.

On the 21st October, 1912, the managing member replied to the District Judge's communication of the 1st October, 1912, forwarding a copy of a resolution passed by the Committee in the previous June to the effect that they would not hold an election, and renewing the request to the Judge to nominate a member. On the 2nd January, 1913, the present respondent, in the character of a person interested, filed a petition in the District Court praying the Court to fill up the vacancy in the Committee by nomination, on the ground that the list of voters was stale and that delay would occur in preparing a new list. The same District Judge, Mr. MOSCARDI, made on this petition the order already referred to of the 6th January, 1913. On the face of the order it is set forth that it was argued—

"that the intention of the legislature in section 10 of the Act was clearly that such vacancies should be filled by the Committee by election, and only in the last resort by the Court."

It is also pointed out that—

"the Committee had a voters' list drawn up so recently as 1909, that there was no reason why an election should not be held in this case . . . and no . . . reason was urged why the provisions of section 10 of the Act should not govern this case."

The last paragraph of the Order runs thus:—

"It is clear to me that it is the duty of the Committee to fill up the vacancy by election, and that there is no obstacle preventing them from doing so. I therefore order that the vacancy be forthwith filled up by the remaining members of the Committee. Time, three months."

It will be observed that it is not stated explicitly in this order by what process the Committee are to fill up the vacancy,

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whether by election or by nomination or co-option. The members of the Committee, however, owing possibly to the matters already referred to set forth on the face of the order, came to the conclusion that by it they were directed to hold an election which, on the 24th March, 1913, they accordingly did. The appellant was the only candidate; 1,745 votes were recorded for him. The Committee thereupon declared him duly elected, and reported the result to the District Court.

About this time a new Judge, Mr. C. G. SPENCER, was appointed to the District Court of Tanjore, and during the months of April and June certain applications were made to him with which it is quite unnecessary to deal.

Four petitions were then presented to the District Court, one bearing date the 23rd June, 1913 by the present appellant, praying that it might be declared that his election was valid, and that he might be permitted to perform his duties; one of the same date by the present respondent alleging that the election was void, and praying that the Court might, by its own nomination, fill the vacancy; and two bearing the respective dates of the 17th May, 1913 and 18th July, 1913 by one Dakshinamoorthi Pillai, praying that the election might be declared void for several reasons, including amongst others the alleged defective nature of the voters' lists.

On the 19th July, 1913, the District Judge, Mr. C. G. SPENCER, dealt by one order of that date with the matters of these four petitions, and decided that the election of the present appellant was regular, and accepted him as a member of the Committee, on the ground that upon the true construction of the 10th section of the aforesaid Act of 1863, the words, "or may order that the vacancy be forthwith filled up by the remaining members of the Committee," must be taken to mean by implication "filled up by the members of the Committee by election," since that is the mode prescribed in the earlier portion of the section for filling up a vacancy by them. It will be observed that this order is based upon the assumption that the earlier order of Mr. A. F. G. MOSCARDI of the 6th January, 1913 was in effect an order directing the Committee to fill up the vacancy by holding an election, and that it was understood and acted upon by them as such.

The present respondent upon the 6th August, 1913 presented a petition to the High Court asking for a revision of this order under the 115th section of the Code of Civil Procedure, to which he made the present appellant and the Temple Committee respondents. On the application coming on for hearing, a preliminary objection was raised that a petition for revision of the adjudication of the District Court did not on the legal construction of the statute in such a matter as that dealt with in section 10 of the Act of 1863 lie.

The High Court held that this objection failed, and proceeded to deal with the merits of the application. In reference to them they held that, according to the true construction of the 10th section, the District Court had no jurisdiction whatever to order the remaining members of the Committee (as it was taken it had ordered them) to fill up the vacancy by means of an election, or to validate the filling up of it by these means in obedience to such an order, and ordered that the order of the District Judge, Mr. SPENCER, dated the 19th July, 1913, should be set aside, as made without jurisdiction, and that the case should be sent back to be dealt with by the District Court by the light of this judgment.

On the hearing of this appeal both these points have been raised and argued. In their Lordships' view the decision of the High Court was on both points right, and they fully concur in and approve of it.

As to the preliminary objection. The 115th section of the Civil Procedure Code enables the High Court, in a case in which no appeal lies, to call for the record of any case if the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, or to have exercised its jurisdiction illegally or with material irregularity and further enables it to pass such an order in the case as the Court may think fit.

It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. And if the appellant's contention be correct, then if the Civil Court should absolutely and whimsically decline

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to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie.

The act of the District Court complained of in the present case was an adjudication by it that the present appellant having been elected in pursuance of an order of the Court was a member of the Committee. The words of the statute are:

“And whoever shall be then elected and the said rules shall be a member of the Committee to fill such vacancy.”

If the election be valid and regular, the person elected becomes a member of the Committee without any consent or approval being given by the District Court. It is contended, however, that the making of this order, necessarily involving, as it does, the construction of the statute—a pure matter of law—is not a judicial, but merely an administrative or ministerial act. A key, it would appear to their Lordships, as to the true position of the Civil Court under this 10th section may be found by referring to the position it occupies under the immediately preceding and some of the succeeding sections of the Act. Section 9 provides that every member of a Committee appointed under sections 7 and 8 shall hold office for life unless removed for misconduct or unfitness, and no such member shall be removed except by order of the Civil Court. Surely in such a question as the amotion of an officer from his office for misconduct or unfitness, the Court which makes the order removing him is exercising judicial functions? Any order made in such a matter in disregard of the requirements of natural justice, such, for instance, as proceeding without giving the member sought to be removed notice, or affording him an opportunity of defending himself, would clearly be voidable or void.

Again, under section 14, any person may sue in this Civil Court the manager or superintendent of the mosque or the members of this very Committee for breach of trust or misfeasance. And the Court might decree specific performance of any acts to be done by either of these functionaries, might award damages against him, or might remove him from office. Under section 16 the Court, in a suit pending before it, might refer the matter to arbitration.

It appears to their Lordships to be clear that in all these matters the Civil Court exercises its powers as a Court of Law, not merely as a *persona designata* whose determinations are not to be treated as judgments of a legal tribunal.

It was next contended that the matter of the four petitions in which the order of the 19th July, 1913 was made, did not constitute a “case” within the meaning of the 115th section of the Code of Civil Procedure. No definition is to be found in the Code of the word “case.” It cannot, in their Lordships’ view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must, they think, include an *ex parte* application, such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties. Their Lordships concur, therefore, with the High Court in thinking that the matter adjudicated upon was a case within the meaning of the 115th section of the Code.

Minakshi Naidu v. Subramanya Sastri(1) decided by this Board, is wholly different from the present. There the District Judge had, under this section 10, by his order appointed the appellant to fill a vacancy in the Temple Committee. An appeal was taken from this order, on the ground of the appellant’s unfitness for the post by reason of his religious belief. The question of the jurisdiction of the Civil Court to make the order was not raised. It was not pretended that a right of appeal—which, if given at all, must be given by statute—was given by Act XX of 1863; but it was contended that it was given by the 540th section of Act X of 1877, which gives a general right of appeal from decrees of Courts exercising original jurisdiction. The definition of the word “decree” given in this Act is modified by Act XII of 1879, and, as modified, runs as follows:—

“Decree” means a formal expression of an adjudication upon any right, claim, or defence set up in a Civil Court where such adjudication decides the suit or the appeal.”

Well, it is obvious that an order made by the Civil Court on an application which may be made by “any person whatever,” appointing a particular man to fill a vacancy on a committee, is

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(1) (1888) I.L.R., 11 Mad., 26; s.c., L.R., 14 I.A., 160.

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not a "decree" within the meaning of this definition. The Board, on that occasion, carefully abstained from expressing any opinion upon the question whether proceedings, somewhat in the nature of *quo warranto*, could be taken to remove a person improperly appointed.

On the point of substance on the merits it was next contended that when a vacancy amongst the members of a committee occurs, the statute imposes upon the remaining members a statutory duty to hold, within three months from the date of the vacancy, an election in the manner provided by the rules for the choice of a new member to fill this vacancy, and that if these members fail to discharge this statutory duty the jurisdiction of the Court is in the first instance confined to either itself appointing a person to fill the vacancy, or to making an order, somewhat in the nature of a mandamus, to compel them to perform their statutory duty. Well, in the first place it is admitted that the section does not expressly provide anything of the kind, and in the next place some of its provisions make it impossible to imply anything of the kind.

In the case of an election, public notice must be given as soon as possible after the occurrence of the vacancy, and the election must be held within three months after that date; but the Order of the Court requiring the remaining members of the committee to forthwith fill up the vacancy may not be made till long after this period of three months has elapsed. It would in such a case be impossible to fulfil the statutory condition as to the time for holding the election. Again, the order is to be to the effect that these members shall forthwith fill up the vacancy, which seems to exclude all the delays contemplated where an election is held; and again where an election is held the remaining members of the committee merely act as the returning officer. They do not in any sense fill up the vacancy. The electors elect a person to be the new member, and upon his election by them, he, according to the statute,

"shall be a member of the committee to fill the vacancy".

If in such a case the vacancy can properly be said to be filled up by anybody, it is by the electors rather than by the remaining members of the committee that this is done, whereas the order to be made in case of their default contemplates, and indeed directs, that these members themselves are to fill up the vacancy. The

filling of it up is to be their act. It is to be done by them forthwith, without the aid or intervention of any electors or other persons and it would appear to their Lordships it must be an act kindred in character to that which the Court itself may do, namely, appoint a person to fill the vacancy. It was also urged that if his construction of the section be adopted, it would enable the remaining members of the committee, by their own default, practically to disfranchise the electors, and at the discretion of the Court possibly procure the patronage for themselves. That no doubt is so, and before a legislative body empowered to amend the statute, it might furnish a powerful argument for its amendment; but the function of this Board is to declare the law, not to alter it, and the argument cannot therefore here avail. In addition it is to be remembered that where the Civil Court appoints, the electors are by and through the same default of the same members of the committee equally disfranchised, yet that is expressly authorized by the statute. The Court must be trusted not to confer upon these members by its order the power to appoint were the nature and circumstances of their default show that they are unworthy of being trusted with the privilege of appointing a member. Their Lordships are, for these reasons, of opinion that the decision appealed from was right, that the appeal fails and must be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitor for the appellant—O. A. Cayley.

Solicitor for the respondent—Douglas Grant.

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VASUDEVA
AYYAR.
—
LORD
ATKINSON.

J.V.W.

APPELLATE CIVIL.

Before Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.

1916,
July, 31
and
August, 7.

THEVARAYA REDDY AND FIVE OTHERS (DEFENDANTS
Nos. 1 to 6), APPELLANTS,

v.

VENKATACHALAM PANDITHAN AND FIVE OTHERS
(PLAINTIFFS AND DEFENDANTS Nos. 7 to 9),
RESPONDENTS.*

Transfer of Property Act (IV of 1882), ss. 83 and 84—Deposit in Court—Title of mortgagee's legal representative in dispute in suit—Withdrawal by mortgagor before decision in suit—Cessation of interest.

Where a mortgagor, who had deposited in Court under section 83 of the Transfer of Property Act the money due from him on the mortgage, withdrew the amount from Court before the title of the legal representatives of the mortgagee, which was then in dispute, was established in a suit:

Held, that the mortgagor was not entitled to exemption from interest on the mortgage amount from the date of the deposit under section 84 of the Transfer of Property Act.

Krishnasami Chettiar v. Ramasami Chettiar (1912) I.L.R., 35 Mad., 44, referred to.

APPEAL under clause 15 of the Letters Patent against the judgment of AYLING, J. (TYABJI, J., dissenting), in Second Appeal No. 881 of 1913 against the decree of R. ANNASWAMI AYYAR the Temporary Subordinate Judge of Trichinopoly, in Appeal No. 108 of 1912, transferred from the file of the District Judge of Trichinopoly, preferred against the decree of K. R. KRISHNASWAMI AYYANGAR the Acting District Munsif of Kulittalai, in Original Suit No. 414 of 1910.

The suit was brought to recover the amount due on a mortgage bond executed on the 27th May, 1895 by the defendants Nos. 1 and 2 in favour of one R. P., who was the manager of the family to which the plaintiff and defendants Nos. 7 to 9 belonged. After the mortgagee's death, the mortgagor who wished to discharge the mortgage, paid the full amount due into Court on the 1st October, 1903 under section 83 of the Transfer of Property Act, as the legal representatives of the mortgagee were disputing among themselves as to who were entitled to the said amount. Notice was given as required by

* Letters Patent Appeal No. 329 of 1914.

that section of the Act; but as the mortgagee's representatives could not settle their disputes, the money remained in Court for about a year when the mortgagors withdrew it. The present suit was filed on the 6th August, 1910. The mortgagee's legal representatives claimed to recover the amount due on the mortgage with interest and contended that interest did not cease to run from the date of the deposit in Court under section 84 of the Transfer of Property Act by reason of the withdrawal of the amount by the mortgagors. The Lower Appellate Court allowed the amount of interest claimed by the plaintiff. On Second Appeal preferred by the defendants, AYLING and TYABJI, JJ., differed and the Second Appeal was dismissed in accordance with the judgment of AYLING, J., who agreed with the view of the Lower Appellate Court. A Letters Patent Appeal was preferred against the judgment of AYLING, J.

C. V. Ananthakrishna Ayyar and K. R. Rangaswami Ayyar for the appellants.

T. R. Venkatrama Sastriyar for the respondents.

ABDUR RAHIM, OFFG. C.J.—The only question in this appeal is whether the appellants having deposited the money due from them on the mortgage, under section 83 of the Transfer of Property Act, can claim exemption from interest under section 84 although they withdrew the amount afterwards. The money was left in Court for a year or more, but the title of the respondents as legal representatives of the mortgagee was then in dispute. The suit which settled their right was not decided until after the appellants had withdrawn the money. Section 84 says:

“When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender, or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.”

The legislature has drawn a distinction between the case of a tender and a deposit as to the date from which interest shall cease to run. And this apparently for good reasons: a tender in order to be valid must be made to the person entitled to receive the money. But when only a deposit is made the mortgagor must do something more. He must do all that has

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to be done in order to enable the person entitled to the money to receive it. Where the mortgagee as in this case is dead and the mortgagor not being sure as to who are the persons entitled to succession and thus able to make a valid tender, deposits the money in Court, but withdraws it before the rightful heirs are ascertained, he cannot be said to have done all that he could do to enable them to receive the money. In such cases the mortgagor cannot claim the benefit of section 84, for the money having been withdrawn before the persons entitled to it had established their right, it must be taken that so far as they are concerned the deposit had never been made. The deposit in order to be effective under section 84 must remain in Court until the mortgagee or his successor in interest has been enabled or is in a position to draw it. This is the interpretation put upon section 84 in *Krishnasami Chettiar v. Ramasami Chettiar*(1), which has been followed by AYLING, J. I may mention that we are not concerned here with the question whether that case was rightly decided upon its facts for it is possible that the mortgagor there had in addition to the deposit also made a valid tender. It appears however that after the suit was instituted the mortgagor again deposited the amount in Court. In calculating interest from that date the amount deposited should have been deducted from the principal, and interest allowed only on the balance. To that extent the decree will be varied; otherwise the appeal will be dismissed, but in the circumstances of the case without costs. The respondent will be entitled to interest at 6 per cent on the amount decreed from the date of the decree of this Court. Time for payment will be six months.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—I entirely agree with the learned Officiating Chief Justice. The main argument of Mr. Rangaswami Ayyangar was that as no money is paid in the case of a tender, the legislature did not intend that in a deposit the money should be continuously in Court till drawn out. There is no analogy between the two; when a debtor tenders money he must do it only to the person legally entitled thereto. He takes the risk of deciding for himself whether the offer he is making is to the proper person. In the case of the person to whom the tender is made, the latter can have no claim for interest and can have no grievance if it is refused, as he had the

(1) (1912) I.L.R., 35 Mad., 44.

option and right of claiming payment at once and has not availed himself of the same. On the other hand, a deposit is ordinarily made when the debtor is in doubt as to who is the rightful claimant. He wants to absolve himself from future liability by leaving it to the Court to hand the money over to the true owner. Nobody may be in a position to apply for payment immediately as in the case of a tender. Consequently, the money must be in deposit to be drawn out as soon as the legal rights of the parties are determined. I am also of opinion that the term "deposit" implies that the money is in the hands of the Court until it is paid to the creditor. It may not infrequently happen that between the deposit originally made and the time when the true owner is ascertained, the debtor has become insolvent or incapable of meeting his obligations. This would be a good reason for expecting that the money must be in Court. Further, if the debtor wants to escape liability for payment of interest, I do not see why he should not allow the money to be in Court. The fact that in a tender there may be advantageous circumstances is no ground for departing from the obvious intent of the legislature in the case of deposits.

Stress was laid on the clause,

"Has done all that has to be done by him to enable the mortgagee to take such amount out of Court."

If the money is not in Court's deposit, I do not think it can be said that the requirements of this clause are satisfied by an original deposit and its withdrawal. If the money is not in Court as soon as the rights of the parties have been pronounced upon, an application will have to be made for depositing the money again in Court. A further application to draw it out will have to follow. It seems to me that the debtor will not be doing all he can, if he has withdrawn the money.

I am of opinion that *Krishnasami Chettiar v. Ramasami Chettiar*(1) was rightly decided. Whether on the facts the judgment might have been different is not what we have to consider. I consider that the principles enunciated are sound.

It was sought to be argued that every deposit implies an antecedent tender and, as in the present case, notice of deposit was given to all the possible claimants, the deposit must be regarded as a legal tender. It is clear that the right to the

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money was disputed and therefore none of the creditors was in a position to claim the money, and that is the essence of a tender. I see no force in this contention.

I agree that under Order XXIV, rule 3 of the Code of Civil Procedure, interest was not allowable upon the sum paid into Court after the institution of the suit. I agree with the order as to costs.

PHILLIPS, J. PHILLIPS, J.—I agree with AYLING, J., that this Second Appeal should be dismissed, but unlike him I am not prepared to agree with the ruling in *Krishnasami Chettiar v. Ramasami Chettiar*(1), for in that case a mortgagor deposited money in Court, sent notice to the mortgagee, who refused to accept the amount. This in effect amounted to a tender through Court and section 84 of the Transfer of Property Act lays down very clearly that when a tender has been made interest ceases to run. It also ceases to run, when the mortgage money has been deposited in Court and the mortgagor has done all that has to be done by him to enable the mortgagee to take such amount out of Court. When therefore the mortgagee has been in a position to draw the money from Court and has refused to do so, interest ceases to run just as in the case when the mortgagee refuses a tender out of Court. So far as I can see, there is no provision in the Act, whereby interest is again to run if the deposit is withdrawn after the mortgagee has refused to receive it. The cessation of interest is the penalty imposed upon the mortgagee for refusal to accept the money when offered, and this penalty is not remitted because he changes his mind when it is too late. With all respect therefore I venture to differ from the reasoning of the judgment in *Krishnasami Chettiar v. Ramasami Chettiar*(1).

In this case, however, the circumstances are different. One of the mortgagees died and there was a dispute as to who were his legal representatives. If, therefore, the mortgagors had made a tender to one of the two sets of claimants they ran the risk of tendering to the wrong person, in which case the tender would not be valid. To avoid this difficulty, or for some other reason, the mortgagors deposited the amount in Court, but it was not drawn because of the dispute as to the rights of the respective claimants. Until that dispute was settled, the mortgagees could not draw the money out of Court, for the Court was not in

(1) (1912) I.L.R., 35 Mad., 44.

a position to know who were the rightful mortgagees. It is, however, contended, that this dispute did not affect the mortgagors, as they had done all that they had to do to enable the mortgagees to draw the money. No doubt they had taken all the active steps necessary, but because they withdrew the deposit before the dispute was settled, the mortgagees were unable to draw the amount. Prior to the settlement of the dispute, the mortgagees could not draw the money because of the dispute, and after settlement they could not draw it because the money was not there. If the mortgagors had left the money in Court until the dispute was settled, they would have done all they had to do when the deposit was made and notice issued to the mortgagees; but as they failed to leave the deposit in Court sufficiently long to enable the mortgagees to draw the amount, they failed to do all that they had to do, and consequently interest did not cease to run.

A further objection is taken that interest has been allowed on the amount deposited after this suit was filed. This is clearly wrong, as under Order XXIV, rule 3 of the Code of Civil Procedure, interest on the amount deposited ceases as soon as plaintiff receives notice of the deposit. I therefore agree in the order proposed.

K. R.

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APPELLATE CIVIL.

Before Mr. Abdur Rahim, Officiating Chief Justice and
Mr. Justice Seshagiri Ayyar.

ABDUL KHADER SAHIB *etal* (APPELLANTS),

v.

THE OFFICIAL ASSIGNEE OF MADRAS *etal*
(RESPONDENTS).*

1916,
July,
25 and 26
and
August 7.

Presidency Towns Insolvency Act (III of 1909), ss. 7, 36 and 90—11 & 12 vict., cap. 21, sec. 26—Immoveable property situate outside local limits of ordinary original civil jurisdiction of High Court—Dispute as to title—Jurisdiction of High Court in insolvency to decide—Summary procedure, when—Letters Patent, cl. 12 and 18—Bankruptcy Act 46 & 47 vict., cap. 52 of 1883, sec. 102.

Under section 7 of the Presidency Towns Insolvency Act (III of 1909), the High Court of Madras in the exercise of its Insolvency Jurisdiction, has jurisdiction to adjudicate on claims relating to immoveable property situate outside the limits of its Ordinary Original Civil jurisdiction; the jurisdiction which existed under section 26 of 11 & 12 vict., cap. 21, has not been cut down by the Presidency Towns Insolvency Act.

The jurisdiction conferred by section 7 of the Act is of a discretionary character, and it is seldom that the Insolvency Court will deem it expedient to try difficult questions of title; the Judge in such cases would ordinarily ask the Official Assignee in Insolvency to establish his title in an ordinary Civil Court.

Section 36 of the Act does not control the language of section 7 but provides a special and summary procedure in certain cases; nor does section 90 curtail the jurisdiction otherwise exercisable by the Insolvency Court.

Decisions on the Bankruptcy Act (46 & 47 vict., cap. 52) of 1883, section 102, corresponding to section 7 of the Indian Act III of 1909, are relevant and should be followed.

Clause 12 of the Letters Patent does not control the provisions of clause 18 thereof so as to limit the Insolvency Jurisdiction of the Court.

Ex parte Dickinson; In re Pollard (1878) L.R., 8 Ch. D., 377 at p. 386; *Ex parte Brown; In re Yates* (1879) L.R., 11 Ch. D., 148, followed.

Maule v. Davis; In re Motion (1873) L.R., 9 Ch. App., 192 at p. 210; *In re Lucas* (1915) I.L.R., 42 Cal., 109; *Ganeshdas Panalal; In re R. D. Sethna v. R. S. D. Chopra* (1908) I.L.R., 32 Bom., 198 and *Khan Sahib Bangi Abdul Kadhar Sahib v. The Official Assignee* (1913) 14 M.L.T., 51, referred to.

APPEALS from the judgments and orders of BAKWELL, J., in Insolvency Petition No. 65 of 1914 in the matter of Loganatha Mudali an insolvent and Insolvency Petition^{1a}

* Original Side Appeals Nos. 87 and 95 of 1915.

No. 62 of 1915—In the matter of A. Chockalinga Mudaliar an insolvent.

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OF MADRAS.

The Official Assignee of Madras took out a garnishee summons from the High Court of Madras in the exercise of its Insolvency jurisdiction in an Insolvency Petition, in which he prayed in effect that certain immoveable property situate in the Chingleput District outside the limits of the Ordinary Original Civil jurisdiction of the High Court and standing in the name of the insolvent's wife, might be declared to be the property of the insolvent and as such vested in the Official Assignee by virtue of the order of adjudication and that she might be ordered to deliver the title-deeds to him. The insolvent's wife alleged that the property was purchased by her out of her own funds and had been in her possession and enjoyment since the purchase; the Official Assignee admitted that he had not obtained possession thereof. The insolvent's wife was a resident within the local limits of the Ordinary Original Civil jurisdiction of the High Court. A preliminary objection was raised on her behalf that the High Court had no jurisdiction, under the Presidency Towns Insolvency Act, to deal with this matter on an application in the Insolvency Court but that the proper procedure was a regular suit in a Civil Court having jurisdiction over the subject-matter. The case came on for disposal before BAKWELL, J., who held that the Insolvency Court had no jurisdiction to decide disputed question of title to immoveable property situate outside the local limits of the Ordinary Original Civil jurisdiction of the High Court and dismissed the application of the Official Assignee. The latter preferred an appeal to the High Court. The same question of law was raised in the connected Appeal No. 95 and the appeals were heard together.

Original Side Appeal No. 87 of 1915.

R. N. Aingar for the appellant.

M. A. Thirunarayanachariyar for the respondent.

Original Side Appeal No. 95 of 1915.

M. D. Devadoss and K. Luke for the appellant.

C. Sidney Smith for respondents Nos. 2 and 3.

ABDUR RAHIM, OFFG. C.J.—Mr. Justice BAKWELL, sitting in the Insolvency Court, has held that, under the new Insolvency Act III of 1909, he has no jurisdiction to try the question

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whether certain property situate outside the local limits of the Original Civil jurisdiction of this Court belongs to the insolvent, it being alleged by the Official Assignee that the purchase in the name of the insolvent's wife effected 3 or 4 years before the petition in insolvency was filed was merely *benami* for the insolvent himself. He was of opinion that though admittedly the old Act 11 & 12 Vict., cap. 21, gave a discretion to the Judge sitting in the Insolvency Court to exercise jurisdiction in such cases over third parties, the present Insolvency Act has made a change in the law and all questions arising between the Official Assignee and third parties must be dealt with by the ordinary Civil Court which has jurisdiction over the matter. With all respect to the learned Judge, it seems to me that section 7 of the Act gives him the power to decide questions of title to land situate outside the limits of the Original Civil jurisdiction of the High Court. It says:

"Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact; which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

I do not think that because questions of priority are mentioned first, the very comprehensive words that follow must be narrowed down in their application. The section expressly enables the Court to decide all questions whatsoever which it may deem expedient to decide for the purpose of doing justice or making a complete distribution of the insolvent's property. I find nothing in these words which for a moment suggest that the jurisdiction which the Court had hitherto has been in any way cut down. Reliance is however placed upon section 36, clause (5), which says that if on the examination of a person, summoned on the application of Official Assignee or of any creditor and who has been in possession of the property belonging to the insolvent, the Court is satisfied that the allegation is true, it will order the person in possession to deliver the property to the Official Assignee. The argument is that this shows that the power of the Court to deal with property in possession of a person other than the insolvent is confined to cases where that person admits that the property belongs to the insolvent. But section 36 only provides a

summary procedure in cases where there is no dispute raised, but that does not necessarily exclude the jurisdiction of the Court to deal with cases of disputed title. Only in cases of the latter class the ordinary procedure has to be followed. Section 90 provides:

"In proceedings under this Act the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction."

An appeal lies from an order made in the exercise of the insolvency jurisdiction in the same way as from a judgment in civil suits. It has been argued that where questions of title to property are concerned, the general policy of the legislature is that they should be tried in the ordinary forum and difficult and complicated questions of title should not be decided in insolvency proceedings which are more or less of a summary nature. The answer to that is that the jurisdiction conferred by section 7 is of a discretionary character, and it is seldom that the Insolvency Court will deem it expedient to try difficult questions of title. The Judge in such cases would ordinarily ask the Official Assignee to establish his title by an ordinary civil suit and it is only cases which do not involve any prolonged enquiry that the Insolvency Court itself would undertake to decide. Reliance was placed on behalf of the respondent on a decision of Mr. Justice CHITTY of the Calcutta High Court in *In re Lucas*(1). That decision does not however in any way help the respondent. It lays down, that

"Section 36, clauses (4) and (5) of the Presidency Towns Insolvency Act, 1909, provides summary procedure in cases where there is no dispute; it is not intended for contentious matters or for following property the subject of fraudulent preference or dishonest concealment."

But these observations have no force in cases where the ordinary procedure provided in the Civil Procedure Code is followed for the purpose of deciding whether the property in possession of a third person really belongs to the insolvent. It may be pointed out that rule 13 of this Court and rule 5 of the Calcutta High Court clearly recognizes the distinction between cases in which the procedure under section 36 or the ordinary procedure is to be followed. The English decisions on the subject which

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(1) (1915) I.L.R., 42 Cal., 109.

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were also discussed at the bar are, I think, perfectly relevant in this connection, inasmuch as section 102 of the Bankruptcy Act of 1888 corresponding to section 72 of the Bankruptcy Act of 1869 is identically in the same terms as section 7 of the Indian Act. In *Ex parte Dickin*; *In re Pollard*(1) and in *Ex parte Brown*; *In re Yates*(2) the jurisdiction of the Court of Bankruptcy in deciding upon the rights of third parties is fully recognized and though in *Ellis v. Silber*(3) there are some general remarks of Lord SELBORN which militate against that view, it cannot be said that the authority of *Ex parte Dickin*, *In re Pollard* (1) and *Ex parte Brown*; *In re Yates*(2) has been shaken. The English law on the subject is correctly stated in Williams on Bankruptcy, new edition, pages 375—377 and in Robson's Law of Bankruptcy, page 37, where they state the result of the English decisions as affirming the Insolvency Court's jurisdiction in adjudicating upon the rights of third parties.

Nor can it be rightly said that section 12 of the Letters Patent decides the question: for under section 18, the Judge is to exercise

"Such powers and authorities with respect to the original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India."

As for the argument based on section 9 of Act III of 1909 the proviso to it makes it clear that it was not intended to curtail the jurisdiction of the Court.

The order of Mr. Justice BAKEWELL dismissing the application for garnishee summons taken out by the Official Assignee, is set aside and the case will be remitted to the Insolvency Court for disposal according to law. The same order will govern Appeal No. 95: costs will abide the result.

SESHAGIRI
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SESHAGIRI AYYAR, J.—I agree. The point for decision is whether the Insolvency Court in Madras has jurisdiction to adjudicate on claims relating to immoveable property situated outside the limits of its ordinary original civil jurisdiction. It was conceded that the practice until very recently was to deal with claims to such properties in the Court of Insolvency. It was also not disputed that under section 26 of 11 & 12 vict., cap. 21, the Presidency Insolvency Courts had and exercised

(1) (1878) L.R., 8 Ch. D., 377 at p. 386. (2) (1879) L.R., 11 Ch. D., 148.
(3) (1872) L.R., 8 Ch. App., 83 at p. 85.

this jurisdiction: see *Ganeshdas Panalal: In re R.D. Sethna v. R. S. D. Chopra*(1). The question is whether section 7 of Act III of 1909 which replaces the old section enacts a departure from the rule which was well understood and accepted by all the Courts. The section says:

"The Court shall have full power to decide all questions of priorities, and all questions whatsoever . . . for the purpose of doing complete justice or making a complete distribution of property."

I fail to see in this section anything to cut down the jurisdiction till then exercised. The decision whether a particular property belongs to the claimant or insolvent is necessary for doing justice as well as for the distribution of the property. If anything, the section is more comprehensive than section 26 of the repealed statute. It is true that in terms that section deals with the claims of third parties; but the language employed by the legislature in the new Act is intended to comprise more questions (e.g., the one relating to priority) than came within the purview of the old section. The expression "all other questions whatsoever" expands rather than curtails the jurisdiction already possessed. Reference was made by Mr. Tirunarayanachariar to section 36 of the new Act as pointing to a limit on the powers of the Court. That section empowers the Insolvency Court to summon any person known or suspected to have in his possession any property belonging to the insolvent; and in clauses (2) and (3) prescribes the procedure to be followed on his failure to appear or on his appearance. Then follows clause (5) which seems to put a restraint upon the summary powers of the Court:

"If, on the examination of any such person, the Court is satisfied that he has in his possession any property belonging to the insolvent."

The Court may direct the delivery of the properties. This clause does not say that the Court should base its decision once for all on the evidence adduced by the garnishee, and that it has no power otherwise to adjudicate upon the rights of the garnishee. The enquiry at this stage to my mind is analogous to what takes place when a claim to property is advanced in execution proceedings. The enquiry in such proceedings is not generally exhaustive; because a further right of litigation by

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(1) (1908) I.L.R., 32 Bom., 198.

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suit is reserved to the unsuccessful party. Similarly, the Insolvency Court is restricted to the materials furnished by the examination of the garnishee in summarily dealing with his claim. That is how I interpret the section. As pointed out in *In re Lucas*(1) and in *Khan Sahib Bangi Abdul Kadhar Sahib v. The Official Assignee*(2) the contentious matters arising on the claim should not be disposed of only on the examination of the claimant, but should be allowed to be dealt with in the ordinary way. That is to say, the Insolvency Court will have to raise the necessary issues, hear evidence and come to a final conclusion, as fully as if a suit were instituted for the purpose. I am, therefore, clearly of opinion that section 36 does not control the language of section 7, but provides a special and summary remedy in certain cases.

A brief examination of the provisions of the English Bankruptcy Act bears out fully this position. Section 36 corresponds to section 27 (1) of the Bankruptcy Act of 1883. It is not necessary to refer to the later English Act in dealing with this subject. This section is more restrictive in its operation than the Indian Act. The English Act speaks of the admission of the party summoned as being the basis of the summary decision. Section 7 of the Indian Act corresponds to section 102 of the Bankruptcy Act of 1883. The proviso and the subsequent clauses of the latter section have no bearing in this country. The decisions under section 102 hold that the Bankruptcy Court has jurisdiction to deal with the rights of third parties: *Ex parte Anderson*, *In re Anderson*(3), *Halliday v. Harris*(4) and *Morley v. White*; *In re White*(5). As against these decisions the observations of Lord SELBORNE in *Ellis v. Silber*(6) relating to section 72 of the repealed Bankruptcy Act were strongly relied on. These observations must be understood as negating the suggestion that the ordinary Courts should under no circumstances entertain a claim where the Bankruptcy Court has seisin of the matter. The more guarded expression of opinion in *Maule v. Davis In re Motion*(7) (Lord SELBORNE took part in this case also) bears out this view: see also *Ex parte Tait*, *In re Tait & Co.*(8). In my opinion, the distinction between the two classes of cases is this.

(1) (1915) L.R., 42 Cal., 109.

(3) (1870) L.R., 5 Ch. App., 473.

(5) (1872) L.R., 8 Ch. App., 214.

(7) (1873) L.R., 9 Ch. App., 192 at p. 210.

(2) (1913) 14 M.L.T., 51.

(4) (1874) 9 C.P., 638.

(6) (1872) L.R., 8 Ch. App., 83.

(8) (1872) L.R., 13 Eq., 311.

Whereas what the Lord Chancellor dealt with in *Ellis v. Silber*(1) referred to the contention that the Bankruptcy Court alone was competent to adjudicate upon the claims of third parties, *Maule v. Davis*; *In re Motion*(2) and the other cases relate to the discretion to be exercised by the Bankruptcy Court in directing the trustee to institute or defend in the ordinary Courts suits concerning the rights of third parties. Of course, in England, no question of the local jurisdiction of the High Court can arise. Applying the principle of these decisions to India, it can safely be said that whereas section 7 gives jurisdiction over the property of the insolvent wherever situate, section 36 indicates that this jurisdiction should be exercised summarily only in certain cases and that in other cases all the formalities of a regular trial should be observed, although the forum will be the same in both cases.

The only other point that need be mentioned is the suggestion that clause 12 of the Letters Patent controls clause 18. I see no force in this contention. The two jurisdictions are separately dealt with in the Letters Patent, and there is no reason for importing into clause 18, the restrictive provisions of clause 12. Moreover the Letters Patent by clause 18 directs the Judge to exercise

“such powers and authorities with respect to original and appellate jurisdiction, and otherwise, as are constituted by the laws relating to insolvent debtors in India.”

These powers are contained in Act III of 1909 and not in clause 12 of the Letters Patent. Mr. Sidney Smith who appeared in the connected appeal referred to section 90 as placing a restriction on the powers of the Insolvency Court; but the proviso to that section makes it clear that it was not intended to limit the powers otherwise exerciseable by the Insolvency Court. I am, therefore, of opinion that the decision under appeal should be reversed and that the petitions should be remitted back for disposal on the merits. Costs will abide.

Original Side Appeal No. 87 of 1915.

Solicitor for the appellant—*M. K. Ramaswami Ayyar.*

Solicitor for the respondent—*P. Kandaswami.*

Original Side Appeal No. 95 of 1915.

Solicitor for the appellant—*P. Ramnathan.*

Solicitors for respondents Nos. 2 and 3—*Messrs. Short, Bewes & Co.*

K.R.

(1) (1872) L.R., 8 Ch. App., 83 at p. 85. (2) (1873) L.R., 9 Ch. App., 192 at p. 210.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Phillips.

1916.
October,
19, 20 and 26.

T. MUTHUSWAMI AYYAR (PLAINTIFF), APPELLANT,

v.

KALYANI AMMAL *et al* (DEFENDANTS), RESPONDENTS.*

Hindu Law—Gift to unborn person, validity of—Settlement deed in 1889—Gift to daughter for life, then to her unborn children, effect of—Alienation by daughter—Suit by adopted son of settlor—Right of reversioner to sue—Hindu Transfers and Bequests Act (Madras Act I of 1914)—Suit decided before the Act—Act passed pending appeal—Act, if applicable to the appeal—Power of Appellate Court in passing decrees on appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Declaratory decree, nature of—Discretion of the Court in such cases.

A Hindu executed a deed of settlement in 1889 by which he demised some properties to his daughter, "in order that she may enjoy them during her lifetime and that after her they should be enjoyed with all rights by her sons and daughters who may be alive"; the daughter alienated some of the properties in 1907; the plaintiff, the adopted son of the settlor, claiming to be the nearest reversioner filed a suit in 1912 for a declaration that the alienations were without necessity and not binding on the reversioners. He impleaded the settlor's daughter as the first defendant, and her daughter, born in 1899, as the second defendant and the alienees as the other defendants. The Hindu Transfers and Bequests Act (Madras Act I of 1914) came into operation during the pendency of the appeal in the Lower Appellate Court. Both the Lower Courts dismissed the suit:

Held, on second appeal:

(1) that the Hindu Transfers and Bequests Act (I of 1914) was retrospective in its operation and was applicable to this case;

(2) that the gift in favour of unborn children of the daughter of the settlor was valid;

(3) that consequently the plaintiff was not the nearest reversioner entitled to maintain the suit;

(4) that the rule that a remote reversioner can sue if the nearest reversioner is a female is inapplicable when the latter is entitled to an absolute estate;

(5) that there was no collusion between the first and the second defendant by reason of the fact that the latter's guardian put forward an alternative contention on a point of law setting up an absolute title in favour of the first defendant;

(6) that the authority of an Appellate Court is not limited to determining the question whether the original Court was right according to the law in force at the date of its judgment, but was entitled to pass such decree or order as was

* Second Appeal No. 188 of 1915.

in accordance with any later enactment which came into operation subsequent to such date;

Kanakayya v. Janardhana Padhi (1913) I.L.R., 36 Mad., 439 (F.B.) and *Govinda Parama Guruvu v. Dandasi Pradhanu* (1910) 20 M.L.J., 528, referred to; and (7) that a declaratory decree is a matter of discretion and, when there was already one and there might be more than one preferential heir before the plaintiff, the discretionary relief could be properly refused.

SECOND APPEAL against the decrees of D. G. WALLER, the acting District Judge of Tinnevely, in Appeals Nos. 49 to 53 of 1914, preferred against the decrees of K. S. RAMASWAMI SASTRIYAR, the District Munsif of Tinnevely, in Original Suits Nos. 7 and 9 to 12 of 1912.

One Muthu Ayyar, who was the maternal grandfather and the adoptive father of the plaintiff, executed a deed of settlement, dated the 30th January, 1889, under which he demised some properties in favour of his daughter Kalyani Ammal, consisting of shops, house-sites, etc., and cash amounting to Rs. 8,500 and directed that out of the cash, lands should be purchased and a house built,

"in order that the said Kalyani Ammal should enjoy them during her lifetime and after her they should be enjoyed by her sons and daughters who may be alive."

The settlor died within three weeks of the settlement. The daughter, while in enjoyment of the properties purchased for her, alienated by way of exchange, sale and mortgage some of the said properties about the year 1907. The plaintiff, who was the adopted son of the settlor, claiming to be the nearest reversioner to the properties dealt with in the settlement deed after the death of the daughter, brought the present suit for a declaration that the alienations made by the daughter, who was the first defendant, were without necessity and not such as were binding on the reversioners. The first defendant had a daughter born in 1899 who was joined as the second defendant in the suit, while the alienees were the other defendants therein. The plaintiff contended that the demise under the settlement deed was only valid to the extent of a life-interest in favour of the first defendant and that the gift in favour of her children who were not in existence at the date of the deed was void under the Hindu Law as they purported to be made in favour of unborn persons. The first and second defendants pleaded *inter alia* that the gifts in favour of the first defendant's children was valid;

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and that the plaintiff was not competent to sue. The guardian of the second defendant as well as the first defendant also contended in the alternative that the first defendant took an absolute estate under the deed of 1889; the defendants further pleaded that the plaintiff was not a reversioner at all or only a remote reversioner who was not competent to sue; and that in any event a declaratory decree was a discretionary relief which should not be granted in this case. The District Munsif, who tried the original suit, held that the first defendant took under the deed of settlement an absolute and heritable estate subject to defeasance and that the plaintiff was not a reversioner to the estate and dismissed the suit on the 30th September, 1913. The plaintiff preferred an appeal on the 28th January, 1914 to the Lower Appellate Court which came on for hearing on the 31st October, 1914. During the pendency of the appeal, the Hindu Transfers and Bequests Act (Madras Act I of 1914) was passed which came into force on the 14th March, 1914. The learned District Judge held on appeal that the provisions of the new Act I of 1914 applied to the case, and decided that the disposition in favour of the second defendant (who was the daughter of the first defendant) was valid under the provisions of the Act, and that the plaintiff was not at the time a reversioner at all, near or remote, inasmuch as the second defendant was alive at the date of the suit; he consequently dismissed the appeal. The plaintiff preferred a second appeal to the High Court.

T. R. Ramachandra Ayyar and *N. A. Krishna Ayyar* for the appellants.

C. V. Anantakrishna Ayyar for respondents Nos. 1, 3 and 4.

T. Eroman Unni for the second respondent.

SPENCER AND
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JUDGMENT.—This suit was brought to have an alienation made by a Hindu female declared to be void. The plaintiff's grandfather, Muthaiyar, by whom he was adopted as a son, demised by a settlement deed of the year 1889 certain properties of the value of Rs. 8,500 in favour of Kalyani Ammal, his daughter by his second wife, in order that she

"should enjoy them during her lifetime and that after her they should be enjoyed with all rights by her sons and daughters who may be alive."

The plaint alleges that out of the said properties Kalyani Ammal, who is first defendant, had in 1907 alienated certain

immoveable property without necessity by a deed of exchange in favour of the third defendant.

The first defendant has a daughter, second defendant, who was born in 1899. As she was unborn at the date of the execution of the settlement deed, the main question to be decided was whether, the disposition in her favour was valid. The District Munsif held that it was valid under Hindu Law. An appeal was preferred from his decision on 28th January, 1914 and was heard and decided on 31st October, 1914. Between the filing and the disposal of the appeal Madras Act I of 1914 came into force. Section 3 of this Act declares that transfers and bequests may be validly made in favour of unborn persons. The District Judge therefore applied the provisions of this Act and dismissed the appeal, holding that the plaintiff not being at present a reversioner had no right of suit.

It is now contended on the plaintiff's behalf that he was the nearest reversioner at the time when he instituted his suit, seeing that the second defendant acquired an interest by virtue of an enactment which came into force after the suit was decided in the first Court and while an appeal was pending. It is argued that the law applicable to this suit will be the law as it stood at its institution on 3rd January, 1912; further, that as the second defendant has precluded herself from suing by colluding with first defendant and setting up her mother's absolute right, he is entitled to sue for the preservation of the estate and that he does so on behalf of the general body of reversioners.

It is not necessary to go into the question whether this disposition in favour of unborn persons was valid even under the general law applicable to Hindus before the passing of Act I of 1914, as the District Munsif held that it was; for we are satisfied that the Act was rightly applied by the District Judge to the facts of the present case.

The Act is by nature a declaratory one, and therefore it cannot be argued that it must not be construed so as to take away previous rights (*vide* Maxwell on the Interpretation of Statutes, page 361). Section 2 declares:—

"In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to such date."

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In *Kudappa Venkayamma v. Narasimma*(1) the provisions of the Act were applied retrospectively to dispositions under a will in favour of persons who were not in existence at the death of the testator, although the will was made long before the Act was passed and although the suit, like the present suit, was instituted in 1912 before the passing of the Act. We see no reason to differ from that decision and are of opinion that Act I of 1914 has retrospective effect. So far as second defendant's rights under the will are concerned, section 2 (2) expressly gives retrospective effect to the dispositions under the will. This being so, plaintiff's rights must also be retrospectively affected by necessary implication.

As was pointed out in *Kanakayya v. Janardhana Padhi*(2) the authority of an Appellate Court is not limited to determining the question whether the Original Court was right according to the law in force at the time of its judgment. Under Order XLI, rule 33 of the Code of Civil Procedure an Appellate Court is entitled to pass such further decree or order as the case may require, the object being, as explained in *Govinda Parama Guruvu v. Dandasi Pradhanu*(3), to avoid unnecessary multiplicity of proceedings. In that case a ryot was allowed to plead in appeal a right of occupancy which had been conferred on him by section 6 of the Madras Estates Land Act, although, when the Court of First Instance passed a decree for ejecting him, the said Act had not come into force.

As regards the plaintiff's right to obtain a declaratory decree, it may be observed in the first instance that he is not at the present date the nearest reversioner to the property in suit, if as the settlement deed implies, the children of first defendant who survive their mother are to take an absolute estate at her death. Besides second defendant who is still a minor, other children may be born or adopted during the first defendant's lifetime.

Article 125 of the Limitation Act, as pointed out by their Lordships in the Privy Council decision—*Venkatanarayana Pillai v. Subbammal*(4)—contemplates suits for a declaration that an alienation effected by a Hindu female life owner is not binding being brought by the person who, if the female died at the date

of instituting the suit, would be entitled to possession. At the date of instituting this suit if Kalyani had died, the second defendant would certainly have been entitled to possession unless the creation of an interest in favour of an unborn person be held to be void at its inception.

The principle laid down in a previous decision by Privy Council—*Rani Anand Kunwar v. The Court of Wards*(1)—was that although a contingent reversionary heir may bring a suit of this nature, yet, as a general rule, it must be brought by the presumptive reversionary heir, i.e., the person who would succeed if the life owner were to die at that moment. This principle was held in *Chidambura Reddiar v. Nallammal*(2), to be inapplicable to a case where the nearer heir is a female and as such is entitled only to a limited estate. It would apply when a female entitled to an absolute estate intervenes.

Thus the plaintiff in the present suit has no present right to impeach the alienations made by the first defendant unless he can show either that the demise in favour of the unborn children of first defendant was void in law, or that if it was not void, the interest thereby created in favour of second defendant as well as that of first defendant were those of limited owners. We are not prepared to find for him on either of these legal contentions. But his pleader quotes *Rani Anand Kunwar v. The Court of Wards*(1) for the further purpose of showing that if the heirs nearer in succession collude with the life owner, a more distant reversioner may sue.

In this case defendants Nos. 1 and 2 put in a joint written statement asserting that under the deed of settlement the first defendant became absolutely entitled to the properties given to her thereby. It was also put forward that if this was not the right construction to be put on the document, the plaintiff was still not entitled to succeed.

The construction of the document depended on the interpretation to be put upon it in a Court of Law. It is not known what view the minor will adopt as to her rights when she attains majority. At present she is under the control of her father and mother who have merged her interests in their own. The circumstances, therefore, are not such as to justify a

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(1) (1913) 31 M.L.J., 33. (2) (1913) I.L.R., 36 Mad., 439 at p. 444 (F.B.).
(3) (1910) 20 M.L.J., 528. (4) (1915) I.L.R., 38 Mad., 406 (P.C.).

(1) (1881) I.L.R., 6 Cal., 764 (P.C.).

(2) (1910) I.L.R., 32 Mad., 410.

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presumption that she will not assert her reversionary rights when she becomes a major, and there is certainly no evidence that when plaintiff filed his suit he was aware that the presumptive reversioner (second defendant) was colluding with the first defendant.

A declaratory decree is a matter of discretion [*vide Doorga Persad Singh v. Doorga Konwari*(1)] and we think that the District Judge exercised a sound discretion in refusing to give the plaintiff the relief sought in his plaint, seeing that there is already one and there may in time be more than one preferential heir to him.

This second appeal is dismissed with costs (one set). In the District Munsif's Court the plaintiff succeeded on the issue as to adoption and to a great extent on other issues. We direct each party to bear his own costs in the Court of First Instance and that the order of the Lower Appellate Court as to costs of the first appeal do stand.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1916,
October, 31
and
November,
1 and 9.

KULLAPPA GOUNDAN (PLAINTIFF RESPONDENT), APPELLANT,
v.

ABDUL RAHIM SAHIB, FIRST DEFENDANT (FIRST DEFENDANT PETITIONER), RESPONDENT.*

Court Fees Act (VII of 1870), sec. 7, cl. v (b) and (e) — Assessed land — Coconut trees thereon—Suit for land and trees—Valuation of suit—Garden, meaning of.

In a suit to recover possession of assessed land on which coconut trees stand, the valuation should be under section 7, clause v (b) and not under clause v (e) of the Court Fees Act (VII of 1870).

The word 'garden' in section 7, clause v (e) of the Court Fees Act (VII of 1870) should be taken as referring primarily to a garden in the English sense, that is an ornamental or pleasure or vegetable garden attached to a house.

Andothodan Moidin v. Pullambath Mamally (1889) I.L.R., 12 Mad., 301, (F. B.), referred to.

(1) (1879) I.L.R., 4 Cal., 190.

* Letters Patent Appeal No. 110 of 1915.

The conversion of an assessed arable field into a coconut tope does not affect the application of clause (v) (b) of section 7 of the Court Fees Act.
Venkayya v. Ramaswami (1889) I.L.R., 22 Mad., 39 and *Murugesu Chetti v. Chinnathambi Goundan* (1901) I.L.R., 24 Mad., 421, referred to.

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APPEAL under clause 15 of the Letters Patent against the judgment of KUMARASWAMI SASTRIYAR, J., in *Abdul Rahim Sahib v. Kullappa Goundan* *.

The plaintiff claiming to be a purchaser of the suit lands under a sale-deed for Rs. 7,000, sued for recovery of possession of the same and prayed also for a declaration and injunction in respect thereto. The lands sued for, were assessed lands, on some portions of which coconut trees were planted; but the plaintiff valued the suit at Rs. 1,000, valuing the lands at five times the revenue assessed on them, i.e., at Rs. 364-11-0, and also valued the coconut trees at Rs. 500 and the other reliefs at Rs. 136. The suit was instituted in the District Munsif's Court. The defendant objected to the valuation for purposes of jurisdiction and Court fees, contending that the lands should be valued as a garden at its market value under section 7, clause (v) (e) of the Court Fees Act, and that consequently the District Munsif had no jurisdiction to entertain the suit. The District Munsif overruled this objection. The defendant preferred a Civil Revision Petition *.

PETITION under section 115 of the Civil Procedure Code (Act V of 1908) and section 15 of the Charter Act, praying the High Court to revise the order of RAVI VARMA RAJA, the District Munsif of Tiruppattur, in Original Suit No. 94 of 1914.

1915,
July,
12 and 23.

P. R. Ganapati Ayyar for the petitioner.

K. Jagannatha Ayyar for the respondent.

This Petition came on for hearing before KUMARASWAMI SASTRIYAR, J., who delivered the following

JUDGMENT.—This is a petition filed under section 115, Civil Procedure Code and section 15 of the Charter Act to revise the order of the District Munsif of Tiruppattur, dated the 24th April 1915, wherein he held that the property in dispute fell under section 7, clause (v) (b) of the Court Fees Act (Act VII of 1870) and that the suit was rightly valued and was within the pecuniary limits of his jurisdiction. The plaintiff claiming

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* Civil Revision Petition No 283 of 1915.

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to be the purchaser of the properties mentioned in the plaint for Rs. 7,000 sued for a declaration of title, for an injunction restraining the defendants from interfering with his enjoyment of the plaint properties and for possession of the properties if the Court was of opinion that the plaintiff was not in possession. The plaintiff valued the suit at Rs. 1,000 the details of the valuation being Rs. 5 for injunction asked for, Rs. 364-11-0 for possession, Rs. 115 value of three wells, Rs. 500 value of coconut trees and Rs. 2 value of plantain trees. The defendants objected to the valuation and *inter alia* stated that the value of the coconut tope was Rs. 4,500. The contention for the defendants, so far as it is material for the purpose of this petition, is that part of the property claimed is a coconut garden on which there are several coconut trees (plaintiff admitting at least 500) and that the case falls under section 7, clause (v) (e) which provides that where the subject matter is a house or garden the fee is payable on its market value. The District Munsif was of opinion that even assuming there was a coconut garden on the property it did not fall within the definition of a "garden" in section 7, clause (v) (e) but that it should be treated as assessed land.

Under the Suits Valuation Act VII of 1887 the value for purposes of jurisdiction and of Court fees is the same and the point for determination is whether clause (v) (b) of section 7 is to be applied or clause (v) (e) of the Court Fees Act. The District Munsif seems to treat the question as a dry question of law, but I think that this is a question of fact to be determined on the evidence in each case. A garden has been defined in Murray's dictionary as an enclosed piece of ground devoted to the cultivation of flowers, fruits or vegetables and there can be little doubt that coconuts are edible fruits and that they are largely used for culinary purposes in this country. If the trees stand on a well-defined portion of the property which is marked off from the rest, I do not see why the land on which the trees stand should not be a coconut garden. The District Munsif was of opinion that the Full Bench decision of this Court in *Andathodan Moidin v. Pullambath Mamally*(1), decided that the word "garden" is to be taken as meaning ornamental, pleasure or vegetable garden, but I do not

(1) (1889) I.L.R., 12 Mad., 301 (F.B.).

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think that the District Munsif is right in his view. The question in the above case related to the valuation of a *paramba* on which there were coconut trees. The land being in Malabar was not assessed and all that their Lordships decided was that the case fell either under clause (v) (c) or (v) (e) of section 7 of the Court Fees Act, according as the *paramba* was of a description that would come under the definition of a garden or not. The following observations of their Lordships at page 304 make this clear:—

"In fact, in Malabar, a tree tax is substituted for land assessment and whether or not a *paramba* is assessed, depends upon the nature of the trees grown therein. It is therefore evident that *parambas* should either be classed as lands paying no revenue or as gardens. The word 'garden' is nowhere defined in Act VII of 1870, but from its occurring in connection with the word "houses", we are of opinion that the term refers primarily to a garden in the English sense—ornamental, pleasure or vegetable—and that *parambas* do not ordinarily come under that category. We do not, however, wish it to be understood that in no case should a *paramba* be treated as a garden for the purpose of Court Fees Act. Whether or not the *paramba* sued for is to be regarded as a garden or as land which pays no revenue is a question of fact which must be decided in each case."

I think the proper course the District Munsif should have taken was to have called for evidence as to whether, having regard to the position of the land on which the trees stand and the number of trees thereon, the plot of land can be said to be a "garden" or not. A few isolated trees on a piece of land will not make it a garden, but where a number of trees are planted on a particular piece of land which is well defined and can be marked off from the rest of the land, it is difficult to see why that particular plot should not be treated as a garden, if the land is used for the cultivation of flowers, fruits or vegetables.

It has been argued by the respondent's vakil that, if the case falls under clause (v) (a), (b) or (c), the market value is no test for determining the Court fees payable even though the property may fall under the definition of "garden" and that clause (v) (e) applies only where clause v (a), (b) and (c) cannot apply. I am unable to follow his argument, for a garden must be situated on some land or other and all land must be assessed or unassessed. If therefore, assessment was the criterion, clause v (e) is perfectly

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unnecessary. In my opinion, the proper construction of the section is that whether the land is assessed or unassessed it will fall under clause (v) (e) if it can be defined as a "garden."

A preliminary objection was taken that no revision lay as the petitioner would have the right of appeal against the decree, if it went against him. Cases have been quoted on both sides in some of which the High Court declined to interfere with interlocutory orders and in some of which the High Court did so. For the petitioner reference has been made to *Veerabhadran Chetti v. Nataraju Desikar*(1), *Somasundrum Chettiar v. Manicka Desika Gnana Sammunda Pandara Sannadi*(2), *Nagaraja Pillai v. Vythinatha Aiyar*(3), *Subramania Pattar v. Narayana Pattar*(4), *Venkatachellam Pillai v. Parasu Pattar*(5) and *Rai Yatindra Nath v. Hari Charan*(6).

There is very little authority directly in point. The only case in point [*Bhag Bhari v. Jawaharsingh*(7)] is in favour of the view I have taken.

For the respondents reference has been made to *In re Nizam of Hyderabad*(8), *Devata Sreerama Moorthy v. Sree K. Venkata Seetharama Chandra Rao Garu*(9), *Venkatasubbiah v. Seshachalam*(10), *Chidambaram Chetti v. Nagappa Chetti*(11), *Jagannatha Mudaliar v. Appasami Mudaliar*(12), *Rudrappa v. Narasinga Row*(13) and *A. Gaebble v. Ramayi Ammal*(14).

It is difficult to reconcile all the observations made by the learned Judges who took part in the cases above referred to. In case of discretionary powers vested in Courts, I do not think any hard and fast rule can be laid down so as to fetter that discretion in advance in all cases that may arise in future. The observation of JENKINS, C.J., in *In re an Attorney*(15), that a discretion given in the widest terms by the legislature ought not to be crystallized or restricted by a series of cases but should remain "free and untrammelled to be fairly exercised according to the exigencies of each case" may well be borne in mind. It

(1) (1905) I.L.R., 28 Mad., 28.

(3) (1911) 21 M.L.J., 484.

(5) (1914) M.W.N., 614.

(7) (1914) 25 I.C., 545.

(9) (1914) M.W.N., 95.

(11) (1913) 24 M.L.J., 73.

(13) (1905) I.L.R., 29 Bom., 213.

(2) (1908) I.L.R., 31 Mad., 60.

(4) (1915) 2 L.W., 230.

(6) (1914) 20 C.L.J., 428.

(8) (1886) I.L.R., 9 Mad., 256.

(10) (1912) 22 M.L.J., 136.

(12) (1914) 1 L.W., 233.

(14) (1914) 24 I.C., 781.

(15) (1914) I.L.R., 41 Cal., 446 at p. 457.

seems to me that the power of superintendence and the powers given by section 115 were intended to give to the High Court jurisdiction to see that the proceedings before the lower Courts were properly conducted and I see no reason why the High Court should refuse to set right matters if by doing so it would save unnecessary expense or delay or a multiplicity of proceedings. The correct rule in my opinion seems to be that while the Courts will not generally interfere in revision where an equally efficacious remedy is open to the party by way of appeal it will do so where it would not be possible to put the parties in the same position in appeal as they would have been if the irregularities had been set right in the lower Court by timely interference. Having regard to the provisions of the Suits Valuation Act, it seems to me that the relief which the petitioner will get in appeal would not be co-extensive with the relief which he will get now. There can be little doubt that a party is entitled, as a matter of right, to have a suit tried before a Court which has got pecuniary jurisdiction to try it and that, where a Court on an erroneous view of the law proceeds to exercise a jurisdiction which it does not possess, there is nothing to prevent the party from immediately taking such steps as the law allows to set aside the order of the lower Court. If, however, he chooses to wait until the trial is over, and to take the chance of a decision in his favour, section 11 of the Suits Valuation Act steps in to prevent him from getting the proceedings of the lower Court set aside simply on the ground of error as to jurisdiction unless he can show that he is prejudicially affected in the disposal of the suit on its merits. The fact that a restricted right is given to the party after judgment has been pronounced is no reason for depriving him of his right to take immediate steps to have his suit tried by a Court which, in law, has pecuniary jurisdiction.

The plaintiff admits in his plaint that he purchased the property for Rs. 7,000 and he values the relief at Rs. 1,000. The District Munsif, without taking any evidence on the objections of the defendants and without determining whether the suit is one which would fall within his jurisdiction has, in my opinion, erroneously treated the question as a dry question of law and held that he has jurisdiction over the subject-matter in dispute.

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Under these circumstances, I think that this is a fit case for the High Court to interfere in revision and to direct at the early stage of the suit that the provisions of law as to jurisdiction, are satisfied. I set aside the order of the lower Court and direct the District Munsif to dispose of the objections of the defendants as to jurisdiction according to law in the light of the observations above made. Costs of this petition will abide and follow the result.

Against the above decision of KUMARASWAMI SASTRIYAR, J., the plaintiff-respondent preferred an appeal under the Letters Patent.

Letters Patent Appeal.

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K. R. Subrahmanya Sastriyar for the appellant.

P. R. Ganapathi Ayyar for the respondent.

AYLING, J.—This is a Letters Patent Appeal against an order of KUMARASWAMI SASTRIYAR, J., passed under section 115, Civil Procedure Code. The matter arises out of a suit brought in the Court of the District Munsif of Tiruppattur for a declaration, injunction and, if necessary, decree in ejectment in respect of certain lands. The defendants contended that the value of the suit lands was in excess of the District Munsif's jurisdiction: and an issue was framed on this point. In the plaint the value of the lands is calculated as provided in section 7, clause (v) (b) of the Court Fees Act (VII of 1870), at five times the assessment but the defendants contended that, as coconuts were grown on a portion of the lands, this portion fell under clause (v) (e): and that their market value should be adopted for purpose of valuation. The District Munsif rejected this contention of the defendants and decided that the plaint valuation was correct.

The learned Judge, without expressing a final opinion as to the proper method of valuation, considered that the fact that the lands were separately assessed to land revenue was not conclusive; and that it was the duty of the District Munsif to decide on evidence:

"Whether, having regard to the position of the land on which the trees stand and the number of the trees thereon, the plot of land can be said to be a garden or not."

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He accordingly set aside the District Munsif's order and directed him to dispose of the objections to jurisdiction in the light of his remarks. With all respect, the facts of the case appear to me to be sufficiently clear from the record before us to enable us to decide whether the District Munsif was in a position to dispose of the issue without further enquiry, and whether his finding was correct.

It is clear from the plaint schedule that the suit property consists of five dry and six wet fields, each separately assessed to land revenue (*ryotwari*), on one or more of these survey fields (it is immaterial which) was what is called a "coconut tope"—i.e., a number of coconut trees growing close together: and the defendants contended that such field or fields must be regarded as constituting a garden within the meaning of clause v (e) of the Court Fees Act.

We do not know over how many fields the "tope" extended, or how thickly together they grew, I do not consider such information necessary to a decision; and may remark that it would be most inconvenient to make the proper principle of valuation of a suit for purposes of jurisdiction dependent on such an uncertain factor as the comparative density of the trees.

I shall assume the position most favourable to the defendants: that all the coconut trees grew on a single survey number sufficiently close together to form what is usually referred to as a tope. Would this survey field be a "garden" so as to come under clause (v) (e) of the Court Fees Act.

As pointed out by a Full Bench of this Court in *Andathodan Moidin v. Pullambath Mamally*(1), there is much significance in the juxtaposition of the words "house or garden" in that clause; and it should be taken as referring primarily to a garden in the English sense ornamental or pleasure or vegetable. There is no allegation or suggestion in the present case either in the pleadings or arguments that the tope or indeed any of the survey numbers adjoins or is close to a dwelling house. What we do know is that they are assessed lands held on patta presumably for agricultural purposes and that on a portion of

(1) (1889) I.L.R., 12 Mad., 301 (F.B.).

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them coconut trees are grown instead of an ordinary wet or dry crop. If the holder of the land raised a crop of paddy or ragi on this portion, there can be no question that it would be valued under clause (v) (b) of the Court Fees Act. Does the fact that coconut trees are raised instead make any difference. In my opinion it does not: and, in support of this view, I may rely on the decisions in *Venkayya v. Ramasami*(1) and *Murugesu Chetti v. Chinnathambi Goundan*(2). In the former of these MOORE, J., held that a tenant who raised coconuts on a wet field must be held merely to have chosen to grow one description of crop, coconuts, in lieu of another, paddy or ragi; and this view was quoted with approval by BHASHYAM AYYANGAR, J., in the later case. The learned Judge dealt at some length with the distinction between agriculture and horticulture, and was clearly of opinion that the owner of a betel garden or coconut tope was engaged in the former and not in the latter. With this view I respectfully concur, and consider that it is as applicable in regard to section 7 of the Court Fees Act as to the provisions of the Registration Act, or the law of landlord and tenant, which were the subjects of construction in those cases.

I would therefore hold that the conversion of an assessed arable field into a coconut tope does not affect the application of clause (v) (b) of section 7 of the Court Fees Act, and, as no other circumstance is put forward, I think the District Munsif was justified in applying that clause and accepting the plaint valuation without further inquiry.

I would therefore set aside the order of the learned Judge and restore that of the District Munsif. The appellant should get his costs from the respondent in this Court.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—I agree. The question in this case is whether, in a suit to recover possession of land on which coconut trees stand, the valuation should be under section 7, clause 5 (b) or under clause 5 (e) of the Court Fees Act, VII of 1870. Mr P. R. Ganapathi Ayyar contended that, when coconut trees are grown on land it becomes a garden and, as such, its value must be fixed according to the market rate.

(1) (1899) I.L.R., 22 Mad., 39.

(2) (1901) I.L.R., 24 Mad., 421.

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There are two points to be considered. The first is whether irrigable land on which coconut trees have grown becomes a garden, and the second is, if it is not a garden, whether the trees on the land should be separately valued. As regards the first of these questions, the decision in *Andathodan Moidin v. Pullambath Mamally*(1) seems to be conclusive. The word "garden" in section 7, clause 5 (e) of the Court Fees Act is apparently used in a technical sense. The Act was drafted by an English lawyer and, as was pointed out by Mr. Justice AYLING in the course of the argument, the term "garden" connotes in the English language that it is either an appendage to the house or is a place which is kept for purposes of pleasure. The fact that the term "garden" is coupled with the term "house" shows that what the legislature contemplated is a piece of ground which is used by the owners of a house as a place of recreation and as one on which vegetables and the like are grown for purposes of home consumption. The definition of the term "garden" in Stroude's Judicial Dictionary supports this view. It may be that an enclosed place detached from the house is resorted to by the owner of it for purposes of pleasure. Such a ground would be a garden. I do not mean to suggest that no profit should be derived from such a place. I am only referring to the meaning which the term ordinarily bears. No doubt in common parlance, we speak of a coconut tope or a mango grove as a garden. If that is the legal acceptance of the term, a place where tamarind trees are grown should similarly be regarded as a garden. There is something repugnant in the idea of calling a group of tamarind trees or *iluppa* trees as a "garden". I do not think the term "tope" which is employed largely in India is in any way synonymous with the term "garden". I am, therefore, of opinion that this piece of ground on which coconut trees have been grown, is not a "garden".

The next question is whether, when a suit relates to the recovery of the land as well as the trees thereon, a separate valuation should be put upon the trees apart from the land. This question is not covered by any direct authority. It was held by Mr. Justice MOORE in *Venkayya v. Ramasami*(2) that the planting of coconut trees on cultivable land did not alter the

(1) (1889) I.L.R., 12 Mad., 301 (F.B.). (2) (1899) I.L.R., 22 Mad., 39.

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character of the land. The learned judge said :

"They have, it must, in my opinion, be held, merely chosen to grow one description of crop, coconuts, in lieu of another, paddy or ragi. . . . In many parts of Malabar, one may see in a stretch of wet land fields grown with coconut trees intermingled with plots of paddy land. Both are irrigated in much the same way and both may, it appears to me, be held to be cultivated with wet crops.

According to the learned judge, coconut trees on arable land must be regarded as a crop on the field; such a field is not converted into land of a different description or quality by the planting of coconut trees; for example, betel vine may be grown upon paddy field or pepper vine or sugarcane or plantain trees. In all these cases, the distinctive characteristic of the field as arable land is still kept up, notwithstanding the fact that what are generally known as agricultural produce is not grown upon the field. The dictum of Mr. Justice MOORE was quoted with approval by Mr. Justice BASHYAM AYYANGAR in *Murugesu Chetti v. Chinnuthambi Goundan*(1). The learned judge says :

"It was held [referring to *Venkayya v. Ramasawmi*(2)] that instead of raising one kind of crop (paddy or ragi) by tillage, he raised without tillage another kind of crop (coconut). That decision proceeds, in my opinion, on the principle that the holding is used as an agricultural holding whether the crop be a cereal one or a garden crop."

It follows from this judgment with which I entirely concur that coconut trees upon nanja lands is only a crop on it and do not change the nature of the field. If that is so, no separate Court fee is leviable on the coconut trees. It is settled law in this Presidency that in suing to recover possession of land, the plaintiff need not value the mesne profits separately unless he lays claim to past mesne profits at a particular rate: see *Maiden v. Janakiramayya*(3). It has also been held, that no Court fee need be paid upon the value of improvements: see *Referred Case No. 4 of 1899* (4). Similarly, no Court fee is payable upon the trees because on a decree for possession of the land, the trees grown on it would pass to the decree holder. Mr. P. R. Ganapati Ayyar's sugges-

(1) (1901) I.L.R., 24 Mad., 421 at p. 425. (2) (1899) I.L.R., 22 Mad., 39.
(3) (1898) I.L.R., 21 Mad., 371. (4) (1900) I.L.R., 23 Mad., 84.

tion that if nothing is said about the trees in decreeing possession of the land, it would be open to the judgment debtor to remove the trees is not supported by any authority. Ordinarily, a decree for possession of property would convey all that stands upon that property at the time of the decree; and there is no reason why in the case of coconut trees, a different principle should obtain.

I am therefore of opinion that the field in question is not a "garden", nor is a separate fee leviable upon the trees.

I am, therefore, constrained to differ from the learned judge who has held that the field should be valued as a "garden".

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

MAHOMED GHOUSE RAHMAN SAHIB (OF MESSRS. T. A. RAHMAN & SONS)—(ACCUSED), PETITIONERS,

1916,
November, 9.

v.

NATHU VELLABJI (COMPLAINANT), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 185—Transfer of case—Case pending in a Court outside the jurisdiction of High Court—Power of High Court to transfer to a Court within its jurisdiction or to decide by which Court such case shall be tried.

Section 185 of the Criminal Procedure Code (Act V of 1898), does not empower a High Court to transfer to a Court subordinate to its own jurisdiction a case pending in a Court subordinate to the jurisdiction of another High Court, nor does it empower a High Court to decide by which Court such a case shall be tried.

PETITION praying the High Court to direct the transfer of Case No. 571 of 1916, from the file of the Chief Presidency Magistrate of Bombay to that of the Chief Presidency Magistrate of Madras.

The petitioner was a trader carrying on business in Madras, while the respondent was carrying on business in Bombay and also at Madras through his agent in Madras. The respondent

* Criminal Miscellaneous Petition No. 392 of 1916.

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preferred a complaint against the petitioner in the Chief Presidency Magistrate's Court at Bombay, charging the petitioner with offences under sections 482 and 486 of the Indian Penal Code for using and selling goods under false and counterfeit trade-marks. The petitioner moved the High Court of Madras under section 185 of the Criminal Procedure Code to transfer the case to the Court of the Chief Presidency Magistrate at Madras, alleging that two summonses from the Bombay Presidency Magistrate's Court had been served on him to appear and answer the above charges and also to produce certain documents. The affidavit in support of the petition stated that the offences, if any, were committed at Madras, that it was very inconvenient and expensive for the petitioner and his witnesses to go to Bombay and that the complainant had his agent to represent him at Madras, and on all these grounds the petitioner prayed for the transfer of the case to the file of the Chief Presidency Magistrate's Court at Madras.

C. Rajagopala Ayyangar for the petitioner.

R. N. Aingar for the respondent.

E. R. Osborne, the Acting Public Prosecutor, for the Crown.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—I agree with my learned brother that this petition should be dismissed. I am clear that section 185 of the Code of Criminal Procedure does not enable a High Court to make an order transferring a case pending on the file of a Criminal Court whether within or outside its jurisdiction to the file of another Criminal Court whether such other Criminal Court be within its own jurisdiction or without its jurisdiction. Section 185, in my opinion, has absolutely nothing to do with transfer or with a High Court's power of transfer. The power to transfer vested in the High Court, so far as the Criminal Procedure Code is concerned, is dealt with and was intended by the Legislature to be dealt with solely by section 526 of the Code of Criminal Procedure. That section gives full powers to a High Court to transfer cases pending in a Court "subordinate thereto" to any other "such" Court, that is, any other Court subordinate to it or even to itself. It seems to me [with the greatest respect to the decisions in *Hiran Kumar Chowdhary v. Mangal Sen*(1), and *Emperor v. Chaichal Singh*(2) which I am

(1) (1912) 17 C.W.N., 761.

(2) (1909) 2 I. C., 361.

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unable to follow] to be contrary to usually accepted canons of construction to infer from the language of section 185 (which does not use the word "transfer" or any word even remotely suggesting the idea of "transfer") a power in the High Court to *transfer* cases, especially to transfer a case pending in a court outside its jurisdiction. As my learned brother points out, what power has a High Court to enforce its order transferring a case instituted and pending outside its jurisdiction? As he has further pointed out, section 527 (1) of the Code of Criminal Procedure clearly implies that it is only the Governor-General in Council that has the power to transfer a case pending in a court subordinate to one High Court to be tried by a Court subordinate to another High Court. On this short ground, this revision petition should be dismissed.

As, however, it was argued that we are, at least, entitled to "decide" under section 185 of the Code of Criminal Procedure by which Court the offence shall be inquired into or tried and that this provision means that we are entitled to express an opinion (even though it might be a mere pious unenforceable opinion) that the Presidency Magistrate's Court within our jurisdiction should inquire into this case, I shall proceed to express my opinion on the whole scope of that section (185 of the Code of Criminal Procedure).

Reliance was placed on behalf of the petitioner, on *Queen-Empress v. O'Brien*(1) and *Babu Lal v. Ghansham Das*(2). Those, however, were cases in which the High Court's opinion was expressed *against* the jurisdiction (and competency to try) of the Court subordinate to that High Court, which subordinate Court had taken cognizance of a criminal case (and not against the jurisdiction of a Court not subordinate to itself). Of course, every High Court has power to prevent a Court subordinate to itself from grasping at jurisdiction or from trying a case which had better be tried by another Court whether subordinate to that High Court or not subordinate to it. It has also power to decide when an accused person is found within its jurisdiction and a criminal case is pending against him in a Court subordinate to its appellate criminal jurisdiction, which of two courses is more advisable: (1) that the offence should be inquired into and tried by that

(1) (1897) I.L.R., 19 All., 111.

(2) (1908) 5 A.L.J., 333.

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subordinate Court, or (2) that the offence should be inquired into and tried by a Court subordinate to another High Court (which subordinate Court is empowered to take cognizance of it under one of the sections 177 to 184): in other words, I am quite clear that section 185 was intended only to apply to and provide for the following two sets of circumstances: (1) where two cases are pending in two Courts within the jurisdiction respectively of two separate High Courts on the same set of facts, the High Court within which the offender is found has the deciding voice *whether the Court within its own jurisdiction shall or shall not proceed against the accused* (such decision being intended to be based on grounds of convenience, jurisdiction, fairness to both sides, etc.); if it decides in the affirmative, the outside Court cannot proceed further as the High Court has full powers to prevent a person who is within its jurisdiction from being taken out of that jurisdiction till the case in its subordinate Court is concluded and (2) where only one case has been instituted in a Court subordinate to the High Court in whose jurisdiction the offender is, that High Court can decide whether the case should be inquired into and tried by its own subordinate Court or should be tried in a Court within the jurisdiction of some other High Court.

I am consequently of opinion that *where no case is pending in a Court subordinate to a particular High Court*, section 185 cannot be availed of by that High Court to give a decision that a Court subordinate to it should or should not inquire into or try an offence charged in a case pending in a Court not subordinate to it. I wish to add that as my opinion numbered (1) as above is not consistent with the observations in *Hiran Kumar Chowdhary v. Mangal Sen*(1) (which observations are to the effect that grounds of convenience cannot be considered in giving a decision under section 185 and that where there is no real doubt as to jurisdiction, section 185 does not apply) I respectfully dissent from that decision also.

NAPIER, J.

NAPIER, J.—This is an application by a person carrying on business in Madras to transfer to the Chief Presidency Magistrate, Madras, Case No. 571 of 1916 on the file of the Chief Presidency Magistrate, Bombay, in which the petitioner is accused of offences under sections 482 and 486 of the Indian

Penal Code on the complaint of the counter petitioner who carries on business in Bombay. The application purports to be made under section 185 of the Criminal Procedure Code, the ground alleged being that the Chief Presidency Magistrate has no jurisdiction to try the case. I express no opinion on the question whether the section applies to cases where there is a doubt as to the existence of jurisdiction in the Court that has taken cognizance, as well as to cases where there is admittedly double jurisdiction under sections 179 and 181, Criminal Procedure Code. Whether this be so or not, I am clearly of opinion that this Court has no jurisdiction to entertain the application. In terms section 185, Criminal Procedure Code, gives no power to transfer at all, but it is argued that the power to transfer must be inferred as being requisite to make the decision operative. This is not so; for dealing with Courts under our own jurisdiction we have specific powers under the Code, and we cannot possibly *infer* a power to deprive Courts not under our superintendence, of their jurisdiction. Reliance is placed on *Hiran Kumar Chowdhary v. Mangal Sen*(1), where the High Court of Calcutta made an order transferring a case pending before a Court subordinate to the Chief Court of the Punjab to one of its own Courts. I am unable to follow this precedent. Admittedly a High Court cannot enforce such an order and I have no doubt that, on the true reading of the section, there is no such power. It was pointed out in the course of argument that the conflict of jurisdiction or double jurisdiction under sections 181 to 184, Criminal Procedure Code, usually arises where offences have been committed in one jurisdiction and consequences follow in another, and not owing to the place where a person charged is. If section 185, Criminal Procedure Code, is to be given the wide meaning sought to be put on it, it would follow that the High Court, within whose jurisdiction a person charged is, could make an order where the conflict or doubt as to the jurisdiction arose between two local Courts in the jurisdiction of another High Court, that is to say, for instance, the Court of the Resident of Bangalore, in whose jurisdiction a person was living at the time a charge was laid against him in a Madras Court could decide as to which of two Courts

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(1) (1912) 17 C.W.N., 761.

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under the jurisdiction of the High Court of Madras a person should be tried on the application of section 181, clauses (2), (3) and (4), or section 182, Criminal Procedure Code. It is hardly necessary to say that this could not have been the intention of the legislature. In my opinion, the Court has no power to transfer under this section. What it can do is to decide by which Court the offence shall be inquired into or tried and where a charge has been laid and the accused person is at the time within its own jurisdiction and a question arises whether it should not more properly be tried in a Court subject to the jurisdiction of another High Court, the High Court in whose jurisdiction the person is can decide that its own Court should not inquire into the matter and stay proceedings. It would be then open to the complainant to lay his charge in the other Court and any objection to the jurisdiction of that Court would be heard by its own High Court. This action has been taken on several occasions (*vide Emperor v. Chaichal Singh*(1) and *Babu Lal v. Ghansham Das*(2)). It is true that in those cases the Court did make an order that the foreign Court should try the case, but I desire to say that, even if we had jurisdiction in this case on our reading of the section above set out, we should not think it proper to make any such order because we should be unable to enforce it. It is suggested that the Magistrate of a foreign Court might act on the order and take cognizance of a Case. Even if he did, it would be open to the accused to apply to the High Court having jurisdiction over that Magistrate, and it cannot be suggested that our order would be in any way binding on that High Court. The only person who has any jurisdiction to pass orders binding on different High Courts is the Governor-General in Council under section 527, Criminal Procedure Code, and I am satisfied that the Court did not intend to vest in any High Court powers which were on the face of them infructuous or might lead to conflict with another High Court.

The petition is therefore dismissed.

Attorneys for the complainant—*Messrs. Grant and Grotorex.*

K.R.

(1) (1909) 2 I.C., 361.

(2) (1908) 5 A.L.J., 333.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

SARAVANA PILLAI, PETITIONER,

v.

ARUNACHALAM CHETTIAR, RESPONDENT.*

1916,
November,
8, 9 and 15.

Civil Procedure Code (Act V of 1908), sec. 73—Rateable distribution, application for—Decree, validity of, if can be impeached—Inquiry, judicial or administrative—Objection to decree as collusive, if can be raised—Power of Court—Conditions under section 73.

An inquiry under section 73 of the Civil Procedure Code is of a non-judicial character and a Court charged with the distribution of assets under that section has no power to inquire into the validity or the *bona fides* of a decree on the strength of which rateable distribution is claimed.

Shankar Sarup v. Mejo Mal (1901) I.L.R., 23 All., 313 (P.C.), referred to.

The only conditions to be satisfied under section 73 are that there must have been an application before the assets are realized, and that the decree should not have been satisfied.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the order of MAULAVI GHULAM JILANI QUIRASHI SAHIB BAHADUR, the District Munsif of Shiyali, dismissing the Execution Application No. 1460 of 1915 in Execution Petition No. 285 of 1915 praying for rateable distribution of the sale-proceeds in Original Suit No. 158 of 1915.

The petitioner, Saravana Pillai, obtained a decree for money against Sabapathia Pillai in Original Suit No. 289 of 1915 on the file of the District Munsif's Court of Shiyali, and filed an application for execution of the decree. One Arunachalam Chettiar had also obtained a decree in Original Suit No. 158 of 1915 on the file of the same Court against the same defendant; he filed an application for execution of his decree and attached some immoveable properties belonging to Sabapathy Pillai; the sale of the properties was fixed for the 20th December 1915. Saravana Pillai, the decree-holder in Original Suit No. 289 of 1915 filed an application dated 20th December, 1915 in Original

* Civil Revision Petition No. 664 of 1916.

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Suit No. 158 of 1915 for rateable distribution of the proceeds that might be realized by the sale in execution. The decree-holder in Original Suit No. 158 of 1915 objected that Saravana Pillai was not entitled to rateable distribution as the decree in Original Suit No. 289 of 1915 was a collusive one and was not based on any real debt. The District Munsif held that it was competent for the decree-holder to raise this objection and called on the petitioner to prove the *bona fide* character of his decree. The petitioner let in no evidence; the District Munsif dismissed the petition. The petitioner preferred this Civil Revision Petition to the High Court.

R. Gopalaswami Ayyangar for the petitioner.

K. V. Sesha Ayyangar for the respondent.

SESHAGIRI
AYYAR, J.

The following judgment of the Court was delivered by SESHAGIRI AYYAR, J.—The petitioner in this case applied for rateable distribution along with others to the District Munsif. Objection was taken that the decree of the petitioner was a collusive one and that consequently he should not be allowed to share in the distribution of the assets. The District Munsif held that it was open to him to inquire into the *bona fides* of the decree obtained by the petitioner. The question for consideration is whether the District Munsif's view is right.

As the counter-petitioner was unrepresented, we requested Mr. K. V. Sesha Ayyangar to assist us in this case. We are indebted to him for the care and energy he has displayed in arguing the case on behalf of the counter-petitioner.

We do not propose to consider the question whether under no circumstances can an executing Court inquire into the validity of a decree. It is fairly well settled that a judgment-debtor is not entitled in execution to impeach the soundness of a decree obtained against him: *Sudindra v. Budan*(1) and *Mahomed Isub v. Bashotappa*(2). This principle applies only as between parties to the decree. As regards strangers, it seems clear that collaterally they can attack the validity of a decree to which they were not parties. The judgment of Lord BROUGHAM in *Earl of Bandon v. Becher*(3) establishes that proposition: see also Bigelow on Estoppel, fifth edition, pages 203 and 211. The

larger proposition, however, that an executing Court is disentitled from questioning the correctness of a decree does not directly arise in this case. In our opinion, whatever may be the rights of an executing Court in this respect, a Court charged with the distribution of assets under section 73 of the Code of Civil Procedure has no such power. It was held by the Judicial Committee in *Shankar Sarup v. Mejo Mal*(1) that such a Court is acting ministerially in apportioning the moneys realized in execution. The question before their Lordships related to limitation. It was argued that a suit brought to contest the validity of payments made to one of the decree-holders should have been instituted within a year of the decision under article 13 of the Limitation Act. Their Lordships pointed out that in making a rateable distribution under section 295 of the Code of Civil Procedure, 1832, the officer was acting departmentally and not as a Court, and that consequently the decision of such an officer was not one which should have been set aside within a year. A comparison of the provisions of the Code of Civil Procedure relating to rateable distribution and to claim proceedings fully bears out this view. Order XXI, which relates to execution, makes provision in rules 58 to 63 for investigating the claims of third parties. There are similar provisions beginning with rule 97 where there is resistance to delivery of possession to the decree-holder. An inquiry is provided for in these rules, and the unsuccessful party is directed to establish his right in a Court of law, failing which it is declared that the orders passed under the rules shall be final. No such provision is to be found with reference to section 73. Clause (2) of that section says that a wrongful distribution may be questioned in a regular suit. No procedure is prescribed for ascertaining the legality or otherwise of the decrees under which rateable distribution is sought. The absence of such a provision indicates that the inquiry under section 73 is non-judicial. It follows from this that an officer distributing the assets can have no power to inquire into the *bona fides* or otherwise of a decree brought to his notice. Section 73 (c), clause (4), does not contemplate any such enquiry. The only conditions to be satisfied are there must have been an application before the assets are

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(1) (1886) I.L.R., 9 Mad., 80.

(2) (1903) I.L.R., 27 Bom., 302.

(3) (1835) 3 C. & F., 479 at p. 510.

(1) (1901) I.L.R., 23 All., 313 (P.C.).

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realized and the decree should not have been satisfied. Both these are matters of record which do not necessitate any lengthy investigation. We are, therefore, on the construction of the provisions relating to rateable distribution, of opinion that it is not competent to the District Munsif to inquire into the validity of a decree on the strength of which rateable distribution is claimed.

Before we examine the decisions which have been quoted before us, we may point out that section 73 of the Code of Civil Procedure, 1908, is only an enabling section. It does not say that the orders passed under it are final unless set aside by a regular suit. It is clear that failure to participate does not prevent a decree-holder from executing his decree against the person and other properties of the judgment-debtor: *Syud Nadir Hossein v. Baboo Pearoo Thovildarinee*(1) and *Janoky Bullubh Sen v. Johiruddin Mahomed Abu Ali Soher Chowdhry*(2).

Now as regards the cases directly bearing on the question, there is no doubt that in Calcutta there are a number of decisions which hold that the *bona fides* of a decree can be inquired into under section 295 of the Code of Civil Procedure of 1882, corresponding to section 73 of the present Code of Civil Procedure. *In re Sunder Dass*(3) enunciates that principle. That was followed in *Chhaganlal v. Fazarali*(4). In *Puran Chand v. Surendra Narain*(5), Justice MOOKERJEE says that the question is not free from difficulty, but that, having regard to the previous decisions of the Calcutta High Court, he was not prepared to dissent from the view that, under section 295 of the old Code, the *bona fides* of a decree can be inquired into. In *Mathura Nath Sarkar v. Umesh Chandra Sarkar*(6), MACLEAN, C.J., doubts the correctness of *In re Sunder Dass*(3). In *Peary Lal Das v. Peary Lal Dawn*(7), Justice MOOKERJEE follows his previous decision in *Puran Chand v. Surendra Narain*(5). The learned Judge, in the earlier case already referred to, says that as, in re-enacting section 73 of the present Code of Civil Procedure, the legislature with knowledge of the decisions in

(1) (1878) 19 W. R., 255 (C.R.). (2) (1884) I.L.R., 10 Cal., 567.
(3) (1885) I.L.R., 11 Cal., 42. (4) (1889) I.L.R., 13 Bom., 154.
(5) (1912) 16 C.L.J., 582. (6) (1897) 1 C.W.N., 633.
(7) (1913) 19 C.W.N., 903.

In re Sunder Das(1) and *Chhaganlal v. Fazarali*(2), has not made any departure from section 295 of the Code of 1882, it may be taken that it accepted as correct the view taken in these cases. But it has to be remembered that *Shankar Sarup v. Mejo Mal*(3), was also under the old Code, and that notwithstanding the pronouncement of the Judicial Committee that the officer distributing the assets is only acting ministerially, the legislature has not thought fit to declare that he was performing judicial functions.

We are not prepared to attach any significance to the fact that section 73 of the present code is almost identical in language with section 295 of the old Code. On the whole, limiting our observations solely to the functions of an officer exercising his duties under section 73, we are of opinion that it is not open to him to enquire into the legality or validity of a decree brought to his notice in distributing the assets.

The order of the Munsif must be set aside: and the petition should be restored to file, and be disposed of according to law. Costs to abide.

K.R.

(1) (1885) I.L.R., 11 Cal., 42. (2) (1889) I.L.R., 13 Bom., 154.
(3) (1901) I.L.R., 23 All., 313 (P.C.).

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Burn.

1916,
October,
24, 26, 27,
30 and 31,
November 8,
13 and 15.

R. M. M. S. T. SOMASUNDARAM CHETTIAR *alias*
VAIRAVAN CHETTIAR AND OTHERS (DEFENDANTS NOS. 7 AND 8),
APPELLANTS,

v.

VAITHILINGA MUDALIAR AND OTHERS (PLAINTIFF,
FIRST DEFENDANT AND PARTY RESPONDENT), RESPONDENTS.*

Hindu Law—Adoption of an orphan by a widow in 1862—Possession of estate by adopted son—Death of adopted son in 1864—Adoption by his widow—Possession of latter adopted son till 1876—Dispossession by former widow in 1876—Death of adopted son in 1881—Suit by latter's widow against former widow for possession—Decree—Death of former widow in 1902—Suit by reversioners of the original owner in 1905—Suit for possession against widow and alienees from both widows, if, barred—Title of reversioners, if, extinguished—Limitation Act (IX of 1871), art. 129 and sec. 29—Later Limitation Acts, XV of 1877 and IX of 1908, effect of—Res judicata—Sudra ascetic or Tambiran—Entry into order of—Right of inheritance, if forfeited—Texts as to Yati, applicability of, to Sudras—Usage—Civil Procedure Code (Act V of 1908), O. XLI, r. 4—Decree on appeal.

A, a Hindu, died in 1849 without issue, leaving a widow C. She adopted B, an orphan, as a son to her husband in 1862 and put him in possession of her husband's properties, other than those alienated by her prior to adoption. B died issueless in 1864 leaving a widow M, who adopted T. The latter was in possession of the properties till 1876 when he was dispossessed by C. T died issueless in 1881, leaving a widow who also died in 1882. M, who succeeded to the estate as T's heiress, sued C in 1887 and recovered possession of the estate from her. C died in 1902. In 1905, the plaintiffs, claiming to be the reversioners of A on C's death, sued to recover the estate of A from the defendants. Some of the defendants were alienees from M who was the fourth defendant, some others were alienees from C, while the first defendant claimed a fourth share in the estate as the widow of one K who was a co-reversioner along with the plaintiffs, but had become a Tambiran before C died in 1902. The defendants other than the first, contended *inter alia* that the suit was barred by limitation and by the rule of *res judicata* :

Held :

(1) that a suit by the reversioners of A for recovery of possession of such of A's properties as were in the possession of the heirs of the adopted son had become barred in 1874 under article 129 of the Limitation Act (IX of 1871) and that a title to such property was acquired by the heirs of the adopted son under section 29 of the same Act and could not be affected by the provisions of the later Limitation Act XV of 1877 or Act IX of 1908 ;

* Appeals Nos. 206 and 207 of 1908 and Nos. 10, 11, 12, 14 and 15 of 1909.

(2) that, although the plaintiffs who were the actual reversioners of A in 1902, were not in existence when the twelve years limited by article 129 expired, their title as reversioners was barred ;

(3) that, consequently, the present suit as against the fourth defendant (the widow of the adopted son) and her alienees was barred by limitation ;

(4) but that in respect of the properties alienated by the widow of A, the present suit for recovery of possession from her alienees was not barred by limitation.

Jagadamba Chaothrani v. Dakhina Mohun Chaothri (1886) I.L.R., 13 Cal., 308 (P.C.) and *Mohesh Narain Munshi v. Taruck Nath Moitra* (1896), I.L.R., 20 Cal., 487 (P.C.), followed.

Thakur Tirbhuvan Bahadur Singh v. Raja Rameshar Butsh Singh (1906) I.L.R., 28 All., 727 (P.C.), explained and applied :

Held also, that the present suit was not barred by the rule of *res judicata* by the decision in the previous suit instituted by M, against C.

Harri Nath Chatterjes v. Mothur Mohun Goswami (1893) I.L.R., 21 Cal., 8 (P.C.), distinguished.

The texts of Hindu Law as to disinheritance applicable to Yati or Sanyasi do not apply to Sudra ascetics unless a usage to this effect is established :

Dharmapuram Pandara Sannadhi v. Vira Pandiyan Pillai (1899) I.L.R., 22 Mad., 302 and *Harish Chandra Roy v. Alir Mahmud* (1913) I.L.R., 40 Cal., 545, referred to :

Held (on the evidence), that no usage was established in this case ; consequently that the first defendant's husband was not excluded from inheriting as a co-reversioner with the plaintiffs by reason of his having entered the order of Tambirans before the succession opened in 1902 and that the first defendant was entitled to recover one-fourth share in the estate in right of her husband :

Held further, that where an appeal was preferred by some only of the alienees who were defendants but no appeal was preferred by the other alienees or the alienor who were also defendants, a decree can be passed in the appeal dismissing the suit in favour of the latter defendants also.

Kulaikada Pillai v. Viswanatha Pillai (1905) I.L.R., 28 Mad., 229 and *Subbarayalu Naidu v. Pappammal*, Second Appeal No. 557 of 1914, followed.

Where some of the appellants, who were defendants, died and their legal representatives were not brought on the record in the appeal :

Held, that it was competent to the Court under Order XLI, rule 4, to set aside the decree as regards the whole of the plaintiff's claim and not merely in respect of the interest of those appellants only whose appeals had not abated.

Chintaman v. Gangabai (1903) I.L.R., 27 Bom., 284, followed.

Dhuttaloor Subbayya v. Paidigantum Subbayya (1907) I.L.R., 30 Mad., 470, referred to.

APPEALS against the decrees of V. K. Desikachariyar, the Subordinate Judge of Negapatam, in Original Suit No. 26 of 1905.

These are connected appeals preferred against the decree of the Subordinate Judge in a suit instituted by the plaintiffs who claimed to recover the suit properties known as the Kulikarai estate, as the nearest reversionary heirs of one Arunachala, the

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last male owner thereof, who died issueless in 1849 leaving a widow Chokkammal. Chokkammal alienated some of the suit properties which formed part of her husband's estate prior to 1862, in which year she adopted one Alagasundara as a son to her deceased husband, and put the latter in possession of such of the properties as were not alienated by her already. Alagasundara was an orphan at the time of his adoption; he continued in possession of the properties until his death in 1864; he died without issue but left a widow Murugathal, the fourth defendant in the present suit; Murugathal adopted one Tyagaraja who enjoyed the properties till 1876, when he was dispossessed of the same by Chokkammal. Tyagaraja died in 1881, leaving a widow who died in 1882. Murugathal succeeded to the estate as the heiress of Tyagaraja, and brought a suit in 1887 (Original Suit No. 9 of 1887 on the file of the Subordinate Court of Negapatam) for recovery of possession of the properties which were taken possession of by Chokkammal by trespass in 1876. Murugathal recovered possession after decree in the said suit. Murugathal alienated some of the properties so recovered by her in favour of some of the defendants in the present suit. In 1902 Chokkammal died. The plaintiffs, who were three out of four co-reversioners to the estate of Arunachala on the date of the death of Chokkammal in 1902, but were not born till after 1884, instituted the present suit in 1905 (Original Suit No. 26 of 1905 on the file of the Subordinate Court of Negapatam) for recovery of possession of the estate of Arunachala from the alienees of Murugathal who was the fourth defendant as well as the alienees of Chokkammal and other persons alleged to be in possession of portions of the estate; the first defendant was the widow of one Bawa Krishnaswami who was a co-reversioner of equal grade with the plaintiffs, and would have been ordinarily entitled to a fourth share in the estate; but he had entered the order of *Tambirans* or *sudra* ascetics prior to 1902 when the succession opened by the death of the widow Chokkammal. The plaintiffs contended that Bawa Krishnaswami had forfeited his right to inheritance by his becoming a *Tambiran* and that the plaintiffs were the sole reversioners entitled to the entire estate, while the first defendant claimed a fourth share in right of her husband in whom the reversionary estate had been vested prior to his death. The alienees from Murugathal and Chokkammal who were joined as

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defendants as well as Murugathal who was the fourth defendant, contended that the suit was barred by limitation and also by the rule of *res judicata* by reason of the decision in the previous suit (Original Suit No. 9 of 1887) instituted by Murugathal against Chokkammal. The Subordinate Judge held that the suit was not barred by limitation or by the rule of *res judicata* and that the first defendant's husband did not forfeit his right to inherit by reason of his entering the order of *Tambirans*, and consequently decreed the suit in favour of the plaintiffs as well as the first defendant for their respective shares in the estate. Some of the alienees of Murugathal, namely, the seventh and eighth defendant, preferred separate appeals to the High Court (*viz.*, Appeals Nos. 206 and 207 of 1908); the alienees from Chokkammal and some other defendants who claimed that the property did not belong to the estate, preferred separate appeals; the plaintiffs also preferred a separate appeal (Appeal No. 14 of 1909) but the fourth defendant and some of the alienees from her who were defendants, did not appeal against the decree of the Lower Court. In Appeal No. 11 of 1909 preferred by some of the defendants claiming that the lands in their possession did not belong to the estate of Arunachala some of the appellants died during the pendency of the appeal but their legal representatives were not brought on the record of the appeal, and a question was raised in the appeal whether a decree could be passed in the appeal in favour of such of the appellants also in respect of whom the appeal had abated.

A. Krishnaswami Ayyar for the appellants (defendants Nos. 6 to 8) in Appeals Nos. 206 and 207 of 1908.—The main contentions of these appellants are based on (1) Limitation, (2) *Res judicata*, (3) Estoppel, and (4) Necessity for the alienations.

(1) *Limitation*.—The present suit is instituted by the three plaintiffs who are the reversioners of Arunachala who was the last male owner of the estate who died in 1849. His widow died in 1902. But as early as 1862, his widow adopted a son Alagasundara who was put in possession in 1862 of the suit properties, now held by the appellants; the adopted son and his heirs, namely, his widow Murugathal and his adopted son Thiagraja, were in possession till 1876, when Thiagraja was dispossessed by Chokkammal (widow of Arunachala). The facts as to adoption by Chokkammal and possession by the adopted son and his

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heirs on the footing of adoption have been found in the previous suit (Original Suit No. 9 of 1887) instituted by Murugathal against Chokkammal, and the Lower Court has accepted the same and also found the same in this suit also. By reason of the possession of the adopted son (Alagasundara) and his heirs till 1876 the right of suit of the reversioners of Arunachala was barred; it was barred in 1874, under article 129 of the Limitation Act (IX of 1871), and the title of the reversioners was extinguished under section 29 of the same Act; under article 129 of Act IX of 1871, a suit for recovery of possession as well as for setting aside the adoption was barred; the title of the reversioners was extinguished and a title to the properties became vested in 1874 in the adopted son's heirs who were in possession of the estate claiming under the adoption. And the right of suit which was barred under the Limitation Act IX of 1871, cannot be revived by the enactment of the later Acts, viz., Act XV of 1877 and Act IX of 1908. By way of analogy, adverse possession against the widow barred the reversioners also under the Limitation Act of 1859; the later Acts of 1871, 1877 and 1908 cannot revive the right which was barred.

The decisions of the Privy Council in *Jagadamba Chaothrani v. Dakhina Mohun Roy Chaothri*(1) and *Mohesh Narain Munshi v. Taruck Nath Moitra*(2) are conclusive on the question. *Jagadamba Chaothrani v. Dakhina Mohun Roy Chaothri*(1) arose under the old Act of 1871; *Mohesh Narain Munshi v. Taruck Nath Moitra*(2) arose after the Act of 1877, the facts having occurred during the life of the Act of 1871. Both are direct decisions on the scope of the article 129 of Act IX of 1871 and the latter deals specifically with the effect of the later enactment, viz., Act XV of 1877. The decision of the Privy Council in *Tirubhuwan Bahadur Singh v. Rameshar Bakhsh Singh*(3) is not really against this contention, when it is properly understood on the facts of that case: Firstly, in *Tirubhuwan Bahadur Singh v. Rameshar Bakhsh Singh*(3) the adoption was made to the woman herself and not to the last male owner; she made a will nominating an heir to herself. The plaintiffs sued as heirs by adoption of the woman to the estate of the woman: see *Tirubhuwan Bahadur Singh v. Rameshar Bakhsh Singh*(3); a reference is made to article 144 and not

(1) (1886) I.L.R., 13 Calc., 303 (P.C.). (2) (1893) I.L.R., 20 Calc., 487 (P.C.).
(3) (1906) I.L.R., 23 All., 727 (P.C.).

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article 141 which shows that the adoption referred to was to the woman herself and not to her husband. Article 29 of Act IX 1871 does not apply to adoptions of the kind dealt with in *Tirubhuwan Bahadur Singh v. Rameshar Bakhsh Singh*(1) whereas in the present case the adoption was made to the husband and not to the woman. *Tirubhuwan Bahadur Singh v. Rameshar Bakhsh Singh*(1) refers to the class of cases mentioned in *Raj Bahadoor Singh v. Achumbit Lal*(2). Secondly, in *Tirubhuwan Bahadur Singh v. Rameshar Bakhsh Singh*(1), it is clear that the adopted son was not in possession and a suit by him for possession was dismissed: see also *Lachman Lal Chowdhri v. Kanhaya Lal Mowar*(3), *Rathnamasari v. Akilandammal*(4), *Venkoba Row v. Nataraja Chettiar*(5) and *Hurnabh Pershad v. Mandil Dass*(6). *Muhammad Umar Khan v. Muhammad Niuzuddin Khan*(7) is not a decision on the Act of 1871, but a decision only on article 118 of Act XV of 1877: see also *Velugu Mangamma v. Bundlamudi Veerayya*(8), *Rama Row v. Venkoba Row*(9), *Kolandavelu Pillai v. Armugatha Pillai*(10) and *Tirubhuwan Bahadur Singh v. Rameshar Bakhsh Singh*(1).

(2) *Res Judicata*.—The decision in Original Suit No. 9 of 1887 which was instituted by Murugathal (the fourth defendant) against Chokkammal is *res judicata* between the plaintiffs and the fourth defendant and her alienees. Chokkammal represented herself and all the reversioners of Arunachala: see *Hari Nath Chatterjee v. Mothur Mohun Goswami*(11) and *Chiruvolu Punnumma v. Chiruvolu Perrazu*(12): article 141 of Act XV of 1877 cannot give a right, if it is barred as *res judicata*: see *Lachhan Kunwar v. Manorath Ram*(13). *Amrit Dhar v. Bindesri Prasad*(14) is not good law. In the previous suit, the High Court did not refer in its judgment to any particular article; they must be deemed to have applied article 129 of the Act of 1871.

(1) (1906) I.L.R., 28 All., 727 at pp. 728, 730 and 731 (P.C.).
(2) (1879) 6 I.A., 110. (3) (1895) I.L.R., 22 Calc., 609 (P.C.).
(4) (1903) I.L.R., 26 Mad., 291 at p. 301 (F.B.).
(5) (1914) M.W.N., 903. (6) (1900) I.L.R., 27 Calc., 379.
(7) (1912) I.L.R., 39 Calc., 418 (P.C.).
(8) (1907) I.L.R., 30 Mad., 308. (9) (1907) 17 M.L.J., 282.
(10) (1913) 18 I.C., 493. (11) (1894) I.L.R., 21 Calc., 8 (P.C.).
(12) (1906) I.L.R., 29 Mad., 390 at p. 410 (F.B.).
(13) (1895) I.L.R., 22 Calc., 445 (P.C.).
(14) (1901) I.L.R., 23 All., 448.

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(3) *Estoppel*.—[WALLIS, C.J.—There is no issue raising the question of estoppel, and the point has not been taken in the Court below. We must decline to go into that question on appeal.]

(4) *Necessity*.—The alienations made by Murugathal in favour of the appellants are supported by necessity. A person who acquires title by prescription against a widow is entitled to powers of alienation which will be good if it is made for necessity. A person in possession of a *poliam* can alienate for preservation of the estate. Assuming Murugathal obtained a widow's estate only by prescription and that the reversioners were not barred, still her alienations made for her own maintenance and other necessary expenses incurred for the preservation of the estate will be binding on the estate absolutely. Such expenses are for her maintenance, cultivation expenses and litigation expenses of the suit instituted by her against Chokkammal.

[WALLIS, C.J.—You were in possession; you are not asked to pay *mesne* profits; the expenses you refer to must have been met by you from the income of the estate in your possession.]

S. Srinivasa Ayyangar for respondent (first defendant).—The present suit is not barred by limitation. Under the Act of 1859 (Act XIV of 1859), clause 15, a suit for declaration and a suit for recovery of possession were separately provided for. The Act of 1871 introduced article 129 which related to suits both to establish and to set aside adoptions. The Limitation Act (XV of 1877) and Act IX of 1908 provide different articles, one for suits for declaring an adoption to be invalid (article 118) and another (article 119) for suits for declaring an adoption to be valid. Under the Limitation Act XV of 1877 and IX of 1908, it has been held that article 118 does not apply to suits for recovery of possession: see *Tirubhuvan Bahadur Singh v. Rameshar Bakhsh Singh*(1), *Velugu Mangamma v. Bundlamudi Veerayya*(2), *Rama Row v. Venkoba Row*(3) and *Kolandavelu Pillai v. Armugatha Pillai*(4). In the present case it was not necessary to sue to set aside the adoption, as it was already set aside in the previous suit (Original Suit No. 9 of 1887) in which the adoption was set up by the then plaintiff (Murugathal), who is now the fourth defendant, and denied by the defendant

(1) (1906) I.L.R., 28 All., 727 (P.C.).
(3) (1907) 17 M.L.J., 282.

(2) (1907) I.L.R., 30 Mad., 308.
(4) (1913) 18 I.C., 493.

therein; and the adoption was negatived in that suit. No separate suit to set aside the adoption by the reversioners was necessary; and the present suit is only for possession after the death of the widow Chokkammal, as the adoption had been already set aside in the previous suit.

Lapse of time does not confer the status of an adopted son. It only confers an immunity on the adopted son: see *Tirubhuvan Bahadur Singh v. Rameshar Bakhsh Singh*(1). There is really no inconsistency between that case and *Jagadamba Chaodhrani v. Dakhina Mohun Roy Chaodhri*(2); if there were inconsistency, the later case should be followed. In *Mohesh Narain Munshi v. Taruck Nath Moitra*(3), the plaintiff was the adopted son of the last male owner and was entitled to possession immediately on his adoption and his suit after twelve years after adoption was held barred. But here the reversioner is entitled to possession only on the death of the widow Chokkammal in 1902. Further the present plaintiffs were not in existence in 1876; they were born only after 1884. They were not the reversioners when the twelve years from the date of adoption elapsed. The plaintiff's right accrued only long after the adoption.

[WALLIS, C.J.—While article 129 of the Limitation Act was in force, the predecessors of the plaintiffs-in-interest were barred.]

But these plaintiffs, as reversioners, do not claim from the previous reversioners; they do not claim through other reversioners for purposes of limitation. "Immunity" referred to in *Tirubhuvan Bahadur Singh v. Rameshar Bakhsh Singh*(1), is a personal immunity. No status can be acquired by lapse of time.

If the presumptive reversioner at that time was also the actual reversioner when the estate fell into possession, then it may be a question whether the decisions in *Jagadamba Chaodhrani v. Dakhina Mohun Roy Chaodhri*(2) and *Mohesh Narain Munshi v. Taruck Nath Moitra*(3) might apply; but these cases do not apply to a person who was not in existence when the twelve years elapsed under article 129. Such persons are not the persons who could have sued, and, not suing, should be held to be barred afterwards. It was nowhere held under the Act of

(1) (1906) I.L.R. 28 All., 727 (P.C.).

(2) (1886) I.L.R., 13 Calc., 308 (P.C.). (3) (1893) I.L.R., 20 Calc., 487 (P.C.).

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1871 that a remoter reversioner, who was not even born within the twelve years specified in article 129, would be barred, whatever the immediate reversioner's case may be. The rule in *Jagadamba Chaodhrani v. Dakhina Mohun Roy Chaodhri*(1) has been applied only to immediate reversioners and should not be extended to remoter reversioners. Neither *Jagadamba Chaodhrani v. Dakhina Mohun Roy Chaodhri*(1) nor *Mohesh Narain Munshi v. Taruck Nath Moitra*(2) is authority for applying article 129 to remoter reversioners.

Second point.—The previous suit (Original Suit No. 9 of 1887) brought by Murugathal (fourth defendant) against Chokkammal is conclusive as *res judicata* as to the invalidity of the adoption. There is no necessity for the plaintiffs now to sue to set aside the adoption, as it was held in the previous suit that there was no valid adoption. The point is not here urged as a plea of *res judicata*, but to show that no further setting aside was necessary.

[WALLIS, C.J.—As Murugathal succeeded on the ground of adverse possession, the finding as to adoption is not *res judicata*. Under the Act of 1859, possession adverse to the widow, was also adverse to the reversioners.]

No; possession under an adoption or alienation made by a widow was not adverse to reversioners. It was adverse only if it was adverse against the widow also: see *Miterjeet Singh v. Toondun Singh*(3), *Kotamarti Sitaramayya v. Kotamarti Vardhuamma*(4), *Rajendro Nath Holdur v. Jogendro Nath Banerjee*(5) and *Ratnamasari v. Akilandammal*(6). The adverse possession found in this case must be adverse against the widow only. This finding is impossible unless the adoption was found against. The Court had expressly found against the adoption and found on adverse possession. If the Court did not find on adoption but went on adverse possession, it would not be *res judicata*. The plaintiff in Original Suit No. 9 of 1887 set up adoption. She failed to establish it, and consequently the possession was held to be adverse which had ripened to a title after twelve years. There is no necessity for a reversioner

(1) (1886) I.L.R., 13 Cal., 308 (P.C.). (2) (1893) I.L.R., 20 Cal., 487.

(3) (1869) 12 W.R., 14. (4) (1874) 7 M.H.C.R., 351.

(5) (1871) 15 W.R. (P.C.), 41.

(6) (1903) I.L.R., 26 Mad., 291 p. at 301 (F.B.).

to bring a suit for a formal declaration as to the invalidity of the adoption.

Mr. T. Rangachariyar for respondents (plaintiffs).—The defendants Nos. 6, 7 and 8 set up a plea not of limitation but of adoption by prescription. No title as adopted son can be acquired by prescription; nor was possession adverse to the present plaintiffs before 1902. In *Mohesh Narain Munshi v. Taruck Nath Moitra*(1), the possession was adverse to the plaintiff immediately on his adoption. The present plaintiffs do not claim through the widow or other reversioners before him and therefore are not barred, though the widow or such other reversioners might have sued. These plaintiffs were born only in 1884 and later: see *Runchordas v. Parvati Bai*(2) and *Govindu Pillai v. Thayammal*(3). In all the cases referred to, the adopted son was the defendant who defended his possession; the rule in *Jagadamba Chaodhrani v. Dakhina Mohun Roy Chaodhri*(4) should not be extended to the adopted son's heirs and their alienees. The policy of the Limitation Act of 1871 was a short-lived one and a departure, which was departed from again in 1877. If the adopted son died, nature has set aside the adoption.

Second Point (res judicata).—The previous decision as to adverse possession is not as to adverse possession against the estate of the reversioners; at most the nature of the adverse possession was left undetermined. Under the Act of 1859, the cause of action for the widow and reversioners was the same; under the Act of 1871, the cause of action for the reversioners was made different from that of the widow. The previous decision does not say that the suit was barred under the Act of 1859 but only under the Act of 1871. *Hari Nath Chatterjee v. Mothur Mohun Goswami*(5) does not apply to this case; in *Hari Nath Chatterjee v. Mothur Mohun Goswami*(5), (1) the defendants were not let into possession by the widow, as the adopted son was in this case; (2) the widow was barred under the Act of 1859, and not so in this case.

A. Krishnaswami Ayyar, in reply.—No distinction can be made between immediate and remoter reversioners. Article 129

(1) (1893) I.L.R., 20 Cal., 487.

(2) (1899) I.L.R., 23 Bom., 725 (P.C.).

(3) (1905) I.L.R., 28 Mad., 57.

(4) (1886) I.L.R., 13 Cal., 308 (P.C.).

(5) (1894) I.L.R., 21 Cal., 8 (P.C.).

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of Act IX of 1871 is general in its terms. The Act of 1871 expressly refers to immediate reversioners as in article 144, when it means to specify them. One reversioner can continue a suit brought by another reversioner: see *Venkatanarayan Pillai v. Subbammal*(1), *Ayyadorai Pillai v. Solai Ammal*(2), *Subbamma v. Madi Reddy*(3), *Hurnabh Pershad v. Mundil Dass*(4) and *Venkoba Row v. Nataraja Chettiar*(5). If one reversioner is barred, another reversioner is also barred in suits for declaration; see *Ayyadorai Pillai v. Solai Ammal*(2) and *Chiruvolu Punnumma v. Chiruvolu Perrazu*(6). *Tirubhuwan Bahadur Singh v. Rameshar Bakhsh Singh*(7) is not a class of cases in which a declaratory suit could have been brought, as the estate there in question was the woman's *stridhanam*. A declaratory suit would be under article 129 only in respect of the husband's estate; see Specific Relief Act, section 42, illustration (f). Suit for declaration is allowed in case of reversioners; see *Janaki Ammal v. Narayanasami Ayyar*(8), *Samarendra Chandra Deb v. Birendra Kishore Deb*(9) and *Sheoparsun Singh v. Ramanandan Prasad Singh*(10). All that *Tirubhuwan Bahadur Singh v. Rameshar Bakhsh Singh*(7) decides is that there is an immunity in respect of the adoptive father's estate. The adopted son does not acquire a status by lapse of twelve years, so that he may inherit as such to the estate of all collaterals, *bandhus* or the *stridhanam* property of the adopting widow.

Second Point (res judicata).—The finding in Original Suit No. 9 of 1887 that there was no adoption in the previous suit, is not *res judicata*, because in spite of the finding against the plaintiff in that suit, she got a decree in her favour; the finding under such circumstances it has been held, is not *res judicata*: see *Venkatasuryanarayana v. Shiva Shankara Narayana*(11), *Run Bahadur Singh v. Lucho Koer*(12), *Moosa Goolam Arief v. Ebrahim Goolam Arief*(13), *Thakur Mugundeo v. Thakur Mahdeo*

(1) (1915) I.L.R., 38 Mad., 408 (P.C.). (2) (1901) I.L.R., 24 Mad., 405.

(3) (1915) 2 L.W., 337.

(4) (1900) I.L.R., 27 Calc., 379 at p. 401.

(5) (1914) M.W.N., 903.

(6) (1906) I.L.R., 29 Mad., 390 (F.B.).

(7) (1906) I.L.R., 28 All., 727 (P.C.). (8) (1916) I.L.R., 39 Mad., 634.

(9) (1908) I.L.R., 35 Calc., 777 (S.B.). (10) (1916) I.L.R., 43 Calc., 694 (P.C.).

(11) (1915) 2 L.W., 101. (12) (1885) I.L.R., 11 Calc., 301.

(13) (1913) I.L.R., 40 Calc., 1 at p. 20 (P.C.).

Singh(1) and *Hari Nath Chatterjee v. Mothur Mohun Goswami*(2), are conclusive on the question.

Hon. Mr. T. Rangachariyar for the respondent was allowed to cite *Ranganatham Chettiar v. Lakshmi Ammal*(3), where the suit was dismissed but adjudication was still held to be *res judicata*.

Appeal No. 14 of 1909.

Hon. Mr. T. Rangachariyar for appellants (plaintiffs)—The plaintiffs are the sole reversioners; Bava Krishnasamy, the husband of the first defendant, having entered the order of *Tanbirans* of the Dharmapuram mutt was excluded from inheritance to his collaterals. He became civilly dead. A *Sudra* can become a *sanyasi* or an ascetic. The ancient *puranas* and *smritis* recognize such capacity. By immemorial usage in Kaliyuga the *Sudras* can become *sanyasis*. Custom recognizes such right in South India. Decision of Courts including the Privy Council have recognized the custom. *Sudra sanyasis* are recognized even by text-writers. Ancient books such as *Mahabharata* refers to *Sudra sanyasis*. There are *mutts* for Brahmans and *Sudras*. Bulk of them are *Sudra mutts*; see *Rameswaram mutt case*, *Ramalingam Pillai v. Vythilingam Pillai*(4), where the Privy Council spoke of "making a *Vellala* layman an ascetic": see also *Ponnambala Tambiran v. Siva jnana Desiku Gnana Sambanda Pandarasannadhi*(5) and *Giyana Sombandha Pandara Sannadhi v. Kandasami Tambiran*(6). An ascetic (if a *Brahman*) is a *Yati*, if a *Sudra*, is a *Paradesi*. The vows are similar to *Brahman sanyasam*.

Giyana Sombandha Pandara Sannadhi v. Kandasami Tambiran(6), speaks of succession to the head of a mutt under the *Mitakshara* law. In *Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai*(7), *SUBRAHMANYA AYYAR, J.*, doubts whether a *Sudra* can become a *sanyasi*, but it is a short judgment and there is no detailed discussion; it is a case of others inheriting to the *Sudra* ascetic's estate.

[WALLIS, C.J., Has *Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai*(7), ever been doubted?]

(1) (1891) I.L.R., 18 Calc., 647 at p. 668.

(2) (1894) I.L.R., 21 Calc., 8 (P.C.).

(3) (1913) 21 I.C., 15.

(4) (1893) 20 I.A., 150 at p. 154.

(5) (1894) 21 I.A., 71.

(6) (1887) I.L.R., 10 Mad., 375 at pp. 384 and 423.

(7) (1899) I.L.R., 22 Mad., 302.

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Yes, by Golab Chandra Sarcar Sastri: see Sircar's Hindu Law, page 474; Ghose's Hindu Law (1903 Edition), pages 691 and 738; Strange's Hindu Law, page 154; Vasishta, Katyayana, Devala, Mitakshara, Setlur, Hindu Law, pages 63, 238 and 239, Smriti Chandrika, chapter V, section 7, clause 11, West and Buhler, page 552; Steele, page 439. A woman can become a *sanyasi*, so can a Sudra. Appar and Nanda (a *Panchama*) were saints: Mitakshara, chapter IX, section 8, prescribe rules as to property of hermits. If Sudras can become ascetics, it attracts the line of inheritance prescribed for Brahmans. There is no need of proof as to acceptance of the rules. The Sudras follow the *Brahma* form of marriage: the presumption is that Sudras follow the *Brahma* form of marriage with all its incidents: *Kailasam Pillai v. Nataraja Thambiran*(1). The Subordinate Judge is wrong when he says that the plaintiff must prove not only usage as to Sudras becoming *sanyasi* but also prove the usage as to exclusion of inheritance. The texts as to exclusion for the Brahman ascetics, will be applicable. The text of exclusion as to inheritance of lunatics is applicable to Sudras also: *Muthusami Mudaliar v. Masilamani*(2).

Hon. Mr. S. Srinivasa Ayyangar for the respondent (first defendant)—The text as to exclusion of inheritance does not apply to Sudra ascetics but only to Dwija ascetics. There is no proof of usage in favour of plaintiff. *Dharmapuram Pandara Sannadhi v. Virapanthyan Pillai*(3), is followed in *Harish Chandra Roy v. Alir Mahmud*(4), *Gouri Shankar Byas v. Niadar Singh*(5), *Lochan Binmali v. Adhar Chandra Mihanta*(6), *Sree Ambalavana Pandara Sannathy v. Sundara Reddiar*(7) and *Sundrabai v. Shivrarnajana*(8). The civil death is not and cannot be attained unless the ceremony of *jeera sraddham* is performed: these Pandarasannadhis cannot and do not perform that to the Tambirans: see also Mayne's Hindu Law, sections 603 and 590. It is a rule of exclusion which is claimed. It must be strictly proved. The rule of exclusion is made in the texts only for Brahmans and cannot be applied to Sudras in the absence of proof of usage.

(1) (1910) I.L.R., 33 Mad., 265. (2) (1910) I.L.R., 33 Mal., 342 at p. 347.

(3) (1899) I.L.R., 22 Mad., 302.

(4) (1913) I.L.R., 40 Calc., 545. (5) (1914) 23 I.C., 287.

(6) (1916) 35 I.C., 630.

(7) Civil Revision Petition No. 183 of 1914.

(8) I.L.R., 32 Bom., 81 at p. 96.

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JUDGMENT.—These are appeals from the decree of the Subordinate Judge of Negapatam in a suit brought by the plaintiffs to recover the suit properties as next reversioners of the last male owner whose widow died in 1902. The defendants relied on long possession under an adoption made by the widow in 1862 and pleaded that the suit was barred by limitation and *res judicata*. The Subordinate Judge overruled both pleas and gave the plaintiffs a decree against which several of the defendants have appealed. We propose to deal, in the first place, with Appeals Nos. 206 and 207 of 1903 filed by the defendants Nos. 7 and 8 who are alienees from the heirs of the alleged adopted son. The main facts are not now in dispute, and may be briefly stated. Arunachala, the last male owner, died in 1849 leaving a widow Chokkammal. In 1862, Chokkammal adopted one Alagasundara, a younger brother of her deceased husband. This adoption was afterwards impeached on the ground that Alagasundara was not given in adoption by his father who was dead at the date of the adoption and that consequently it was bad. Alagasundara was put in possession of the properties which had not been already alienated, with the exception of certain properties which were retained by Chokkammal for her maintenance, and continued in possession till he died in 1864 leaving a widow Murugathal, the fourth defendant. Murugathal adopted one Thiyagaraja who enjoyed the properties until 1876 when he appears to have been dispossessed by Arunachala's widow Chokkammal. He died in 1881 leaving a widow who died in 1882. On her death his adoptive mother Murugathal, the fourth defendant, became his heiress and instituted Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam against Chokkammal to recover the properties of which she had dispossessed him in 1876. In this suit it was held that the adoption on which Murugathal relied was invalid on the ground that Alagasundara was an orphan at the date of his adoption in 1862, but that he and his heirs had acquired a title by adverse possession and a decree was accordingly given in her favour, and affirmed by the High Court in *Chokkammal v. Murugathal*(1).

In this state of things, Mr. A. Krishnaswami Ayyar for the appellants the defendants (Nos. 7 and 8) alienees from the fourth

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defendant, contended that the suit was barred both by limitation and by *res judicata*, and also desired to raise the question of estoppel, but, as there was no issue raising the question of estoppel as regards the properties concerned in these appeals and as the point was not taken in the Court below, we declined to go into it.

The question of *res judicata* was argued at great length on both sides and many cases were cited, but we think it may be disposed of very briefly. The suit of 1887 was a suit against the widow Chokkammal and was decided against her, as we understand the case, on the ground that she had been out of possession for more than twelve years from 1862 when she took Alagasundara in adoption and put him in possession, and that consequently her right to sue to recover possession became barred under Act IX of 1871 and her title became extinguished at the same time under section 29 of that Act, and thereupon Alagasundara's heirs who were in possession acquired a title as against her, and became entitled to recover the properties from her within twelve years of her dispossessing them in 1876. In these circumstances, no question arose, or can be said to have been decided in that suit, as to the right of her husband's reversioners to sue after her death. The case is distinguishable from *Hari Nath Chatterji v. Mothoor Mohun Goswami*(1) in which, after the death of the widow Pearimoni, Sampurna, one of the reversioners, brought a suit to recover possession of the estate from one Mothoor Mohun which was dismissed on the ground of limitation, a decision which their Lordships held to be *res judicata* in a subsequent suit by another reversioner against the same Mothoor Mohun. This decision, as we understand it, proceeded on the ground that Sampurna when she sued after the death of the widow to recover, as reversioner to her deceased father, the properties in possession of the defendant represented the estate, and a decision that was necessary for the decision of that suit was *res judicata* when the same question arose again in a suit by a subsequent reversioner.

Having disposed of the question of *res judicata*, we have next to consider the question whether the present suit should be held to be barred by limitation. Mr. A. Krishnaswami Ayyar who appeared for the appellants formally raised the contention

(1) (1894) I.L.R., 21 Cal., 8 (P.C.).

that the suit is barred under article 118 of the Act of 1877 which was in force when it was brought, but in the state of the authorities in this Court, he rested his case mainly on the contention that it became barred under article 129 of Act IX of 1871, which was in force in 1874 when the prescribed period of twelve years from the date of adoption expired without the adoption having been set aside.

Under Act XIV of 1859, in a suit by a reversioner to recover the estate from an alleged adopted son, time did not run against the reversioner until his right to possession accrued on the death of the widow, as held by the Privy Council in *Rajendro Nath Holdar v. Jogendro Nath Banerjee*(1). This was the general rule applied by article 142 of Act IX of 1871 to suits for possession of immovables by reversioners of the last male owner entitled to succeed to the estate on the death of a Hindu female; but article 129, which prescribed for suits to establish or set aside an adoption a period of twelve years from the date of adoption, was held in effect to have introduced an exception to the general article 142 in cases where possession could not be obtained by the reversioner without successfully questioning an adoption. Articles 118 and 119 were substituted in the Act of 1877 for article 129 of Act IX of 1871; and, as is well known, there have been divergent decisions in India as to whether these articles, which speak of obtaining a declaration that an adoption is invalid or never took place or that it is valid, merely reproduced the substance of article 129 of the Act of 1871, or are limited to declaratory suits, as distinct from suits for possession which depend on the validity of an adoption, in which case the effect of the change as regards this latter class of suits was simply to restore the law as it was under the Act of 1859. The arguments for the first view are forcibly stated in the Full Bench judgments of the Bombay High Court in *Shrinivas v. Hanmant*(2) and for the latter view in Sir V. BASHYAM AYYANGAR's judgment in *Ratnamasari v. Akilandam*(3). His view has been accepted in this Court since the decision of the Privy Council in *Tirubhuvan Bahadur Singh v. Rameshar Bakhsh Singh*(4) and is in accordance with

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(1) (1871) 15 W.R., 41 (P.C.). (2) (1897) I.L.R., 24 Bom., 280 (F.B.).
(3) (1903) I.L.R., 26 Mad., 291 at p. 301 (F.B.).
(4) (1906) I.L.R., 28 All., 727 (P.C.).

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the more recent pronouncement of their Lordships in *Muhammad Umar Khan v. Muhammad Niaz-ud-din-Khan*(1).

We have therefore only to deal with the contention that under article 129 of the Limitation Act of 1871 both the widow Chokkammal and her husband's reversioners became barred and their title to the suit lands extinguished in 1874 when the period of twelve years from the date of the adoption expired, and the heirs of the adopted son acquired a title as against them. This question has been argued before us mainly with reference to the decisions of the Privy Council as to article 129 and it is therefore necessary to examine carefully those decisions. In the first case—*Raj Bahadoor Singh v. Achumbit Lal*(2)—the widow in 1860 had executed a deed purporting to adopt two brothers and to make over her properties to them, but the gift was not to take effect until her death. Their Lordships held that this could not be treated as a serious attempt to adopt a son or sons as heirs to her husband. The question therefore as to article 129 did not arise, but their Lordships made certain observations which appeared to be susceptible of the meaning that article 129 was no bar to suits for possession. In the next case, however—*Jagadamba Chaothrani v. Dakhina Mohun Roy Chaothrani*(3)—their Lordships distinguished this case and pointed that it was

“not a case in which the heir cannot possibly get at the ancestor's property without disturbance of a title and of possession founded on adoption to that ancestor.”

And they laid down in the clearest terms that in such cases article 129 of Act IX of 1871 was a bar to the suit as follows at page 95:—

“The plaintiffs' counsel were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within twelve years from the adoption, while yet the very same issue is left open for twelve years after the death of the adopting widow, it may be fifty years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a

moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession.”

In this passage their Lordships raised the question whether, in the case of an adoption by the widow, it must have been questioned under the Act of 1871 within twelve years of the date of the adoption or might be questioned in a suit for possession after the date of the adopting widow, it may be fifty years later; and they laid down that article 129 struck at all suits in which the plaintiff could not possibly succeed without displacing an apparent adoption by which the defendant was in possession. This case seems to show that, in their Lordships' opinion, no suit could be brought while the Act of 1871 was in force for possession after the death of the widow unless the adoption had been set aside within the time prescribed by article 129. In that case, the adoptions in question were in 1853 and 1856, and the suits were brought by the persons who were the reversioners of the last male owner at the death of his surviving widow in 1868. Act IX of 1871 was in force when that suit was brought, but the same principles were apparently applied by their Lordships in a later case—*Mohesh Narain Munshi v. Taruck Nath Moitra*(1)—, where the suit was brought after Act XV of 1877 had been substituted for Act IX of 1871. In that case, their Lordships considered it unnecessary to determine whether the defendant had been in possession of the estate from the date of the adoption through his adoptive mother and guardian or she herself had been in possession under a deed executed by her husband. They held it sufficient that the right of the defendant to the status of an adopted son of Shib Narain, the last male owner, had been openly and constantly asserted, not only in all actings connected with the estates, but also in his daily life in family with the plaintiff. They pointed out that twelve years from the date of the defendant's adoption expired in 1863 when the plaintiff had come of age, and held that his suit became barred under article 129 of the Act of 1871, and that the Act of 1877 could not revive his suit which had become barred under the Act of 1871.

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(1) (1912) I.L.R., 39 Cal., 418. (2) (1879) 6 I.A., 110.
(3) (1886) I.L.R., 13 Cal., 308 (P.C.)

(1) (1896) I.L.R., 20 Cal., 487 (P.C.).

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The respondents, however, rely mainly on the more recent decision of the Privy Council in *Tirubhuvan Bahadur Singh v. Rameshar Bakhsh Singh*(1) and the main question in the case is as to the interpretation to be put upon that judgment. The estate which was the subject of the suit had been confiscated in 1838 and subsequently settled upon the widow of the last male owner in her own right and as her separate property. The defendant took possession after her death claiming that she had adopted him in 1858, and was sued for possession by the plaintiff who claimed to be the next heir of the lady under the Oudh Estates Act, 1859. The defendant pleaded that that Act did not apply, and that, if it did, he as the adopted son was the next heir to the lady, and that at all events the plaintiff was not entitled to oust him from possession of the estate without having obtained a declaration that the adoption was invalid, and that a suit for such a declaration was barred. It may also be mentioned that, during the widow's lifetime and while Act IX of 1871 was in force, the defendant sought to recover possession of the estate from the widow on the footing of the adoption and the Judicial Commissioner in 1878 found against the adoption and dismissed his suit, a finding which their Lordships intimated at the close of the case was *res judicata* against him, though they did not rest their decision on that ground but on the question of limitation, which had been mainly relied on in the argument.

Mr. Cohen for the defendant-appellant relied on the cases to which we have referred and contended that, as the right to sue to set aside the defendant's adoption had become barred under article 129 of the Act of 1871 while that Act was in force, the defendant had acquired a title within the meaning of section 2 of the Act of 1877 which by the terms of the section was not to be affected by the passing of that Act. Their Lordships disposed of this contention very briefly. "Giving full effect" they said:

"to the Jagadamba case—*Jagadamba Chaothrani v. Dakhina Mohun Roy Chaothrani*(2)—, and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption amounts to acquisition of the title within the meaning of section 2 of the Act

(1) (1906) I.L.R., 28 All., 727 (P.C.). (2) (1886) I.L.R., 13 Calc., 308 (P.C.).

of 1877. Their Lordships think that the appeal may be disposed of on this short ground, whether the alleged adoption was or was not an apparent adoption to which the ruling in the Jagadamba case would apply if the Act of 1871 were now in force."

This judgment is summarized in the head note to *Tirubhuvan Bahadur Singh v. Rameshar Bakhsh Singh*(1), as a decision that Act IX of 1871 had no application to that case which was governed by the provisions of the Act of 1877 which was in force when the suit was brought. It appears to contain an express ruling that the fact that a suit to set aside the defendant's adoption became barred under article 129 of the Act of 1871 while that Act was in force did not amount to an acquisition of title which would be protected by section 2 of the Act of 1877, a ruling which if applicable would be fatal to the appellant. But, as regards this question of acquisition of title, their Lordships' observations must be taken to have been made with reference to the case before them, and are in our opinion inapplicable to a case like the present in which the heirs of the alleged adopted son claiming under him were *in possession* of the lands which are the subject of these appeals in 1874 when the right to sue to set aside the adoption became barred under article 129 of the Act of 1871 which was then in force. Section 29 of that Act provided that, at the determination of the time hereby limited to any person for instituting a suit for possession of any land, his right to such land should be extinguished. To take, in the first instance, the case of the widow, Chokkammal who in 1874 was the next heir of her husband, the last male owner, her right to sue for possession of these lands became barred in 1874 according to the decision of their Lordships in *Jagadamba Chaothrani v. Dakhina Mohun Roy Chaothrani*(2) when the period limited to her under article 129 expired, and thereupon her right to these said lands became extinguished under the section, and the heirs of the adopted son who were then in possession acquired a title against her on the strength of which they subsequently recovered possession from Chokkammal after she had ousted them in 1876. There was thus clearly an acquisition of title by the heirs of the adopted son at any rate against her while the Act of 1871 was in force, and the title so

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acquired was not to be affected by the enactment of Act XV of 1877.

The only other question then is, whether the suit for recovery of the lands now in suit became barred while Act IX of 1871 was in force, not only against the widow who was then the nearest heir, but also against all other heirs of the last male owner including the present plaintiffs; as, if it did, we think the effect of section 29 was to confer upon the heirs of the adopted son who were in possession when such suits became barred a title against such heirs also which was not affected by the passing of Act XV of 1877. In our opinion, while Act IX of 1871 was in force, time ran against all the reversioners of the last male owner from the date of the adoption, and they all became barred on the expiry of that date. The object of the legislature in that enactment was that all questions relating to adoption, including suits for possession of land depending on questions of adoption, should be determined within twelve years, and not after the death of the widow of the last male owner, it might be fifty years later, as observed by their Lordships in *Jagadamba Chaodhrani v. Dakhina Mohun Roy Chaodhri*(1). Further the point has been expressly decided in India in *Harnabh Pershad v. Mandil Dass*(2) and the same view was taken by the Bombay High Court in *Shrinivas v. Honmant*(3) under the Act of 1877, which, in their opinion, reproduced article 129 of the Act of 1871, and by Sir SUBRAHMANYA AYYAR, J. in his Order of Reference in *Chiruvolu Punnamma v. Chiruvolu Perrazu*(4). Our attention has been called to the fact that in *Tirubhuvan Bahadur Singh v. Rameshar Bakhsh Singh*(5) as in the present case, the reversioners bringing the suit were not in existence when the twelve years limited under article 129 expired, and reliance has been placed on that fact for the respondents. Their Lordships in their judgment make no reference to the fact that the plaintiffs who were the nearest reversioners at the death of the widow were not the nearest reversioners when the period limited under article 129 expired, and we do not think their judgment can be treated as proceeding on any such ground. What we understand their Lordships to have decided was that, although the right to sue to set aside the

(1) (1886) I.L.R., 13 Cal., 308 (P.C.). (2) (1900) I.L.R., 27 Cal., 379.
(3) (1897) I.L.R., 24 Bom., 260. (4) (1906) I.L.R., 29 Mad., 390.
(5) (1906) I.L.R., 28 All., 727 (P.C.).

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defendant's adoption became barred under article 129 while the Act of 1871 was in force, that fact did not of itself, and without possession, confer title to the suit lands on the defendant, or prevent the plaintiff from suing for them when Act XV of 1877 was in force within the time limited by that Act. Their Lordships seem to have recognized that the defendant had acquired an immunity from a suit by the plaintiff of the kind specified in article 129 of Act IX of 1871, in other words, that the plaintiff's right to bring such a suit was barred.

It may be that the provisions of the Act of 1871 were considered to involve some hardship to persons in the position of the present plaintiffs, and that may have been the reason for altering those provisions by the Act of 1877, but section 2 of the Act of 1877 expressly saved titles acquired under the repealed Act, and we are of opinion, for the reasons already given, that the title of the heirs of the adopted son and those claiming under them to the lands which are the subject of the appeals was among the titles so saved. Appeals Nos. 206 and 207 of 1908 are allowed and the suit dismissed as against the appellants therein with costs throughout.

The fourth defendant and some of the other defendants who are alienees from her have not appealed, but we think the suit against them ought also to be dismissed by us under Order XLI, rule 33, Civil Procedure Code for the reasons given by SUBRAHMANYA AYYAR, J., in *Kulaikada Pillai v. Viswanatha Pillai* (1) and in accordance with the recent decision in *Subbarayalu Naidu v. Papammal*(2). The point decided in *Kundasamy Chetty v. Annamalai Chetty*(3) does not arise and it is unnecessary to consider that decision now. The decree will be reversed and the suit dismissed against the fourth defendant and all the other defendants claiming under her as alienees including the fifth defendant who has appealed on another point.

[Their Lordships in disposing of Appeal No. 10 of 1909, found that the items in dispute originally belonged to the estate of Arunachala and were alienated by his widow Chokkammal in 1855 without any legal necessity, and proceeded on the plea of limitation as follows :—]

(1) (1915) I.L.R., 28 Mad., 229 at p. 234.
(2) (1915) 29 I.C., 579. (3) (1915) I.L.R., 28 Mad., 67.

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As regards the question of limitation which has been argued in the other appeals in the case, the heirs of the adopted son admittedly did not acquire the title to the suit lands while the Act of 1871 was in force. In these circumstances, we are unable to distinguish this case from *Tirubhuvan Bahadur Singh v. Rameshar Bakhsh Singh*(1) the most recent decision of their Lordships, and following that case, we think the plea of limitation was rightly overruled. The appeal is dismissed with costs.

[Their Lordships in disposing of Appeal No. 11 of 1909, found that the property in question did not belong to the estate of Arunachala and allowed the appeal. As regards some of the appellants who died during the pendency of the appeal and whose legal representatives were not brought on the record, their Lordships held as follows:—]

The twentieth and twenty-second defendants died after the appeal had been preferred and their representatives have not been brought on the record. It has been argued that as the appeal has abated as regards these appellants the decree of the Lower Court cannot be modified as far as their interests are concerned. The grounds of appeal in which the appellants have succeeded are common to all the appellants and we think the terms of Order XLI, rule 4 of the Code of Civil Procedure are wide enough to cover this case—*Chintaman v. Gangabai*(2)—and enable this Court to set aside the decree as regards the whole of the plaintiff's claim and not merely in respect of the interest of those appellants whose appeals have not abated. Any other conclusion would lead to "incongruity in judicial decisions on the same facts": vide, *Dhuttaloor Subbayya v. Paidigantam Subbayya*(3).

The appellants in Appeal No. 14 of 1909 are the plaintiffs in Original Suit No. 26 of 1905 on the file of the Court of the Subordinate Judge of Negapatam. Although our decision in Appeals Nos. 206 and 207 of 1908 governs this appeal, we think that as the questions involved have been argued before us, it is desirable that we should give findings on the questions raised. The grounds of appeal relate firstly to the findings of the Subordinate Judge as to the property comprised in the ninth to fourteenth schedules attached to the plaint. Mr. T. Rangachariyar

(1) (1906) I.L.R., 28 All., 727 (P.C.). (2) (1903) I.L.R., 27 Bom., 284.
(3) (1907) I.L.R., 30 Mad., 470.

did not press the appeal as far as these items of property are concerned.

The second question concerns the rights of the first defendant. She is the widow of Bava Krishnaswami Mudali. He was a reversioner to the estate of the late Arunachala Mudali and stood in the same degree of relationship as the plaintiffs to the last male holder. Under ordinary circumstances, the first defendant would be entitled to one-fourth share of the estate recovered by the reversioners. The case of the plaintiffs—appellants however is that Bava Krishnaswami had severed his connexion with his family by having "renounced the world and entered the order of religious ascetics known as *tambirans*." It is further alleged that by this act "he forfeited all rights of property and all future rights of succession as a member of the secular family to which he belonged." It has not been disputed in appeal that Bava Krishnaswami did enter the order of Sudra ascetics known as *tambirans*. It is however clear on the authorities that the texts as to disinheritance applicable to *yathi* or *sanyasi* do not apply to a Sudra ascetic unless a usage to this effect is established: *Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai*(1) and *Harish Chandra Roy v. Alir Mahmud*(2). In the Court of first instance an attempt was made to prove that Bava Krishnaswami belonged to a special class of Sudras who may according to some *agamas* be admitted into the order of *sanyasis*. This contention was rejected by the Subordinate Judge and has not been advanced before us.

The Subordinate Judge has also found against the existence of any usage such as is referred to in the cases cited above. We agree with this finding. The forty-sixth and forty-seventh witnesses for the plaintiffs are both heads of Sudra mutts. The latter is Pandarasannadhi of the Dharmapuram Athinam which Bava Krishnaswami joined. He admitted that he was unable to state positively what the custom is regarding property belonging to a Sudra ascetic prior to his admission to the order. He knew of no case in which a contention had been raised that a *tambiran* could not succeed to property of his family. It may be noted that *Dharmapuram Pandara Sannadhi v. Virapandiyam*

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(1) (1899) I.L.R., 22 Mad., 302.

(2) (1913) I.L.R., 40 Cal., 545.

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Pillai(1) relates to this institution and that no attempt was made at that time to set up any special custom. Plaintiffs' witness No. 46 was unable to give any opinion without referring to the shastras as to whether a tambiran has rights to family property after becoming a tambiran. This evidence coming from the side of the plaintiffs and from persons holding the position these witnesses do is a strong indication that no custom exists of the kind which the appellants seek to establish. Numerous instances appear in the evidence on both sides of dealings with family property of tambirans which are inconsistent with their having lost their rights in it and with any consciousness on the part of those dealing with them that there was anything unusual in such transactions. In no case do they appear to have been questioned. As far as the evidence before us goes, we have no doubt that the plaintiffs have failed to establish that Sudra ascetics are by custom subject to the same disabilities as sanyasis. The appeal must be dismissed with costs of the respective respondents.

The only question argued in the memorandum of cross objections filed by the first respondent in this appeal relates to costs. The first defendant has been directed to bear her own costs in the contest with the plaintiffs as to her husband's position. We see no reason to interfere with the discretion the Subordinate Judge has exercised in making this order. The memorandum of cross-objections is dismissed with costs.

K.R.

(1) (1899) I.L.R., 22 Mad., 302.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Burn.

V. NAVANEETHA KRISHNA THEVAR (TWENTY-THIRD DEFENDANT), APPELLANT,

v.

RAMASWAMI PANDIA THALAVAR AND TWENTY-FOUR OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1, 3 to 9, 11, 13 to 22 AND 27 TO 31), RESPONDENTS.*

1916,
November,
10, 13, 17, 20
and 24.

Hindu Law—Reversioners—Widow's estate—Estate taken under the management of the Court of Wards—Alienations by the Court of Wards—Power of Court of Wards as to alienations, if, absolute or limited like that of the limited owner—Court of Wards Act (Madras Act I of 1902), sec. 35—Suit by reversioners for declaration—Alienations, held good—Declaration as to title of plaintiff, as reversioner, if, can be given—Conversion of rent in kind into money rent—Power of widow to commute—Evidence Act (I of 1872), sec. 35—Copies of Takids, etc., made in official registers, if admissible.

Where the plaintiff, claiming to be the nearest reversioner to the last male owner of a zamindari, sued for a declaration that certain alienations, made by the Court of Wards during their management of the estate on behalf of the adoptive mother of the late Zamindar on her succeeding to the estate as his heir on his death, were not binding on the estate beyond her lifetime:

Held: that the power of the Court of Wards under section 35 of the Madras Court of Wards Act (I of 1902), is in terms absolute and not governed by the restrictions in the latter part of the section;

that the Court of Wards had absolute powers of alienation in respect of the property taken under its charge, although the person on whose behalf the management was taken up was only a limited owner of the property like a widow;

that consequently the alienations in the case were valid, without proof of necessity such as would support an alienation by a Hindu widow; and

that the conversion of rents payable in kind into money rents is within the powers of a limited owner like a widow:

Held further:

(a) that reversioners are not entitled to sue for a declaration that they are the nearest reversioners to an estate unless the decision of that question is incidental to the grant of some other relief to which they may be entitled;

Janaki Ammal v. Narayanasami Ayyar (1916) I.L.R., 39 Mad., 634 (P.C.), applied.

and (b) that copies of actual letters, such as Takids from the Collector to the *Majumdar* and his replies thereto, made in registers of official

* Appeal No. 380 of 1914.

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correspondence kept for reference and record are admissible in evidence under section 35 of the Indian Evidence Act, and are entitled to great consideration. *Rajah Muttu Ramalinga Setupati v. Perianayagam Pillai* (1874) L.B., 1 I.A., 209 at page 238, referred to.

APPEAL against the decree of A. N. ANANTHARAMA AYYAR, the Subordinate Judge of Tinnevely, in Original Suit No. 30 of 1911.

The plaintiff claimed to be the nearest reversionary heir to the late Zamindar of Uttumalai, Navaneethakrishna Maruthappa Thevar who died in 1891. The plaintiff alleged that he was the son of one Gnanapurani Nachiar, who was said to be the legitimate daughter of one Gomathimuthu Nachiar, alleged to be the lawfully married second wife of the Zamindar Navaneethakrishna Maruthappa Thevar, who was the grandfather of the last male owner and had died in 1850. The last zamindar died without issue in 1891, and was succeeded by the first defendant who was his adoptive mother and her claim was established by the Privy Council decision *Annapurni Nachiar v. Forbes*(1). In 1901, the Court of Wards took over the management of the Uttumalai estate on behalf of the first defendant. The plaintiff instituted the present suit ostensibly for a declaration that certain alienations made by the Court of Wards of some of the properties of this zamindari during the course of their management were invalid beyond the lifetime of the first defendant as they were not supported by necessity and were beyond the powers of a Hindu widow on whose behalf the Court of Wards were in management and for a declaration that he was the nearest reversionary heir to the zamindari after the first defendant. The first defendant was the adoptive mother of the last male owner as already said; she was represented in the suit by the Manager of the Court of Wards who were in charge of the estate under Act I of 1902. The Court of Wards, on behalf of the first defendant, disputed the plaintiff's title as a reversioner and denied the factum and the legality of the marriage of Gomathimuthu Nachiar and the claim of Gnanapurani Nachiar as the legitimate daughter of the said zamindar. The twenty-third defendant claimed to be the nearest reversioner to the zamindari and denied the plaintiff's title as a reversioner. Defendants Nos. 24 to 31 were

(1) (1900) I.L.B., 23 Mad., 1 (P.C.).

remoter reversioners who supported the twenty-third defendant and denied the plaintiff's title. Defendants Nos. 2 to 22 were alienees and persons claiming from them. The Court of Wards also contended that the alienations were valid as they maintained that the Court of Wards had absolute powers of alienation granted to them under the Statute (Act I of 1902), and were not restricted by the limitations imposed on the limited owner on whose behalf the estate was taken over by them for management. There were similar suits instituted by the plaintiff as well as the twenty-third defendant in the District Munsif's Court of Ambasamudram, and these suits were transferred to the Subordinate Judge's Court of Tinnevely for trial and disposal along with the suit (Original Suit No. 30 of 1911) already filed in the Subordinate Judge's Court. The Subordinate Judge held that the plaintiff was the nearest reversioner to the estate, that the alienations were invalid and not binding on the plaintiff or the estate beyond the lifetime of the first defendant. The twenty-third defendant as well as some other defendants preferred separate appeals to the High Court.

T. R. Ramachandra Ayyar, T. R. Vankalarama Sastryar and S. Viswanatha Ayyar for the appellant.

Hon. Mr. S. Srinivasa Ayyangar and K. Rajah Ayyar for the first respondent.

Nugent Grant and *S. Ramaswami Ayyar* for the second respondent.

M. D. Devadoss for the respondents Nos. 12 and 13.

The others were not represented.

WALLIS, C.J.—Appeal No. 380 of 1914 is an appeal from WALLIS, C.J. the judgment of the Subordinate Judge of Tinnevely, in Original Suit No. 30 of 1911, a suit brought by Ramasami Pandia Thalavar claiming to be the nearest reversioner of the last zamindar of Uttumalai to declare that certain alienations made by the Court of Wards during their management of the Estate on behalf of the widow of the late zamindar, Raneer Meenakshi Sundara Nachiar, now an incapacitated proprietor under Madras Act I of 1902, are not binding on the Estate. Under that Act, as amended, suits by and against a ward are to be in the name of the ward but the conduct of the suit is with the manager appointed by the Court of Wards acting as guardian *ad litem*.

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Defendants Nos. 2 to 22 are alienees and persons claiming under them. Defendant No. 23 denies the plaintiff's pedigree and claims to be the next reversioner, and has brought a similar suit (Original Suit No. 26 of 1912) to declare the alienations of the properties mentioned in schedules 5 and 6 of the plaint in Original Suit No. 30 of 1911 invalid. He was added as a party to the suit together with defendants Nos. 24 to 31 who claim to be remote reversioners and support him. The plaintiff has also brought other suits in the Court of the District Munsif of Ambasamudram (Original Suits Nos. 380 to 382 of 1909) to question an alleged alienation made by the first defendant whilst in management in 1901, and these suits have been transferred to the Subordinate Judge's Court of Tinnevely and tried along with the principal suit (Original Suit No. 30 of 1911) and are now the subject of appeals before us (Appeal Nos. 346 to 351 of 1915). Though this and the connected suits have been brought for a declaration that certain alienations are not binding beyond the life of the first defendant, there can be little doubt that the main object of the plaintiffs in the suits was to assert their respective titles as next reversioners to the estate on the death of the first defendant. The relationship of the twenty-third defendant is admitted, and though the Subordinate Judge found against his reversionary right, it is now admitted that his judgment on that point cannot be supported. The relationship set up by the plaintiff in the present suit is strongly contested both by the Court of Wards on behalf of the first defendant and by the twenty-third defendant, and was the main question fought in the Court below. The Subordinate Judge has found that the plaintiff's case is true and that he is the son of Gnanapurani Nachiar, the legitimate daughter of the zamindar, who died in 1850 and of his second wife Gomathimuthu Nachiar, who, according to the plaintiff's case, was the daughter of one Maruthappa Thevar and was married by the zamindar Navaneetha Krishna Maruthappa Thevar as his second wife between the years 1841 and 1845, and that Gnanapurani's mother was not, as contended by the defendants, a dancing girl named Kuppi who was living with the zamindar as his concubine when she gave birth to Gnanapurani. He has also held the alienations questioned to be invalid and has given the plaintiff a declaration to that effect. His judgment on the latter point is supported by the twenty-third and subse-

quent defendants, but Mr. Nugent Grant instructed by the Manager for the Court of Wards who is the guardian *ad litem* of the first defendant has appealed against this part of the decision also, and contended that the alienations cannot be questioned, and, that being so, that the suit should be dismissed without going into the claims of the rival reversioners.

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The alienations questioned in the main suit were made by the Court of Wards whilst in superintendence of the Estate purporting to act under the statutory powers given them by section 35 of the Act. In 1899 the old Court of Wards Regulation V of 1802 was amended by the insertion of a general chapter intended to enable the Court to take incumbered estates under their management and clear them from encumbrances, and in 1902 the Regulation was repealed by Madras Act I of 1902 which re-enacted the provisions of the Act of 1899 and introduced other changes. Section 35 of the Act is in the following terms :—

“ The Court may mortgage or sell the whole or any part of any property under its superintendence and may give leases or farms of the whole or any part of such property for such terms as it thinks fit, and may make remissions of rent or other dues, and may generally pass such orders and do such acts not inconsistent with the provisions of this or any other Act for the time being in force as it may judge to be for the advantage of the ward or for the benefit of the property;”

The Subordinate Judge has held that this only enables the Court to sell or mortgage the particular interest of the ward in the property under superintendence unless there are circumstances which would justify the ward himself if *sui juris* in selling outright. Under the Act, the ward is not necessarily a full owner and may be, as here, a widow, or the owner of an impartible estate with limited powers of alienation under the Madras Impartible Estates Act, 1904, which continued in substance the provisions of the temporary Act passed at the same time as the Court of Wards Act in 1902, or the property may be owned as joint family property by several minors in which case the senior if of age would only have a limited right of sale. In comparatively few cases under superintendence in this Presidency would the ward if *sui juris* be full owner with power to sell outright. The power to sell, mortgage or lease is in terms

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absolute, and is not governed by the restriction in the latter part of the section, as pointed out in *Mohsan Shah v. Mahbub Ilahi*(1); and to say that the Court cannot sell outright where the ward has only a life interest unless there are circumstances which would justify the ward himself in selling under the Hindu Law is to import into the section the words which are not there, and to hamper the Court in the exercise of powers which are conferred upon it as incidental to its right of management for the benefit of the estate, that is, of the ward and those who come after him. The word "property" under its superintendence means, in my opinion, the moveable and immoveable property itself and not the particular interest of the ward as widow. Further, if the word "property" be construed as confined to the limited interest of the ward, it will be necessary to look elsewhere for the Court's power to sell and mortgage outright in cases where the Hindu Law allows it. Powers of selling, mortgaging and leasing are often conferred on trustees and others as incidental to powers of management, the proceeds being held by them as part of the estate, and I see no reason why the section should not be construed as conferring such powers upon the Court. To enable it to extricate encumbered estates from difficulties, the legislature in other sections has gone the length of enabling it to oust mortgagees in possession from management of the property under mortgage to them and take over the management. Sales or mortgages of life interests are always highly speculative and unsatisfactory transactions, and were not, in my opinion, the transactions which the section was enacted to validate. It seems to me that the intention was to enable the Court of Wards to give a statutory title free from the risk of law suits by subsequent heirs, etc., and so to enable it to realise the best price for the estate. The decision by their Lordships of the Judicial Committee in *Muhammad Mumtaz Ali Khan v. Farhat Ali Khan*(2) did not relate to a sale or mortgage but to a transaction which their Lordships held to be a voluntary alienation not warranted by the latter part of the section which was nearly in the same terms as the present section.

As regards the particular alienations in the plaintiff's schedule, that referred to in the schedule 6 was of one of

(1) (1907) I.L.R., 29 All., 589.

(2) (1901) L.L.R., 23 All., 394 (P.J.).

two bungalows possessed by the estate at a watering place called Courtallam. No tenants were to be obtained, it was falling into decay, and the fact that a ruined zamindar had been allowed to live there by the late zamindar and had been buried in the compound was against its letting well. I think that the widow herself would have been justified in selling under these circumstances. The property comprised in the schedule 6 is only 1·7 acres. Both these sales were, in my opinion, within the powers of the Court.

The alienations complained of in schedules 1 to 4 were in respect of certain *pannai* lands in which there was admittedly no occupancy right. The tenants who held on leases for fixed terms set up that, in consideration of their having reclaimed the lands, the late zamindar had promised to grant them permanent leases on favourable terms and that the promise had been confirmed by his widow in September 1891, whilst in charge of the estate on behalf of her minor son. The Court of Wards contested that claim but later on entered into compromises by which on payment of Rs. 160 per kotta of land the tenants were allowed permanent rights of occupancy at a fixed rent. The result was to settle the litigation and to raise money for the satisfaction of the debts incurred during the life of the late zamindar. The Subordinate Judge is wrong in saying that such debts were binding only if incurred for necessary purposes. The Madras Impartible Estates Act, 1902, did not affect debts already incurred. The estate which has been included in the Impartible Estates Act was presumably impartible, and under the decisions of the Privy Council was alienable by the holder for the time being prior to the passing of the Act of 1902. Assuming that this transaction amounted to sale of the *kudiwaram* or occupancy right, I think the alienation was covered by the first part of the section 35, and that in any case it was covered by and was also within the powers conferred by the second part. As regards the rates reserved, it is not shown that they were inadequate, regard being had to the premium paid.

The other alienations complained of were made by the widow herself and are the subject of the three suits instituted in the District Munsif's Court of Ambasamudram and transferred to the Subordinate Judge's Court of Tinnevely and tried along with the other suits, and of separate appeals. The complaint is

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that the first defendant granted the tenants permanent leases and converted the waram rents into fixed money rents. The objection that the first defendant granted permanent leases is unsustainable, as it is well settled that even before the passing of the Madras Estates Land Act of 1908 there was a presumption in this Presidency that ordinary ryots, such as these, had permanent occupancy rights in the holdings, and it would have been hopeless to contest it. The conversion of rents payable in kind into money rents is, I think, within the powers of a limited owner, such as a widow. In a good year, rents payable in kind may produce more, but in a bad year they may bring in nothing; and, as is well known by every one at all acquainted with the subject, there are great difficulties in the way of the due realization of the land-holder's share under the waram system. These and other reasons have induced the legislature now to give either party a right to sue for a commutation of waram into money rents. In the present case, the Subordinate Judge has not found, and it is not shown, that the rate of commutation was unfair, and in these circumstances, I do not think, the plaintiff was justified in coming to Court and asking for a declaration as to these items. It is therefore unnecessary to consider the other points raised by Mr. Nugent Grant in this connection.

The result is that the plaintiffs in these suits have not made out their right to declarations that any of the alienations complained of are not binding on the estate. It is well settled by a long catena of cases ending with the recent decision of the Privy Council in *Janaki Ammal v. Narayanasami Ayyar*(1), that the reversioners are not entitled to sue for a declaration that they are the next reversioners unless the decision of that question is incidental to the grant of some other relief to which they may be entitled. It follows that the only course open to us is to allow all the appeals, reverse the decrees of the Lower Court, and dismiss the suits.

As however the case may not stop here, we think it right to allow the petitioners in Civil Miscellaneous Petitions Nos. 845 and 1655 of 1915 and 2996 of 1916 for the admission of certain documents rejected by the Subordinate Judge, namely, (1) the decree of the Zillah Court of Tinnevely, dated 31st May 1859

(1) (1916) I.L.R., 39 Mad., 684 (P.C.).

in Original Suit No. 4 of 1859, (2) the Takid of the Collector to the Muzumdar on the death of the raja in 1850, (3) the reply of the Muzumdar, and (4) the Collector's Takid in 1853 on the complaint of the zamindar's widow as to the conduct of Maruthappa Thevar who according to the plaintiff's case was the father of Gnanapurani's mother. They will accordingly be marked as Exhibits XXXIV, XXXV, XXXVI and XXXVII respectively and incorporated in the record. The learned Advocate-General did not support the exclusion of the last three on the ground that the copies of correspondence kept in the Collector's and taluk offices were not signed but contended that they were not admissible under section 35 of the Indian Evidence Act. We think however that copies of actual letters made in registers of official correspondence kept for reference and record are admissible under section 35 as reports and records of acts done by public officers in the course of their official duty and of statements made to them, and that in the words of their Lordships in *Rajah Muttu Ramalinga Setupati v. Periyannayagam Pillai*(1), they are entitled to great consideration in so far as they supply information of material facts and also in so far as they are relevant to the conduct and acts of the parties in relation to the proceedings of Government founded upon them.

[His Lordship then referred to the arguments which had been put forward on either side as to whether the plaintiff's mother was a wife or a concubine, but gave no finding; that portion of the judgment has been omitted from this report.]

BURN, J.—I agree with the learned Chief Justice in holding that the decree from which Appeal No. 380 of 1914 is preferred should be reversed. There can be no doubt that the real object of the litigation is not the securing of a declaration with regard to the transactions of comparatively little importance which are being impugned but the determination of the question of who the nearest reversioner is with a view to claims to succession on the death of the zamindar.

As the suit is being dismissed on other grounds, it is unnecessary to record any finding on the merits of the claim put forward by the appellant and first respondent in Appeal No. 380 of 1914. As however the questions have been fully argued, it

(1) (1874) L.R., 1 I.A., 209 at p. 238.

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may be as well to indicate briefly the view I am inclined to take on some of the principal contentions which have been relied on in the course of the argument.

[His Lordship then discussed the evidence on the question of the title of the plaintiff as the nearest reversioner but did not give any finding on the question and proceeded as follows] :—

I purposely refrain from expressing any opinion on the effect of the evidence as a whole.

I agree with the judgment of the learned Chief Justice as regards the connected appeals.

K.R.

APPELLATE CRIMINAL.

1917,
January, 11.

Before Mr. Justice Ayling and Mr. Justice Napier.

*Re PIRANU NADATHI AND TWO OTHERS (ACCUSED).**

Registration Act (XVI of 1908), ss. 82 and 83—Offence under section 82—Prosecution by a private person—Permission under section 83, whether necessary.

Permission under section 83 of the Registration Act (XVI of 1908) is not a preliminary requisite for the institution by a private person of proceedings for an offence under section 82 of the Act.

* Criminal Miscellaneous Petition No. 422 of 1916.

Section 82.—Whoever—

(a) intentionally makes any false statement, whether on oath or not, and whether it has been recorded or not, before any officer acting in execution of this Act, in any proceeding or inquiry under this Act; or

(b) intentionally delivers to a registering officer, in any proceeding under section 19 or section 21, a false copy or translation of a document, or a false copy of a map or plan; or

(c) falsely personates another, and in such assumed character presents any document, or makes any admission or statement, or causes any summons or commission to be issued, or does any other act in any proceeding or enquiry under this Act; or

(d) abets anything made punishable by this Act; shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.

Section 83.—(1) A prosecution for any offence under this Act coming to the knowledge of a registering officer in his official capacity may be commenced by or with the permission of the Inspector-General, the Branch Inspector-General of Sindh, the Registrar or the Sub Registrar, in whose territories, district or sub-district, as the case may be, the offence has been committed.

(2) Offences punishable under this Act shall be triable by any Court or officer exercising powers not less than those of a Magistrate of the Second Class.

Gopinath v. Kuldip Singh (1885) I.L.R., 11 Calc., 566, and *Queen-Empress v. Re NADATHI Vythilinga* (1888) I.L.R., 11 Mad., 500, referred to.

REFERENCE under section 215 of the Criminal Procedure Code (Act V of 1898), by the Assistant Sessions Judge of Tinnevely, in Sessions Case No. 65 of 1916, praying the High Court to issue an order quashing the commitment of the accused in the said case which is Referred Case No. 9 of 1916 of the file of K. SANKARAN, the Sub-Magistrate of Srivaikuntam.

The material facts appear from the judgment of AYLING, J.

E. R. Osborne, the acting Public Prosecutor, for the Crown.

Rao Sahib G. Venkataramayya for Hon. Mr. B. N. Sarma for the first accused.

L. S. Viraraghava Ayyar for all the accused.

AYLING, J.—This is a reference by the Assistant Sessions Judge, Tinnevely, recommending that the commitment of certain accused for offences falling under section 82 of the Indian Registration Act should be quashed under section 215, Criminal Procedure Code, as bad in law. No permission was obtained for the prosecution in this case from any of the officers mentioned in section 83 of the Registration Act, and in the view of the Assistant Sessions Judge this fact is fatal to the institution of the case.

It has been held by a Full Bench of the Calcutta High Court in *Gopinath v. Kuldip Singh*(1) that no sanction is necessary before the institution by a private person of a charge under section 82 of the Registration Act, and it may be inferred from the judgment of this Court in *Queen-Empress v. Vythilinga*(2) that the learned Judges were inclined to take the same view. The wording of section 83 is far from clear, but on a consideration of the section, the cases quoted before us and the arguments on both sides, I am inclined to take the same view. One cannot but be pressed by the marked difference between the wording of section 83 of the Registration Act and that of the corresponding sections in various other Acts which unequivocally and in the clearest terms lay down that previous sanction or permission is required for the institution of proceedings—*vide*, section 70 of the Stamp Act, section 72 (a) of the Post Office Act, section 36 of the Income-tax Act and section 29 of the Arms Act. Had it

(1) (1885) I.L.R., 11 Calc., 566.

(2) (1888) I.L.R., 11 Mad., 500.

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AYLING, J. been the intention of the legislature to bar prosecution for offence under the Registration Act by private persons without sanction or permission of the Registration authorities, it is difficult to see why the intention could not have been expressed in the same way so as to put the matter beyond doubt. Our attention has, moreover, been drawn to the corresponding section, section 95 of Act XX of 1866 which runs thus :—

“A prosecution for any offence under this Act coming to the knowledge of a Registering officer in his official capacity may be instituted by the Registrar-General, the Branch Registrar-General, the Registrar or (with the sanction of the Registrar to whom he is subordinate) the Sub-Registrar in whose territories, district or sub-district, as the case may be, the offence has been committed. All prosecutions under this Act shall be instituted before a person exercising the powers of a Magistrate or Subordinate Magistrate of the First Class; and all fines imposed under this Act may be recovered in the manner prescribed in section 61 of the Code of Criminal Procedure.”

It seems to me that the intention of this section was merely to prevent official prosecutions for offences under the Act being instituted by an officer below a certain grade. Even a Sub-Registrar had to get the sanction of the Registrar to whom he is subordinate. I do not see anything in this section to suggest that it is intended to bar private prosecutions and I should be loath to infer that the changes introduced in Act III of 1877 were intended to extend the operation of the section to such prosecutions. Mr. Venkataramayya invites our attention to the words “with the permission of” in the later Act. But the natural effect of these words is simply to enable, for instance, the Sub-Registrar to depute a clerk to lay a complaint of an offence instead of going to the Magistrate’s Court himself for that purpose as he would have to do under the older Act. The words which occur in all the Acts

“an offence coming to the knowledge of a Registering officer” admittedly tend against the view put forward by the Assistant Sessions Judge. I am inclined to hold that permission of the Registration officers is not a preliminary requisite for the institution of proceedings by a private person for offences under the Registration Act and that the committal in this case may stand.

NAPIER, J.—I agree with my learned brother in his judgment for the reasons given by him but will add a few observations of

my own because I also agree with him that the question is one on which it is possible to arrive at a different conclusion, as will be seen from the decisions of the Calcutta High Court. Now the section is section 83 of the Registration Act. It is admitted before us that the language of this section is not clear. Speaking for myself, I am inclined to think that it should be paraphrased in this way: “When an offence under this Act comes to the knowledge of a Registering officer in his official capacity, he may commence a prosecution, etc.” “The persons who are authorized to prosecute are as follows” “and they may, in addition, give permission to some other person to prosecute.” If the language had been in that form, I should have very little doubt that it was simply permissive and giving power to the officers of the department. But it has been urged before us, that the words “a prosecution for any offence may be commenced” are analogous to proceedings provided in Bankruptcy and other Acts in which the words “may be commenced” and “may be instituted” have been held to be directory and exclude the right of any person other than the person mentioned in the Act. As there is this ambiguity in the section we are permitted, under the authority of the House of Lords and the Privy Council, to examine the history of the provision and I therefore turn to the provision in the Old Act of 1866; here we find the language is simpler and is as follows :—

“A prosecution for any offence coming to the knowledge of a Registering officer in his official capacity may be instituted by the Registrar-General, the Branch Registrar-General, the Registrar or, (with the sanction of the Registrar to whom he is subordinate) the Sub-Registrar.”

Now it is somewhat curious that there is no reported decision of any prosecution under this Act. Mr. Venkataramayya argues that under this Act there was no power in any private person to lay a complaint of an offence under the Act, his argument being that as the Act created the offence and as it designates the persons who are entitled to institute proceedings so the right to institute must be confined to those persons. And he relies on the analogies of various other Acts to which he has drawn our attention. Those Acts have been referred to in the judgment of my learned brother and I will not recapitulate them. But there are two distinctions between those Acts and this. Those

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Re NADATHI. Acts create offences which do not primarily affect or injure any private person. They are offences against laws passed by Government either for protection of the public or are financial provisions. For instance the public is not in the slightest degree interested in the recovery of stamp duty or offences against Stamp Acts. The second point to be considered is this, that in all those Acts, if I am not mistaken, the form of the section is prohibitory. I will take the Stamp Act as an example; section 70:

"No prosecution in respect of any offence punishable under this Act shall be instituted without the sanction;" and I think the language is in the same form in every one of the other Acts. It is argued by Mr. Venkataramayya that the provisions of section 82 creating offences, are also provisions dealing with offences against public servants and that, on the face of them, they do not purport to affect either the public or any particular person; and that he is entitled to rely on the analogy of section 195 (1) (a), Criminal Procedure Code, where sanction of the public servant is required for contempt of his lawful authority. But I think, on examining the section a little more closely, it becomes apparent that although the false statement [I am taking clause (a)] has been recorded before an officer and therefore in one sense it is an offence against that officer, still it is recorded under sections of the Act which exists for the protection of a private person and is therefore really a portion of an offence against the private person. I would only mention sections 34 and 74 of the Registration Act. Section 34 provides that no document shall be registered unless the person executing it appears before the Registering officer and the Registering officer shall thereupon enquire into certain matters to "satisfy himself as to the identity", etc., etc. Section 74 provides that where a denial is made before a Registrar he shall, as soon as conveniently, enquire whether the document has been executed or whether the requirements of the law for the time being in force have been complied with.

It follows therefore that these enquiries into these false statements made are entirely for the benefit of a particular person who may be injured or otherwise affected by the registration of the document and it seems to me that one cannot treat these sections as being in the same class as sections which impose penalties

for offences in contempt of the authority of public servants or offences against Government. That being so, I see no reason why a private person should not be allowed to lay a complaint of an offence under the Act. There is no doubt that the private person is more seriously injured by the action of an offender who not only forges a document but endeavours to give it higher authority by registering it and therefore he is put in a more dangerous position by this action. I can see no reason why he should not be entitled to institute the proceedings on which higher penalties are provided for the offence. My learned brother has referred to the Full Bench decision in *Gopinath v. Kuldip Singh*(1). It is quite true that there are decisions the other way. They are *Queen-Empress v. Batesar Mandal*(2), *Hussain Khan v. Emperor*(3) and *Emperor v. Jivan*(4). I cannot but express my regret that we have not the advantage of the reasoning of the learned Judges in those cases and so we are compelled to treat this matter as a case of first impression. I admit that I have had great difficulty in arriving at a conclusion; but I have come to a conclusion which is in agreement with my learned brother's decision and I have thought it necessary to give my additional reasons somewhat at length so that when this matter comes before this Court on another occasion the Court may have whatever assistance will be offered to it by the reasons which we have given.

K.R

(1) (1885) I.L.R., 11 Cal., 566 (F.B.) (2) (1884) I.L.R., 10 Cal., 604.
(3) (1916) 14 A.L.J., 412. (4) (1915) I.L.R., 37 All., 107.

PRIVY COUNCIL.*

KANDAKURI BALA SURYA PRASAD ROW AND
ANOTHER (REPRESENTATIVES OF PLAINTIFF),

1917.
March, 9, 12,
13, 15, 16,
19, 21 and 22
and May, 3.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT),
AND TWO OTHER APPEALS—THREE APPEALS CONSOLIDATED.

[On Appeal from the High Court of Judicature at
Madras.]

Irrigation Cess Act (Madras Act VII of 1865), sec. 1, provisoes, 1 and 2, as amended by Madras Act V of 1900—Right of Government to levy cess for irrigation purposes—Zamindaris settled at Permanent Settlement—Sanads, construction of—Cultivation extended and crop grown not customary at date of sanad—Engagement by zamindar with Government—Right to flowing water—Land Encroachment Act (Madras Act III of 1905).

The appellants sought to recover from the Secretary of State for India, the respondent, sums of money paid under protest in respect of water cesses levied by the Government of India under Madras Act VII of 1865 (as amended by Madras Act V of 1900), the portions applicable to the case being section 1 and provisoes 1 and 2.

The lands in suit were contiguous to the river Vamsadhara, and some time prior to the Permanent Settlement extensive works had been carried out to supply the district with water from the river, and the water was distributed throughout the district by means of branch channels and subsidiary channels ending in many instances in village tanks and reservoirs. The Government carved out of the land four zamindaris, on each of which they assessed a permanent revenue or *jumma*, and had them put up to public auction, and each purchaser received a sanad. These sanads did not mention any water rights. They contained (*inter alia*) agreements by the zamindars to encourage their ryots to improve and extend the cultivation of the land. Subject to his observing the conditions of the sanad, each zamindar was authorized to hold the zamindari in perpetuity for himself and his heirs. One of the four zamindaris (Urlam) was purchased by the appellant's predecessors-in-title at a sale for arrears of revenue and the other three were bought at various times by the Government. The sluices of only one of the channels were on the appellant's lands, but he used for irrigation purposes water from the river through all the four channels.

*Present:—Lord BUCKMASTER, Lord PARKER of Waddington, Lord FAIRMOOR, Mr. AMER ALI and Sir WALTER PHILLIMORE, *Bart.*

Held, that the Permanent Settlement was an engagement with the Government within the meaning of proviso 1 of section 1 of the Act VII of 1865. That the effect of the Permanent Settlement was to vest the channels with their head sluices and branch and subsidiary channels, and the tanks or reservoirs in the zamindars through or within whose zamindaris the same respectively passed or were situate, and to give the zamindar the right or easement of taking water from the river for irrigation purposes. That the zamindar on whose estate the head sluices and initial portions of each of the four channels in question were situate, obtained under his sanad the right to take water from the river (assuming that it belonged to Government), and such right was to be measured by the size of the channel, or the nature and extent of the sluices and weirs governing the amount of water which entered the channel, and not by the purposes for which the grantor or his tenants had been accustomed to use water from the channel prior to the date of the grant. That after the water was lawfully taken into the channel the Government had no further rights in it except as owners of the other zamindaris. That the zamindars in whose favour the sanads were made took subject to the customary rights of the ryot cultivators, and the rights of all holders of inams under existing inam grants and in other respects the rights *inter se* of the several zamindars under the sanads were analogous to the rights of upper and lower riparian owners on a natural stream. That there being no evidence that more water was being taken from the river than would be justified by the sanads as construed, the cesses were wrongly levied on the appellants.

The law of the Madras Presidency as to rivers and streams certainly differs in some respects from the English law and it is quite possible that it recognizes some proprietary rights on the part of Government in the water flowing in rivers and streams.

CONSOLIDATED APPEALS Nos. 102, 106 and 107 of 1914 from a judgment and three decrees (9th September, 1910) of the High Court at Madras, which by the first decree affirmed, and by the second and third decrees varied, judgments and decrees (18th November, 1904; 12th November, 1906 and 17th December, 1906) of the Court of the District Judge of Ganjām.

The three suits which gave rise to these appeals were filed in the District Court of Ganjām by the Zamindar of Urlam, the predecessor in title of the present appellants, against the Government for certain declarations and for a refund of sums levied by the Collector as water-cess under Madras Act VII of 1865 (as amended by Madras Act V of 1900). They were numbered respectively No. 3 of 1904 (6th February, 1904), No. 19 of 1905 (19th June, 1905) and No. 30 of 1906 (2nd July, 1906). The question raised in all the suits was as to the right of the respondent to levy water-cess from the plaintiff (now deceased and represented by the present appellants) under the Act, by which water-cess is leviable by Government wherever water is supplied

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from any river or channel belonging to or constructed by Government, unless the zamindar or inamdar is by virtue of any engagement with the Government, entitled to irrigation free of separate charge.

For the purpose of this report the facts are sufficiently stated in the judgment of the Judicial Committee, and also in the report of the appeal to the High Court (MILLER and MUNRO, JJ.) whose judgment delivered by MILLER, J., is in *Kandukuri Mahalakshamma Garu v. The Secretary of State for India*(1).

The following portions of the Act were referred to in the arguments and in the judgment:—

Madras Act VII of 1865 (amended by Madras Act V of 1900), section 1 which provides as follows:—

“(a) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by, Government, and also,—

“(b) whenever water by direct or indirect flow or by percolation or drainage from any such river, stream, channel, tank or work from or through adjoining land irrigates any land under cultivation or flows into a reservoir and is thereafter used for irrigating any land under cultivation, and, in the opinion of the Collector, subject to the control of the Board of Revenue and of the Government, such irrigation is beneficial to, and sufficient for, the requirements of the crop on such land,—

“it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess for such water, and the Government may prescribe the rules under which, and the rates at which, such water-cess as aforesaid shall be levied, and alter or amend the same from time to time:

“Provided that where a zamindar or inamdar or any other description of landholder not holding under ryotwari settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more:

“Provided also that no cess shall be leviable under this Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the same be irrigated by using without due authority water from any source hereinbefore

(1) (1911) I.L.R., 34 Mad., 295 at pp. 298 to 313.

mentioned and such source is different from or in addition to that which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as the source of irrigation of such land.”

On these appeals—

Upjohn, K.C., and Sir *W. Garth* for the appellants, contended that the water flowing for irrigation of the lands was not supplied or used from any river, stream, channel, tank, or work belonging to, or constructed by, the Government. The Vamsadhara river and the four channels for conducting the water for irrigation did not belong to the Government, and the channels were not constructed by them, and therefore the levies of water-cess which the appellants were called upon to pay were unauthorized and illegal. In any case the water of the river Vamsadhara was not the property of the Government, and even if it were, it did not follow that the river “belonged to” the Government within the meaning of Act VII of 1865: the levies made on the appellants were for water from the channels or some of them and not from a river within the meaning of that Act. The general law in India as to the rights in flowing water is the same as in England: reference was made to *Ramessur Pershad Narain Singh v. Koory Behari Pattuk*(1); *Kali Kishen Tagore v. Jodoo Lal Mullick*(2); Easements Act (V of 1882) section 7, illustrations (f) and (j); *Perumal v. Ramasami*(3) and *Debi Pershad Singh v. Joynath Singh*(4). The control of the irrigation water did not justify the Government in interfering with the rights to which private persons were entitled. Reference was made to *Ponnusami Tevan v. The Collector of Madura*(5); *Kristna Ayyan v. Vencatachella Mudali*(6); *The First Assistant Collector of Nasik v. Shamji Dasrath Patil*(7); *Ramachandra v. Narayanasami*(8); *Sankaravadivelu Pillai v. Secretary of State for India in Council*(9); and *Ambalavana Pandara Sannathi v. Secretary of State for India*(10). Madras Act VII of 1865, it was contended, was only applicable where a complete system of irrigation had been constructed by the Government for the public

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(1) (1788) I.L.R., 4 Calc., 633 (P.C.). (2) (1897) L.R., 6 I.A., 190.
(3) (1888) I.L.R., 11 Mad., 16. (4) (1897) I.L.R., 24 Calc., 865 (P.C.).
(5) (1869) 5 M.H.C.R., 6. (6) (1872) 7 M.H.C.R., 60.
(7) (1883) I.L.R., 7 Bom., 209. (8) (1893) I.L.R., 16 Mad., 333.
(9) (1905) I.L.R., 28 Mad., 72. (10) (1905) I.L.R., 28 Mad., 539.

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benefit; see the Preamble, and section 1 (b) of the Act. But all they did in that way after they purchased the three zamindaris was for the benefit of their own estates. Flowing water required legislation before any one could acquire a property in it. Madras Act III of 1905, section 2, it was submitted, referred only to the bed of a river and not the water flowing over it: as to that, the High Court had not put the proper construction on it. Act III of 1905, section 2, was declaratory only as to the land. The beds of the channels on their lands, it was contended, passed by the sanad to the appellants' predecessor in title, and the appellants were therefore within the first proviso to section 1 of Act VII of 1865 as amended by Act V of 1900, and were entitled to the use of the water in them free of separate charge for all purposes, subject only to the rights of other proprietors above and below them. The channels were upon the zamindaris, where they were settled, the Government reserving no interest in them. The sanads included grants, either expressly or impliedly of the rights to use the water supply for irrigation to extend the wet cultivation subject only to the rights of the other riparian owners: reference was made to *Watts v. Kelson*(1); *Secretary of State for India in Council v. Perumal Pillai*(2); *Chidambara Rao v. The Secretary of State for India in Council*(3); *Maria Susai Mudaliar v. The Secretary of State for India in Council*(4); *Lutchmee Doss v. Secretary of State for India*(5); *Secretary of State for India v. Swami Naratheeswarar*(6); *Secretary of State for India v. Ambalavana Pandara Sannadhi*(7) and Madras Regulation XXV of 1802. There was a presumption in the case of all the jirayati and inam lands of Venkatapuram, as it was in the case of other inams, that the rights of irrigation free of separate charge for all purposes was taken into account in fixing the peshkash and the inam assessment at the time of the respective settlement. In any case the appellants were entitled to irrigation free of a separate charge for all purposes from the Mobagam channel.

P. O. Lawrence, K.C., Sir H. Erle Richards, K.C., and Kenworthy Brown for the respondent contended that the water

(1) (1870) L.R., 6 Ch., 168 at p. 175.

(3) (1903) I.L.R., 26 Mad., 66.

(5) (1909) I.L.R., 32 Mad., 456.

(2) (1901) I.L.R. 24 Mad., 279.

(4) (1904) 14 M.L.J., 350.

(6) (1911) I.L.R., 34 Mad., 21.

(7) (1911) I.L.R., 34 Mad., 368.

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was supplied and used for the purpose of irrigation from the river Vamsadhara which belonged to the Government; and the flow of water into the channels from the river was controlled by the Government and was directed by anicuts on the river bed which also belonged to the Government. In the Madras Presidency all rivers and streams including the flowing water vest in the Government—see Madras Act III of 1905, section 2, sub-section(1). Reference was made to *Ponnusawmi Tevan v. The Collector of Madura*(1) and *Fischer v. The Secretary of State for India*(2). The ownership of the flowing water cannot be shown to be in any one but the Government and therefore it vests in them under the above Act. As the water comes from a river belonging to the Government it is not material that it comes through channels which do not belong to Government, nor that the appellants had a right to take the water. The channels, however, were constructed by Government or its tenants before 1803 and belong to Government; and the Lukulam, Polaki, and Jalmoor channels before they reach the zamindari pass through ryotwari lands, and are there kept up and repaired, and the water is distributed by works belonging to and constructed by Government. The onus of negating the title of Government to the river and the channels, and of proving an engagement with Government within the proviso to section 1 of Act VII of 1865, was on the zamindar and it had not been discharged. The High Court was right in holding that there was no distinction between the Mobagam channel and the other channels. The Courts in India have rightly concurred in holding (a) that the appellants are not entitled to irrigation free of charge for their zamindari by virtue of any engagement with Government other than the engagement involved in the Permanent Settlement sanad and (b) that such engagement is limited to the quantity of irrigation existing at the date of the sanad; reference was made to *Secretary of State v. Janaki-ramayya*(3). The peshkash was fixed according to the produce of the land at the time of the settlement, and not with a view to future extensions of cultivation; and there were concurrent findings that the irrigation by the plaintiff exceeded that customary at the date of the settlement. Reference was made to *Secretary of State for India v. Maharajah of Bobbili*(4);

(1) (1889) 5 M.H.C.R., 6.

(3) (1914) I.L.R., 37 Mad., 322.

(2) (1909) I.L.R., 32 Mad., 141.

(4) (1916) 30 M.L.J., 1.

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Jagadindra Nath Roy v. Secretary of State for India(1) and
Secretary of State for India in Council v. Perumal Pillai(2). On
the question of engagement with Government, reference was made
to the 5th Report, Appendix 18, "Instructions to Collector"
No. 17 and Madras Act VII of 1865, section 2.

Upjohn, K.C., replied.

The judgment of their Lordships was delivered by

LORD
PARKER OF
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LORD PARKER OF WADDINGTON.—These are consolidated appeals
from a decree of the High Court of Madras, dated the 9th
September 1910, and made in three actions, in each of which
Kandukuri Maha Lakshammamma (who has since died and is now
represented by the appellants) was plaintiff and the Secretary of
State for India was defendant. The plaintiff sought in each action
to recover from the Secretary of State monies paid under protest in
respect of water-cesses which the Government of India had levied
under the Madras Act VII of 1865, as amended by Act V of
1900. The point to be determined was the right of the Govern-
ment to levy these cesses. The cess, the subject-matter of the
first action, was levied in respect of water used for the second
crop on jirayati lands, part of the estates of Urlam and Devadi, of
which the plaintiff was owner. Devadi was originally part of
Urlam, and is hereinafter included in the expression "the Urlam
Estate" or "the Urlam Zamindari." The cess, the subject of
the second action, was levied in respect of water used for (1) the
first crop on so much of the irrigated jirayati lands belonging to
the Urlam Estate as the Government alleged to be in excess of
the area so irrigated at the time of the Permanent Settlement,
(2) the first crop on so much of certain inam lands situate within
the Urlam Estate, and of which the plaintiff was the inamdar, as
the Government alleged to be in excess of the mamul or customary
wet at the dates when such inam lands were respectively originally
granted or subsequently settled; (3) the second crop on the
whole of such inam lands. The cess, the subject of the third
action, was levied in respect of water used both on jirayati and
inam lands for all the purposes abovementioned with respect to
the cess the subject of the second action. It may be mentioned
that the plaintiff succeeded in the High Court on the issue as to

(1) (1903) I.L.R., 30 Cal., 291 (P.C.).

(2) (1901) I.L.R., 24 Mad., 279 at p. 283.

the Government's right to levy a cess in respect of water used
for the second crop on all the inam lands except those situate in
the village of Venkatapuram. The Government have not
appealed to His Majesty in Council. It would seem therefore
that the questions their Lordships have to decide are the follow-
ing: *First*, Are the Government entitled under the Act to levy
a cess for water used for the second crop on jirayati lands parcel
of the Urlam Estate? *Second*, The same question as to inam
lands in the village of Venkatapuram. *Third*, Are the Govern-
ment entitled under the Act to levy a cess for water used for the
first crop on so much of the jirayati lands parcel of the Urlam
Estate as may be in excess of the area of such lands irrigated
at the time of the Permanent Settlement? *Fourth*, Are the
Government entitled under the Act to levy a cess for water used
for the first crop on so much of the inam lands within the Urlam
Estate as is in excess of the area of such lands irrigated at the
respective dates when these inam lands were originally granted
or subsequently settled? In order to answer these questions
their Lordships must, in the first instance, examine the provisions
of the Act itself.

The Act is intituled :

"An Act to enable the Government to levy a separate cess for
the use of water supplied for irrigation purposes in certain cases."

It recites that in several districts of the Madras Presidency,
large expenditure out of Government funds has been and
is still being incurred in the construction and improvement of
works of irrigation and drainage to the great advantage of
the country and of proprietors and tenants of land, and that
it is right and proper that a fit return should in all cases
alike be made to Government on account of the increased
profits derivable from lands irrigated by such works. By
section 1 of the Act as amended by the Madras Act V of 1900
it is provided (*inter alia*) that whenever water is supplied or used
for purposes of irrigation from any river, stream, channel, tank,
or work belonging to or constructed by, Government, it shall
be lawful for the Government to levy at pleasure on the land so
irrigated a separate cess for such water, and the Government may
prescribe the rules under which, and the rates at which, such
water-cess as aforesaid shall be levied, and alter and amend the
same from time to time. Then follow two provisoes, the first for

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the protection of zamindars, inamdars, or any other description of landholder not holding under ryotwari settlement; and the second, for the protection of landholders under ryotwari settlement. Under the first proviso, where a zamindar, inamdar, or other landholder not holding under ryotwari settlement is, by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under the Act is to be imposed for water supplied to the extent of this right and no more. Under the second proviso, no cess is to be levied under the Act in respect of land held under ryotwari settlement which is classified and assessed as wet unless the same be irrigated by using, without authority, water from any source thereinbefore mentioned and such source is different from, or in addition to, that which has been assigned by the revenue authorities or adjudged by a competent Civil Court as the source of irrigation of such land.

It cannot be denied that, with regard to the true meaning and construction of this Act, various difficulties arise. In the first place, it might have been expected from the recitals that the cess which the Government are authorized to levy would have been confined to a cess in the case of land irrigated from works constructed or improved by Government and would have been in some way proportional to the extra profits derivable by reason of such irrigation. But this does not seem to be the effect of the first section. The amount of the cess is discretionary and, as a matter of fact, it is levied on the basis of the area irrigated, irrespective of actual or possible profits. Moreover, it appears to be leviable whether the Government have or have not spent money in constructing or improving the source from which the water is supplied. If, for example, a riparian owner irrigates his land with water derived from a river or stream of which it can be truly said that it is a river or stream belonging to the Government, a cess would appear to be leviable even though the Government had never spent a single rupee in improving the source of supply. If, in order to avoid this result, reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner.

In the next place, it is by no means easy to say what is meant by a river or stream "belonging to the Government."

The same expression in an Act of the United Kingdom would probably connote a Government ownership of the bed or the banks of the river, but it is quite possible that the law of the Madras Presidency recognizes some proprietary right on the part of Government in the water flowing in rivers and streams. The law of the Madras Presidency as to rivers and streams certainly differs in some respects from English law: *Fischer v. Secretary of State for India*(1). Further, the Madras Act III of 1905 appears to enact that (*inter alia*) all standing and flowing water, not the property of private individuals, is the property of Government, but subject to the natural and easement rights of other landholders. If this section be relied on, it is a nice problem whether a riparian owner, who is exercising his natural or prescriptive right of taking water from a natural stream for purposes of irrigation, is taking water from a stream belonging to the Government within the meaning of the Cess Act? If he is, the natural and prescriptive rights of riparian owners are seriously diminished by the Act and, where the Government have not expended money in improving the natural stream, apparently without any sort of *quid pro quo*.

Lastly, it is by no means easy to decide as to the class of case which the first proviso is intended to meet. Their Lordships cannot accept the contention that the proviso applies only where there is an express contract that the supply to which the person claiming the protection of the proviso is entitled shall be free from anything in the nature of a future tax. It is enough, in their Lordships' opinion, that the person relying on the proviso shall show an engagement between the Government and himself or his predecessors in title by virtue of which he is, in fact, entitled to water for irrigation (1) from the source from which he is actually irrigating his lands; (2) to the amount of water actually used for such irrigation and (3) without being subject to a "separate charge" for such irrigation. But there is a difficulty in arriving at what is the meaning of the expression "free of separate charge." A provision that the person relying on the proviso must prove that he is already being charged for the supply would be intelligible, for in that case by the imposition of a cess, he

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(1) (1909) I.L.R., 32 Mad., 141.

PRASAD ROW would be charged twice for the same thing. But this is not what he has to prove. Indeed, he has to prove the contrary. He must prove either that he is not charged already for the supply, or that the charge, if any, is not a "separate charge."

THE SECRETARY OF STATE FOR INDIA. Their Lordships think that the real object of the proviso may be found in the following considerations: The cess under the Act is leviable on the land which is irrigated. It is therefore in the nature of a land tax, and by section 2 is recoverable in the same manner as arrears of land revenue. Now the permanent land settlement in the Madras Presidency (as in the Presidency of Bengal) proceeded on the footing that, whatever may have been the interest of the zamindars and other landholders prior to the British occupation, the Government would grant to them and their heirs

"a permanent property in their land for all time to come, and would fix for ever a moderate assessment of public revenue on such lands the amount of which should never be liable to be increased under any circumstances:"

see section 1 of Madras Regulation XXV of 1802. The Government, therefore, came under an obligation not to raise the jumma, or as it is sometimes called, the peshkash, fixed at the Permanent Settlement in respect of the lands then granted. Under these circumstances the Government could not impose a cess for the use of water the right to use which was appurtenant to the land in respect of which the jumma was payable without in fact, if not in name, increasing the amount of such jumma, and thus committing a breach of the obligation undertaken at the time of the Permanent Settlement. If the right to use the water was paid for separately the case would be different. The existence of a separate charge would show that no payment for the use of the water was included in the jumma, and the imposition of a water cess, though it might increase the separate charge would not increase the jumma. Its imposition would not be a breach of the Government's obligation.

That the object of the first proviso was to safeguard the obligation not to increase the jumma is borne out by a consideration of the second proviso. The incidents of Ryotwari tenure are governed by custom, and include a right to receive from the owner of the soil (whether the Government or a private individual) a supply of water sufficient for the irrigation of the mamul

wet lands comprised in each holding. The owner of the soil is on his part, entitled to his customary share in the actual produce. It has, however, long been the practice on Government estates to make periodical settlements with the ryots whereby the Government's share in the produce is commuted for a fixed annual payment, in assessing which the wet lands are separately classified. The annual payment is incapable of increase during the period for which the settlement is made. It is paid (*inter alia*) for the ryot's right to water for irrigating his mamul wet lands, and would be increased if a new cess were imposed for this supply. The second proviso seems to be intended to provide against this result.

Their Lordships therefore conclude that whether or not there are other possible cases which the first proviso was intended to meet, it at least covers the case of engagements with the Government arising out of the Permanent Settlement. If by virtue of such settlement a zamindar is entitled to take and use water from any such source of supply as mentioned in the Cess Act, and this right is part of or appurtenant to the property in respect of which he pays a single jumma or peshkash, no cess can be levied under the Act in respect of the water which he is so entitled to take and use.

The appellants claim the benefit of the first proviso, relying mainly on the engagement with the Government constituted by the Permanent Settlement of the Urlam Estate, but as to the inam lands in some degree also on engagements arising out of the inam grants or subsequent inam settlements. Obviously if their claim be well-founded the appeal must succeed on this ground alone, and it will be unnecessary for their Lordships to deal with the other questions which have been argued. Their Lordships therefore propose to consider in the first instance whether, and to what extent, the appellants are within the first proviso. That they are to some extent within the proviso was admitted in the Courts below, and was not really contested before their Lordships' Board. The respondent's contention was really this: The appellants, he said, may well be entitled without separate charge to certain water rights under the Permanent Settlement or in respect to inam lands under the inam grants or subsequent inam settlements, but those rights must in all cases be limited by the mamul prevailing when the particular settlement

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or grant relied on was made. The mamul did not extend to a second crop on any of the jirayati lands in the Urlam Estate or to the inam lands in the village of Venkatapuram, nor did it extend to any wet land which was not mamul wet at the date of the settlement or grant on which reliance is placed. The Government has not charged cess for any water taken or used in accordance with the mamul. If they have done so they will refund the amount so charged; but they claim the right to charge cess for water taken in excess of the mamul whether for the second crop on mamul wet land or for any crop on land in excess of the mamul wet. This contention depends for its validity on the true effect of the particular settlement or grant upon which reliance is placed, and the true effect of such settlement or grant depends upon its terms taken in connection with the circumstances existing when it was made. Their Lordships will first consider the effect of the Permanent Settlement of the zamindari or estate of Urlam. They will postpone for the present all question as to inams.

The Urlam Estate had no separate existence prior to the Permanent Settlement. Till then it was part of a larger district consisting of (1) *haveli* lands and (2) lands belonging to a religious community of Brahmans known as the Agraharam, such last-mentioned lands being held under inam grants. This district was bounded in part by the river Vamsadhara, and some time prior to the Permanent Settlement extensive works had been carried out for the purpose of supplying the district with water from the river. These works included four main channels known as Jalmour, Polaki, Lukulam and Mobagam. The first three appear to have been cut by one Ramaradhanlu, a member of the Agraharam, who was also a renter under Government of the whole or the greater portion of the *haveli* lands within the district. The origin of the Mobagam channel is lost in obscurity. Each channel derived its water by means of weirs and sluices from the river Vamsadhara, and the water was distributed throughout the district by means of branch channels and subsidiary channels ending in many instances in village tanks or reservoirs. The prosperity of the district depended to a great extent on the supply of water thus obtained.

In 1802 the Government proceeded to carve out of this district four estates or zamindaris, subsequently known as

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Jalmour, Nagarakatakam, Urlam, and Polaki, and to assess the permanent land revenue or jumma to be paid for each estate. Having assessed the permanent jumma the Government in July 1803 caused these four estates or zamindaris to be put up for public auction. At the auction all four estates were sold. It appears that in the advertisement announcing the sale particular attention was called to the fact that the village tanks or reservoirs had been repaired or improved for the benefit of purchasers, and particular stress laid on the benefit which the country would derive from the improvement of the properties offered for sale. In due course after the sale each purchaser obtained a sanad, but none of these sanads is now forthcoming. The corresponding kabuliyat in the case of the Urlam Estate is, however, in evidence. It refers to the Urlam sanad, the terms of which must have corresponded in all material particulars with those of the kabuliyat. Their Lordships see no reason to suppose that the other sanads were not framed on the same lines.

The Urlam kabuliyat does not mention any water rights. It does not even refer to the existence of main or branch or subsidiary channels or of the tanks or reservoirs in the several villages. It mentions the advantages likely to accrue to the zamindar and his people by the public revenue being put on a permanent foundation, and it refers to the jumma payable for the zamindari as a permanent annual tax, of which no increase can be ever made, whatever changes or improvements the interests or pleasure of the zamindar may lead him to introduce in his zamindari. It contains also an argeement by the zamindar to enter into engagements with his ryots in manner provided by section 14 of the Madras Regulation XXV of 1802, and to encourage such ryots to improve and extend the cultivation of the land. Subject to his observing the conditions of the kabuliyat, the zamindar is authorized to hold the zamindari in perpetuity for himself and his heirs.

Their Lordships regret that they have not been supplied with a map or plan showing the boundaries of the four zamindaris, the subject of the auction sale, their position with regard to each other, and the extent to which the four main channels with their numerous branches or subsidiary channels lay within the boundaries of each estate. It appears, however,

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to be common ground that the four zamindaris together comprised all the *haveli* lands within the district, including those contiguous to the river Vamsadhara, together with the head sluices of the four channels, and, if the principles of English law governing the grant of land bounded by a stream or river be applicable in the Madras Presidency, they comprised also the river bed *usque ad medium filum* and the weirs by which water was diverted from the river into these main channels.

Three of the four zamindaris, namely, Jalmour, Nagarakatakam, and Urlam, were sold in 1809-'10 in order to raise arrears of land revenue. Two of them, namely, Jalmour and Nagarakatakam were bought by the Government, and thenceforward became Government land subject to ryotwari tenure. The third, namely, Urlam, was bought at the same time by the plaintiff's predecessor in title. The sluice gates of the Mobagam channel were admittedly in the Urlam zamindari. The sluice gates of the Polaki channel were originally in Urlam, but appear to have been removed about 1824 to the Government village of Parlam, which would thus seem to have been within Jalmour or Nagarakatakam, for the Government did not acquire the Polaki zamindari till 1850. The sluice gates of the Jalmour channel were admittedly in the Jalmour zamindari; those of Lukulam are now admittedly on Government lands, but it is impossible to determine on the evidence in which zamindari they were comprised at the Permanent Settlement. They were certainly not comprised in Urlam.

The Jalmour main channel does not pass through any village in the Urlam zamindari. From it, however, some 130 acres of Urlam derive their water supply either by regulators in the main or branch channels, or by subsidiary channels through the estate, ending in one instance at least in a village tank. The Jalmour channel also now irrigates some 6,000 acres of Government land and some 1,100 acres belonging to the Agraharam. The Lukulam, Polaki, and Mobagam main channels all pass for considerable distances through the Urlam zamindari. Lukulam now supplies water to some 1,000 acres of Urlam land, some 500 acres of Government land, and some 2,500 acres belonging to the Agraharam. Polaki now supplies water to some 500 acres of Urlam, some 10,000 acres belonging to the Government, and some 1,500 acres belonging to the Agraharam. Mobagam

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now supplies water to some 3,500 acres of Urlam and some 500 acres of Government land. No doubt most, if not all, of the Government lands now supplied with water from these four channels were originally comprised within the zamindaris of Jalmour, Polaki, or Nagarakatakam. Moreover, though the area of land under each of the four channels may have increased since the Permanent Settlement, the general purpose which each channel served at the date of the Permanent Settlement can in their Lordships' opinion, be properly inferred from the facts as they now exist.

Before proceeding further, it may be useful to summarise the conclusions arrived at by the Subordinate Judge and the High Court respectively. The Subordinate Judge held that the Vamsadhara river was not a river belonging to the Government within the meaning of the Cess Act. He held, however, that the head sluices of the Jalmour, Polaki, and Lukulam channels, with the initial portions of the channels themselves, belonged to Government, and must be looked on as the sources of supply of water for the lower portions of the whole system of irrigation dependent upon them, and it was immaterial that parts of these main channels, or the branch or subsidiary channels leading therefrom, or the tanks or reservoirs in which some of the subsidiary channels ended, belonged to the owners of the villages through which they passed or in which they were situate. He held further that the rights of the owners of these villages were confined to using the water in the main branch and subsidiary channels and tanks or reservoirs for the purposes for which the same had been used at the time of the Permanent Settlement. They could not therefore, without the consent of the owner of the head sluices and the initial portions of the channels, lawfully use the water for a second crop unless second crops were within the then existing mamul, or extend wet cultivation beyond the area of the then mamul wet. On the other hand, he held, with regard to the Mobagam channel, that its head sluice and its initial portion did not belong to Government but to the owner of the Urlam zamindari, who had an unlimited right to the use of the water in the channel subject to the mamul rights of others. These findings appear to involve the following propositions:—

First.—The effect of the Permanent Settlement was to vest the head sluices of the four channels, the channels themselves

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and all branch and subsidiary channels and tanks or reservoirs in the zamindars, through or within whose zamindaris the same respectively passed or were situate.

Second.—The zamindars who thus acquired the head sluices with the initial portions of the channels themselves, became entitled to take into the channels from the river as much water as they chose, subject only to the rights of lower riparian owners on the river, and as little as they chose, subject to the obligation to send down each channel sufficient water to satisfy the mamul rights of persons entitled to water from the system supplied by each channel.

Third.—If the owner of the head sluice or the initial portion of any channel sent down more water than would satisfy those mamul rights, the proprietors of other parts of the channels or of the branch or subsidiary channels or the tanks or reservoirs were not entitled to make use of the surplus, or if they were entitled to make use of the surplus, were not so entitled by virtue of the sanads granted at the Permanent Settlement.

Fourth.—It was merely the accident of the Government having subsequently purchased the zamindaris of Jalmour, Polaki, and Nagarakatakan which in any way brought their powers under the Cess Act into play. Had those zamindaris still existed in private ownership, each of these channels would have been precisely in the same position as the Mobagam channel.

The High Court disagreed with the Subordinate Judge on the question as to the Vamsadbara river. They held that it belonged to Government, and must, for the purposes of the Cess Act, be looked on as the source of supply of the whole system of irrigation dependent on the four main channels. They agreed with the Subordinate Judge that the effect of the Permanent Settlement was to vest the head sluices, the four channels, and all branch and subsidiary channels, and the tanks or reservoirs, in the zamindars, through or within whose zamindaris the same respectively passed or were situate. They held that the water rights of the owners of the head sluices and the initial portions of the channels, as of all other persons entitled to water from the system supplied by these channels, were confined to the mamuls at the date of the Permanent Settlement,

and that the Government could therefore charge water cess in respect of water used in excess of the then mamul, either for a second crop where no second crop had been customary, or for irrigating land in excess of the original wet area. These findings appear to involve the propositions: (1) that the easements of taking water from the Vamsadbara conferred by the sanads were confined to taking sufficient water to satisfy the mamul rights and (2) that, if without objection from the Government, more water were taken, the proprietors of the various portions of the main channels, branch or subsidiary channels, or of the tanks or reservoirs, were not entitled to make use of the surplus, or if they were entitled to make use of the surplus, were not so entitled by virtue of the sanads granted at the Permanent Settlement.

In their Lordships' opinion, there can be no real doubt that the Courts below were right in holding that the effect of the Permanent Settlement was to vest the channels, with their head sluices and branch and subsidiary channels, and the tanks, or reservoirs, in the zamindars through or within whose zamindaris the same respectively passed or were situate. As pointed out by the High Court, this would be in full accordance with the policy enunciated in the well-known Fifth Report. Indeed, no reason can be suggested for implying in favour of the Government any reservation of this system of irrigation. It is not shown that the Government were retaining any of the land thereby irrigated. They were parting, or had parted, with (if not the whole), at any rate, the greater portion of such land. If they retained any, it would be enough to imply a reservation of water rights in respect of the land so retained. It is true that, on this footing, disputes were not unlikely to arise (indeed, they did arise) as to the relative rights of the several zamindars or their ryots. But the probability of such disputes is not sufficient reason for implying a reservation. They could not concern the Government, and were capable of settlement by arrangement, or through the medium of the Courts. On the other hand, the reservation of the main channels and other works would certainly have raised questions as to the Government's liability for repairs or otherwise. But, while agreeing in this respect with the conclusion of the Courts below, their Lordships do not think that such Courts attached sufficient

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importance to that conclusion. In their opinion, the fact that the ownership of the channels and works passed under the several sanads is of the utmost importance in ascertaining the water rights thereby conferred.

Assuming that the Vamsadhara river belongs to Government, the case may be looked on in this way. The owner of a river and of contiguous land through which passes a channel constructed for irrigation purposes and supplied with water from the river, grants the contiguous land together with the channel. Obviously some right or easement of taking water from the river must pass. The only question is as to the measure of this right. In their Lordships' opinion, the right must be measured by the physical conditions, such as the size of the channel, or the nature and extent of the sluices and weirs governing the amount of water which enters the channel, and not by the purposes for which the grantor or his tenants have been accustomed to use water from the channel prior to the date of the grant. The water in the channels may never have been used by the grantor or his tenants at all, but it would be absurd to hold on that account that no easement or right of taking water from the river passed by the grant. The case would have been very different if the contiguous land had been granted reserving the channel. In that case if any easement passed, it would be an easement in respect of which the channel and not the river was the servient tenement, and if no water had been or were being used by the grantor or his tenants, it may well be that there were no existing physical conditions by which the principle of continuous and apparent easements could be brought into play. In such a case no easement or right to use water from the channels would pass under the grant.

It follows from these considerations that the zamindar in whose estate the head sluices and initial portions of each of the four channels in question were situate obtained under his sanad the right to take water from the Vamsadhara (assuming it belonged to the Government) limited only by the size of the channel and the nature of the sluices and works by which water was diverted from the river into the channel. The Government could not complain if the amount of water taken were within this limit. After the water was lawfully taken into the channel,

the Government had nothing further to do with the matter; the subsequent distribution and use depended on the rights *inter se* of the zamindar and others entitled to take water from the system supplied by the channels in question.

It may be observed that the Government could not grant the zamindaris otherwise than subject to the customary rights of the ryot cultivators and the rights of all holders of inams under existing inam grants. The zamindars in whose favour the sanads were made took therefore subject to those rights. In other respects the rights *inter se* of the several zamindars under their sanads would, in their Lordships' opinion, be analogous to the rights of upper and lower riparian owners on a natural stream. Each would be entitled to have the full supply taken into the main channels. Each would be entitled to make use of the water in any channel through his own lands or in tanks or reservoirs in villages within his estate, but in exercising this right each would be bound to have due regard to the existence not only of the rights of the ryots and inamdars in the lower portions of the irrigation system, but to the rights similar to his own of the other zamindars in whose estates any portion of the system was situate. Further, each zamindar might be entitled to take water from a channel or branch channel in the estate of the others if at the time of the settlement and on the principle of continuous and apparent easements circumstances pointed to the intention to create such a right. It follows that each zamindar could (subject as aforesaid) legally authorize his ryots to use water to the use of which he was himself entitled for the growth of second crops on their holdings or for increasing the area of land within their boundary for the time being under wet cultivation. In taking advantage of such authorization the ryots would be entitled to rely on the engagements with the Government arising out of the Permanent Settlement to the same extent as the zamindar himself. All these zamindari rights would moreover arise under and be dependent upon engagements with the Government embodied in the sanads granted at the Permanent Settlement, and payment for them would be included in the jummas.

Assuming, on the other hand, that the river Vamsadhara does not belong to the Government, the right of taking water from it into each of the four channels could not depend on any

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easement created by virtue of the Permanent Settlement. It would depend in part upon the natural rights of riparian owners and in part on prescriptive rights existing at the date of, and passing under, the sanads, or acquired since the sanads were granted. Moreover, in the case of these prescriptive rights, it would be the lands of the lower riparian owners and not the river itself which would constitute the servient tenement. The Government would have even less interest in the amount of water taken into the channels than if the river belonged to them and constituted the servient tenement. The rights *inter se*, however, of the grantees of the four zamindaris would be, for all practical purposes, the same. The rights of the proprietor of Urlam under his sanad could not in any case be affected by the subsequent purchase by the Government of the three other zamindaris.

The construction of the sanads in the way their Lordships construe them has the advantage of being in ample accord with the known policy and objects of the Permanent Settlement. The uncertainty as to the ownership of the soil and the liability to arbitrary and varying assessments to the land revenue had (to use the language of Regulation XXV of 1802)

"obstructed the progress of agriculture, population, and wealth."

The policy was to encourage such progress, and accordingly we find in the *kabuliyat* of the Urlam Estate (which is admittedly a common form *kabuliyat*) an undertaking by the zamindar to encourage his ryots to extend and improve the cultivation of the land. The same point is emphasized in the advertisement for the sale at which the zamindaris were sold. In this part of India water is essential for improvements in agriculture. These facts coupled with the actual grant to the zamindars of the channels, branch channels, and works, constituting an extensive system of irrigation which must have been created for the benefit of the lands comprising the several zamindari estates, manifests, in their Lordships' opinion, an intention that the water therefrom should be used to the utmost extent for the purpose of improving the estates, and increasing the population or wealth of the district. On the construction of the sanads adopted by the High Court, water could not properly be used for any such purpose. Indeed, though the channels, branch

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channels, and works constituting the irrigation system were included in the grants, no right to use such system passed at all. For the grants were necessarily subject to the existing rights of the ryots and inamdars, and according to the decision of the High Court it was only in respect of these rights that any water could be used from the system.

Both the Courts below appear to have arrived at the conclusion that the water rights which passed by the sanads were limited by the mamuls at the Permanent Settlement for the following reasons: The assessment of the permanent jumma in the case of each zamindari was arrived at on the basis of the then actual produce of the land. An annual value was placed on this produce, and a proportion of the annual value was fixed as the jumma or peshkash. The water actually used in growing the annual produce thus comes within the assessment. The use of the water for other purposes was not assessed at all, and therefore does not pass by the sanad grants. In their Lordships' opinion, this process of reasoning is fallacious on two grounds: It does not follow that the assessors in fixing the proportion of the annual value which should constitute the jumma or peshkash did not take into full account the possibility of improving the cultivation of the lands, the subject of the grant, by means of the irrigation system comprised therein. The jumma or peshkash was in the case of each of the zamindaris in question admittedly high. Again, it does not follow that all which is not brought into account in fixing the jumma or peshkash is excluded from the grant. On this footing many things of great importance to the enjoyment of a zamindari would not pass by a zamindari grant, for example, waste land, farm buildings, tanks, or, in the present case, irrigation channels. As pointed out in the recent case of *Rajah Ranjit Singh Bahadur v. Kali Dasi Debi*(1), the property taken into account in arriving at the jumma is by no means necessarily the same as the property upon which the jumma is chargeable, and all that is chargeable with the jumma or peshkash is included in the grant.

There being no evidence whatever that more water is being taken from the river than would be justified by the sanads—

(1) (1917) L.R., 44 I.A., 117.

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construed as in their Lordships' opinion they ought to be construed—it follows that the appellants must succeed in respect of the jirayati lands on which the cesses in dispute were levied. It remains to consider the case of the inam lands.

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Inams are Government grants subject to quit-rents, and in some instances to services. They were not assessed for land revenue at the date of the Permanent Settlement. The inams now in question existed at the date of the Permanent Settlement, and the quit-rents payable in respect thereof were by the Urlam sanad made part of the assets of the Urlam Estate. They are constantly referred to in the inam records as within the Urlam Estate. They were sometime since acquired by the plaintiff or her predecessors. The appellants, therefore, are the inamdars as well as the persons entitled to the quit-rents under the Urlam sanad. The water for the use of which the cesses in dispute were levied was used by the zamindar on inams which belonged to her and were within her zamindari. The question is whether the zamindar was entitled so to use this water. In their Lordships' opinion, the answer to this question must be in the affirmative. The only persons who could complain of such use would be persons whose rights to take water from the irrigation system in question were interfered with by such user, and there appears to be no such person. If the cess were levied on the plaintiff as Urlam zamindar, she brings herself within the first proviso by virtue of the engagement with Government arising out of her zamindari sanad. If the cess were levied upon her as inamdar, she can rely on the same engagement to the same extent as could a tenant of zamindari land authorized by the zamindar to use the water. It is, therefore, in their Lordships' opinion unnecessary to consider the terms of the original inam grants or the effect of any subsequent inam settlement. The appellants must succeed also as to the inam lands.

The result is that the appeals succeed both as to jirayati and inam lands. The right thing will be to discharge the orders of the Subordinate Judge and the High Court, and to declare that the rights of the zamindar of Urlam under the Urlam sanad to irrigate the Urlam Estate (including inams therein) from the Jalmour, Polaki, Lukulam, and Mobagam channels or their branches, are not limited by any mamul, and that such

zamindar, not being subject to any separate charge for such irrigation, is within the protection of the first proviso to section 1 of the Madras Irrigation Cess Act VII of 1865, as amended by the Act V of 1900. The appellants will be entitled to recover the amounts paid under protest with interest at 6 per cent per annum and their costs here and in the Courts below. Their Lordships' will humbly advise His Majesty accordingly.

Appeals allowed.

Solicitor for the appellants: *Douglas Grant.*

Solicitor for the respondent: *The Solicitor, India Office.*

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PRIVY COUNCIL.*

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1917,
June, 20.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT).

[On Appeal from the High Court of Judicature at
Madras.]

Irrigation Cess Act (Madras Act VII of 1865)—Conditions necessary to entitle Government to levy water-cess—Extent of right to water—Engagement by landholder with Government.

In this case the decision in *Prasad Row v. The Secretary of State for India* (1917) I.L.R., 40 Mad., 886 (P.C.) was followed, on the admission of the respondent that the rights of the parties were governed by it.

APPEAL No. 6 of 1915 from the decree (18th October 1910) of the High Court at Madras, which varied the decree (4th July 1905) of the Subordinate Judge of Tinnevely.

The facts of the case appear in the report of the appeal to the High Court (Sir ARNOLD WHITE, C.J., and AYLING, J.) which will be found in *Secretary of State for India v. Ambalavana Pandara Sannadhi*(1).

* Present:—Lord PARKER of Waddington, Mr. AMER ALI and Sir WALTER PHILLIMORE, Bart.

(1) (1911) I.L.R., 31 Mad., 368.

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On this appeal—

De Gruyther, K.C., and *B. Dube* for the appellant.

Sir Erle Richards, K.C., and *Kenworthy Brown* for the respondent.

The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON.—The Secretary of State for India in Council admits that the rights of the parties in this appeal are governed by the recent decision in the consolidated appeals of *Prasad Row v. The Secretary of State for India in Council*(1). The appellant on this admission asks for no further relief. Both parties leave the question of costs to the discretion of the Board. The declaration and injunction claimed by the appellant are, in their Lordships' opinion, too wide, and under the circumstances they think that justice will be met by humbly advising His Majesty that no order should be made on this appeal, except that the parties should each bear his own costs.

Solicitor for the appellant: *Douglas Grant*.

Solicitor for the respondent: *The Solicitor, India Office*.

J.V.W.

APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter and Mr. Justice Srinivasa Ayyangar.

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(DEFENDANT), APPELLANT,

v.

P. VENKAYYA (DIED) AND ANOTHER (PLAINTIFF AND HIS LEGAL REPRESENTATIVE), RESPONDENTS.*

Lease of Government land in writing, registered—Possession of part not given from inception of lease—Suit for damages—Time from which limitation begins to run—Limitation Act (XV of 1877), art. 116—Failure to give possession, whether, a continuing breach—Equivocal or ambiguous acknowledgment, whether, a valid one under section 19 of the Limitation Act (XV of 1877)—Transfer of Property Act (IV of 1882), applicability of, to Crown grants.

The plaintiff obtained in March 1896 from the defendant, the Collector of Godāvāri District, acting as Agent to the Government, a lease, in writing registered, for five years, of a piece of land whose 'probable extent' was described

(1) (1917) I.L.R., 40 Mad., 886 (P.C.).

* Appeal No. 90 of 1912.

as 777 acres. The plaintiff was given possession of only 668 acres and unsuccessfully demanded possession of the rest in July 1896. After some correspondence, the Tahsildar in 1898 communicated to the plaintiff the Collector's order that, 'pending the disposal of the dispute, the collection of one-third of the kist (rent) should be stopped and the remaining sum collected.'

The plaintiff brought this suit in 1903 for damages for non-delivery of possession of 109 acres.

Held:

(a) that the cause of action for breach of the covenant to give possession occurred at the inception of the lease, i.e., in March 1896 and that as more than six years had elapsed from that date, the suit was barred under article 116 of the Limitation Act, and

(b) that breach of a covenant to give possession is not a continuing breach and such a covenant is not part of a covenant for quiet enjoyment which is a 'continuing covenant.'

Held further, that the Tahsildar's communication, which was as consistent with a temporary suspension or an *ex gratia* remission of a claim for rent as with an acknowledgment of liability, was not such an unequivocal acknowledgment as is required by section 19 of the Limitation Act.

Held also, that though the Transfer of Property Act is not applicable to Crown grants, like the one in question, the principle of its provisions as to leases, e.g., section 108, etc., is applicable to them.

Quære: Whether the Tahsildar or Collector had authority to acknowledge.

Per SRINIVASA AYYANGAR, J.—The plaintiff was barred even if limitation be reckoned from July, 1896 when he demanded and failed to obtain possession from the Government.

APPEAL against the decree of F. H. HAMNETT, the District Judge of Gōdāvāri, in Original Suit No. 13 of 1903.

The facts are given in the first two paragraphs of the judgment of COUTTS TROTTER, J.

N. Grant, the Acting Government Pleader, for the appellant, the Crown.

T. Prakasam for the second respondent.

COUTTS TROTTER, J.—This is an appeal by the Secretary of State for India in Council against a judgment of the District Judge of Gōdāvāri awarding to the plaintiff a sum of Rs. 14,000 by way of damages. The facts of the case are comparatively simple, though the questions for determination are complex and difficult. The plaintiff in March 1896 acquired from the Collector of Gōdāvāri district acting as Agent for the Government, a patta or lease of a piece of land called the Sidhantam Lanka at an annual kist of Rs. 6,010 for a period of five years. These lankas are islands formed in the bed of the river Gōdāvāri by the silting up of solid matters brought down by its waters. They are

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extremely fertile and valuable for the purpose of cultivation, but their configuration and consequently their size is constantly varying owing to the action of the river; and it is often extremely difficult to delineate the exact boundaries of a particular lanka at any given time. The patta purported to convey the Sidhantam Lanka, defining its "probable extent" as 777 acres 64 cents. The plaintiff entered into possession of the lanka, but found that 109 acres out of the 777 covered by the patta were in the possession of the zamindar of Gopalapuram who contended that that portion of the land did not belong to the Sidhantam Lanka at all but to his own lanka of Gopalapuram. The plaintiff complained to the Government and a prolonged dispute ensued between the Government and the zamindar as to which of them really was entitled to the 109 acres. Into the merits of that dispute it is unnecessary to go. But so far as the plaintiff is concerned, the outcome to him was that he never at any time during the term of his patta got possession of any portion of the disputed area. In one fasli corresponding to the year 1898 it appears that an order was passed by the Collector remitting a third of the rent for that fasli in respect of the 109 acres; and this becomes material in considering a subsidiary question raised in this appeal which will be dealt with in its place. The plaintiff instituted the suit claiming damages against the Government on the 11th March, 1903, more than six years from the date of his patta and from the date, viz., the 2nd July, 1896, when he demanded possession from the Government and failed to obtain it.

The defence put forward by the Government in their written statement was that the area given in the patta was only an approximate and rough estimate, and that all that the plaintiff was entitled to was that which should prove in fact to be the Sidhantam Lanka theretofore owned by Government, that he took that which the Government had and no more, and that if part of the land which the parties supposed to constitute the Sidhantam Lanka should prove not to be part of it, he had no remedy.

At the first hearing in the District Court before the then District Judge, Mr. HAMNETT, this contention prevailed. But on appeal to this Court it was upset and it was held that what was leased to the plaintiff included the 109 acres claimed by the zamindar of Gopalapuram and that he was entitled in law to

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pursue any remedy in damages which that finding might entitle him to. At the same time Government was allowed by the learned Judges to take the point of limitation which had not been raised by them at the first hearing. The case accordingly went back to the District Court, and the then District Judge, Mr. PARTHASARATHI AYYANGAR, dealt with the two issues of limitation and of the quantum of damages, and he decided both in favour of the plaintiff. The Government have appealed from that decision, and the only question that we are called upon to decide relates to their plea of limitation. Under that plea there are two questions for decision: First whether the plaintiff's cause of action arose more than six years before suit was brought; and secondly whether if it did, there has been an acknowledgment sufficient to take the case out of the statute. It was suggested by the learned Government Pleader that in order to have the benefit of the latter contention, the plaintiff should have set it up either by amending his plaint or putting in a further statement in the nature of a reply alleging the acknowledging and specifying the document or documents containing it. Having regard to the circumstances in which Government was allowed to avail itself of the plea of limitation, we are not disposed to give effect to the suggestion and are prepared to treat the plaint as amended by the addition of the necessary averments. Indeed on our intimation to that effect during the course of the argument the learned Government Pleader very properly did not press the point.

To determine the first point as to whether the plaintiff's case is *prima facie* barred by limitation, it is necessary to see what is the exact nature of the plaintiff's cause of action. In the course of an interesting argument in which I received the greatest assistance from both the learned counsel, a great many authorities were referred to, and the history of the various covenants suggested to be applicable to the case was to some extent investigated. The Transfer of Property Act does not apply to Crown grants, but section 108 of that Act sets out in a convenient form the implied contracts usually subsisting from lessor to lessee as follows:

"(b) The lessor is bound on the lessee's request to put him in possession of the property: (c) The lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the

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lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption."

The latter of these implied contracts corresponds to the familiar covenants for quiet enjoyment of English law. Into the history of the former I will enquire presently. It is quite clear that the obligation to put the lessee in possession of the property was broken *quoad* the 109 acres in dispute in July 1896, and that that cause of action which the plaintiff undoubtedly possessed is barred by limitation. But it is argued on his behalf that he has a separate remedy in respect of the same failure to put him in possession under the contract for quiet enjoyment. It is argued that the contract for quiet enjoyment subsists throughout the lease, and that its breach is a continuing one, the remedy for which was available to the plaintiff at any time during the continuance of his term. If this contention is sound, then the plaintiff's suit is not barred.

The covenant for quiet enjoyment of English law was a covenant appropriate to feoffments and conveyances of the fee simple in land and was naturally expressed or implied when leases, historically a much later method of dealing with real estate, became usual. Another usual and necessary covenant in conveyances of the fee simple was the covenant for title, whereby the settlor or vendor warranted to his alienee that he had a good title to the land which he was purporting to convey. To leases which conveyed only a chattel interest in land the covenant was inappropriate. All that the lessee could get or demand was possession for the stipulated period, and so long as he got that, not merely was the exact nature of his lessor's title no concern of his, but it has always been a settled principle of English law that he was estopped from denying or questioning it in any way. At the same time it was essential that he should be able to enforce the right to possession which the instrument of lease purported to confer upon him; and accordingly it was held as early as *Holder v. Taylor*(1), that the operative word *demisi* in a lease imported a covenant to put the lessee in possession. The point was there taken that as the lessee had never had possession and therefore had only what the English law

(1) (1814) Hobart, 12.

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called an *interesse termini*, he could not sue in covenant. The Court overruled the objection and held that he could sue on this implied covenant to put him in possession involved in the word *demisi* and the Court proceeds to make the observation :

"But if it were an express covenant for quiet enjoying, there perhaps it were otherwise."

The main doctrine of *Holder v. Taylor*(1) was reaffirmed in later cases : see *Coe v. Clay*(2) and *Jinks v. Edwards*(3). It is now a settled doctrine of English law and appears in India as section 108 (b) of the Transfer of Property Act. Like its correlative, the covenant for title, it is broken once and for all by failure to comply with it at the inception of the term.

The covenant for quiet enjoyment, on the other hand, undoubtedly has a continuous operation throughout the tenancy and preserves to the tenant his right of possession. The question has been raised whether it is available to a tenant who has never had possession at all, and whose interest is a mere *interesse termini*. CHITTY, J., in *Wallis v. Hands*(4) has held that such a person cannot sue on the covenant for quiet enjoyment. While not dissenting from that learned judge's opinion, which was also the opinion of the Bombay High Court in *Ardesir v. Vajesing*(5), I do not think it desirable to base my judgment on grounds largely derived from the technicalities of the English law of real property, and prefer to put it on more general considerations. In my opinion the nature of the remedy available to a tenant under the covenant or contract for quiet enjoyment depends upon the nature of the breach. The test as to whether a breach is continuous is this : if the plaintiff sues in damages, can he only sue for the damage actually accrued up to the date of suit, or may he sue for the whole of the damage accrued and prospective that the breach will cause to him? In the former case the breach is continuing, in the latter it is single and final. I think that the failure of a lessor to give possession of the demised lands to his lessee goes to the very root of the contract, and is so fundamental a breach of it as to entitle the lessee to treat that breach as final, and bring an action forthwith for the whole of his prospective

(1) (1814) Hobart, 12.

(3) (1856) 11 Exch., 775.

(2) (1829) 5 Bing., 440.

(4) (1893) 2 Ch., 75.

(5) (1901) I.L.R., 25 Bom., 593.

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damages. The matter may be illustrated in this way. Suppose that a month after the date fixed for the commencement of the term, the lessor had for the first time tendered possession to the lessee: could he then compel him to take possession and accept compensation or reduction of rent for the month he had been out of possession? I think it manifest that he could not; and that can only be, because the lessor's breach being final, it is not open to him to remedy it subsequently. I therefore hold that assuming the contract for quiet enjoyment to give a remedy to this plaintiff, there was a complete and final breach of that contract so far as concerns the disputed land at the inception of the term and that consequently limitation began to run against him then. On this view of the matter it becomes unnecessary to discuss the argument urged at the bar, viz., that the plaintiff having got possession of a substantial portion of the demised land could not be regarded as having a mere *interesse termini* as to any other part of it. Whether he had an *interesse termini* or something more, the breach as to these lands was complete at the inception of the term, and by remaining in possession of the rest of the lands throughout the term, the plaintiff obviously showed his willingness to treat the breach as to the suit lands as a separate breach complete in itself: see also *Ardesir v. Vajesing*(1) on this point.

One other contention was urged by the respondent, viz., that even assuming the period of limitation to run from the date alleged by the appellant, there is a subsequent acknowledgment sufficient to take the case out of the statute. The acknowledgment is said to be contained in Exhibit H, which is a memorandum from the Tahsildar to the plaintiff and is in the following terms:—

"The Collector in his No. 301-Revenue of 1898, dated 13th February 1898, ordered that pending the disposal of the dispute regarding the Siddhantam Lanka obtained by you at an auction, the collection of one-third of the cist should be stopped and the remaining sum collected. Therefore deducting one-third of the amount payable by you for this year, out of the balance of the demand amount of Rs. 4,403-2-0 excluding Rs. 2,317, the amount paid by you towards the sum of Rs. 2,935-6-8, the demand amount payable for the months of January and February, the balance of

(1) (1901) I.L.R., 25 Bom., 593.

Rs. 618-6-0 is still due, you must send that money this day only. As the taluq chitta would be closed to-morrow please send the money immediately."

The contention is that this is to be construed as an admission by Government that as they had failed to give possession of a portion of the demised property, they were under a liability at least to remit a portion of the rent. It seems to me extremely doubtful whether the Tahsildar or even the Collector would have any authority to make any such admission; their authority in all probability would be limited to communicating the decision to remit the rent, and would not extend to making admissions of legal liability. But it is unnecessary, in the view that I take of the true construction of Exhibit H, to decide this question. It is for the plaintiff to satisfy us that its language amounts to an unequivocal admission of liability and he has failed to do so. In my opinion, the language used is at least as consistent with a temporary suspension of a claim for the rent or at most with an *ex gratia* remission of that claim as with an acknowledgment that it is legally irrecoverable. The document thus being at best ambiguous, I think that this contention of the plaintiff fails.

The appeal will accordingly be allowed and the suit dismissed; but having regard to the circumstances of the case, we direct each party to pay their own costs.

SRINIVASA AYYANGAR, J.—The facts are fully set out in the judgment just delivered and it is unnecessary to repeat them.

This being a suit to recover damages for breach of a contract, and there being no other specific article, the article of limitation applicable to the case is either article 115 or 116. The starting point is the same in both the cases though in the case of a contract in writing registered, the period of limitation is six instead of three years. Although the obligation in this case is one which is implied from the relation of the parties, as that relation was constituted by an instrument in writing registered, the period of limitation is, according to the decisions of this court, six years just as if the obligation had been expressed in words in the writing. But whether the period is six years under article 116 or three under article 115 is immaterial in this case; for the suit was instituted more than six years from the date when the lessee should have got possession and less than three years after the expiry of the term, and the starting point for limitation in both cases is that

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provided for by the third column of article 115. Under that article time begins to run from when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (*where the breach is continuing*) when it ceases. Unless the breach in this case was a 'continuing breach' the suit is barred by limitation. For the determination of this question, viz., whether the breach was a 'continuing breach' it is necessary to examine the precise nature of the obligation undertaken by the defendant. On principle and in common sense, every person who purports to transfer property for value agrees to place the transferee in possession, if and when the transferee is entitled to it, and if he does not do so, it is clear that he is liable in damages for the breach of that obligation, though the transferee may be in a position to bring ejectment to recover possession of the land transferred either from the transferor or from others who may be in possession without a lawful title: *Coe v. Clay*(1) and *Jinks v. Edwards*(2): whether this obligation is incurred in the case of a gift need not be considered. I do not think it useful or necessary to consider whether any and what covenants could be implied by the use of certain technical words as *dedi*, *concessi* or *demisi*, nor to consider the exact nature or scope of such implied covenants, whether they ought to be called covenants for quiet enjoyment, or covenants for title, whether such covenants last after the termination of the estate of the grantor or whether a person who has only an *interesse termini* can bring an action of covenant on breach of a covenant for quiet enjoyment: see *Markham v. Paiyet*(3), *Mostyn v. West Mostyn Coal and Iron Company*(4), *Bandy v. Cartwright*(5), *Bayres & Co. v. Lloyd & Sons*(6), *Wallis v. Hands*(7), *Cloake v. Hooper*(8) and *Ludwell v. Newman*(9). I think it would be mischievous to introduce the technical rules of English Conveyancing or Real Property Law. The covenant or the contract (in India there is no difference between a contract and a covenant or rather there is no such thing as a covenant, except probably in cases governed by the English Law), whether

(1) (1829) 5 Bing., 440.

(3) (1808) 1 Ch., 697.

(5) (1853) 22 L.J. Ex., 285.

(7) (1893) 2 Ch., 75 at p. 85.

(2) (1856) 11 Exch., 775.

(4) (1876) L.R., 1 C.P.D., 145.

(6) (1895) 2 Q.B., 615.

(8) (1873) Freem. (K.B.), 121.

(9) (1795) 6 Term Reports, 458.

express or implied, to place the transferee in possession operates *in presenti* and that obligation is broken and broken once for all as soon as the transferor declines, or is unable to place the transferee in possession. In the case of a lease, the obligation is to place the lessee in possession in the beginning of the term: see *Drury v. Macnamara*(1), per WIGHTMAN, J.; also Woodfall's *Landlord and Tenant*, page 719. On the breach of this obligation the lessee is entitled to institute an action and recover by way of damages the whole value of the term.

From the very nature of the obligation it is clear that there cannot be a continuing breach, for the covenant or contract is not a continuing one. The Transfer of Property Act does not apply to Crown grants and further the chapter relating to leases in that Act does not apply to agricultural leases; but the provisions of section 108 regulating the rights and liabilities of lessors and lessees may usefully be referred to for the purpose of determining the nature of the ordinary covenants by which the lessor and the lessee are bound. Under the heading 'Rights and Liabilities' of the lessor in section 108 of the Transfer of Property Act, by clause (b), it is provided that the lessor is bound on the lessee's request to put him in possession of the property, and by clause (c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee he may hold the property during the time limited by the lease without interruption. Clause (c) is the usual covenant for quiet enjoyment, and this covenant is, by the concluding words of that paragraph, expressly made to run with the land, while there is no such provision as regards the obligation provided for in clause (b). Likewise in the case of sales under section 55, clause (f), the obligation to give possession by a vendor to his vendee is prescribed. It is clear that the obligation to give such possession is not one which runs with the land, as the breach, if any, of the obligation takes place immediately on the transfer of property becoming complete: see *Rawle's Covenants for Title*, sections 204, 205 and 207. The analogy, if any, is to a covenant for title, and in fact BRETT, J., in discussing the position of the lessee in a case similar to the present says:

(1) (1855) 5 E. & Bl., 612 at p. 617.

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"There has clearly been a breach of the covenant for title, and we think that without any eviction the lessees, though there was a lease of the whole at one rent, could have a right to refuse to incur the risk of committing a trespass on the part to which there was no title, and to elect, instead of giving up the whole, to keep the part to which there was a good title, and have nothing to do with the other part, and sue for damages for the breach of the covenant for title. I do not think it necessary to determine whether there would in such a case be an apportionment of rent, because it seems to me that, whether there was an apportionment or not, the defendants would probably be entitled to some damages in respect of the breach of the covenant for title:" see *Mostyn v. West Mostyn Coal and Iron Company*(1).

The covenant for title here mentioned is obviously not the ordinary covenant for title, for the lessor does not generally warrant: that he has title to grant the term which he purports to grant see an interesting article in 39 Sol. Journal, page 444. It is now settled that a breach of a covenant for title is not a continuing breach: *Turner v. Moyn*(2).

Assuming, however, that the obligation to place the lessee in possession is really part of the obligation undertaken by the covenant for quiet enjoyment, construing that covenant as importing an obligation to give possession, in the beginning of the term and maintain it during the term, yet the breach of it does not necessarily constitute a "continuing breach," though a covenant for quiet enjoyment is a "continuing covenant" in the same way as a covenant to pay rent is. It is to be observed that in the case of a continuing breach, the starting point is the time when the breach ceases and under section 23 of the Limitation Act a fresh period of limitation begins to run at every moment of the time during which the breach continues. The object is obviously to prevent multiplicity of suits, and to enable one action to be brought for all loss suffered during the whole period the breach continued. The article implies the right of the person committing the breach to resume performance of the contract. As stated in Sedgwick on Damages, article 89, it applies to cases where

"a single act of the defendant may be of such a nature as to give rise to a continuous breach of this contract with the plaintiff

(1) (1876) L.R., 1 C.P.D., 145 at p. 152. (2) (1901) 2 Ch., 825.

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which, however, the defendant may bring to a close by resuming performance. In such a case each moment during which the injury is allowed to continue is really a new breach; and if action is brought during the continuance of the injury, compensation can be recovered for such loss only as is caused before the beginning of the action."

Well-known instances of a continuous breach are of covenants "to repair and keep in repair," or "to insure and keep insured." During the continuance of the breach any number of actions can be brought for compensation for loss caused before the beginning of the action, but in many cases the recovery can only be nominal, as the lessee may make the repairs, or insure the premises, before the end of the term. Even in cases where the loss caused may be substantial as, for instance, in the case of a contract not to engage in a competing business, the ascertainment of such loss may be difficult. In these cases the person damaged is not obliged to bring successive suits for damages, but can wait and bring an action once for all at the end of the term, when there is no possibility of future performances; or if during the continuance of the contract the obligor resumes performance, the obligee may bring his suit once for all for all the damages sustained by him till then. In *Jacob v. Down*(1) where there was a covenant to build within a particular time and also a covenant to repair and keep in repair, it was held that the covenant to build was broken once for all on the expiry of the time limited; but it was also held on the language of the particular covenant, that the covenant to repair also included a continuing covenant to build. It is to be observed that in that case the lessor was during the term entitled to the rent and at the end of the term to have back the land demised, together with the buildings which the lessee covenanted to build and keep in repair; the lessee might have performed his covenant by building before the expiry of the term; and although the lessor might have sued for a breach of the covenant he could not possibly have recovered the whole value of the building but only the loss sustained by him owing to the non-existence of the building at the particular time when he brings the suit (and that is likely to be merely nominal) and a recovery in such a suit would not prevent him from instituting another suit for subsequent

(1) (1900) 2 Ch., 166.

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loss arising from the non-existence of the building between the date of the first suit and the second. In cases of failure to deliver possession, the lessor, if he fails to deliver possession at the commencement of the term, cannot subsequently insist on performance nor can the lessee after having instituted a suit for damages for non-delivery of possession, in which he is entitled to recover the whole value of the term, again institute a suit for non-delivery after the institution of the first suit. Even a subsequent eviction, by paramount title, of the lessee, from the whole or a portion of the demised premises does not constitute a continuing breach of the covenant within the meaning of the article 115. The lessee so evicted can on eviction bring his action and recover as damages the whole value of the remainder of the term and would not be entitled to bring another action. Redman, Landlord and Tenant, page 244. No doubt if the eviction was from a portion of the premises and if there is a subsequent eviction from another portion and so on, the lessee may bring successive actions, in each of which he would be entitled to recover the value of the lands from which he was evicted for the remainder of the term, but that would not be a case of a continuing breach but that of successive breaches of the same covenant. The dictum of GREEN, J., in *Raju Babu v. Krishna Rao Ramachandra*(1) does not apply to every case of a breach of the covenant for quiet enjoyment irrespective of the fact, as to whether the breach consists in mere disturbance in the enjoyment in a wrongful eviction by the landlord or by a third party by virtue of a paramount title. The period of limitation therefore began to run from the time when the lessee became entitled to possession, i.e., from the time of the lease or at the latest from the 2nd July, 1896 when he demanded possession from the Government and failed to obtain it. On the question of acknowledgment, I agree.

N.R.

(1) (1877) I.L.R., 2 Bom., 293.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Napier.

*Re SELLAMANI (PRISONER), APPELLANT.**

Criminal Tribes Act (III of 1911), sec. 23 (1), (a) and (b)—First conviction for scheduled offence after the Act—Conviction for such offences prior to the Act—Punishment.

1918,
March,
14 and 15.

An accused person who belongs to a tribe notified to come under the Criminal Tribes Act (III of 1911) and who is for the first time after the enactment of that Act convicted of an offence specified in the schedule to that Act, is liable to be punished under clause (a) and not clause (b) of section 23 (1) of the Act, though he may have been convicted once or several times of such offence before the passing of the Act.

APPEAL against the order of S. G. ROBERTS, the Sessions Judge of South Arcot district, in Calendar Case No. 52 of 1915.

The accused who was charged with and convicted in 1915 of having committed in June 1915 the offences of house-breaking by night and causing hurt in committing robbery (sections 457 and 394, Indian Penal Code) pleaded guilty to three previous convictions under section 457, Indian Penal Code, in 1894 and 1899 and to three convictions under section 380, Indian Penal Code, in 1907. The Local Government notified in 1911 under section 3 of the Criminal Tribes Act (III of 1911) the tribe to which the accused belonged as a criminal tribe. The Sessions Judge punished the accused with transportation for life under section 23 (1) (b) of the Criminal Tribes Act. Section 23 (1) of the Act is as follows :—

“(1) Whoever, being a member of any criminal tribe, and having been convicted of any of the offences under the Indian Penal Code specified in the schedule, is hereafter convicted of the same or any other offence specified in the said schedule, shall, in the absence of special reasons to the contrary to be mentioned in the judgment of the Court, be punished,—

(a) on a second conviction, with imprisonment for a term of not less than seven years, and

(b) on a third conviction, with transportation for life.”

The accused preferred this appeal.

* Criminal Appeal No. 21 of 1918.

Re
SELLAMANI. The accused was not represented.
E. R. Osborne, the acting Public Prosecutor, for the Crown.

AYLING, J. The following Judgment of the Court was delivered by
AYLING, J.—The conviction is by a jury and there is no mis-
direction.

As regards sentence, we observe that the case appears to fall under clause (a) and not under clause (b) of section 23 (1) of the Criminal Tribes Act, 1911. Accused's last conviction was in 1907: so that his present conviction is his first after the enactment of Act III of 1911 and the notification of his tribe as a criminal tribe. Section 23 (1) is not altogether easy of interpretation: but we think that the phrase "second conviction" has reference to the words in the sentence "is hereafter convicted" and not to the earlier words "having been convicted" as the Sessions Judge has read them. The section will thus read "whoever . . . having been convicted . . . is hereafter convicted . . . shall on a second conviction be punished, with imprisonment for a term of not less than seven years"; and we must take the words "second conviction" to signify a first conviction for a scheduled offence after the coming into force of the Act, following upon either one or many convictions of scheduled offences prior to the Act: and a third conviction in clause (b) to signify a second conviction so following.

The construction put on the words by the Sessions Judge would entail a sentence of transportation for life on a member who had prior to the notification been twice convicted, for the first offence committed by him after the Act. We cannot think that the Legislature intended such a drastic provision. We notice a third alternative reading, namely, that 'on a second conviction' means second after the notification but we think that this cannot be accepted. The Legislature could not have intended to omit reference to the case of a first conviction after the notification. If it had wished that no special punishment should be attached to such a conviction it would have used some such words as "shall on such conviction be punished with the punishment provided by the Penal Code but on the next conviction, etc." It is also extremely improbable that the Legislature would have intended to omit such fresh convictions from the mischief of the Act.

On the view we have taken the Sessions Judge was not bound as regards sentence by the limitations imposed by clause (b) and should have dealt with it under clause (a); and on the merits of the case we think the ends of justice will be met by a sentence of ten years' rigorous imprisonment to which the sentence is hereby commuted, the conviction being affirmed.

N.R.

Re
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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

K. SATTIRAJU (SECOND DEFENDANT), APPELLANT,

v.

P. VENKATASWAMI AND TWO OTHERS (PLAINTIFF, FIRST
DEFENDANT AND SUPPLEMENTAL RESPONDENT),
RESPONDENTS.*

1916.
September,
22 and
October, 11.

Hindu Law—Adoption by a minor widow—Want of independent, disinterested advice—Validity of adoption—Ratification by widow after attaining majority, effect of.

A widow, authorized by her husband to adopt a boy if and when she chose, adopted her own brother, when she was eleven years of age on the interested advice of her father.

Held, that the adoption made by the widow while a minor and without independent advice, was void *ab initio* and could not be therefore validated by subsequent ratification.

Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row (1906) I.L.R., 29 Mad., 437, dissented from.

APPEAL against the order of A. RAGHUNATHA RAO, the Subordinate Judge of Cocanada, in Appeal No. 119 of 1914, preferred against the decree of E. J. S. WHITE, the District Munsif of Cocanada, in Original Suit No. 624 of 1912.

The facts of the case appear from the judgment of OLDFIELD, J. *B. Narasimha Rao* for the appellant.

S. K. Parthasarathi Ayyangar for *V. Ramesam* for the respondent.

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SADASIVA AYYAR, J.—The second defendant is the appellant in this case. The plaintiff brought the suit for possession of the plaint lands as lessee from the first defendant who, the plaintiff alleges, was the adopted son of one Subbarayadu who died in 1907, having, by his registered will, executed shortly before his death, given authority to his widow, Viyyammal, about eleven years old at that time, to make an adoption, if and when she chose. The first defendant is still a minor and the lease relied upon by the plaintiff was executed by his alleged adoptive mother's father acting as guardian of the first defendant and is dated July 1912. Viyyammal attained majority in February 1914 about one and a half years after this suit was brought. The first defendant's adoption is said to have taken place in May 1907, very soon after her husband's death. One of the defences raised in the case is that the first defendant was not validly adopted to Subbarayadu by Viyyammal and that therefore the plaintiff cannot maintain the suit as the first defendant's lessee. The District Munsif held that the first defendant's adoption was invalid and dismissed the suit. I think it convenient to consider at this stage some of the important precedents on this point.

(a) In *Mondakini Dasi v. Adinath Dey*(1) it was held that an adoption by a widow who was a minor at the time (that is, who had not attained her eighteenth year according to the Indian Majority Act) would be valid provided the widow had attained sufficient maturity of understanding to comprehend the nature of the act, especially if her husband had indicated the boy to be adopted and left her no discretion in the matter. At the first defendant's adoption, and it is found by both Courts that Viyyammal was only about eleven years old, she had not attained sufficient maturity of understanding to exercise a proper discretion as to the boy to be adopted. Hence the adoption is invalid if her discretion was a *sine qua non*.

(b) In *Ranganayakamma v. Alwar Setti*(2) it was held that a thirteen years old widow had not sufficient discretion of her own to choose a proper boy for adoption but that the intelligent and disinterested guidance of her legal guardian seeking *bona fide* to provide for a spiritual necessity with due regard to her interests

(1) (1891) I.L.R., 18 Calc., 69.

(2) (1890) I.L.R., 13 Mad., 214.

so far as it was compatible with such necessity could take the place of her own discretion.

"There must, however, be cogent evidence of such intelligent and disinterested guidance."

These observations were, however, *obiter dicta* as the adoption in that case was set aside on the ground that the consent of the widow of thirteen years of age was obtained by coercion and she repudiated the adoption in the suit.

(c) In *Jumona Dassya v. Bama Soondari Dassya*(1) it was held that a youth of fifteen or sixteen had attained years of discretion according to Hindu Law and was capable of giving permission to his widow to adopt, though, not having attained the age of eighteen years, he was a minor for most other purposes.

(d) In *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row*(2) this Court (DAVIES and BENSON, JJ.) held that an adoption made by a major widow under coercion was only voidable by her and could be ratified by her; but when that case went up on appeal to the Privy Council [*Narasimha v. Parthasarathy*(3)] the adoption was set aside on some other ground (namely that the power given by the husband to the two widows jointly had lapsed by the death of one of them and their Lordships had not to consider the question whether an adoption made under coercion could be ratified by a major widow.

(e) In *Amrito Lal Dutt v. Surnomoye Dasi*(4), their Lordships of the Privy Council state that a husband cannot give power to anybody except his widow to make an adoption. I shall quote the following passages from that judgment:—

"That no one can adopt a son to a dead man except his widow is such a rudimentary principle of Hindu Law and one so constantly occurring in ordinary life, that it is difficult to suppose any educated man to be ignorant of it. That the widow's choice of a boy may be restricted in various ways and among them by requiring the consent of persons named by the husband is also familiar law."

The learned District Munsif found as a fact in this case, (a) that Viyyammal exercised no discretion in the matter of the adoption and (at her age at the time) was not capable of exercising any discretion, (b) that her father who acted as her guardian did not give disinterested advice to her in the matter of the adoption,

(1) (1876) I.L.R., 1 Calc., 289 (P.C.). (2) (1906) I.L.R., 29 Mad., 437.

(3) (1914) I.L.R., 37 Mad., 199 (P.C.). (4) (1900) I.L.R., 27 Calc., 998 (P.C.).

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(c) that the authority to adopt given by the husband required as a *sine qua non* the exercise of her own discretion, that is, the power to adopt was so restricted by the husband that it could be exercised only according to her own discretion and that even if the substitution of the guardian's disinterested advice allowed by *Ranganayakamma v. Alwar Setti*(1) could be applied, there was no such disinterested advice given in this case—the advice, if any was given, having been very much interested.

On appeal, the learned Subordinate Judge “quite” agreed with the District Munsif that Viyyammal was not at the time of the alleged adoption of an age which rendered her capable of exercising her own discretion in the matter of the adoption and that the advice of her legal guardian was not at all disinterested. He did not deal with sufficient clearness with the question whether the power given to her by her husband did not require as a *sine qua non* the exercise of her own discretion. He found that Viyyammal's father did not give her an opportunity to exercise her own discretion in the matter and did not even consult her about the desirability of adopting a boy. But he remanded the suit to the District Munsif in order that, as she was, on the date of the Subordinate Judge's judgment, nearly nineteen years old, and was in a position to state whether she would ratify the act that was done when she was eleven years old, she might be asked whether she ratified the act of adoption and that then the suit might be decided. Against this remand order, the present appeal has been filed by the contesting defendants. Several interesting questions of Hindu Law were discussed during the course of the arguments in this case, and I shall shortly state my views thereon, though I believe that for the decision of this case, it is unnecessary to express a final opinion upon most of those questions.

The Indian Majority Act fixing eighteen years as the age of majority says in section 2 :

“Nothing herein contained shall affect the capacity of any person to act in the following matters: (a) marriage, dower, divorce and adoption.”

We have therefore to turn to the Hindu Law as to the age of capacity of a person to make a valid adoption. The

(1) (1890) I.L.R., 13 Mad., 214.

age of majority for both males and females according to Hindu Law, in my opinion, commences at the age of sixteen (*Praptetu Shodasé Varshé* प्राप्तेतु षोडशे वर्षे) that is, on the completion of the fifteenth year: see *Mothoormohun Roy v. Soorendra Narain Deb*(1) and *Madhusudan Manji v. Debigobinli Newgi*(2). Though the parents can give a girl in marriage before she completes her fifteenth year, the real and final marriage in the days of the old Hindu Law took place when both bride and bridegroom were majors over fifteen years of age. Even when the damsel becomes “marriageable” that is, has attained her fifteenth year, she is recommended in Chapter 9, Sloka 90, of Manu to wait three years before she chooses for herself; even that is only a moral precept as is shown by the next Sloka 91 which says that she does not commit any offence if she chooses her bridegroom after she attains her marriageable age. The gloss “of eight years” in Sloka 83 of Manu is that of the ingenious commentator and is not in the text: see also Sloka 93 which says that the father's dominion ceases when the damsel is of full marriageable age. In the Privy Council case—*Jumona Dassya v. Bamasomdari Dassya*(3)—also it is said that a male youth of the age of fifteen “or of the full age of adolescence” is regarded as having attained the age of discretion according to Hindu Law and capable of adopting. I do not think that Mr. Justice MITTER in *Rajendro Narain Lahoree v. Saroda Soonduree Dabee*(4) intended to state that even before fifteen a male Hindu could adopt, and if he meant it I respectfully dissent from that opinion. I am also clear that, according to Hindu Law, a widow has not got the legal discretion to adopt a proper boy to her husband before she finishes the fifteenth year of her age. The *obiter dictum* also in *Ranganayakamma v. Alwar Setti*(5) is that a widow of thirteen years was not possessed of such discretion. There is nothing in that judgment to indicate that she is capable of exercising such discretion before she completes her fifteenth year. The Privy Council having held in *Amrito Lal Dutt v. Surnomoye Dasi*(6) that the only person who could make an adoption to her husband is the widow.

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(1) (1876) I.L.R., 1 Calc., 108 at p. 114 (F.B.).
(2) (1868) 1 B.L.R., 49 (F.B.). (3) (1876) I.L.R., 1 Calc., 289. (P.C.)
(4) (1871) 15 W.R., 548. (5) (1890) I.L.R., 13 Mad., 214.
(6) (1900) I.L.R., 27 Calc., 996 (P.C.).

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I am inclined to hold that the *obiter dictum* in *Ranganayakamma v. Alwar Setti*(1) that her discretion could be replaced (when she is less than fifteen) by her guardian's intelligent and disinterested advice cannot be supported. Apart from the decision of the Privy Council also, I am clear on the Hindu Law that it is only the widow's discretion exercised after she attains majority and is thus capable of legal discretion in civil matters that can validate the adoption made by her to her husband. I am further of opinion that the dictum in *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row*(2) (the decision which as I said before, was reversed by the Privy Council on another point) that an adoption under coercion may be ratified just as a contract under coercion can be ratified is not, with the greatest respect, sustainable as the act of adoption is not an act in the nature of a contract, and the validity of an act changing the status of a person cannot be made to remain in suspense at the option of one of the actors in the transaction. The question of coercion and voidability again does not arise in the present case. It is not alleged that the adoption of Viyyammal was brought about through coercion and hence voidable, but the contention is that she was incompetent to give a valid legal consent to take a boy in adoption and to accept the gift made of a boy in adoption to her husband, having then not attained the legal age of discretion according to the Hindu Law. The analogy applicable (if analogy from the law of contract is at all legitimate) is rather that of a contract made by a minor than that of a contract made by a major under coercion.

Even assuming for the sake of argument, (a) that Viyyammal's guardian's advice, if disinterestedly given, could supply the place of her own consent and discretion and (b) that the Hindu Law does not require her to have passed her fifteenth year before she could make a valid adoption, I must hold, on the finding, that she was not asked her consent at all and that her guardian's advice was not disinterested, that the adoption was wholly invalid and could not be ratified. I am also clear that if her consent was an indispensable requirement under her husband's will her guardian's advice cannot be substituted for it. Where

(1) (1890) I.L.R., 13 Mad., 214.

(2) (1906) I.L.R., 29 Mad., 437.

the widow was directed to adopt a particular boy by her husband and she had no discretion at all in the matter, then it may be that she might have validly adopted that particular boy even though she was less than fifteen: see *Mondakini Dasi v. Adinath Dey*(1).

Before concluding, I should like to fortify myself with the opinions of two text writers (whom I consider as the best Sanskritists among English knowing Hindu Lawyers) on the questions of minority and the age of competence to adopt. Jogendra Chunder Ghose says in his book on Hindu Law at page 851:

"There is a divergence among Bengal and Benares Writers, about the age of majority under Hindu Law. The former say that it is the beginning and the latter that it is the end of the sixteenth year. The text of Angira shows that the Bengal Writers are right."

And then he quotes at page 855. Texts of Angira, Manu, Vishnu, Sankha Likhita, Narada and Vrihaspathi which read as a whole, clearly establish that till the end of the fifteenth year (उन षोडश *Una Shodasa*) a person is a *bala* and then becomes a major on entering the sixteenth year. At page 584, the learned author says:

"The Privy Council have held that a minor of the age of fifteen or sixteen can give a valid permission to his wife to adopt. Mr. Mayne has interpreted the judgment of Mr. Justice MITTER on this matter to hold that a boy between the years of ten and sixteen can adopt. But the act of taking in adoption is not only a religious act but a legal transaction (*Vyavahara*) and one who has not attained the sixteenth year is incapable of validly entering into such a transaction under the Hindu Law:—see Narada, XIII, 32 to 36.)"

I shall now quote a few passages on the Hindu Law of Adoption and Tagore Law Lectures, 1888, by Gopalachandra Sarkar Sastri, M.A., B.L. At pages 207 *et seq.* that learned author says:

"An important question arises whether there is any limit as to the minimum age under which a person should not be permitted to adopt. The question is beset with considerable difficulty in consequence of there being no express rule of Hindu Law on the

(1) (1891) I.L.R., 18 Calc., 69.

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matter, and the solution of it must therefore depend upon general principles of law and analogies.

"It is worthy of remark here that as adoption imitates nature, the relative age of the adopter and the adoptee should be such that the one may be looked upon as the son of the other. Accordingly it was required by Roman Law that the adopter should be older than the person adopted by full puberty, that is, eighteen years. The same thing appears to be implied by Saunaka's text which says that the boy adopted should bear the reflection of a son though it has been explained by Nanda Pandita in quite a different way. He says that the boy should be one who is capable of being begotten on his natural mother by the adoptive father. This explanation is no doubt given for a different purpose, but it has also an important bearing on this question. Judged by this test an adoption by a minor appears most unreasonable."

"The boy adopted is entitled to become an heir not only of the adopter but also of his relations, and to become his coparcener under the Mitakshara School. Therefore the same reasons that require majority of a man for his competency to bequeath his property by a will apply with greater force to an adoption; for both are acts requiring judgment and reflection."

"The religious duty of adoption attaches to a married man failing to get male issue. And regard being had to the provisions of the Codes relating to the religious duties in the successive stages of life, there cannot be any doubt that a man cannot contract a marriage during his minority without a breach of religious duties. He is to commence the study of the sacred literature at the eighth year (Manu II, 36) to prosecute his studies for a period at the lowest of twelve or nine years (Manu III, 1) and after the studentship is over, he is to become a house-holder by marrying a damsel before her puberty. He may, on the lowest calculation get a son at the age of twenty, and failing to get one, may adopt. It follows therefore that *religious considerations can by no means be put forward for supporting an adoption by a minor.*"

"There is nothing to be found in the Shastras contemplating marriage by a man in his minority. The Hindu Law does nowhere provide guardianship of a male for the purpose of his marriage. On the other hand, its provisions on the subject show that a man is to choose his own wife and to maintain and protect her himself. A perusal of the prescribed Ceremonial Law of Marriage cannot leave

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any doubt on the mind that the bridegroom passing through the rites must be a grown up man of mature understanding. Manu ordains:— 'A man aged thirty years may marry a girl of twelve years; or a man of twenty-four years a damsel of eight; but if he finishes his studentship earlier, let him marry earlier. Whatever interpretation you may put upon this passage it shows beyond the shadow of a doubt that the marriage of men during minority cannot be justified on religious grounds, *far less can an adoption by a minor be supported by religious considerations.*'"

At page 249, in the same work, it is said:

"An act of adoption by a widow, which she is not legally bound to perform, which is not conducive to her spiritual welfare" (as "a widow may attain to heaven by practising religious austerities, though destitute of male issue") "but which is highly detrimental to her temporal interests by causing divestment of her estate, must in order to be legally binding on her, be shown to be done by her as a perfectly free agent."

"When an adoption by a young widow is set up against her, the Court will expect clear evidence that at the time she adopted, she was fully informed of those rights and of the effect of the act of adoption upon them."

"Regard being had to the above principles, it appears to be clear that an adoption by an infant widow if not *ab initio* void, is voidable in law."

"To hold that an adoption in which an infant widow is caused to take a part mechanically is valid in law, would be legalizing a pious fraud; for it must virtually be the act of those under whose custody the infant widow may be placed, and who abuse the authority they possess over the widow by making her to adopt when she is incapable of understanding the effects of the act on her own rights, apprehending that she may refuse to do so, after attaining majority, being influenced more by her personal interests than by the pious duty of adopting a son to her deceased husband. A Bombay Sastri gave his opinion that a widow *while under puberty cannot adopt*: see Steele's Law and Custom, page 48. The reason for the rule may be that she is incompetent to bring forth a son then, an adoption by a woman being supposed to be analogous to the production of a son."

Then the author refers to the absurdity of the idea of a girl having a fictional son when she is naturally incapable of having a real son. Though I have quoted at length these two writers to support my views as against the views in *Ranganayakamma v.*

SATTIRAJU *Alwar Setti*(1), *Rajendro Narain Lahoree v. Saroda Soonduree*
 v. *Dabee*(2) and *Sri Rajah Venkata Narasimha Appa Row v. Sri*
 VENKATA- *Rajah Rangayya Appa Row*(3). I think on the facts found in
 SWAMI. this case by both the lower Courts that there is no valid adoption
 SADASIYA even if the dicta found in those cases are accepted in their
 AYYAR, J. entirety. I would therefore allow the appeal and restore the
 decree of the District Munsif with costs here and in the lower
 Appellate Court.

OLDFIELD, J. OLDFIELD, J.—I agree with the conclusions reached in my
 learned brother's judgment, which I have had the advantage of
 reading, but I prefer to rest my decision on narrower grounds.

Plaintiff sued the second to eighth defendants for possession of certain properties, alleging that he held them on lease granted by the guardian of first defendant, alleged adopted son of one Subbarayudu. Second to eighth defendants who claim under Subbarayudu, now deceased, denied that first defendant had been validly adopted. The adoption is said to have been made by Viyyammal, widow of Subbarayudu, in pursuance of a permission to adopt contained in his will. First defendant is Viyyammal's brother. The first question is whether first defendant had been validly adopted, as he alleges, in 1907 before the plaintiff's lease in 1912.

In 1907 Viyyammal was aged between eleven and twelve and I respectfully adopt my learned brother's reasons for holding that for the purpose of adoption she was still a minor. No clear authority having been shown for the view that with reference to any special period of minority she had attained competency to adopt at the time in question, the decisions in *Mondakini Dasi v. Adinath Dey*(4) and *Ranganayakamma v. Alwar Setti*(1), are relevant. No doubt in each a decision as to the circumstances, in which a minor widow could adopt, was unnecessary, since in the one the boy to be adopted was specified in the will containing the authority to adopt and in the other the adoption was held to have been procured by coercion. But in the absence of any more recent or direct authority the conclusion based on these two cases must be that

(1) (1890) I.L.R., 13 Mad., 214.
 (3) (1906) I.L.R., 29 Mad., 437.

(2) (1871) 15 W.R., 548.
 (4) (1891) I.L.R., 18 Cal., 62.

"sufficient maturity of understanding to enable the widow to comprehend the nature of her act is necessary,"

and further that as this Court held in the second, there must be

"cogent evidence of her having acted under the intelligent and disinterested guidance of her legal guardian seeking *bona fide* to provide for a spiritual necessity with due regard for her interests so far as it is compatible with such necessity."

I agree with my learned brother that in the present case the lower Court's findings of fact entail that the adoption in 1907 was invalid.

There is more room for controversy in connection with the remainder of its judgment in which it remanded the case in order that Viyyammal might be impleaded and a retrial might be held with reference to the possibility of her having validated or being able and willing to validate the adoption with effect from a date prior to plaintiff's lease. This remand will plainly be useless if no such validation is legally possible. The second question for our decision is therefore as to its possibility. We have had Viyyammal made a party to the appeal, and she has supported the contentions of plaintiff and first defendant.

The question is one of some difficulty regarding which there is very little authority; and the value of that authority impaired by the fact that in some cases the term "ratification" is used loosely, apparently as equivalent to conduct, which would amount to evidence that a valid adoption had been made or to an estoppel against the denial of one. Again we clearly have no concern with such interpretations of the term as that by Lord MACHNAGHTEN in *Stewart v. Kennedy*(1), where its use in a private letter was in question or with cases of acceptance by one person of the acts of another, as for instance of an agent or guardian. What plaintiff requires is judicial recognition of ratification or some doctrine akin to it, as applicable to the case before us, such a doctrine in fact, as is implied in the definition of ratification given by Lord WATSON in the case just referred to. To quote the relevant portion of it

"the confirmation of an imperfect obligation by the party who was not legally bound by it"

I refer to a doctrine akin to ratification, because the accuracy of the description of an adoption as an obligation cannot be

(1) (1890) 15 A.C., 75.

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assumed. It is further material with reference to Indian law that this definition is applicable to no power ordinarily exercisable by a minor, because a minor can incur no sort of obligation during minority, his contractual acts being void *ab initio*: *Mohori Bibi v. Dharmodas Ghose*(1) and *Navakotti Narayana Chetty v. Logalinga Chetty*(2).

The case of an adoption by a minor widow is *sui generis*. The decisions in *Mondakini Dasi v. Adinath Dey*(3), and *Ranganayakamma v. Alwar Setti*(4), already referred to and that in *Amrito Lal Dutt v. Surnomoye Dasi*(5), show that, notwithstanding her minority the legal act can and must be performed by her, not by her guardian on her behalf. This is borne out in the present case by the terms of the authority, under which the widow professed to act, which empowered her, not only to choose the boy to be adopted, but also to decide whether there should be an adoption at all. Does the right of independent action, conceded to the minor in this matter, place her act on the same footing as that of an adult with reference to ratification or any similar doctrine? It seems to me that it cannot do so, where, as here, the defect in the original act, which has to be repaired, consists in the failure to obtain the guardian's disinterested advice. For, though the grounds on which such advice was insisted on by this Court in *Ranganayakamma v. Alwar Setti*(4), are not stated, that case to my mind lays down a condition precedent, which must be fulfilled before the act of the minor, a generally incapacitated person can have any degree of validity, and does not, like the cases dealing with adult *purdah* ladies, merely lay down a rule of evidence. If the minor widow's act is *ab initio* totally invalid for want of independent advice, it cannot be validated later by anything of the nature of ratification.

The foregoing assumes that an adult widow can validate an adoption originally imperfect by subsequent conduct. That position also however is in my opinion unsustainable. It is supported by one authority only—*Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row*(6). It is material

(1) (1903) I.L.R., 30 Calc., 539. (2) (1910) I.L.R., 33 Mad., 312.
(3) (1891) I.L.R., 18 Calc., 69. (4) (1890) I.L.R., 13 Mad., 214.
(5) (1900) I.L.R., 27 Calc., 996 (P.C.). (6) (1906) I.L.R., 29 Mad., 437.

that no one's interest was prejudicially affected in that case by the subsequent ratification in consequence of anything which happened before it, and that the lady, who made the adoption, was dead, when the litigation began. And accordingly, when the Court had found that during the years, for which she lived after the ceremony, she fully agreed to the adoption and was anxious to establish it, it would naturally strive to uphold it. It did so very shortly on the grounds that Hindu Law did not treat an adoption as void on account of coercion, the objection under consideration, and that under the law of contracts it would be only voidable. This conclusion was reached without reference to the decisions to be cited *infra* and it was not disputed, when the case went on appeal to the Privy Council, the judgment there proceeding on other grounds.

The decisions in question were given in Bombay; and no doubt they deal directly with the ratification of an imperfect adoption, not by the widow who made it, but by the person in whom the inheritance had vested and whose consent to an adoption has been held essential to its validity in that Presidency. They do not however turn on any merely local conception of the effect of an adoption, in so far as they are relevant for the present purpose; that is in so far as they deal with the possibility of validation by subsequent acts or conduct. That possibility is no doubt recognized in *Payapa v. Appanna*(1) where subsequent ratification by conduct or acquiescence on the part of the person, in whom the estate was vested by inheritance, is referred to as one condition of the validity of an adoption and as an alternative to his contemporaneous consent. But it must be added with all respect, that the reference to ratification was merely *obiter*, since none was relied on in the case before the Court, and that it is hardly reconcileable with the marked insistence on the contemporaneous character of the consent to be required in the portion of the judgment, in which consent is dealt with. It is significant that of the cases relied on by RANADE, J., as authorizing ratification, three were evidently cases of estoppel and the fourth—*Rajendra Nath Holdar v. Jogendra Nath Banerjee*(2)—was decided mainly with reference to the conclusion, based *inter alia* on the conduct of members of the family that the will containing

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(1) (1899) I.L.R., 23 Bom., 327.

(2) (1871) 14 M.I.A., 67.

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OLDFIELD, J. the authority to adopt was genuine; and it is therefore, possible that the learned Judge referred loosely to ratification, as covering estoppels which debarred the party from denying, or conduct which would establish against him, a consent when the adoption was made. This interpretation of the judgment is supported by the absence of any attempt to reconcile the portion of it relating to ratification with the previous Full Bench decision in *Vasudeo v. Ramachandra* (1) in which RANADE, J., had concurred, though on grounds of his own. His colleagues held that in the words of FARREN, C.J.,

"The adoption in question must have been either valid or invalid at the time it took place, and its validity could not depend on the subsequent action of one of the persons in whom the estate had vested and who was alleged to have consented later."

As FULFON, J., observed, there was at that date no authority for holding that subsequent assent could validate an adoption which was not valid when made. I am not able in the circumstances already stated to accept the later Madras decision above referred to as conclusive in favour of an application of the doctrine of ratification, which appears to me objectionable on its merits. I therefore concur with my learned brother in deciding against it. The result is that the appeal is allowed with costs here and in the lower appellate Court and the decree of the District Munsif restored.

N.B.

(1) (1898) I.L.R., 22 Bom., 551.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Phillips.

DIVI PUNNIAH (FIRST DEFENDANT), APPELLANT,

v.

GORANTLA KOTAMMA AND SIX OTHERS (PLAINTIFF AND HER
LEGAL REPRESENTATIVES), RESPONDENTS.*

1916.
November,
24.

Charitable inams—Resumption of, by Government—Patta granted to one of the previous trustees—Suit by representative of another trustee for share—Effect of resumption—Distinction between resumption and enfranchisement of personal or service inams.

Where the Government resumed certain lands which were held previously as charitable inam and 'after imposing an assessment' granted a patta to one of the persons who were the trustees thereof prior to the resumption.

Held, that the representative of another trustee had no right to claim a share in the land, as against the trustee to whom the patta was given.

The principles regulating the ownership of enfranchised lands in cases of enfranchisement of personal or service inams, afford no guidance in cases of resumption of charitable inams.

In cases of enfranchisement, there is a change not of ownership of the land but of the tenure on which it is held; in cases of resumption, the land previously the property of the trust is at the absolute disposal of the Government who can grant it to any one who becomes the owner subject to the obligations ordinarily attached to ryotwari tenure.

Gunnaiyan v. Kamakchi Ayyar (1903) I.L.R., 26 Mad., 339 and *Pingala Lakshmi-pathi v. Bommireddipalli Chalamayya* (1907) I.L.R., 30 Mad., 434, distinguished.

SECOND APPEAL against the decree of T. VARADARAJULU NAYUDU, the Subordinate Judge of Guntūr, in Appeal No. 578 of 1911, preferred against the decree of C. VIRASWAMI REDDI, the District Munsif of Ongole, in Original Suit No. 581 of 1909.

The plaintiff sued for partition and recovery of a half share in the suit lands. She alleged that the lands were previously "charitable inam lands" which were subsequently converted by the Government into jirayati lands, and that a patta was issued to the first defendant alone in fasli 1317 as the purpose for which the lands were given as inam was not fulfilled. She claimed that the property was common family property, and that she was entitled to a half share in respect of her husband's right in

* Second Appeal No. 2424 of 1914.

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the lands after resumption and that the granting of the patta to the first defendant alone did not affect her antecedent right thereto. The original Court dismissed the suit on the ground that the plaintiff had not shown that she was in possession within twelve years prior to suit. The lower Appellate Court reversed the decree and granted a decree for partition of a half share in favour of the plaintiff, holding that the plaintiff was proved to be in management of the trust within twelve years before suit and that the resumption of the land and the grant of patta to the first defendant alone did not affect the title of the plaintiff to the lands at the time of resumption. The defendant preferred a Second Appeal.

T. Prakasam and P. Chenchiah for the appellant.

T. V. Venkatarama Ayyar and R. Rajagopala Ayyar for respondents Nos. 2 to 7.

OLDFIELD
AND
PHILLIPS, JJ.

JUDGMENT.—The dispute in this Second Appeal is regarding the right to a tope site. The tope was, in the words of the plaint, “transferred from charitable inams by Government and assessed to jirayati” or shortly “resumed”, patta being granted to first defendant. The lower Appellate Court gave plaintiff a decree for a half share of the land on partition on the ground that she represented the interest of one of the two trustees of the tope before its resumption, defendant representing the other. The lower appellate court applied *Gunnaiyan v. Kamakchi Ayyar*(1) and *Pingala Lakshmipathi v. Bommireddipalli Chalamayya*(2), dealing with the case on principles applicable to cases of enfranchisement of personal or service inams.

Those principles in our opinion afford no guidance in cases of resumption of charitable inams. In cases of enfranchisement there is a change, not in the ownership of the land, but in the tenure on which it is held. In cases of resumption the land previously the property of the trust becomes the property of the person, to whom Government grants it, subject of course to the obligations ordinarily attached to ryotwari tenure. It has not been shown and we do not think that Government is bound to grant land, which it has resumed, to the former trustee or to any particular person; on the other hand the matter is in its discretion and, if its grantee happens to be a former trustee, it

(1) (1903) I.L.R., 26 Mad., 339. (2) (1907) I.L.R., 30 Mad., 434 (F.B.).

is not to be assumed that the re-grant was made to him on that account or that any other person can claim to participate in the grant on the ground that he also shared in the original trustee's rights.

Taking this view, we allow this second appeal and dismiss the suit with costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

SYED HASAN RAZA SAHIB SHAMSUL ULAMA AND TWO
OTHERS (DEFENDANTS NOS. 1, 4 AND 5), APPELLANTS,

1916,
November, 20
and
December, 6.

v.

MIR HASAN ALI SAHIB AND TWO OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 2, 6 AND 7), RESPONDENTS.*

Election—Public body—Vacancy—Election to fill up vacancy by less than a majority of voters, validity of—Appointment of a minor as Muthawalli of a mosque, validity of.

According to a scheme framed by the High Court, a mosque in Madras was governed by a managing committee of five members, including the President, and three Muthawallis working under them, and vacancies in the committee were to be filled by election by an electoral body consisting of the remaining committee members and the three Muthawallis and the committee was to appoint “competent men” as Muthawallis for the mosque.

In 1906, one M.M. who was then eleven years of age, was appointed by the committee as one of the Muthawallis. In 1914 the electoral body consisted of the president, three other members of the committee and two Muthawallis excluding M.M. Notice of a meeting to fill up a vacancy in the committee in 1914 was served on all the members of the electoral body except M.M. Three members of the electoral body attended the meeting at which the plaintiff was elected. There was no rule or practice fixing the quorum for meetings of the electoral body:

Held:—

(1) that plaintiff having been elected at a meeting attended by less than a majority of those entitled to vote, his election was invalid,

(2) that the election of M.M. as Muthawalli while he was a minor was invalid *ab initio*, and

* City Civil Court Appeal No. 9 of 1916.

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(3) that *M.M.* even though a major at the time of plaintiff's election, was not entitled to vote, and want of notice to him of the meeting was immaterial.

APPEAL against the decree of C. R. THIRUVENKATACHARIYAR, the City Civil Judge of Madras, in Original Suit No. 225 of 1914.

The facts appear from the judgment of AYLING, J.

V. Viswanatha Sastriyar and *M. S. Venkatarama Ayyar* for the appellants.

T. R. Ramachandra Ayyar and Messrs. *Venkatasubba Rao* and *Radhakrishnayya* for the first respondent.

T. G. Raghavachariyar for the respondents Nos. 2 to 4.

AYLING, J.

AYLING, J.—The suit out of which this appeal arises was brought by plaintiff (first respondent) to declare the validity of his election as a member of the committee of the Abbas Ashoor Khana or Thousand Lights Charities in Madras. These charities are governed by a scheme framed by this Court in Original Suit No. 392 of 1878. The decree in that suit (Exhibit VII) provides *inter alia* for a managing committee of five members (including the president), and three *Muthawallis* working under them. Vacancies in the committee were to be filled by election by an electoral body consisting of the remaining committee members and the three *Muthawallis*. According to plaintiff, he was validly elected in accordance with the rules contained in the decree at a meeting held on 7th June, 1914.

Defendants Nos. 1, 4 and 5 who are admittedly members of the electoral body above referred to, raised various objections to the validity of the election, which were all rejected as baseless by the City Civil Judge, who gave plaintiff the declaration sued for. Hence this appeal.

Before us, the validity of the election was attacked on three grounds. Two of these may be briefly disposed of. It was argued, (1) that the procedure was in contravention of rule 6 of a series of rules framed for themselves by the committee and *Muthawallis* in 1888 (Exhibit IV) and

(2) that election was void for failure to give notice of meeting to one Moulvi Mahomed Madhi Sahib, who, according to appellants, was one of the *Muthawallis* at the time.

As regards (1), a consideration of Exhibit IV leaves no doubt in my mind that rule 6, which is relied on, was only intended to govern the proceedings at meetings of the managing committee, and has no application to elections by the committee and

Muthawallis conjointly. I may add that I find no evidence that this procedure was ever followed at elections. In my opinion, the objection based on this rule is without foundation.

As regards (2), Moulvi Mahomed Madhi Sahib was at the time of his appointment as *Muthawalli* in 1906 a boy of eleven years of age; and I agree with the learned City Civil Judge that his appointment is altogether void and that he did not possess the status of *Muthawalli* at the time of plaintiff's election.

The third objection is of a more serious character. Excluding Moulvi Mahomed Madhi Sahib, there were six surviving members of the electoral body on 7th June 1914:—

- (1) The President of Committee (first defendant),
- (2) three members of Committee (defendants Nos. 2, 3 and 4), and
- (3) two *Muthawallis* (defendants Nos. 5 and 6).

Of these only three persons (defendants Nos. 2, 3 and 6) were present at the meeting. The other three are found to have had notice of the meeting but they failed to attend, and they oppose plaintiff's election. It is argued that plaintiff's election, not being the act of a majority of the electoral body, is invalid.

The decree in Original Suit No. 392 of 1878 simply directs that the surviving or continuing members of the committee and the *Muthawallis* for the time being do elect a person from the Shiah sect to the vacancy; that each elector should have one vote and the President a casting vote in case of equality and that the person to whom the greatest number of votes is given be deemed to be elected. There is no provision for a quorum at an electoral meeting, nor for a minimum number of votes to be recorded for a candidate to render his election valid.

The electoral body in this case is certainly "a select and definite body"; and it is hardly disputed that the general rule of English law regarding such bodies is that any act of such a body by way of resolution at a meeting is only valid, when a majority of the body are present—vide, Halsbury's Laws of England, volume 8, page 351.

Mr. Ramachandra Ayyar has however argued that this rule is not to be rigidly applied to Indian bodies; that circumstances may justify its being disregarded; that the practice of each body is the real test; and that before declaring the election invalid on this ground there are questions of fact which require

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to be gone into. He relies on *Anantanarayana Ayyar v. Kuttalam Pillai*(1) and *In re Tavistock Iron Works Company—Lyster's case*(2).

I can find no ground for holding that this rule, considered as one of general application, is less applicable in India than in England, or is one which we should not follow. There is nothing in the judgment of SUBRAHMANYA AYYAR, J., in *Anantanarayana Ayyar v. Kuttalam Pillai*(1), to support such a view though he points out that the rule is one rather of English law than of general jurisprudence. The learned Judge, on the other hand, applied the rule to the case before him, examined the constitution of the body in question, its particular rules of procedure and decided that there was in that case a valid rule whereby the quorum at a meeting was fixed at a number less than the number present at the meeting out of which the dispute arose. On this ground he declared the resolution valid.

In the English case—, *In re Tavistock Iron Works Company—Lyster's case*(2) which is also quoted in *Anantanarayana Ayyar v. Kuttalam Pillai*(1) LORD ROMILLY, M. R., sought and found a ground of exemption from the usual rule in the existence of a quorum—not by specific rule—but by the course of business adopted by the particular body in that case. I may remark that in that case there was a specific rule to the effect that

“every question at a Board or a Committee shall be determined by a majority of the votes of the Directors present thereat.”

In the present case it would no doubt be open to respondents to show that similar circumstances existed; a valid rule fixing the quorum at a meeting at three or less; or even a course of business from which such a rule could be inferred. But the existence of any such rule is not even suggested; and it is clear from the evidence on record that previous elections have not been held at meetings with a minority of electors present. I do not think we should be serving any useful purpose but should on the contrary be wasting the money of parties and uselessly prolonging litigation by calling for a finding on this point.

I must hold that the resolution on 7th June, 1914, having been passed at a meeting attended by less than a majority of those entitled to vote, was invalid.

(1) (1899) I.L.R., 22 Mad., 481.

(2) (1867) L.R., 4 Eq., 233.

The decree of the City Civil Judge should, therefore, be set aside and the suit dismissed; but in the circumstances I would direct each side to bear its own costs throughout.

SESHAGIRI AYYAR, J.—I agree.

My learned colleague has stated the facts and the points arising for decision. As the questions argued raise important issues, I wish to add a few words. I feel no hesitation in holding that under the scheme the committee had power only to make rules for the meetings of the managing committee. I am also satisfied that Exhibit IV does not purport to frame rules for any business other than that to be transacted at the meetings of the managing committee.

On the question whether the election of the plaintiff by three members of the committee is valid, I felt considerable doubts during the course of the argument. To a certain extent, the authorities to which our attention has been drawn have run counter to many a preconceived idea of mine on the question of quorum. I was under the impression that unless a quorum was fixed for a body of business men, any number of members of that body who happened to be present at a meeting could validly bind the others by their resolution, provided due notice of the meeting was given to all. I am now satisfied that this impression is not well-founded. Again it is apparent that the quorum for a managing committee cannot be fixed by that committee. The quorum should be settled by the larger body which elected the managing committee, unless that body empowered the committee to fix its own quorum. In *In re Tavistock Iron Works Company—Lyster's case*(1), this position was made clear. The argument of counsel and the authorities quoted in that case show that unless empowered to fix a quorum, the committee could not agree to substitute the decision of a fixed number among them for that of the whole committee.

A distinction is drawn between a committee consisting of a definite number and a body composed of an indefinite number of persons. The distinction seems to be this: In the first class of cases, the number of the select body is fixed. In the second class of cases, the number is subject to variation every year or at stated periods. For example, the number of electors of a

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Temple Committee or of a member for a Municipality is liable to fluctuation. Residence for a particular period, or the attaining of age of minors can bring in new electors. Whereas in the case of a Select Committee, the number is fixed. The procedure to be adopted at the meetings of these two different bodies is stated in Halsbury's Laws of England, volume 8, pages 351 and 352. It seems well settled that an election by a definite body can only be held when the majority of that body is present to exercise the franchise: *Rex v. The Bailiffs, etc., of Ipswich*(1) and *Ari Cotton v. Des*(2).

WILLS, J., in *Mayor, etc., of Merchants of the Staple of England v. Governor and Company of Bank of England*(3) states the law thus:

"The acts of a corporation are those of the major part of the corporators, corporately assembled; Com. Dig. tit. Franchise, F. 11; and, omitting the words 'corporately assembled,' this is declared by 33, Hen. VIII, c. 27, to be the common law. This means that, in the absence of special custom, the major part must be present at the meeting, and that of that major part there must be a majority in favour of the act or resolution. It was so decided in Easter Term, 1693: *Hascard v. Somany*(4) quoted in Viner's Abridgment, tit. Corporations, G. III, pl. 7: and it was said by Lord MANSFIELD in *Rex v. Monday*(5), to be undoubted law. By 'corporately assembled', it is meant that the meeting shall be one held upon notice which gives every corporator the opportunity of being present: see *Smyth v. Darley*(6). The notice need not necessarily be special, but there must be such knowledge, or such means of knowledge, as to give each corporator, the opportunity of attending."

Lord KENYON, C.J., expressed himself very emphatically on this question in *Rex v. Bellringer*(7): see also *Howbeach Coal Company v. Teague*(8) and *In re London and Southern Counties Freehold Land Company*(9).

The decisions to which Mr. Ramachandra Ayyar drew our attention, do not conflict with this view of the law. In *In re Tavistock Iron Works Company—Lyster's case*(10), it was held that the Managing Committee, under the power vested in it, impliedly fixed

(1) (1790) 2 Ld. Raym., 1232. (2) (1795) 1 Str., 53; s.c., 93, E.R., 380.
(3) (1887) 21 Q.B.D., 160 at p. 165. (4) (1826) 1 Freem., 504.
(5) (1777) 2 Cowp. 530; s.c., 98, E.R. 1224. (6) (1849) 2 H.L.C., 789.
(7) (1792) 4 T.R., 810; s.c. 100 E.R., 1315. (8) (1860) 5 H. & N., 151.
(9) (1885) 31 Ch. D., 223. (10) (1867) L.R., 4 Eq., 233.

two members as forming the quorum; nor does *Anantanarayana Ayyar v. Kuttalam Pillai*(1) support the respondent. It may be that the Temple Committee should not be spoken of as the constituent members. The word *constituent* member can only apply to the units of an electoral body which elects the Temple Committee. However that may be, the actual decision in that case does not support the position taken up by the respondent.

It was suggested that the usage of the institution was in favour of electing a member of the committee in the way it was done on the present occasion. In the first place, the scheme is of so recent an origin that there has been no time for the development of custom in this behalf. In the second place, it is doubtful whether a custom can be pleaded with reference to a decree of Court. The proper course would have been to apply for its variation. Lastly, I am satisfied that the evidence to which our attention was drawn does not establish the alleged custom. Exhibit III only relates to circulation. It is the same with Exhibit III (a). Exhibit XV has no reference to election at all. The mixed process of passing a resolution at a meeting and then having it circulated among the absent members seems to have been gone through in this instance. These documents afford no proof of the custom now set up.

For the above reasons, I agree in holding that the plaintiff was not validly elected.

One other argument may be shortly disposed of. It was said that the election was invalid as Moulvi Mahomed Madhi Sahib was not given notice of the date and place of election. He is the son of the fifth defendant and is alleged to have been elected in 1906 when he was admittedly only eleven years of age. It is true that on the date of the present election he was a major. It is also true that on some previous occasions he was consulted as if he were legally holding the office of trustee. The argument before us was that as this gentleman was entitled to a hereditary trusteeship in the mosque, he was validly elected even though he was a minor at the time of election; and that on attaining age, he was entitled to take part in the management of the institution and in discharging the other functions. I am unable to read Exhibit VII in the sense suggested by Mr. Visvanatha

(1) (1899) I.L.R., 22 Mad., 481.

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Sastriyar. The scheme directs that the managers should be elected :

"from among the male descendants of the plaintiffs and defendants, and in default of competent male descendants of the plaintiffs and defendants from amongst the other descendants of Majeed Ool Dowlah Bahadur deceased in the pleadings of the said Suit No. 198 of 1869 mentioned and in default of any competent male descendant of the said Majeed Ool Dowlah Bahadur then from amongst the members of the Shiah sect of the Muhammadan community of Madras."

This provision does not create a hereditary right, but only gives a preferential claim for selection.

Further when the scheme speaks of competent men, I feel no doubt that competency as to age was contemplated. Moreover, the Muhammadan Law on this question seems clear. Both according to Imameea (the authority binding on the Shiahs) and the Hanefee—"Puberty and understanding are essential in all cases to a valid appointment."

The authorities quoted for the appellants only relate to hereditary trusteeship. In such cases, the *kazi* is empowered to appoint a substitute during the minority of the *de jure Muthawalli*: Amir Ali, volume I, pages 353 and 445, IV Edition. In *Piran v. Abdool Karim*(1) it was held that a *Sajjadanashinship* should not be conferred on a minor. The observations in page 220 do not suggest, as was contended before us, that in the case of a *Muthawalli* a minor can be appointed. Mr. TYABJI in his Principles of Muhammadan Law at page 411, points out the distinction between devolution and appointment by selection and says that "puberty is a *sine qua non*" in all cases of appointment.

It is clear, therefore, that the fifth defendant's son was not validly appointed and that failure to give him notice of the meeting did not render the proceedings invalid.

The decree of the learned City Civil Judge must be set aside. I agree in the order as to costs made by my learned brother.

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(1) (1892) I.L.R., 19 Calc., 203.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

NATESA PILLAI AND TWO OTHERS (PETITIONERS, PLAINTIFFS
NOS. 2 TO 4 AND LEGAL REPRESENTATIVES OF THE FIRST
PLAINTIFF), APPELLANTS,

1916,
November, 29
and
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15.

v.

GANAPATHIA PILLAI AND THIRTEEN OTHERS (DEFENDANTS),
RESPONDENTS.*

Limitation Act (IX of 1908), art. 182, cl. (5)—Application for execution—Omission to file encumbrance certificate and draft sale proclamation—Return for amendment—No re-presentation—Application, whether, in accordance with law.

An application for execution presented in December, 1912 was ordered to be returned for amendment, the order requiring the applicant to file (a) encumbrance certificates and (b) draft proclamation of sale. It was never taken back by the applicant or amended. A fresh application was presented in January, 1915. On the objection that the application of December, 1912 was not in accordance with law and that the application of January, 1915 was therefore barred by limitation:

Held that the application of December, 1912 having complied with every statutory requirement, was one in accordance with law within article 182 (5) of the Limitation Act and that the application of January, 1915 was therefore in time, the failure to re-present the earlier application being of no consequence; as neither the failure to file an encumbrance certificate as required by rule 148 of the Rules of Practice nor the failure to file a draft proclamation of sale (which is not required by Order XXI, rule 69, Civil Procedure Code, to be annexed to the application) were such defects as would render an application otherwise legal, illegal.

APPEAL against the order of H. D. C. REILLY, the acting District Judge of South Arcot, in Execution Petition Register No. 13, of Execution Petition No. 3 of 1915, in Original Suit No. 4 of 1902.

A mortgage decree was passed on the 22nd February, 1910. An execution application was presented on the 18th December, 1912 for sale of the mortgaged properties and it was returned for amendment with the following endorsement:—

"Pleader's fee claimed is excessive. It should be calculated on the amount realized in execution. This application should be

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accompanied by encumbrance certificates. Draft sale proclamation, i.e. (vide rule 66 of Order XXI, Civil Procedure Code); item No. 93 not fully described. Returned. Time allowed fifteen days."

The applicant never took back the application but presented another execution application on 2nd January, 1915. The lower Court held that the application of 18th December, 1912 was not in accordance with law and that therefore the application of January, 1915 was barred by limitation. Thereupon the decree-holder preferred this appeal.

S. Muthia Mudaliyar for the appellants.

V. Ratnasomanathan and *K. R. Subrahmanya Sastri* for the respondents.

ATLING, J.—The sole question for disposal in this appeal is whether the decree-holder's execution petition filed on 18th December, 1912 is an application for execution in accordance with law within the meaning of article 182 of the Indian Limitation Act (Schedule I). It was ordered to be returned for amendment on account of certain defects; but was never taken back and in consequence never amended.

The two defects which the District Judge regards as serious, and on account of which he has held the application to be inoperative to save limitation are: (1) The omission to file an encumbrance certificate with the application and (2) The omission to specify the assessment on the land sought to be brought to sale. The leading case on the point is *Ramanadan v. Peria-thambi*(1), in which the learned Judges say—

"We are of opinion that the application of 1879, although not complying in every particular with the requirements of section 235 of the Civil Procedure Code (XIV of 1882) was substantially an application made in accordance with law, and that, although it was returned for amendment and nothing further was done upon it, the application gives a fresh starting point from the date of its presentation."

This principle has been followed in numerous subsequent cases in which the importance of various defects has been considered. It has usually been decided that they were insufficient to justify the application being treated as one not in accordance with law.

(1) (1883) I.L.R., 6 Mad., 260.

It was apparently argued before the District Judge that no defect or omission was material as long as there was an application of some kind for the execution of the decree in the manner provided by law. This contention was rightly rejected by him, and he very reasonably remarks that a line must be drawn between applications which, though defective, are to be considered as in accordance with law, and applications which are so defective as not to be treated as applications at all for this purpose. This no doubt is so; and it is by no means easy to say where the line should fall. But I feel little hesitation in saying that the defects in the present case could not be considered as disabling without running counter to reported decisions of this Court. The application was no informal petition but one drawn up in the form prescribed by the rules. It is not contended that the failure to re-present it after amendment makes any difference, apart from the nature of the defects. The failure to state the assessment on the land can hardly be treated as more serious than the failure to specify a previous execution application, which has been held to be a mere formal defect, so long as it did not prejudice the judgment-debtor or mislead the Court: vide, *Rama v. Varada*(1), which is a case on much the same lines as the present one. The obligation to file an encumbrance certificate is imposed by rule 148 of the Civil Rules of Practice just as the obligation to file a copy of a decree is by rule 164 and the observations of the Court in *Pachiappa Achari v. Poojali Seenan*(2), are as applicable to the one case as to the other.

But while I feel no doubt of the result of the present case, if the spirit underlying the previous decisions of this Court be applied, I am conscious that the law as therein enunciated is undesirably vague from a practical point of view. It appears to be generally conceded that an execution application may be so defective as not to be an application according to law at all, but what would constitute such defects is a matter of doubt. There are apparently conflicting decisions of this Court (at any rate decisions not easy to reconcile) as to the effect of failure to verify the execution petition: vide, *Raghunatha Thatha Chariar*

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(1) (1893) I.L.R., 16 Mad., 142.

(2) (1905) I.L.R., 28 Mad., 557 at p. 559.

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v. Venkatesa Tawker(1) and *Ramayyan v. Kadir Bacha Sahib*(2). If I may say so, it seems worthy of consideration whether legislation should not be resorted to in order to make the position of parties clearer. An enactment that from henceforward no petition dismissed or struck off for any default of the party presenting it should be treated as a step in aid for the purpose of saving limitation, would, as it seems to me, impose no real hardship on decree-holders and would make the law certain. In a matter of this kind, it is of supreme importance that a decree-holder should be always in a position to know when the time for execution of his decree will expire.

I would set aside the order of the District Judge and direct him to restore the petition to file and dispose of it according to law.

I would make no order as to costs.

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SESHAGIRI AYYAR, J.—I am of the same opinion. The decree in this case was passed on the 22nd February, 1910. An application for execution was presented on the 18th December, 1912. It was returned to the decree-holder with directions to furnish certain information. It was not re-presented. The present application was filed on the 2nd January, 1915. The District Judge has held that the application of December, 1912 was not in accordance with law and that the failure to re-present it prevented its operation as a step in aid of execution.

On the second question, it is well-settled that under article 182 of the Limitation Act, it is the date of the presentation of the application that counts. The facts that it was returned and that no orders were passed thereon do not affect the question.

The first question is more difficult. The course of authorities in this Presidency has been very indulgent to the decree-holder. It is open to doubt whether this partiality has not resulted in encouraging parties to present applications often carelessly and not infrequently with reckless disregard of the requirements of the law. The Limitation Act gives three years for filing the first application. This period is long enough to enable the most indifferent suitor to collect all the necessary information before applying for execution; still, it is our painful experience, that petitions are lodged which are absolutely incapable

(1) (1903) I.L.R., 26 Mad., 101.

(2) (1908) I.L.R., 31 Mad., 68.

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of having a decision passed on them, in the hope that it may serve to furnish a new starting point. In my opinion a stricter provision of law might conduce to speedier remedy and to the avoidance of applications which, only in name, answer to what the law expects of the party. I would suggest that the legislature should enact a clause to the effect that a party failing to comply with the demand to furnish the necessary legal information should not have counted in his favour the defective application he has presented.

I shall now proceed to see whether the application of December, 1912 was in accordance with law, as understood in this Presidency. I do not propose to examine the case-law of the other High Courts, as admittedly there is no consistency in the pronouncements of the various High Courts on this question. Before considering the case-law, the peculiar features of the application in question may be stated. The endorsement returning the application was in these terms:

"Pleader's fee claimed is excessive. It should be calculated on the amount to be realized in execution. This application should be accompanied by encumbrance certificates. Draft sale proclamation, i.e. (vide rule 66 of Order XXI, Civil Procedure Code); item No. 93 not fully described. Returned. Time allowed fifteen days."

The District Judge has held, and we agree with him, that the wrong calculation of the pleader's fee did not affect the legality of the application. As regards item No. 93, the learned vakil for the respondent has conceded that the application was not defective in not giving the proper description of the property. The production of an encumbrance certificate is not a requirement of the Code of Civil Procedure. It only requires the party to state whether the property was subject to an encumbrance. I am satisfied, on reading the application, that this information was furnished. But the rules of the High Court provide for the Court calling upon the decree-holder to produce an encumbrance certificate. As at present advised I am not prepared to hold that if an application is in other respects legal, the failure to comply with a demand to produce an encumbrance certificate would have the effect of making it "an application not in accordance with law." There have been numerous cases in this Court in which failure to comply with the rules of practice has not been regarded as affecting the validity of the application.

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The only other information that was not contained in the application related to the production of a draft sale proclamation. Order XXI, rule 66, does not in terms say that a draft of that kind should be annexed to the application. Clause (e) empowers the Court to call for such information as would enable it to settle the proclamation of sale. In this particular instance, what the party failed to state was the assessment due on the land sought to be sold. That is a material information. The Court, instead of requiring the party to give this specific information, asked for a "draft sale proclamation." The rule to which the endorsement drew attention does not support such a requisition being made. At the same time, I am clear that a party failing to assist the Court in this particular can have no grievance if the application is rejected as not being in accordance with law.

It is not necessary to examine the case-law at any length. In my opinion, any application which does not comply with the requirements of Order XXI, rule 11 (2) or with the provisions of the Code which impose a statutory obligation on the applicant to furnish information would not be in accordance with law. Such an application may serve to start a new period of limitation only if the demands of the Court, to supply the defects are complied with. *Ramayyan v. Kadir Bacha Sahib*(1) and *Ramanadan v. Periatambi*(2) are not against this proposition. In the first of these cases, it was held that as the decree was in the Court the failure to furnish a copy did not detract from the application. In the second case an arithmetical error in the calculation of interest was held not to vitiate the application. It was held in a number of cases that if the Court and the judgment-debtor are not likely to be prejudiced by the want of the particulars, the application should be regarded as being one in accordance with law: *Rama v. Varada*(3), *Raghunatha Thatha Chariar v. Venkatesa Tawker*(4) and *Kamatchi Ammal v. Pitchu Ayyar*(5). It is not easy, in a given instance, to say definitely how far the opposite party or the Court may or may not be prejudiced. I do not regard these decisions as laying down

(1) (1908) I.L.R., 31 Mad., 68.

(2) (1883) I.L.R., 6 Mad., 250.

(3) (1893) I.L.R., 16 Mad., 142.

(4) (1903) I.L.R., 26 Mad., 101.

(5) (1916) 2 M.W.N., 152.

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that a party is entitled as a matter of right to claim that a statutory disregard by him should not count against him. All that was said in these cases was, that the particulars called for were not of such a nature as would have prevented the Court from acting on the petition. I am in entire accord with the proposition enunciated in *Pachiappa Achari v. Poojali Seenan*(1) that if an application is so defective that a Court cannot pass orders thereon in execution, it should not be regarded as being one in accordance with law: see also *Srinivasa Iyengar v. Tirumalai Chetty*(2). In the present case, I am not satisfied that the party failed to supply any information which the Code makes it incumbent upon him to furnish.

I would, therefore, set aside the order of the District Judge and remand the application to him for disposal on the merits.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Napier.

PETHU AYYAR (PLAINTIFF), APPELLANT,

v.

SANKARANARAYANA PILLAI AND THREE OTHERS

(DEFENDANTS), RESPONDENTS.*

1916,
December,
20.

Transfer of Property Act (IV of 1882), sec. 52—Lis Pendens—Attachment before judgment—Claim to attached property by third party, allowed—Suit by decree-holder against claimant to establish his right to attach—Suit dismissed—Appeal by decree-holder—Judgment-debtor, not a party to suit or appeal—Sale in execution of another decree by another decree-holder pending appeal—Decree on appeal—Subsequent sale in execution—Validity of prior sale.

A decree-holder had attached the property of his judgment-debtor before decree in his suit, and, while he was seeking to establish his right to attach and sell such property as the property of his judgment-debtor by suit against a successful claimant, another decree-holder attached the same property and brought it to sale during the pendency of the appeal in the claim suit. The judgment-debtor was not made a party to the claim proceedings or the subsequent suit or appeal. The property was again sold in execution of the decree of the former decree-holder who purchased it and sued to recover possession.

(1) (1905) I.L.R., 28 Mad., 557.

(2) (1914) M.W.N., 372

* Second Appeal No. 720 of 1915.

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Held, that the auction purchaser in the prior sale was not affected by the doctrine of *lis pendens* and his purchase was valid as against the purchaser in the subsequent auction sale.

Per WALLIS, C.J.—The doctrine of *lis pendens* was inapplicable on the ground that the judgment-debtor was not a party to the claim proceedings or the subsequent suit and could not be considered to be represented in that suit by the plaintiff therein.

Lalu Mulji Thakar v. Kashi Bai (1886) I.L.R., 10 Bom., 400, referred to.

Even if the judgment-debtor was a party thereto, there is no *lis pendens* as the doctrine of *lis pendens* applies only to alienations which are inconsistent with the right which may be established by the decree in the suit: here as the sale in execution proceeded on the very footing that the property belonged to the judgment-debtor, the doctrine is inapplicable.

Per NAPIER, J.—The doctrine of *lis pendens* does not apply as the judgment-debtor was not actually or constructively a party to the claim suit.

Phul Kumari v. Ghanshyam Misra (1908) I.L.R., 35 Cal., 202 (P.C.), explained.

Krishnappa Chetty v. Abdul Khader Sahib (1915) I.L.R., 38 Mad., 535, dissented from.

SECOND APPEAL against the decree of A. N. ANANTARAMA AYYAR, the Subordinate Judge of Tinnevely, in Appeal No. 84 of 1914, preferred against the decree of K. S. GOPALARATNAM AYYAR, the District Munsif of Ambasamudram, in Original Suit No. 48 of 1913.

The first defendant obtained a decree in Small Cause Suit No. 1766 of 1907, against the third defendant and in execution of the said decree, the suit properties were sold in auction and purchased by the first and second defendants on the 20th November, 1908 and in October, 1909. The plaintiff had brought a suit (Original Suit No. 144 of 1907) against the third defendant and obtained an attachment before judgment of the same properties in 1907. The third defendant's wife put in a claim petition in the said suit in respect of the attached properties. The petition was allowed in her favour on the 28th August, 1907. The plaintiff thereupon filed a suit (Original Suit No. 127 of 1908) against her. The third defendant was not made a party either to the claim proceedings, or to the subsequent suit. The latter suit was dismissed on the 28th October, 1908; but the plaintiff filed an appeal which was allowed in his favour on the 8th September, 1910. The plaintiff, having obtained a decree in his suit (Original Suit No. 144 of 1907) against the third defendant, applied for attachment and sale of the properties and purchased the same in auction on the 10th November, 1911.

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The plaintiff, as purchaser in auction in execution of his decree, sued to recover the properties from the first and second defendants, who were the purchasers in auction in 1908 and 1909 in execution of the decree in the Small Cause Suit above mentioned during the pendency of the appeal in the claim suit. The plaintiff contended that the auction sale to the first and second defendants was void under the rule of *lis pendens*. Both the lower Courts dismissed the suit; the plaintiff preferred a Second Appeal.

S. Ramaswami Ayyar for the appellant.

K. V. Krishnaswami Ayyar for respondents Nos. 1 and 2.

WALLIS, C.J.—This appeal raises the following question. If, WALLIS, C.J. when a decree-holder has attached the property of the judgment-debtor in execution of a money decree and while he is seeking to establish his right to attach and sell such property as the property of the judgment-debtor by suit against a successful claimant, the judgment-debtor not being a party to the claim proceedings or the subsequent suit, another decree-holder attaches the same property and brings it to sale, is the auction-purchaser affected by the doctrine of *lis pendens* so that a subsequent purchaser at a Court auction in execution of the decree in execution of which claim proceedings were taken acquires a good title as against him? In this case the first sale took place while the claim proceedings were pending at a stage when the claimant had succeeded in the suit and an appeal had been filed by the judgment-creditor, which was afterwards successful. The sale was in execution of a decree against the judgment-debtor and the claimant, and must be taken to have been of both their interests; but, as it has since been found that the claimant had no interest, the sale may be treated merely as a sale of the judgment-debtor's interest. The case does not come within section 64, Civil Procedure Code, which only avoids private transfers and deliveries contrary to the attachment as against all claims enforceable under the attachment, and must, I think, be held applicable to private transfers between the date of the attachment and the final decision in any claim proceedings and the subsequent suit thereon, as held in *Sukhdeo Prasad v. Jamna* (1). Again private alienations by the claimant though not strictly within the words of the section 64 must also be held

(1) (1901) I.L.R., 28 All., 60.

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to be subject to the result of that litigation, as held in *Krishnappa Chetty v. Abdul Khader Sahib*(1). The present case, however, is one of a sale in execution and it is quite clear that under the Code attachment was not intended in any way to affect attachments and sales in execution of other decrees. The Code contemplates co-existing decrees and orders for sale, and contains provisions as to the Court which in such a case is to have the conduct of the sale, and as to rateable distribution of the sale-proceeds among the various decree-holders. This being so, can it be that the filing of a claim-petition in one of the suits questioning the right to attach and the subsequent suit in which strictly speaking the only question at issue is the judgment-creditor's right to attach the property as the property of the judgment-debtor operate under the doctrine of *lis pendens* against all sales in execution of other decrees against the judgment-debtor, so as to make the auction purchaser's title dependent on the result? Where the right to attach the property as the property of the judgment-debtor is admitted, a prior attachment in one suit does not affect a sale under a later attachment in another suit; and it is difficult to see why the fact that the right to attach is being questioned by a stranger to the suit should make any difference. The effect of answering the question in the affirmative would be to interfere with the due working of the provisions of the Code for the simultaneous execution of several decrees against the same judgment-debtor, and if it had been intended that any such result should follow when the right to attach is questioned by claim proceedings, it would have been expressly provided for. This question was decided in *Lalu Mulji Thakar v. Kashibai*(2), in the case of a judgment-debtor named Pitambar, where the Court held that the doctrine of *lis pendens* was inapplicable on two grounds, one that the purchaser at the execution sale did not derive title from Pitambar, and the other that Pitambar was not a party to the claim suit and was not represented therein by the plaintiff simply because the plaintiff sought to establish his right to attach and sell the property as the property of Pitambar. In this case also the judgment-debtor was not a party to the claim proceedings and the attaching creditor's subsequent suit, and the decision

(1) (1915) I.L.R., 38 Mad., 535.

(2) (1886) I.L.R., 10 Bom., 400.

that he could not be considered to be represented in that suit is entirely in accord with the subsequent decisions of this Court in which the question has arisen in other connexions. This ground would therefore be sufficient to dispose of the present case. But even supposing the judgment-debtor to have been a party, I do not consider that that would make any difference. The observations of the learned Judges that the purchaser at the Court auction did not derive title from the judgment-debtor are not in accordance with the view now prevailing. There is however a broader principle which is sufficient to take the case out of the operation of section 52 of the Transfer of Property Act, and that is that, as held in *Muniswami v. Dakshnamurthi*(1), the doctrine of *lis pendens* applies only to alienations which are inconsistent with the right which may be established by the decree in the suit. Here the sale in execution proceeded upon the very footing that the property belonged to the judgment-debtor and the doctrine is therefore inapplicable to the case. The scheme of the Code as already observed is to allow executions of money decrees to go on simultaneously, and to hold that the sale in any one suit may be made available in other suits by way of rateable distribution. The lower Court was right and the second appeal must be dismissed with costs.

NAPIER, J.—The question that arises in this appeal is whether the sale of certain properties by Court auction which were purchased by defendants Nos. 1 and 2 in execution of a decree obtained by the first defendant in Small Cause Suit No. 1766 of 1907 is good against the subsequent purchase of the same properties by the plaintiff in execution of his decree in Original Suit No. 144 of 1907. It is contended by the plaintiff that the properties in question were bought by the defendants in circumstances that enable him to plead that the sale is void by virtue of the doctrine of *lis pendens*. The suit by the plaintiff was brought against the third defendant and he had attached the properties in question before judgment. The suit in which defendants Nos. 1 and 2 bought the properties was brought by the first defendant against defendants Nos. 3 and 4 who are husband and wife some time after the plaintiff's suit. Prior to the plaintiff obtaining a decree the fourth defendant, wife of the

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(1) (1882) I.L.R., 5 Mad., 371.

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third defendant, put in claim petitions (Exhibits E and F) with respect to the attached properties. To these petitions she made the plaintiff a party, but not the third defendant, her husband, who was the defendant in the suit. The District Munsif held an enquiry and on the 28th August 1907 allowed the claim and directed the release of the properties from attachment before judgment (vide Exhibit C). The plaintiff then filed the suit, Original Suit No. 127 of 1908, against the fourth defendant, the claimant, not making the third defendant, her husband, a party under section 283 of the old Civil Procedure Code (Order XXI, rule 63 of the new Code) to establish the right which he claimed, viz., the right to attach. This suit was dismissed by the District Munsif on the 28th October 1908, but the decision was reversed in appeal on the 8th September 1910. The plaintiff then applied for attachment and sale, he having meanwhile got a decree against the third defendant and he purchased the properties on the 10th November 1911 in the sale in execution of his decree. Three years before this, on the 20th November 1908, the first defendant purchased the first item in Court-sale by himself in execution of his Small Cause Suit decree against defendants Nos. 3 and 4; and in October 1909 the second defendant purchased the second item in execution sale by the first defendant in the said small cause suit. There has been some contention before us as to whose interests were purchased in these last Court sales, but I am satisfied that the interests of both the defendants Nos. 3 and 4 in the properties were sold. The result of the appeal in the claim suit is that the fourth defendant has been found to have had no interest in those properties. So we are only concerned with the effect of these sales on the interest of the third defendant, the judgment-debtor in the original suit brought by the plaintiff. It is contended for the appellant that this sale was subject to his rights in the third defendant's properties and that therefore he is entitled to the properties. Mr. Krishnaswami Ayyar raises two defences to this contention, viz. (1) that as the judgment-debtor was not a party to either the claim proceedings or the claim suit, section 52 of the Transfer of Property Act does not apply; and (2) as the only claim made by the plaintiff was a right to attach, that was not a right to immoveable property within the meaning of section 52, Transfer

of Property Act, and so could not be affected by the transfer by court sale. It is now beyond dispute that involuntary sales by decree are covered by the mischief of the doctrine, though I do not think it has been decided that such sales come within the actual purview of section 52, Transfer of Property Act. I am inclined to think that they do not, as under section 2, proviso (d) of the Act,

"Nothing herein contained shall be deemed to affect any transfer by operation of law or by, or in execution of, a decree of a Court, save as provided by section 57 and Chapter IV of the Act", neither of which apply to section 52. I will take it however that the doctrine is as stated in the language of the section.

It has been argued for the appellant, first that the judgment-debtor was a party to the claim proceedings. I cannot accept this contention as there is no evidence of any notice being served on him and it is clear that he did not appear. The fact that his name together with that of nine other defendants appears in the heading of the claim petition, only means that the petition was in a suit to which he and the other defendants were parties. In this view, the plaintiff must fail. But I am of opinion that even if the judgment-debtor had been a party to the claim proceedings, the position of the plaintiff would have been no stronger. Admittedly he was not a party to the claim suit. It is contended, however, on behalf of the appellant that he was constructively a party, being represented by the plaintiff; and reliance is placed on two decisions of this Court—*Kadir Mohideen Marakkayar v. Muthukrishna Ayyar*(1) and *Krishnappa Chetty v. Abdul Khader Sahib*(2). The first of these cases only decides that where on the application of the plaintiff, a certain person is entered on the record in the place of a deceased defendant as his legal representative and that person raises no objection that he was not the sole legal representative of the deceased defendant and that there were others who ought to be joined, and where no other person claiming to be co-heir has applied to have his name joined as legal representative then that person who was so brought on the record sufficiently represents the estate of the deceased for the purpose of the suit, and in the absence of any fraud or collusion the decree passed in such suit will bind

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(1) (1903) I.L.R., 26 Mad., 230.

(2) (1915) I.L.R., 38 Mad., 535.

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the estate. This proposition has been affirmed by the Privy Council as being necessary to protect bona fide purchasers at court auction. But it is no authority for the proposition now contended for. *Krishnappa Chetty v. Abdul Khader Sahib*(1) is however in point. In that case Mr. Justice SADASIYA AYYAR thought himself bound by the decision of the Privy Council in *Phul Kumari v. Ghanshyam Misra*(2) to hold that the claim suit is only a continuation of the claim proceedings and that therefore a series of cases beginning with *Narainan, K. I. v. Nilakandan Nambudri, K. I.*(3) in which the contrary view was taken, must be held to be overruled. The reasons given by the learned Judge for coming to that conclusion will be found stated at pages 541 to 545. The proposition which he considers to have been established by the decision of the Privy Council, is stated by him at page 544.

"Suits of this class though called original suits, are not in their essence original actions but merely forms of appeal allowed by the Civil Procedure Code to be brought in the guise of original suits."

With due deference to the learned Judge, I do not think that the language used by the Privy Council compels us to hold that a judgment-debtor who was a party to claim proceedings is constructively a party to a claim suit between the claimant and the attaching creditor. What was actually decided in *Phul Kumari v. Ghanshyam Misra*(2) was that a claim suit was properly stamped with a court-fee of Rs. 10 as a suit to

"alter or set aside a summary decision or order" of a Civil Court within the meaning of sub-section (1) of Article XVII, Schedule II of the Court-fees Act (VII of 1870). It had been contended in the High Court that the proper fee was one calculated on the value of the decree in execution of which the claimant's property had been wrongly attached, and the High Court held that the suit was one in which consequential relief was prayed for and therefore subject to an ad valorem court-fee. Their Lordships of the Privy Council point out that the cause of action is the order passed on the claim petition and decide that it comes exactly within the words,

(1) (1915) I.L.R., 38 Mad., 535. (2) (1908) I.L.R., 35 Calc., 202 (P.C.).
(3) (1882) I.L.R., 4 Mad., 131.

"to alter or set aside an order."

In explaining the action, their Lordships use the following language:—

"Section 283, Civil Procedure Code, recognizes such a suit as not merely an appropriate but the only mode of obtaining review in such cases."

Now it is clear that in this sentence their Lordships are not using the term 'review' in the technical sense given to it by the Civil Procedure Code. A little further on, their Lordships say:

"Misled by the form of the action directed by section 283, both parties have treated the action as if it were not simply a form of appeal, but as if it were unrelated to any decree forming a cause of action."

I do not think that in using the words "a form of appeal," their Lordships intended to do more than indicate that this was the method by which the effect of the order could be got rid of. Nowhere in their judgment do their Lordships express any opinion that the attaching creditor represents the judgment-debtor and no such question arose in that suit. It seems to me that all that their Lordships have decided is that the words in section 283, viz.,

"may institute a suit to establish the right which he claims to the property in dispute," come within the words,

"to alter or set aside an order of a Civil Court," because the order of a Court on a claim petition is one passed in proceedings to establish the same right which is claimed to the property in dispute. In the view I have taken on the first point, I do not think it necessary to express any opinion as to what would have been the result if the judgment-debtor had been made a party to the claim suit. The appeal will be dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Kumaraswami
Sastriyar.

1916,
November, 27
and
December, 21.

KRISHNAPPA MUDALY (RESPONDENT-PLAINTIFF), APPELLANT,

v.

PERIASWAMY MUDALY (PETITIONER-FOURTH DEFENDANT),
RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 47, O. XXI, rr. 100 and 101—Exonerated defendant, whether a party to the suit—Suit for redemption—Person claiming adversely to both the mortgagor and the mortgagee—Misjoinder of causes of action and parties—Party exonerated—Delivery of possession in execution—Objection to delivery of property by exonerated defendant—Proceedings whether under section 47 or Order XXI, rule 100 of the Code.

Where a party to a mortgage suit, who sets up a title adverse to both the mortgagor and the mortgagee, has been exonerated from the suit on the ground of misjoinder and his claim has not been adjudicated upon in the suit:

Held, that he does not remain a party to the suit for the purposes of section 47 of the Civil Procedure Code and his claim petition in respect of properties delivered in execution of the decree to the decree-holder falls under Order XXI, rule 100 of the Code.

Ramaswami Sastrulu v. Kameswaramma (1900) I.L.R., 23 Mad., 361 (F.B.) and *Sivasamba Iyer v. Kuppan Samban* (1915) 39 M.L.J., 629, distinguished.

Gadicherla Chinna Seetayya v. Gadicherla Seetayya (1898) I.L.R., 21 Mad., 45 and *Venkatapati Naidu v. Subraya Mudali* (1907) 17 M.L.J., 416, referred to.

Jaggeswara Dutt v. Bhuban Mohan Mitra (1906) I.L.R., 33 Cal., 425 and *Musammam Radha Kunwar v. Thakur Reoti Singh* (1916) 20 C.W.N., 1279 (P.C.), followed.

APPEAL against the order of H. D. C. REILLY, the Acting District Judge of South Arcot, in Appeal No. 74 of 1915, preferred against the order of P. VENKATARAMA AYYAR, the District Munsif of Tindivanam, in Execution Petition I, Execution Application No. 1 and Miscellaneous Petition Register No. 15 of 1915 in Original Suit No. 481 of 1914.

The plaintiff sued as the purchaser of the suit properties to redeem a mortgage executed by the sixth defendant in favour of the first defendant. The fourth defendant was joined as a party to the suit, as he claimed an interest in the property; but as the

* Appeal Against Appellate Order No. 28 of 1916.

interest claimed by him was adverse to both the mortgagor and the mortgagee, he was exonerated with costs from the suit and his claim was not adjudicated upon in the suit. The plaintiff obtained a decree for redemption, and he paid the amount decreed and applied for possession of the property. The amin in execution delivered a portion of the property in the possession of the fourth defendant, who thereupon filed a claim petition under Order XXI, rule 100, of the Code of Civil Procedure. The lower Courts found that the fourth defendant was in possession on her own account and directed that the decree-holder should deliver back possession to the fourth defendant, without adjudicating on the question of title of the fourth defendant. The decree-holder preferred a Civil Miscellaneous Second Appeal to the High Court.

T. Ethiraja Mudaliyar for the appellant.

S. Venkatarama Ayyar for *V. Viswanatha Sastriyar* for the respondent.

JUDGMENT.—The appellant who claimed title as purchaser of certain items of property sued to redeem a mortgage executed by the sixth defendant in favour of the first defendant. The fourth defendant who is the present respondent was made a party to the suit on the ground that he was claiming an interest in the property. As he claimed an interest adverse to the mortgagor and mortgagee, he was exonerated from the suit. The order recites that the fourth defendant was an unnecessary party to the suit and that he was exonerated with costs "leaving open the issues affecting him." A decree for redemption was passed in favour of the plaintiff-appellant, and he paid the amount decreed and prayed that possession of the mortgaged property be delivered to him. The amin in execution delivered a portion of the property in the possession of the respondent. The respondent who had been exonerated from the suit and whose claims to the properties was not adjudicated upon filed a petition under Order XXI, rule 100 of the Code of Civil Procedure, objecting to possession being given on the ground that the property belonged to him and was in his possession and enjoyment and that the decree in the suit was collusively obtained by the plaintiff against the sixth defendant who had no title. The decree-holder opposed the application and contended *inter alia* that as the fourth defendant was a party to the suit his

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remedy was under section 47 of the Code and not under Order XXI, rule 100. The District Munsif was of opinion that section 47 did not apply and that he came under Order XXI, rule 100. He ordered the fourth defendant to be restored to possession. On appeal the District Judge was of opinion that section 47 applied but dismissed the appeal on the ground that the provisions of section 47 and Order XXI, rule 100 were not mutually exclusive.

The chief grounds urged in appeal are that the fourth defendant continued to be a party to the suit notwithstanding the fact that he was exonerated, that the lower Appellate Court should have gone into the question of the title of the fourth defendant and should have dismissed his petition if he was unable to show a title superior to that of the plaintiff instead of having confined itself to the main question of possession and dispossession.

We are of opinion that the case falls under Order XXI, rule 100 of the Code of Civil Procedure, and that the lower Courts were right in refusing to decide in execution proceedings questions which had advisedly not been adjudicated upon in the suit.

When a party to a mortgage suit is exonerated on the ground that he sets up a title adverse to both the mortgagor and mortgagee, the ground of exoneration is that he ought never to have been made a party, the suit being bad for multifariousness as the plaintiff is joining causes of action which ought not to be joined and the joinder of which will be embarrassing. In *Jaggewara Dutt v. Bhuban Mohan Mitra*(1) it was held that such a suit was against the provisions of sections 44 and 45 of the old Code of Civil Procedure (Order II, rules 4 and 5 of the present Code) and was bad for multifariousness and in *Musammatt Radha Kunwar v. Thakur Reoti Singh*(2) their Lordships of the Privy Council were of opinion that the joinder in a mortgage suit of parties who set up adverse claims was irregular and would only lead to confusion.

The exoneration in the present case having been on the ground of misjoinder we are of opinion that the party whose claim was not adjudicated upon does not remain a party to the suit for the purpose of section 47 of the Code of Civil Procedure.

(1) (1906) I.L.R., 33 Cal., 425. (2) (1916) 20 C.W.N., 1279 (P.C.).

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Exoneration from the suit may be due to various causes and the question whether a party remains on record for the purpose of section 47 in spite of such exoneration will depend upon the nature and scope of the order having regard to the pleadings and the reason which led to such dismissal or exoneration. To hold that in cases of misjoinder (and consequent refusal of the Court to adjudicate upon the particular matters in contest) the party whose claim was not adjudicated upon and who was exonerated remains a party to the suit would lead to the anomaly that the Court would be bound in execution proceedings to decide the very questions which it refused to determine in the suit.

No authority has been cited for the broad proposition that a party, once on the record remains a party notwithstanding exoneration so as to entitle the Court to determine in execution matters which it refused to adjudicate upon in the suit. Most of the authorities cited were under section 244 of the old Code of Civil Procedure, and do not throw much light on the explanation to section 47 which was added by the Code of 1908 and there is a conflict of authority so far as the Madras High Court is concerned as to the effect of exoneration. None of the cases cited deal with the case of the striking out of a claim on the ground of misjoinder. *Ramaswami Sastrulu v. Kameswaramma*(1) and *Sivasamba Iyer v. Kuppan Samban*(2) decide that a party who is exonerated and against whom a suit is dismissed comes within section 244 of the old Code of Civil Procedure, and section 47 of the new Code, but they do not appear to be cases of exoneration by reason of misjoinder of causes of action. In *Ramaswami Sastrulu v. Kameswaramma*(1) the observation of the Judges when referring to *Gadicherla Chinna Seetayya v. Gadicherla Seetayya*(3) indicate that where the name of a party who has been exonerated is actually removed from the record, the result would have been different. In *Abdul Kasim v. Thambusami Pillai*(4) OLDFIELD AND KRISHNAN, JJ., were of opinion that the removal of the name of a party from the suit such as appears to have taken place in *Gadicherla Chinna Seetayya v. Gadicherla*

(1) (1900) I.L.R., 23 Mad., 361 (F.B.) at p. 367. (2) (1915) 29 M.L.J., 629.

(3) (1898) I.L.R., 21 Mad., 45.

(4) Civil Revision Petition No. 768 of 1915 and Appeal Against Appellate Order No. 88 of 1915.

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Seetayya(1) would take the case out of section 47 of the Code. As pointed out in *Venkatapati Naidu v. Subraya Mudali*(2) the mere fact that the name of the exonerated party is not formally removed from the record pursuant to the order exonerating him would not affect the question as to whether he remains a party.

The appeal fails and is dismissed with costs.

K.R.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield
and Mr. Justice Kumaraswami Sastriyar.*

1916,
September, 21
and
October, 12
and
1917,
April, 17,
18 and 20.

V. PERUMAL PILLAI (SIXTH DEFENDANT), APPELLANT,

v.

R. M. M. R. M. RAMAN CHETTIAR (SECOND PLAINTIFF),
RESPONDENT.*

Mortgage—Suit for sale of one item exonerating other items mortgaged—Right of mortgagee to exonerate—Contribution, duty of, whether, lost by exoneration—Transfer of Property Act (IV of 1882), ss. 60 and 82.

A mortgagee seeking to realize the amount due to him brought a suit for sale of one only of the items mortgaged impleading therein the mortgagor and the person who purchased the equity of redemption in the one item in execution of a money decree. The mortgagee exonerated from liability the other items mortgaged:

Held by the FULL BENCH, that, a mortgagee voluntarily releasing from the suit a portion of the mortgaged property is not bound to abate a proportionate part of the debt and is entitled to recover the whole of the mortgage amount from any portion of the mortgaged property.

Ponnusami Mudaliar v. Srinivasa Naickan (1908) 1 L.R., 31 Mad., 333, and *Surjiram Marwari v. Barhamdeo Parsad* (1905) 1 C.L.J., 337, dissented from.

Semle:—A release of certain items by the mortgagee has not the effect of releasing those items from liability for contribution under section 82 of the Transfer of Property Act.

Jugal Kishore Sahu v. Kedar Nath (1912) 1 L.R., 34 All., 606, referred to.

SECOND APPEAL against the decree of T. SRINIVASA AYYANGAR, the Subordinate Judge of Tuticorin, in Appeal No. 71 of 1913,

(1) (1898) 1 L.R., 21 Mad., 45. (2) (1907) 17 M.L.J., 416.

* Second Appeal No. 1893 of 1914.

preferred against the decree of MAULAVI G. J. QURAISHI SAHIB BAHADUR, the District Munsif of Tuticorin, in Original Suit No. 231 of 1911.

One Subbu Naidu (deceased) who was the father of defendant No. 1 and the husband of defendant No. 2 hypothecated four items of property for Rs. 1,000 to the plaintiff on 2nd May 1898. Defendant No. 6 bought the second item in execution of a simple money decree against the mortgagor, six months after the institution of the present suit and was added as supplemental defendant. The mortgagee brought this suit for the realization of Rs. 2,300 due to him under the mortgage and exonerated items 1, 3 and 4 from liability for the mortgage and prayed for a decree against the defendants and against the second item. One of the issues in the case was "whether the exoneration by the plaintiff of other items of the hypotheca is legal and valid." Both the lower Courts gave a decree as prayed for, holding that the plaintiff was entitled to exonerate some of the items and to get a decree for the entire amount against the rest. Thereupon the sixth defendant preferred this Second Appeal.

K. R. Rangasami Ayyangar for the appellant.

K. S. Jayarama Ayyar for *T. Arumainatham Pillai* for the respondent.

This Second Appeal came on for hearing in the first instance before SESHAGIRI AYYAR and NAPIER, JJ., who made the following ORDERS OF REFERENCE TO A FULL BENCH.

SESHAGIRI AYYAR, J.—The point for decision in this case is whether a mortgagee suing on his mortgage is entitled to exonerate certain items of the mortgaged property from liability and can recover the whole debt by the sale of the other items. There are some possible theories: one is that by virtue of the contract of mortgage every item of the property is charged with liability for a proportionate share of the debt; another that the mortgagee has the option to recover the whole debt from any one or more of the properties mortgaged; and a third that the purchaser of the equity of redemption in any portion of the mortgaged properties is entitled to assume that the burden of the debt is distributable equally upon the whole property. The principle of section 37 of the Transfer of Property Act may be invoked in his favour. The first proposition is not affected by the principle that after decree, it is open to the mortgagee

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decree-holder to sell any one of the properties covered by the decree to satisfy the decree debt. It may be said that whatever may have been the original obligation of the properties to contribute rateably, the decree imposes a liability jointly and severally (if one may use such an expression in respect of things as opposed to persons) upon the properties comprised in the decree, and that the rights of the decree-holder are not restricted to proceeding rateably against each item of the property. Therefore, the cases which recognize the right after decree to sell any one of the properties do not compel me to hold that it is a necessary corollary from it that the mortgagee has the right to proceed in the suit against any one of the properties mortgaged.

It has been held by BENSON and MILLER, JJ., in *Ponnusami Mudaliar v. Srinivasa Naickan*(1) that if a mortgagee voluntarily releases in the suit a part of the mortgaged property, he cannot throw the whole burden of the debt on the other portion. Dr. Rash Behari Ghose has taken the same view in his book on Mortgages. In *Krishna Ayyar v. Muthukumaraswamiya Pillai*(2), Sir ARNOLD WHITE, C.J. and SUBRAHMANYA AYYAR, J., held

“that, if the action of the mortgagee had had the effect of extinguishing the mortgage lien upon any portion of the mortgaged property so as to relieve it from the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be rateably liable for.”

They proceed to observe

“so long as the equities in the matter of contribution as between these parties are thus unaffected by the act of the plaintiff, the latter's right to be paid the whole of his debt from whatever portion of the mortgaged properties he wishes to comprise in his suit cannot be questioned.”

Hari Kissen Bhagat v. Veliat Hossein(3) supports the proposition enunciated in *Ponnusami Mudaliar v. Srinivasa Naickan*(1). In *Moro Raghunath v. Balaji Trimbak*(4) (decided before the Transfer of Property Act was extended to Bombay), the same view was taken. The question was discussed at some length in *Jugal Kishore Sahu v. Kedar Nath*(5) and the learned Judges

(1) (1908) I.L.R., 31 Mad., 333.

(2) (1906) I.L.R., 29 Mad., 217.

(3) (1903) I.L.R., 30 Cal., 755.

(4) (1889) I.L.R., 13 Bom., 45.

(5) (1912) I.L.R., 34 All., 606.

held that although as between the mortgagor and the mortgagee the latter may be entitled to recover his debt by the sale of any one of the items mortgaged, the moment the equity of redemption in them passes to third persons, this right ceases to be exercisable. The third theory, I suggested, may account for this view.

It is contended, on the other hand, that the right to contribution is secured by section 82 of the Transfer of Property Act; that that right is enforceable by and against the purchasers of the various items of property, without interfering with the rights of the mortgagee to proceed against any one of these items. This is the view taken recently by my learned brother Mr. Justice NAPIER in *Venkata Subba Reddi v. Bagiammal*(1). In this state of the authorities, I think it desirable that the following question should be referred for the opinion of the Full Bench:—

“Whether a mortgagee voluntarily releasing from the suit a portion of the mortgaged property is bound to abate a proportionate part of the mortgage debt?”

NAPIER, J.:—I do not think that it can be disputed that primarily every portion of the mortgaged property whether there were originally more than one mortgagor or by assignment there has become more than one, is security for the mortgage debt and that the mortgagee has the option of recovering the whole debt from any portion. The only question is whether his right is lost by the fact of his releasing part of the mortgaged property either for a proportionate amount of the debt or freed from any liability and if so whether this benefit operates in favour of an original mortgagor or an assignee only. As my learned brother points out a view has been taken that by such release rights of contribution are lost, and therefore the mortgagee's right to recover the whole debt from the remaining property is put an end to. This proposition is however not accepted in *Jugal Kishore Sahu v. Kedar Nath*(2) for, the Court in that case on page 610 states that “notwithstanding the release, the part released remains liable to contribute rateably.” In spite of this view the Court held, as my learned brother points out, that when the equity of redemption has passed to

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(1) (1916) I.L.R., 39 Mad., 419.

(2) (1912) I.L.R., 34 All., 606.

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a third party the right to proceed against that part of the mortgaged property for the balance ceases to be exercisable. *Hari Kissen Bhagat v. Veliat Hossein*(1) does not rest on any question of contribution either but only decides that where the mortgagee is willing, as in that case he was, to apportion the debt between the released property and the other and so brought his suit for a portion against the other only he could not be compelled to make the released mortgagor a party. (The head-note is, I think, misleading.) I have given my best consideration to the matter in *Venkata Subba Reddi v. Bagiammal*(2), where I point out that it will be a strange result if on the true construction of section 82 of the Transfer of Property Act the right of contribution of the properties is lost, whereas by section 44 of the Contract Act the release "does not free the joint promisor from responsibility to the other joint promisor." My learned brother and myself have lately considered this section in *Kunchithapatham Pillai v. Palamalai Pillai*(3) and have held that "the contract to the contrary" means a contract between the owners of the equity of redemption and not a contract between the mortgagee and one of the owners. It is to be noted that in *Krishna Ayyar v. Muthukumaraswamiya Pillai*(4), the Court does not decide that releasing does release the property from its liability to the co-mortgaged properties. If no arrangement made between one of the mortgagors and the mortgagee can affect the rights of the other mortgagors to make the released property liable for its rateable proportion under section 82, the basis for the equity is gone, and I am unable to see why any equity is required where a statutory remedy is provided by the section. I agree with my learned brother in the terms of reference.

On this Reference :—

S. Panchapakesa Sastriyar for *K. R. Rangaswami Ayyangar* for the appellant.—A mortgagee who exonerates from suit some of the mortgaged properties cannot recover the whole amount from the remainder of the mortgaged properties and he is bound to abate a proportionate portion of the mortgage debt.

(1) (1903) I.L.R., 30 Cal., 755. (2) (1916) I.L.R., 39 Mad., 419 at p. 422.
(3) (1917) 32 M.L.J., 347. (4) (1906) I.L.R., 29 Mad., 217.

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Section 60 of the Transfer of Property Act refers only to redemption. There is no section with regard to sale. All the properties are in law bound to satisfy the mortgage debt rateably and this will appear from the rule of contribution enjoined by the Act. He referred to *Imam Ali v. Baij Nath Ram Sahu*(1), *Surjiram Marwari v. Barhamdeo Persad*(2), *Surjiram Marwari v. Barhamdeo Persad*(3), *Surjiram Marwari v. Barhamdeo Persad*(4), *Sheo Prasad v. Behari Lal*(5), *Jai Gobind v. Jas Ram*(6), *Jugal Kishore Sahu v. Kedar Nath*(7) and *Ponnuusami Mudaliar v. Srinivasa Naickan*(8).

The mortgagee is bound in equity to distribute the burden equitably on every item of the mortgaged property. Even the mortgagor can have contribution. The equitable principle is that the right of contribution is not to be prejudiced though this principle is not to be found in any section of the Transfer of Property Act: vide *Jagapathi Raju v. Sudrusannama Arad*(9).

The words "are mortgaged" in section 82 of the Transfer of Property Act mean "remain mortgaged at the time of the suit."

K. S. Jayarama Ayyar for *T. Arumainatha Pillai* for the respondent.—The question referred must be answered in the negative. The matter is governed by sections 60, 82, 95 and 56 of the Transfer of Property Act. The mortgagee can proceed against any portion of the mortgaged properties and get a decree for the whole amount. I rely on *Krishna Ayyar v. Muthukumaraswamiya Pillai*(10) and *Appayya v. Rangayya*(11). The Calcutta view based upon the passage from Ghose on Mortgages has been disapproved of in the Full Bench decision of *Appayya v. Rangayya*(11). Even in Calcutta, *Hara Kumari Chowdhurani v. Eastern Mortgage and Agency Company, Limited*(12) is the other way. He referred to *Kunchithapatham Pillai v. Palamalai Pillai*(13).

S. Panchapakesa Sastriyar replied.

(1) (1906) I.L.R., 33 Cal., 613 at p. 622.
(2) (1906) 1 C.L.J., 337. (3) (1905) 2 C.L.J., 202.
(4) (1905) 2 C.L.J., 288. (5) (1903) I.L.R., 25 All., 79.
(6) (1898) A.W.N., 120. (7) (1912) I.L.R., 34 All., 608.
(8) (1908) I.L.R., 31 Mad., 333.
(9) (1916) I.L.R., 39 Mad., 795 at pp. 799 and 800.
(10) (1908) I.L.R., 29 Mad., 217 at pp. 219 and 224.
(11) (1908) I.L.R., 31 Mad., 419 at p. 422 (F.B.).
(12) (1908) 7 C.L.J., 274. (13) (1917) 32 M.L.J., 347.

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The following OPINION of the Full Bench was delivered by WALLIS, C.J.—We think this question must be decided with reference to the provisions of the Transfer of Property Act, and more especially of section 60 which deals with the right to redeem. Redemption in England is an equitable relief which the Court allows on such terms as have been considered equitable in a long course of decisions. One of the established rules is not to allow redemption of any portion of the mortgaged property except on payment of the whole of the mortgage debt, and further limitations of the right to redeem are to be found in the doctrines of tacking and consolidation. In India the right is now governed by section 60 which gives the mortgagor a right to redeem on payment or tender of the mortgage money but expressly provides that

“nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.”

This section ignores the equitable doctrine of consolidation which requires the mortgagor to pay something more than the mortgage money as a condition of redemption, but it adopts and gives statutory force to the rule that a part of the mortgaged property is not to be redeemed except on payment of the mortgage money. One exception only is made for the case of the mortgagee having himself acquired part of the mortgaged property. To insist on the mortgagor paying the mortgagee the whole mortgage money in such a case without a proportionate abatement would give the mortgagor an immediate right of suit against the mortgagee or his assignees to recover back by way of contribution what he had paid in excess of his proportionate share, and this the legislature has avoided by the exception. It has not made any such statutory exception in favour of the mortgagor in the case, mentioned in the Order of Reference, of a mortgagee voluntarily releasing from the suit a portion of the mortgaged property, and we are not at liberty to derogate from the terms of the section by introducing one. Nor can we entertain the argument that such a case can be considered to come within the exception because the action of the mortgagee in

releasing part of the mortgaged property is an acquisition by himself within the meaning of the section.

If the mortgagor is not entitled to an abatement from the mortgage money on this ground in a suit for redemption, the same rule must, we think, apply in a suit for sale or foreclosure in which the Court has equally to fix the sum on payment of which the mortgagor is entitled to redeem. In *Krishna Ayyar v. Muthukumaraswamiya Pillai*(1), there is an observation at the close of the judgment

“that if the action of the mortgagee (in releasing part of the mortgaged property) has had the effect of extinguishing the mortgage lien upon any portion of the mortgaged property so as to relieve it from the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be rateably liable for.”

It is, we think, clear that the release by the mortgagee has no such effect, and that the released portion of the mortgaged property remains liable for contribution under section 82 of the Transfer of Property Act, as pointed out by CHAMIER and PIGGOTT, JJ., in *Jugal Kishore Sahu v. Kedar Nath*(2). The owner of part of the mortgaged property who pays off the mortgaged debt is entitled under this section to contribution from the rest of the mortgaged property in the absence of a contract to the contrary, that is to say, unless he has deprived himself of that right by contract. We may also observe that the words in the first paragraph of the section

“where several properties . . . are mortgaged to secure one debt”

mean ‘have been mortgaged,’ just as in the second paragraph in the words,

“where . . . one is mortgaged to secure one debt and then both are mortgaged to secure another debt,”

the meaning is clearly ‘has or have been mortgaged,’ and that the language of the section affords no foundation for the argument that the owners of parts of the equity of redemption could be deprived of their right to contribution under the section by the action of the mortgagee in releasing another portion of the mortgaged property.

The decision in *Ponnusami Mudaliar v. Srinivasa Naickan*(3) proceeds upon the authority of a passage in Mr. Ghose’s

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(1) (1908) I.L.R., 29 Mad., 217 at p. 224.
(2) (1912) I.L.R., 34 All., 606. (3) (1908) I.L.R., 31 Mad., 333.

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well-known work on Mortgages and does not consider the provisions of the Transfer of Property Act on which we have based our conclusion. This is also true of the Calcutta decisions to the same effect to which we have been referred, beginning with *Surjiram Marwari v. Barhamdeo Persad*(1). With great respect we are constrained for the reasons already given to differ from those decisions, and to hold that having regard to the provisions of the Transfer of Property Act it is not open to us to give effect to the suggested equity against a mortgagee who releases part of the mortgaged property from the mortgage. To do so would no doubt make a subsequent suit for contribution unnecessary, but on the other hand it would introduce additional complications into mortgage suits which are already complicated enough. In our opinion however the question has to be decided not on the balance of convenience, but in accordance with the provisions of the Act, and for the foregoing reasons we answer the question referred to us in the negative.

N.R.

APPELLATE CRIMINAL.

Before Sir John Wallis, Kt., Chief Justice.

*Re DUDEKULA LAL SAHIB (ACCUSED), APPELLANT.**

1917,
March, 20,
April, 17
and
May, 1 and 4.

Criminal Procedure Code (Act V of 1898), ss. 247, 403 and 494—Order of acquittal under section 494, whether final bar to further proceedings—Autrefois acquit.

In a summons case, the Public Prosecutor withdrew from the prosecution before the accused had been served and the accused was acquitted under section 494, Criminal Procedure Code.

On a difference of opinion between ABDUR RAHIM and NAPIER, JJ., as to whether the accused could be said to have been tried as well as acquitted within the meaning of section 403, so as to bar further proceedings,

Held by Sir JOHN WALLIS, C.J., under section 429, that the rule of English law requiring the accused to have been tried as well as acquitted in order to bar further proceedings which is embodied in section 494 of the present Code (section 61 of the Code of 1872) is inapplicable to the statutory acquittals subsequently introduced into the Code, i.e., the sections now numbered 494, 247 and 345 which are intended to bar further proceedings whether the accused can be said to have been tried or not.

Cases governed by section 429, Criminal Procedure Code, cannot be referred to a Full Bench.

(1) (1905) 1 C.L.J., 337.

* Criminal Revision Case No. 85 of 1917.

† *Re Kotayya*, (1917) I.L.R., 40 Mad., 977 (foot-note) dissented from.

*Re DUDEKULA
LAL SAHIB.*

CASE referred for orders of the High Court under section 438 of the Criminal Procedure Code, by E. A. DAVIS, to set aside the order of the Deputy Magistrate of Narasaraopet.

The necessary facts appear from the judgment of ABDUR RAHIM, J.

E. R. Osborne, the *Acting Public Prosecutor*, for the Crown.

The accused was not represented.

† *Criminal Revision Case No. 866 of 1916.*

ORDER:—The complainant in this case, K. Venkayya, presented a complaint to the Taluk Magistrate, Nandigama, on 8th August, 1916 against the accused B. Kotayya and others, charging them with an offence under section 426, Indian Penal Code. The case was duly taken on file and posted for hearing, and eventually adjourned to 20th September, 1916; on which date in consequence of the absence of complainant an order of acquittal was passed under section 247, Criminal Procedure Code.

1917,
February, 2
and 27 and
March, 8.

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Subsequently on 22nd September 1916, complainant presented a fresh complaint of the same offence based on the same facts and explained his absence on 20th September 1916 to the satisfaction of the Magistrate. The Magistrate thereupon took cognizance of this second complaint and directed the issue of process to the accused. The sole question is whether section 403, Criminal Procedure Code, is a bar to the Magistrate's taking cognizance of the second complaint by reason of the order of acquittal passed on 20th September, 1916.

In our opinion it is not. Section 403 only bars the retrial of a person, who has once been *tried* and convicted or acquitted: and in this case it does not appear that the accused were tried on the first complaint. The trial of a summons case cannot be said to begin until the particulars of the offence are stated to the accused under section 242, Criminal Procedure Code, and there is nothing in the record to indicate that this was done. In fact from the Magistrate's explanation it may be safely inferred that it was not. No trial having even commenced on the first complaint, section 403 does not bar the Court from taking cognizance of the second complaint.

Our attention has been drawn to the ruling in *In re Guggilapu Paddaya of Palakot*(1), in which a different view of section 403 has been taken: but with all respect we feel unable to concur in the reasoning of the learned Judge who decided that case. In our opinion some meaning must be attached to the word "*tried*" in the early part of section 403 (1). It should not be treated as mere

(1) (1911) I.L.R., 34 Mad., 253.

Re DUDERULA
LAL SAHIB.

This case came on for hearing in the first instance before ABDUR RAHIM and NAPIER, JJ., who made the following ORDERS :—

ABDUR
RAHIM, J.

ABDUR RAHIM, J.—The question of law which we are asked to consider in the letter of reference arose under the following circumstances: The police had filed a charge sheet under section 447 of the Indian Penal Code against a certain person before a Magistrate with second-class powers, a summons was issued but before it was served the Public Prosecutor with the consent of the Court withdrew from the prosecution under section 494, Criminal Procedure Code, and the accused was then

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surplusage as the learned Judge would seem to do. It would have been quite simple to word the section thus :—

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(1) "A person who has once been convicted or acquitted by a Court of competent jurisdiction of an offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offences for which a different charge from the one made against him might have been made under section 239, or for which he might have been convicted under section 237."

This would clearly include an acquittal under section 247 at the very outset before anything had been done in the case. But since the word "tried" has been inserted, we must give it due weight. We are unable to see that this construction renders the provisions of section 247 nugatory; or that any inference can be drawn from the omission to refer to section 247 in the explanation to section 403. None of the three Calcutta cases quoted in *In re Guggilapu Paddaya of Palakot* (1) appear to us to be in point. In *Panchu Singh v. Umor Mahomed Sheikh* (2) the Court simply deals with the power of the District Magistrate to direct further enquiry under section 437, Criminal Procedure Code: and the effect of section 403 is not considered at all. *Bishun Das Ghosh v. The King Emperor* (3) deals with exactly the same point: and the order in the first proceedings was one under section 258—not section 247. The judgment in the last case—*Kedar Nath Biswas v. Adhin Manji* (4)—simply follows the two previous rulings and deals also with an order under section 437, Criminal Procedure Code. Assuming that it is not within the power of a District Magistrate or Sessions Judge to direct a Magistrate to make further enquiry into a case which has been acquitted under section 247, Criminal Procedure Code, it does not follow that the Magistrate may not himself entertain a fresh complaint on the same facts. He

(1) (1911) I.L.B., 34 Mad., 253.

(2) (1899) 4 C.W.N., 346.

(3) (1902) 7 C.W.N., 493.

(4) (1903) 7 C.W.N., 711.

acquitted as required by that section. Thereafter the person on whose field the offence of criminal trespass was alleged to have been committed, preferred upon the same facts a complaint charging the accused with offences under sections 143, 447 and 341 of the Indian Penal Code. That case was tried and the accused convicted and sentenced separately for each of the offences. The convictions were on appeal confirmed but the sentences reduced. The District Magistrate under section 438 of the Criminal Procedure Code has asked us to revise the

is only debarred from doing so by section 403: which is not even referred to in any of these rulings.

The case relied on by the District Magistrate in his order of reference (in *Suraiya Sastri v. Venkata Rao* (1) is easily distinguishable. The accused in that case not only appeared, but "answered to the charge."

Another good reason for declining to treat the word "tried" as mere surplusage is that it is essential to a plea of *autrefois acquit* under English Law. The law is stated in Russell on Crimes at page 1983 of the 7th edition:

"At common law a man who has once been tried and acquitted for a crime may not be tried again for the same offence if he was in jeopardy upon the first trial. He was so in jeopardy if (1) the Court was competent to try him for the offence, (2) the trial was upon a good indictment, (3) the acquittal was on the merits, that is, by verdict on the trial or in summary cases by dismissal on the merits followed by a judgment or order of acquittal."

It is clear that the mere fact of a judgment of acquittal is not in England sufficient to entitle the person acquitted to plead *autrefois acquit*. The matter was exhaustively considered by the Court of King's Bench and the law was laid down as follows by the Lord CHIEF JUSTICE :—

"The true meaning of this great fundamental maxim is that a man shall not twice be put in peril after a verdict has been returned by the Jury, that verdict having been given on a good indictment and one on which the prisoner could be legally convicted and sentenced. It does not however follow that if from any particular circumstance a trial has proved abortive, that the case should not again be submitted to the consideration of a Jury and determined as right and justice may require."

The law being so clear in England and its requirements having been reproduced in the Indian Law we are satisfied that we cannot eliminate the word "tried" from the section. The accused has not been tried and the Magistrate acted in accordance with law in taking the complaint on his file.

The papers will be returned.

(1) (1886) 2 Weir's Cr. R., 457.

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conviction and sentence under section 447, on the ground that the acquittal under section 494 in this case where no charge was required to be framed, operated as a bar to further trial for the same offence.

The effect of an order under section 494 in a summons-case does not appear to have been the subject of any decision so far as the present question is concerned. I had, however, sitting singly to consider the effect of an acquittal under section 247 in *In re Guggilapu Paddaya of Palakot*(1), and held that it operated as a bar to further proceedings for the same offence so long as the order remained in force. But a divisional bench consisting of my learned brother and AYLING, J., have in a recent case, *Re Kotayya*(2) held otherwise. It seems to me that no distinction can be drawn between an acquittal under section 247 and one under section 494 for the purposes of the present question; and I need hardly say that in deference to the views expressed by AYLING and NAPIER, JJ., I have carefully reconsidered the matter. But even a more detailed examination of section 403 and the other provisions of the Criminal Procedure Code and of the authorities has only confirmed me in my former opinion.

The question turns on the construction of section 403. Its sub-section (1) says that

"a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted" is not liable to be tried again for the same offence, while sub-sections (2) and (4)—sub-section (3) does not throw much light on the question as all convictions must be after trial—in dealing with certain cases where the previous acquittal or conviction would not bar further trial, speak of "a person acquitted or convicted of any offence" dropping the words "who has once been tried." It can hardly be doubted that by the words "a person who has once been tried by a Court of competent jurisdiction for an offence and "convicted," or "acquitted," in sub-section (1) and "person 'acquitted' or 'convicted' of any offence" in sub-sections (2) and (4) the legislature contemplated the same set of facts. Now, what is the sense in which the legislature has used the two phrases? In the first place, it must be taken to be a clear implication of

sub-sections (2) and (4) that in cases other than those mentioned therein, the provisions of sub-section (1) should apply and the person who has been "acquitted" or "convicted" should not be tried again. Then the explanation to the section is important in ascertaining what is intended by sub-section (1). It mentions the orders which are not to be regarded as acquittals for "purposes of this section" and this can have little signification, if all orders of acquittal passed in accordance with the express provisions of the Code were not intended to have the effect defined by the section, viz., the barring of further proceedings. There is no attempt made to discriminate between different orders of acquittal.

An examination of the other provisions of the Criminal Procedure Code shows at once the solicitude evinced by the legislature on the question of the form of orders which the various Criminal Tribunals are to pass in different kinds of proceedings in given circumstances with a view mainly to indicate their respective effects and to provide suitable remedies in case of wrong orders of each category. The list of the orders terminating proceedings given in the explanation seems to be exhaustive and of these the main classes are orders of "discharge" and "acquittal."

In summons-cases the proceedings against an accused person commence with the issue of process (Chapter XVII) on the Magistrate taking cognizance of the offence in one of the ways mentioned in the previous chapters. But if in a case of "complaint" he refused to take cognizance his order would be one dismissing the complaint (section 203). If the Magistrate took cognizance and issued process, the proceedings are to be terminated by an order either of "acquittal" or "conviction" (section 245) unless the proceedings are stopped under (section 249). The order of "acquittal" is to be passed if after hearing the evidence the Magistrate finds the accused not guilty (section 245), or if the complainant does not appear (section 247) or upon withdrawal of the complaint by the complainant (section 248), or upon the Public Prosecutor withdrawing from the prosecution (section 494).

In warrant-cases tried by a Magistrate, the accused is to be "discharged" where no case is made out and so no charge need be drawn (section 253) or the Public Prosecutor

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(1) (1911) I.L.R., 34 Mad., 253. (2) (1917) I.L.R., 40 Mad., 977 (foot-note).

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withdraws from the prosecution before a charge is framed (section 494); he is to be "acquitted" if the Magistrate finds him not guilty after a charge has been drawn (section 258) or the Public Prosecutor withdraws from prosecution (section 494) after the framing of the charge. Similarly also in sessions cases, the legislature has carefully provided when an order terminating proceedings is to have the effect of a "discharge" and when it will operate as an 'acquittal'; see sections 209, 213, 305, 307, 333 and 494. Then we find that express provisions are made for the setting aside of orders of discharge (see sections 436, 437, 438 and 439) and of acquittal either under section 417 or under the general powers of revision of the High Court (section 439). All this leaves no room for doubt that the legislature intended that a person once 'acquitted' shall not be liable to be prosecuted for the same offence so long as the acquittal is not set aside by the High Court. Even in cases of discharge it has been ruled that no fresh proceedings can be had with respect to the same matter unless the order has been first set aside as provided for in the Criminal Procedure Code. It is suggested in the judgment of AYLING and NAPIER, JJ., in *Re Kotayya*(1) that it does not follow from their construction of section 403 that an order of acquittal when there has been no decision on the merits, such as for instance an acquittal under section 247, would be nugatory, but so far as I can find, they do not point out nor can I see for myself what other effect it can have if it is to be no bar to further proceedings for the same offence.

Not only do the provisions of section 403 itself clearly imply that every order of acquittal so long as it is in force is a bar to further proceedings except in the circumstances specified in the section itself, but I do not think that the words of sub-section (1) necessarily deny that effect to an order of acquittal under section 494 or section 247. In summons-cases the 'trial' commences as soon as the Magistrate has taken cognizance of the matter and issued process. The mere fact that Chapter XX is headed 'Of the trial of summons-cases by Magistrates' and that section 242 lays down that the first thing that a Magistrate has to do when the accused appears or is brought before him is to ask him to show cause why he should not be convicted, does not indicate that the

(1) (1917) I.L.R. 40 Mad., 977 (footnote).

'trial' did not commence at an earlier stage within the meaning of the Code. In fact Chapter XVII shows that the proceedings before the Magistrate commence with the issue of process, and that the draftsman did not think of distinguishing between 'commencement of proceedings' and 'commencement of trial,' will be apparent from the way both the phrases are used in the marginal notes of section 271 and in the heading. The word 'tried' or 'trial' has not been defined anywhere. If the trial of a summons-case commences as soon as the process is issued, is there any good reason for saying that an order of acquittal would not come within the meaning of sub-section (1) of section 403, unless it was passed at a particular stage? It seems to be conceded that if the accused on being questioned under section 242 denied that he committed the offence and he is acquitted, then sub-section (1) of section 403 would apply. But such an order may be made without any decision on the merits, on the ground of absence of the complainant (section 247) or withdrawal from prosecution (section 248 or section 494). It would follow therefore that section 403, sub-section (1) does not require that there should have been a finding on evidence that the accused is not guilty, and if it is not correct to say that in summons-cases proceedings commence only after the accused has been questioned under section 242, it seems to me that the only possible meaning we can give to the words 'who has once been tried' is 'against whom proceedings have been commenced in Court, i.e., against whom the Court has taken cognizance of an offence and issued process.' On comparing sub-section (1) with the sub-sections (2) and (4) it is clear that the draftsman intended to assign the same scope to the phrase in question in sub-section (1) as to the phrase 'a person convicted or acquitted,' in sub-sections (2) and (4) so far as this matter is concerned, though it was not a happy idea of his to use different expressions to signify the same thing. I think that if we are not to frustrate the clear intentions of the legislature we must not construe the words 'who has once been tried' in sub-section (1) in any sense other than what I have suggested.

The decided cases so far as they go, support the view of the law which I expressed in *In re Guggilapu Paddaya of Palakot*(1)

(1) (1911) I.L.R., 34 Mad., 253.

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One important case which was not then brought to my notice is *Queen Empress v. Sivarama*(1). There it was held by KERNAN and WILKINSON, JJ., that a second charge for the same offence against an accused person who was erroneously 'discharged,' but who ought to have been 'acquitted' on withdrawal by the Public Prosecutor from the prosecution under section 494, Criminal Procedure Code, at the Court of Session, was bad. If a narrow meaning were to be given to the word 'tried' in section 403, it could not be said that the 'trial' had commenced at the date of withdrawal, because up to commitment the proceedings are described in the Criminal Procedure Code as 'enquiry' and the word 'trial' is used only in connection with proceedings after commitment. The Public Prosecutor withdrew from the prosecution before any charge was framed in the Sessions Court, according to the practice then obtaining. This makes it clear that the charge framed by the Committing Magistrate, could not have been read to the accused and he could not have answered to any charge in the Sessions Court, when the Public Prosecutor withdrew on the ground, that the sanction on which the prosecution was based was bad. The ruling in *Suraiya Sastri v. Venkata Rao*(2), related to a summons-case and it was held there that since the accused had appeared and answered to the charge, apparently meaning that he had been questioned under section 242, Criminal Procedure Code, he had been 'tried' within the meaning of section 403, but it was not laid down that if he had not appeared and been questioned, section 403 would not apply. In *Panchu Singh v. Umor Mahomed Sheikh*(3) an order of 'dismissal' in a summons-case under section 247, Criminal Procedure Code, with respect to the case of an accused person who did not appear, was treated as a bar to the revival of the charge against him. The two cases—*Bishun Das Ghosh v. The King-Emperor*(4) and *Kedar Nath Biswas v. Adhin Manji*(5)—it may be said, do not specifically deal with the question under consideration, because it is not stated that the fresh proceedings were quashed on the ground that section 403, Criminal Procedure Code, applied. The ground of the decisions

(1) (1889) I.L.R., 12 Mad., 35; s.c., 2 Weir's Cr.R., 654.
(2) (1886) 2 Weir's Cr. R. 457. (3) (1899) 4 C.W.N., 346.
(4) (1902) 7 C.W.N., 493. (5) (1903) 7 C.W.N., 711.

however, was that the acquittal of persons other than petitioners on the same allegations had not been set aside in accordance with the law.

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I do not propose to discuss the provisions of English law relating to '*autrefois acquit*' as the system of Criminal Procedure in this country is obviously so different from that of England that to draw any sort of inference from the state of law on the subject in England, where no such clear distinctions exist between different kinds of orders terminating proceedings and which does not provide similar measures for rectifying wrong orders of acquittal and discharge, would to my mind be only misleading.

I therefore agree with the District Magistrate that the conviction and sentence under section 447 of the Indian Penal Code are bad in law and should be set aside.

My learned brother holds a different view of the law. The paper will therefore be placed before his Lordship the Chief Justice for such orders as to the disposal of the case as he may think fit to pass. I may mention that as the question involved is one of importance, it is desirable, in my opinion, that it should be decided by a Full Bench.

NAPIER, J.—I adhere to the opinion expressed by me in *Re Kotayya*(1), that it is impossible to treat the words 'once been tried by a Court of competent jurisdiction' in section 403, Criminal Procedure Code as surplusage, or to apply the word 'tried' to a case where a man has not even been served with the summons. I have no doubt that the section is intended to reproduce what is undoubtedly the law in England namely that to plead *autrefois acquit* successfully the accused must have been put in peril either before the jury or the Magistrate.

As my learned brother takes a different view the case should, I think, go before a third Judge under sections 439 and 429 of the Criminal Procedure Code but as my learned brother thinks otherwise the matter will be laid before the Chief Justice for orders.

(1) (1917) I.L.R. 40 Mad., 977 (footnote).

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LAL SAHIB.

On this reference,—

E. R. Osborne, the Acting Public Prosecutor, for the Crown.

The accused was not represented.

This case again came on for hearing before WALLIS, C.J. who made the following

WALLIS, C.J.

ORDER.—Two learned Judges having differed in a Criminal Revision Case, section 439 of the Code of Criminal Procedure read with section 429 requires the case to be decided by a third Judge and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the rules of the Court.

With reference to this case I have arrived at the same conclusion as Mr. Justice ABDUR RAHIM.

If sections 403 and 494 of the Code of Criminal Procedure had been originally enacted at one and the same time, I should find it very difficult to come to that conclusion. But seeing that the Code of Criminal Procedure, which is founded on the English Law of Criminal Procedure has been repeatedly modified in the successive Codes of 1861, 1872, 1882 and 1893, when an apparent conflict arises between what would appear to be the intention of the legislature in one section and what would appear to be its intention in another section, the best method of ascertaining what the intention of the legislature really is, appears to me to be to examine what is the English rule upon the subject and how far that rule has been adopted and what modifications have been subsequently introduced in the successive Codes.

Now in English Law a plea of *autrefois acquit* or *convict* can only be raised in bar of subsequent proceeding when the conviction or acquittal has been for the same offence in a trial had before a Court of competent jurisdiction. The Attorney-General at any stage of a criminal prosecution may enter a *nolle prosequi* and bring the proceedings to an end. But that does not bar fresh proceedings against the accused. Consequently in England when the prosecution desire not to go on with the case the practice is not to tender further evidence and for the judge then to direct the jury to acquit. That rule of English Law was embodied in the Code of Criminal Procedure of 1861 in section 55 as follows :

"A person who has once been tried for an offence and convicted or acquitted of such offence, shall not be liable to be tried again for the same offence."

words which with certain explanations are still retained in section 403 of the present Code.

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Under that Code Public Prosecutors were directed by the Calcutta Court not to withdraw the graver charge and proceed upon the lesser charge because such a course would have the effect of depriving the accused of the benefit of acquittal on the graver charge. (5 Sutherland's Criminal Letters, 4.) Then came the Code of 1872, section 61 :

"A Public Prosecutor may with the consent of the Court withdraw any charge against any person in any case of which he is in charge; and upon such withdrawal, if it is made whilst the case is under inquiry, the accused person shall be discharged. If it is made when he is under trial, the accused person shall be acquitted."

This was an entirely new departure because it entitled the accused to an acquittal by statute on the withdrawal by the Public Prosecutor and without any reference to the evidence at the trial. It has never been doubted that when the Public Prosecutor withdraws under this section in course of trial and the accused is acquitted he cannot be subsequently charged for the same offence. Yet, it seems difficult to bring such an acquittal within the language of section 460, of that Code (now section 403) and say that he is a person who has been "tried" for an offence and convicted or acquitted. Supposing the Public Prosecutor to intervene immediately after the case is taken up by the Sessions Judge and to withdraw and the accused then to be acquitted, I find great difficulty in saying that the accused has been "tried" and acquitted within the meaning of section 403 of the present Code. It seems to me that in section 61 of the Act of 1872 the legislature introduced a fresh form of statutory acquittal under that section which was intended to have the same operation as an acquittal in accordance with the English rule under section 460 (now section 403).

So much for the Code of 1872. It was only in the Code of 1882 that the alteration was made which has given rise to the present case. Section 494 dealing with the withdrawal by the Public Prosecutor, provided that "if the withdrawal is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted."

The reference in the latter part was clearly to summons-cases which deal with more trivial offences and, it seems to me the

Re DUDUKULA LAL SAHIB. intention of the legislature was that the withdrawal by the Public Prosecutor at any stage in those trivial cases was to have the same effect as his withdrawal under the previous part of that section, that is to say, that there was to be a final bar of fresh proceedings.

A similar change was introduced as regards this class of cases into what is now section 247 of the Code, as regards non-appearance of the complainant in a summons-case.

In the Code up to that time such failure to appear by the complainant had merely led to a dismissal of the complaint. But in 1882 to make the law more stringent it was provided, as it still is, that on the non-appearance of the complainant the Magistrate might acquit the accused unless he chose to adjourn. Here again, I think that the intention of the legislature was that the acquittal should operate as a final bar of further proceedings. The history of the legislation shows, to my mind, a distinction between what I may call the law as to the common law plea of *autrefois acquit* reproduced in section 403 of the Code, and the statutory acquittals which have been introduced in sections 494, 247 and 345.

It has not been suggested in this case that the withdrawal from the prosecution by the Public Prosecutor was irregular and in these circumstances I agree with the conclusion arrived at by Mr. Justice ABDUR RAHIM that the conviction and sentence are bad in law and should be set aside.

S.V.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Abdur Rahim, the Officiating Chief Justice,
Mr. Justice Seshagiri Ayyar and Mr. Justice Phillips.*

AIYASAMIER (DEAD) AND FOUR OTHERS (PETITIONER—PLAINTIFF
AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

1916,
February 7,
and 16, July,
18 and
August, 7.

v.

VENKATACHELA MUDALI AND TEN OTHERS (RESPONDENTS—
DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 48—Mortgage-decree, for sale and for recovery of balance if any from the mortgagor—Sale and ascertainment of insufficiency—Execution for balance—Twelve years computable from what date.

Held, by the Full Bench (PHILLIPS, J., dissenting):—

Where a mortgage-decree provides for recovery of any balance from the other properties of the mortgagor in case the sale-proceeds of the mortgaged properties are found insufficient to satisfy the entire decree amount, the decree-holder has under section 48, Civil Procedure Code, twelve years for the recovery of such balance reckoned from the time when it is ascertained to be due.

Ratnachalam Ayyar v. Venkatarama Ayyar (1906) I.L.R., 29 Mad., 46 and *Narhar Rayhunath v. Krishnaji Govind* (1912) I.L.R., 38 Bom., 383, followed.

Venkata Perumal v. Prayag Dassji (1915) 29 I.C., 556, overruled.

Per ABDUR RAHIM, OFFG. C.J., and SESHAGIRI AYYAR, J.—“The date of the decree” in clause (a) of section 48, Civil Procedure Code, means the date the decree becomes executable.

Per PHILLIPS, J.—Under section 48, Civil Procedure Code, the period of twelve years for the recovery of the balance is to be computed from the date the decree actually bears.

APPEAL against the decree of D. VENKOBIA RAO, the Acting District Judge of Tanjore, in Appeals Nos. 598 and 653 of 1913, preferred against the order of S. C. RAMASWAMI AYYAR, the District Munsif of Valangiman, in Execution Petition No. 454 of 1912, in Original Suit No. 117 of 1894.

This is an application for execution of a decree which ran as follows:—

“That the defendants do pay to the plaintiff the suit amount with costs and with interest on the suit amount at the rate of 6 per cent per annum from the date of the plaint till the date

* Appeal Against Appellate Order No. 105 of 1914.

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of realization of the amount within three months from this date, that in default, the mortgaged properties shall be sold by public auction and if there be balance even after that, it shall be recovered by the plaintiff from the first defendant and the common family properties of both the defendants."

The decree was passed on 16th January, 1895 and an order absolute for sale was passed on 11th April, 1900. In accordance with the order absolute the mortgaged properties were sold on 3rd May, 1901 and the sale was confirmed on 12th July, 1901; and the sale-proceeds being insufficient to satisfy the entire decree amount, this execution petition was, after some intervening applications, filed on 14th November, 1912 for the recovery of the balance from the other properties of the mortgagor. The judgment-debtor contended that the application being more than twelve years from the date of the decree, it was barred under section 48 of the Civil Procedure Code. The Court of First Instance allowed the application but the lower Appellate Court reversed this decision and dismissed the application as barred under section 48 of the Civil Procedure Code. The decree-holder appealed.

G. S. Ramachandra Ayyar for the appellants.

S. Muthiah Mudaliyar for the respondents.

This Civil Miscellaneous Second Appeal came on for hearing in the first instance before SADASIYA AYYAR and MOORE, JJ., who made the following ORDERS OF REFERENCE TO A FULL BENCH:—

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SADASIYA AYYAR, J.—The plaintiff is the first appellant. The decree was passed so long ago as in January, 1895. The execution petition out of which this appeal arose was filed on the 14th November, 1912. The question is whether it is barred by the twelve years' period mentioned in section 48 of the Code of Civil Procedure.

The decree, as I construe it, is a mortgage-decree directing sale of the mortgaged properties, if they are not redeemed within three months by payment of the decree amount. It is also a personal decree against the first defendant and a decree realizable by the attachment and sale of the family properties of the defendants for any balance which might be left after the mortgaged properties are sold. Instead of postponing the passing of the personal decree till after the mortgaged properties are sold and the price fetched at the sale is ascertained

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to be inadequate to satisfy the amount due to the mortgagee, a personal decree contingent on the mortgaged properties not fetching the whole of the decree amount was passed at once on the 16th January, 1895, according to the old practice in the mufassal. I do not think that, as contended by the respondents, a decree executable at once against the person of the first defendant for the whole amount decreed was intended to be passed, that is, executable even before the mortgaged properties were brought to sale: see *Varadiah v. Raja Kumara Venkata Perumal*(1).

An order absolute for sale was passed on the 11th April, 1900. The passing of an order absolute was made in execution under the old Civil Procedure Code and did not mean the passing of a final decree (according to the decisions of this Court). In accordance with the order absolute, the mortgaged properties were sold on the 3rd May, 1901 and the sale was confirmed on the 12th July, 1901 and the right to proceed against the person of the first defendant and against the family properties of the defendants granted by the decree of 16th January, 1895 became ripe on there being an unsatisfied balance out of the decree amount after the sale of the mortgaged properties.

If the twelve years' period mentioned in section 48 of the Code of Civil Procedure be calculated either from the date of the combined decree of 1895, or the date of the order absolute for sale, April, 1900, the present execution petition of November, 1912 is clearly barred. If, however, it is calculated from July, 1901 when alone the decree-holder's right under the decree to proceed against the person of the first defendant and the other properties of the defendants could be, for the first time, enforced, then the execution petition is not barred by limitation.

As I have held that the decree did not give a right to proceed against the person and other properties for the decree amount at once on the date of the passing of the decree and as no "certain" date was fixed for the accruing of that right to the decree-holder, it is arguable that section 48 (1) (b) of the Code of Civil Procedure which prohibits any fresh application for execution after the expiration of twelve years from the date of

(1) (1913) 28 M.L.J., 83.

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default in making a payment which is directed by the decree to be made at a "certain date" does not apply to this case. The date on which the decree directs the balance to be paid, in default of which execution can proceed against other properties, is the date of the confirmation of a future sale of the mortgaged properties, the latter date depending on when the decree-holder applies for sale of the mortgaged properties and when the proceedings for sale become ripe and when the Court fixes the date for sale, etc. But it can so be made certain by the decree-holder bringing the mortgaged properties to sale and may we not apply the doctrine that that is certain which can be rendered certain? In *Narhar Raghunath v. Krishnaji Govind*(1), it was held that section 48, clause 1 (a), itself must be interpreted as meaning

"the date of the decree sought to be executed if the decree is capable of execution at once or, if the decree is not capable of execution at once, the date when the decree becomes executable."

I have incidentally considered this decision in my judgment in *Venkatamma v. Manikyam Nayani Varu*(2). *Narhar Raghunath v. Krishnaji Govind*(1) is, in respect of the material facts analogous to the present case. There a decree passed in 1892 became for the first time capable of execution in 1908 in respect of the personal remedy given to the plaintiffs in the fourth part of that decree. Until 1908 the decree in respect of that part of the remedy was merely ancillary and provisional. It was held that the twelve years' period mentioned in section 48 must be calculated from 1908 when only that part of the decree became capable of execution. Though I was inclined to follow *Narhar Raghunath v. Krishnaji Govind*(1) in my judgment in *Venkatamma v. Manikyam Nayani Varu*(2), it was unnecessary to express a final opinion on that point for the purpose of that decision. Mr. Justice NAPIER who took part with me in the decision in *Venkatamma v. Manikyam Nayani Varu*(2), expressed still greater doubts than myself as regards the correctness of the construction of section 48 in *Narhar Raghunath v. Krishnaji Govind* (1), and of the construction of article 182, old article 179, in *Muhammad Suleman*

(1) (1912) I.L.R., 36 Bom., 368.

(2) (1914) 18 M.L.T., 399.

Khan v. Muhammad Yar Khan(1), the analogy of which decision was relied on in *Narhar Raghunath v. Krishnaji Govind*(2).

Mr. G. S. Ramachandra Ayyar suggested that the decision as to the construction of section 48 is not necessary in this case because it had been held in a prior execution application of 1910 that that application was not barred as the twelve years should be calculated only from July, 1901. But as the applicability of the bar by section 48 to the present execution application does not necessarily depend upon the former application of 1910 being barred, in other words, as this application need not necessarily be within time if the former application of 1910 is held to be within time, I do not think that there is anything in the contention of the appellants' vakil on this question of *res judicata*, the decision on a question of law in one proceeding not being *res judicata* in any later proceeding except to this extent, namely, that the right which was the object-matter of the former proceeding and was established in favour of one party cannot be questioned in the subsequent proceeding: see *Mangalathammul v. Narayanaswami Aiyar*(3) and *Palaniappa Chettiar v. Savari Naidoo*(4).

Returning then to the main question, *Venkata Perumal v. Prayag Dassji*(5) was quoted by the respondents' learned vakil as in his favour. The decree in that case was construed by the District Judge (see his "finding") as a decree granting only a provisional personal remedy, provisional on the sale of the mortgaged property not fetching the full decree amount. But it does not appear that the learned Judges of this Court (OLDFIELD and TRABBI, JJ.) accepted that finding as the following sentence occurs in their judgment:

"We think it sufficient that the decree before us was never at any time, after it was passed, inexecutable."

But they also state that

"It did not provide for the payment of any money by defendant on a certain date,"

thus showing that on the date of the decree, the mortgagor was not made liable at once to pay personally the whole decree amount. Anyhow, I have been unable to fully understand the

(1) (1895) I.L.R., 17 All., 39. (2) (1912) I.L.R., 38 Bom., 368.
(3) (1907) I.L.R., 30 Mad., 461. (4) (1908) 18 M.L.J., 548.

(5) (1915) 29 I.C., 550.

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reasoning of the judgment in that case. *Narhar Raghunath v. Krishnaji Govind*(1) is referred to in the judgment as also *Venkatamma v. Manikyam Nayani Varu*(2) but no dissent is expressed from *Narhar Raghunath v. Krishnaji Govind*(1). I think that even if the words of section 48, clause (1) (a) cannot be extended as held by the Bombay High Court in *Narhar Raghunath v. Krishnaji Govind*(1) so as to include the later date when a decree becomes executable, the decision therein can be supported on the ground that the words "certain date" in clause (1) (b) might be made to include the future date which is rendered certain by proceedings and facts ordinarily expected to take place. For instance, let us take a case where a compromise decree is passed making a certain sum payable to a minor girl on her marriage, the minor being six years old on the date of the decree. Supposing that the marriage takes place when she attains her nineteenth year more than twelve years after the decree—Is section 48 to be treated as a bar to execution because the date of her marriage was not "certain" in the ordinary sense on the date of the decree?

I would therefore refer for a decision of a Full Bench the following question :—

Where a mortgage-decree for sale includes also a provisional decree for recovery of any balance from the other properties of the mortgagor in case the sale-proceeds of the mortgaged properties are found insufficient to satisfy the entire decree amount and where the mortgaged properties are afterwards sold and the sale-proceeds are found insufficient, from what date is the twelve years' period mentioned in section 48 of the Code of Civil Procedure to be calculated where an application is made to enforce the decree for the balance against the judgment-debtor's other properties?

MOORE, J. MOORE, J.—The decree in this case is similar in its terms to the decree which the learned Judges had to construe in *Venkata Perumal v. Prayag Dassji*(3) which is against the appellants.

The decree directs first the sale of the mortgaged properties in default of payment of the decree amount within three months and that the first defendant personally and the common family properties of the defendants shall be liable for any balance not

(1) (1912) I.L.R., 36 Bom., 368. (2) (1914) 16 M.L.T., 399.
(3) (1915) 29 I.C., 556.

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obtained by the decree. The decree was not, I think, executable against first defendant personally and the family properties until after the sale of the mortgaged properties had taken place. In fact, as my learned brother has pointed out, the right to proceed against first defendant personally and the family properties of the defendants was contingent on there being an unsatisfied balance out of the decree amount after the sale of the mortgaged properties. *Narhar Raghunath v. Krishnaji Govind*(1) is referred to but not expressly dissented from in *Venkata Perumal v. Prayag Dassji*(2) and I confess that I have found some difficulty in following the reasoning of the judgment in the latter case.

The learned Judges (OLDFIELD and TYABJI, JJ.) observe that authority is unsettled as to the portion of section 48 of the Code of Civil Procedure applicable to such a decree, and go on to say :

"that the decree before us was never at any time inexecutable, and that it did not provide for the payment of any money by the defendant on a certain date."

The effect of the decision appears to be that in the opinion of the learned Judges the period of twelve years' limitation in that particular case must be calculated from the date of the decree and not from the date when the sale-proceeds of the mortgaged properties prove insufficient and the balance is ascertained.

In *Venkatamma v. Manikyam Nayani Varu*(3) my learned brother was inclined to follow *Narhar Raghunath v. Krishnaji Govind*(1) while NAPIER, J., doubted the correctness of the decision.

I accordingly agree in the question which my learned brother proposes to refer to a Full Bench.

On this Reference—

A. V. Viswanatha Sastriyar for G. S. Ramachandra Ayyar for the appellants.

S. Muthiah Mudaliyar for the respondents.

This case again coming on for hearing before the Full Bench, the Court expressed the following OPINIONS :—

ABDUR RAHIM, OFFG. C.J.—The answer to the question referred to the Full Bench should be that the period of limitation

ABDUR
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(1) (1912) I.L.R., 36 Bom., 368. (2) (1915) 29 I.C., 556.
(3) (1914) 16 M.L.T., 399.

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under section 48 of the Code of Civil Procedure runs from the date when, after the remedy against the mortgaged property has been exhausted, it is ascertained that there is a balance due to be recovered from the defendant and his other properties. The decree in this case was passed before the present Code of Civil Procedure came into operation, and under the provisions of the Transfer of Property Act. Properly speaking, there should have been first a decree for sale of the mortgaged properties, and if the mortgaged properties were found insufficient, a separate decree or order should then have been made for realization of the balance from the person and other properties of the judgment-debtor. But there was a very prevalent practice in the mufassal Courts to draw up one decree providing for the sale of the mortgaged property and if the sale-proceeds were insufficient to satisfy the decree, for recovery of the balance from the other properties of the mortgagor. A combined decree like this, though irregular, has been held to be within the competency of the Court and binding on the parties: see *Dinabandhu v. Mashuda*(1). It has further been ruled that in such cases, it is not necessary to obtain another separate decree or order under section 90 of the Transfer of Property Act: see *Periyasami Kone v. Muthia Chettiar*(2).

That was the state of law, when section 48 of the Code of Civil Procedure which now provides the limit of time for execution was enacted. It is in these words:

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—(a) the date of the decree sought to be executed, or (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree."

I am not prepared to hold that clause (b) applies to decrees like the one under consideration, for they cannot be said to direct payment or delivery of property at a "certain" date. For that clause to apply, the date should be fixed in the decree or at

least should be ascertainable from its terms. We have not been referred to any authority for applying the maxim "whatever can be made certain is to be treated as certain" to the construction of a statute of limitation and I am not aware of any.

I think however the case falls under clause (a). There is no good reason for holding that the date of the decree sought to be executed must necessarily be the date put down at the time it was drawn up. The legislature by using the qualifying words "sought to be executed" seems to me to have indicated that the date is to be ascertained with reference to the time when the decree becomes capable of execution. Otherwise, there are cases in which, if time were to be reckoned from the date when the judgment is pronounced, which, as provided in the Code of Civil Procedure (Order XX, rule 7), is the date which the decree must bear, the result would be that the decree-holder would not be able to execute the decree at all; for instance, where a decree directs something to be done upon a certain contingency, such as in the case mentioned by SADASIVA AYYAR, J., where a decree for partition provides for an amount to be spent for the marriage of a girl belonging to a Hindu family in the event of and when the marriage takes place. A decree may give more than one relief, some of them may be enforceable at once and some can only be enforced at future dates either fixed in the decree or depending on the happening of a particular event. A decree is defined as

"the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit."

When the reliefs given in respect of those rights are distinct and enforceable at different periods of time, then for purposes of execution, there is in fact, more than one decree though embodied in one document. In such cases, it is only reasonable to hold that the date of the decree sought to be executed within the meaning of section 48, clause (a) of the Code of Civil Procedure, may not be what it bears on its face. It is the date when the particular adjudication sought to be enforced becomes ripe for execution according to the terms of the decree.

(1) (1912) 18 C.L.J., 1318.

(2) (1915) I.L.R., 38 Mad., 677.

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This is the view of the law adopted in *Ratnachalam Ayyar v. Venkatarama Ayyar*(1), and in *Narhar Raghunath v. Krishnaji Govind*(2). In *Vyidianatha Aiyar v. Subramania Patter*(3), the learned Judges seem to have gone even further, holding that in cases of this class, time begins to run for the whole of the decree only from the time of the ascertainment of the amount left undetermined. But I do not wish to express any decided opinion as to whether this is correct. The opposite view was expressed in *Jnanendranath Bose v. Khulna Loan Company, Limited*(4) and by this Court in *Venkata Perumal v. Prayag Dassji*(5) where it was held that time must be calculated from the date which the decree bears on the face of it, and it makes no difference whether that part of the decree which is sought to be executed did not become capable of being enforced until afterwards. For the reason which I have given, I am of opinion that the ruling in *Ratnachalam Ayyar v. Venkatarama Ayyar*(1) and *Narhar Raghunath v. Krishnaji Govind*(2) is correct and the case reported in *Venkata Perumal v. Prayag Dassji*(5) so far as this point is concerned must be overruled.

The answer will be as proposed by SESHAGIRI AYYAR, J., and myself.

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AYYAR, J.

SESHAGIRI AYYAR, J.—I am of the same opinion. The decree in this case was passed in January, 1895. Its terms are:

"that the defendants do pay to the plaintiff the suit amount with costs and with interest on the suit amount at the rate of 6 per cent per annum from the date of the plaint till the date of realization of the amount within three months from this date, that in default the mortgaged properties shall be sold by public auction and if there be balance even after that, it shall be recovered by the plaintiff from the first defendant and the common family properties of both the defendants".

Even under the Transfer of Property Act, the decree for the balance ought to have been passed only on ascertaining the amount remaining due after the sale of the hypotheca. None the less, the loose practice of passing a combined decree for sale as well as for the recovery of the balance in case the sale-proceeds resulted in a deficit, was generally prevalent. The new

(1) (1906) I.L.R., 29 Mad., 46. (2) (1912) I.L.R., 36 Bom., 368.
(3) (1913) I.L.R., 36 Mad., 104. (4) (1913) 18 C.W.N., 492.
(5) (1915) 29 I.C., 556.

Code of Civil Procedure by making section 90 of the Transfer of Property Act part of the procedure to be followed in the framing of decrees has drawn pointed attention to what a mortgage-decree should contain at the outset, and when the personal decree for the balance should be passed. It was held by MOOKERJI, J., in *Dinabandhu v. Mashuda*(1), that a composite decree like the present one,

"though not strictly in conformity with the provisions of the Transfer of Property Act, is a good and valid decree as between the parties thereto."

It has also been held that in the case of such decrees it is not necessary to apply for a further order under section 90 of the Transfer of Property Act, after exhausting the mortgaged properties: *Sadho Singh v. The Maharaja of Benares*(2) and *Periyasami Kone v. Muthia Chettiar*(3).

If the decree is binding on the parties, and if it is executable without a further application for granting a personal decree, the next question is when does it become executable. In *Kommachi Kather v. Pakker*(4) it was held by this Court that it is only on the ascertainment of the deficit that the decree is executable. The observations of BANERJI and RICHARDS, JJ., in *Munawar Husain v. Jani Bijai Shunkar*(5) show that any application to execute the personal decree before the hypotheca is sold will not be in accordance with law, and will not be regarded as a step in aid of execution. *Periyasami Kone v. Muthia Chettiar*(3) speaks of such an application as one which the Courts should never entertain.

Now comes the crucial question whether under section 48 of the Code of Civil Procedure, time begins to run against the decree-holder from the date of the composite decree or only from the date when it becomes executable against the person and the other properties of the judgment-debtor. If the parties are bound by the terms of the decree, and if it cannot be given effect to until the happening of a contemplated contingency, limitation cannot be said to run against the party seeking to enforce his rights until he is in a position to avail himself of the advantage. The essence of the law of limitation is to provide

(1) (1912) 16 O.L.J., 318. (2) (1907) I.L.R., 29 All., 12.
(3) (1915) I.L.R., 38 Mad., 677. (4) (1897) I.L.R., 20 Mad., 107.
(5) (1905) I.L.R., 27 All., 619.

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against dilatoriness and negligence in the enforcement of a man's rights. But where the party is unable to seek his remedies, it cannot be said that he has failed to avail himself of the cause of action that has accrued to him.

It is true that under section 48, the twelve years' period runs from the date of the decree sought to be executed. As pointed out by SADASIVA AYYAR, J., in the Order of Reference, the literal construction of this section would render nugatory clauses in partition decrees directing payment of sums of money for marriages, etc., on the performance of the ceremonies. *Ex facie* such sums would not be recoverable at once; for the contingency may never happen. Consequently, if the twelve years are to be reckoned from the date of the decree, the party in very many cases will be without a remedy.

It is a well-recognized principle of jurisprudence that

"where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence": Maxwell on the Interpretation of Statutes, page 344.

It is on this principle, I take it, that the decision of the learned Judges of the Bombay High Court in *Shevda Daulatram v. Narayen*(1) proceeds. *Vydianatha Aiyar v. Subramania Patter*(2) and *Ratnachalam Ayyar v. Venkatarama Ayyar*(3) lay down that notwithstanding the date of the decree, it becomes executable so as to invite limitation against the party not able to seek relief at once, only when the decree is capable of execution and not before. The learned Judges who decided *Venkata Perumal v. Prayag Dassji*(4) have taken a different view, and they are supported by *Jnanendranath Bose v. Khulna Loan Company, Limited*(5). The course of decisions in this Presidency is the other way. I would, therefore, overrule *Venkata Perumal v. Prayag Dassji*(4) and answer the reference by saying that limitation began to run in the case of the decree under execution only when the balance was ascertained.

(1) (1912) I.L.R., 36 Bom., 268. (2) (1913) I.L.R., 36 Mad., 104.
(3) (1906) I.L.R., 29 Mad., 46. (4) (1915) 29 I.C., 556.
(5) (1913) 18 C.W.N., 492.

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PHILLIPS, J.—This reference has arisen from the fact that the question referred has been answered in two different ways, in one way by this Court in *Venkata Perumal v. Prayag Dassji*(1) and in another way by the Bombay High Court in *Narhar Raghunath v. Krishnaji Govind*(2). The Bombay High Court has held that the date from which the limitation is to run is the date when the decree became in all its parts ripe for execution, that is to say, when the personal remedy became available to the decree-holder. In *Venkata Perumal v. Prayag Dassji*(1). OLDFIELD and TYABJI, JJ., have held that the period of limitation must run from the date of the decree. The decision of the Bombay High Court is supported by a decision in *Muhammad Suleman Khan v. Muhammad Yar Khan*(3) where it was held that, under article 179 of the Limitation Act of 1877, the date of the decree from which the three years' limitation is to run must necessarily apply only where there is a decree or order which can at its date be executed. In *Vydianatha Aiyar v. Subramania Patter*(4) it was held:

"For the purposes of limitation regarding execution of a decree the decree must be taken as a whole and ordinarily when a portion of the decree is not executable by reason of the fact that the amount due under that portion is left to be determined at a future time, limitation begins to run as regards execution of the whole decree only from the time of ascertainment of the amount left undetermined, even though it might have been open to the party to have executed the other portions earlier."

These two cases did not raise a question under section 48 of the Code of Civil Procedure, but under the Limitation Act, and they are not direct authority for the present case. In *Sabhanatha v. Lakshmi*(5) in the case of a decree for payment of a certain sum annually as maintenance, it was held that execution was barred by limitation when the application was put in more than three years from the previous application, and similarly in *Yusuf v. Sirdar*(6). In *Ratnachalam Ayyar v. Venkatarama Ayyar*(7) it was also held:

"A decree which leaves matters to be subsequently ascertained becomes capable of execution as to them only when they are ascertained; and an application for execution will not be barred if

(1) (1915) 29 I.C., 556. (2) (1912) I.L.R., 36 Bom., 368.
(3) (1895) I.L.R., 17 All., 39. (4) (1913) I.L.R., 36 Mad., 104.
(5) (1884) I.L.R., 7 Mad., 80. (6) (1894) I.L.R., 7 Mad., 83.
(7) (1906) I.L.R., 29 Mad., 46.

presented within three years of the time when, by such matters being settled, it becomes executable.”
 The authorities are clearly conflicting, and I think we must turn to the section for determining what is the correct interpretation of it.

Section 48 of the Code of Civil Procedure lays down:

“Where an application to execute a decree not being a decree granting an injunction has been made, no order for execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from (a) the date of the decree sought to be executed, or, (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.”

It is suggested by SADASIVA AYYAR, J., in his order of reference, that, possibly, clause (b) might cover the present case

“on the ground that the words ‘certain date’ might be made to include the future date which is rendered certain by proceedings and facts ordinarily expected to take place.”

But, with all deference, it appears to me that, in the present case, there is no decree for payment at a certain date because the decree provides firstly for the sale of the mortgaged properties, and it is only in case the proceeds of the sale are insufficient to extinguish the debt that any necessity arises for payment under the personal decree, and it can hardly be said, when it is not even certain that any payment will have to be made, that it orders payment at a certain date. In this view, clause (b) is not applicable to the present case, and the application would be barred unless it is in time under clause (a). Under clause (a), we have to compute the period from the date of the decree sought to be executed. The words, in themselves, are very clear, for a decree can only bear one date, but the matter has been somewhat complicated by the rulings to which I have referred above, that similar words in the schedule to the Limitation Act are to be modified by reading into the words “the date of the decree” the words “the date when the decree becomes executable.” This addition to the words of the statute has, it appears to me, been suggested in order to avoid hardship and to give a reasonable meaning to the words contained in the statute. A similar addition may be read into section 48 (a) but this is no authority

for going even further. The Legislature has laid down a period of twelve years as the maximum period within which a decree can be executed (save in the case of fraud) and presumably this period has been fixed with a view to avoid a prolonged harassing of the judgment-debtor, and consequently I think the section must be strictly construed. Assuming that “the date of the decree” means “the date when the decree becomes executable,” I can see no reason for adding the words “and any subsequent date on which a further relief is granted” more especially when the decree is one which ought not to have been passed in its present form. The trouble in this case has arisen from the fact that the decree is erroneous. The decree for the sale of the mortgaged properties should first have been made, and subsequently a personal decree given for any balance outstanding. It would have been open to the decree-holder to have the decree amended by omitting the personal decree. In that case, if a personal decree had been subsequently given, twelve years’ time would have run from the date of that decree. It has been held that a decree must be treated as a whole: *vide*, *Vyidianatha Aiyar v. Subramania Patter*(1) and *Viraraghava Ayyangar v. Ponnammal*(2). In *Ashfaq Husain v. Gauri Sahai*(3) it was even held by the Privy Council that, where there were two decrees, one against several defendants and a subsequent decree against another defendant who had been *ex parte* at the first hearing, the period of limitation did not begin to run until the date of the subsequent decree against this one defendant. These cases are authority for holding that there can be only one date from which limitation is to proceed. What is suggested should be done in the present case is that limitation as regards one part of the decree should run from the date of the decree, and as regards another part of it, from the date when that portion becomes ripe for its execution. If, however, there is only one date from which limitation begins to run, it does not appear to me possible to construe this one decree as having two separate dates for the commencement of limitation. There is nothing in the words of section 48, clause (a), to support this theory, unless one can read something into that section which is not there. In

(1) (1913) I.L.R., 38 Mad., 104.

(2) (1900) I.L.R., 23 Mad., 60.

(3) (1911) I.L.R., 33 All., 264.

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consequence of the law having been laid down to that effect, I would prefer to interpret the words as they stand, and would hold that the date of the decree must be one date alone and from that date twelve years must be calculated. It is the view taken in *Venkata Perumal v. Prayag Dassji*(1) by a Bench of this Court and also by the Calcutta High Court in *Jnanendranath Bose v. Khulna Loan Company, Limited*(2) and I would prefer to follow these decisions rather than the one in *Narhar Raghunath v. Krishnaji Govind*(3). In this view, in answer to the question referred, I would hold that the date mentioned in section 48 of the Code of Civil Procedure is the date of the decree and not the date when the sale-proceeds of the mortgaged properties had been found to be insufficient to satisfy the decree.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1916,
November,
14, 15 and
21.

THE MYLAPORE PERMANENT BENEFIT FUND, LIMITED,
IN LIQUIDATION BY ITS LIQUIDATORS A. VENKATARAYALIAH
AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

T. AROGIASWAMI PILLAY (PLAINTIFF),
RESPONDENT.*

Set-off—Limited Company—Right of shareholder to appropriate paid-up calls towards debt due from him to Company—Joint Stock Companies, Friendly Societies and Building Societies—Distinction between as to rule of set-off.

A shareholder, in a Permanent Benefit Fund with limited liability, who obtained a loan on executing a mortgage to the Fund which subsequently went into liquidation, is not entitled to appropriate by way of set-off his paid-up calls towards the mortgage-debt but is bound to pay the entire mortgage-debt before he can redeem the property.

Principle of set-off in Court laid down in English decisions in the case of Joint Stock Companies and Friendly Societies as distinguished from Building Societies, applied.

(1) (1915) 29 I.C. 556.

(2) (1913) 18 C.W.N., 492.

(3) (1912) I.L.R., 36 Bom., 368.

* City Civil Court Appeal No. 13 of 1916.

In re Overend, Gurney & Co. (Grissell's case) (1866) L.R., 1 Ch. App., 528
In re Paraguassu Steam Tramroad Company (1872) L.R., 8 Ch. App., 254; and
In re Hiram Maxim Lamp Company (1903) 1 Ch., 70, followed.
Brownlie v. Russell (1883) 8 A.C., 235 and *Josh v. North British Building Society* (1886) 11 A.C., 489, distinguished.

APPEAL against the decree of C. R. TIRUVENKATA ACHARIYAR, the City Civil Judge of Madras, in Original Suit No. 77 of 1915.

The plaintiff purchased the equity of redemption in the suit properties which had been mortgaged to the Mylapore Permanent Benefit Fund, Limited, by the vendor who was a shareholder in the Fund. The vendor had taken in July 1910 five shares in the Fund which was a Company or Society with limited liability. He had under the rules to pay Rs. 5 per month as shareholder and was entitled to Rs. 500 at the end of eighty-four months. In August 1910 he obtained a loan of Rs. 500 from the Fund on a mortgage of the suit properties. He had to pay the monthly subscriptions and also the interest due on the loan every month, which he continued to do till August 1913. The plaintiff purchased the equity of redemption of the mortgaged property in April 1914. The Fund went into liquidation in May 1914. The plaintiff sued to redeem the mortgaged property from the Fund and claimed to appropriate the amount of the paid-up calls of his vendor towards the amount due on the mortgage-debt and offered to pay the balance as the price of redemption. The learned City Civil Judge, who tried the suit, upheld his contention and passed a decree for redemption after allowing the deduction of the paid-up calls from the mortgage-debt as claimed by the plaintiff. The defendants preferred an appeal to the High Court.

M. B. Duraiswami Ayyangar for the appellants.

G. Krishnaswami Ayyar for the respondent.

The following JUDGMENT of the Court was delivered by:—

SESHAGIRI AYYAR, J.—The vendor of the plaintiff took five shares in the defendants' Fund (The Mylapore Permanent Benefit Fund) in July 1910. In August following, he borrowed from the Fund Rs. 500 and executed a deed of mortgage in respect of the suit property in his own behalf and on behalf of his minor sons, as their guardian. Under the rules of the Fund, he had to pay Rs. 5 a month as shareholder, and was entitled to Rs. 500 at the end of eighty-four months. There are provisions in the rules

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for payment of penal interest in case the subscription was not regularly paid. Under the deed of mortgage, he and his sons were liable to pay interest at a particular rate every month. The document contains provisions for the payment of a higher rate in case interest was not regularly paid. The plaintiff's vendor paid the subscription on his shares, and the interest on the mortgage till August 1913. The plaintiff purchased the equity of redemption of the property mortgaged to the Fund in April 1914. The Fund went into liquidation in May 1914.

The case for the plaintiff was that the calls paid by his vendor must be deducted from the amount of the loan originally advanced, and that he should be entitled to redeem the property on payment of the balance. The Fund contended that the paid-up calls should not go in reduction of the debt due and that the entire amount of the mortgage-debt should be paid before redemption. The learned City Civil Judge holding that the subscriptions paid should be given credit to the plaintiff, has decreed redemption on payment of the balance. The Fund has appealed.

The learned Judge has mainly relied upon *Brownlie v. Russell*(1) for his conclusion. That is a case of a Building Society. Lord SELBORNE points out that building societies are different from joint stock companies and friendly societies and that the liability of contributories in such cases is wholly regulated by the contract and by the special rules of the society. Rule 12 which is printed at page 237 makes it clear that the loans advanced to members should be liquidated by monthly payments. That is a distinct provision that such payments ought to be applied towards the debt advanced to the member. There was a similar provision in the case of the society referred to in the judgment of the House of Lords in *Josh v. North British Building Society*(2).

In the present case, the rules do not provide for the appropriation of the monthly subscriptions towards the loan. On the contrary, the provision is for the settlement of the account after the calls have matured at the end of the eighty-fourth month and for the payment of the balance. No doubt, there is nothing to prevent the redemption of the mortgage at an earlier date; but

(1) (1883) 8 A.C., 235.

(2) (1886) 11 A.C., 489.

if it was left outstanding, the adjustment of the two claims can only be made at the end of the eighty-fourth month.

Mr. G. Krishnaswami Ayyar referred to the fact that the sons also joined in the execution of the mortgage and undertook to pay the calls. We do not think this makes any difference. We have seen from the accounts kept by the Fund that the subscription as such was paid only by the father as shareholder.

These being the facts, the law is clear. It was held in *In re Overend, Gurney & Co., Grissell's Case*(1) that when a society goes into liquidation, the contributory or the shareholder is not entitled to set off the paid-up calls or the calls that he may be required to pay as a contributory against the debt due from him. Lord CHELMSFORD, L.C., stated the law upon this point thus:

"And the argument against the allowance of a set-off, addressed to the Court on behalf of the official liquidators, is extremely strong that, if a debt due from the company to one of its members should happen to be exactly equal to the call made upon him, he would in this way be paid twenty shillings in the pound upon his debt, while the other creditors might, perhaps, receive a small dividend, or even nothing at all.

"The case of a member of a limited company is different from that of a member of a company of unlimited liability as to set-off. This is exemplified in the 101st section, where a set-off upon an independent contract is allowed to the member of an unlimited company against a call, although the creditors have not been paid evidently because he is liable to contribute to any amount until all the liabilities of the company are satisfied, and, therefore, it signifies nothing to the creditors whether a set-off is allowed or not. But with respect to a member of a company with limited liability, if a set-off were allowed against a call, it would have the effect of withdrawing altogether from the creditors part of the funds applicable to the payment of their debts."

As this is a Fund with limited liability, the shareholder under this ruling is not entitled to any set-off. In *Black & Co.'s Case, In re Paraguassu Steam Tramroad Company*(2), Lord SELBORNE, L.C., approved of the dictum of Lord CHELMSFORD and explained the principles on which the refusal to allow a set-off is based:

(1) (1866) L.R., 1 Ch. App., 528.

(2) (1872) L.R., 8 Ch. App., 251 at p. 261.

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"I think it right, rather in consequence of what was said by the Court of Common Pleas in *Brighton Arcade Company v. Dowling*(1), than for any other reason, to observe that I entertain no doubt whatever that *In re Overend, Gurney & Co., Grissell's Case*(2), was decided on the soundest principles. What is the ordinary law of set-off? It is what in the civil law was called compensation, and simply means this: that when you have got two cross demands of a nature substantially the same, and due to and from A and B in the same right, that is to say, when the one is a creditor in his own right and debtor also in his own right to the other, the one debt may be set off against the other at the option of the party from whom payment is demanded. But it is essential in such cases that the rights should be substantially the same. If they were apparently the same at law but different in equity, set-off would not be allowed here; nor do I suppose that, in the present state of the law, it would be allowed at common law either. But here the rights are substantially different, the moment that the winding up takes place, the whole administration is carried on with a view to the payment of the debts of the creditors, and in the first instance to payment *pari passu* . . . and the hand which receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors. The result of this contention, that one particular creditor may pay himself in full by retaining his own calls and not paying them, would, in effect, be to give him a preference, and to exonerate him from his obligation as a shareholder to contribute towards the payment of the debts of the other creditors. That appears to me to be utterly opposed to the whole principle of the law of set-off, and to all the provisions of the Act which bear on the subject."

We have made these lengthy quotations as no reported Indian case on this subject has been brought to our notice, and as it is desirable that the law on the subject should be made clear. These decisions were followed in *In re Hiram Maxim Lamp Company*(3); see also Lindley on Companies, Sixth Edition, pages 1022 and 1027: what applies to a set-off in Court is equally applicable to an attempted appropriation by the plaintiff by way of set-off before he sues for redemption.

The above statement of the law governs all joint stock companies and friendly societies: We must, therefore, hold that the plaintiff is bound to pay the entire debt secured by the

(1) (1868) L.R., 3 C.P., 175.

(2) (1866) L.R., 1 Ch. App., 528.

(3) (1903) 1 Ch., 70.

mortgage before he can redeem the property. We must modify the decree of the City Civil Judge as above indicated. Time for payment will be extended by three months from this date. Each party will bear his own costs throughout. The memorandum of objection is also dismissed. No costs.

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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Phillips.

TIRUMALAISAMI NAIDU (PLAINTIFF), APPELLANT,

v.

SUBRAMANIAN CHETTIAR (DEFENDANT), RESPONDENT.*

1916,
December, 6,
7 and 15.

Civil Procedure Code (Act V of 1908), O. XXI, r. 93—Old Code (Act XIV of 1882), ss. 313 and 315—Auction sale under the old Code—Sale of property in which judgment-debtor had no saleable interest—Right of purchaser to refund of purchase-money—Suit—Application—Suit for possession—Cause of action—Right of suit, accrued before new Code—Effect of new Code on such right—General Clauses Act (X of 1887), sec. 6 (c) and (e)—Repealing statute, construction of.

Where the plaintiff, who purchased some lands in Court-auction in 1907, brought a suit to recover possession thereof in 1908, and failed in the suit in 1909 and in the Second Appeal therefrom in 1911 on the ground that the judgment-debtor had no saleable interest in the property, subsequently instituted a suit in 1914 for the recovery of the purchase money from the decree-holder, and the latter contended that the suit was not maintainable:

Held, that the suit was maintainable, notwithstanding the provisions of Order XXI, rule 93 of the Civil Procedure Code (Act V of 1908).

The plaintiff had a right of suit under the old Civil Procedure Code (Act XIV of 1882); and such right, having accrued to him while such Code was in force, it could not be affected by the provisions of the new Code of Civil Procedure (Act V of 1908) by virtue of the provisions of section 6 (c) and (e) of the General Clauses Act (X of 1887).

As the right of the plaintiff to make an application under Order XXI, rules 91 and 93, would have been barred before the new Code came into force, the new Code should not be so construed as to apply to the present case.

Mohideen Imbrahim v. Mahomed Mura Levai (1912) 23 M.L.J., 497 and *Parvathi Ammal v. Govindasami Pillai* (1916) I.L.R., 39 Mad., 803, followed.

Rustomji Ardeshir Irani v. Vinayak Gangadhar Bhat (1911) I.L.R., 35 Bom., 29, dissented from.

* Second Appeal No. 985 of 1916.

TIRUMALAI-SAMI NAIDU v. SUBRAMANIAN CHETTIAR. *Colonial Sugar Refining Company v. Irving* (1905) A.C., 369, applied. *Abbott v. The Minister for Lands* (1895) A.C., 425, distinguished. *Gopeshwar Pal v. Jiban Chandra Chandra* (1914) I.L.R., 41 Cal., 1125, followed.

SECOND APPEAL against the decree of F. A. COLERIDGE, the District Judge of Madura, in Appeal No. 180 of 1915, presented against the decree of K. KRISHNAMA ACHARIYAR, the Subordinate Judge of Madura, in Original Suit No. 88 of 1914.

The plaintiff purchased some lands in 1907 in an auction-sale held in execution of a decree. The lands had been advertised for sale subject to a usufructuary mortgage redeemable on payment of Rs. 50. The plaintiff, as purchaser of the equity of redemption, brought a suit in 1908 for redemption and recovery of possession of the lands on payment of the mortgage amount. The defendants therein pleaded that the plaintiff had obtained no title under the auction-sale, as the judgment-debtor had no saleable interest in the property. The District Munsif upheld their contention and dismissed the suit; the decision was affirmed on appeal by the Lower Appellate Court and eventually by the High Court on the 6th October 1911. The plaintiff thereupon brought the present suit to recover the purchase money paid by him for the sale from the decree-holder who had drawn the amount from Court. The suit was instituted in 1914. The defendant pleaded *inter alia* that the auction purchaser was not competent to maintain the suit, and relied on the provisions of Order XXI, rule 93 of the Code of Civil Procedure (Act V of 1908), and also contended that the suit was barred by limitation. The Original Court decreed the suit; but on appeal by the defendant, the Lower Appellate Court held that a suit was not maintainable by virtue of the provisions of the Civil Procedure Code (Act V of 1908), and that the suit, if maintainable, was barred by limitation, and consequently reversed the decree of the Original Court and dismissed the suit. The plaintiff preferred a second appeal.

Hon'ble Mr. T. Ranga Achariyar and K. Bhashyam Ayyangar for the appellant.

C. V. Anantakrishna Ayyar for the respondent.

OLDFIELD, J.—The question before us is in its most general form whether the plaintiff, a Court-sale purchaser, whose suit for possession of the property put up for sale has failed, is

entitled to recover the purchase money by suit or whether, as the lower Appellate Court held, he can do so only by petition under Order XXI, rule 93 of the Code of Civil Procedure.

Such a right of suit in cases, to which the present Code can be applied without reservation, was dismissed in *Mohideen Imbrahim v. Mahomed Mura Levai*(1), one learned Judge being unwilling to negative it, though expressing no decided opinion, and the other negating it directly, because the purchaser had no longer a substantive right to recover, but only a statutory right to do so by application in special circumstances; and the latter opinion was confirmed *obiter* in *Parvathi Ammal v. Govindasami Pillai*(2). The contrary view however has been taken in *Rustomji Ardeshir Irani v. Vinayak Gangadhar Bhat*(3), the purchaser's right of suit being based on the existence of a contractual relation between him and the decree-holder and of a warranty by the latter of some saleable interest to be implied from the provisions of the Code. With all respect I cannot follow the reasoning *Dorab Ally Khan v. Abdool Azeez*(4) and *Sundara Gopalan v. Venkata Varada Ayyangar*(5) are referred to in the judgment. But they show that in the absence of fraud (and none was referred to there or has been in the present case) the doctrine of warranty of title cannot be applied to Court sales or be the basis of proceedings, except those, which the processual law permits; and, if there is no warranty between the decree-holder and purchaser, there was no other basis for a contractual relation between them, since the former had no ownership of the property sold. In a Court-sale nothing passes beyond the right, title and interest of the debtor; and, as there is no guarantee that it exists or is of any particular extent, the purchaser would have no cause of action apart from the statute. The former code accordingly conferred on him a special right, which the present Code has restricted and for the enforcement of which it provides special procedure. Taking this view I am against the plaintiff's general contention.

The plaintiff however has relied mainly on the special circumstances of his case, that he made his purchase and

(1) (1912) 23 M.L.J., 487. (2) (1916) I.L.R., 39 Mad., 808.
(3) (1911) I.L.R., 35 Bom., 29 at p. 31. (4) (1878) 5 I.A., 116.
(5) (1894) I.L.R., 17 Mad., 228.

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brought his suit for possession, impleading the defendant, when his right was regulated by sections 313 and 315 of the Code then in force. In that suit he asked for delivery of the suit land and profits. It was decided against him in 1909, after the provisions referred to had been superseded by Order XXI, rule 93, under which, as I have held, his right is only to apply to the Court for a refund. It is not disputed that he was originally entitled to sue. The argument for consideration is only that the change in the law did not deprive him of his right to do so.

The effect of a change in the law is to be ascertained in the absence of special provision in the new enactment (and section 154 of the present Code preserves only existing rights of appeal, not other remedies), by reference to section 6 (c) and (e), Act X of 1897, its material portion being that a repeal

"shall not (c) affect any right or privilege acquired or accrued under the enactment repealed or (e) affect any legal proceeding or remedy in respect of such right or privilege; and any such legal proceeding or remedy may be instituted, continued or enforced as if the repealing Act had not been passed."

The first question then is whether the plaintiff's right to repayment of his purchase money had accrued to him before the change in the law. Under the former law, section 315 of the former Code, he would have been entitled to receive back the money, when the sale was set aside under section 312 or 313 or, the contingency we are concerned with,

"When it was found that the judgment-debtor had no saleable interest in the property and the purchaser (plaintiff) was for that reason deprived of it."

Was it so found and was the plaintiff deprived, as the defendant contends, only when the former's suit failed in 1909, after the present code came into force? In that event his right had not accrued and his remedy was affected, or did the right accrue earlier before his suit was filed in 1907?

To support the former view the defendant has relied on the decisions in *Nilakanta v. Imam Sahib*(1) and *Mohideen Imbrahim v. Mahomed Mura Levai*(2) the latter approved in *Sidheswari*

(1) (1893) I.L.R., 16 Mad., 361.

(2) (1912) 23 M.L.J., 487.

Prasad Narain Singh v. Goshain Mayanand(1), in which it was held that the plaintiff's cause of action for a claim such as that before us, accrues, when there has been a suit against the person in possession on its determination against him. But though such determination may be part of plaintiff's cause of action in the sense in which the term is used in *Read v. Brown*(2) and subsequent Indian cases, as including,

"Every fact, which it would be necessary for the plaintiff to prove, if traversed to support his right to the judgment of the Court,"

it does not follow that it is necessary to the accrual of his "right" the term used in the enactment under consideration. If it did, it would follow further that his right was dependent on and arose only on his becoming conscious of it in consequence of his discovery that the debtor had no saleable interest and of his deprivation of the property by reason thereof, although the title opposed to his own must have existed at the date of his purchase and could not have been affected by any proceedings subsequent to it. It is possible to avoid this anomaly only by holding that his "right" dates from his purchase and is primarily to the property and secondarily in the alternative and contingently to repayment, the latter branch of it becoming enforceable only on failure in respect of the former. If this view is correct, the plaintiff's right had accrued before the repeal of section 315 of the former Code. I refer next to authority for the position that such an alternative and contingent right will be preserved under section 6 (c), Act X of 1897.

In *Colonial Sugar Refining Company v. Irving*(3) the question was as to the effect on a right of appeal direct to the Privy Council of a change in the law pending the trial of an action, which would have interposed an appeal to the Local High Court. That right of appeal existed at the date of the change in the law in the sense that it had been conferred by law on every suitor; it was suspended and contingent in the sense that it would be exercisable, only when and if the decision were given against him. It was held not only that the right was not one merely of procedure, but also that it had vested in the suitor, before the

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(1) (1913) I.L.R., 35 All. 419.

(2) (1898) 22 Q.B.D., 123.

(3) (1905) A.C., 369.

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change took place. This case was followed in *Kalinga Hebbra v. Narasimha Hebbra*(1) and *Salimamma v. Valli Husanabba Beari*(2) with reference to the right of appeal; and in *Madurai Pillai v. Muthu Chetty*(3) with reference to another consequential and contingent remedy. In *Rajah of Pittapur v. Venkata Subba Row*(4) it was applied even more generally in a manner, to which I return. On the other hand, *Abbott v. Minister for Lands*(5) was cited for the defendant, as deciding that a mere right to take advantage of the provisions of a repealed statute is not a "right accrued." But the judgment runs:

"The mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment," and the case can accordingly be distinguished on two grounds. Firstly, if the doing of an act is necessary, the plaintiff before us had done one towards availing himself of his right, when he sued the person in possession. Secondly, the plaintiff's right differed essentially from the right (if it was properly so called), which the Judicial Committee was considering; for the latter was a mere option to take up land, enforceable against the Minister for Lands only after it had been exercised by the making of an application with the necessary formalities and a specification of the land claimed, whilst the former was definite and enforceable from its origin. This case therefore is in no way opposed to the conclusion, which is otherwise adequately supported that plaintiff's right, including the branch of it, which he is now enforcing, had accrued, before the former Code was repealed.

That conclusion has been reached on direct consideration of the law. But it can be supported also by reference to a rule of construction. Although the plaintiff was proceeding in a legal way towards recognition of his right to repayment and could have been met by no objection, if the law had not changed, in terms the change made his further progress impossible; and in the absence of any specific provision or necessary implication the repealing statute will therefore not be construed against him.

(1) (1911) 21 M.L.J., 631.

(2) (1911) 21 M.L.J., 764.

(3) (1916) I.L.R., 38 Mad., 823 (F.B.). (4) (1916) I.L.R., 39 Mad., 645.

(5) (1896) A.C., 425.

His only course under the present Code would have been to move for the setting aside of the sale under Order XXI, rule 91 and article 166, Schedule I of the Limitation Act within thirty days of its confirmation and to apply for repayment under rule 93 and article 181 within three years from its being set aside. This course he could not take since his first application would have been out of time at the date of the repeal. A repealing enactment cannot impose an impossible condition on pain of forfeiture of a vested right or be applied to cases, in which its provisions cannot be obeyed, *Gopeshwar Pal v. Jiban Chandra Chandra*(1); and similarly it was held by a FULL BENCH of this Court in *Rajah of Pittapur v. Venkata Subba Row*(2) that a new rule of limitation must be read subject to an implied exception in cases where its provisions would absolutely destroy the right of suit, which was in existence when that rule came into force. On this ground also the plaintiff is entitled to succeed.

Two other points have been referred to in argument. Firstly the defendant contended in his written statement that the judgment-debtor should be made a party. This cannot be considered since it was not pressed at the trial. Secondly the Sub-Judge awarded interest up to date of suit at 12 per cent, the rate claimed in the plaint. The interest at the usual Court rate is however all that plaintiff is entitled to in accordance with the authorities. *Rodger v. The Comptoir D'Escompte De Paris*(3), *Ayyavayyar v. Shastram Ayyar*(4) and *Arunachellam v. Arunachellam*(5).

The result is that the Sub-Judge's decree is restored subject to the modification that the plaintiff will be entitled to interest at 6 per cent instead of 12 per cent to date of that decree and subsequent interest at 6 per cent on the amount so decreed. The parties will give and receive proportionate costs.

PHILLIPS, J.—I agree.

PHILLIPS, J.

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(1) (1914) I.L.R., 41 Cal., 1125.

(2) (1916) I.L.R., 39 Mad., 645.

(3) (1871) L.R., 8 P.C., 465.

(4) (1886) I.L.R., 9 Mad., 506.

(5) (1892) I.L.R., 15 Mad., 203.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1916,
December,
14, 15
and 22.

SUBRAMANIA AYYAR AND SIX OTHERS (PETITIONERS),
APPELLANTS,

v.

RAJA RAJESWARA DORAI *alias* MUTHURAMALINGA
SETHUPATHI AND ANOTHER (RESPONDENTS).*

Evidence Act (1 of 1872), sec. 92, proviso 6, and ss. 93 and 95 to 97—Deed of settlement, construction of—Subsequent conduct of parties to the instrument, whether admissible in evidence—Execution proceedings—Res judicata—Notice of particular questions, necessity for—Application for execution—Order at one stage of the application, if res judicata at another stage.

Where by a Deed of Settlement, almost the whole of the settlor's immovable property was transferred to trustees together "with buildings and appurtenances thereto" and the question was raised as to whether certain specific properties were included in the Deed:

Held, that, the ambiguity in the deed being latent, in construing the deed, the subsequent conduct of the parties thereto can be legitimately looked into under section 92, proviso 6 of the Evidence Act for the purpose of ascertaining to what persons or things the expressions used therein were intended to apply.

Tulshi Pershad Singh v. Ramnarain Singh (1886) I.L.R., 12 Cal., 117 (P.C.), *Venkataramanna v. Venkatapathi* (1916) 28 M.L.J., 510, *Forbes v. Watt* (1872) 2 Sc. & D. App., 214 and *Van Diemen's Land Company v. Table Cape Marine Board* (1906) A.C., 92, referred to.

Viswanji Sons & Co. v. Shapurji Burjorji (1912) I.L.R., 36 Bom., 387 at p. 395, explained.

A decree-holder applied for execution of his decree by attachment and sale of certain properties in the possession of the respondents, the sons of the deceased judgment-debtor. Notice went to the respondents to show cause why they should not be brought on record as the legal representatives of the deceased judgment-debtor for purposes of execution; they did not appear and an order was made *ex parte*;

Held, that they were not estopped by this order from moving to set aside the attachment on the ground that the properties did not belong to the judgment-debtor.

Observations as to the application of the principle of *res judicata* to orders in execution.

APPEALS against the order of C. V. VISWANATHA SASTRIYAR, the Subordinate Judge of Ramnad, in Execution Petition No. 350

* Appeals Against Appellate Orders Nos. 103, 194, 263 and 290 of 1914.

of 1913 in Original Suit No. 72 of 1900; in Execution Petition No. 246 of 1913 in Civil Suit No. 189 of 1900, on the file of the High Court of Madras in its Ordinary Original Civil Jurisdiction in Execution Petition No. 123 of 1913 in Original Suit No. 32 of 1901 and in Civil Miscellaneous Petition No. 754 of 1913 in Execution Petition No. 246 of 1913 in Civil Suit No. 189 of 1900 on the file of the High Court of Madras in its Ordinary Original Civil Jurisdiction, respectively.

The late Raja of Ramnad executed a deed of trust on the 12th July 1895, transferring almost the whole of his properties to certain persons as trustees for the benefit of his two sons, the present Raja of Ramnad and his brother. The late Raja died on the 23rd December 1903; he had incurred some personal debts, on which suits were brought against him after the deed of trust, and in four of the suits decrees were passed against him, and in the fifth suit, after the decree of the original Court was passed, the late Raja died and in the appeal therefrom the legal representatives were brought on the record and a decree was passed against them. The decree-holder applied for execution of the above-mentioned decrees against the sons of the late Raja as his legal representatives, and prayed for attachment and sale of certain properties as the assets of the late Raja in the hands of his sons who were the respondents in the petition. The properties attached in the course of the execution proceedings were 'all of them purchased by the late Raja.' The principal question in the cases was whether these items of property were included in the deed of trust of 1895 or were the personal property of the late Raja, which became assets in the hands of his sons. The deed of trust purported to include the whole of the ancestral, impartible estate commonly known as the Ramnad Zamindari, specifically mentioned certain properties in Madras and Madura, and contained a clause in these terms, viz., 'together with buildings thereon and appurtenances thereto respectively.' The decree-holders contended that these items (which were purchased by the late Raja before the deed of trust) were not included in the trust deed and were available as assets of the late Raja in the hands of the counter-petitioners. The latter contended that they were included in the deed of trust and relied *inter alia* on the evidence of conduct of the late Raja and other parties to the

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deed in proof of the intention of the parties and as a help to the construction of the document. After the filing of the petitions for execution in the above cases, notices were issued to the respondents to show cause 'why they should not be brought on the record as the legal representatives of the judgment-debtor for the purpose of execution.' They had no notice that any particular property was going to be attached. The respondents did not appear, and an order was passed for attachment of the properties. When they came to know of the order for attachment, they immediately filed petitions praying for the cancellation of that order. The decree-holders contended that the previous order for attachment was *res judicata* in the subsequent proceedings. The lower Court admitted evidence of the conduct of the late Raja subsequent to the deed of trust as evidence that these properties were included in the deed of trust and held that the properties were included in the deed of trust and that the respondents were not barred by the previous order for attachment from raising their objections to the liability of the properties for attachment in execution of the decrees as assets of the late Raja. The decree-holders preferred appeals to the High Court.

V. Purushottama Ayyar and S. Subrahmanya Ayyar for the appellants in Civil Miscellaneous Appeal No. 103 of 1914;

K. Bhashyam Ayyangar and C. Krishnamachariar for the appellants in Civil Miscellaneous Appeals Nos. 194 and 290 of 1914;

Hon. Mr. S. Srinivasa Ayyangar, the Acting Advocate-General, and S. Soundararaja Ayyangar for the appellant in Civil Miscellaneous Appeal No. 263 of 1914.

L. A. Govindaraghava Ayyar, V. Raghunatha Sastriyar and R. Krishnama Achariyar for the respondents in all the appeals.

The following JUDGMENT of the Court was delivered by

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SESHAGIRI AYYAR, J.—These appeals have been preferred against orders passed by the Subordinate Judge of Ramnad in execution. The decrees were obtained in four out of these five appeals against the late Raja of Ramnad, and the respondents have been impleaded as legal representatives in possession of assets belonging to the deceased. In one of the appeals, after the decree was obtained in the first Court, there was an appeal

to the High Court by the plaintiff. During the pendency of the appeal, the Raja died and the respondents were brought in as his legal representatives and a decree was passed against them.

There are two points which are common to all the appeals. We shall first deal with them. The facts may be shortly stated as follows: The late Raja of Ramnad having become heavily involved, executed a deed of trust (Exhibit VI) on the 12th July, 1895 by which he transferred almost the whole of his properties to certain trustees for the benefit of his two minor sons, the present Raja of Ramnad and his brother. The late Raja died on the 23rd December 1903. The decrees in execution were all obtained subsequent to the date of the deed of trust, on debts contracted personally by the deceased. The properties attached in the course of the execution were all of them purchased by the late Raja. The principal point for decision is whether these properties were included in the deed of trust (Exhibit VI). The second point is whether certain orders passed in the course of the execution have the force of *res judicata* against the respondents.

Item No. 1 in dispute is known as the Colonel's bungalow. Item No. 2 is a plot of vacant land near the bungalow. These two items were purchased on the 22nd February 1890 (Exhibit E). Item No. 3 is known as Raja Rajeswari Vilasam alias Mangala Vilasam. It was purchased on the 15th November 1890 (Exhibit E-3). Item No. 4 is called Niravi Palace and was purchased on the 27th July 1892 (Exhibit E-2). Item No. 5 called Latham's Bungalow was purchased on the 8th February, 1892 (Exhibit E).

The Subordinate Judge who heard the applications came to the conclusion that these properties formed part of the estate conveyed by the deed of trust, and that they were not liable to be proceeded against in execution. The decree-holders have appealed.

The learned Advocate-General raised various contentions against the order of the Subordinate Judge. His arguments were: (a) that as these properties were purchased out of the income derived by the late Raja from his estate, they were his personal properties and as such liable to be proceeded against as being the assets in the hands of the respondents; (b) that the burden of proof is upon the respondents to show that these

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properties were incorporated with the zamindari which was conveyed by the trust; (c) that the Subordinate Judge was in error in considering the conduct of the late Raja as evidence that these properties were included in the deed of trust and (d) that the orders passed directing the attachment of the properties operated as *res judicata* against the respondents.

On the main question, both sides relied upon the language of the deed of trust. We do not think that the language affords much assistance one way or the other. In paragraph 2 it is stated :

"all that ancestral and impartible estate or zamindari descending to a single heir . . . described in the first schedule hereunder written and commonly called or known as the Ramnad Zamindari" and also certain specified properties in the towns of Madura and Madras shall vest in the trustee. After specifically describing the bungalows in Madura and Madras, a clause is added in these terms :

"together with the buildings thereon and appurtenances thereto respectively."

It was conceded by the learned Advocate-General in the course of the argument that this clause refers to the whole of the zamindari and not simply to the specifically described bungalows in Madura and Madras. The question largely turns upon the meaning to be attributed to this clause. In clause 4 it is stated that :

"The right to reside with the members of his family in the several palaces and buildings comprised in the said lands and in the said premises described in the said first schedule is reserved for the settlor of the trust."

In paragraph 5 a reservation is made in favour of the settlor of various devastanams, chattrams and kattalais with their appurtenances. In paragraph 20 a provision is made for the residence of the Diwan trustee in a suitable building "forming part of the premises hereby assured."

These are the clauses upon which reliance was placed in the course of the argument.

The learned Advocate-General contended that the properties in dispute cannot be said to be appurtenances to the zamindari. Mr. Govindaraghava Ayyar, on the other hand, relied upon the fact, which is not disputed, that these purchased properties at

one time belonged to the estate and contended that the repurchase by the deceased Raja is strong evidence that he intended to incorporate them with the zamindari. We are not prepared to lay much stress upon the fact that they originally formed part of the zamindari although it is conceivable that the purchaser might have entertained the idea that in repurchasing them he was restoring the properties to the estate.

Mr. Govindaraghava Ayyar also relied upon the fact that as regards items Nos. 2, 3 and 4, they were close to the ancient palace of the Raja of Ramnad, and that communications were opened from that palace to these new palaces, and argued that that fact made them appurtenances to the estate. We think this fact is also entitled to some consideration. But the main argument related to the admissibility of the evidence relating to the conduct of the late Raja in respect of these palaces. The learned Advocate-General argued that in construing the deed of trust, evidence as to events which happened subsequently should not be looked into. The point is not free from doubt, but after giving our best consideration to the question, we have come to the conclusion that the conduct of the parties to the deed can be legitimately looked into in construing the expression "appurtenances" in the trust deed. Section 93 of the Evidence Act which was relied on by the appellant relates to what is known as "patent ambiguity." Sections 95, 96 and 97 refer to "latent ambiguities." We do not think that this is a case of "patent ambiguity." The illustrations to section 93 show that the ambiguity apparent on the face of the document must be of such a nature as to make the document meaningless *per se*. In other words the executant should not have been sure of his meaning or intention. It cannot be said that the expressions "buildings thereon" and "appurtenances thereto" are ambiguous or defective in that sense. The expression "appurtenances to an estate" is a common one. The real difficulty in such cases would be in ascertaining the properties included by that expression. We think proviso 6 to section 92 is applicable to this case.

From the Indian authorities quoted before us no definite principles are deducible. But there are a few Privy Council decisions and some decisions of the English Courts which lend support to the proposition contended for by the respondents. In

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Tulshi Pershad Singh v. Ramnarain Singh(1) the Judicial Committee considered the meaning of the term "istemrari mokurari" and their Lordships stated at page 130:

"The Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual."

This decision was followed by the learned CHIEF JUSTICE and COUTTS TROTTER, J., in *Venkataramanna v. Venkatapathi*(2) in construing the term "*kayam patta*" in a deed. In *Forbes v. Watt*(3) it was held that

"where documents are obscure but where parties have long acted on the footing of a given practical construction the Court in the absence of better evidence, will accept that construction as correct."

Taylor in his work on Evidence, volume II, section 1194, says:

"It may be said broadly that extrinsic evidence of every material fact, which will enable the Court to ascertain the nature and qualities of an instrument, or in other words, to identify the persons to whom and the things to which the instrument refers must of necessity be received."

And he quotes *Bank of New Zealand v. Simpson*(4) in support of that proposition. Another proposition seems well established, namely, that

"if the terms of a document be vague and general, or have diverse meanings, parol evidence will always be admissible of any extrinsic circumstances tending to show what person or persons or what things were intended by the party, or to ascertain his meaning in any other respect: see *Grant v. Grant*(5)."

In *Doe d. Pearson v. Ries*(6), TINDAL, C.J., says:

"Upon the general and leading principle in such cases, we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was; if the words of the instrument be ambiguous, we may call in aid acts done under it as a clue to the intention of the parties."

(1) (1886) I.L.R., 12 Cal., 117 (P.C.). (2) (1816) 23 M.L.J., 510.

(3) (1872) 2 Sc. & D. App., 214.

(4) (1900) A.C., 182.

(5) (1870) L.R., 5 C.P., 727.

(6) (1832) 8 Bing., 178; s.c. 151 E.R., 369.

In *Van Diemen's Land Company v. Table Cape Marine Board*(1), Lord HALSBURY stated, referring to the subsequent possession taken under an instrument:

"Why is it not evidence and cogent evidence when the taking possession of the particular piece of land is proved, and the continuance in possession before and after the grant is proved?"

In Halsbury's *Laws of England*, volume 10, page 451, the proposition is thus stated:—

"If after other methods have been exhausted, there remains a doubt as to the effect of the instrument, it is permissible to give evidence of the acts done under it as a guide to the intention of the parties; in particular of acts done shortly after the date of the instrument."

As against these authorities, we were referred to *Vissanji Sons & Co. v. Shapurji Burjorji*(2), where at page 395 this observation occurs:

"Everybody is now agreed that what took place after the execution of that document can have no bearing on the construction of it."

We do not think that this sentence enunciates any general principle of law. It is only intended to point out that in the particular case before the Judicial Committee, it was conceded that subsequent conduct was not to be relied upon for the construction of the document. In *Achuta Ramaraju v. Subbaraju*(3) an attempt was made to explain away a clear and unambiguous statement in a document by surrounding circumstances. Such evidence was rightly rejected. Nor is *Balkishen Das v. W. F. Legge*(4), inconsistent with the statement of law contained in Halsbury's *Laws of England*, volume 10, page 451.

It is clear that where the language used in a document is clear, no evidence should be received to explain away the language. It is equally clear that where on the face of the document, the words are so ambiguous as to be incapable of conveying any definite meaning, evidence should not be given to remove the ambiguity or to supply the defects; but where the language used in a document is capable of being applied to a number of persons or things and the question is which of these persons or things was intended to be denoted by the expression

(1) (1906) A.C., 92.

(2) (1912) I.L.R., 36 Bom., 387 (P.C.).

(3) (1902) I.L.R., 25 Mad., 7.

(4) (1900) I.L.R., 22 All., 149.

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used, evidence may be given to show what was the thing meant or who was the person intended. We think that the expression "buildings thereon and appurtenances thereto" falls under the last of these clauses, and that consequently it is open to the Courts to consider the evidence relating to the conduct of the parties in construing that clause.

Now we shall consider the evidence which has been adduced in the case. Exhibits V(a), V(c) and V(f) show that Latham's bungalow was purchased for the Samasthanam. This evidence is admissible in any case. Exhibit V(h) shows that the property was regarded as belonging to the Samasthanam. Exhibit V(j) shows the receipt of rent by the trustees from this bungalow. The oral evidence is uncontradicted that immediately after the execution of the trust-deed the Diwan trustee took possession of all these five items of property including Latham's bungalow, received rents from two of them, spent money for the repair of all of them, employed men to look after them and otherwise treated them as part of the property which had been conveyed under the deed of trust. The Colonel's bungalow was in the occupation of the Diwan trustee and, as we pointed out before, the provision in the deed of trust is that the Diwan trustee should be in one of the bungalows conveyed by the deed of trust. There are II and II(a) relating to repairs, II(b), relating to the sale-proceeds of coconuts and III(a) relating to establishment charges. There are also statements made by the Raja which undoubtedly show that he believed he had conveyed these properties by the deed of trust, Exhibit V(ff) and Exhibit VI. If evidence of subsequent conduct is receivable in evidence, there can be no manner of doubt that the five items of property were taken possession of by the trustee, were regarded as being part of the zamindari, and were dealt with as property in which the settlor had no manner of subsisting interest. Even apart from the evidence as to conduct, we are of opinion that there is evidence of possession from 1895, the date of the deed of trust, up to 1914, which possession was certainly not on behalf of the late Raja but on behalf of the present respondents. It was contended that this possession, even if the trust deed did not include these properties, was adverse to the Raja and that the present respondents had acquired a prescriptive title to them. There is much force in this contention. On the whole, we have come to

the conclusion that these properties were conveyed by the deed of trust and were therefore not assets of the deceased Raja which could be proceeded against in execution.

Before concluding this part of the case we may say, we agree with the learned Advocate-General in his contention that the onus is upon the respondents to show that the properties purchased by the late Raja were incorporated with the zamindari. *Parbati Kumari Debi v. Jagadis Chunder Dhabal*(1), *Janki Prasad Singh v. Dwarka Prasad Singh*(2) and *Murbaza Hassain Khan v. Mohammad Yassin Ali Khan*(3) establish this proposition beyond doubt. The decision in *Ramanayya v. Rangappayya*(4) related to property which had descended to an heir after purchase. It was held that the fact that it descended in the same way as the zamindari was evidence that the purchase was incorporated with the zamindari. We think that the respondents have discharged the onus which lay on them. We are satisfied that the acts of ownership exercised by the trustee and the other evidence to which we have referred show that these five items of property form part of the estate conveyed by the deed of trust.

The second question argued by the learned Advocate-General related to the plea of *res judicata*. The order to attach was made on the 5th August 1913. The present respondents filed a petition after that order to set aside the attachment. If we understood the learned Advocate-General aright, his contention was that every stage in an execution proceeding is complete by itself, and if not objected to at the time, it would operate as *res judicata* at a subsequent stage of the same proceeding. In this case, it must be remembered that before the execution application was finally disposed of, the attachment was objected to by the respondents. It is against the orders dealing with those objections that these appeals have been preferred. It is true that the principle of *res judicata* has been extended to execution proceedings ever since the decision in *Mungul Pershad Dichit v. Girja Kant Lahiri*(5). It was held in that case, if after notice, a decision was passed on an execution petition, it would not be open to the parties to object to that decision when a

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(1) (1902) I.L.R., 29 Cal., 433. (2) (1913) I.L.R., 35 All., 391 (P.O.).
 (3) (1916) 31 M.L.J., 804 (P.O.). (4) (1894) I.L.R., 17 Mad., 144.
 (5) (1882) I.L.R., 8 Cal., 51.

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subsequent application was presented. That decision has been followed in *Subbiah Naicker v. Ramanathan Chettiar*(1) and in *Rameshwar Singh v. Rateshwar Singh alias Rahim Ramanji*(2). But there is no authority for the proposition that in the course of the same application an order passed at one stage of it would be *res judicata* at its further stage. Reliance was placed on certain observations in *Venkatagiri Iyer v. Sadagopachariar*(3). We do not think that is an authority for the proposition now advanced. As we had occasion to remark on more than one occasion recently, the principle of constructive *res judicata* should be very cautiously applied to execution applications. In the first place, the legislature has not enacted specifically that the rule of *res judicata* applies to execution proceedings. The reason is obvious. It is open to a decree-holder to proceed piecemeal with his execution. He is not bound to proceed against all the properties comprised in the decree at once, and consequently the principle underlying the general rule of *res judicata* is not in terms applicable to execution proceedings. At the same time, as pointed out by the Judicial Committee, parties should not be allowed to agitate the same question after it has been once decided; and this dictum of their Lordships has been extended to cases where the parties had an opportunity to object to the decision, but did not avail themselves of that opportunity. One principle seems to be clear, and that is, that the party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision. In the present case, notice went to the respondents to show cause why they should not be brought on the record as the legal representatives of the deceased judgment-debtor for the purpose of execution. They had no notice that any particular property was going to be attached. When they came to know that an order was passed to attach the properties, they immediately filed a petition praying for the cancellation of that order. We are satisfied that the respondents are not estopped from raising their contention. We must therefore overrule this plea.

(1) (1914) I.L.R., 37 Mad., 462.

(2) (1913) 17 C.L.J., 125.

(3) (1904) 14 M.L.J., 359.

As we said before, these two points are common to all the civil miscellaneous appeals. A further point was argued by Mr. Bashyam Ayyangar in Civil Miscellaneous Appeal No. 194 and it was this: After the attachment in pursuance of the High Court decree, the late Raja died. Thereupon an application was made to bring in the respondents as his legal representatives. No objection was raised to their being brought on the record as such. The argument of the learned Vakil was that the failure to object estopped the present respondents from contesting that the properties in their hands were not liable to be proceeded against under the decree. We are wholly unable to accept this contention. When notice is served to show cause why certain persons should not be brought on the record as legal representatives, it is not their duty to put forward all the defences open to them in their individual capacity. It is only when execution is sought against them in their individual capacity that they are bound to resist the attempt by putting forward all their personal defences. We do not think *Seth Chand Mal v. Durga Dei*(1) is any authority for the contention now put forward. We overrule this contention.

In Civil Miscellaneous Appeal No. 290, the same additional contention was raised. In Civil Miscellaneous Appeal No. 103, Mr. Purushottama Ayyar raised a further point that the decree itself was obtained in the High Court after the death of the late Raja against the respondents as his legal representatives. It is true that the language of the decree is somewhat obscure, but on a previous occasion, the question whether this decree made the respondents personally liable was considered by the Subordinate Judge of Madura, and he held that they were not personally liable. No appeal was preferred against that decision, and consequently it is binding on the plaintiff, the present appellant.

For these reasons, we are of opinion that the order of the Subordinate Judge refusing execution against the five items of properties is right, and we dismiss these appeals.

The learned Advocate-General at the opening stated that a large number of documents have been printed unnecessarily, and that in case his client failed, they should not be ordered to

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(1) (1890) I.L.R., 12 All., 313 (F.B.).

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bear the costs of this unnecessary printing. We must observe that many of the documents placed before us should not have been printed. To most of them no reference was made in the course of the argument. We therefore hold that the respondents are entitled only to one-fourth of the costs of printing the documents; but are entitled to vakil's fees in full and to the costs of the pleadings.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Napier.

1917,
 February,
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RATNA MUDALI AND ANOTHER (FIRST AND THIRD ACCUSED),
 PETITIONERS,

v.

KING-EMPEROR, RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 54—Indian Penal Code (Act XLV of 1860), ss. 225 and 332—Cognisable offence—Issue of warrant of arrest—Arrest by a police officer without warrant—Legality of arrest—Obstruction of such officer by third parties, if an offence.

A police officer is justified in making an arrest under section 54 of the Criminal Procedure Code, of a person against whom a charge of having committed a cognisable offence has been preferred although the warrant issued for the purpose had not been entrusted to him; and a person obstructing and beating such officer while he is attempting to arrest the offender, is guilty of offences under sections 225 and 332 of the Indian Penal Code.

In the matter of Charu Ch. Majumdar (1916) 20 C.W.N., 1233, distinguished.

PETITION (Criminal Revision Case) under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of V. VENUGOPAL CHETTI, the Sessions Judge of Chingleput, in Criminal Appeal No. 30 of 1916, preferred against the conviction and sentence of D. N. STRATHIE, the Joint First-class Magistrate of Chingleput, in Calendar Case No. 115 of 1916.

Two persons named Velan and Kuppan were absconding from a charge of theft. A warrant had been issued for their

* Criminal Revision Case No. 807 of 1916 (Criminal Revision Petition No. 657 of 1916).

arrest. Two police constables to whom the warrant had not been entrusted, were directed by their Sub-Inspector to be on the look-out for them and arrest them if found. On 11th April 1916, the two constables found the absconders at the market place in Chittamoor, and proceeded to arrest them. The absconders escaped owing to the obstruction caused to the constables by the petitioners who also beat the police officers and caused them injury. The petitioners were then charged under sections 225 and 332 of the Indian Penal Code. The lower Courts held that they were guilty of the offences charged, as the police officers were justified in making the arrest of the absconders, though the warrant was not issued to them for execution. The accused preferred a Criminal Revision Petition to the High Court.

Hon. Mr. T. Rangachariyar for the petitioners.

E. R. Osborne, the Acting Public Prosecutor, for the Crown.

AYLING, J.—The only point argued is that the arrest was illegal. It is in evidence that a warrant had been issued for the arrest of Velan and Kuppan on a charge of a cognisable offence, that the constable knew of this, and had been directed by their Sub-Inspector to be on the look-out for them and arrest them if found. In such circumstances, I have no hesitation whatever in deciding that they were justified under section 54 of the Code of Criminal Procedure in making the arrest. Of the cases quoted by Mr. Rangachariyar, *In the matter of Charu Ch. Majumdar*(1) is clearly distinguishable on the ground that no warrant had been issued. The other cases *Abdul Gafur v. Queen-Empress*(2), *Queen-Empress v. Dalip*(3) and *Queen-Empress v. Kalian*(4), appear to me to have no bearing on the applicability of section 54 of the Code of Criminal Procedure.

There is no reason for interfering with the convictions but I regard the imposition of a fine on the first accused as unnecessary and would remit that portion of the sentence.

The fine, if paid, should be refunded.

NAPIER, J.—This point is to my mind not arguable. A clear distinction is made in the Criminal Procedure Code between cognisable and non-cognisable cases. Section 54 empowers any police officer to arrest without an order from a Magistrate and

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(1) (1916) 20 C.W.N., 1233.

(2) (1896) I.L.R., 23 Cal., 896.

(3) (1896) I.L.R., 18 All., 246.

(4) (1896) I.L.R., 19 Mad., 310.

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without a warrant any person who has been concerned in a cognizable offence or against whom a reasonable complaint has been made or credible information received or a reasonable suspicion exists of his having been so concerned. The object of the Code is to give the widest powers to the police in cognizable cases and the only limitation is the necessary requirement of reasonability and credibility to prevent the misuse of the powers. The legislature could have confined the power to officers in charge of a police station as is done in section 55 where matters are dealt with which are not offences but has not thought fit to do so. The suggestion that a police officer who suspects a man of having committed a cognizable offence may arrest but that he may not arrest when a warrant has been issued, has nothing in the language of the section to support it and would enable a man wanted by the police on a charge of murder, for instance, to defy every police officer except the one who held the warrant. *In the matter of Charu Ch. Majumdar*(1) is a case where the accused was wanted by the police in Bombay and he was arrested in Bengal at their request, and there is no evidence that a warrant had been issued. There is, in my opinion, nothing in the learned Judge's observations which support the argument addressed to us. I agree with the order of my learned brother.

K.R.

APPELLATE CRIMINAL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield,
and Mr. Justice Kumaraswami Sastriyar.*

1916, October, 31,
November, 9
and 1917,
April,
16 and 17.

*In re KOLANDAIVELU AND ANOTHER (ACCUSED NOS. 1 AND 3).**
*Christian Marriage Act (XV of 1872), sec. 68—Hindu performing marriage in
Hindu mode between persons one of whom is a Christian, whether guilty
under.*

A Hindu by religion performing a marriage according to the Hindu mode between two persons one of whom is a Christian, commits an offence under section 68 of the Christian Marriage Act (XV of 1872).

(1) (1916) 20 C.W.N., 1233.

* Criminal Revision Case No. 544 of 1916.

Madras High Court, Appellate Side, Proceedings, 21st March 1871 (1871) 6 M.H.C.R., Appx. xx and Queen-Empress v. Yohan (1894) I.L.R., 17 Mad., 391, approved.

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Meaning of "solemnize" in Section 4, explained.

TAKEN up case No. 21 of 1916 from the file of T. S. THIAGARAJA AYYAR, the acting Sessions Judge of North Arcot, in Sessions Case No. 59 of 1916.

The accused was not represented.

M. D. Devadoss for the complainant.

E. R. Osborne, the Acting Public Prosecutor, for the Crown.

This case came on for hearing in the first instance before SADASIYA AYYAR and NAPIER, JJ., who made the following ORDERS OF REFERENCE TO FULL BENCH.

NAPIER, J.—The records of this case have been called for by NAPIER, J. the High Court on its own motion owing to a doubt whether the case relied on by the Sessions Judge to convict the accused is good law. The facts are that a Hindu by religion, a *purohit* among the *Valluvus* (Hindu Pariahs), performed a marriage in the Hindu mode between a Hindu Valluva and a Christian girl, aged 11, belonging to the same community. The priest has been convicted under section 68 of the Christian Marriage Act XV of 1872, and the father of the girl has also been convicted under the above section 68 read with section 114 of the Indian Penal Code, and the Sessions Judge has very properly followed the decision of this Court in *Queen-Empress v. Yohan*(1) which follows another decision in *Madras High Court, Appellate Side Proceedings, 21st March 1871*(2). In my opinion, these decisions are wrong and should be reconsidered.

The Christian Marriage Act is a Code repealing and embodying the provisions of several prior Acts which were taken from the numerous English Marriage Acts. The preamble states:

"Whereas it is expedient to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion. . . ."

Section 4 provides that

"every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void."

(1) (1894) I.L.R., 17 Mad., 391.

(2) (1871) 6 M.H.C.R., App. xx.

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Section 5 provides that

"marriages may be solemnized in India by any of the five different persons, (1) persons who have received ordination, (2) clergymen of the Church of Scotland, (3) Ministers of religion licensed under the Act, (4) Marriage Registrars appointed under the Act, and (5) persons licensed under this Act to grant certificates of marriage between Native Christians;"

and in addition it provides that marriages may be solemnized in the presence of a Marriage Registrar appointed under this Act. The offence charged here is that the accused "solemnized" a marriage in the absence of the Marriage Registrar. Now it is not suggested that the Marriage Registrar is authorized to attend Hindu marriages, and it is to be noted that no person can be appointed a Marriage Registrar other than a Christian (vide section 7). If, therefore, a Hindu does marry a Christian girl according to the customs of his caste, both he and the officiating priest render themselves liable to imprisonment or transportation for ten years. It seems to me that this cannot be the intention of the Act. The object of section 68 with its highly penal consequences is to punish persons for the serious offence of purporting to solemnize a marriage between two persons who honestly believed that they were being married, the consequences of such a void marriage being intensely serious. The English Acts never contemplated marriages in form other than those suitable for Christians and, in my opinion, the Indian Act intended to go no further. The use of the word "solemnized" is, in my view, indicative. It is true that the marriage provided for under the Act, need not in all cases be of a religious character just as in England persons can go through a civil ceremony before a Registrar; but the word "solemnized" is never used in this country with reference to a Hindu marriage ceremony. Section 10 provides that

"every marriage under this Act shall be solemnized between the hours of 6 in the morning and 7 in the evening."

Section 42 provides that where the marriage is solemnized in the presence of a Registrar, one of the parties must make oath that there is not any impediment of kindred or affinity or lawful hindrance to the said marriage. Section 51 provides that in some part of the ceremony each of the parties shall make a declaration of absence of lawful impediment and shall say to the other

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"I call upon these persons here present to witness that I, A.B., do take C.D., to be my lawful wedded husband (or wife)."

Such sections are, on the face of them, inapplicable to Hindu marriages, and the forms in the schedule are all such as are applicable to Christian marriages. It seems to me that the whole Act has reference to nothing but marriages which purport to be solemnized in accordance with usage among Christians, and we would read section 4 as meaning

"every marriage purporting to be a Christian marriage shall be solemnized, etc."

If this section is not to be so read, it would follow that the legislature in 1872 has declared void all marriages according to caste custom between a Hindu and a Christian, with the necessary result that the children are illegitimate and cannot acquire rights of property. I very much doubt whether the legislature intended to interfere in this manner with Hindus among whom marriages are regulated by caste custom. There are, as already stated *Madras High Court, Appellate Side Proceedings, 21st March 1871*(1) and *Queen-Empress v. Yohan*(2) and in addition, there is a later case *Queen-Empress v. Paul*(3). The decision in *Madras High Court, Appellate Side Proceedings, 21st March 1871*(1) was on the language of section 56 of the Act V of 1865 and the Court decided the point on the strict language of the Act. The case was, however, not argued on either side. *Queen-Empress v. Yohan*(2) purported to follow the decision in *Madras High Court, Appellate Side Proceedings, 21st March 1871*(1). In *Queen-Empress v. Paul*(3) the only point taken was that the word "solemnized" could only have reference to a religious ceremony, and the Court, having pointed out that the civil marriage is also solemnized under the Act, thought that this point settled the matter. In my opinion, the question raised is of serious importance in view of the large number of Christians among the lower castes, and I therefore, think it right to refer to a Full Bench the question:—

"Whether a Hindu by religion performing a marriage according to the Hindu mode between two persons either of whom is a Christian commits an offence under section 68 of the Christian Marriage Act, XV of 1872".

(1) (1871) 6 M.H.C.B., Appx. xx. (2) (1894) I.L.B., 17 Mad., 391.
(3) (1897) I.L.B., 20 Mad., 12.

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SADASIVA AYYAR, J.—I confess that I was at first not inclined to reopen the question which my learned brother's order, just now pronounced, refers to a Full Bench as that question had been considered in three cases *Madras High Court, Appellate Side Proceedings*, 21st March 1871(1), *Queen-Empress v. Yohan*(2) and *Queen-Empress v. Paul*(3) at sufficient intervals of time, and might, in a manner, be deemed to have been settled. But I have been much impressed by the arguments and considerations put forth from the Bench by my learned brother in the course of the hearing of these cases and as set out in his above order and I cannot say that the judgments in those cases deal so fully and exhaustively with all the aspects of the question as to preclude its authoritative reconsideration by a Full Bench.

For instance, as regards the meaning of the word "solemnize" in section 68, the decision in *Queen-Empress v. Paul*(3) says that it only means "conduct, celebrate or perform" and one of the reasons given is that in a marriage "solemnized" before a Marriage Registrar, "no ceremonies are necessary." But a Marriage Registrar cannot be the professor of any other religion than the Christian religion (see section 7 of the Christian Marriage Act) and two ceremonies or ceremonial declarations have to be made before him by each of the parties to the marriage under section 51 of the Act. Those declarations are:

"I do solemnly declare that I know not of any lawful impediment why I, A.B., may not be joined in matrimony to C.D."

"I call upon these persons here present to witness that I, A.B., do take thee, C.D., to be my lawful wedded wife (or husband)."

I do not see why these four indispensable solemn declarations (two by each party) required to be made only before a professing Christian recognized as such by the Government and authorized to record those solemn declarations should not be called "necessary ceremonies" required to validate the marriage. I am inclined to think that "solemnization" in section 68 indicates the performance of marriages "according to rules, rites, ceremonies and customs" of a Christian church or after complying with the ceremony of the four solemn declarations prescribed for celebrating marriages before the Christian Marriage Registrar. I think the making of those declarations before the Christian

(1) (1871) 6 M.H.C.R., Appx. xx. (2) (1894) I.L.R., 17 Mad., 391.
(3) (1887) I.L.R., 20 Mad., 12.

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Marriage Registrar means the observance of certain "particular forms and ceremonies" of solemnization and that that is one of the several definite modes of the "solemnization" of marriages contemplated by the Act. In Halsbury's Laws of England, volume 16, section 581 (page 302), the declarations above-mentioned are described in the margin as coming within "Forms and ceremonies." If the word "solemnize" as used in the Act merely means "celebration" (including celebration with Hindu or Mussalman rites), the Act cannot be said not to violate the principle of religious neutrality followed almost without exception by the Indian legislature, a violation which visits followers of religions other than the Christian with very severe criminal penalties for doing acts not prohibited by those other faiths. A construction which credits the legislature with such violation should, if possible, be avoided. A Sunni Mussalman male and a male of one of several of the Shiah sects can validly marry according to his law in the permanent form and with Muhammadan rites a "Kitabia" (that is a Jew or a Christian or the follower of any other religion revealed in a Kitab or sacred book provided she is not a fire-worshipper or idolatress). According to some other Shiah sects he can validly marry her in mute form (see Ameer Ali, volume II, page 320). If section 68 of the Christian Marriage Act be interpreted as widely as has been done in *Queen-Empress v. Yohan*(1) and *Queen-Empress v. Paul*(2) a Khazi who performs a marriage between a Mussalman male and a Christian female according to Mussalman rites is liable to the punishment of transportation for ten years. Whereas a Christian minister or Marriage Registrar who performs a marriage with Christian rites or the declaration ceremonies mentioned in section 51 between a Mussalman male and a Christian female is not subjected to any such penalty and performs a perfectly lawful and valid act. It may be said that when section 4 declares that a marriage "solemnized" otherwise than in accordance with section 5 between two persons though one of them alone is a Christian is void, the legislature does interfere with the Mussalman religion and the additional imposition of criminal penalties of a severe nature on such solemnization by the later section 68 does not, in principle, carry the interference further. But if the

(1) (1894) I.L.R., 17 Mad., 391.

(2) (1897) I.L.R., 20 Mad., 12.

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meaning of the word "solemnize" is confined to (1) the celebration with the marriage rites and ceremonies of a Christian church and (2) the ceremonies of declaration prescribed to be followed before the Christian Marriage Registrar appointed by the Act, neither of the sections interferes with the tenets and marriage rules of other religions than the Christian. The Full Bench decision in *Queen-Empress v. Fischer*(1) does not deal directly with the interpretation of the word "solemnize."

However, as I said in the beginning, I have had some hesitation in the matter (especially as the first Christian Marriage Act of 1852 was based on the provisions of English Statutes, 14 & 15 Vict., cap. 10 and other Statutes which did not probably care for the principle of religious neutrality and treated religions other than the Christian with somewhat scant consideration). While therefore I do not think it necessary to express a final opinion on the matter, I do not think it undesirable to have the matter reconsidered by a Full Bench. I accordingly join in the reference proposed by my learned brother.

On this Reference—

E. R. Osborne, the Acting Public Prosecutor, for the Crown, relied on *Queen-Empress v. Yohan*(2) and *Queen-Empress v. Paul*(3).

M. D. Devadoss for the complainant was not heard.

T. R. Ramachandra Ayyar (*amicus curiæ*) for the accused.—Act XV of 1872 applies only to marriages solemnized in the Christian form and has no application to a marriage in the Hindu form even where one of the parties is a Christian. The marriages that are dealt with in Act XV of 1872 are only Christian marriages as the short title of the Act itself indicates. The preamble also shows that it was an Act to consolidate and amend the law relating to the solemnization in India of the marriages of Christians. The previous Act which was repealed by Act XV of 1872 is Act V of 1865 whose title was the Indian Marriage Act. Hence in section 4, the word "marriage" must be taken as denoting only a Christian marriage. Whatever may be the view with reference to marriages of persons who are not

(1) (1891) I.L.R., 14 Mad., 342. (2) (1894) I.L.R., 17 Mad., 391.
(3) (1897) I.L.R., 20 Mad., 12.

Native Christians, the Act seems to take particular care when dealing with the marriages of Native Christians in describing the marriages as marriages between Native Christians: section 5, clause (5) and sections 9, 37, 59 and 60. Hence it seems to be clear that the marriages contemplated in the Act are confined to a Christian form of marriage and in the case of Native Christian, it must be between Native Christians. The expression "solemnize" is only applicable to marriages recognized by Christians. It was not the intention of the Legislature, nor does the language of the Act warrant the inference, that a marriage celebrated in the Hindu or Muhammadan form should be within the pale of the Act.

The Court delivered the following

OPINION.—We are of opinion that the decisions in *Madras High Court, Appellate Side Proceedings*, 21st March 1871(1) and *Queen-Empress v. Yohan*(2), which were accepted in *Queen-Empress v. Paul*(3) were rightly decided. In our opinion the Act was intended to apply to the marriages of all Christians in India, including marriages where only one of the parties is a Christian. Section 4 expressly says that

"any marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void";

and section 68 merely provides a penalty for solemnizing or professing to solemnize such a marriage contrary to the provisions of the Act. Offences under the section may vary very widely in gravity, and it has been considered necessary, as in England, to provide a very heavy maximum sentence which would be wholly inapplicable in such a case as the present, but that does not show that cases such as the present do not come within the section. Nor does the use of the word "solemnize" which is referred to in the Order of Reference of NAPIER, J., give rise in our opinion to such an inference. That word which is now invariably used in this connexion has a history which may usefully be referred to. The general law of the medieval Church, which regarded marriage as a sacrament as well a contract, did not regard the presence of

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(1) (1871) 6 M.H.C.R., Appx. xx. (2) (1894) I.L.R., 17 Mad., 391.
(3) (1897) I.L.R., 20 Mad., 12.

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a priest in orders as essential to the validity of the marriage. The parties might themselves enter into the contract, and the issue born of the marriage would be legitimate, though such a marriage was regarded as clandestine and irregular as contrasted with a marriage *in facie ecclesiae*, and did not carry with it all the incidents of such a marriage. BRACON in a passage cited in *Reg. v. Millis*(1), whilst upholding the validity of such clandestine marriages, says that they did not confer on the wife a right to dower. On the other hand he says that a wife married *in facie ecclesiae* was entitled to dower *propter solemnitatem* which we may translate 'because of the solemnization of the marriage' or 'the performance of the marriage in solemn form.' A solemnized marriage is thus a marriage effected in a solemn and regular manner, as opposed to an irregular and clandestine marriage. The question whether there was a stricter rule in England requiring the presence of a priest in orders arose in the great case of *Reg. v. Millis*(1) and was answered in the affirmative in accordance with the view of the Irish Court owing to the Lords being equally divided. To put an end so far as it could to clandestine marriages, the Council of Trent decreed that in future all marriages must be celebrated *coram parochio*, that is, in the presence of the parish priest, and also in the presence of witnesses. Its decrees were not received in England or Scotland, but Lord Hardwicke's Act, which was passed in 1754 with the same object, put an end to clandestine marriages in England by requiring all marriages to be celebrated in the Parish Church. This was considered a hardship by Roman Catholics and non-conformists, and in 1837 they were allowed to be married at their own places of worship if the marriage was attended by the Registrar, and provision was also made for the solemnization of marriages before the Registrar himself.

As regards Christian marriages in India it was held by Sir ERSKINE PERRY in *Maclean v. Cristall*(2) that the rule in *Reg. v. Millis*(1) as to the presence of a priest in orders, had never been applicable in India. The Legislature however considered it necessary to legislate in India on the same lines as in England against irregular and clandestine marriages among Christians and dealt with the subject in Acts XXV of 1864, V of 1865, and

(1) (1844) 10 Cl. & F., 534.

(2) (1849) P.O.C., 175.

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XV of 1872 the Act now in force. Under that Act all marriages of Christians including marriages where only one of the parties is a Christian, must be performed, on pain of nullity, in one of the prescribed forms. The Act makes no distinction between Native Christians and other Christians, except that by section 9 it provides for the issue of licences to perform marriages between Native Christians to Christians who are not ministers of religion to meet the case of an insufficiency of ministers of religion, and that it directs that the registers of the marriages of Native Christians shall be kept separately from the registers of other Christian marriages, a provision dictated by administrative convenience. The provisions of section 9 have no bearing on the question now before us as they only apply where both the parties are Native Christians, as expressly declared by Act II of 1892; and therefore marriages of Christians with persons who are not Christians must be solemnized in one of the other manners provided in the Act. The general effect of the Act is as already stated to require that every marriage where one of the parties is a Christian, must as a condition of validity be solemnized in one of the prescribed forms, excluding the form prescribed by section 9 unless both the parties are Native Christians. The Act however is only concerned with the forms in which the marriage is to be solemnized, and does not deal with objections to the validity of the marriage. As pointed out in *Lopez v. Lopez*(1) where the history of this legislation is carefully examined, it requires one of the parties to the proposed marriage to make a declaration that there is no impediment of kindred or affinity or other lawful hindrance, and also requires that the Minister of religion or Registrar should be satisfied that there is no lawful impediment; but it provides in section 88 that

"nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into."

We answer the question in the affirmative.

N.R.

(1) (1885) I.L.R., 12 Cal., 607.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Abdur Rahim, Mr. Justice Coutts Trotter, Mr. Justice Seshagiri Ayyar and Mr. Justice Srinivasa Ayyangar.

1915,
September,
8 and 21
and
1917,
February, 8
and
April, 23.

MULLA VEETIL SEETI KUTTI AND SIX OTHERS
(DEFENDANTS NOS. 5 AND 8 AND LEGAL REPRESENTATIVES OF
THE EIGHTH DEFENDANT), APPELLANTS,

v.

K. M. K. KUNHI PATHUMMA AND THREE OTHERS (PLAINTIFF
AND DEFENDANTS NOS. 11 TO 13), RESPONDENTS.*

Limitation Act (IX of 1908), art. 134—Transfer with possession by mortgagee—Transferee taking possession of some items later than date of transfer, effect of—Transferee not taking possession at all of some other items, effect of—Limitation from what date, date of transfer or date of possession—"Transfer" in article 134, meaning of—Question referable to a Full Bench, when—High Court, Appellate Side Rules, r. 2.

Held, by the Full Bench (WALLIS, C.J., and COUTTS TROTTER, J., *contra*) that article 134 of the Limitation Act does not apply to a transfer from a trustee or mortgagee under which possession is not taken by the transferee.

Per WALLIS, C.J., and COUTTS TROTTER, J.—Article 134 of the Limitation Act applies to a transfer from a trustee or mortgagee under which possession is not taken by the transferee.

Where possession is taken under the transfer not on the date of the transfer but some time later:—

Held: (a) *Per* WALLIS, C.J., and COUTTS TROTTER, J.—Article 134 of the Limitation Act applies and time begins to run from the date of transfer and not from the date of taking possession;

(b) *Per* ABDUR RAHIM and SESHAGIRI AYYAR, JJ.—Article 134 of the Limitation Act applies, but time begins to run not from the date of transfer but from the date of taking possession; and

(c) *Per* SRINIVASA AYYANGAR, J.—Article 134 of the Limitation Act is not applicable to the case. It applies only in cases where the transferee takes possession on the date of transfer and where the mortgagor is entitled even on the date of transfer to sue the transferee for possession.

Per SRINIVASA AYYANGAR, J.—*Obiter*—"Transfer" in article 134 means "transfer of title" and not "transfer of possession."

Held by the Full Bench:—Under rule 2 of the Rules of the High Court, Appellate Side, only a question of law involved in the determination of the case may be referred to a Full Bench; and that the third question referred to them did not so arise in the case.

* Second Appeal No. 2568 of 1912.

SECOND APPEAL against the decree of K. IMBICHUNNI NAYAR, SEETI KUTTI the Subordinate Judge of South Malabar at Calicut, in Appeal No. 531 of 1911, preferred against the decree of A. SUBRAHMANYA AYYAR, the District Munsif of Parapanangadi, in Original Suit No. 632 of 1909.

The facts of the case are stated in the Order of Reference of TYABJI, J.

K. P. M. Menon for appellants Nos. 1 and 3 to 7.

A. Sundaram for the first respondent.

The other respondents did not appear.

This Second Appeal came on for hearing in the first instance before AYLING and TYABJI, JJ., who made the following ORDERS OF REFERENCE TO A FULL BENCH.

TYABJI, J.—The facts and questions involved in this appeal may be very shortly stated. TYABJI, J.

When I refer to the parties I include their predecessors-in-title. All the mortgages mentioned below are usufructuary.

In 1862 the plaintiff mortgaged items 2 and 3 for Rs. 1,000 to defendants Nos. 1 to 4 (Exhibit A); defendants Nos. 1 to 4 took possession.

In 1886 defendants Nos. 1 to 4 purported to mortgage item 2 for Rs. 125 in favour of one Haji (Exhibit XV), who was subsequently redeemed by defendants Nos. 5 and 8.

In 1893 defendants Nos. 1 to 4 purported to mortgage item 3 to thirteenth defendant for Rs. 75 (Exhibit XXVI).

In 1894 defendants Nos. 1 to 4 purported to mortgage items 2 and 3 to defendants Nos. 5 and 8 for Rs. 9,000 (Exhibit XVIII). Possession of item 2 was taken by defendants Nos. 5 and 8 in 1900 (Exhibit XX); possession of item 3 has been taken after the suit was instituted.

Defendants Nos. 1 to 4, on each of the occasions when they purported to mortgage the properties, purported to mortgage them as if they were full owners, and not merely as mortgagees.

The plaintiff has sued to redeem his original mortgage of 1862, Exhibit A, and the contention of defendants Nos. 5 and 8 is that as their transfer from the mortgagees was more than twelve years prior to the suit, the original mortgagor is barred from suing for possession without redeeming them; article 134 of the Indian Limitation Act. Both the lower Courts have held

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on the authority of *Ramachandra v. Sheikh Mohidin*(1) that the title of defendants Nos. 5 and 8 could become indefeasible only twelve years after possession and as defendants Nos. 5 and 8 had possession for the said period prior to suit, their claim has not become perfected by adverse possession.

It is argued before us that *Ramachandra v. Sheikh Mohidin*(1) was wrongly decided and that on the wording of the article no question as to possession arises.

The article provides that :

a suit to recover possession of immoveable property

(1) conveyed or bequeathed in trust or

(2) mortgaged

and afterwards transferred from the trustee or mortgagee for valuable consideration, shall be barred after twelve years from the date of the transfer.

The difficulties in reading the article as contended for by the appellant are twofold. In the first place, in accordance with it a suit for possession may be barred, though the defendants may not have taken possession and consequently there may have never accrued a cause of action against him for obtaining possession. This is not a mere academic difficulty. In regard to the third item of property the difficulty arises in this very appeal: for it is contended that in regard to that property the present suit could not lie against the fifth and eighth defendants as they were not in possession at the date of the suit. They have taken possession since the suit was instituted and if now a fresh suit were instituted against them the defence would be that the suit is barred under article 134, as the suit would be twelve years after the transfer.

Thus according to the appellant's contention a mortgagee can transfer not merely his own rights but the rights of the mortgagor, and can pass a better title than he himself possesses by the simple device of deferring possession to the transferee for twelve years and the mortgagor can do nothing to prevent this being done. Secondly, if the article is read as the appellant contends, then though the transfer by the mortgagee may be only of a limited interest and of an interest which does not carry with it the right of possession still the real owner of the property

(1) (1899) I.L.R., 23 Bom., 614.

would be unable to obtain possession after twelve years of the transfer; so that not only is the mortgagee (a person not entitled to full ownership) enabled to transfer full ownership, but the full ownership is acquired by the transferee whether it is purported to be transferred or not. That the article should not be read literally on this second point was decided in *Radhanath Doss v. Gisborne*(1).

The difficulty on the other hand in reading the article as read in *Ramachandra v. Sheikh Mohidin*(2) is that the words in the third column of the article are "from the date of the transfer" and not "from the date of possession."

It seems to me that *Ramachandra v. Sheikh Mohidin*(2) can be supported on the basis (1) that the law of limitation implies that the suit in question could have been instituted during the period allowed or as expressed in *Peria Aiya Ambalam v. Shunmuga Sundram*(3) :

"limitation cannot run against him when there is no remedy open to him to recover possession of his property"

and (2) that the transfer referred to in the first column of the article must by necessary implication be a transfer which gives the right to possession and which is not complete unless possession is actually transferred. I do not express any opinion on the question whether the article can be so restricted beyond referring to the remarks of Lord CAIRNS in *Radhanath Doss v. Gisborne*(1) approved in *Juggernath Sahoo v. Syud Shah Mahomed Hossein*(4) to the effect that the article must be stringently read.

Ramachandra v. Sheikh Mohidin(2) gave effect to a previous decision of the Bombay High Court in which FARRAN, C.J., delivering the judgment of himself and FULTON, J., said that until the defendants held possession under their mortgage for the full period of twelve years the plaintiff could have disregarded it and recovered possession and that it was only after the defendants had held possession for twelve years that article 134 coupled with section 28 of the Indian Limitation Act gave legal validity to their mortgage barring the plaintiff from recovering possession without redeeming them.

(1) (1871) 14 M.I.A., 1.

(3) (1915) I.L.R., 88 Mad., 903.

(2) (1899) I.L.R., 23 Bom., 614.

(4) (1874) 2 I.A., 48.

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It has been argued before us that the reference to possession was merely *obiter*. But it seems to me to be more likely that a Judge of so much experience as Sir CHARLES FARRAN had in mind the second of the two difficulties which I have mentioned: unless the transfer by the mortgagee was one which entitled the transferee to possession it is difficult to give any effect to the article; and if that concession has to be made the step taken in *Ramachandra v. Sheikh Mohidin*(1) seems justifiable.

There are however some other cases both of this and the other High Courts which make it desirable, in my opinion, that the matter should be settled by a Full Bench of this Court. The point that was referred in *Manavikraman Ettan Thamburan v. Ammu*(2) to the Full Bench was whether a person who had taken a sub-mortgage could be said to have "purchased" within the terms of the article of the Act of 1877: it was no doubt assumed that if he could be styled a purchaser the article applied: on the point referred the article has been amended and made quite clear. On the other hand in the analogous case, where a usufructuary mortgagee is ousted by a trespasser, a Full Bench of this Court held on general principles and not on any express words in any article that limitation does not run against the mortgagor until there has been an assertion of adverse title to the knowledge of the mortgagor. *Peria Aiya Ambalam v. Shunmuga Sundram*(3). The same principles were again enunciated in elaborate judgments of the FULL BENCH in *Vyapuri v. Sonamma Bai Ammani*(4). The question in the last case was whether the possession of a trespasser who has dispossessed a simple mortgagor is adverse to the simple mortgagee. These decisions of the Full Bench are based on general principles which are applicable to the present case, unless it is held that the language of the article precludes any other construction but that which is put forward by the appellant.

I would therefore refer the following question to the Full Bench:—

(1) Does article 134 of the Indian Limitation Act apply to a transfer from the trustee or mortgagee under which possession is not taken by the transferee?

(1) (1899) I.L.R., 23 Bom., 614.
(3) (1915) I.L.R., 38 Mad., 903.

(2) (1901) I.L.R., 24 Mad., 471.
(4) (1916) I.L.R., 39 Mad., 811.

(2) Where possession is taken under the transfer but at some time after the date of the transaction purporting to transfer the right to take possession, does time begin to run from the date when possession is taken or from the date of the transaction?

(3) Where the mortgage is usufructuary and the mortgagor has no right to obtain possession from the mortgagee at the time of the transfer, does time run against the mortgagor under article 134,

(a) from the time of the transfer or

(b) from the time when the mortgagor's right to sue for possession accrues, under the original mortgage or

(c) from the time when the transferee enters into possession or

(d) from the time when the transferee enters into possession and asserts an adverse title to the knowledge of the mortgagee.

His Lordship then dealt with certain other questions arising in the case which were not referred to the Full Bench but which were made to await its opinion.

AYLING, J.—I agree to the reference proposed: and also in AYLING, J. the conclusions arrived at by my learned brother on the other points argued before us.

On this Reference—

K. P. M. Menon for the appellants.—The suit is barred by article 134 of the Limitation Act. The article applies even if the transfer is not accompanied by possession and even if the transferee has notice of the limited nature of the transferor's title. Limitation under the third column of the article runs from "the date of transfer" and not from the date of possession. In article 11 (a) of the Limitation Act, it is not the date of dispossession but it is the order to dispossess that counts for limitation. In the Referring Order in *Ahmud Kutti v. Raman Nambudri*(1) time is held to run from the date of sale and not from the date of confirmation for the purpose of article 134. The decisions of the Bombay and Allahabad High Courts are wrong as they hold that possession with the transferee is necessary for the application of article 134, on the false analogy

(1) (1902) I.L.R., 25 Mad., 99 (F.B.).

SEETI KUTTI afforded by section 10 of the Limitation Act. In *Maniklal v. Kunhi Pathumma* *Atmaram v. Manchershhi Dinsha Coachman*(1) the question of possession is treated as irrelevant.

A. Sundaram for the respondent.—The suit is not barred under article 134. The word “transfer” in the first and third columns of article 134 means only a transfer with possession, for it is meaningless to sue for possession from one who has not got possession by transfer, and possession must be under the transfer and not in any other way. If the transfer does not entitle the transferee to take possession, the fact that he in some way obtains it afterwards does not make the article applicable. Limitation runs only from the date when possession is actually taken: *Bagas Umarji v. Nathabhai Utamram*(2) and *Husaini Khanam v. Husain Khan*(3). Notice of the defective title in the transferor does not protect the transferee.

This case again coming on for hearing before the Full Bench, the Court delivered the following Opinions:—

WALLIS, C.J. WALLIS, C.J.—Our rules only provide for a reference to a Full Bench where both the learned Judges constituting the Bench agree that the question of law to be referred is involved in the determination of the case. There are weighty and obvious reasons for this limitation, and it is therefore desirable that we should confine ourselves to the questions which actually arise in the present case. The suit is to redeem a mortgage of the year 1862 and is within time as against the mortgagees, having been brought within sixty years from the date of the mortgage, article 148. The question is whether it is also within time as against transferees from the mortgagees, or is barred under article 134 as having been brought more than twelve years from the date of the transfer. The plaintiff's mortgagees acting as full owners executed several usufructuary mortgages of items 2 and 3 under which they have been out of possession of these items since 1862 and 1894 respectively. The most recent mortgages of both these items were more than twelve years before suit, but the present mortgagees did not get possession under these mortgages from the prior mortgagees as regards item 2

(1) (1876) I.L.R., 1 Bom., 269 at p. 280. (2) (1912) I.L.R., 36 Bom., 146.
(3) (1907) I.L.R., 29 All., 471.

until 1900 and as regards item 3 until after the institution of *SEETI KUTTI v. Kunhi Pathumma* the present suit.

As regards both items the suit is covered by the language of article 134 taken in its natural sense, but it is said that, as the plaintiff had no occasion to sue the present transferees by way of mortgage from the original mortgagees until they took possession as regards item No. 2 in 1900 and as regards item No. 3 after the institution of this suit, the article does not apply. With regard to the last case it must be remembered that possession was not with the mortgagees but with prior transferees from them, so that for over thirty years the mortgagors if they wished to recover possession of the suit properties would have had to sue transferees from the mortgagees.

This result, it is said, may be arrived at in three ways:—

(1) by reading the date of transfer in the third part of the article as meaning transfer with possession,

(2) by holding that the article only applies to cases where possession is given on the date of the transfer, and

(3) by holding that time did not run under the article until the transferees from the mortgagees took possession.

In my opinion none of these solutions is admissible. Article 134, as is well known, is founded on section 25 of the Real Property Limitation Act, 1834, which, after providing generally in section 24 that suits in equity should be barred in the same way as actions at law, went on to provide in section 25 that when land is vested in a trustee the right of the *cestui que trust* to bring an action for the recovery of the land shall be deemed to have first accrued when the land shall have been conveyed to a purchaser for valuable consideration and shall be deemed to have accrued only as against such purchaser and any person claiming through him. This was an exception in favour of the *cestui que trust*, as it prevented time running against him until there had been a conveyance by the trustees to a purchaser for valuable consideration. Now, as to the first suggestion, it has never been doubted, so far as I know, that when the section applies, time begins to run from the date of the conveyance and not from the date when possession is taken under the conveyance. The very object of the statute was to get rid of the question as to when possession became adverse, which was the starting point under the Act of James I as construed by the

SEETI KUTTI v. KUNHI PATHUMMA. WALLIS, C.J. Courts, and to fix a definite period at which the right to re-enter or bring the action for recovery should be deemed to have accrued. To come now to the Indian enactments, there is in my opinion equally little ground for holding "the date of the purchase" in the corresponding section 16 (v) of the Indian Limitation Act of 1859 and in article 134 of the Acts of 1871 and 1877 and "the date of transfer" in article 134 of the present Act mean transfer with possession. Section 16 (v) of the Act of 1859 was obviously taken from section 25 of the English Act, but was made applicable to purchases from mortgagees as well as from trustees, and there is nothing in the extension to justify us in reading purchase, or now transfer, as purchase or transfer with possession. The word "purchase" was probably substituted for "conveyance" to cover oral sales, but there is no reason to suppose that it was intended to depart in other respects from the starting point provided in section 25 of the English Act. To adopt this construction in my opinion is simply to alter the statutory starting point and to go back to the date of adverse possession which was the old law modified by the Act of 1834.

I feel no less difficulty in holding that the present article applies only where possession is taken on the date of the transfer, as this is inserting words which are not there and would practically exclude nearly all the cases which would otherwise come within the article, as possession is rarely taken by the transferee on the date of the transfer. Even supposing section 25 of the English Act of 1834 to be susceptible of such a construction, I do not think that would affect the present question.

Mr. Lewin points out that a strict construction of section 25 would bar reversionary heirs whose right to sue might not arise until long after the date of the conveyance, and he founds an argument on the fact that section 25 is in form a proviso on section 24 which imposes the same limitation upon suits in equity as upon actions at law, and a proviso the general effect of which is to extend rather than to limit the right of suit. As observed in *Darby and Bosanquet*, second edition, page 417, its effect is to prevent time running in favour of a trustee against a *cestui que trust* upon an express trust or those claiming through him until a conveyance for value has been made by such trustee or some one claiming through him and that the right of the

cestui que trust is to be deemed to accrue at the date of such conveyance. SEETI KUTTI v. KUNHI PATHUMMA.

"Now it is obvious", the learned authors remark, "that unless this is construed as only a proviso on the 24th section (the italics are mine) it might, instead of extending the time wherein the *cestui que trust* might bring his remedy actually take it away before his right accrued."

Accordingly they agree with Mr. Lewin that the section may be read as applicable only to cases where it extends, and not to cases where it restricts, the right of suit which the mortgagee might otherwise have. It cannot, I think, be said that this construction has ever been adopted in any decided case and Mr. Godefroi in his work on Trusts, fourth edition, page 600, refers to it as probable but doubtful. On the other hand it would appear that in the cases to which the article has been held applicable the date of the conveyance has always been taken as the starting point. In *Attorney-General v. Flint*(1), one of the trustees of charitable land who was also the owner of adjoining lands incorporated a building standing on the charity land with a building standing on his own land and afterwards sold the whole building in 1817. A conveyance pursuant to the sale was executed by his executors some years later, and it was held that the suit was not barred as it was brought within twenty years from the date of the conveyance. In *Petre v. Petre*(2), it was held that there was no express trust to bring the case within section 25, but that, even if there were, the suit was barred as having been brought more than twenty years after the date of a deed by the trustee conveying the property to the trustees of his marriage settlement. In a somewhat similar Irish Case—*Smith v. Smith*(3)—the trustee was held to have conveyed the property to the trustees of his marriage under a settlement which was not forthcoming at the date of the suit and to have enjoyed it during his life-time, and it was held that a suit against his son who took under the settlement after his death was barred by section 25. The decision was reversed on the ground that the terms of the settlement were not proved—*Smith v. Smith*(4); but it would appear from the observations

(1) (1844) 4 Hare, 147.
(2) (1876) Ir. R., 10 Eq., 273.

(2) (1853) 1 Drew, 371.
(4) (1876) 1 L.R., 1r., 206 (C.A.).

SEETI KUTTI of Darby and Bosanquet, page 444, that the Appellate Court
 v. KUNHI agreed with the lower Court that the suit would have been
 PATHUMMA. barred under section 25 if the settlement had been proved.
 WALLIS, C.J. *Smith v. Smith*(1) only decides that there is no dispossession
 until some one else takes possession. In *St. Mary Magdalen,*
Oxford v. The Attorney-General(2), there is nothing in their Lord-
 ships' judgments to recognize the contention raised for the
 respondent, and assuming however that this is the correct
 construction of section 25 of the English Act, section 16 (5) of
 the Indian Act of 1859 was not appended as a proviso to any
 previous section but was wholly self-contained, and, in the
 language of their Lordships in *Lala Soni Ram v. Kanhaiya*
Lal(3), as regards other articles of the English and Indian
 Statutes, I think that section 16 (5) of the Act of 1859 was
 essentially different in its language and intention from section
 25 of 3 and 4 Will. 4, c. 27, and the same observation applies to
 article 134 of the present Act.

With reference to purchases from mortgagees, section 16 (5)
 of the Act of 1859 expressly provided that the period of limita-
 tion should be the same as in the case of suits against the
 mortgagee himself under section 1 (15), but this provision, which
 would have met the present case, was not reproduced in article
 134 of Act IX of 1871 which shows clearly the intention of the
 legislature to further restrict the time in the case of purchases
 from mortgagees. Article 134 of Act XV of 1877 omitted the
 words in "good faith" from the first part of the article, while
 the present Act of 1908 substituted the words transfer or
 purchase throughout the article with consequential variations.
 In these circumstances, it cannot, I think, be held that the
 intention of the Indian legislature in this article was to make a
 provision in favour of the *cestui que trust* or mortgagor and give
 him a further period than he would otherwise have had. On the
 contrary, the intention was clearly restrictive; and it seems to
 me therefore that, even if the construction of section 25 of the
 English Act suggested by Lewin and Darby and Bosanquet be
 accepted, that affords no warrant for introducing such a con-
 struction here. The Indian legislature, must have been perfectly

(1) (1876) 1 L.R., Ir., 206 (C.A.).

(2) (1857) 6 H.L.C., 189.

(3) (1913) I.L.R., 35 All., 227 (P.C.).

well aware that in the case of sales and mortgages alike posses- SEETI KUTTI
 sion is rarely given on the date of the transfer; and, if it had v. KUNHI
 intended the date of taking possession under the sale or PATHUMMA.
 mortgage to be the starting point, nothing would have been WALLIS, C.J.
 easier than to say so. It has not done so, and it is not open to
 us to effect this by taking out of the article nearly all the cases
 which would otherwise fall within it. The decision of the Privy
 Council in *Batul Begum v. Mansur Ali Khan*(1), is no authority
 for such a course. That was a suit for pre-emption as to which
 under article 10 the starting points are either taking physical
 possession or the registration of the instrument of sale. There
 had been no such registration, and the suit property which
 consisted of certain shares in an estate did not admit of physical
 possession being taken except by means of a partition suit
 which had not been brought. Neither of the starting points
 prescribed under article 10 was to be found in the case, and in
 these circumstances their Lordships applied the residuary article.
 Here however, we have the date of the instrument of transfer
 which is, as I read it, the prescribed starting point under article
 134. All that was decided in *Rungiah Gounden & Co. v. Nanjappa*
Rou(2), was that a decree directing the sale of mortgaged
 property in default of payment of the mortgaged debt on or
 before the date fixed in the decree was not a decree directing
 payment of the amount to be made at a certain date, within the
 meaning of article 179, column 3, paragraph 6 (which I should
 have thought it obviously was not) and that consequently the
 application did not come within the article and must be governed
 by article 178. This, in my opinion, is no authority for giving
 the go-by to the starting point prescribed in article 134 for this
 particular class of suits by refusing to apply the article to the
 bulk of the suits falling under it and treating them as governed
 by some other article. I may add that I do not think any
 argument can be founded on the fact that the articles are printed
 in three columns.

Taking this to be the article to be applicable and the start-
 ing point to be the date of the instrument of transfer we have
 next to consider whether there is any rule of construction under
 which time can be considered not to run until the transferee

(1) (1901) I.L.R., 24 All., 17 (P.C.). (2) (1903) I.L.R., 26 Mad., 780.

SEETI KUTTI from the mortgagee gets into possession. In *Lala Soni Ram v. Kanhaiya Lal*(1), their Lordships laid down that that under the Indian Act, once time begins to run it could not be suspended except under the provision of the Act, and explained the decision in *Burrell v. The Earl of Egremont*(2), as proceeding on the construction of the peculiar language of section 40 of the English statute, and I do not think their Lordships intended to depart from that principle in their recent decision *Nrityamoni Dassi v. Lakhan Chandra Sen*(3), affirming the decision in *Lakhan Chunder Sen v. Madhusudan Sen*(4), for the reasons given by the learned Judges of the Calcutta High Court. That decision can be supported on the ground that the case was covered by section 14 liberally construed, and I do not think it is authority for the proposition that under our Limitation Act we are at liberty to allow periods of suspension not provided for in the Act. That would be wholly opposed to the line of reasoning in *Lala Soni Ram v. Kanhaiya Lal*(1), as well as to recognized principles of statutory construction. It is I think equally inadmissible under the statute to say, not that the running of time shall be suspended, but that it shall not begin to run from the time limited in the article except under some express provision of the statute. See also the judgment of NEVILLE, J., in *In re Metropolis and Counties Permanent Investment Building Society, Gatfield's case*(5). For these reasons I am unable with great respect to follow the decision in *Ramachandra v. Sheikh Mohidin*(6), and the obiter dicta in *Husaini Khanam v. Husain Khan*(7).

Briefly my answer is that, when as here the case is covered by the language of the article, it is not permissible to depart from the article itself or from the starting point prescribed therein on grounds of real or fancied hardship. Darby and Bosanquet have a final chapter on the construction of statutes of limitation but they do not refer to any such propositions such as are now suggested. In my opinion they are destitute of authority and all the limitations which have been placed in

(1) (1913) I.L.R., 35 All., 227 at p. 237 (P.C.).

(2) (1844) 7 Beav., 205.

(3) (1918) I.L.R., 43 Cal., 660 (P.C.).

(4) (1908) I.L.R., 35 Cal., 209. (5) (1911) 1 Ch., 698.

(6) (1899) I.L.R., 23 Bom., 614. (7) (1907) I.L.R., 29 All., 471 at p. 480.

modern times on the operation of the statutes of limitation have been based on a construction of the language of the particular sections and not on any such general principles. I may add that I see no great hardships in the present case. The mortgagees in this case had parted with possession to transferees more than thirty years before suit and had never retaken it, and the mortgagors might at any time have ascertained the extent of the incumbrances they had created by reference to the Registration Office of the district. My answer is that in this case the mortgagors are barred.

ABDUR RAHIM, J.—The questions referred to the Full Bench relate to the construction of article 134 of the Limitation Act which has been the subject of much discussion. It is in these words:—

“To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration; twelve years (from) the date of transfer.”

The article embodies certain alterations of the similar provisions of the previous Limitation Acts. In the first place, it is meant to apply not merely to purchases but also to other transfers made by a trustee or a mortgagee. This alteration was due, apparently, to the doubts that arose as to whether the word “purchaser” covered the case of transferees like lessees and mortgagees: see *Manavikraman Ettan Thamburan v. Ammu*(1) and the dissentient judgment of DAVIES, J., and *Ram Kanai Ghosh v. Raja Sri Sri Hari Narayan Singh Deo Bahadur*(2), etc.

The main question raised by the reference depends, in my opinion, on what kinds of transfer are referred to in the “article” or in other words, whether the word “transfer” means merely the execution of an instrument of transfer, such as a deed of sale, lease or mortgage, or the passing of property or of an interest in property along with possession. It is a well-known rule for construing the Indian statute of limitation that we must read the first and the third columns together. The first column of article 134 defines the scope of the article as applying to suits for the recovery of possession of immoveable property

(1) (1901) I.L.R., 24 Mad., 471.

(2) (1906) 2 C.L.J., 546.

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which has been "transferred" by a trustee or a mortgagee; the date from which time is to be calculated is given as "the date of the transfer." Now, from the very moment of the transfer the transferee should be capable of being sued for recovery of possession and this implies that the transfer must be a transfer with possession. The result would be that unless the transferee has been in possession for twelve years the suit against him would not be barred under article 134. If the transferee did not obtain possession in pursuance of the transfer, article 134, in my opinion, would not apply at all. Reading the article, therefore, in that light, I agree in the decision in *Ramachandra v. Sheikh Mohidin*(1) and *Husaini Khanam v. Husain Khan*(2) although some parts of the reasoning in those cases might be open to criticism. This is also the view suggested in *Muthu v. Kambalinga*(3) which it may be mentioned was overruled on another point by the Full Bench in *Ahmud Kutti v. Raman Nambudri*(4); and in all the cases which have been brought to our notice bearing on the interpretation of article 134, the purchaser or other transferee who was held to be protected by this article had been in possession for twelve years. That also seems to be the effect of the English rulings as stated in *Lewin on Trusts* at page 1125—

"No possession by a purchaser for valuable consideration short of the statutory period will be a bar."

I should therefore answer the first question in the negative.

As regards the second question, I would answer it by saying that time will run from the date when the transfer is completed by the transferee being given possession.

The third question assumes the position that the mortgagor was not entitled to obtain possession from the mortgagee at the time of the transfer. It was strongly suggested in the course of the argument that in such a case article 134 will not apply and that time will not run at all until the mortgagor's right to obtain possession from the mortgagee has accrued. Article 134 as has been pointed out in more than one decision, does not apply to cases where a trustee or a mortgagee makes the transfer in pursuance of the power vested in him; in such cases the

(1) (1899) I.L.R., 23 Bom., 614. (2) (1907) I.L.R., 29 All., 471.
(3) (1889) I.L.R., 12 Mad., 316 at p. 318. (4) (1902) I.L.R., 25 Mad., 99 (F.B.).

transferee becomes merely an assignee of the trust or mortgage and cannot claim any higher position (see *Vythilingam Pillai v. Kuthiravattah Nair*(1) and *Ram Kanai Ghosh v. Raja Sri Sri Hari Nurayan Singh Deo Bahadur*(2): it applies only to transfers made in excess of the transferor's powers. Now a mortgagee in possession is prohibited from doing any act which is destructive or permanently injurious to the property mortgaged (see section 76 of the Transfer of Property Act). If he therefore purports, for instance, to sell the property to a third person the mortgagor would be entitled, although the terms of the mortgage may not have expired to protect his own interests by a proper suit. If a transfer is only threatened he can obtain an injunction and if it has actually been made he can ask for possession to be delivered to the mortgagee. It is not however necessary to answer the third question.

COUTTS TROTTER, J.—With great respect to my brothers ABDUR RAHIM and SESHAGIRI AYYAR and the learned Judges who decided *Ramachandra v. Sheikh Mohidin*(3), I am unable to construe "transfer" as meaning "transfer with possession", because that is really what it comes to, that seems to me to amount to a bodily importation into the statute of words that are not there. But I am impressed with the argument that the third column of the schedule is meant to fix the time at which the plaintiff's cause of action is to be deemed to accrue. How can a cause of action be deemed to accrue at a time when circumstances precluded it from existing? It is very tempting to hold that the article cannot apply to a plaintiff whose cause of action did not exist at the time when limitation is said to begin to run. Such a general principle would be intelligible and very likely salutary; but I do not find it in the statute or in any decision that is binding upon this Court, and I do not see how I can import a general principle into a codifying statute. It is no doubt a startling result to say that a man's cause of action can be barred before it has accrued: but if the plain words of the enactment involve that, we cannot rewrite it. I agree respectfully with my Lord that the words here are too plain to evade; and I question whether judicial attempts to mitigate the

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(1) (1906) I.L.R., 29 Mad., 501. (2) (1905) 2 C.L.J., 546.
(3) (1899) I.L.R., 23 Bom., 614.

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v. harm than good. If the words of the statute work injustice
KUNHI unless a violent strain is put upon them, the legislature alone can
PATRUMMA. cure the evil.
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My answer therefore to the first question is yes; to the second, from the date of the transaction.

SESHAGIRI **SESHAGIRI AYYAR, J.**—Although a large number of questions
AYYAR, J. were submitted for the consideration of the Full Bench the arguments related only to two points: (a) whether the plaintiffs are bound to pay a sum of Rs. 9,000 to defendants Nos. 5 and 8 before redeeming the mortgage; (b) whether they are bound to pay them a further sum of Rs. 125. The facts which raise these two questions are briefly these: the plaintiffs are the owners of the property. They mortgaged items 2 and 3 for Rs. 1,000 to defendants Nos. 1 to 4 in the year 1862. It was a usufructuary mortgage, and defendants Nos. 1 to 4 took possession under the mortgage. In the year 1882, these defendants notwithstanding they were only mortgagees dealt with the property as if they were full owners thereof and gave a mortgage of item 2 to one Poker; in 1886 one Haji redeemed Poker. The fifth defendant redeemed Haji and got possession in 1900. From the year 1886 to 1900 Haji held possession under a mortgage for Rs. 125. Consequently, he acquired a right to be redeemed on the payment of that amount. The fifth defendant who has stepped into the shoes of Haji is entitled to claim that right. Mr. Sundram who appeared for the plaintiff did not dispute the liability of his client to pay the sum of Rs. 125 before redemption. That disposes of the second question.

The first question is more difficult. It was only in the year 1900 that the fifth defendant got possession of the property, although the mortgage for Rs. 9,000 was in the year 1894. The suit for redemption was brought in the year 1909. If limitation commenced to run from 1894, the date of the mortgage, the plaintiff could not maintain the suit in its present form. If, on the other hand, limitation began to run only from 1900 when possession was obtained by the fifth defendant, the suit is in time. I have come to the conclusion that the suit is in time. In my opinion, clauses (1) and (3) of the schedule should be read together and the words appearing in one of the clauses should be given the same meaning as in the other clause. I

also consider that the canon of construction suggested by **BENSON** **SEETI KUTTI**
and BHASHYAM AYYANGAR, JJ., in *Rungiah Gounden & Co. v.* **KUNHI**
Nanjappa Row(1), namely, **PATRUMMA.**

"If the various starting points fixed in the third column of any article from which the period of limitation is to be reckoned do not cover all cases falling within the class of suits or applications described in the first column, it will be impossible to hold that the article in question is exhaustive of the class" is the right one.

Before examining the language of article 134, I may premise by observing that it is in the nature of an exception to article 148 which provides for ordinary cases of redemption. It is also clear from its place that its object is to afford protection to the person in possession. Further the protection is of the same kind as that contained by implication in section 28 of the Act, by which a prescriptive right (limited or unlimited as the case may be) is secured as against the person who has the legal ownership in him. Consequently one may safely assert that the article should be construed liberally in favour of the legal owner as it cuts down the remaining period for enforcing his rights of redemption and strictly against the transferee as he is permitted to acquire a right which in strictness he is not entitled to, and which secures to him an advantage only under special circumstances.

An analysis of the first clause of article 134 of the Limitation Act shows (a) that the suit must be to recover possession; (b) that the properties sought to be recovered must have been first mortgaged; and (c) that it should have been transferred by the mortgagee for valuable consideration. I have omitted the words relating to conveyance and trust in this analysis. The question then is, what is the meaning to be attributed to the word "transfer" in the first column? If the suit is to recover possession it would not *prima facie*, lie against a transferee who has not obtained possession. It follows therefore that it is a prerequisite of a suit under this article that the transferee from the mortgagee must have obtained possession. The word "transfer" in this column does not simply mean a paper conveyance, but the transfer of possession. If the term "transfer" is used

(1) (1903) I.L.R., 26 Mad., 780.

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in column (1) in that sense, it necessarily follows that the word "transfer" in column (3) has the same meaning. The legislature in speaking of the date of the *transfer* in column (3) must have had in mind the *transfer* with the attributes which that term possesses in column (1). In this view, time does not begin to run until the transferee has taken possession of the property. If we turn back to section 28 of the Limitation Act, the right which is extinguished and which confers upon the opposite party a title by prescription is traceable to loss of possession. That is the policy of the law, and I fail to see why the legislature should be taken to have meant in article 134 that anything short of deprivation of possession should bar a person entitled to possession or confer upon the party not taking possession, a prescriptive title as if he had been in possession from the date of the paper transfer. The essence of the title lost and of the title acquired both under section 28 of the Limitation Act and under article 134 is that one party should have lost possession and the other party should have acquired that possession. I am, therefore, apart from the authorities, of opinion that under article 134 a transferee from a mortgagee prescribes only from the date that he takes possession of the property transferred to him. Reference may be made in this connexion to the observations of MOOKERJEE, J., in *Promotha v. Kishore*(1) and in *Priyasakhi Debi v. Bireswar Shanthan*(2). Mr. Justice MUTTUSWAMI AYYAR understood the word "purchase" in the third column of article 134 before it was amended as relating to possession under the purchase. There is the direct authority of *Ramachandra v. Sheikh Mohidin*(3) in favour of the view I have indicated. *Husaini Khanam v. Husain Khan*(4) also is to the same effect. Nothing that has been urged in the course of the argument in this case has led me to depart from the position so uniformly maintained.

I do not propose to discuss at length the case-law bearing on 3 and 4 Will. 4, c. 27, from which admittedly article 134 has been borrowed. The Indian article is far wider in its application than the English section. None-the-less, the principle which was held to underlie 3 & 4 Will. 4, c. 27, has a bearing

(1) (1917) 25 C.L.J., 133.

(2) (1916) 21 C.W.N., 177.

(3) (1899) I.L.R., 23 Bom., 614.

(4) (1907) I.L.R., 29 All., 471.

upon the present case. In *Agency Company v. Short*(1), Sir SEETHI KUTTI HORACE DAVEY (afterwards Lord Justice DAVEY) contended that

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"Under 3 & 4 Will. 4, c. 27, the title of the rightful owner to land is not defeated unless some other person or successive persons has or have been in possession thereof for a continuous period of twenty years."

LORD MACNAGHTEN accepted this contention and held that where a trespasser was in possession for less than twenty years and then relinquished possession, the law presumed that the rightful owner was in possession immediately after. In answer to the argument that when once time had begun to run, nothing can stop it, his Lordship stated:

"There is not, in their Lordship's opinion, any analogy between the case supposed and the case of successive disabilities mentioned in the statute. There the statute 'continues to run' because there is a person in possession in whose favour it is running."

PARKE BARON'S observations in *Smith v. Lloyd*(2):

"We are clearly of opinion that the statute applies not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of BLACKBURN, C.J., in *McDonnell v. McKinty*(3) and the principle on which it is founded,"

were accepted by the Judicial Committee as good law. The argument of Counsel in *Attorney-General v. Flint*(4) seems to have proceeded on this assumption, although the question of possession did not directly arise for consideration in that case. If we bear in mind the further principle that there can be no presumption of possession in favour of a wrong-doer, it becomes clear that the rightful owner is not affected by anything short of actual possession taken against him. Compare *Secretary of State for India v. Krishnamoni Gupta*(5).

In this view, although the fifth defendant obtained a mortgage in 1894, for Rs. 9,000, as he did not take possession under

(1) (1888) 13 A.C., 793.

(2) (1854) 9 Ex. (Wels., H. & G.) 562; a.c., 23 L.J. Ex., 192.

(3) (1847) 10 Ir. L.R., 514.

(4) (1844) 4 Hare, 147.

(5) (1902) I.L.R., 29 Calc., 518 at p. 525 (P.O.).

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it until 1900 and as the suit was brought within twelve years of the taking of possession, the plaintiff is not bound to pay the sum of Rs. 9,000 before redeeming the mortgage.

There is another way of looking at this question, which I do not propose to examine at any considerable length; but having regard to the fact that that point of view has found favour with one of my learned colleagues, I wish to say a word on that question. In this connexion I am assuming that the word "transfer" in article 134 does not mean, "transfer with possession." In that view if at the date of the transfer, the transferee had not taken possession, the article 134 would have no application. If the article does not apply, then the residuary article 144 would apply as against the person who claims to have acquired a limited prescriptive right to be redeemed. Under that article time begins to run only when the possession of the defendant becomes adverse to the plaintiff.

In my opinion, wherever both the first and third columns of an article are not applicable to a case, we must apply the residuary articles. The function of the residuary articles is to provide for cases which could not be covered by the exact words used in both the columns of an article. After all, no legislature and the ingenuity of no draftsmen can provide in terms against all possible contingencies, and that is the reason why residuary articles are inserted in the Limitation Act. In this view also the suit is in time. Therefore my view is that the claim of the fifth defendant that he should be redeemed only on payment of Rs. 9,000 to him is unsustainable.

In the light of the above observations, my answer to the first question is "No." The answer to the second question is that time begins to run only after the date of possession. I do not think it necessary to give an answer to the third question, as it does not arise for consideration in this case.

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SRINIVASA AYYANGAR, J.—Article 134 of the Limitation Act has not been easy to construe, nor is it easy to apply in concrete cases. Soon after the omission in 1877 of the words "in good faith" which qualified the word "purchasers" in the Limitation Act of 1871, a question arose which is not yet settled beyond controversy, whether a transferee with an actual knowledge of the limited title of his transferor was entitled to the protection of the article, especially when such transferor had under no

circumstances power to transfer a larger interest than he had. SEETI KUTTI There was no apparent reason for treating him differently from KUNHI his transferor but yet the language of the article was plain. It PATHUMMA. may be that the legislature desired in the case of transferees for SRINIVASA value to prevent an inquisition into circumstances attending the AYYANGAR, J. transfer or the state of knowledge of the transferee after twelve years from the date of the transfer. Mr. Justice AYLING and myself had to consider the question in a recent case *Subbaiya Pandaram v. Muhamed Musthafa Maracayar* (1) but that is not the point here.

The questions referred to us are as to the applicability of the article to suits where the mortgagor had no right to sue for possession on the date of the transfer, or where the transferee does not or cannot take possession on the date of the transfer, that is one question, and the other, as to the starting point of limitation to suits to which the article applies.

The suits contemplated by the article are suits for possession, presumably by a mortgagor, or his representative (we are concerned only with mortgages here) and against the transferee or his representative. Though there was some discussion at the bar about it, there can be no doubt that the suits governed by the article are suits against the transferees or their representatives. Section V of the Act of 1859 in which the provision was first enacted is conclusive of this question, for it says,

"in suits for recovery from the purchaser or any person claiming under him."

Further the article cannot, I think, apply to suits where at the time of the transfer the mortgagor was not entitled to sue for possession; otherwise he may be barred before he has a right of action. The mortgagor for instance may not be entitled to redeem till after the expiry of over twelve years from the date of the mortgage and if soon after the date of the mortgage the mortgagee alienates the mortgaged property and places the alienee in possession, the mortgagor would be left wholly without a remedy if article 134 applied in so far as the recovery of possession of his land is concerned, a manifestly unjust result. When we remember that mortgages for long terms are quite common in this country and in Malabar the common and the usual mortgage (the kanam) is irredeemable

(1) (1917) 32 M.L.J., 85.

SEETI KUTTI for twelve years, we would not be justified in construing article 134 in such a way as to indirectly take away the right of redemption of the mortgagor, while that right has been the subject of anxious protection in law; so much so that an impediment to the fair exercise of the right even by a contract of the parties at the time of the transaction, i.e., a clog on the equity of redemption is not recognized. The Indian Legislature in section 60 of the Transfer of Property Act, as has been pointed out, has omitted the words "in the absence of a contract to the contrary" with a view to prevent the mortgagor from contracting himself out of his right of redemption at the time of the mortgage. Whatever doubts there may have been prior to the decision of the Privy Council in *Bakhtawar Begam v. Husaini Khanam*(1), as to whether the mortgagor was at liberty to redeem before the time limited for payment, now there can be no question that he cannot do so unless he reserves such a right by the mortgage contract. No doubt it may be said that a mortgagor should not bind himself not to redeem for a long period, but a Limitation Act should not be construed as fettering or affecting a substantive right. It may also be said that he may have an action for damages against the mortgagee on his covenant to place him in possession on redemption, but that would be a poor substitute for his land.

As on principle no period of limitation can begin to run till there is a cause of action (the third column of the elaborate schedules in the Limitation Acts of 1871 and onwards is based on this principle and the *terminus a quo* as far as possible is made to coincide with the earliest time at which an action could be brought) we ought not to construe the article, if the language admits of it, in such a way as to bar the action before the cause of action arose or even, to cut short the period so as to give varying periods of time for the same suit, varying according to the time which elapsed between the date of the transfer and the accrual of the cause of action. In construing these articles of the Limitation Act we should not lay undue stress on the first column of the article which describes the nature of the suits, and hold that all suits of that class must be governed by that article, though the starting point fixed in the third column cannot be

(1) (1914) I.L.R., 36 All., 195 (P.C.).

applied at all or cannot be applied without working injustice. **SEETI KUTTI** On this principle in *Rungiah Gounden & Co. v. Nanjappa Row*(1) it was held that an application for execution of a mortgage decree, which cannot be executed till after the time fixed for payment (usually six months), is not governed by article 179 of the Act of 1877 but by article 178 of that Act. It is to be observed that one of the starting points specified in the third column of article 179 is the date of the decree and there is no difficulty in counting the period of limitation from that date, and it is as easy to apply article 179 to that case as article 134 to this. For other illustrations of the same principle I may refer to the decisions of this Court in *Palaniyandi Malavarayan v. Vadamalai Odayan*(2) and *Manikkam Pillai v. Thanikachelam Pillai*(3), where it was held that unless there was a person in existence competent to sue there can be no limitation. There may no doubt be cases where on ground of public policy or owing to the difficulty in fixing precisely the time when the cause of action arises, a limited period may be fixed beginning from more or less arbitrary starting points; for example a suit to recover moveable property from a depositary or pawnee must, under article 145 of the Limitation Act, be brought within thirty years from the date of the deposit, or pawn, though there may be a contract between the parties fixing a time before which the depositor or pawnor could not recover the property from the bailee. Such contracts are likely to be rare and it is obviously convenient that questions of title to moveable property which is capable of transfer by mere delivery of possession should be settled as soon as possible. It is noteworthy that though under clause 15 of section I of the Act of 1859 the beginning of the period of limitation was the date of the transaction in suits to recover moveable and immoveable property alike, irrespective of the time fixed by the contract for such recovery and though the same provision was re-enacted in 1871, in the Act of 1877 the starting point was altered so as to coincide with the date of the accrual of the cause of action as regards suits to redeem mortgages of immoveable property. Again when the Act of 1908 was passed, in article 138 the starting point was altered so as to coincide with

(1) (1908) I.L.R., 28 Mad., 780.

(2) (1915) 2 L.W., 723.

(3) (1916) 4 L.W., 369.

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the accruer of the cause of action and clause 2 was added to section 15, thus showing the anxiety of the legislature to prevent any injustice by time running against a person who was unable to sue. At the same time it is to be noted that though a change was made in respect of suits for redemption or recovery of possession of immoveable property from mortgagees, no corresponding change was made in article 134 which provided for suits to recover possession from transferees. This may be due to the fact that article 134 provides for recovery from transferees, not merely of mortgagees but also of trustees.

As regards recovery of moveable property from buyers from bailees or trustees for which provision is made in article 133 in practically identical terms, there is no difficulty in applying the article, as the bailor may recover possession from the buyer without reference to the time fixed in the contract of bailment as the bailor can at his option avoid the contract of bailment in the circumstances referred to in the first column of the article. (Section 150 of the Contract Act. *Donald v. Suckling*(1), per BLACKBURN, J.)

In England 3 & 4 Will. 4, c. 27, section 28, which was afterwards repealed and re-enacted as section 8 of the Real Property Limitation Act of 1874 merely reducing the period of limitation from twenty years to twelve, provided

"that when a mortgagee shall have obtained the possession or receipt of the profits of any land comprised in his mortgage, the mortgagor shall not bring an action or suit to redeem the mortgage but within twelve years next after the time when the mortgagee obtained such possession."

Both before the enactment (when Courts of Equity applied the provisions of the statutes of limitation, which in terms did not apply to equity suits, in analogy to actions at law) and after, it appears to have been understood that the provisions of the statute and similar provisions in the earlier statutes did not bar redemption even after twenty years from the date of the mortgagee taking possession if the mortgagee as such was entitled to remain in possession till his mortgage was satisfied, i.e., where, as in the case of a Welsh mortgage which closely resembles a usufructuary mortgage as defined in the Transfer of Property Act there is no question of default, or forfeiture or right of

(1) (1866) L.R., 1 Q.B., 585 at p. 612.

foreclosure [see Coote on Mortgages, pages 32 and 33 and *SEETI KUTTI v. KUNHI PATHUMMA*].
• *Yates v. Hambly*(1) and *Fenwick v. Reed*(2)].

In *Alderson v. White*(3) there was a sale and a covenant to resell on payment of the purchase money at or upon the 25th March in any year. The suit was to redeem long after twenty years after the purchaser had taken possession. The LORD CHANCELLOR in appeal held that the transaction was not a mortgage and that concluded the case. But referring to the plea of the statute he said :

"I am disposed to think that the statute cannot apply so as to make the mere possession by the mortgagee for twenty years a bar to redemption when the original contract is in terms that the mortgagor may redeem at any time during a period extending beyond the 20 years."

It appears to me therefore that the stringent provisions of article 134 which cuts down the long period of sixty years which a mortgagor has after his right to redeem accrued, should not be construed as barring his action even before it arose, or as giving him a lesser period than twelve years if the cause of action arose after the date of the transfer, but before the expiry of twelve years, more especially as a transferee need not be a transferee in good faith. This question however does not really arise in this case and it is therefore unnecessary to answer the third question in the reference.

As regards the first and second questions I think that unless the transferee had possession on the date of the transfer the article cannot apply. The possession need not be physical or actual possession. As I have said already the suit must be one for possession against the transferee. The article is obviously intended to protect a person in possession for over twelve years and the article assumes that the plaintiff is in a position to sue for recovery of possession from the transferee on the date of the transfer. If on the other hand the article is so construed as to apply to cases where the transferee has not possession or cannot, or is not entitled to get possession on the date of the transfer, there is no reason to confine it to cases in which the transferee takes possession within twelve years from the date of the transfer, and not to apply it to cases where he takes possession long after twelve years from the

(1) (1742) 2 Atk., 380.

(2) (1816) 1 Mer., 114 at p.125.

(3) (1858) 2 De. G. & J., 97.

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date of the transfer. In the latter case the mortgagor's right to redeem or recover possession would cease, retrospectively as it were, the moment the transferee obtains possession, even if he gets it by the voluntary surrender of the mortgagee or his representative. To take a case which is of ordinary occurrence in Malabar, *A* is the janmi and grants a kanam on the 1st January 1900 to *B*. This is not redeemable within twelve years, and is often not redeemed for a much longer time. *B* sub-mortgages his mortgage interest on kanam to *C* a year after, i.e., on the 1st January 1901 and places *C* in possession and immediately after say on the 1st February 1901 sells the property to *D* absolutely or gives a melcharth purporting to act as the janmi. *D* will have to redeem *C* before he obtains possession which he may not be entitled to do till after twelve years from the 1st January 1901, i.e., till January 1913 as *C* might claim to hold possession, as kanamdar against his mortgagor *B* and his transferee *D*, though not against the janmi *A*. The amount due to *C* is never an easily ascertainable sum owing to his right to compensation for improvements which is often not settled till after a prolonged enquiry in courts. Many years may elapse, even twelve years, before the rights of *D* and *C* *inter se* are settled and *D* becomes entitled to or gets possession through court. In the case supposed *A* cannot sue anybody for possession till after the 1st January 1912 and would have sixty years to redeem *B* and recover possession from *C*. *D* is not entitled to redeem *C* till January 1913, and may not get or even be entitled to get possession till some time after. Twelve years from the date of the transfer would expire in February 1913, and *A* has practically no time to bring a suit for possession from *D* the transferee even under the most favourable circumstances. But *D* may not take possession, for many a melcharth holder is unable or unwilling to pay for redemption immediately he obtains a transfer, more especially as he generally stipulates for twelve years' enjoyment after he obtains possession. The real owner then may be barred, the very instant he is able to sue the transferee for possession. In this very case one of the transferees got possession after the institution of the suit for redemption. It must be remembered that there can be oral sales, in places where the Transfer of Property Act is not in force, and such sales would have been valid in all Provinces before the passing of that Act, and when

the Limitation Act of 1877 was enacted. The language of article 134 in that Act so far as concerns the present matter was exactly the same as that of the later Act of 1908. It is difficult to see how the mortgagor can in such cases possibly know that his rights are being affected to his prejudice, assuming that there is some sort of a duty to search the registers to find out if his mortgagee has not been fraudulently dealing with the property in violation of the mortgage contract. It is true that the Law of Limitation may bar a person's right, though he may not know that his rights are being infringed, but where he has no reason to believe that his rights are infringed by the act of those who are bound to protect it, it appears to be unnecessary to restrict or interfere with his right, unless the language of the statute is plain. A mortgagor can no doubt as soon as the mortgage money becomes payable sue to redeem the mortgage and implead in that suit the transferees of his mortgagee, but if his mortgagee is in possession on his own behalf, the suit would be governed by article 148 and not by article 134. If after the institution of such a suit the transferee obtains possession, as has happened in this very case, should the suit be dismissed as barred by article 134, though it was not barred at its institution? It must be remembered that the doctrine of *lis pendens* cannot apply, as the transferee obtained possession by virtue of a right created antecedent to the institution of the suit. The fact that in this case the original mortgagee had created mortgages and placed the mortgagees in possession is also immaterial, for they had been redeemed by the last transferee from whom possession is sought; the last transferee does not claim as assignee of the previous mortgagees whom he had redeemed, but as a mortgagee from the original mortgagee.

It was not suggested that suits for recovery of possession in article 134 do not include suits to recover possession on payment of whatever may be found due to the mortgagee, i.e., suits for redemption, and no such limitation can be placed on the article.

The conclusion then I arrive at is that unless the mortgagor or his representative can sue for recovery of possession from the transferee on the date of the transfer the article does not apply. This construction gives sufficient protection to those who are entitled to protection, namely, persons who take a transfer from

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SERTI KUTTI v. KUNHI PATHUMMA. SRINIVASA AYYANGAR, J. mortgagees who, rightly or wrongly, they may believe, have the power to transfer an absolute title, as a mortgagee by conditional sale after condition broken, an English mortgagee after the period fixed for redemption, or a mortgagee with a power of sale after the time for the exercise of the power has arrived; as by lapse of time they may be prevented from proving facts or circumstances which would enable them to keep their purchase. That, I believe, is also the reason for the omission of the words "good faith" in the article, for a person may not be able to prove it after a long lapse of time, though the omission undoubtedly may enable a transferee with notice to obtain the protection of the article. Even transferees from ordinary usufructuary mortgages may be entitled to protection, as such mortgages, in Provinces in which the Transfer of Property Act is not in force, may be effected by delivery of possession, and a transferee from a person who has long been in possession may not be in a position to find out whether such possessor is an absolute owner or a mere mortgagee, just in the same way as it may be difficult to ascertain if a person in possession of movable property is an absolute owner or bailee. But there is no reason to extend the protection so as to materially affect the substantive rights of owners who are not in a position to protect their interests.

If however the article is to be applied it is difficult to fix any other date than the date of the transfer, i.e., the transfer of title as the starting point. That "transfer" in this article means the transfer of title and not transfer of possession is clear, for the word "transfer" was substituted for the word "purchase" to settle the conflict of decisions on the interpretation of the latter word in the Act of 1877. In *In re Metropolis and Counties Permanent Investment Building Society Gatfield's case*(1), NEVILLE, J., held that time for redemption of a common mortgage in England commenced from the date of the mortgagee taking possession as provided by section 7 of the Real Property Limitation Act of 1874 and observed that the statement in Fisher's Book that

"time will not run in the case of a common mortgage until the day of redemption has arrived; for the mortgagor cannot redeem before that day"

(1) (1911) 1 Ch., 668.

must be accepted with caution; he apparently dissented from the dictum of WALTON, J., to the contrary in a previous case. It is to be observed that there was no question in that case that section 7 of the statute applied to the suits for redemption of common mortgages, in which ordinarily the mortgage money becomes payable in six months; there are also generally provisions in these mortgages for the mortgagor being in possession till default. There can therefore be no hardship in applying the provisions of the section. Hardship or no hardship, if the language of the statute is quite plain as it is in this case, we are not entitled to take liberties with it under the guise of construing it. I am therefore with all respect unable to agree with the decision in *Husaini Khanam v. Husain Khan*(1). *Rumachandra v. Sheikh Mohidin*(2), as I read it, only decided that article 134 does not apply except to cases of transferees with possession.

My answer then to the questions 1 and 2 is that article 134 does not apply at all to the cases mentioned therein.

N.B.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Kumaraswami Sastriyar.

PIERCE LESLIE AND COMPANY, LIMITED, COCHIN
(THROUGH THEIR AUTHORIZED AGENT JAMES DELL) (RESPONDENT,
DECREE-HOLDER), APPELLANT,

v.

E. J. PERUMAL alias KOCHU PAPI (PETITIONER,
JUDGMENT-DEBTOR), RESPONDENT.*

1917,
January, 17
and 24,
February, 2,
April,
19 and 20
and May, 3.

Execution—Limitation—Application to transmit a decree of a British Court to a Travancore Court, whether an execution application or a step in aid of execution—Issue of notice on such application, whether affords a fresh starting point, under article 132, clause (6)—Limitation Act (IX of 1908), art. 132, cla. (5)—Power of British Courts to send their decrees for execution to Courts of Travancore State—Civil Procedure Code (Act V of 1908), sec. 45, effect of.

(1) (1907) I.L.R., 29 All., 471. (2) (1899) I.L.R., 23 Bom., 614.

* Appeal Against Order No. 343 of 1915.

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Held by the Full Bench :

(1) that in the absence of any provision to that effect in the Civil Procedure Code, Courts in British India have no power to send their decrees for execution to the Courts in Travancore but may and should send to these Courts the documents they require to enable them to execute these decrees under the powers conferred upon them by the legislative authority in Travancore ;

(2) that the execution contemplated by the Civil Procedure Code and article 182 of the Limitation Act being execution by British Courts in India on application made to such Courts, an application to a British Court in India to send a decree of such Court for execution to a Court of Travancore is neither an execution application nor a step in aid of execution within article 182, clause (5) ; and

(3) that the issue of a notice to the judgment-debtor on any such application to show cause why the decree should not be transmitted to a Travancore Court does not give a fresh starting point under article 182 (8), as no such notice is required by the Civil Procedure Code to be issued as a preliminary for execution by the Travancore Court.

APPEAL against the order of J. A. DE'ROZARIO, the Subordinate Judge of Cochin, in Miscellaneous Petition No. 251 of 1915 in Execution No. 96 of 1915 in Original Suit No. 6 of 1911.

A decree for money was passed on 21st August 1911 by a British Court situated in Cochin. On an application made on 7th October 1912 for execution of the decree praying for the issue of notice to the judgment-debtor and for an order of transfer of the decree to a District Court in the Native State of Travancore within whose jurisdiction the judgment-debtor was then residing, the Court ordered on 16th October 1912 the issue of notice to the judgment-debtor and finally transmitted the decree on 13th November 1912 to the Travancore Court for execution. Not being able to realize any amount through the Travancore Court, the decree-holder applied on 5th January 1915 to the British Court at Cochin for execution by arrest of the judgment-debtor who was then residing within the jurisdiction of that Court. On the objection of the judgment-debtor that the present application was barred by limitation, on the ground that the previous proceedings did not in law keep alive the decree, the lower Court dismissed the application as barred by limitation. Thereupon the decree-holder preferred this Civil Miscellaneous Appeal to the High Court.

D. Chamier for the appellant.

M. D. Devadoss and *K. U. Luke* for the respondent.

The appeal came on for hearing in the first instance before *OLDFIELD* and *BAXEWELL, JJ.*, who made the following ORDERS OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—I do not dissent from the considerations based on the provisions of the Code, which my learned brother specifies in the Order of Reference he is about to deliver. But I wish to state clearly why I think that the decision in the recent case, *Chidambaram Chetty v. Ramanatham Chetty*(1), to which he refers is not conclusive in this.

That decision relates to the transmission of a decree for execution in the Native State of Pudukkottai ; and it does not appear to have been suggested that any such provision has been made by the sovereign authority of that State for execution of British decrees, as is shown in the case before us to have been made by the sovereign authority of Travancore, the State with which we are concerned. This seems to me of considerable importance, because, reciprocity established, an important step will have been taken towards establishing that the Government of British India has committed itself to adoption of both the methods, by which foreign judgments can receive effect, not only to the procedure by suit on them, but also to direct execution of them : vide *Bar* : Private International Law, second edition, 943 : *Westlake* : Private International Law, fifth edition, 397. The fact that only the first of these methods of enforcing foreign judgments is recognized in England cannot be conclusive, when the conditions in India are essentially different. And it is, as my learned brother points out, a strong reason for the contrary view that the Government of India has entered into agreements with Travancore and other States, which would be one-sided, if our own Courts could not take the action necessary to secure the benefit of them by transmitting decrees. It is of course a question whether such transmission is authorized by the wording of the Code or must be based on the Courts' inherent powers. In any case the application of the latter would in my opinion involve no unduly liberal construction of them. I add that the cases dealt with in the judgment above referred to do not deal with transmission to a State, with which arrangements of the kind now in question have been made.

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(1) (1917) 32 M.L.J., 487.

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BAKEWELL, J.—Two questions have been argued in this case: first, whether the Courts in British India have power to send their decrees to the Courts of the State of Travancore for execution and secondly, if they have this power, whether proceedings thereunder fall within article 182 of the Limitation Act so as to give a fresh period of limitation for further proceedings in execution.

There is a difference of opinion amongst jurists as to the principle upon which the courts of one state recognize and enforce the decrees of another (see Piggott's Foreign Judgments and Jurisdiction, Part I, Chapter II), but in India it can scarcely be doubted that it is the comity which should exist between the courts of states united under the same suzerain. Under statutory authority this comity has been recognized by the Governments of India and Travancore for a long time: see notification of the Government of India of 10th December, 1885, and notification of the Maharaja of Travancore of 1st July, 1886, set out in the orders of the Madras Government of 30th December, 1885 and 29th March, 1887. The procedure adopted to enforce the foreign decree in both states is simpler than that prescribed in England and other European states (see Piggott, Part I, page 8) and consists in one court transmitting a copy of its records to the other and thereupon the latter court proceeds as if the decree had been passed by itself.

An application must of course be made by the creditor to the former court, which must be satisfied that its decree is subsisting and is executable in the latter, but otherwise the court exercises no judicial functions but only performs the ministerial acts of preparing and transmitting the copy of its record. It has been argued that though provision has been made for the enforcement of the decrees of Native States in British India (Civil Procedure Code, section 44) no authority has been given by the Indian Legislature to its own courts to entertain such an application or perform these acts, and since the hearing of this case this view has been adopted by two learned Judges of this Court. With all respect, I am of opinion that when the Legislature and the Government have recognized the existence of this comity, it is the duty of the courts to take the necessary steps to carry it into effect and for this purpose to follow the procedure which has been prescribed as regards other courts.

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I have arrived at the same conclusion from an examination of the provisions of the Code of Civil Procedure, 1908. The Code does not define the word "Court" but only the expression "foreign Court" [section 2 (5)], and section 39 enacts generally that a court may send its decree for execution to another court. The Rules of Practice annexed to the code do not provide any special form of application for transmission of a decree, but merely prescribe the records to be sent (Order XXI, rule 6); rules framed by this Court, however, direct that applications shall be in the same form as an ordinary application for execution and that notice to the debtor shall be given in similar circumstances (Civil Rules of Practice, rule 161).

I do not think that there is any ground for limiting the expression "another Court" in section 39 to a court situate in British India, and construe it as meaning "a court in which the decree is executable."

I may point out that a court could not refuse to supply a party with a properly authenticated copy of its decree for the purpose of filing a suit thereon in the court of another state when that is the procedure adopted in that court for the enforcement of foreign decrees, and that the transmission of such a copy by the court itself cannot be said to involve the exercise of jurisdiction.

With regard to the second question, paragraph 5 of article 182 of the Limitation Act, 1908, speaks generally of applications "to take some step in aid of execution," and I think that it is not limited to execution in the court to which the application is made but includes execution in a court authorized to execute the decree.

Having regard to the difference of opinion already mentioned we refer the two questions set out above to a Full Bench for decision.

On this Reference—

D. Chamier for the appellant.—There is a notification by the Government of Travancore enabling execution in that State of decrees of British Indian Courts. Our Courts have inherent power to transmit decrees for execution to Travancore—see

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section 151 of Civil Procedure Code. Section 44 of Civil Procedure Code provides for the execution of the decrees of Native States in British India. There is also a notification by the Governor-General in Council to that effect—*vide* Volume 4 of Rules and Orders, page 1614, and Rule 161 (3) of the Civil Rules of Practice. The recent case of *Chidambaram Chetty v. Ramanatham Chetty*(1) is based on the view that there is no notification issued by the State of Pudukkottai enabling decrees of British Courts to be executed in Pudukkottai. Similarly the want of a treaty to that effect accounts for the result in *Kasturchand Gujar v. Parsha Mahar*(2). *Ratan Mahanti v. Khaloo Sahoo*(3) is wrong.

On the second question I rely on clauses (5) and (6) of article 182 of the Limitation Act. The present application was not barred as the last application was within three years of this and as notice was issued.

[OLDFIELD, J.—Is an improper notice, a notice under article 182 of the Limitation Act. Is your previous application an execution application at all? You only asked for notice to be issued.]

The application is one for execution and the notice was properly ordered.

[KUMARASWAMI SASTRIYAR, J., referred to *Maharajah of Bobbili v. Narasaraju Bahadur*(4).]

That is a case of transfer to another British Indian Court under section 39, Civil Procedure Code. But if a case is transferred to a non-British Court by a British Indian Court the latter still has *seisin* of the case. Clause (6) of article 182 has not the words "in accordance with law." Hence if notice is issued, whether rightly or wrongly, that saves limitation.

M. D. Devadoss for the respondent.—Section 38, Civil Procedure Code, provides that a decree can be executed either by the Court passing it or by one to which it is transferred. The Courts contemplated by the Code to which decrees can be transferred for execution are only British Indian Courts. The fact that the Code is pertinently silent in sections 44 and 45, Civil

(1) (1917) 32 M.L.J., 487.

(3) (1902) I.L.R., 29 Cal., 403.

(2) (1885) I.L.R., 12 Bom., 230.

(4) (1916) I.L.R., 39 Mad., 640 (P.C.).

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Procedure Code, as to execution of our decrees by Courts of Native States shows that our Courts have no power to transfer our decrees to Native States for execution. If there is any inherent power to transfer our decrees to Native States, an inherent power would exist to send our decrees to British Courts in foreign territories in India and section 45 is unnecessary, and the fact that a section specially giving such power is enacted shows the absence of the power now contended for by the other side. If there is any such inherent power even Order V, rule 26, Civil Procedure Code, is unnecessary. I rely on the cases distinguished by the other side.

On the second question, I submit that the application is not an execution application but one for transmission and the notice sent is not a notice issued under Order XXI, rule 22, but a notice to show cause why the decree should not be transferred. No notice is required by the Code to be sent on an application for transmission of a decree to the Travancore Court: *Sripati Charan Choudry v. R. Belchambers*(1).

[Court.—But as the decree was more than a year old, notice had to go.]

An application for transmission is not an application for execution: *Chutterpat Singh v. Rai Bahadur Saita Soomari-mull*(2).

[The CHIEF JUSTICE.—But our rules require even an application for transmission to be in the form of an execution application.]

A wholly incompetent application is not a step in aid of execution. *Varadaraja Mudali v. Murugesam Pillai*(3) holds that a notice given by a Court having no jurisdiction is a mere waste paper and null and void. This application, even though it prays for transmission of the decree, is not a step in aid of execution; for, if the lower Court cannot transmit the decree to a Native State, it cannot be a step in aid of execution in accordance with law—*vide* *Natesa Pillai v. Gunapathia Pillai*(4) and *Langtu Pande v. Brijnath Saran Pande*(5). The aid must be for execution by a British Court since execution

(1) (1910) 15 C.W.N., 661.

(3) (1916) 30 M.L.J., 40.

(2) (1915) 20 C.W.N., 889 (F.B.).

(4) (1917) 21 M.L.J., 257.

(5) (1906) I.L.R., 28 All., 337.

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by a Native Court is not contemplated either by the Civil Procedure Code or by the Limitation Act. Reference was made to *Gipilandhu v. Damburu*(1) and *Abdul Kadir Rowther v. Krishna Malamal Nair*(2) as to what acts will be aids in execution.

D. Chamier in reply submitted that even a Court transmitting a decree to another Court is an executing Court; see heading of Order XXI, rule 3. Rule 6 comes under that heading; see also clause (c) of the rule 6. A step in aid of execution may be in aid of execution in a foreign Court, and it need not be execution under the Civil Procedure Code but may be one under the notifications issued by a Native State. Reference was made to *Aghore Kali Debi v. Prosunno Coomar Banerjee*(3) and *Haridas Nanabhai v. Vithaldas Kisandas*(4) as to what can be a step in aid of execution.

This appeal again coming on for hearing,

The Court expressed the following OPINIONS:—

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WALLIS, C.J.—This reference raises questions of novelty and importance as to the execution by the Courts of Native States of decrees passed by Courts in British India. The further investigation which the subject has now received has confirmed me in the opinion expressed in the recent case in *Chidambaram Chetty v. Ramanatham Chetty*(5) in accordance with the decisions of the Bombay and Calcutta Courts in *Kasturchand Gujar v. Parsha Mahar*(6) and *Ratan Mahanti v. Khatoo Sahoo*(7) that section 42 and the following sections of the Code of Civil Procedure do not authorize us to send or transfer our decrees for execution to the Courts of Native States, but has also satisfied me that this consideration by no means disposes of the question. Those sections have a two-fold effect. In the first place they empower the Courts to which a decree is sent for execution to execute it when the Court to which it is sent is subject to the authority of the Indian legislature, an effect they cannot have as regards a Court in a Native State which is not

(1) (1888) I.L.R., 11 Mad., 336.

(3) (1895) I.L.R., 22 Cal., 827.

(5) (1917) 32 M.L.J., 487.

(2) (1914) 23 I.C., 553.

(4) (1912) I.L.R., 36 Bom., 638.

(6) (1888) I.L.R., 12 Bom., 230.

(7) (1902) I.L.R., 29 Cal., 400.

subject to this legislative authority. In the second place they have the effect of depriving the Court sending the decree of authority to execute it itself and of making the Court to which the decree is sent the executing Court to all intents and purposes. They in fact effect a transfer of the decree for purposes of execution: *Maharajah of Bobbili v. Narasaraju Bahadur*(1) and *Chutterpat Singh v. Rai Bahadur Saita Soomarimull*(2).

Where the Courts of Native States have been empowered by the legislative authority to which they are subject to execute the decrees of British Courts, there is nothing to prevent the Indian legislature from providing that the decrees of British Courts may be sent to them for execution and that such sending should have the same effect as if the decrees had been sent for execution to Courts in British India. This is exactly what the Indian legislature has done as regards certain Courts in Native States by Act VII of 1888 whereby it inserted in the Code of 1882 a new section 229-A, now section 45 of the present Code. With regard to Courts which have been established or continued in Native States by the authority of the Governor-General in Council (in the exercise of foreign jurisdiction) and to which section 45 has been declared to apply by notification issued by the same authority, that section provides that so much of the foregoing sections (38 to 44) as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send decrees for execution to such Courts. Its effect is to authorize our Courts to transfer their decrees for execution to those Courts, when the legislative authority to which they are subject, the Governor-General in Council has empowered them to execute them. It is important to observe that neither in 1888 nor when the present Code was enacted was any such provision introduced as regards other Courts in Native States, and the inference seems irresistible that Courts in British India are not authorized to send or transfer their decrees for execution to Courts in Native States in the same way as to Courts to which they are authorized to send them by the Code. The omission is the more remarkable with regard to Courts in Native States not established or continued by the authority of the Governor-General in Council, because section 44

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(1) (1916) I.L.R., 39 Mad., 640 (P.C.). (2) (1915) 20 C.W.N., 889 (F.B.).

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provides for the issue of notifications declaring that the decrees of these very Courts may be executed in British India as if they had been passed by the Courts of British India. Such a notification was issued with regard to the Travancore Courts and also the Cochin Courts in 1887 as part of a reciprocal arrangement by which those Courts were to execute the decrees of our Courts, and a Government Order, dated 29th March 1887, No. 671 (Judicial) directed the Regulations made by the Travancore and Cochin Governments to be communicated to this Court and to be published in the *Fort St. George Gazette*. Similar notifications have been issued with regard to the Courts of numerous other Native States based on similar undertakings as to execution of our decrees in their Courts; and a Notification 2053 I.B., dated the 22nd September 1911, and printed in British Enactments in force in Native States, volume 6, page 158, notifies for general information the Native States which have consented that the decrees passed by Civil Courts in British India may be executed in their territories by the Courts therein mentioned. It also appears that the decrees of our Courts have been executed by the Travancore Courts and the Courts of other Native States for many years, and it would be very unfortunate if we were obliged to hold that there was any legal impediment in the way of the satisfactory working of the system. There is no such necessity. It is I think clear from an examination of the provisions of the Code of Civil Procedure to which I have referred that the policy of the Indian legislature has been to leave such decrees to be executed in the Courts of Native States pursuant to the legislative authority of such states, but not to provide, as they have in section 45 as regards certain other Courts in Native States, for the transfer to them of the decrees of our Court for execution so as to make them the executing Courts as regards such decrees for all purposes with authority to decide all questions arising in the course of execution. The Indian legislature has so far refrained from making provision for the transfer of these important powers with regard to the decrees of Courts in British India to Courts in Native States other than those specified in section 45 of the Code.

Coming now to the powers conferred on the Travancore Courts and other Courts in Native States by their own legislative

authorities to execute the decrees of Courts in British India, such execution might be authorized upon production by the decree-holder of a certified copy of the decree and an affidavit of non-satisfaction without any communication with the Court in British India which passed the decree. This would appear to be the system at home under the Judgments Extension Acts of 1838 and 1882 where the procedure is for the decree-holder to get a certificate of the judgment from the officer of the Court which passed it and to register that certificate in the other Court upon which it becomes executable there as a decree. The regulations made by the Travancore State, and set out in the Government Order already referred to, provide for the execution of the decree upon receipt of a copy of the decree, a certificate of non-satisfaction, and a copy of any orders for execution, or a certificate that no such order has been made, and appear to contemplate that those documents should be received from the British Court direct. If this be so, I can see no reason why a British Court should not act in aid of the Travancore Court and furnish them as matter of comity, and I think it its duty to furnish them and that it has inherent powers to do so. But an order that these documents should be sent to the Travancore Court is not an order sending the decree for execution to the Travancore Court, and should no longer be described as in the petition in the present case, as a transfer of the decree to the Travancore Court for execution. My answer to the first question in the reference is that Courts in British India have no power to send their decrees for execution to the Travancore Courts, but may and should send to these Courts the documents they require to enable them to execute these decrees under the powers conferred upon them by the legislative authority in Travancore.

On this view the words "proceedings thereunder" in the second part of the reference must be read as referring to an application to one of our Courts to send the Travancore Court the documents required by it to enable it to execute our decree under the authority of the Travancore legislature, and the question then is whether such an application affords a fresh starting point as regards execution of the decree by our own Courts under article 182 of the Limitation Act. First with regard to the fifth clause in the third column, an application to the Travancore Court to execute the decree of a British Court

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under powers conferred upon it by the legislative authority in Travancore would not in my opinion be an application "in accordance with law to the proper Court for execution" within the meaning of the article so as to create a fresh starting point for the execution of the decree by the executing Court in British India. The proper Court in my opinion for such an application is the executing Court under the law of British India which, as already shown is not the Travancore Court. The Indian Limitation Act extends only to British India and has no operation *proprio vigore* in Travancore. It prescribes periods of limitation as to the filing of suits and the execution of decrees in British India, and when it makes an application in accordance with law to a proper Court a fresh starting point, it must be taken to mean an application in accordance with the provisions of the law in British India to be found in the Code of Civil Procedure to which the article refers or elsewhere. It cannot have been the intention of the legislature to make an application for execution to a Court in a Foreign State under the law of that State and governed by the law of limitation there in force a fresh starting point under our Limitation Act for the execution of our own decrees in our own Courts. If this be so, I am equally of opinion that an application to a British Court to take a step in aid of the execution by a Travancore Court of the decree of a Court in British India would not be an application to take some step in aid of the execution of the decree within the meaning of the fifth clause of the article. Treating the application to the Court in this case as an application to send the necessary documents to the Travancore Court, I think it did not make a fresh starting point under the article.

With regard to the sixth clause, notice to show cause why the decree should not be executed was no doubt issued in the present case by the Court in British India prior to the so-called transmission of the decree to the Travancore Court. That however was not in my opinion a notice required by the Code of Civil Procedure, 1908, so as to bring the case within the article. In the first place the Civil Procedure Code only extends to British India, and does not require any notice to be sent as a preliminary to the execution of a decree by a Court in Travancore. Secondly it has recently been held by a Full Bench of the Calcutta Court in *Chutterpat Singh v. Rai Bahadur Saita*

Soomarimull(1), that where the transfer of the decree for execution is authorized by the Code, the Code requires the notice to be sent by the Court to which the decree has been transferred for execution. My answer to the second question is in the negative.

OLDFIELD, J.—I respectfully agree with the conclusion that our Courts are entitled in the exercise of the inherent powers recognized in section 151 of the Code of Civil Procedure, to send the requisite documents to Courts in foreign States, with which the necessary arrangements have been made, and therefore to entertain applications asking them to do so.

But, as the powers invoked are inherent, it follows that they cannot be identified with any specifically conferred by the Code to do what it authorizes or to produce any result, for which it provides. There can therefore be no question of the issue of any notice being required by the Code in connexion with their exercise or of such issue as the starting point for a fresh period of limitation under article 182 (6), Schedule I of the Limitation Act; and this is not affected by the fact that the Court executing the decree may properly exercise its discretion with regard to the issue of notice to the judgment-debtor before deciding to use the powers in question.

The remaining contention is that the decree-holder's application for the sending of the necessary documents to the foreign Court affords a fresh starting point for limitation under article 182 (5), because it is for the taking of a step in aid of execution. It may be conceded that the application is, as the article requires, made in accordance with law to the proper Court. But, as was decided in *Bhagwan v. Dhondi*(2) the execution, which is contemplated, must also be in accordance with law; and I do not think that this requirement is satisfied by the fact relied on before us, that it will be in accordance with the foreign law administered by the Court, where proceedings are to be taken. The point is not, so far as we have been shown, covered by direct authority. But a ground of decision can be found in the principle that "the law of limitation is a law relating to procedure having reference only to the *lex fori*" and that "no Court is obliged to depart from its own notions of judicial order from mere comity to

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(1) (1915) 20 C.W.N., 889 (F.B.).

(2) (1898) I.L.B., 22 Bom., 88.

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any foreign nation." *Her Highness Ruckmaboye v. Lulloohoy Mottichund*(1) and Story's Conflict of Laws, 576, 580. It is the British Court, which has to decide whether the conditions postulated by the article are fulfilled and on this principle it will do so in accordance with its own law and without reference to other codes, which may include provisions regarding the executability and methods of execution of decrees different from those in our own. It may be argued that the existence of such provisions in the foreign code in question does not entail that they will in fact be employed or that any execution will take place, which the British Court could not approve and adopt. But that is beside the point, which is that the validity of a step in aid need not be tested, when or if any execution has taken place, but must be determinable, whether any takes place or not, with reference to the legality of the execution, which the step taken is contemplated as aiding. In the case of transmission by one British Court to another, that legality could not be doubtful, since the recipient Court could execute only in accordance with British law. It will be otherwise, when (as in the present case) the recipient Court is foreign and it is uncertain whether its proceedings in execution will conform to that law, the only one which our Courts dealing with the question of limitation can consider. In the absence of ground for any presumption that the foreign Court's proceedings in execution will be in accordance with the law applicable, an application to take a step in aid of them will not be one contemplated in article 182 (5).

For these reasons I would respectfully concur in the answers to the questions referred, which his Lordship the Chief Justice proposss.

KUMARASWAMI SASTRIYAR, J.—I have had the advantage of reading the judgments of the Chief Justice and Mr. Justice OLDFIELD who agrees with the conclusion arrived at by my Lord. I entirely agree with the judgments and as they deal fully with all the points raised, I have nothing useful to add.

Attorneys for the appellant—*Messrs. King and Partridge.*

N.R.

(1) (1852) 5 M.I.A., 234.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Srinivasa Ayyangar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), APPELLANT,

v.

SRI SRI SRI MEERJA SRI PASUPATI VIJAYARAMA
GAJAPATHI RAJU, MAHARAJAH MANYA SULTAN
BAHADUR, RAJAH OF VIZIANAGARAM AND ANOTHER
(PLAINTIFFS), RESPONDENTS.*

1916.
October
13 and 16-20
and
November 15.

Alluvion—Gradual accretion to an already existing lanka—Slow and imperceptible, meaning of—Land added in the bed of the river by slow, imperceptible and gradual river action to a known extent of land, applicability of law of accretion to.

The plaintiff respondent sued for a declaration against Government that a certain lanka or alluvial island formed in the bed of the Godāvari at a place where it was both tidal and navigable belonged to him as an accretion to his adjoining lankas. It was found that the suit lanka was originally formed in contiguity with the plaintiff's land, that it was formed very rapidly and in some years, during the annual rise of the river, large additions were made, which could not but be perceptible as soon as the water subsided, that a portion of the alluvial land was separated from the rest by a channel a few years before the suit, and that it was not possible to say that the accretion was slow or imperceptible;

Held, that the suit land was an accretion to the plaintiff's land, that in applying the rule of English law as to accretions, local physical conditions must be taken into consideration and that in the case of large rivers in India like the Godāvari which on occasions leave large and sudden deposits, it is not necessary that the accretion should be slow or perceptible.

Rez (nom. Gifford) v. Yarborough (1824) 2 Bligh (N.S.), 147 and *Attorney-General v. M'Carthy* (1911) 2 Ir.R., 260, referred to.

Srinath Roy v. Dhinabandhu Sen (1915) I.L.R., 42 Calc., 489 (P.C.), applied.

Held also that the fact that in 1870 when the suit lanka was not as yet formed, the extent and boundaries of the plaintiff's lankas were known or ascertainable did not render the law of accretion inapplicable.

Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Limited (1915) A.C., 599 at p. 612, followed.

APPEAL against the decree of A. SAMBAMURTI AYYAR, the Subordinate Judge of Rajahmundry, in Original Suit No. 63 of 1912.

* [Appeal No. 60 of 1914.

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The facts appear from the opening paragraph in the judgment of SRINIVASA AYYANGAR, J.

V. Ramesam, the acting Government Pleader, for the appellant.—The suit island is an independent formation in the middle of the river.

[Their Lordships intimated that they were against him on this point and that he might address them on the next point.]

In the year 1884, there was a large addition to the plaintiff's lanka—an addition of 610 acres in a single flood season (July to September) and the suit island must (if it was not an independent formation) have been torn out of it in 1888 as an island of 242 acres; since 1888 it grew to its present dimensions.

The large additions in 1884 of 610 acres cannot be regarded as an accretion, and, if it is not, the island of 242 acres, separated out of it in 1888 the present island, cannot belong to the plaintiff. For to be an accretion, the formation must be slow, gradual and imperceptible. As it was formed in a single flood season lasting for two months, and at the end of it, was perceptible, it cannot satisfy the principle of the law of accretion: see *Rez (nom. Gifford) v. Yarborough*(1). I rely on *Lopez v. Muddun Mohun Thakoor*(2), *Jefferis v. East Omaha Land Co.*(3), *Farnham on Waters*, Volume I, page 321, *Ritraj Kunwar v. Sarfaraz Kunwar*(4), *Pragdukt Ravot v. Luchmun Pershad*(5), *Rai Krishna Chandra v. Saivan Bibi*(6), *Baldeo Thakur Rai v. Ugra Nath Misra*(7), *Nagendra Chunder Ghose v. Mahomed Esof*(8) and *Surya Bahadur v. Secretary of State for India*(9).

It does not follow that the formation is gradual, if not sudden; *Abdul Huq v. Subajan*(10). As to the reason of the law, see *Secretary of State for India v. Kadiri Kutti*(11).

My next submission is that a portion of the island is a re-formation on the Kota lanka of Government. *Lopez v. Muddun Mohan Thakoor*(2). The principle of re-formation can be taken advantage of by the Crown; *Ananda Hari Basak v. Secretary of State for India in Council*(12).

(1) (1824) 3 B. & C., 91; s.c., 27 R.R., 292; s.c., 2 Bligh (N.S.), 147.

(2) (1870) 13 M.L.A., 467 at p. 473. (3) (1890) 134 U.S., 178.

(4) (1905) I.L.R., 27 All., 655 at pp. 661 and 669. (5) (1871) 3 N.W.P., 111.

(6) (1906) I.L.R., 28 All., 256. (7) (1915) 29 I.C., 278.

(8) (1872) 10 B.L.R., 406 (P.C.). (9) (1913) I.L.R., 36 Mad., 57.

(10) (1913) 18 I.C., 855. (11) (1899) I.L.R., 13 Mad., 369.

(12) (1906) 8 C.L.J., 316.

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I further submit that there is no law of accretion where the boundaries are fixed. See *Lopez v. Muddun Mohun Thakoor*(1), *Hindson v. Ashby*(2), *Attorney-General v. Chambers*(3), and *Farnham on Waters*, volume I, page 325.

Lastly, the bed of a river cannot be acquired by accretion so long as it is a bed. The bed does not cease to be the bed simply because it is now and then above water. *Hindson v. Ashby*(2), per SMITH and KAY, L., JJ.

Hon. Mr. S. Srinivasa Ayyangar, the acting Advocate-General, for the respondent.—The English law of accretion cannot be definitely applied to India. Indian rivers are larger and more like American rivers. I rely on *Srinath Roy v. Dinabandu Sen*(4). As to the nature of the river Gōdāvari, see *Sri Balasu Ramalakshamma v. The Collector of the Gōdāvari District*(5). The reason of the law is really occupation and not the maxim *de minimis non curat lex*: *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Limited*(6). The formation need not be slow or imperceptible. *Farnham on Waters*, page 321 (footnote). The point as to re-formation is not available to the appellant as it is not raised in the pleadings: see *Nagender Chunder Ghose v. Mahomed Esof*(7). The doctrine as to defined boundaries has been disputed by the decision in *Attorney-General v. McCarthy*(8).

V. Ramesam replied.

AYLING, J.—In this case we have had the benefit of an exhaustive argument on both sides and are particularly indebted to the learned Government Pleader, Mr. Ramesam, for the pains he has taken in presenting the facts to us in the clearest and most intelligible light. I have also had the advantage of perusing the judgment which my learned brother is about to deliver, and can add nothing material to it. The evidence leaves no doubt in my mind that the lower Court's decision on the question of fact is correct. The nucleus of the suit lanka is not an island formed vertically in the bed of the Gōdāvari,

(1) (1870) 13 M.L.A., 467 at p. 979. (2) (1906) 2 Ch., 1.

(3) (1859) 4 De G. & J., 58 at pp. 69—71.

(4) (1915) I.L.R., 42 Calc., 489 (P.C.).

(5) (1899) I.L.R., 22 Mad., 466 at p. 467. (6) (1915) A.C., 599 at p. 612.

(7) (1873) 10 B.L.R., 406 (P.C.). (8) (1911) 2 Tr. R., 280.

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but an accretion to plaintiff's pre-existing *Voota Chiguru Lanka* formed in 1883 and severed from the latter about four years later. I do not think we should be justified in refusing to recognize plaintiff's title to the land thus formed on the ground of the comparative rapidity with which the formation took place. No doubt the reported decisions of the English Courts would seem to indicate that they would refuse to treat such a formation as an accretion, if it occurred in an English river. An addition of over 600 acres in the course of a single flood season could not be described as slow and gradual according to the standard of additions by alluvion in English rivers. But there is nothing abnormal in such a phenomenon in Indian rivers, and although several cases have been quoted in which the Privy Council has dealt with claims to accretions by alluvions in Indian rivers, find none in which this claim has been rejected merely on the ground of the extent of land thus newly formed and the shortness of the period occupied in formation. In *Lopez v. Muddun Mohan Thakoor*(1) and *Hursuhai Singh v. Syud Loot Ali Khan*(2), the lands claimed as accretions measured in round figures 2,500 and 5,000 acres respectively. The exact length of time occupied in formation does not appear but it would seem to have been within a space of about fifteen years in each case. The claims by accretions were rejected solely on the principle of re-formation and there is nothing in the judgment to suggest that apart from this their Lordships would have hesitated to admit the claim by accretion. It seems to me the recognition of title by alluvial accretion is largely governed by the fact that the latter is due to the normal action of physical forces: and the different conditions of Indian and English rivers is such that what would be abnormal and almost miraculous in the latter is normal and common place in the former as pointed out by their Lordships of the Privy Council in *Srinath Roy v. Dinabandhu Sen*(3). Such a difference cannot be ignored in the application of the legal principles of alluvial accretions and it seems to have been given effect to in Bengal Regulation II of 1825. The only requirements in section 4 of that enactment is that this accretion should be gradual, not that it should be slow or

(1) (1870) 13 M.I.A., 467.

(2) (1874) 2 I.A., 28.

(3) (1915) I.L.R., 42 Calc., 489 at p. 531 et seq. (P.C.).

imperceptible. Abnormal changes due to sudden alterations of course and violent avulsions are separately provided for; but all accessions by gradual alluvion are treated alike irrespective of the rate of formation.

I must confess to some doubt as to the extent to which the rapidly changing character of the formations in Indian rivers should affect the principles of re-formation. The permanence of the formations by alluvial accretions seems to vary inversely with their rapidity and the lanka formed in the course of a year or two is frequently destroyed in an equally short space of time. Whether the proprietor of such an evanescent property should be deemed to be entitled *ipso facto* to all subsequent formations over the same portion of the river-bed whatever their origin seems to me open to question. The re-formation principle was certainly recognized and acted upon by the Privy Council in two of the cases cited above, but the circumstances were peculiar and its general applicability to cases like the one before us does not follow. Fortunately although a certain amount of argument was devoted to this point, it is not one which need be decided for the purpose of the present appeal.

I concur in the conclusions arrived at by my learned brother and would dismiss this appeal with costs.

SRINIVASA AYYANGAR, J.—This is a suit by the Zamindar of Vizianagram against the Government for a declaration that a certain lanka formed in the bed of the Gōdāvari belongs to him as an accretion to his adjoining lankas. The defendant, the Government, denied that the suit lanka was an accretion in the legal sense of the term, and also urged that, even if the suit lanka was an accretion, it was not formed laterally as an adjunct to, or in contiguity with, any lanka belonging to the plaintiff but was formed vertically as an island in the bed of the Gōdāvari. At the place where the suit land lies, the Gōdāvari is both navigable and tidal and it is not disputed that the bed of the river at that place belongs to the Government. The lanka in dispute is now an island surrounded on all sides by the river. The trial Judge decided that the lanka was formed by alluvion in contiguity with the plaintiff's land and was subsequently separated therefrom by the river and gave a decree to the plaintiff. The Government appeals.

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In the Court below, the main contest seems to have been raised on the question whether the suit land was formed as an island surrounded on all sides by the waters of the Gōdāvari. In fact, the trial Judge devotes practically the whole of his judgment to the consideration of this question. In this Court, more especially after we had intimated to the Government Pleader that we agreed with the Lower Court that the suit lanka was originally formed in contiguity with the plaintiff's land, the main arguments addressed to us were on the second question, viz., whether the suit lanka was an accretion in the technical sense of the term. The parties are not in agreement as to the time when the suit lanka was formed.

The materials for the determination of the question in dispute here consist of the several maps or plans of the river at the place of dispute from time to time, the *amarakam* or rent roll accounts of the plaintiff which are exhibited as T series and certain muchilikas, executed in favour of the plaintiff for his lankas for some of the years between 1873 and 1905. The oral evidence in the case is not of much value.

The village of Kotipalli which belongs to the plaintiff and the village of Kota which now belongs to the Government are two adjoining villages on the northern bank of the river Gōdāvari. It appears that in or about the year 1838, there was some dispute about the boundaries of these two villages. At that time the plaintiff owned a lanka called Betaru lanka as an adjunct to the Kotipalli village to which it was evidently an accretion on the southern side. The Kota village had a similar lanka on the southern side called the Kotaseri lanka. Between the two lankas, Betaru lanka belonging to the Kotipalli village and the Kotaseri lanka belonging to the Kota village there were the waters of the Gōdāvari. But even so early as 1838 it was anticipated that a lanka was likely to be formed in the place between the two lankas above said; and by the year 1850 a lanka was formed touching Betaru lanka on the west and Kotaseri lanka on the east. It is in fact a rough parallelogram wedged in between the two lankas and in the proceedings in this case is called the Thurpu lanka, "Thurpu" meaning "east", this is east of the plaintiff's Betaru lanka. It was also called Yelapu lanka because during the disputes as to the title of this lanka between the Government and the plaintiff it was auctioned

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year by year. After its complete formation in 1850, there were disputes between the parties with regard to this lanka and the matter was not settled till the year 1867 or thereabouts, when in consequence of the claim of the Government to the whole of the lanka the plaintiff instituted a suit, Original Suit No. 3 of 1867, on the file of the District Court, Gōdāvari, to recover it from the Government with mesne profits. It may be mentioned that when it was originally formed, the area of the lanka was about 390 acres, but between that time and the time when the suit was instituted it was reduced to about 270 acres by erosion of the waters of the river. In 1863 it was determined finally in Suit No. 3 of 1867 that the plaintiff was entitled to that lanka and in the year 1870, the plaintiff was placed in possession of it. There is a survey plan of the village of Kota prepared in the year 1863 (Exhibit VI), which gives a very good idea of the Betaru lanka, the Kotaseri lanka and the Thurpu lanka which then was the subject of dispute. When Original Suit No. 3 of 1867 was instituted the plaintiff filed along with the plaint the plan Exhibit Z and the Government when they put in their written statement in the beginning of 1868, put in a plan Exhibit DD which, it is not disputed, correctly shows the configuration and relative positions of the three lankas. It will be seen from the plan Exhibit DD that a portion of the Thurpu lanka had even then been washed away and Exhibit H (5) the plan prepared by Mr. Larminie of the Public Works Department according to which delivery of the Thurpu lanka was made to the plaintiff, shows that after the decree in 1868 and before delivery in 1870, other portions of that lanka had been washed away. There are two pillars shown at the eastern extremity of the Map H (5); a red line joins the two pillars and is produced south. That line is called Larminie's line and shows the eastern limits of Thurpu lanka including the washed-away portions delivered to the plaintiff. There are two other lankas Vuta lanka and Chiguru lanka which are also of considerable importance in connection with the questions in dispute now. It is seen in Exhibit DD that just to the south and east of the junction of the Betaru lanka and the Thurpu lanka there is a small green space marked H in the plan which was wet land and just west of it a triangular piece of land being the southern portion of block G in DD formed in the south-east of the Betaru lanka which is

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found shaded pale pink in Exhibit DD. These two were the Chiguru lanka and Vuta lanka which were formed as an accretion to the Betaru lanka and belonged to the plaintiff. Their extent in 1868, it is not possible now to find. As the plaintiff claims the present suit lanka as an accretion to his Betaru lanka, of which he was the owner originally the Thurpu lanka to which his title was established by the suit of 1867 and the Vuta and Chiguru lankas which admittedly belonged to him and in part as a re-formation on the site of the said lankas after their erosion by the river, it becomes necessary to advert to and keep in mind the position of these lankas from time to time.

Comparing the three maps Exhibits VI in 1863, DD in 1868, and H (5) in 1870, it will be seen that north of the Thurpu lanka there was a small creek of the river separating that lanka from the mainland, that a considerable portion of the Thurpu lanka had been washed away between 1863 and 1867, and another small portion in the south after the decree in 1863 and before delivery of possession in 1870, and that between the two dates, the Vuta lanka and the Chiguru lanka which were jutting out from the Betaru lanka of the plaintiff to the east and the south with a small narrow creek dividing these two in the north from the Betaru lanka and the Thurpu lanka had been washed away. It will also be seen that the river had cut the newly formed Thurpu lanka into two portions nearly south to north in the direction of the Kota lanka, which is a fixed position in the landscape, the river joining the creek in the north across the Thurpu lanka. In the place where the Vuta lanka and Chiguru lanka were at the time when Exhibit DD was prepared a very small strip of land with a south-east curvature was formed in contiguity with the plaintiff's Betaru lanka and at the south and the east of it was the river. One other important matter to be observed is that the suit lanka had not begun to be formed. That was the state of affairs in 1870.

Between 1870 and 1872, we have no documents on the record to show the position of these lankas. But in 1872 according to the *Amarakam* account (Exhibit T) Vuta lanka was only 8 tooms in extent equal to about 3 acres; from the same document it is found that Betaru lanka and southern Badava which shall hereafter be called Betaru (west) was 113 putties in extent or about 904 acres. Another portion of Betaru lanka

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apparently the south-eastern portion and Thurpu lanka which I shall hereafter refer to as Betaru (east) and Thurpu was of the extent of 68 puttis and 15 tooms (or 550 acres). It will be noticed that the Thurpu lanka which was placed in possession of the plaintiff in 1870 according to the plan exhibit H (5) was only 276 acres in extent including the portion submerged by the river after the decree. How much of the original Betaru lanka is included in these 68 puttis and 15 tooms is not clear. In 1873 the same document shows that the Vuta lanka had become wholly submerged by the waters of the Gōdāvari and there can be no doubt on a comparison of the plan Exhibit H (5) with Exhibit DD that the Chiguru lanka marked as H in Exhibit DD had been washed away between the two dates and only a very small portion of the Vuta lanka which as I said before was just west of it and at the southern extremity of Betaru lanka of the plaintiff was being gradually eroded till in 1873, it had become wholly submerged; between 1873 and 1876, we have no document and it is impossible to say what changes had been made in that locality. The learned Judge in the Court below thinks that the plaintiff's Vuta lanka had at this time extended to the south of Kotaseri lanka and he refers to exhibit W as leading to that conclusion; but the new lanka transferred to Kotipalli shown as the southern boundary of Kotaseri lanka in W appears to me to refer to the Thurpu lanka delivered to the plaintiff in execution of the decree in Original Suit No. 3 of 1867 and for the purpose of the present case it is necessary to keep distinct the plaintiff's Vuta Chiguru lanka, and Thurpu lanka of which he obtained delivery in 1870, and it is quite clear that the plaintiff's Vuta Chiguru lanka did not extend to anywhere near the place where the Kotaseri lanka then was. In the year 1876 we have a map, Exhibit VII, a river conservancy map, which shows the course of the river Gōdāvari. The lankas apparently were not surveyed, but the map is clear enough to show the configuration of the various lankas. Looking at that map it will be seen that the eastern portion of the Thurpu lanka east of the channel as shown in H (5) had become considerably eroded by the waters of the Gōdāvari, while there was an accretion to the western part of the Thurpu lanka. At the same time it is clear that the Vuta lanka Chiguru lanka which had disappeared, in 1873 had re-appeared or rather there had been some re-formation

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at or about the place where the original Vuta lanka Chiguru lanka was. That this re-formation was not of considerable extent will be clear from Exhibit T (1) which is the *amarakam* account for fasli 1287 which also gives the extent leased in fasli 1286. The extent was 2 puttis or 16 acres. It will be seen that Betaru (east) Thurpu lanka was then of the extent of 50 puttis while Betaru (west) was 41-10. By comparison, then, of the extent of Betaru (west), and Betaru (east) Thurpu, it will be seen that west Betaru had been considerably eroded between 1873 and 1876, so that what was 113 puttis in extent in 1873, was reduced to 41-10 in 1876, and as regards east Betaru Thurpu what was 68-15 in extent had become reduced to 50 puttis and at or about the place where the original Vuta lanka Chiguru lanka was, that is, at about the south-eastern extremity of the Betaru at the place where it joined the Thurpu, a small extent of land was newly formed. In fasli 1287, Betaru (east) Thurpu and the Vuta lanka Chiguru lanka, remained the same in extent while Betaru (west) was still further reduced by 10 puttis, so that its extent in 1877 was only 31-10. There is a Muchilika Exhibit J (22) for fasli 1288 but unfortunately there are no details of the various lankas included therein. In fasli 1291 for which year we have an *Amarakam* account Exhibit T (2) and the Muchilikas Exhibits J (3) to J (7), the Vuta lanka Chiguru lanka which in fasli 1287, was only about 2 puttis in extent had increased to 21 puttis. The description by boundaries of the Vuta lanka and Chiguru lanka contained in Exhibits J (3) to J (7) leaves no room for doubt that the Vuta lanka Chiguru lanka which was leased in that year was at or about the place where the original Vuta lanka Chiguru lanka was, as shown in the plan Exhibit DD and Exhibit Z, that is, at the junction of the original Betaru lanka and Thurpu lanka in the south-eastern extremity of the Betaru lanka. In the same year it is interesting to note that Betaru (west) had become still further reduced to 25 puttis while Betaru (east) Thurpu lanka had increased slightly to 55 puttis or thereabouts. There was practically no change in fasli 1292. In fasli 1293, the west Betaru had become still further reduced to 16-15 while the east Betaru Thurpu practically remained the same and about a half of Vuta lanka Chiguru lanka which is called here Pulugula Tippu had been washed away leaving an extent of 11-12-8 or 11½ puttis

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[see T (3) in the column *Amarakam* of the previous fasli 1293 and J (14), J (21), J (25) and J (26)]. Fasli 1294 is an important year as there appears to have been a very considerable change in that year; from Exhibit T (3) which is the *Amarakam* account for fasli 1294 and which also gives the extent of each holding in the previous fasli, it will be seen that out of 16-15 puttis of Betaru (west) only one putti remained. So that out of the extent of 113 puttis of Betaru (west) in fasli 1282 only one putti remained in fasli 1294 the rest having been washed away; at the same time there was a very large accretion, to the extent of about 30 puttis in that fasli to Betaru (west) possibly at the north-western end of that lanka; Betaru (east) Thurpu lanka practically remained the same. Out of 11-12-8 which was the extent of Vuta lanka Chiguru lanka in fasli 1293, 9 puttis were washed away and there was a very large addition of 76-7-7 puttis or 610 acres more or less to those lankas. As there was only a very small quantity, viz., one putti which remained out of the original western Betaru, that one putti was taken along with Vuta lanka and Chiguru lanka which had a very large accretion of 76-7-7 puttis and the total extent of 80 puttis was leased in two lots of 30 and 50 puttis. This does not include Betaru (east) Thurpu lanka or the new accretion of 30 puttis to Betaru (west). Pausing here for a moment it is quite clear there has been a very large addition in continuation of Vuta lanka Chiguru lanka belonging to the plaintiff and it is the Government Pleader's case and there can be no doubt on the plans, that a portion of the present suit lanka must be a portion of that addition in fasli 1294. In fasli 1295 there was no change except that the 80 puttis which then formed Vuta Chiguru lanka, with the small addition of one putti which originally formed part of Betaru (west) together with Betaru (east) Thurpu except the north-eastern portion of Thurpu which went by the name of Jillella Gedda making a total extent of 124-15 puttis were leased out to two tenants in equal portions of 62-7-8 puttis each [T (5), J (10), J (27)]. In fasli 1296 there was no change except that out of the new addition of 30 puttis in western Betaru two had been eaten away leaving 28 [Exhibit T (5)] and in 1887-88 (i.e., fasli 1297) a considerable portion of this remaining 28 puttis of Betaru (west) must have been washed away. But in this year, i.e., fasli 1297 it appears from Exhibit

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T (6) which is the *Amarakam* account for fasli 1298 that the Vuta lanka Chiguru lanka became reduced to 34 puttis or 272 acres and in fasli 1298 the extent remained the same Exhibits [T (6), J (13), S (1), J (12)]. From this year on to about 1899 the extent comparatively speaking did not vary very much; the variation ranging between 272 and 240 acres [T (7), J (1) and T (8) to T (19)]. J (1) is a lease for 10 faslis from fasli 1300 to 1309 and T (8) to T (19) are the *Amarakam* accounts for the corresponding period. During this period there does not appear to be much variation in the extent of Betaru (east) Thurpu either.

There are two important documents, Exhibits J (13) and J (2), which not merely account for the large diminution in the extent of the Vuta Chiguru lanka, in 1887-88, but also prove that the present suit lanka must have begun to be formed adherent to or on the site of the original Vuta Chiguru lanka of the plaintiff. J (13) is the Muchilika for Vuta lanka and Chiguru lanka for fasli 1296 and J (12) for fasli 1298. It will be seen from Exhibit J (13) that the river Godavari was finding a way to the north through the lands adjoining the lankas known by the name of Vuta and Chiguru lanka though it had not then wholly cut across the land. (See the description of the northern boundary of Vuta and Chiguru lanka and the stipulation at the bottom of page 81 in the printed papers.) From Exhibit J (2) it will be found that the river had cut across and the boundaries and description of the Vuta lanka Chiguru lanka which are given in Exhibit J (1) show that Vuta lanka Chiguru lanka had been made into an island from a peninsula. There is no reason to doubt that the Vuta lanka Chiguru lanka which the plaintiff has been leasing from at least 1872, whatever may be its extent, whether it was diminished by erosion or added to by new formations, large or small, relate to lands at or about the place where the plaintiff's original Vuta lanka and Chiguru lanka was according to Exhibits Z and DD. Exhibit M which is another river conservancy map of the year 1890, shows a portion of the present suit lanka as an island. Comparing Exhibits H-3, VII and M the learned Government Pleader said, and that statement was not disputed by the learned Advocate-General for the plaintiff that taking three lines one at the eastern extremity of Thurpu lanka, i.e., Larminie's line, one along the eastern edge of the western block of Thurpu lanka as shown in VII at its

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largest breadth and one along the boundary between the original Betaru lanka and Thurpu lanka including the Vuta Chiguru lankas as they stood in 1870, the said lines would fall just outside or just inside the island shown in Exhibit M. This statement was made to show that the island shown in M which afterwards developed into the suit lanka was formed outside the limits of the plaintiff's lankas. This statement however makes it clear that the plaintiff's lankas must have extended right up to the island shown in M in the south and the fair inference to be drawn from Exhibits J (13) and J (12) is that the land shown as an island in M was a continuation of the plaintiff's lankas in the north till it was severed by the erosion of the river in 1887, or thereabouts. The *Amarakam* accounts and the muchilikas reviewed above leave no room for doubt that the plaintiff was leasing these lands including what is shown as an island in M as forming their Vuta and Chiguru lanka.

A glance at the map (Exhibit M) in 1890 shows that the channel of the Godavari which divided the Thurpu lanka into two portions in a line south to north of the Kota tank had become filled up and that the river had cut its way through the land which was formed in contiguity with the original Vuta lanka and Chiguru lanka of the plaintiff at the south-eastern extremity of the place where the plaintiff had his Betaru lanka in the year 1870. From J the lease of 1890, it appears that the Vuta lanka Chiguru lanka remained an island and its extent was 258 acres, and as already stated that seems to have been practically its extent down to the year 1899 or 1900.

Exhibit F is another river conservancy map of the year 1895. It will be seen from a comparison of Exhibit M with Exhibit F that the river course has considerably changed and the plaintiff says that the channel which had cut an island as shown in Exhibit M silted up and the river again cut another channel across in a different portion of the plaintiff's lanka forming the present suit island. The learned Government Pleader says that this silting up of the channel to the north of the island in M and the cutting of a channel in another place in 1895 is not true. But I do not attach much importance to this matter; because if my conclusion is right that the present suit land began originally to form in contiguity with the plaintiff's land, or in the place where his land was of which I feel no doubt whatever

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subsequent changes which may have taken place by the river running across that land or by again joining that land to the main land and cutting another channel would make no difference in the title of the plaintiff to the land which was originally formed in contiguity with his land if on the application of the law of accretion he is entitled to the new formation. But the subsequent changes in the configuration and in the extent if they are traceable may be of some value in the determination of the question as to whether the formation of the land in the year 1883 was an accretion in the technical sense of the term. But unfortunately the subsequent changes in the configuration of the island as shown in Exhibit M is not traceable, year by year and it is not now possible to say to what extent the land which was of the extent of about 250 to 270 acres from 1888 down to 1900 became extended thereafter. One may even doubt whether the extent of about 250 to 270 acres between 1888 to 1900 shown in the *Amarakam* accounts as the area of Vuta Chiguru lanka is itself correct; for after the lease J(1), which lasted till 1900, the increase or decrease in the lands affected only the lessee and the figures given in the *Amarakam* accounts year by year may not represent accurately the actual extent of the lankas.

In the year 1900 after the expiry of the term of the lease J(1) there was a lease of the Vuta lanka Chiguru lanka to others. The total extent so leased is 600 acres but that extent obviously includes what I have been referring hitherto has Betaru (east) Thurpu. The next important document is Exhibit 5 in 1902. That is a plan prepared by the agent of the plaintiff showing the position of the Thurpu lanka which was delivered to the plaintiff in 1870, the Vuta Chiguru lanka which then belonged to the plaintiff, the subsequent formations and the portions of the original Betaru lanka and Thurpu lanka which then existed. That plan and Exhibit 22 is of use for the purpose of showing the locus in dispute, the extent to which the new formation is on lands which belonged to the plaintiff.

From Exhibit 5, it will be seen that the original Betaru lanka had almost been washed away, so also a considerable portion of the Thurpu lanka which was delivered in the year 1870. Exhibit V also contains a statement that the channel which divided the eastern portion of Thurpu lanka from the western, had become silted up and river Gōdāvari found a different way which seems obvious on a comparison of Exhibit H(5) and Exhibit M.

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Exhibit 23 is a lease of the year 1903, which gives the extent of Thurpu-Vuta and Chiguru lanka as 842 acres, an increase of 242 acres in three years, and in 1907 the same land had increased to 930 acres (Exhibit 23a).

Before the year 1889, the new formations were to the west of Larminie's line which was understood whether rightly or wrongly to form the boundary between Kotapalli and Kota in the river. In 1889 land began to be formed by alluvial action to the east of Larminie's line (Exhibit XI), but in continuation of the land to the west and there were constant quarrels between the Kotipalli and Kota ryots as the extent of the land in the east increased gradually. It is unnecessary to go into these disputes now, but it may be mentioned that there was a fresh extension of land in 1894 about which again the ryots of the two villages quarrelled (Exhibit XVII). Mr. SPENCER settled one of these disputes in 1896 and a plan which was made in connection with that dispute shows only a small extent of land to the east of Larminie's line (C 2). The Government Pleader said it was about 25 acres in extent. In 1900 another plan (Exhibit XX) was prepared by a Revenue Inspector in connection with one of these recurring quarrels between the two villagers and that plan, it was said, showed that the eastern portion had then increased to 103 acres. At the time of the suit in August 1909 the extent was about 550 acres east of Larminie's line and west of it about the same or a little more.

It is clear from the foregoing review of the history of the formation of the suit lanka that the first question raised in this case, namely, whether the land in dispute was formed originally in the bed of the river as an island, i.e., as a vertical formation, or as a lateral extension of the plaintiff's lanka or at least of the site of the plaintiff's lanka must be found for the plaintiff. It is also clear that the suit lanka was formed very rapidly and in some years during the annual rise very large additions were made which could not but be perceptible as soon as the water subsided.

The further question is whether the plaintiff is entitled to the suit land as an accretion to his lankas. The learned Advocate-General strongly pressed on us that his original Betaru lanka and the Thurpu lanka delivered in 1870 and the jutting out land called the Vuta lanka and Chiguru lanka on the

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south-eastern corner where the original Betaru lanka and Thurpu, lanka joined, were really one lanka without there being any discriminating boundary between these portions and was one big block of land by whatever name portions of the same may be described and was subject to erosions or encroachments by the river and the additions formed were additions to the lanka as a whole and not to any particular portion of it. He laid stress on this matter as a basis for his contention that however large in extent the additions may appear to be as the formations were in contiguity with a long rivery line they fall within the definition of accretions. The question then as a question of fact is whether the additions were additions made to a long coast line. I am inclined to think that the additions were to a somewhat narrow coast line of the land belonging to the plaintiff, that is, that the additions were in fact, in or about the place and in extension of the Vuta lanka and Chiguru lanka which occupied the narrow promontory and the additions were not to a long coast line. In the course of the argument here and in the evidence before the Lower Court the plaintiff who in his plaint claimed the suit land as an accretion to the lankas, also, put forward a case of re-formation *in situ* of his own lanka as regards the portions of the new formation. An examination of Exhibit 22 which for this purpose may be taken to be fairly accurate shows that the re-formation at the site of lands which belonged to the plaintiff is only a very insignificant portion of the huge block of land, which is now claimed by the plaintiff. At the same time I accept the argument of the learned Advocate-General that it is not possible to say the exact degree of additions and erosions from time to time, though I think that in some years at least there have been very considerable additions especially in the year 1883 when there was such a large addition of 76-7-7 puttis amounting to about 610 acres in the course of a single year. It is also clear that out of that addition of 610 acres a considerable portion must have been washed away between 1887 and 1888 and there must have been subsequent additions till about the date of the suit. The whole island was over a thousand acres in extent. This being my conclusions on the facts of the case, it remains now to apply the law.

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The law of accretion which is now a part of the law of all civilised countries seems to have had its origin in the civil law, though no doubt in the application of the principle the conditions prevailing in different countries have necessarily to be taken into account; French Code, 556 to 563 and German Civil Law, article 331 (Schuster). It is now quite settled in England that land to be an accretion must be formed by gradual, slow and imperceptible degrees. By imperceptible is meant imperceptible in its progress, i.e., step by step as the accretion is formed and not imperceptible in the result (i.e.), after a long lapse of time. It is scarcely necessary to refer to more than two cases, one the leading case of *Rex v. Yarborough*(1) reported *subnomine Gifford v. Yarborough*(2), a decision of the House of Lords and the other, *Attorney-General v. M'Carthy*(3). It is the manner of the formation not the result which decides whether the addition is an accretion or not, and it was said that if the addition was by gradual and insensible degrees it is an accretion while if a considerable increase takes place at one time it is not an accretion: *Rex (nom. Gifford) v. Yarborough*(1). In *Attorney-General v. M'Carthy*(3), Justice GIBSON, pointed out that a sudden accretion would not give the land to the owner of the adjoining land. He stated however the difficulty in the application of the doctrine in these terms:

"What is the base to which the addition is to be made and what is to be the method of observation? Is the increase to be latent at the end of a week or of a month?"

He answered the question by saying that it must be imperceptible to an ordinary person as the addition is being formed. In a still more recent case from the Colonies Lord SHAW delivering the judgment of the Privy Council stated that the accretion should be natural and should be slow and gradual, so slow and gradual as to be in a practical sense imperceptible in its course and progress as it occurs. And in another place he said that natural silting up, if gradual and imperceptible, will give the land to the adjoining owner: *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Limited*(4). I do not know if it is necessary to refer to any other case in England as to the meaning of the words "gradual, slow and imperceptible;" but

(1) (1824) 3 B. & C., 91; s.c., 27 R.R., 292. (2) (1824) 2 Bligh (N.S.), 147.
(3) (1911) 2 Ir.R. 280. (4) (1915) A.C., 499, at p. 613.

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I may as well refer to a few cases in England where the principle was applied in concrete instances. In *Attorney-General v. Chambers*(1) the Lord Chancellor referring at page 69, to the evidence of witnesses for the Crown who said that the alluvial land has not been added to the main land gradually and imperceptibly but rapidly, observed as follows :

"If by the word 'rapidly' the witnesses mean perceptible, then the Crown and not the defendant will be entitled to these accretions, but if the witnesses merely mean that at the expiration of some period of time they could perceive changes which had taken place although they could not discern them in their progress then another important question may arise."

In *Foster v. Wright*(2), Justice LINDLEY as he then was, said : " 'the change of the bed' of the river has been gradual and although the river bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week nor in fact at all except by comparing its position of late years with its position many years before."

A case where it was decided that the accretion was not imperceptible and therefore did not belong to the adjoining owner may usefully be referred to, for the purpose of showing in what sense this phrase is understood in England. In *Attorney-General v. Reeve*(3) the evidence was that the accretion was going on for a long number of years and that it averaged about 30 feet in a year. The accretion was perceptible in a month. During the interval, 1878, and the date of the action (which was about five years after) the accretion was 300 feet. There are some instructive observations in the course of the argument. Lord COLERIDGE in his judgment after referring to the Institutes, BRACON and Lord HALES' book and *Rex nom. (Gifford) v. Yarborough*(4), *In re Hall and Selby Railway Company*(5) and *Attorney-General v. Chambers*(1) as to the meaning of the words gradual and imperceptible, said that unless the evidence established that the increase was so insensible that it could not be determined even that the sea was there, the land would not belong to the adjoining owner. And referring to the evidence in that case (he) said :

(1) (1859) 4 De. G. & J., 55. (2) (1878) 4 C.P.D., 438.

(3) (1885) 1 T.L.R., 675.

(4) (1824) 3 B. & C., 91; s.c., 27 R.R., 292; s.c., 2 Bligh (N.S.), 147.

(5) (1839) 5 M. & W., 327.

"that this advance of the tide and receding of the line of ordinary high water mark could be plainly perceived from time to time as it went on, that when the wind was blowing strong from north-west to north with a high tide it was even visible from day to day and that the witness had frequently noticed during the prevalence of such winds that the line of ordinary high water mark receded some 10 or 12 feet in a single tide."

If that test is applied to this case or the test as laid down by the Privy Council in *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Limited*(1) I am afraid it is not possible to say that the accretion was gradual, slow and imperceptible. But in England they have not such large rivers as we have in India.

The formation of these lankas in the Gōdāvari was succinctly and accurately described by Mr. Mackenzie in a report made to the High Court in *Sri Balasu Ramalakshamma v. The Collector of the Godavari District*(2), which was finally decided by the Privy Council. This river which is subject to annual floods, deposits in each season a considerable quantity of silt in certain places thereby forming very large and extensive cultivable soil in the bed of the stream. The flood lasts between June and September, and as soon as the flood subsides the soil newly formed is quite perceptible and is easily distinguishable from the previous existing land. Sometimes of course, these formations are made as islands in the midst of the waters and sometimes they are thrown up in contiguity with a pre-existing lanka or the mainland. What happens underneath the water of course is imperceptible but it is difficult to say that the formation is slow or imperceptible in its progress. If we apply therefore the test which is applied in England there can scarcely be any doubt that lankas formed in the Gōdāvari are not accretions at all; but I doubt whether that is the principle which is applicable in India.

In America, where some of the rivers are very large, where also similar formations known as batture are not uncommon; a somewhat different rule is applied. There also the law is stated in terms of the common law rule, they also rely on the institutes of Gaius and Justinian, cite Bracton, Hale and Blackstone, and purport to follow the leading decisions in England,

(1) (1915) A.C., 599.

(2) (1899) I.L.R., 22 Mad., 424.

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but they understand 'imperceptible' as not perceivable in any given moment of time; and even large additions made rapidly by gradual alluvial process, are considered accretions to the neighbouring land; but where the increase is sudden or instantaneous, it is said, it belongs to the sovereign. Of this rule Baron POLLOCK remarked:

"It can hardly be possible that it can be perceptible each moment of time except in the case of a convulsion: *New Orleans v. The United States*(1)."

where the words 'slow and imperceptible' are omitted; *Hagan v. Campbell*(2), *St. Clair Co. v. Lovington*(3) and rule in *DeLassus v. Fatherty*(4). In *Jefferis v. East Omaha Land Co.*(5) counsel in argument said that in the cases decided in the Supreme Court the changes were very rapid and yet the doctrine of accretion was enforced in them. I may refer for an application of this doctrine to *Mulry v. Norton*(6).

In India, there have been several cases decided by the Privy Council with reference to the law of accretion in Bengal. In one of the early cases in which the question was discussed, *Lopez v. Muddun Mohun Thakoor*(7) the test laid down was in the language of the English law that the accretion should be gradual, slow and imperceptible and the reason of the law was said to be the necessity of the case and the difficulty of having to determine year by year to whom an inch, or a foot or a yard belongs. There have been other cases in which the extent of land claimed was quite large, for instance, in *Ritraj Kunwar v. Sarfaraz Kunwar*(8) where the land in dispute was over 2,000 acres in extent and in *Jaggot Singh v. Brijnat Kanwar*(9) where it was about 4,000 acres in extent. But in these two cases the land which was claimed was identifiable as the land of another person; and it is to be observed that in both the cases the rule that to form an accretion by alluvion the addition must be by gradual, slow and imperceptible means was reiterated: see page 668 in *Ritraj Kunwar v. Sarfaraz Kunwar*(8) per Sir ANDREW SCOBLE, and page 772 in *Jaggot Singh v. Brij Nath Kunwar*(9) per Lord ROBERTSON. The learned Advocate-General in one portion of his

- (1) (1836) 10 Pelters, 662 at p. 717. (2) (1838) 33 Am. Dec., 267 at p. 271.
(3) (1874) 23 Wall, 46 at p. 69; s.c., 90 U.S., 59.
(4) (1901) 58 L.R.A., 193. (5) (1890) 134 U.S., 178.
(6) (1895) 53 Am. Rep., 201. (7) (1870) 13 M.L.A., 467.
(8) (1905) I.L.R., 27 All., 655 at p. 668. (9) (1900) I.L.R., 27 Calc., 768.

argument in fact, contended that unless the added land is identifiable as the land of another, it belongs to the adjoining owner whether the same was formed gradually or slowly or suddenly or perceptibly and relied on an extract from a judgment of the Supreme Court of Missouri printed in a note at page 321 of Farnham on Waters. I doubt if the passage supports the Advocate-General's position and in the absence of the full judgment it is impossible to say what was held in that case. If, of course, everything is an accretion within the meaning of the law, which is not identifiable as another man's land (i.e.), in all cases where land is formed adherent to another man's land by deposits of sand or soil, however large or sudden such deposits may be (i.e.), in all cases of alluvial deposits the plaintiff would certainly be entitled to the suit property, for the mud in solution which is precipitated as the waters subside cannot be identified as another man's property; but it seems to me that that is not the law. It is certainly not the law in England [*Stephen's Blackstone Com.*, page 339, *Hindson v. Ashby*(1) and *Attorney-General v. Reeve*(2)] and is contrary to the opinion of the Judicial Committee in *Nagendra Chunder Ghose v. Mahomed Esuf*(3) where their Lordships draw the distinction between mere physical adhesion and accretion or *incrementum latens*; and as far as I understand it, it does not appear to be the law even in America: *Morris v. Brooke*(4). It is to be observed that the author Farnham himself states the law in terms of the common law rule and in a very considerable number of cases both in the Supreme Court of the United States and the States there is always a discussion as to the nature formation, namely, whether it was gradual or slow. If the only question was whether the land was identifiable as that of another no question of gradual or slow increase can possibly arise in any case of alluvial deposit: see also *Secretary of State for India v. Kadiri Kutti*(5). In *Sibessury Dabee v. Lukhy Dabee*(6), *Tarini Churn Sinha v. Watson and Co.*(7) the Calcutta High Court and in the recent case of *Srinath Roy v. Dinabandhu Sen*(8) the Privy Council had to consider the right of *jalkār* or fishery.

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- (1) (1906) 2 Ch., 1. (2) (1885) T.L.R., 675.
(3) (1872) 10 B.L.R., 408 at p. 427 (P.C.).
(4) (1895) 53 Am. Rep., 215 (foot note).
(5) (1890) I.L.R., 13 Mad., 369. (6) (1864) 1 W.R., 88.
(7) (1890) I.L.R., 17 Calc., 963. (8) (1915) I.L.R., 42 Calc., 489 (P.C.).

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Though it was not necessary for the purpose of these decisions to deal with the law of accretion as it was held that the right to *jalkār* did not depend on the ownership of the soil and that the grantee can follow the river, there are valuable observations in them as to the right to the soil as affected by accretion or the converse process of recession. Lord SUMMER delivering the judgment of the Privy Council said that questions of alluvion would depend upon the rapidity of expansion: see page 232 and referring to the change in the course of the river in Watson's case remarked that the change was a sudden one taking place in the course of a single year and not by imperceptible or slow encroachments. On reading these remarks I am inclined to think that a perceptible addition made in the course of a single year during the annual rise of the river is a sudden increase and is not an accretion to the adjoining riparian land; and if the reason for the rule is as stated in Lopez's case, or founded on general security and convenience as said in *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Limited*(1), I can find no reason for giving the mud and sand deposited in large quantities in the bed of a river which belongs to the Crown in trust for the public to the adjoining owner simply because the deposit is also adherent to the adjoining land so long as such deposits are distinguishable from the adjoining land. The principle of identity is, I think, applicable only to derelict lands or lands exposed by the sudden recession of the sea or change of a river's course. If the principle of identity is to be applied to alluvial land, I can find no reason for giving land belonging to one, in this case the Crown, to the neighbouring owner, simply because the river throws a large quantity of mud on it so as to show it above the surface of water.

However that may be, the observations of Lord SUMMER at pages 244, 245 of the report in *Srinath Roy v. Dhinabhandhu Sen*(2) show that in adopting the law as to alluvion in India we should be guided by local physical conditions. I think the principles laid down in the Bengal Regulations as observed by the Judicial Committee at page 469 in *Sri Balasu Ramalakshamma v. The Collector of the Godavari District*(3) afford the best practical guide in applying the law of accretion in the case

(1) (1915) A.C., 599.

(2) (1915) I.L.R., 42 Cal., 489 (P.C.).

(3) (1899) I.L.R., 22 Mad., 464 (P.C.).

of such large rivers as the Gōdāvari. Under that regulation all that is necessary is that the accretion should be by gradual alluvial process; it need not be imperceptible and it need not be slow. Applying this test to this case as I have said already, it is not possible to say that the accretion here was not a gradual addition to the land of the plaintiff though the extent of land added in any particular flood season may be quite perceptible and may easily be ascertainable. In *Sri Balasu Ramalakshamma v. The Collector of the Godavari District*(1) the dispute related to a lanka formed in this very river; the extent of the lanka was about 300 acres which was formed in the course of about three years. Nobody ever suggested that the law of accretion did not apply to that case though at page 459 their Lordships made some observations showing that an accretion must be by gradual, imperceptible deposits. In H (5) which again related to a lanka formed in the Gōdāvari, the original formation which appears to have come up above the water in a single year (1850) was 370 acres in extent. It was never suggested that the principle of the law of accretion did not apply to such a large formation. Then again it was never suggested by the Government or its officers with reference to the disputes in connexion with the suit lanka that it was not a gradual formation to which the law of accretion is applicable till after the present suit was filed. The whole dispute though it began in 1889 was a boundary dispute with reference to Larminie's line. No claim was made either by the Government or Kota ryots to any land to the west of that line although the formation was a single whole which was growing by perceptible degrees from year to year. If the formation was not an accretion in the sense of a gradual formation it is really matter for surprise that Government should not have laid claim to the whole of the land and not merely to the eastern portion as they did till the institution of this suit in 1909. It must be remembered that Mr. Morris who decided the suit of 1867 referred to the decisions of the Privy Council in *Doe v. The East India Co.*(2) and said that land formed by gradual accretion belongs to the owner of the adjacent soil. There was a survey of the Kotapalli village and the land to the west at Larminie's line although it

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(1) (1899) I.L.R., 22 Mad., 464 (P.C.).

(2) (1863) 6 M.I.A., 267.

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formed part of the present suit land was measured and surveyed as belonging to the plaintiff. That was in 1895. It was said that this was only a river conservancy survey and even if it was so its value as evidence is not affected. The dispute again was the subject of a settlement by Mr. (now the Honourable Mr. Justice) SPENCER in 1896. Then too no question was raised with regard to the right of the plaintiff to this land as an accretion to his original lanka but the only claim made and allowed in favour of the Kota ryots was to the northern portion of the land on the eastern side of Larminie's line. Even this was objected to by the plaintiff when some attempt was made to settle the question under the Boundaries Marks Act. While that matter was pending there was a survey made of the whole of the zamindari at the request of the zamindar by the Government in 1904. Prior to that date in connexion with the dispute proposed to be settled under the Boundaries Marks Act Mr. Lakshmana Rao, agent of the plaintiff, had already filed plan (Exhibit V) which showed clearly that the disputed lanka was a very large formation and that the major portion of the lanka which had belonged to the plaintiff had been washed away. Although there was then this dispute between the parties in the survey of 1904 (Exhibit G) a considerable portion of the disputed lanka was measured as belonging to the plaintiff. There again nobody ever suggested that this was not an accretion. Further the immediate cause of this suit was the levy of a so-called penal assessment by the Government and that assessment was with regard to lands east of Larminie's line. There again the Government never suggested that this was not an accretion in the sense of gradual formation. It is only after the suit was filed with reference to the eastern portion that Government in their written statement for the first time stated that this was not an accretion and it was neither slow nor imperceptible. I am not certain that the Government pleader argued that the formation was not even gradual, though he no doubt strongly pressed upon us that the whole or at least a large portion of the original formation was in one year and was not therefore slow or imperceptible. In these circumstances more especially as it is possible for the plaintiff to contend, the learned Advocate-General did in fact raise that contention that owing to the attitude of the Government he had lost evidence which he could have preserved, and in the

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doubtful state in which the matter is left, namely, whether the present suit land or lanka was originally formed in one particular year though it was subject to rapid changes by erosions and large additions in subsequent years and if it was, whether it did not begin at the site of the plaintiff's Vuta Chiguru lanka, I am not prepared to say that the law of accretion does not apply to this formation. I therefore hold though not without hesitation, that the second point also should be decided in favour of the plaintiff.

It only remains to notice two other points raised by the Government pleader for the first time in appeal. He contended that as the extent and boundaries of the plaintiff's lankas in the river were accurately ascertainable from the map or plan H. 5 any lands subsequently formed even by gradual, slow and imperceptible alluvium in what was the bed of the river in 1870 belonged to the Crown; and relied chiefly on the observations of the LORD CHANCELLOR in *Attorney-General v. Chambers*(1). This question was elaborately considered in *Attorney-General v. M'Carthy*(2) already referred to and the conclusion reached that there was no such principle and the fact that the original boundary was known or ascertainable did not render the law of accretion inapplicable, and the observations of the Privy Council at page 612 in (1915) A.C. are to the same effect. The surveys in this case were not within the category of the *agri limitati* of the Civil Law: *St. Clair Co. v. Livingston*(3), Hunter's Roman Law, page 276 and Law Quarterly Review, volume 12, at page 353. This contention must therefore be disallowed.

The other point relates to a claim made now for the first time that the Government is in any event entitled to that portion of the land which is a re-formation in the site of the Kotaseri lanka. No evidence was directed to the question and the Government pleader relies entirely on his plan (Exhibit XXII) prepared and filed for the purpose of this litigation to prove that there has been any re-formation at all on the site of the defendant's lanka. We cannot assume that Exhibit XXII is accurate for this purpose and if we allow this contention it would be necessary to remand an issue for trial to the Lower Court. This

(1) (1859) 4 De G. & J., 55.

(2) (1911) 2 Ir. R., 260.

(3) (1874) 23 Wall., 46 at p. 69; s.c., 90 U.S., 59.

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we must decline to do more especially as the land which the defendant can establish a title to on this basis, was said to be very small.

The appeal must be dismissed with costs.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1916,
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PANKAJAMMAL (PLAINTIFF), APPELLANT,

v.

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BY THE COLLECTOR OF NORTH ARCOT, AND OTHERS (DEFENDANTS
AND LEGAL REPRESENTATIVES OF THE FOURTH
DEFENDANT), RESPONDENTS.*

Hindu Law—Right to perform festival in a temple—Ubayakar—Right of married daughter of last ubayakar—Special custom—Onus of proof.

The right to perform a festival in a temple is a secular privilege and does not confer on the holder an office.

The daughter of the last *ubayakar* or holder of the right, being his heir, is, in the absence of proof of a special custom excluding females, entitled to exercise such right, although she has been married into another family.

Tangirola Chiranjivi v. Raja Manikya Rao (1914) 27 M.L.J., 179, *Raja Rajeswari Ammal v. Subramania Archakar* (1916) 30 M.L.J., 222 and *Veagammuthu v. Pandareswara* (1883) I.L.R., 6 Mad., 151, referred to.

APPEAL under clause (15) of the Letters Patent, against the judgment of SRINIVASA AYYANGAR, J., in *Pankajammal v. The Secretary of State for India*(1).

The plaintiff sued for a declaration that she was entitled, as the heir of her deceased father, to the right to perform the festival of Chitrapournami in the Conjeeveram temple and to recover from the Collector of North Arcot the sum of Rs. 116 and odd to which she was entitled as an *ubayakar* for the performance of the festival. She impleaded the Secretary of

* Letters Patent Appeal No. 123 of 1915.

(1) Second Appeal No. 2376 of 1914 against the decree of L. G. MOORE, the District Judge of North Arcot, in Appeal No. 850 of 1913, preferred against the decree of K. S. VENKATACHALA AYYAR, the District Munsif of Ranipet, in Original Suit No. 215 of 1912.

State for India in Council as the first defendant, as the Collector had refused to pay the amount unless she established her right in a Civil Court. The other defendants were her father's co-sharers and dayadis who disputed the claim of the plaintiff to exercise such right on the ground that the right was confined to the male members of the Thandri Thathāchari family to which the plaintiff's father belonged, and that the plaintiff, being a female and married into another family, could not exercise the right. Both the Lower Courts dismissed the suit, holding that the plaintiff had not established that she, as heir, was entitled to succeed to the right exercised by her late father. The plaintiff preferred a Second Appeal, which was heard by SRINIVASA AYYANGAR, J., who dismissed it. The plaintiff then preferred this Letters Patent Appeal.

T. R. Ramachandra Ayyar and T. M. Vedantam Ayyangar for appellants.

V. Ramesam, the Acting Government Pleader, for the first respondent.

N. S. Rangaswami Ayyangar and T. Narasimha Ayyangar for respondents Nos. 2 and 3.

JUDGMENT.—The question in this case is whether the daughter of a *Thathāchari* belonging to the *Thandri* family, is disqualified from performing a festival in the Conjeeveram temple by reason of the fact, that she has been married into another family. The marriage may give her a different *gotram*, but it is not right to say that she ceases to belong to the family of her father on that account. She and her sons would be the heirs to her father's property. The right to perform a festival is a secular privilege, and has no connection with the right to *Thirtham* and other honours. The learned Judge in the Court below, seems to have thought that the claim to perform the festival, carried with it the right to *Thirthams* and to the other honours belonging to the *Thathāchari* family. In this Court, this portion of the judgment was not sought to be supported. It was argued that the right to perform a festival, conferred an office and that such an office could be held only by a male member of the *Thathāchariar's* family. There is no analogy between the holding of a subordinate trusteeship like a *kattalai-dharmakartaship* and the performance of a festival. The cases quoted relate to the former class and have no bearing on the latter.

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On the other hand, it has been held in this Court, that a female is not incompetent by reason of her sex, from claiming the archaka right: *Tangirala Chiranjivi v. Raja Manikya Rao*(1), *Raja Rajeswari Ammal v. Subramania Archakar*(2). It would ordinarily be the duty of the temple authorities to receive the money that may be tendered to perform a festival from whomsoever it may come. In *Vengamuthu v. Pandaveswara*(3), it was held that such a contribution from a dancing girl should not be rejected. *Prima facie*, therefore, the daughter of the last *ubayakar* would be entitled to ask the temple trustees to receive the expenses of the festival. If it is objected that none but a male could perform such a festival, it is for those that set up this special custom to prove it. However, we do not want to decide this case on the ground that the defendants have not established their contention. We are clearly of opinion that the learned Judge is wrong in holding that the burden was on the plaintiff. In a case like this, when both sides have let in evidence, the best course would be to weigh the evidence as a whole, without throwing the burden of proof on either party. In this view, we must reverse the decree of the learned Judge of this Court and of the District Judge, and remand the appeal to him for disposal on the merits.

Before we send the case down, it is desirable to advert to the extreme contention that was put forward in this Court, that in all cases where evidence as to custom has been let in, we are bound to weigh such evidence and decide for ourselves upon the materials. Mr. Ramachandra Ayyar who came in at a later stage of the case, conceded that this contention is not supported by authority. The learned vakil argued that the question whether on the facts as found, the Courts below were justified in saying that a custom has not been proved is a point on which the High Court is entitled to draw its own inference. To the proposition thus advanced, we see no objection. But we must point out that the value to be attached to the evidence let in, its reliability and, in a measure, its relevancy are all matters for the Court below and that the High Court would not be justified in weighing the evidence as if it were sitting to hear a first appeal.

(1) (1914) 27 M.L.J., 179.

(2) (1916) 30 M.L.J., 222.

(3) (1883) I.L.R., 6 Mad., 151.

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It is open to doubt whether the expression 'a usage having the force of law' in section 100 (a), Civil Procedure Code, should not be confined to the usages of the country or the community as suggested by PETHERAM, C.J., in *Nivath Singh v. Bhikki Singh*(1). Customs like pre-emption, the law merchant and usages like those referred to in section 11 of Act VIII of 1865, seem to have been in the contemplation of the legislature. It seems doubtful whether a private right like the one we are considering falls within section 100, clause (a). However that may be, we feel no doubt that the High Court should not be called upon to examine the oral and documentary evidence relating to a private custom as if it were hearing a first appeal.

For the reasons already given, we reverse the second appeal and remand for disposal on the merits. The costs will abide the result.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., the Chief Justice and Mr. Justice Spencer.

NOCHULLIYIL EUZHUVAN THEETHI'S SON THETHALAN
(SEVENTH DEFENDANT), APPELLANT,

v.

THE ERALPAD RAJAH STYLED ELAYA RAJAH AVARGAL
OF PATINHARA KOVILAGAM IN CALICUT AND FIFTY OTHERS
(PLAINTIFF AND DEFENDANTS NOS. 1 TO 6 AND 8 TO 50 AND LEGAL
REPRESENTATIVES OF THE PLAINTIFF), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 108 (j)—Lessor and lessee—Mortgage with possession by lessee—Mortgagee not liable to the lessor for rent—Privity of estate, meaning of.

A mortgagee with possession from the lessee is not liable to the lessor for rent as there is neither privity of estate nor of contract between them.

Per WALLIS, C.J.—Privity of estate is a technical term of English Law and under that law such privity arises only where the whole of the lessee's interest is assigned over and not where a subsidiary interest is carved out of the lessee's

1916,
December,
21 and
1917,
January 17.

(1) (1885) I.L.R., 7 All., 649.

* Second Appeal No. 1035 of 1914.

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interest. The Transfer of Property Act in enacting section 108 (j) does not seem to have introduced any departure from the English Law.
English and Indian cases reviewed.

SE-OND APPEAL against the decree of A. NARAYANAN NAMBIYAR, the Temporary Subordinate Judge of Palghat, in Appeal No. 211 of 1913, preferred against the decree of A. V. RATNAVELU PILLAI, the District Munsif of Alattur, in Original Suit No. 43 of 1912.

The plaintiff (the first respondent) filed a suit to recover michavaram (*janmi's* share of rent in respect of some lands granted on *anubhavam* (perpetual) right by plaintiff's *stanam* to the ancestor of defendants Nos. 1 to 6 and 10 to 50. Defendants Nos. 7 to 9 were mortgagees in possession under the other defendants. The document under which the defendants Nos. 7 to 9 took possession contained a direction that the *janmi's* michavaram should be paid. The Court of First Instance gave a decree against all the defendants. On appeal by the seventh defendant, the Lower Appellate Court found that the defendants Nos. 7 to 9 were liable for the michavaram on the ground that there was not only privity of estate but privity of contract also and dismissed the appeal. Hence this Second Appeal.

K. R. Subrahmanya Sastriyar for the appellants.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the respondents.

WALLIS, C.J.

WALLIS, C.J.—The question raised in this appeal is whether mortgagees with possession from lessees are liable to the lessor for rent. The Subordinate Judge has held that they are liable on the ground that privity of estate exists between them. In this, I think, he is clearly wrong. "Privity of estate" is a technical term of English Law, and it is clear that under that law no such privity arises unless the whole of the lessee's interest is assigned over. Where a subsidiary interest is carved out of the lessee's interest no fresh privity arises. For instance there is no privity of estate between a lessor and a sub-lessee. Where the lessee mortgages his whole leasehold interest privity arises in English Law, because there the mortgage is by conveyance with a right to a reconveyance, and therefore the whole interest of the lessee is assigned to his mortgagee: but, as this is not considered a desirable state of things, conveyancers prevent such privity of estate from arising by making the mortgage by way of sub-lease of something less than the whole interest of the

lessee. In India a mortgage such as this is not an out and out transfer of the mortgagor's interest (section 57, Transfer of Property Act) and therefore on the English doctrine no privity of estate can arise.

We have, however, to consider the provisions of the Transfer of Property Act as to leases which should be followed in India in preference to English decisions even where it does not in terms apply, as to agricultural leases. Section 108 (j) provides:

"The lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property. The lessee shall not, by reason, only of such transfer, cease to be subject to any liability attaching to the lease."

One effect of this provision is that the lessee does not cease to be liable on the lease by reason only of an out and out assignment, but he will, as in England, cease to be liable if the lessor accepts rent from the assignee and thereby creates a privity of contract between them. It is also to be noted that the liabilities of the transferee arise as in England on and by reason of the transfer, and do not depend on the question whether the transferee has obtained possession; *Monica Kitheria Saldanha v. Subraya Hebbara*(1) and *Kunhi Sou v. Mulloli Chathu*(2). If the transfer is absolute, it has been held that the transferee becomes liable to the lessor—*Kunhamian v. Anjelu*(3)—as in that case privity of estate arises under the English decisions. The section, however, says nothing about privity of estate and the question really is what is the intention of the legislature as regards transfers by the lessee by way of mortgage in the Indian form or by sub-lease, in which cases there would clearly according to the English decisions be no privity of estate on which the liability could be rested. *Kunhamian v. Anjelu*(3) does not afford much assistance, for that was a case of an assignment or absolute transfer of the lease, and all that was held was that there was nothing in the section to prevent the transferee being liable on the doctrine of privity of estate as in England. It is quite another thing to hold that in the case of a mortgage or sub-lease by the lessee the transferee becomes liable directly to the lessor, as such liability cannot be based

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(1) (1907) I.L.R., 30 Mad., 410. (2) (1915) I.L.R., 38 Mad., 86.
(3) (1894) I.L.R., 17 Mad., 296.

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on any recognized doctrine of privity of estate. The decision in *Kannye Loll Sett v. Nistoriny Dossee*(1) appears to have proceeded on the footing that the mortgage in that case amounted to an assignment or transfer of the leasehold interest in which case privity of estate would arise, and is of no assistance in the present case where the transfer by mortgage did not amount to an assignment or out and out transfer. This is clearly pointed out by FARRAN, C.J., in *Timmappa v. Rama Venkanna*(2) where, however, as has been pointed out in *Vithal Narayan v. Shriram Savant*(3) that the word 'contract' both in the headnote and the judgment is a slip, what was meant being not privity of contract but privity of estate:

"A sub-lease differs from the assignment of a lease in that it creates no privity of contract (read, estate) between the sub-tenant and the landlord. The landlord has to deal with his lessee and not with the sub-tenants of the latter. The English authorities show conclusively that a landlord putting an end by a proper notice to the tenancy of his tenant thereby determines the estate of the under-tenants of the latter. This is undoubted law."

Later on the learned Judge observes:

"An assignee of a lease is of course in the different position, for he is brought by his assignment into direct relations with the landlord."

that is to say, in the language of the English Law that privity of estate arises between them. It appears clear that the learned Chief Justice did not consider that in India sub-lessees could be sued for rent by the lessor under section 108 (j) of the Transfer of Property Act or for any other reason. To so hold would be a very serious innovation. We cannot hold that in India the mortgagee in possession is to be directly liable to the lessor for rent without applying the same doctrine to the sub-lessee. Both are governed by the same section 108 (j) of the Transfer of Property Act, and, if actual possession of the land is to make the one liable for rent, it must also be the case with the other. It was no doubt held in *Vithal Narayan v. Shriram Savant*(3) that a mortgagee of a leasehold interest if in possession is liable for rent to the mortgagor; and one reason given is that the distinction between legal and equitable estates does not exist in

(1) (1884) I.L.R., 10 Calc., 443. (2) (1897) I.L.R., 21 Bom., 311 at p. 313.
(3) (1905) I.L.R., 29 Bom., 391.

India. As already pointed out, it is owing to that distinction that in England a legal mortgagee of a lease is held liable for rent to the lessor where the mortgage is an assignment creating privity of estate, but an equitable mortgagee is not so liable; and to avoid this untoward consequence it is usual to create a legal mortgage by way not of an assignment having this effect, but by way of sub-lease of something less than the lessee's interest so that no privity of estate and no liability on the part of the mortgagee arises. This is the invariable practice as stated in the standard works of Coote, Fisher and Robbins. The decision in *Kannye Loll Sett v. Nistoriny Dossee*(1) proceeded as already pointed out on the view that the mortgage was an out and out assignment of the lease, which it is not in the present case or ordinarily in India. The judgment of Lord MANSFIELD in *Eaton v. Jaques*(2) which was also referred to is if anything an authority the other way. What Lord MANSFIELD held was that the mortgagee of a leasehold interest, even when the mortgage was by way of assignment of the whole term, was not liable for rent by virtue of privity of estate, unless he obtained possession as well, a point on which he was overruled by ten Judges in *Williams v. Bosanquet*(3). Both cases however proceed upon the view that the mortgagee is not liable at all to the lessor unless the mortgage be by way of assignment of the term. Lord MANSFIELD observed:

"All this arises from a mere slip in the attorney in making the conveyance, for if he had made it an under lease by leaving reversion of a day in the mortgagor, the landlord would have had no pretext to call upon the mortgagee."

It is thus clear that what Lord MANSFIELD was arguing against was the mortgagee being held liable unless there were both privity of estate and possession, and that his judgment is no authority for the position that possession in the absence of privity of estate will make the mortgagee liable: see also *Cox v. Bishop*(4) and *Ananda Chandra Roy v. Abdulla Horsein Chowdhury*(5). I am therefore of opinion with great respect that the authorities referred to in *Vithal Narayan v. Shriram*

(1) (1884) I.L.R., 10 Calc., 443. (2) (1780) 2 Dougl., 455.
(3) (1819) 1 B.V. & B., 238.
(4) (1857) 5 De G. M. & G., 815; 5 C., 44 E.R., 604.
(5) (1914) I.L.R., 41 Calc., 148.

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Savant(1) do not support the decision. No such liability is imposed by English law on sub-lessees or on mortgagees from lessees either, except as pointed out by Lord MANSFIELD owing to the mere slip of an attorney, and if, it is to be imposed in India, it must be by virtue of section 108 (j) of the Transfer of Property Act and not by virtue of possession. The latter part of the section shows that sub-leases and mortgages created by the lessee do not affect the rights of the lessor against the lessee, still less do they affect the rights of lessee against his sub-lessee or mortgagee. There appears to be no sufficient reason for supposing that it was the intention of the legislature by this section to bring the sub-lessee and the mortgagee from the lessee into direct relations with the lessor. I read the judgment of FARRAN, C.J., in *Timmappa v. Rama Venkanna*(2), as holding that it had no such effect as regards sub-lessees, and can see no reason for applying a different rule to mortgagees from the lessee. To hold otherwise would, it need hardly be pointed out, introduce all sorts of complications as to apportionment, notice to quit, etc. For these reasons I think the lower Courts were wrong and would modify the decree by dismissing the suit as against the appellant and defendants Nos. 8 and 9 with costs throughout.

SPENCER, J.

SPENCER, J.—I concur. The only case in which a mortgagee of a leasehold interest in India becomes, after entering into possession liable to pay the rent appears to be where his possession is attributable to his having obtained a decree for foreclosure, the reason being that in such a case, the lessee parts with the whole of his interest, and the entire interests both of the lessee and of the mortgagee become by operation of law merged in the person of the latter—vide *E. Macnaghten v. Bheekaree Singh*(3) and *Ananda Chandra Roy v. Abdulla Hossein Chowdhury*(4).

Here the defendants Nos. 7 to 9, who are mere transferees of a kanom interest, are clearly possessed of something less than the anubhavam interest under the lease in favour of Nos. 1 to 6 defendants' predecessors. Consequently the agreement in Exhibits III, IV and VII between the lessees and the mortgagees and their assignees *inter se* that the mortgagees should pay the

(1) (1905) J.L.R., 29 Bom., 391.
(3) (1878) 2 C.L.R., 323.

(2) (1897) I.L.R., 21 Bom., 311.
(4) (1914) I.L.R., 41 Calo., 148.

• michavaram or rent will not affect the right of the lessor to look to his lessees for the recovery of his rent, and to them alone. Even if the mortgage document were silent as to the rent, section 65 (d), Transfer of Property Act, provides that the mortgagor shall pay the rent reserved by the lease so long as the mortgagee is out of possession of the mortgaged property, which may be read as implying that the mortgagee should pay it if he gets into possession. But this section deals only with the rights and liabilities of the mortgagor and the mortgagee as between themselves. The rights and liabilities as between the mortgagor and his lessor are regulated by section 108 (j).

The Subordinate Judge who heard the first appeal observed that there was not only privity of estate but privity of contract also. He has given no reasons for his opinion but simply states that plaintiff can enforce the provision in his favour in Exhibit VII though he was not a party to it. Privity of contract is personal privity and extends only to the person of the lessor and to the person of the lessee—vide *Walker's case*(1).

It has not been suggested that there is any foundation in the records of this case for a personal privity existing between the lessor and the mortgagees.

The appellant is entitled to succeed in his appeal with costs throughout.

S.V.

(1) 3 Co. Rep., 22 (a) at p. 23 (a); s.c., 76 E.R., 676.

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SPENCER, J.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Bakewell.

1917,
January
9 and 16.

VAITHILINGA ODAYAR AND ANOTHER (DEFENDANTS),
APPELLANTS,

v.

AYYATHORAI ODAYAR AND THREE OTHERS (PLAINTIFFS,
NOS. 1 AND 2 AND DEFENDANTS NOS. 3, 5 AND 6), RESPONDENTS.*

Caste Disabilities Removal Act (XXI of 1850)—Descendant of Hindu convert to Christianity, whether relieved by the Act.

The Caste Disabilities Removal Act does not apply to descendants of persons relieved by the Act. The descendants of a Hindu convert to Christianity have, therefore, no interests in the property of their unconverted relatives.

Bhagwant Singh v. Kallu (1889) I.L.R., 11 All., 100, dissented from.

APPEAL against the order of P. S. SESA AYYAR, the Subordinate Judge of Mayavaram, in Appeal No. 56 of 1915, preferred against the decree of B. SUBBA RAO, the District Munsif of Tiruvalur, in Original Suit No. 352 of 1913.

The plaintiffs (first and second respondents) are the great-grandsons of one Swaminatha Odayar. They brought a suit to recover certain properties as reversionary heirs to one Chinna Thillai Odayar who was the last male-holder thereof. Chinna Thillai Odayar was the grandson of Velayuda Odayar, a brother of the plaintiff's great-grandfather, Swaminatha Odayar. Swaminatha Odayar became a Christian and the plaintiffs are born Christians; while Velayuda and his descendants including Chinna Thillai Odayar and his widow remained as Hindus. The defendants among other pleas contested the suit on the ground that the plaintiffs not having been first converts to Christianity and having been born Christians could not claim any reversionary rights in the properties of a Hindu. That plea was upheld by the Court of First Instance and the suit was dismissed. The lower Appellate Court reversed the decision and remanded the

* Appeal Against Order No. 231 of 1916.

suit for disposal according to law. The defendants preferred this Civil Miscellaneous Appeal against the order of remand.

T. V. Muttukrishna Ayyar for the appellants.

V. Purushothama Ayyar, T. R. Venkatarama Sastriyar and K. Aravamuda Ayyangar for the respondents.

OLDFIELD, J.—The plaintiffs, Christians, sued to recover the estate of a deceased Hindu, as his reversioners, that is, they claimed in virtue of their own relationship to him, not through any earlier reversioner such as Swaminatha Odayar, the member of their branch of the family, who first embraced Christianity. The lower Appellate Court following the ruling in *Bhagwant Singh v. Kallu* (1) held that they were relieved from all religious disability by Act XXI of 1850 and remanded the suit for decision on its merits. The question is whether this decision is right.

The persons relieved by the Act are those, who (1) renounce, (2) have been excluded from the communion of, a religion and (3) deprived of caste. Renunciation and deprivation are applicable only to rights which have accrued, and therefore are irrelevant in the case of plaintiffs, who were born Christians, before the succession opened. They therefore are not covered by descriptions (1) and (3). As regards (2) there is more difficulty. For the word "exclude" is applied in ordinary parlance to refusal of rights newly claimed and also deprivation of rights already enjoyed, the meaning as given in Webster's Dictionary being: " (1) to shut out; to hinder from entrance or admission; to debar from participation or enjoyment; the opposite of to admit and (2) to thrust out; to expel." It is an argument against the interpretation of "exclude" in the Act in the first of these senses that it is used in the context between two terms, which as I have pointed out, express a different idea. It is further material that, if the Legislature had intended the result entailed by plaintiff's contention, the perpetual right of the descendants of a convert to rely on the law of his birth for purposes of inheritance from unconverted relatives, it could and would have effected it by shorter and more explicit language.

These arguments are supported by the fact that plaintiffs' contention entails consequences repugnant to reasonableness and

(1) (1889) I.L.R., 11 All., 100.

VAITHILINGA consistency. In the case of the original convert his status will be fixed at the date of his conversion and his original law will be invoked only in order to determine whether his relationship entitles him to inherit, not whether that relationship exists. No anomalies therefore, beyond the initial one involved in the application of his original law, will be entailed; with his descendant the case is different. He, having to establish both the points referred to above, will find the concession involved in plaintiffs' interpretation of the Act illusory, since his descent will have to be traced through some Christian marriage which will not be valid according to the law under application and can be established, only if the claimant is allowed to apply both his abandoned and his present law, as may suit each portion of his case. And, if it be said that this is contemplated, the suggestion is so startling that a clearer expression of it than the Act contains may fairly be required.

The only decision of a High Court on the point, *Bhagwant Singh v. Kallu*(1), is no doubt in plaintiffs' favour. It is based on considerations first, of the preamble and then of the body of the Act. In respectfully dissenting from it, I observe first, that the preamble sets out a part only of section 9 of the Bengal Regulation VII of 1832 to which it refers. Reference to the whole and to section 8, of which it is a continuation, shows that (1) their object was to settle all cases of conflict of laws, one omitted portion restricting the operation of section 8 to "*bona fide* profession" of the religion in question at the time of the trial and the whole having no special reference to the particular case of conversion and (2) the settlement consisted, not only in exempting either party from disabilities entailed by the Hindu or Muhammadan Law but also, as provided in the other omitted portion, in applying the principles of justice, equity and good conscience. This recognized, the attempt to identify the purpose of the Act with that stated in the preamble or to explain the one with reference to the other must be abandoned. As regards argument from the body of the Act, the Court, I think, overlooked the fact that protection is in terms given only to one person, the one who has renounced or been excluded; and

with all due deference, it was not justified in extending it by construction to others.

As the Act will not bear the construction proposed by plaintiff the appeal must be allowed, the District Munsif's decision dismissing their suit being restored with costs throughout.

BAKEWELL, J.—I agree. With regard to the construction of Act XXI of 1850, the plaintiffs are not "excluded from the communion of any religion or deprived of caste" by reason of their own conduct or by anything except what was done or suffered by their remote ancestor. The consequence of his act is that his descendants form part of a community separated from his other relations by the observance of a different religion and other usages and governed by a different system of law.

In my opinion the words "having been excluded" and "being deprived of caste" connote an act directed against a particular person and do not apply to an individual who is not a member of a particular community because by reason of his birth he is included within another community.

The plaintiffs and defendants belong to different communities governed by different laws of inheritance and the former desire to bring themselves within both systems in so far as they can derive benefit from so doing and argue that the provisions of the Mitakshara which exclude them have been repealed.

I do not think that the wording of the Act supports this contention.

S.V.

(1) (1889) I.L.R., 11 All., 100.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

APPAN PATRA CHARIAR (PLAINTIFF), APPELLANT,

v.

V. S. SRINIVASA CHARIAR AND FOUR OTHERS
(DEFENDANTS NOS. 1 TO 5), RESPONDENTS.*

1917,
January, 24
and
February, 6.

Hindu Law—Joint family—Will by father bequeathing some lands to his daughter with consent of major son and of relations interested in his minor son—Validity of disposition.

A father in a joint Hindu family can with the consent of his adult son and with the consent of his relations who are interested in a minor son of his bequeath a portion of his ancestral property to his daughter provided the portion is reasonable in extent.

Brijraj Singh v. Sheodan Singh (1913) I.L.R., 35 All., 337 (P.C.), *Kudusunnana v. Narasimha Charyulu* (1907) 17 M.L.J., 528, *Anivillah Sundara Ramayya v. Cherla Seethamma* (1911) 21 M.L.J., 695 and *Arunachala Pillai v. Sampurnathachi* (1914) 27 M.L.J., 485, applied.

SECOND APPEAL against the decree of R. ANNASWAMI AYYAR, the Temporary Subordinate Judge of Trichinopoly, in Appeals Nos. 266 and 320 of 1914, preferred against the decree of P. RANGASWAMI AYYANGAR, the Additional District Munsif of Trichinopoly, in Original Suit No. 49 of 1914 (Original Suit No. 207 of 1912 on the file of the Principal District Munsif of Trichinopoly).

The facts of the case appear from the first three paragraphs of the judgment of SADASIVA AYYAR, J.

G. S. Ramachandra Ayyar for the appellant.

S. Subrahmanya Ayyar for the second respondent.

T. R. Venkatarama Sastriyar for the third respondent.

The other respondents were not represented.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant. He purchased the plaint lands in December 1909 from the first defendant. The first defendant has a minor step-brother who is the second defendant and also an uterine sister, the third defendant. The first and the third defendants' mother was the pre-deceased first wife of one Srinivasa Chariyar who died on the

14th November 1908. Within a fortnight before his death and on the 1st November 1908 (when he was on his death-bed and with the knowledge that his dissolution was not far off), he executed the will, Exhibit V (a), by which he gave the properties mentioned in the Schedule A attached to the will to his eldest son, the first defendant, gave the properties mentioned in the Schedule B to his minor son, the second defendant, and the land mentioned in the Schedule C to his daughter, the third defendant, besides making some other provisions. It is not denied that relatively to the A and the B schedule properties bequeathed to the two sons, the C schedule property left to the daughter is one of small value and it would not be an unreasonably large gift to be made by a very well-to-do father to his only daughter, though he has two undivided sons. It is further found that the first defendant, the elder of the two sons who was a major at the time of the will consented to this provision being made in favour of his sister and attested the will and that the second defendant's mother, the testator's second wife, also consented.

Within a year of the testator's death, however, the widow acting as the guardian of her minor son (the second defendant) repudiated in one respect the validity of the very fair testamentary arrangements made by her husband and while willing that the A schedule properties which were given to her step-son, the first defendant, for his share by her husband, should be his and that the B schedule properties given to her son, the second defendant, should belong to the said son absolutely, grudging the gift of the C schedule properties to her step-daughter, the third defendant. Thereupon on the 3rd November 1909, the first defendant and the step-mother acting as guardian of the second defendant executed the agreement (Exhibit K) by which the C schedule properties were arranged to be sold and converted to cash and the sale-proceeds divided equally between the two sons. It was in pursuance of this agreement that the first defendant sold the properties to the plaintiff in December 1909 under Exhibit A.

The lower Appellate Court held that though the properties dealt with under the will, Exhibit V (a), were ancestral properties in which the two sons of the testator owned interests by birth, a reasonable gift could be made by the father in favour of his only daughter so as to bind his sons and that such a gift

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* Second Appeal No. 1379 of 1915.

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even though made by will would be binding on the sons if they consented to it. It also held that the first defendant having consented to the dispositions in the will was bound thereby and that the second defendant, though a minor at the time, was also bound as consent could be given on his behalf by his mother in his interests and such consent was given. On these findings it held that the third defendant became the sole owner of the C schedule properties, that is, the plaintiff lands by the testamentary gift and that the plaintiff purchased nothing but a bag of wind under the sale deed (Exhibit A). The lower Appellate Court accordingly dismissed the plaintiff's suit with the costs of the defendants Nos. 2 and 3.

The plaintiff's memorandum of second appeal contains twelve grounds, but leaving aside the general grounds and those which relate to the binding nature of the plaintiff's sale deed on the second defendant and those which relate to questions of fact, those which attack the legal validity of the third defendant's title as claimed under the will, Exhibit V (a), may be shortly stated thus:—

"1. The will can only operate from the date of the death of the testator at which time all the properties would pass to the two sons by right of survivorship, being ancestral property.

"2. It is not within the scope and powers of the guardian of a minor son to consent to the giving of property by a father to a third person.

"3. The said consent is also inoperative as it was given by a person who was not the guardian at the time, when she so consented.

"4. The authorities relied upon by the Subordinate Judge are clearly distinguishable and they only refer to gifts *inter vivos* and not to testamentary dispositions."

Besides these four grounds, Mr. G. S. Ramachandra Ayyar who appeared for the appellant raised a new contention before us that the document Exhibit V (a) was not a will but was a settlement *inter vivos* and as it was not registered, it was wholly inoperative and invalid. But this contention was not raised in the lower Courts and not even in the grounds of the second appeal memorandum, and I must decline to allow it to be raised at this stage.

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As regards the grounds, Nos. 2 and 3, I agree with Mr. Ramachandra Ayyar that the second defendant's mother was not the legal guardian of the second defendant so long as his father was alive. Her consent therefore to the testamentary dispositions under Exhibit V (a) cannot give legal validity to the will but can only be an item of the evidence proving that the disposition under the will were in the nature of a fair family-settlement to take effect after the death of the testator and were intended to avoid disputes and litigation and to promote peace. Of course, the father himself as guardian of his son, could act in his son's interest.

I shall now consider the first and the fourth contentions which may be dealt with together. I think that, on the authorities, the father in a joint and undivided family can, with the consent of his adult son and with the consent of his relations who are interested in a minor son of his, make valid provisions by will in favour of the female members of his family provided the said provisions are reasonable in extent and value. I shall refer only to a few cases.

The first and the most important case is the Privy Council decision in *Brijraj Singh v. Sheodan Singh*(1). The following sentence occurs in the judgment of their Lordships of the Privy Council at page 346:—

"But the property was ancestral and therefore Rao Balwant Singh, although head of the family, had no right to make a partition by will of that property among the various members of the family *except with their consent*."

The words I have italicised afford in my opinion clear indication of their Lordships' view that with 'their' consent (that is, the consent of other members of the family) a disposition of property by will by the managing member would be binding on them after his death. No doubt, the observation is an *obiter dictum* as their Lordships found in that case that the document called "will" was really a disposition *inter vivos* but I think that the dictum which was so clearly laid down is binding on this Court especially as in my opinion there is nothing in the Hindu Shastras opposed to the above dictum which (if I may say so with respect) is eminently just and equitable.

(1) (1913) I.L.R., 35 All., 337 (P.C.).

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In *Kudutamma v. Narasimha Charyulu*(1) it was held that a Hindu brother who is the managing member of a joint Hindu family would not be acting in excess of his powers as such, in giving away a reasonable portion of the joint family property to his sisters who, though married in their father's lifetime, were left for some reason or other without a marriage portion.

In *Anivillah Sundara Ramayya v. Cherla Seethamma*(2) it was held that a gift of 8 acres of ancestral land by a Hindu father to his daughter after marriage when the family was possessed of 200 acres of land was valid against his adult sons even without their consent.

I shall next consider *Arunachela Pillai v. Sampurnathachi*(3) which in my opinion is a very strong case. There the undivided paternal grandfather of a minor gave a portion of the family property (about 30 per cent in value of the whole) to his third wife and daughters with the consent of his grandson's widowed mother. It was held that the gift was binding upon the grandson. The learned Judges say:

"It is clear that it was open to the grandfather if he had chosen and without any one's consent to effect a partition and leave the whole of his half share to his third wife and her daughters and it was in our opinion clearly for the benefit of the minor and his guardians to avoid an eventuality so injurious to his interests by consenting to the alienation effected by Exhibit I."

In the present case also, the testator could have separated from his two sons and taken one-third share as his separate share and given it away to his daughter, the third defendant. This would have been much more to the detriment of the second defendant than the provision made in the will by which he got half of the whole ancestral properties except the C schedule properties. In the present case, the testator could have made a gift of the C schedule properties validly to his daughter and effected a partition between his two sons during his life time. But with the consent of his major son and with the consent of his minor son's mother and in what he himself as the guardian of his minor son considered to be in the interests of his said son, he made a gift by will to take effect after

(1) (1907) 17 M.L.J., 528.

(2) (1911) 21 M.L.J., 695.

(3) (1914) 27 M.L.J., 485.

his death instead of by a deed to come into effect at once. I think that on the logical application of the principles laid down in the cases I have referred to above and seeing that their Lordships of the Privy Council treated the disposition by will in certain circumstances though of ancestral property as standing in the same footing as dispositions by deed *inter vivos* provided the consent of the parties to be affected is obtained, the family settlement made by will [Exhibit V(a)] in this case ought to be upheld. In the result the second appeal will be dismissed with costs.

SPENCER, J.—I concur.

N.B.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice and Mr. Justice Oldfield.

V. KRISHNAIYAH (TRANSFEREE—PLAINTIFF),
APPELLANT,

v.

C. GAJENDRA NAIDU AND TWO OTHERS (SECOND PLAINTIFF,
SECOND DEFENDANT AND HIS LEGAL REPRESENTATIVE),
RESPONDENTS.*

1917,
March 20.

Limitation Act (IX of 1908), art. 183—Decree of Original Side of High Court against two persons jointly—Revivor of decree on notice to one only under section 248 of Civil Procedure Code (XIV of 1882), whether a revivor against the other also.

On the Original Side of the High Court an order of revivor under section 248, Civil Procedure Code (Act XIV of 1882), of a decree against two persons jointly when made on an application for execution against only one of them does not keep the decree alive as against the other, so as to enable the decree-holder to execute it against that other judgment-debtor, more than twelve years from the date of the decree. Article 183 of the Limitation Act (IX of 1908) which is applicable to execution of decrees passed on the Original Side of the High Court differs in this respect from article 182.

* Original Side Appeal No. 93 of 1915.

KRISHNAIAH v. GAJENDRA NAIDU. APPEAL against the judgment of BAKEWELL, J., in Civil Suit No. 203 of 1899.

The facts of the case are given in *McLaren v. Veeriah Naidu*(1), where the judgment of the trial Judge (BAKEWELL, J.) from which this is an appeal, is given.

Messrs. *Venkatasubba Rao* and *Radhakrishnayya* for the appellants.

K. Ramachandra Ayyar for the first respondent.

T. Venkatasubba Ayyar and *T. Narayana Sastriyar* for the third respondent.

WALLIS, C.J., AND OLD-FIELD, J. JUDGMENT :—This appeal raises an interesting point as to which Mr. Venkatasubba Rao has candidly put the authorities before us. The question is whether Mr. Justice BAKEWELL was right in holding that an order of revivor of a decree on the Original Side made against the first defendant under section 248 of the old Code was inoperative as against the second defendant to whom no notice went. The term "revivor" in the third column of article 183, as is well known, refers to the common law practice which prevailed in the Supreme Courts in India under which, if a writ of execution was not sued out within a year and a day, it was necessary to revive the decree by a process known as *scire facias* or more fully *scire facias quare executionem non habeat*, that is to say by calling on the judgment-debtor to show cause why the plaintiff should not have execution against him. When the Code of Civil Procedure came to be enacted, the rule was embodied in what was section 248 of the old Code and now Order XXI, rule 22, under which when an application for execution is made more than one year after the date of the decree, notice is to go to the persons against whom execution is prayed requiring him to show cause on a date to be fixed why the decree should not be executed against him. This rule requires notice to go to the person against whom execution is applied for, and subsection 6 of the third column of article 182 of the Limitation Act provides that when such notice has been issued, the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him is to form a fresh starting point. We think both on the reason of the thing and on the analogy of the provisions

(1) (1915) I.L.R., 38 Mad., 1102.

of the Code which apply the doctrine of revivor to India that as regards the revivor of Original Side decrees notice must go to the parties against whom it is sought to revive the decree. The whole doctrine, as is explained in the passage from Blackstones cited in Mr. Justice BAKEWELL's judgment, had its origin in the presumption of satisfaction which was held to arise when execution had not been applied for within a year after the date of the judgment. As regards article 182, Explanation 1 in the third column, provides that where the decree or order has been passed severally against more persons than one, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives shall take effect against them all. This only applies to applications under article 182 which in terms excludes applications such as the present provided for by article 183.

The Explanation refers only to applications under article 182 and has nothing to do with the revivor of Original Side decrees. For these reasons we think that the judgment of Mr. Justice BAKEWELL is right and that the appeal must be dismissed with costs of the first respondent.

N.R.

KRISHNAIAH v. GAJENDRA NAIDU. WALLIS, C.J. AND OLD-FIELD, J.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Napier.

SUNNASI KUDUMBAN (COMPLAINANT), PETITIONER,

v.

SIVASUBRAMANIA KONE AND SIX OTHERS (ACCUSED),

RESPONDENTS.*

1917,
March,
12, 13 and 21.

Criminal Procedure Code (Act V of 1898), sec. 344—Case taken up on police charge-sheet—Informant represented by vakil—Absence of vakil—Application by informant for adjournment—Adjournment conditional on payment of costs by informant—Validity of order.

Where a case was taken up by a Magistrate on a police charge-sheet filed on information furnished by a person who retained a vakil to represent him at the trial and joined in an application for adjournment made by the police officer on the ground of the vakil's absence:

Held, that it was competent to the Magistrate under section 344 of the Code of Criminal Procedure to grant an adjournment conditional on the payment of costs by such person, although he was not a complainant under section 200 of the Code.

Mathura Prasad v. Basant Lal (1906) I.L.R., 28 All., 207; *Sew Prosad Poddar v. The Corporation of Calcutta* (1904) 9 C.W.N., 18 and *Muthusami Iyer v. Ramanathan Chettiar*, Criminal Revision Cases Nos. 485 and 486 of 1916, followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the Order of SAIYID GHYAZUDDIN, the Second Class Magistrate of Madura taluk, in Calendar Case No. 142 of 1916.

The material facts appear from the judgment of NAPIER, J.

S. Panchapagesa Sastriyar for *K. S. Jayarama Ayyar* for the petitioner.

E. R. Osborne, the Acting Public Prosecutor for the Crown.

The respondents did not appear.

AYLING, J.—The main point involved in this petition is whether section 344, Criminal Procedure Code, authorizes a magistrate to grant an adjournment conditionally on the payment of costs. The power, if it exists, is certainly one very rarely exercised; on the other hand, the words of the section "on such terms as it thinks fit" seem wide enough to cover an order making the payment of costs by one party to another a

* Criminal Revision Case No. 680 of 1916 and Criminal Revision Petition No. 557 of 1916.

condition of granting an adjournment. This is the contention of the learned Public Prosecutor; and the only case to which our attention has been directed—*Mathura Prasad v. Basant Lal*(1), *Sew Prosad Poddar v. The Corporation of Calcutta*(2) and a recent decision of a single Judge of this Court in *Muthusami Iyer v. Ramanathan Chettiar*(3)—are all in his favour. It is pointed out that the Code contains no provision for the recovery of costs ordered to be paid under this section; but this is not conclusive, for sections 433 and 488 are instances in which Courts are specifically empowered to award costs without any provision as to their realization. As at present advised, I must hold that section 344 confers the power in question.

Our attention is drawn to the fact that this case was taken up on a police charge-sheet filed on information furnished by petitioner. It appears, however, that petitioner had himself engaged a vakil, and that he (petitioner) applied for the adjournment in consequence of the vakil's absence. In such circumstances the fact that he was not a complainant under section 200, Criminal Procedure Code, would not be a bar to an order being passed against him.

The petition should be dismissed.

NAPIER, J.—In this case we are asked to revise the order of the Second Class Magistrate of Madura taluk directing the payment to the pleader defending the accused of Rs. 25 for costs of the day, the case having been adjourned at the instance of the prosecution. The charge before the Magistrate was on a police report, but the informant was represented at the hearing and joined in the application for adjournment made by the police officer on the ground that his vakil was absent. The order was passed under section 344 of the Code of Criminal Procedure, which is as follows:

"If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any, enquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody."

(1) (1906) I.L.R., 28 All., 207.

(2) (1904) 9 C.W.N., 18.

(3) Criminal Revision Cases Nos. 485 and 486 of 1916.

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NAPIER, J.

We are asked to hold that the words "on such terms as it thinks fit" do not include the power to give costs. It is certainly true that such orders are very rarely made. It is also true that the granting of costs is specifically provided for in certain cases. Sections 148, 433 and 488 contain such a power. It is urged also with considerable force that it is not an incident of ordinary criminal procedure that costs should, so to speak, follow the event. And lastly we are pressed with the argument that, if the power to give costs was intended under this section, some provision would have been made for their recovery. These are certainly formidable arguments against reading this power into the words of the section. On the other hand, it must be noted that this section 344 applies to inquiries and trials and has no reference to the particular proceedings in which special provisions for costs are made.

Section 148 is part of the procedure for prevention of the offences. Section 433 is a special provision for the High Court acting on reference and revision. Section 488 also does not apply to inquiries and trials being part of the chapter on maintenance of wives and children. The principle that where special provision is made in some cases, a like power should not be read into general words does not therefore apply as between the sections. Section 344, which is under consideration, covers the whole field of criminal proceedings in which a person is an accused before a Court exercising ordinary jurisdiction. Nothing in it could be read to make any provision in the exercise of jurisdiction in the other classes of proceedings dealt with above, and it may well be that the legislature in making provisions covering this wide field thought it advisable to give wide powers to judicial officers to be exercised with proper discretion in dealing with cases coming before them in their ordinary procedure. The argument that there is no provision for the recovery of costs would have more force if the legislature had been careful where it does make specific provision for costs to provide also for their recovery, but it is clear that neither in section 433 nor in section 488 has this been done. In section 433, the words are:

"the High Court may direct by whom the costs of such reference shall be paid."

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In section 488, although power is given to issue a warrant for levying the amount due for maintenance in the manner hereinbefore provided for levying fines, sub-clause (8) simply states that the Court shall have power to make such order as to costs as may be just. It may be arguable that on the true interpretation of the section, these costs can be levied by a warrant, but the fact remains that there is nothing specifically laid down by the terms of the section. Apart from the very wide power given by this section 344, there is the use of the word 'terms.' 'Upon such terms' means something more than a mere general power to adjourn. It implies that a concession is granted to one side only on the condition that the other side suffers in some manner; and bearing in mind the wide meaning attached to words 'on terms' in Civil Procedure Code, it is difficult not to assume that the legislature had in mind this ordinary form of terms, namely, the payment of costs. It is true that the language of Order IX of the Civil Procedure Code is 'upon such terms as to costs or otherwise.' But this argument of the specific mention of costs can be used against the contention, because it is clear that the legislature treated the granting of costs as coming within the word 'terms.' If the language in the Code had been 'upon such terms as the Court directs and may also award costs,' the petitioner's argument would have more weight. Turning to authority, we find that the Allahabad High Court in *Mathura Prasad v. Basant Lal*(1), has held that section 344 does give this power. It has also been so held by the Calcutta High Court in a case reported in *Sew Prosad Poddar v. The Corporation of Calcutta*(2), and a Judge of this Court has quite lately followed these two decisions in *Muthusami Iyer v. Ramanathan Chettiar*(3). Where the language used by the legislature is intentionally wide, as it is in this case, I think that on the whole it is best not to attempt to limit it, but to leave to the legislature the task of imposing limitations if it is found that any power exercised under this rule operates in a manner which the legislature thinks unjust. I am therefore of opinion that the power to award costs is vested in the Court under this section. It is next urged that we should interfere with this

(1) (1906) I.L.R., 23 All. 207.

(2) (1904) 9 C.W.N., 18.

(3) Criminal Revision Cases Nos. 485 and 486 of 1916.

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order as it was made against a person whose position in the trial was that of a witness only. I quite agree that we have power to revise any order under this section and to use that power freely for the very reason that the words are so wide. But in this case, I see no reason why we should interfere. The petitioner was, in addition to being a witness, the informant to the police. An informant is a person recognized in Criminal Procedure Code as initiating criminal proceedings. A person considering himself aggrieved can either lay a complaint before a Magistrate under section 190 or give information to the police under section 154, and in either case he occupies virtually the same position in that he is seeking protection from the Courts exercising criminal jurisdiction. As stated above, the informant in this case employed a vakil and was virtually the prosecutor. I see no reason therefore why he should not be made responsible to the accused for the costs of the adjournment which he asked for. I would dismiss the petition.

K.R.

APPELLATE CIVIL.

*Before Mr. Justice Abdur Rahim, Mr. Justice Sadasiva Ayyar
and Mr. Justice Napier.*

K. S. R. RAMANATHAN CHETTY AND THREE OTHERS
(PLAINTIFFS), APPELLANTS,

v.

RANGANATHAN CHETTY AND TWO OTHERS
(DEFENDANTS NOS. 2 AND 3 AND THE LEGAL REPRESENTATIVE
OF THE DECEASED FIRST DEFENDANT), RESPONDENTS.*

1916.
October,
16 and 17,
and
November,
15
and
1917,
May, 4.

Estoppel by conduct—Unregistered deed of exchange of two plots each worth more than Rs. 100—Conduct confirming the exchange, whether an estoppel in a suit to recover possession—Transfer of Property Act IV of 1882, ss. 51, 54 and 118—Compensation.

The plaintiff and the defendant exchanged adjacent plots of land each worth more than a hundred rupees by means of an unregistered deed on 4th March, 1908, both believing that they had effected a valid transfer. Possession was taken by each party and defendant began to erect a very costly building

* Letters Patent Appeal No. 219 of 1915.

placing a wall thereof in the land he had acquired in exchange. While the building was in progress, the plaintiff demanded and obtained Rs. 525 from the defendant on the ground that the plot he parted with was found to be more in extent than the defendant's. After the completion of the building the plaintiff brought this suit in 1911 for recovery of his plot after removal of the defendant's building on it. The defendant pleaded *inter alia* that he had acquired a valid title to the plot, that the plaintiff was estopped by his conduct from recovering the plot and that if the plaintiff was to get a decree he must pay compensation as a condition of recovery:

Held, on Letters Patent Appeal, by SADASIVA AYYAR and NAPIER, JJ. (ABDUR RAHIM, J., dissenting):—

(1) that the plaintiff was not estopped and that he was entitled to recover his plot owing to the absence of a registered deed of exchange as required by sections 54 and 118 of the Transfer of Property Act, and

(2) that the plaintiff must pay sufficient compensation before recovery, under section 51 of the Transfer of Property Act.

Kurri Veerareddi v. Kurri Bapireddi (1906) I.L.R., 29 Mad., 336 (F.B.), followed.

Mahomed Musa v. Aghore Kumar Ganguli (1915) I.L.R., 42 Calc., 801 (P.C.) and *Venkayamma Rao v. Appa Rao* (1916) I.L.R., 39 Mad., 509 (P.C.), explained and distinguished.

Per ABDUR RAHIM, J.—Plaintiff was estopped by his conduct from recovering his plot in spite of the want of a registered deed of exchange.

Per SADASIVA AYYAR and NAPIER, JJ.—The word 'transferee' in section 51 of the Transfer of Property Act includes a transferee under an invalid transfer and the words 'the person causing the eviction' include a transferor under an invalid transfer.

APPEAL under clause (15) of the Letters Patent against the decision of WALLIS, C.J., differing from SESHAGIRI AYYAR, J., in Appeal No. 20 of 1913, preferred against the decree of C. V. VISWANATHA SASTRIYAR, Subordinate Judge of Ramnad at Madura, in Original Suit No. 94 of 1911.

The plaintiff and the defendant exchanged adjacent plots of land each worth more than a hundred rupees, by means of an unregistered deed on the 4th March, 1908, both believing that they had effected a valid transfer. Possession was taken by each party, and the defendant began to build a very costly building placing a wall thereof on one side of the land he had acquired in the exchange. While the building was in progress, the plaintiff demanded and obtained Rs. 525 from the defendant, on the ground that the plot he parted with was found to be more in extent than the defendant's. After the completion of the building the plaintiff brought this suit in 1911, for recovery of his plot after removal of the defendant's building on it. The

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defendant pleaded *inter alia*, that he had acquired a valid title to the plot, that the plaintiff was estopped by his conduct from recovering the plot and that if the plaintiff was to get a decree, he must pay compensation as a condition of recovery. The Lower Court dismissed the suit.

The plaintiff appealed.

S. Srinivasa Ayyangar for the appellant.

A. Krishnaswami Ayyar for the respondents.

1915,
October,
14 and 15,
and
November, 4.
WALLIS, C.J.

This appeal came on for hearing in the first instance before WALLIS, C.J., and SESHAGIRI AYYAR, J., who delivered the following JUDGMENTS:

WALLIS, C.J.—In this case the parties by an unregistered agreement, Exhibit B, dated 4th March, 1908, agreed for mutual convenience to an exchange of certain plots of land forming part of their adjoining house-sites. Exhibit B shows that the agreement was come to in the presence of mediators and the effect of the oral evidence is that it was these mediators who settled the amount of the cash payment to be made by the first defendant to the first plaintiff to equalize matters, but Exhibit B is in terms an agreement signed by the parties and we see no sufficient reason for treating it, as the Subordinate Judge has done, as an award, or for considering whether as such it is exempt from the provisions of the Registration Act. It is therefore necessary to deal with the plaintiff's claim that owing to this want of registration he is entitled to recover back the land given by him in exchange to the defendant, even though the defendant has erected on the land one of the walls of his new house which has cost over Rs. 40,000 and the removal of the wall would bring down the house, and although nearly a year after the exchange when the defendant was beginning to build the plaintiff objected to the extent of the land awarded to him in exchange and obtained a further payment of Rs. 525 from the defendant. The parties have since quarrelled, and it is scarcely denied that the plaintiff's object in bringing the suit is rather to injure the defendant than to benefit himself. It is however argued that in default of registration the land remained the property of the plaintiff as under the Transfer of Property Act the transfer could only be made by registered instrument, and that the defendant is not entitled to the benefit of any of the equities which English Courts raise in such a case against the application of the Statute of Frauds. As

observed in *Maddison v. Alderson*(1) that statute did not make the transaction itself void, whereas it was contended that was the effect of the Transfer of Property Act, and the Full Bench decision of this Court in *Kurri Veerareddi v. Kurri Bapireddi*(2) was relied on. It was held that in a case where the price had been paid and possession delivered but the sale-deed had not been registered the vendor was entitled to get back the property, and that the contract to sell afforded no defence even though the defendant's right to sue for specific performance was not barred at the institution of the suit. WHITE, C.J., arrived at this conclusion with some hesitation having regard to the observation of their Lordships of the Judicial Committee in *Immudipattam Thirugnana Kondama Naick v. Periya Doraisamy*(3) and it may be necessary when the time comes to consider how far the decision of the Full Bench can be reconciled with the very general language used by their Lordships in the more recent case of *Mahomed Musa v. Aghore Kumar Ganguli*(4), though no doubt the transaction there in question took place before the passing of the Transfer of Property Act and the effect of its provisions is not expressly referred to in the judgment. But assuming *Kurri Veerareddi v. Kurri Bapireddi*(2) to be correctly decided I am not prepared to hold that it involves the proposition that, where there is no registered document, no amount of acquiescence on the part of the transferor will bar his right to get back the property within the statutory period. Where a lessee for a limited term erects buildings on the land and the lessor stands by and says nothing, it was no doubt held in *Ramsden v. Dyson*(5) and *Beni Ram v. Kundan Lal*(6), that the mere acquiescence of the lessor will not debar him from recovering the land at the expiry of the term. In *Immudipattam Thirugnana Kondama Naick v. Periya Doraisamy*(3) the plaintiff sued in the year 1895 for a declaration of his title and for redemption. The mortgage in 1882 by the plaintiff's father in favour of the mortgagees, provided that on redemption the property should be handed over to the contesting defendant, but their

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(1) (1883) 8 A.C., 467.

(3) (1901) I.L.R., 24 Mad., 377 (P.C.).

(5) (1866) L.R., 1 H.L., 129.

(2) (1906) I.L.R., 29 Mad., 336 (F.B.).

(4) (1915) I.L.R., 42 Calc., 801 (P.C.).

(6) (1899) I.L.R., 21 All., 496 (P.C.).

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Lordships found, not only that there was no registered transfer as required by the Transfer of Property Act, but that it was not proved that there was any valid contract by the plaintiff's father to make the transfer to this defendant. If there had been such a contract, their Lordships were of opinion that it would have been a good defence, as the defendant might call on the transferor's heir to implement the contract, and this though the suit was brought more than twelve years after the date of the alleged transfer. The present case is undoubtedly much stronger; not only was there a contract to exchange but it was fully performed; and long afterwards the plaintiff stood by and acquiesced in the defendant's building and obtained a further payment from him. In these circumstances putting aside the conveyance altogether, I think the plaintiff is estopped. KAY, J., in *McManus v. Cooke*(1) cites an old case, *Anon*(2) which is both brief and apposite. "*Short v. Taylor*(3) in Lord SOMER's time was cited, which was, Short built a fine house, Taylor began to build another, but laid part of his foundation on Short's land. Short seeing this did not forbid him but very much encouraged it; and when the house was built he brought an action and Lord SOMERS granted an injunction." The plaintiff's conduct in this case has been far worse than that of Short. It is clear, observes KAY, J., in *McManus v. Cooke*(1), citing this case, that if a man builds a house partly on his neighbour's land, and the neighbour acquiesces in this being done Courts of equity will interfere to prevent him from disturbing it. Assuming *Kurri Veerareddi v. Kurri Bapireddi*(4), to be rightly decided, I do not think it prevents us from applying this rule in India or obliges us to countenance a purely vexatious suit such as this. I may also refer to *Plimmer v. Mayor & Co. of Wellington*(5) and *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Limited*(6) which were cited before us as supporting the same view. I would therefore uphold the decree though on different grounds and dismiss the appeal with costs. In the result the appeal is dismissed with costs.

(1) (1887) 35 Ch.D., 681.

(2) 2 Eq. C. Abr., 522.

(3) (1709) Mich. 8 Anne Anon. M.S. Rep.

(4) (1906) I.L.R., 29 Mad., 336 (F.B.).

(5) (1884) 9 A.C., 699.

(6) (1915) A.C., 599.

SESHAGIRI AYYAR, J.—I have the misfortune to differ from the learned Chief Justice.

The main facts are not in dispute. By a deed, dated the 4th March, 1908, there was an exchange of building sites between the first plaintiff and the first defendant. The first defendant erected a wall on the exchanged site and put up a substantial building. This suit was instituted in 1911 for recovery of the site after removing the building on it. The case for the plaintiff is that as the deed was not registered no title passed to the plaintiff. The Subordinate Judge held that the document was not a deed of exchange and that real exchange was effected by the award of arbitrators. Mr. Krishnaswami Ayyar for the respondent drew our attention to the evidence on this point. We feel no hesitation in holding that the document is a deed of exchange and that there is no satisfactory evidence to prove that the arbitrators gave an award as to the exchange. The evidence does not show that there was any antecedent dispute relating to the exchange. There is no reference in writing. On the evidence it is clear that all that the mediators were called upon to do was to fix the price to be paid by the defendant as he was taking a larger extent than the plaintiff obtained from him. The evidence on the side of the plaintiff is clear and consistent and we accept that as being more in accordance with the probabilities of the case. We cannot accept the finding of the Subordinate Judge on this point.

The question of law arising on these facts is whether the plaintiff is not entitled to recover possession because of his conduct in allowing the first defendant to erect a substantial building at a great cost. There can be no doubt that the plaintiff has no merits and his conduct has not been aboveboard. Still if the law is in his favour the Court will not be justified in refusing him relief.

The Full Bench decision of this Court in *Kurri Veerareddi v. Kurri Bapireddi*(1) lays down that if the party resisting possession has no statutory or prescriptive title he cannot rely on equities to resist the suit. Mr. Krishnaswami Ayyar contended that this decision must be taken to have been overruled by the decision of the Judicial Committee in *Mahomed*

(1) (1906) I.L.R., 29 Mad., 336 (F.B.).

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Musa v. Aghore Kumar Ganguli(1). I am unable to agree with this contention. In the case before their Lordships there was a compromise in a suit. The compromise with reference to certain portions of it should have been registered. This was not done. But in pursuance of the terms, the parties were placed in possession and dealt with the properties as owners. Their Lordships held

“that even although the razinama and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption the actings of parties have been such as to supply all such defects.”

Before the Transfer of Property Act, the law did not prescribe any formalities for conferring title. Under the old Registration Regulations and Acts, if a document of a particular description was in writing but was not registered, it was not receivable in evidence. Therefore the document commented upon by their Lordships was not *ipso facto* invalid. Only it was not receivable in evidence. To such a case the decisions which construed the Statute of Frauds in England were held applicable. As pointed out by Mr. Srinivasa Ayyangar, the reference in the judgment of the Judicial Committee to *Maddison v. Alderson*(2), shows that their Lordships were not considering cases for which the statute has prescribed a particular form for conferring title. The judgment of some of the noble Lords in that case would seem to show that the principle of equitable estoppel can apply only to executory contracts and not to executed contracts. See specially the judgment of Lord BLACKBURN. I do not think that the Judicial Committee intended to lay down that even where a statute enjoins that title would pass only if certain formalities are complied with, conduct and acting can be relied upon to supplement an inchoate title. Section 54 of the Transfer of Property Act says that a

“Transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made *only* by a registered instrument.”

The second clause of section 118 is :

(1) (1915) I.L.R., 42 Calc., 801 (P.C.).

(2) (1883) 8 A.C., 467.

“A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale.”

The use of the word *only* in these sections excludes the possibility of title being acquired within the statutory period by any other process. I feel no doubt that their Lordships of the Judicial Committee did not intend to override statutory requirements by their observations. Their Lordships have always held with reference to Indian enactments that “the essence of a code is to be exhaustive” : see *Balkishen Das v. W. F. Legge*(1), *Dhanipal Das v. Maneshar Baksh Singh*(2), *Gokulmandar v. Pudmanung Singh*(3), *Webb v. Macpherson*(4) and *Mulraj Khatau v. Visvanath Prabhuram Vaidya*(5). I am therefore of opinion that *Kurri Veerareddi v. Kurri Bapireddi*(6) is unaffected by *Mahomed Musa v. Aghore Kumar Ganguli*(7). The next branch of the argument of Mr. Krishnaswami Ayyar relates to estoppel. If I understood him aright he does not claim that the conduct of the plaintiff has given him a title to the property; his position is that Courts should not afford relief to the plaintiff as he is not entitled to it by reason of his conduct. In other words, although in law the plaintiff has a title to recover, Courts should reject his claim on grounds of equity. Before I deal with the cases quoted by the learned vakil, I shall refer to the principle which this contention seems to offend. The learned vakil for the appellant invoked the aid of the well-known principle that there can be no estoppel against law. I shall state what, in my opinion, are the uses and limitations of this rule before applying it to the present case. The rule of estoppel is one of evidence. It ought not to be allowed to prevail against a statutory right. There are many instances in which parties have been held entitled to equities, using that term in the sense of estoppel although as pointed out by JENKINS, C.J., in *Municipal Corporation of Bombay v. Secretary of State* (8), the two rights are distinct. Even against a statute, equity may be relied upon in certain cases. The provision in the statute may be directory and not mandatory. Equity will relieve against its strict

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(1) (1900) I.L.R., 22 All., 149.

(2) (1906) I.L.R., 28 All., 570.

(3) (1902) I.L.R., 29 Calc., 707.

(4) (1904) I.L.R., 31 Calc., 57.

(5) (1913) I.L.R., 37 Bom., 198.

(6) (1906) I.L.R., 29 Mad., 336 (F.B.).

(7) (1915) I.L.R., 42 Calc., 801 (P.C.).

(8) (1905) I.L.R., 29 Bom., 580.

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enforcement. Certain penalties may be held *in terrorem* with a view to the prompt obedience of the statutory rule. Equity will help to relieve the vigour of the law in such cases. Under a rule of law, time may not be of the essence of the contract. Here is room for the application of equity. Apart from these and similar instances, in my opinion, no principle of equity or estoppel should be allowed to prevail against a plain and mandatory provision of law. Where the law says as in the present case, that title can be acquired *only* in a particular way, there is no room for the application of the doctrine of estoppel. The effect of holding otherwise would be to override legislation. Courts will then be creating a title which the legislature has distinctly negatived. Whatever may be the position in England, before the Judicature Act, when equitable relief was given along with and often in opposition to common law remedies, I do not think the Courts in this country have power to nullify legislative provisions. The authorities in this country support this position: *Chidambara Chettiar v. Vaidialinga Padayachi*(1), *Dhiraj Chandra Bose v. Srimathi Hari Dasi Debi*(2) and *Jagadbandhu Saha v. Radha Krishna Pal*(3). Mr. Krishnaswami Ayyar referred to the dictum of Lord Kingsdown in the well known case of *Ramsden v. Dyson*(4). The actual decision in that case was that as no expectation was held out to the tenant the landlord was not estopped. Lord Kingsdown dissented from the conclusion of the other noble Lords. The argument before the House of Lords was directed to showing that by the conduct of the landlord an equity was created in favour of the tenant. No question of statutory command or prohibition had to be dealt with in that case. I do not think the pronouncement of Lord Kingsdown and of the other noble Lords are relevant to cases where the Courts are asked to act in direct contravention of enacted law. *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Limited*(5) is not really against this view. In that case the respondents had acquired by a grant from the Crown certain lands of which the sea was the boundary. As a result of the erection of protective works by them, a strip of land accreted to that already possessed by them. The Crown claimed this accretion. It was

(1) (1915) I.L.R., 38 Mad., 519. (2) (1915) 19 C.W.N., 507.
(3) (1909) I.L.R., 36 Calc., 920. (4) (1866) L.R., 1 H.L., 129.
(5) (1915) A.C., 599.

conceded that ordinarily the accretion would go to the Crown; but it was contended that, having agreed to give access to the sea by the original grant, the Crown was estopped from laying claim to this piece of land so as to derogate from the rights already granted. This contention was upheld. At page 620 their Lordships say:

"In truth and substance what was done was to protect the land to guard against invasion of the sea as a destructive force, and to conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it is recognized by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim as was done, that licence would have been in entire accord not only with the right of the subject but with the duty of the Crown. This principle is in accord with the law laid down in *Attorney-General v. Tomline*(1), and principally with the opinions of Fry, J., in *Attorney-General v. Tomline*(2), at the trial and Cotton, L.J., in the Court of Appeal in *Attorney-General v. Tomline*(3)".

As I understand this judgment, the Judicial Committee were inclined to think that the grant of land implied a licence to reclaim as well. The reference to *Lyon v. Fishmongers Company*(4) and other cases shows that their Lordships were prepared to presume from the nature of the grant a right in the respondents and grantees to erect walls in the foreshore in order that the benefits arising from the original grant may be properly enjoyed. One other observation may be made with reference to this case. No question of statutory title as in the present appeal arose in it. *Sarat Chunder Dey v. Gopal Chunder Laha*(5) was much relied upon by the respondent. In that case the title-deed was in the name of the mother. The son had allowed her to deal with the property. The son's property passed under the Court sale to the plaintiff and the defendant claimed title under the mother by virtue of another Court sale on the mortgage created by her. It was found that the mother was only a *benamidar* for the son. Their Lordships of the Judicial Committee held that the son would have been estopped from questioning his mother's

(1) (1880) 14 Ch.D., 58. (2) (1879) 12 Ch.D., 214 at p. 223.
(3) (1880) 14 Ch.D., 58 at p. 69. (4) (1876) L.R., 1 A.C., 662.
(5) (1893) I.L.R., 20 Calc., 296 (P.C.).

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dealings as she had the ostensible title in her to the property and that consequently persons claiming under the son were similarly estopped. I fail to see how this case affords any help to the respondent. The estoppel pleaded, related to the claim as real owner against a person having *prima facie* the statutory title. The other cases quoted do not require any detailed examination. I am of opinion that the plaintiff was not estopped from suing to recover the property. I further agree with the contention of the learned vakil for the appellant that section 115 which has been held to be exhaustive of the law in India—*Asmatennessa Khatun v. Harendra Lal Biswas*(1)—does not cover this case. However reprehensible the conduct of the plaintiff may be, there is no suggestion in the evidence that at the time the defendant erected his house on this land, he was aware that he alone had title to the property and not the defendant. The plaintiff has no doubt taken advantage of the infirmity in the defendant's title but it is not shown that he was aware of this infirmity when building operations commenced and intentionally led the defendant in the belief that he had a valid title. The truth seems to be that until about the time of the suit both parties believed that a good title had been secured by the document of 1908. In this view, the plaintiff cannot be said to be estopped from claiming his property: see *Barrow's Case*(2).

The only other point is whether the plaintiff should be allowed to recover the property without paying substantial compensation to the defendant. Under the Transfer of Property Act, there is no question that the option should be given to the transferor to elect either to convey the property validly or to pay compensation. Mr. Srinivasa Ayyangar says that his client elects the latter alternative. He also contended that the Act in terms would not apply to the present case. Section 51 of the Transfer of Property Act speaks of the transferee of immoveable property making improvements. Without expressing any opinion whether the term "transferee" would apply to persons who have obtained invalid transfer, I think the principle of the section governs the present case. The plaintiff, in my opinion, must pay substantial damage before he is given a decree for possession. As the question has not been dealt with by the Court of first instance, the

(1) (1908) I.L.R., 35 Cal., 904. (2) (1880) 14 Ch.D., 432.

Subordinate Judge should be allowed to return a finding on the fourth issue in the view I have taken of the case. The proper course will no doubt be to appoint an expert commissioner to determine the extent of the damage that is likely to accrue and to give an estimate of the compensation to be paid.

The plaintiffs preferred this Appeal under article 15 of the Letters Patent.

Hon. Mr. S. Srinivasa Ayyangar, the Advocate-General, for the appellant.—Both the learned Judges hold that the transaction was an exchange and that there was no award and section 118 of the Transfer of Property Act applies. The doctrine of estoppel does not apply to invalid sales. The question is whether there was any representation as stated in section 115 of the Evidence Act and this Court has held in *Kurri Veerareddi v. Kurri Bapireddi*(1) that there is no estoppel when a statute has been evaded. The Privy Council case of *Mahomed Musa v. Aghore Kumar Ganguli*(2) which held that estoppel applies is distinguishable on two grounds: (1) it was before the Transfer of Property Act, when no writing was required and (2) the contract was an executory contract. This case is explained in *Venkayamma Rao v. Appa Rao*(3) as holding that estoppel by reason of part-performance applies only to an executory contract. There is a previous agreement in writing found in this case. But that is not admissible under section 49 of the Indian Registration Act as it is unregistered; for an agreement to exchange is a transaction which affects immovable property: see *Narayana Chetty v. Muthiah Servai*(4). The doctrine of part-performance creating an estoppel is applicable only where non-registration does not avoid the contract but only bars the writing from being proved: see *Maddison v. Alderson*(5), see also *Lalchand v. Lakshman*(6). Equity will estop if the person lies by knowing that the land is his own. But that is not the case here, for here both parties thought that each party lost his rights and that the other party acquired title by the

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(1) (1906) I.L.R., 29 Mad., 886 (F.B.).
(2) (1915) I.L.R., 42 Cal., 801 at pp. 815 and 816 (P.C.).
(3) (1916) I.L.R., 39 Mad., 509 at p. 521 (P.C.).
(4) (1912) I.L.R., 35 Mad., 63 (F.B.). (5) (1883) 8 A.C., 467.
(6) (1904) I.L.R., 28 Bom., 466 at p. 471.

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unregistered exchange; see *Wilmott v. Barber*(1), *Hoare v. Kingsbury Urban Council*(2) and *Proctor v. Bennis*(3). Section 51 of the Transfer of Property Act implies that no title can be transferred by estoppel. It says that compensation is payable; but the transferor has the option in the matter.

T. R. Venkatarama Sastriyar for A. Krishnaswami Ayyar for the respondent.—On the facts found, the plaintiff is estopped I rely on the two recent decisions of Privy Council: *Mahomed Musa v. Aghore Kumar Ganguli*(4) and *Venkayamma Rao v. Appa Rao*(5). These have impliedly overruled *Kurri Veerareddi v. Kurri Bapireddi*(6). These two decisions of the Privy Council hold that if a contract has been acted upon and performed in part the parties cannot resile from it; see also 27 Halsbury, page 38. The fact that a deed which ought to have been registered was not registered, was held in *In re Wilson*(7) not to wipe out the effect of estoppel: see also *Narasayya v. Raja of Venkatagiri*(8) and *Immudipattam Thirugnana Kondama Naick v. Periya Dorasamy*(9). The exchange deed refers to a previous oral agreement. The exchange deed may not be admissible in evidence to prove title. But the agreement therein referred to is admissible: see section 54 of the Transfer of Property Act. Such agreement is not a transaction affecting immoveable property: see the reasoning in *Raja of Venkatagiri v. Nayana Reddi*(10). The recent Full Bench case in *Narayana Chetty v. Muthiah Servai*(11) is distinguishable, as the agreement to lease which was there in question required to be registered: see *Narasimha Raju v. Ragunadha Raju*(12). Even in cases where there was an invalid deed specific performance can be claimed on the footing that the deed was evidence of an agreement: see *Parker v. Taswell*(13) and *Upendra Nath Banerjee v. Umes Chunder Banerjee*(14). *Kurri Veerareddi v. Kurri Bapireddi*(6) has been dissented from by the other High Courts and

(1) (1880) 15 Ch.D., 96 at p. 105. (2) (1912) 2 Ch.D., 452.

(3) (1887) 38 Ch.D., 740.

(4) (1915) I.L.R., 42 Cal., 801 (P.C.). (5) (1916) I.L.R., 39 Mad., 509 (P.C.).

(6) (1908) I.L.R., 29 Mad., 366 (F.B.). (7) (1916) 1 K.B., 382.

(8) (1914) I.L.R., 37 Mad., 1 at p. 15. (9) (1901) I.L.R., 24 Mad., 377 (P.C.).

(10) (1894) I.L.R., 17 Mad., 456 (F.B.).

(11) (1912) I.L.R., 35 Mad., 63 (F.B.). (12) (1915) M.W.N., 819.

(13) (1858) 44 E.R., 1111. (14) (1910) 12 C.L.J., 25 at p. 30.

also in Madras: *Akbar Fakir v. Intail Sayal*(1) and *Thiru-venkatachariar v. Seshadri Iyengar*(2). The plaintiff is not entitled to succeed as he in effect gave a licence to the defendant to build on the land in question; see *Plimmer v. Mayor & Co. of Wellington*(3) and *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Limited*(4).

ABDUR RAHIM, J.—The question raised by this Letters Patent Appeal is one of considerable importance and difficulty. It is, to put it shortly, how far it is open to the Court to refuse to recognize the title of the plaintiffs—appellants suing to recover immoveable property of the value of more than Rs. 100 which they purported to convey to the defendants—respondents by an unregistered document, on the ground that the transfer has been acted upon by the latter who spent considerable money in erecting valuable buildings on the land, with the knowledge of and encouraged by, the appellants. The facts are sufficiently set forth in the judgments of the learned CHIEF JUSTICE and SESHAGIRI AYYAR, J., who took different views and it is unnecessary to repeat them in detail. The result of the findings is that at the time of the transaction in question, which was an exchange of two plots of land between the appellants and the respondents, both the parties believed that the document evidencing the exchange did not require registration. Possession was taken by each party of the plot received by him under the exchange. The respondents erected a building which cost about Rs. 40,000 placing the wall of this building on one side on the land which they had got in exchange, and the appellants during the time the building was in progress also demanded and obtained a sum of Rs. 525 from the respondents as compensation on the allegation that the land which they had parted with was larger in quantity than the land which they had received from the respondents. It is further found that the object of the appellants in instituting the suit to recover the land which belonged to them before the exchange and which they say still belongs to them notwithstanding the attempted transfer is not so much to benefit themselves as to injure the respondents. The question for decision, however, is one purely of law, viz., whether, under the

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(1) (1915) 29 I.C., 707.

(2) (1916) 30 M.L.J., 559.

(3) (1884) 9 A.C., 699.

(4) (1915) A.C., 599.

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circumstances, the equities in favour of the defendants are a sufficient answer to the plaintiffs' suit for ejectment.

The effect of sections 54 and 118 of the Transfer of Property Act on what has taken place in this case is, that Exhibit B which is described as an agreement of exchange is ineffectual to create a valid transfer of the plaintiff's land, and by reason of section 49 read with section 17 of the Registration Act that document cannot be held to affect the right of the appellants to the property in dispute.

On behalf of the appellants it is argued that their title to the property remains and as the suit is within time, to refuse their claim for recovery of the land will be virtually nullifying the enactment of the legislature the effect of which is to preserve the title in them in spite of what has taken place. The answer to this argument on behalf of the respondents is that in none of the enactments referred to, does the legislature purport to deal with the question of rights based on equities arising from the actings and conduct of the parties. It is argued that it is open to the Court to say to the appellants: "It is true that your rights in the property have not been transferred to the respondents by the instrument in question but having regard to what has taken place it will be fraudulent on your part to set up your legal title against the respondents and the Court will not help you to perpetrate the fraud."

Such an answer to the suit is, in my opinion, in accord with well recognized equitable principles, of the application of which there are many instances in the law.

One of them is the doctrine of part-performance by which the operation of the Statute of Frauds in England is prevented from being used for purposes of committing fraud. The Statute of Frauds provides that

"No action shall be brought whereby to charge any person upon any contract or sale of land . . . unless the agreement . . . shall be in writing . . . etc."

No doubt it has been held that this provision relates to procedure, but as it has been pointed out by FRY, L.J., in his book on Specific Performance, it really goes to the solemnities of the contract: see paragraph 497, page 254. It is not necessary for the application of this equitable doctrine that there should have been a fraudulent conception from the beginning. It is

sufficient if the circumstances render it a fraud on the part of the party relying on the statute to take advantage of the fact that the bargain was not recorded as required.

I fail to understand why this equitable rule should not be applied to a transaction purporting to be a transfer in pursuance of a valid contract. On the other hand, there would seem to be less difficulty in applying the doctrine in such cases than where its aid is sought to compel the defendant to carry out a parol contract in spite of a statute which says that no action shall be brought to enforce such a contract. Further if a defendant can be debarred because of his conduct from setting up a statutory defence, it should be easier to uphold the defence to such a suit as this on the ground that, although the transfer which the appellants purported to make to the respondents was invalid, it would be inequitable on their part, having regard to the fact that the latter have acted upon it in such a way as to alter their position, to resile from the bargain to the prejudice of the respondent.

The question, how far the actings of parties can be allowed to affect the application of section 54 of the Transfer of Property Act to cases of this class was discussed by a Full Bench of this Court in *Kurri Veerareddi v. Kurri Bapireddi*(1) where the previous rulings on the subject were considered in detail. The law as laid down there would undoubtedly be binding on us unless, as suggested by the learned CHIEF JUSTICE, the pronouncements of the Privy Council in a later case—*Mahomed Musa v. Aghore Kumar Ganguli*(2)—make it necessary that we should reconsider that ruling. It was held by the Full Bench that:

"a contract of sale followed by delivery of possession does not, when there is no registered sale, create any interest in the property agreed to be sold and cannot, even if enforceable at date of suit or decree, be pleaded in defence to an action for ejectment by one having a legal title to recover."

Then, there are general observations in the judgments delivered by the learned Judges in which the duty and expediency of giving full effect to the words of the statute are emphasized as against recognition of equities modifying the application of the Statute law.

(1) (1906) I.L.R., 29 Mad., 336 (F.B.). (2) (1915) I.L.R., 42 Cal., 801 (P.C.).

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So far as it holds that delivery of possession under an unregistered instrument of sale is not a sufficient answer to a suit by the vendor to recover possession, I am not prepared to express any doubt on the correctness of the ruling. The Transfer of Property Act contemplates sales being effected in some cases by delivery of possession and in others only by a registered instrument, and to hold that in cases of the latter class where the legislature insists on a registered instrument, mere delivery of possession would be sufficient would be going directly against the wishes of the legislature: see *Lalchand v. Lakshman*(1) and *Jagadbandhu Saha v. Radha Krishna Pal*(2). Even with reference to the rulings under Statute of Frauds, Lord BLACKBURN said in *Maddison v. Alderson*(3) that if the matter were *res integra* he would not go so far as to hold that delivery of possession of the land would take the case out of the statute. And it is possible that too many exceptions have been allowed to the operation of the Statute of Frauds (see Story's Equity Jurisprudence, sections 765 and 766). However that may be in cases where owing to his own conduct it would be clearly inequitable or fraudulent for a party to insist upon his legal rights, it is the duty of the Court of Equity to give relief to the other party who has suffered by such conduct. So far Lord BLACKBURN entertained no doubt. He says:

"the conduct of the parties may be such as to make it inequitable to refuse to complete a contract partly performed. Wherever that is the case I agree that the contract may be enforced on the ground of an equity arising from the conduct of the party."

That seems to be in accord with what is laid down by the Privy Council in *Mahamed Musa v. Aghore Kumar Ganguli*(4), *Venkayamma Rao v. Appa Rao*(5) and in an earlier case *Immudiputtam Thirugnana Kondama Naick v. Periya Doraisamy*(6).

Before dealing with the Privy Council decisions, however, I shall mention *H. Young & Co. v. Mayor and Corporation of Royal Leamington Spa*(7) where it was held that a contract entered into by an urban authority but not under seal as

(1) (1904) 1 L.R., 28 Bom., 466.

(2) (1909) I.L.R., 36 Calc., 920.

(3) (.883) 8 A.C., 467.

(4) (1915) 1 L.R., 42 Calc., 801 (P.C.).

(5) (1916) 1 L.R., 39 Mad., 509 (P.C.). (6) (1901) I.L.R., 24 Mad., 377 (P.C.).

(7) (1883) 8 A.C., 517.

required by a statute did not bind the Corporation and therefore the plaintiff who had carried out certain works in pursuance of such an agreement could not recover the value of what he had done. But the basis of this decision was that the Corporation could exercise its statutory power to enter into contracts only by the observance of certain solemnities, that is, the affixing of the seal, intended for the protection of rate-payers and there was no room therefore in such a case for the operation of the equitable doctrine of part performance. What are the circumstances which should be sufficient to raise an equity that would be an answer to a suit for possession by a person who purported to convey the property by an unregistered instrument must depend on the facts of a particular case. But they must be such as should have altered though not irretrievably the position of the defendant acting on the faith of the bargain sought to be resiled from. If the effect of *Immudipattam Thirugnana Kondama Naick v. Periya Doraisamy*(1) be that even in such cases the plaintiff is entitled to eject the defendant I venture to think, as I shall show presently, that it is no longer good law after the pronouncements of the Judicial Committee in *Mahomed Musa v. Aghore Kumar Ganguli*(2) and *Venkayamma Rao v. Appa Rao*(3). Nor is the proposition laid down in the Full Bench case, namely that even where a valid contract of sale in favour of the defendant is proved, that would not be a sufficient defence to a suit in ejectment in such cases any longer tenable.

Mahomed Musa v. Aghore Kumar Ganguli(2) related to transactions which took place before the passing of the Transfer of Property Act; there is thus no question of the actual decision in that case being applicable here. But their Lordships of the Judicial Committee while pointing out the fact that no written conveyance was necessary by the law of India, considered it desirable to lay down certain principles of general application which, as I understand their judgment, would not be affected by any such enactment as the provision of the Transfer of Property Act requiring certain classes of transfer to be in a particular form. They observe:

"To use language common from very early times in Scotland and highly approved in *Maddison v. Alderson*(4) in the House of

(1) (1901) 1 L.R., 24 Mad., 377 (P.C.) (2) (1915) I.L.R., 42 Calc., 801 (P.C.).

(3) (1916) I.L.R., 39 Mad., 509 (P.C.). (4) (1883) 8 A.C., 467.

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Lords, it is no doubt true that there is a *locus penitentiae*, that is, a 'power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been adhibited in an authentic shape.' This is the situation where the parties stand upon nothing but an engagement which is not final or complete. But where actings and conduct of parties are founded on, then in all such cases, to use language of Professor Bell in his Principles, section 26: '*rei interventus* raised a personal exception, which excludes the plea of *locus penitentiae*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocally referable to the contract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable'."

Then they say that there is nothing in the law of India inconsistent with it but that upon the contrary, the law of India follows the same rule. They further quote with approval the statement of Lord SELBORNE in *Maddison v. Alderson*(1) that the defendant in such a case is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the statute could not be thought to have had in contemplation would follow. It seems to me that the reasoning would apply with all the greater force to the present case where it is the plaintiffs that are faced with equities resulting from the acts done by the defendants not merely on the faith of the contract, but also on the basis of further acts of the plaintiffs purporting to be done in perfecting the contract. It is observed by the Board that:

"many authorities are cited in support of these propositions from English and Scotch Law and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon".

In my opinion the proposition laid down in such clear and emphatic language entirely covers this case. Their Lordships

(1) (1883) 8 A.C., 467.

were of course aware that in India there was no Statute of Frauds and the statute to which their observations were most applicable was the Transfer of Property Act. In a more recent appeal from the decision of this Court—*Venkayamma Rao v. Appa Rao*(1)—their Lordships took occasion to repeat the equitable principle enunciated by Lord SELBORNE in *Maddison v. Alderson*(2) as pointed out by them in *Mahomed Musa v. Aghore Kumar Ganguli*(3) as much applicable in India as in England. That was a suit to recover possession of land on the strength of a contract and the propositions which have been referred to above were cited in order to show that even if the acceptance of the proposal to convey the village in dispute might be considered to be defective, the defect must be taken to have been cured in view of the actings of the plaintiff. The case affords another illustration of the principle "that equities may support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon."

In an earlier case—*Immudipattam Thirugnana Kondama Naick v. Periya Doraisamy*(4)—the Privy Council had expressed the same view in a case in which the provisions of the Transfer of Property Act made the mortgage in question in that suit invalid as not being made by a registered instrument. There it was contended that though the mortgage might fall short of an actual transfer, it showed a good contract for one and that the defendant might now call upon the heir of the mortgagor to implement that contract. Their Lordships said that if such a contract were proved, it would have been an answer to the plaintiff's claim and the exact form in which it could be enforced was not material. As pointed out by the learned Chief Justice, if the defendant in that case had sought to enforce the alleged contract by a suit he would have been time-barred. Here, there can be little doubt that there was a valid contract for transfer of the land in dispute by way of exchange and it seems to me that *Immudipattam Thirugnana Kondama Naick v. Periya Doraisamy*(4) is authority for the proposition that it is a sufficient answer to the plaintiff's suit. No doubt the observation of the

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(1) (1916) I.L.R., 39 Mad., 509 (P.C.). (2) (1883) 8 A.C., 467.

(3) (1915) I.L.R., 42 Calc., 801 (P.C.). (4) (1901) I.L.R., 24 Mad., 377 (P.C.).

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Judicial Committee in *Immudipattam Thirugnana Kondama Naick v. Periya Doraisamy*(1) was considered by the Full Bench in *Kurri Veerareddi v. Kurri Bapireddi*(2) and put aside as an *obiter*. But now that the principle on which the dictum of the Privy Council was based has been so clearly explained and developed in *Mahomed Musa v. Aghore Kumar Ganguli*(3) and *Venkayamma Rao v. Appa Rao*(4) we should no longer be justified in disregarding the principle itself because embodied in a statement not necessary for the decision of the case.

Another group of cases in which the operation of equity founded on the conduct of parties is exemplified is represented by *Gregory v. Mighell*(5), the rule of which is explained by Lord KINGSDOWN in the leading case of *Ramsden v. Dyson*(6) in these words:

"If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell*(5) and as I conceive, is open to no doubt."

Other well-known cases illustrative of the same doctrine are *Plimmer v. Mayor & Co. of Wellington*(7) and *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Limited*(8) where an irrevocable license from the Crown to erect jetties and buildings on the foreshore was presumed. The Judicial Committee while adverting in the latter case to the remark of WILLES, J., in *Rogers v. Brooks*(9) that after so long a possession (i.e., of 36 years) he would presume anything in favour of the plaintiff and to the comment thereon of Lord HERSHELL observes:

"In the opinion of the Board this passage does not support the proposition that a transfer of the *dominium* of lands can be effected without the presumption of a lost grant, or without possession

- (1) (1901) I.L.R., 24 Mad., 377 (P.C.). (2) (1906) I.L.R., 29 Mad., 336 (F.B.).
(3) (1915) I.L.R., 42 Cal., 801 (P.C.). (4) (1916) I.L.R., 39 Mad., 503 (P.C.).
(5) (1811) 18 Ves. Jun., 328; (s.c.) 34 E.R., 341.
(6) (1866) L.R., 1 H.L., 129. (7) (1884) 9 A.C., 699 at p. 710.
(8) (1915) A.C., 539. (9) (1784) 1 T.R., 431.

during the full requisite period of prescription. But *this case does* RAMANATHAN
bear upon a question of maintenance of possession considered apart from RANGA-
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The italics are mine. It is worthy of note that the facts of *Anon*(1) referred to by the Chief Justice and which was cited with approval by KAY, J., in *McManus v. Cooke*(2) as laying down that if a man builds a house partly on his neighbour's land and the neighbour acquiesces in this being done, Courts of Equity will interfere to prevent him from disturbing it, very closely resemble the facts of the present case.

Rulings of the above categories which are really illustrations of the same principle on which the doctrine of part-performance is founded are based on grounds of acquiescence and FRY, J., in *Willmott v. Barber*(3), expressed the limitations of this rule in these words:

"In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

The third condition mentioned in the above proposition must however be understood as subject to exceptions as Mr. Justice STORY states in his *Equity Jurisprudence*, second English Edition, section 387:

"There are indeed, cases where even ignorance of title will not excuse a party: for, if he actually misleads the purchaser by his

- (1) 2 Eq.C.Abr., 522. (2) (1837) 35 Ch.D., 681.
(3) (1880) 15 Ch.D., 98 at p. 105.

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own representations, although innocently, the maxim is properly applied to him, that, where one of the two innocent persons must suffer, he shall suffer who, by his own acts occasioned the confidence and the loss."

That is also the effect of section 115 of the Evidence Act as interpreted by the Judicial Committee in *Sarat Chunder Dey v. Gopal Chunder Laha*(1). The existence of estoppel does not depend on the motive or the knowledge of the matter on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act or omission has induced another to act or to abstain from acting should have been fraudulent or that he shall not have been under a mistake or misapprehension.

No doubt as observed by Lord SELBORNE, the doctrine of estoppel by representation is applicable only to representation as to some state of facts alleged to be at the time actually in existence and not to promises *de futuro* which if binding at all must be binding as contracts. But representation as to the legal act of a party being valid as was the case in *Sarat Chunder Dey v. Gopal Chunder Laha*(2) is within the meaning of section 115 of the Evidence Act and in the present case the conduct of the appellants in obtaining from the respondents Rs. 525 on account of this land while construction of the building was in progress amounted to a representation that the transaction of exchange was valid and the respondents were actively encouraged thereby to go on spending money on the faith of the representation. This at least is sufficient to estop the appellants from contending that the title did not pass to the respondents even if no estoppel arose from what had happened previously.

The recognition of equities arising from the conduct of parties is not confined to transactions with respect to land as held by KAY, J., in *McManus v. Cooke*(3) and as will also be seen from *In re Wilson*(4) and the cases cited there by HORRIDGE, J. In *In re Wilson*(4) the question was as to the effect of actings on a deed of arrangement admittedly void for want of registration and an observation of HONYMAN, J., which had the approval of Lord ESHER, M.R. is quoted:

(1) (1898) I.L.R., 20 Cal., 296 (F.C.).

(2) (1893) I.L.R., 20 Cal., 296 at p. 313 (F.C.).

(3) (1885) 35 Ch.D., 681.

(4) (1916) 1 K.B., 382.

"A man cannot say at one time that the transaction is valid and thereby obtain the advantage to which he could only be entitled on the footing that it is valid and at another time say it is void for the purpose of securing some further advantage."

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HORRIDGE, J., on the authority of that and other cases held that the appellant could not rely upon the invalidity of the deed of arrangement observing:

"The view that I have taken does not make the registration of the deed good but prevents the appellant from relying on its invalidity."

The Indian cases before *Kurri Veerareddi v. Kurri Bapireddi*(1) as reviewed there, show a conflict of decisions and it is unnecessary to discuss them again. The ruling in the Full Bench case has been followed in *Narasimha Raju v. Raghunadha Raju*(2). In *Thiruvengkatachariar v. Seshadri Iyengar*(3), however, the CHIEF JUSTICE and SRINIVASA AYYANGAR, J., held that it did not apply to a suit in which the defendant was sought to be ejected by the plaintiffs who had bought the land from the owner by a registered sale deed but with notice of a prior contract of sale in favour of the defendants, on the ground that the latter obtained a registered conveyance afterwards. In neither of these cases, however, the effect of the pronouncements of the Judicial Committee was taken into consideration.

The only case brought to our notice in which it was considered is *Khagendra Nath Chatterjee v. Sonathan Guha*(4) and there the learned Judges expressed their dissent from *Kurri Veerareddi v. Kurri Bapireddi*(1) and gave effect to equitable considerations arising from the conduct and actings of parties in the light of the propositions laid down by the Judicial Committee.

Agreeing with the learned Chief Justice, I would dismiss the appeal with costs.

As my learned brothers SADASIVA AYYAR and NAPIER, JJ., have taken a different view of the case, the order shall be as proposed by them.

SADASIVA AYYAR, J.—I had the great advantage, before I began to write this judgment, of a perusal of the opinion which

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(1) (1906) I.L.R., 29 Mad., 336 (F.B.).

(2) (1915) M.W.N., 819.

(3) (1916) 30 M.L.J., 559.

(4) (1915) 20 C.W.N., 149.

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my brother, NAPIER, J., has prepared in this case and which he is about to deliver.

I agree with that judgment except on one or two very minor points which will be mentioned in the course of the following judgment of my own.

The estoppel in *Ramsden v. Dyson*(1) and *McManus v. Cooke*(2) is based on what is called 'a duty' on *A* the owner of a land to actively assert his title to that land and set up his adverse title when he sees *B* building upon his land, when *B* was supposing by mistake that he (*B*) was the owner of the land and not *A*. I am myself (with the greatest respect) inclined to doubt very much whether there is any such legal duty upon *A*'s part to actively correct the mistake made by *B*. Especially where *B*'s mistake was a very foolish and reckless mistake, why should not *B* suffer for it? However, as my learned brother has pointed out, there is nothing to show in the present case that the plaintiff knew his own subsisting title to the site when the building in question was being raised by the defendant. In *Russell v. Watts*(3) COTTON, L.J., speaks of *A* letting *B* 'run into a trap' by *A*'s failure in his duty to undeceive *B*.

The learned Lord Justice was evidently not satisfied that the mere doctrine of estoppel by omission was sufficient to support the decisions and attempts to press into service the doctrine of 'laying traps' which had been till then utilised only as a part of the law of torts. That doctrine of 'trap' seems to have been once pushed too far in English Courts [see CROMPTON, J.'s dictum in an old case *Gallagher v. Humphrey*(4)] and I do not feel inclined to introduce all the refinements and uncertainties found in the subsequent English case, law on this point into India. Under that doctrine, trespassers were sometimes converted into licensees, invitations to trespass by good natured negligent owners of land were implied on most slender grounds and a man was made civilly liable in damages to trespassers because he was too indolent to fence his lands not even closely bordering on a highway. In short, moral and social duties were sought to be converted into legal duties. The rather too wide language (if I may say so with respect) used by some of the

(1) (1866) L.R., 1 H.L., 129. (2) (1887) 35 Ch.D., 681.
(3) (1884) 25 Ch.D., 559. (4) (1862) 10 W.R., 664.

Law Lords in *Cooke v. Midland Great Western Railway of Ireland*(1) was sometimes sought to be availed of for even extending the doctrine. In that case, however, there was a statutory duty cast upon the Railway Company to fence their land and to keep the fencing in proper repair; and we also know that Railway Companies guilty of negligence are treated much less indulgently in England than in India. In the more recent case of *Latham v. Johnson*(2) this doctrine of trap has been, however, now confined within strict limits. Because some English decisions have established a legal duty on the negligent owner of the land for not looking after it and not preventing the public from trespassing upon it, I am not inclined to hold that Indian Courts ought to create a legal duty in *A* the owner of a land to actively take the trouble to warn a reckless person, *B*, who chooses to build in *A*'s land and to impose upon *A* the disability of losing his right to recover the possession of his land from a trespasser, because he did not give the warning to *B*.

As regards the cases like *Plimmer v. Mayor & Co. of Wellington*(3) and *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Limited*(4), these are not cases where *B* who built on *A*'s land was ignorant of *A*'s right. He knew it full well and yet built upon *A*'s land believing that *A* was assenting to such building and would give him (*B*) a perpetual lease-right (or other similar right), *A* having conducted himself in such a manner as to induce *B* to entertain a reasonable belief that *A* assented to the building. These cases also do not apply to the facts of the present case, as the defendants did not believe that the plaintiffs continued to be the owners of the plaint site or that the defendants could build only with the plaintiffs' implied or express consent and had no power to build without such consent. He did not care for or expect plaintiffs' consent at all. The plaintiffs' conduct in not objecting had nothing to do with the defendants' activities in the building operations and the defendants did not expect from any such conduct that the plaintiffs as the *then* owners were going to give the defendants license to build with permanent rights over the site and the building.

(1) (1903) A.C., 229.
(3) (1884) 9 A.C., 699.

(2) (1913) 1 K.B., 398.
(4) (1915) A.C., 599.

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I am also of opinion that section 51 of the Transfer of Property Act indicates that the person *B* believing in good faith that he is absolutely entitled to property and building on it, cannot be allowed to claim larger rights than are mentioned in that section, namely, either to have the value of the improvements made by him estimated and paid by *A* (the evictor) or to require the evictor *A* to sell his interests in the property at the then market value irrespective of the building. I agree with SESHAGIRI AYYAR, J., that the option is with *A*, the person entitled to evict, in this case the plaintiffs. I think the word "transferee" in section 51 includes also a transferee under an invalid transaction of transfer and the words "the person causing the eviction" include also the transferor under an invalid transaction of transfer.

As regards the Privy Council decision in *Venkayamma Rao v. Appa Rao*(1), I am clear that the language of their Lordships at page 527 clearly implies that their Lordships were aware that the decree should be strictly (a) for execution of a conveyance in plaintiff's favour and (b) for possession of the plaint lands, these being the two reliefs ordinarily claimed and decreed in a successful suit for specific performance of a contract of sale, but their Lordships thought that as a Receiver had been appointed in the suit and such Receiver (as an officer of the Court) would act upon their Lordship's judgment (as he was bound to do) without the necessity of the plaintiffs applying for execution of the decree, the shape of their Lordships' decree need not include a direction for the execution of a conveyance and that the decree for delivery of possession alone "in the terms of the contract affirmed" as valid by the Privy Council would be sufficient to give the plaintiff full relief especially in view of the declaration of the plaintiff's title as owner and her being given possession through the officer of the Court. I am unable, however, to agree with the contention of the learned Advocate-General (and I regret that on this point I differ from my learned brother, NAPIER, J.) that the contract relied on by the plaintiff in the above Privy Council case is not a contract to convey, falling under section 54 of the Transfer of Property Act but is governed by section 9 of that Act.

(1) (1916) I.L.R., 39 Mad., 509 (P.C.).

I would allow the appeal and pass an order for return of a finding on the issue in terms of the last paragraph of the judgment of SESHAGIRI AYYAR, J. The parties will bear their respective costs throughout. Three months for return of finding and ten days for objections.

NAPIER, J.—The question raised in this appeal is, whether in the circumstances, the defendant is entitled to resist the suit brought by the plaintiff to recover possession of land which he, the defendant, received from the plaintiffs in exchange for other land, the exchange not having been made in accordance with the provisions of section 118 of the Transfer of Property Act. The first ground on which the claim is resisted is that of estoppel. Mr. T. R. Venkatarama Sastri relies on the fact that one year after the exchange purported to have been made and the parties took possession of the respective plots, the plaintiff claimed a sum of money by way of compensation for the difference in size of the two plots and that he received it knowing at the time that the defendant was building on the land. He has strenuously urged that this receipt of the money intentionally caused the defendant to believe that the property was his. I am, however, unable to see how this argument arises on the facts. The money was claimed and received by the plaintiff in the full belief that he had no longer any title to the land which he had parted with and in compensation for deficiency in area. It had nothing to do with the fact that the defendant was building and would have been claimed by him whether the defendant built or not. It represented nothing more than the full completion of the contract to change. It is impossible to argue that the facts of this case can be brought within the doctrine of estoppel as laid down in the well-known case of *Wilmott v. Barber*(1) where the requirements for estoppel by representation under English law are set out and it has been expressly held by the Privy Council that section 115 of the Indian Evidence Act reproduces the English law on this point. It is however argued that there is a doctrine of equitable estoppel which is more favourable to persons in the position of this defendant. This doctrine is referred to by Lord Justice BOWEN in *Proctor v. Bennis*(2) as the equitable doctrine of acquiescence, authority for which is to be found in the case of

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(1) (1830) 15 Ch. D., 96 at p. 105. (2) (1887) 36 Ch. D., 740.

RAMANATHAN v. RANGA-NATHAN. NAPIER, J. *Ramsden v. Dyson*(1). It is important to ascertain exactly the limits of this doctrine as it has been expressly applied to this country by the Privy Council in *Beni Ram v. Kundan Lal*(2). I gather from the language used by the learned Chief Justice in this case under appeal that he relies on *Ramsden v. Dyson*(1) and a later case *McManus v. Cooke*(3). The doctrine in *Ramsden v. Dyson*(1) is as follows:—

“If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money. It considers, that when I saw the mistake into which he had fallen, it was in my duty to be active and to state my adverse title.”

It is however clearly stated in a later passage that to raise the equity the real owner should at the time know that the land belongs to him (*vide* page 141). This condition is insisted on in *Proctor v. Bennis*(4) where COTTON, L. J., says that

“the party who has suffered, should have been acting in ignorance of the title of the other man and that the other man should have known that ignorance and not mentioned his own title,” and BOWEN, L. J., says

“in order to make out such acquiescence it is necessary for them to establish that the plaintiff stood by and knowingly allowed the defendant to proceed and to expend money in ignorance of the fact that he, that is, the person setting up his claim, had rights and meant to assert such rights.”

In an earlier case, *Russell v. Watts*(5), the same learned Lord Justice, COTTON, L. J., states as follows:—

“The knowledge by A of B's mistake imposes on A the duty to undeceive him, if he knows facts which are unknown to the other persons and does not inform them about it but lies by and lets them run into a trap.”

The whole subject is considered in White and Tudor's Leading Cases in Equity under the heading “equitable estoppel,” where a large number of cases are collected and the proposition is thus stated by the learned editor from the language of the Court of Appeal in *De Bussche v. Alt*(6):—

(1) (1856) L. R., 1 H. L., 129.

(3) (1887) 35 Ch. D., 681.

(5) (1884) 25 Ch. D., 559.

(2) (1893) I. L. R., 21 All., 496 (P. C.).

(4) (1887) 36 Ch. D., 740.

(6) (1878) 8 Ch. D., 314.

RAMANATHAN v. RANGA-NATHAN. NAPIER, J. “If a person having a right and seeing another committing an act infringing upon that right stands by in such a manner as really to induce the person committing the act to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.”

The proposition put in this form seems rather to narrow the doctrine as enunciated in some of the cases; but it is clear that the essence of the doctrine of estoppel by acquiescence is that the acquiescence should occur in a party *who knows that his right is being infringed*. It may be that this goes a little beyond the doctrine laid down in *Willmott v. Barber*(1) where estoppel requires that the possessor of the legal right must have *encouraged* the plaintiff in his expenditure of the money and it is possible that it also goes beyond the doctrine as stated in section 115 of the Evidence Act; but whether this be so or not, it is clear that the facts of this case do not come within the doctrine, for there is no evidence that at the time the defendant was expending his money, the plaintiff knew that the exchange was bad in law by reason of the want of registration. With the greatest deference therefore to the learned Chief Justice, I cannot think that this defence can prevail.

The next point argued by Mr. T. R. Venkatrama Sastri was that a licence by the plaintiff to the defendant must be implied and reliance is placed on two cases—*Plimmer v. Mayor & Co. of Wellington*(2) and *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Limited*(3); but in both those cases the Crown being naturally the owner of the foreshore knew that the land on which the other parties were building was the property of the Crown and the cases come within the doctrine above stated. It is impossible to say that a person can give another licence to build on his land when he does not know that the land belongs to him.

The next point taken for the respondents is that there having been part performance of the exchange, the law will treat it as complete although admittedly there is no valid exchange under the Transfer of Property Act. The authorities relied on for this proposition are two recent cases in the Privy Council *Mahomed Musa v. Aghore Kumar Ganguli*(4) and *Venkayamma*

(1) (1880) 15 Ch., D., 98.

(3) (1915) A. C., 599.

(2) (1884) 9 A. C., 699.

(4) (1915) I. L. R., 42 Cal., 801 (P. C.).

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Rao v. Appa Rao(1). Before examining these cases it is advisable to understand how the law has been regarded in this country.

The language of the Transfer of Property Act admits of no misconstruction. Section 54—

“Sale is a transfer of ownership,” etc.

“Such transfer in the case of tangible immovable property of the value of 100 rupees can be made only by a registered instrument.”

“In the case of tangible immovable property of a value less than 100 rupees, such transfer may be made either by a registered instrument or by delivery of the property.”

It has definitely been laid down by a Full Bench of this Court that the words “can be made only” make it impossible for any person to acquire title to property of that description by transfer “*inter partes*” otherwise than by a registered instrument: vide *Kurri Veerareddi v. Kurri Bapireddi*(2), where the whole question was exhaustively considered. The learned Chief Justice points out how important it is from the point of view of public policy to maintain the requirements of registration and how dangerous it is to allow cases of hardship to affect these requirements and thus induce a system of uncertainty and give opportunities for claims to be founded on perjured evidence. SUBRAHMANYA AYYAR, J., quotes some very strong observations by the House of Lords on the danger of modifying imperative statutory provisions on the ground of equity from—*H. Young & Co. v. Mayor and Corporation of Royal Leamington Spa*(3) from which I extract the following:—

“It is however for the legislature to determine whether the benefits derived by enforcing a general rule are or are not too dearly purchased by occasional hardships. A Court of Law has only to inquire what has the legislature thought fit to enact.”

Bearing in mind that it has been the effort of the legislature of this country to codify the law so as to make it easily applicable by Judges of inferior Courts not so highly trained as those in Courts in England, I have no doubt that this is the true principle to apply in ascertaining the law of this country. We have not here as there has been in England an equity jurisdiction that has grown up side by side with the common law of the country,

(1) (1916) I.L.R., 39 Mad., 509 (P.C.). (2) (1906) I.L.R., 29 Mad., 336 (F.B.).

(3) (1893) 8 A.C., 517.

and I think that we should refrain from engrafting equitable doctrines on the plain words of our Codes. This is the view that I have expressed in other cases and it is founded on decisions of their Lordships of the Privy Council in several cases. But it is said that we have no alternative since the two decisions above referred to. Before dealing with the observations of the Board relied on, it is advisable to ascertain exactly what was decided in each case. In *Mahomed Musa v. Aghore Kumar Ganguli*(1), the suit was to redeem two mortgages, dated the 22nd July, 1848 and the 4th April, 1871. The defendants pleaded that in 1873 a suit to enforce the latter agreement was brought by the mortgagee and settled by a compromise under which the mortgage debts were to be paid off and the property to be divided into specific shares, the mortgagor to convey those shares to the parties respectively entitled, and that a decree was made by the Court that the suit be decided in pursuance of the terms of the compromise and be struck off from the list. No conveyance was executed by the mortgagor nor was the agreement registered; but it was acted upon and carried out by all the parties and their successors in title up to the date of the suit as if the conveyance has in fact been made. The High Court of Calcutta held that the mortgages of 1848 and 1871 were extinguished by the compromise and that therefore the right to redeem was lost. The Privy Council accepting the view of the facts taken by the learned Judges,

“concurred with the legal result arrived at.”

That is the actual decision. Their Lordships say on page 815:

“the point which is made against giving effect to this compromise is that a conveyance was not made. This is true: but no written conveyance by law of India was at the date of that transaction necessary, the Transfer of Property Act not having been passed until the year 1882.”

The judgment of the High Court is not reported, but it is clear from the arguments that the Court relied on the fact that at the date of the compromise agreement, registration of such an agreement was optional under section 18 of the Registration Act IX of 1871 and held that oral evidence was admissible to prove that the equity of redemption was released by the mortgagor. It cannot be argued that the actual decision in the case is any

(1) (1915) I.L.R., 42 Cal., 801 at p. 815 (P.C.).

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authority for the proposition that the requirements of the Transfer of Property Act can be ignored: but it is suggested that the *obiter dicta* of the Board carry the case a great deal further. Dealing with these dicta with the very greatest respect as I am bound to do, I think it proper to apply the rule laid down by Lord HALSBURY in *Quinn v. Leatham*(1), in discussing the decision in *Allen v. Flood*(2).

"There are two observations of a general character which I wish to make and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found there, are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found."

Applying this principle of construction of judgments, I feel myself entitled to say that general expressions as to the effect of equity on statutory requirements must be confined to the statute under consideration, and secondly, that where, as in that case, no statutory requirement was violated, general expressions of the effect of the equity on the acts of the parties are no authority for ignoring statutory requirements. That the acts of the parties or their intended acts were alone under consideration is clear from the language used on page 815 in *Mahomed Musa v. Aghore Kumar Ganguli*(3):

"But even if a transfer in writing had from a conveyancing point of view been omitted or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the appellants in the attempt made in the present suit to redeem the mortgages, for the points against opening up the transactions are manifold and in their Lordships' opinion conclusive. The compromise has been acted upon by all the parties to it and by their successors in title from that date to this."

It is to my mind perfectly clear that their Lordships are here referring to the failure by the mortgagor to execute a conveyance in accordance with this agreement and not with any reference to statutory requirement of a conveyance which as their Lordships have pointed out in the previous sentence did not at that time exist. It is with reference to this state of affairs that their Lordships apply *Maddison v. Alderson*(4), and

(1) (1901) A.C., 495.

(3) (1915) I.L.R., 42 Cal., 801 at p. 815.

(2) (1898) A.C., 1.

(4) (1883) 8 A.C., 487.

the language of Professor Bell in his *Principles*, section 26 and therefore when their Lordships in the next words say:

"They do not think there is anything in the law of India in consistent with it but that on the contrary these laws follow the same rule."

This dictum has reference to the effect of long continued acts of parties in rendering unnecessary a conveyance which was required by the terms of the agreement, and not to the effect of such acts on statutory requirements. I will now deal with *Venkayamma Rao v. Appa Rao*(1). The facts are as follows:—The suit was brought by a lady for a declaration that she was entitled to a certain village and for possession. She based her case on an alleged contract with the last holder and on a subsequent oral bequest to her. The District Judge held that the village had been purchased under the alleged contract and had been held in trust for the appellant. He also upheld the oral devise. The High Court found neither contract nor devise proved and dismissed the suit (except against a party who had not appealed). Before the Privy Council it was contended that there was a valid contract which could be enforced by specific performance. It was *not* contended that anything had occurred which operated as a transfer. The contract as found by the Board was as follows. The deceased lady had induced the plaintiff, her niece, to live with her by promises of a general character and had actually conveyed to her two small properties which she purchased. In 1898 she purchased the suit village. She made no concealment that she had done it for the plaintiff but she refused permission for the title being taken in the plaintiff's name. A quarrel arose and the plaintiff and her husband left the deceased. Then the deceased wrote a letter which the Privy Council held to be a promise. By the letter she undertook to convey the property to the plaintiff on her death. The plaintiff returned to live with the deceased and their Lordships held that constituted acceptance of the promise and consideration for a good contract (*vide*, page 522). Having found the contract their Lordships say that the citation of *Maddison v. Alderson*(2) and *Maunsell v. Hedges, White*(3) is beside the mark:

(1) (1916) I.L.R., 39 Mad., 509 (P.C.).

(2) (1883) 8 A.C., 487.

(3) (1854) 4 H.L.C. 1039.

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"The true issue is is a contract proved? Had a contract been proved in either of the examples cited there is nothing to suggest that the law would have refused to give effect to it *by way of specific performance*."

Their Lordships then go on to consider the facts on a narrower basis:

"Suppose the proof of acceptance *in terms* by the Rani was considered to be defective, what is the situation in view of the actings of the plaintiff?"

and continue:

"their acting took place on the footing of a proposal so made and were known by Papamma to have taken place on that footing. In these circumstances the objection that the contract was inchoate or incomplete cannot be maintained."

For this proposition their Lordships referred to *Maddison v. Alderson*(1), and *Mahomed Musa v. Aghore Kumar Ganguli*(2), and say that the power of resiling is barred by the *rei interventus* excluding the plea of *locus penitentiae*, and once more their Lordships say that there is nothing in the law of India inconsistent with it. With great respect to my learned brother who takes a different view, I am at a loss to understand what bearing this latter observation has on the supposed efficacy of part-performance to effect a transfer of immoveable property contrary to the Transfer of Property Act. If any Act is referred to, it can only be the Contract Act or the Specific Relief Act for the existence of a valid and enforceable contract was the sole question under consideration, and if I may say so with respect, neither do I know anything in either Act which would prevent a Court finding a contract proved in the circumstances suggested by their Lordships. Neither the decision nor the dicta, nor indeed the argument of counsel had anything whatever to do with part-performance operating as transfer. An argument is however founded on the form of the decree in that case, it being a direction to the Receiver to put the plaintiff in possession. Their Lordships say that the fact there is a Receiver saves any complexity in carrying out the judgment. The plaintiff had, on the footing of a contract and an oral devise, asked for a *declaration of title* and possession. Undoubtedly, if the oral devise was proved, there would

(1) (1883) 8 A.C., 467.

(2) (1915) I.L.R., 42 Cal., 801 (P.C.).

have been a valid transfer and the decree asked for would have been proper. Counsel before the Privy Council however based his case on contract only and asked for *specific performance*. The Privy Council found the contract proved and did not deal with the devise, so, naturally, did not give a declaration of title. The only question is why did not the Board put its decree for *specific performance* in the form of a direction to the Receiver to convey? The report is silent on this matter but I am inclined to think that the suggestion of the learned Advocate-General is the true explanation. He points out that the transaction is not a sale because there was no price, and not a gift because there was consideration, and clearly not an exchange; so none of sections 54, 123 or 118 of the Transfer of Property Act applies with the result that section 9 applies and the transfer can be made without writing. The simplest form of transfer is by putting a person in possession—*vide* section 54 of the Transfer of Property Act. No registered instrument was necessary and it follows therefore that the form of the decree in this case does not give any assistance to the doctrines sought to be established. I would like also to point out that the application of the doctrine of part-performance in England, and the use sought to be made of it in this case are not *in pari materia*. In England it belongs to the sphere of contract and operates, where applicable, to allow a party to prove a contract in an action in spite of a statutory prohibition. Here there is no contract part-performed. The contract is executed. What is sought is to make total performance of an executed contract operate to create legal rights in violation of a statute. Even if there had only been part-performance by one party there would have been no statutory difficulty in getting a decree for specific performance for there is no statutory provision in the Transfer of Property Act or the Contract Act requiring the contract to be proved by writing. There is therefore no room for the application of the English doctrine of part-performance in this country. What the respondents are really seeking to do is to apply another entirely different equitable rule inherited from the Courts of Chancery, "Equity will treat that as done which ought to be done" and to apply it against the statute. For the above reasons, I am clear that nothing in either of the two cases relied on has any bearing on the point and that the authority of the decision of the Full Bench in *Kurri Veerareddi v. Kurri*

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Bapireddi(1) remains unshaken. I would add that apart from principle and authority I should find great difficulty in accepting the statute where it indicates that placing in possession will not be a valid transfer, and ignoring it where it uses the definite words 'a transfer of ownership can be made only by a registered instrument.' We are next asked to make a decree for specific performance. I have the greatest difficulty in seeing how such a decree can be given to a defendant [*vide* observations of SUBRAHMANYA AYYAR, J., in *Kurri Veerareddi v. Kurri Bapireddi*(1)], and I am clear that we cannot do it in this case when the defendant did not ask for it in his written statement, and no issue was settled on the point. I therefore express no opinion on the questions whether Exhibit B can be used to prove an agreement or what agreement would be proved by it. The sole question that remains is whether the defendant is entitled to the benefit of section 51 of the Transfer of Property Act or the principle underlying it. In my opinion a wide meaning must be given to the word 'transferee' in this section and it should read as including a person to whom land is purported to be transferred. The provision in the Mesne Profits and Improvements Act XI of 1855, which is still in force in India where English law is applicable is:

"If any person shall erect any building, etc., upon any lands held by him *bona fide* in the belief that he had an estate in fee-simple, etc., and such person, be evicted by any person having a better title"

and the rest of the section is reproduced in section 51 of the Transfer of Property Act. It has been held in *Ramalinga v. Samiappa*(2) that section 51 only declared the pre-existing law on the subject and there is no doubt that the Act of 1855 embodied the English law. I would therefore adopt the course suggested by SESHAGIRI AYYAR, J., and call for a finding on the fourth issue. I agree with SADASIVA AYYAR, J., as to costs.

In compliance with the order contained in the above judgment, the Subordinate Judge of Ramnad at Madura submitted alternative findings. On the higher scale he found that the compensation payable by the plaintiff to the defendant for the

(1) (1906) I.L.R., 29 Mad., 336 (F.B.). (2) (1890) I.L.R., 13 Mad., 15.

damage likely to accrue by the demolition of that portion of the building standing on the site in dispute including depreciation in value owing to loss of symmetry was Rs. 5,795; on the lower scale he found that the actual loss would be Rs. 3,505.

This Letters Patent Appeal again coming on for hearing the Court delivered the following:

JUDGMENT.—We think that Rs. 3,505 will be a sufficient compensation in the circumstances of the case on the basis on which the amount is calculated in paragraph 12 of the Subordinate Judge's finding. The decree will be modified accordingly. The mandatory injunction will not be issued until this amount has been deposited in Court. The money will be deposited by the plaintiffs within a fortnight of the reopening of the Court and the defendants will remove so much of the building as stands on the land of the plaintiffs within two months from the date of the deposit. There will be no order as to costs.

ABDUL
RAHIM,
SADASIVA
AYYAR AND
NAPIER, JJ.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Bakewell.

CHALLA BALAYYA (DEFENDANT), APPELLANT,

v.

KANUPARTHI SUBBAYYA (PLAINTIFF), RESPONDENT.*

Negotiable Instruments Act (XXVI of 1881), sec. 27—Promissory note executed under the authority of a marksman but not marked by him—validity of—Applicability of section 226 of the Indian Contract Act (IX of 1872).

The law of agency as stated in section 226 of the Indian Contract Act is applicable to Negotiable Instruments and a promissory note executed by a person under the authority of a marksman is valid though the marksman has not affixed his mark thereto.

APPEAL against the order of J. W. HUGHES, the District Judge of Cuddapah, in Appeal No. 140 of 1914, preferred against the decree of A. S. VIRASWAMI AYYAR, the Acting District Munsif of Cuddapah, in Original Suit No. 513 of 1913.

* Appeal Against Order No. 288 of 1916.

1917,
January 10.

BALAYYA
v.
SUBBAYYA.

This was a suit upon a promissory note in favour of the plaintiff executed in the following manner :—

“ Nishani mark of Challa Subbayya.”

Plaintiff's case was that these words were written by another on behalf of the executant, namely, Chella Subbayya the defendant, while the defendant contended that he did not give any such authority and that in the absence of a separate mark, there was legally no execution of the promissory note. The District Munsif dismissed the suit without going into the merits, on the ground that as there was neither a signature nor an actual mark there was no valid execution. On appeal by the plaintiff the District Judge held that the words

“ Nishani mark of Challa Subbayya ”

written on the authority of the defendant was equivalent to execution by him and reversed the decree and remanded the suit for disposal on the merits. The defendant appealed.

I. V. Ramanuja Rao for the appellant.

M. Patanjali Sastri for B. Somayya for the respondent.

The following JUDGMENT of the Court was delivered by

OLDFIELD, J. OLDFIELD, J.—The suit promissory note purports to be executed by defendant-appellant in virtue of the words on it

“ Nishani mark of Challa Subbayya.”

There is in fact no separate mark. The plaintiff contends that the absence of one is immaterial and that he is at liberty to prove that the words referred to were written with defendant's authority and therefore constituted a valid execution of the instrument.

As regards the first point, we cannot see and have not been shown authority for holding that any separate mark is essential, if the writing relied on is in fact written with authority.

As regards the second, no case has been cited to the effect that the ordinary law of agency stated in section 226 of the Indian Contract Act is inapplicable to negotiable instruments; and section 27, Negotiable Instruments Act, is to the contrary effect, its restrictive portion being irrelevant in the present connection. *Radhakrishna v. Subraya* (1) relied on by appellant, was decided with reference to the execution of a will and the special wording of section 50, Indian Succession Act. It therefore lays down no general rule. We accordingly agree with the lower

(1) (1917) I.L.R., 40 Mad., 550.

Appellate Court that plaintiff is at liberty to prove the execution of the suit note by defendant's authority and that the case must be remanded in order that he may have an opportunity to do so. The appeal against order is dismissed with costs.

N.B.

APPELLATE CIVIL.

Before Sir Charles Arno'd White, Kt., Chief Justice, and Mr. Justice Sankaran Nair.

K. HAJEE ABDUL LATHEEF SAHIB AND ANOTHER
(PLAINTIFFS), APPELLANTS,

1917,
November

v.

THE OFFICIAL ASSIGNEE OF MADRAS (DEFENDANT),
RESPONDENT.*

Insolvency proceedings—Order disallowing a claim to goods seized by the Official Assignee after adjudication—Suit to set aside the order, maintainability of.

No suit lies to set aside an order made by the Insolvent Court dismissing on the merits a claim to goods seized by the Official Assignee after adjudication.

Followed in *The Official Assignee of Madras v. Mungayarkarasu Ammal*. †

APPEAL against the judgment of WALLIS, J., in Civil Suit No. 206 of 1911.

The Official Assignee of Madras attached and took possession of certain goods in the custody of the plaintiffs alleging that the sale of such goods to them by the insolvent was a collusive and fraudulent transaction. The plaintiffs moved before WALLIS, J.,

* Original Side Appeal No. 4 of 1912.

† Appeal Against Order No. 103 of 1917.

Sir John Wallis, Kt., Chief Justice, and Mr. Justice Kumaraswami Sastriyar.

1917,
August 9.

JUDGMENT.—The point raised in this appeal was decided by one of us (the CHIEF JUSTICE) in Original Suit No. 206 of 1911 on the file of the High Court on the Original Side and the decree was affirmed in Appeal in *Abdul Latheef v. The Official Assignee of Madras* (1). Following that decision, we allow the appeal and reverse the order and restore the decree of the Munsif with costs throughout.

(1) (1917) I.L.R., 40 Mad., 1173.

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sitting in the Insolvent Court for a declaration that the property so seized was their property and not the property of the insolvents. Their application was dismissed on the merits on the 16th August, 1910. They thereupon filed a suit on the Original Side to set aside the order. The suit was dismissed by the following JUDGMENT :—

WALLIS, J.—“The order was made by the Insolvency Court exercising jurisdiction under section 7 which corresponds to section 102 of the Bankruptcy Act. No case has been cited in which it was ever attempted to set aside an order under the English section by a suit. No right to set aside the order by suit is given as in the case of claims under the Civil Procedure Code. The proper remedy in my opinion is by way of appeal and this is the remedy resorted to in the English cases. I hold that the plaint discloses no cause of action and dismiss it with costs.”

The plaintiffs preferred this appeal.

A. Krishnaswami Ayyar for *C. P. Ramaswami Ayyar* for the appellants.

WHITE, C.J.,
AND
SANKARAN
NAIR, J.

M. D. Davadoss and *M. K. Ramaswami* for the respondent.

JUDGMENT.—The appellants made an application in the insolvency of *A. S. Mahomed Oosman Sahib & Co.* and asked for a declaration that certain goods which had been seized by the Official Assignee after adjudication, were their property and not the property of the insolvents. This application was dismissed on the merits. The appellants then brought a suit against the Official Assignee for the declaration which he had asked for in his application in the insolvency. No authority has been cited in support of the contention that such a suit will lie. In our opinion it will not.

We see no reason for interfering with WALLIS, J.'s order refusing leave to amend the plaint.

The appeal is dismissed with taxed costs.

S.V.