THE INDIAN LAW REPORTS.

MADRAS SERIES,

CONTAINING

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

REPORTED BY

Privy Council ... ... C. BOULNOIS, *Middle Temple.*

High Court ... ... K. BROWN, *Inner Temple.*
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Chief Justice.

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Puisne Judges.

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

„ G. A. PARKER (*Returned from leave on 9th March*).

„ H. H. SHEPHARD (*Leave for one month in continuation of the recess*).

„ J. W. BEST.

„ J. A. DAVIES (*Offg. till 8th March*).

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

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ADMINISTRATION, Letters of—*Promissory note given to a firm consisting of two undivided Hindu brothers—Decease of the brothers—Suit on note by their sons without taking out letters:*

Two brothers, members of an undivided Hindu family, who traded as 'T. Iyavier and Brother,' became the holders of a promissory note given to the firm. The elder brother having died, his son joined the firm in his place, and he and his uncle filed a suit against the maker of the note, but before the action was heard the uncle died, and his son (a minor) was substituted as plaintiff for him, suing by the other plaintiff as his next friend. The plaintiffs had not taken out letters of administration to their respective fathers' estates:—*Held*, (1) that assuming that the younger brother could have sued as surviving member of the firm, on his death the necessity for taking out letters of administration could not be avoided; (2) that, if the debt was in reality due to the plaintiffs' family and not to the obligees of the bond, they could not sue upon it in their own right of survivorship without taking out letters of administration, since the promissory note did not disclose the nature of the debt, and, moreover, the other members of the family should have been joined as plaintiffs. *Venkataramanna* v. *Venkayya* (I.L.R., 14 Mad., 377) distinguished.

Chockalinga Pillai v. *Natesa Ayyar* 147

ASSIGNMENT OF CONTRACT:

See CONTRACT (1).

ATTACHMENT BEFORE JUDGMENT—*Suit against one member of undivided Hindu family—Death of defendant before decree—Right of survivorship:*

Where, in a suit against one member of an undivided Hindu family, not as representing the family, there is an attachment before judgment of family property, and the defendant dies before decree is passed, the right of survivorship takes effect before the attachment becomes effectual for the purpose of execution. *Sadayappa* v. *Ponnama* (I.L.R., 8 Mad., 554) followed.

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Ramanayya v. *Rangappayya* 144

CARRIER'S ACT—ACT III OF 1865—*Railways Act—Act IX of* 1890, *ss.* 72, 76—*Contract Act—Act IX of* 1872, *ss.* 151, 152, 161—*Liability of Railway Companies as bailees:*

Subject to the provisions of Act IX of 1890, the responsibility of Railway Companies for loss of goods delivered to them for carriage is that of a bailee under sections 151, 152 and 161 of the Indian Contract Act. In a suit for damages occasioned by such a loss the plaintiff need not prove how the loss occurred, but on proof of the loss, the Company will, in absence of proof of any ground upon which it can be exonerated, be liable as a bailee.

Sesham Patter v. *L. S. Moss* 445

CHRISTIAN MARRIAGE ACT—ACT XV OF 1872, s. 68—*Solemnization of marriage under Hindu rites between a Native Christian and a Hindu by a person not authorized to perform marriages under section 5 of the Act:*

A person who performs a ceremony of marriage according to Hindu form between a Native Christian and a Hindu commits an offence under section 68 of Act XV of 1872, unless he is authorized to solemnize marriages under section 5 of the Act.

Queen-Empress v. *Yohan* 391

CIVIL COURTS ACT (MADRAS)—ACT III OF 1873, s. 12—*Jurisdiction of Munsiff's Court—Execution of decree of superior court—Civil Procedure Code—Act XIV of* 1882, *ss.* 25, 223:

As in suits so in execution proceedings the competent *forum* is ordinarily that indicated by section 12 of the Civil Courts Act, but in the five cases mentioned in section 223 of the Civil Procedure Code special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction, the object whereof is to secure to judgment-creditors in certain cases a special facility or convenience. The condition as to the jurisdiction of the Subordinate Court to which a suit can be transferred under section 25 of the Code of Civil Procedure is not laid down in section 223 of the Code, which relates to transfers of applications for execution of decrees, and was omitted therefrom for the special reasons mentioned therein *Narasayya* v. *Venkatakrishnayya* (I.L.R., 7 Mad., 397) followed. *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee* (I.L.R., 16 Calc., 457) and *Durga Charan Mojumdar* v. *Umatara Gupta* (I.L.R., 16 Calc., 465), dissented from.

Shanmuga Pillai v. *Ramanathan Chetti* 309

CIVIL PROCEDURE CODE—ACT XIV OF 1882, ss. 4, 622—*Rent Recovery Act—Act VIII of* 1865, *s.* 76:

Orders passed by a Collector under the Rent Recovery Act are not open to revision under section 622 of the Civil Procedure Code. *Velli Periya Mira* v. *Moidin Padsha* (I.L.R., 9 Mad., 332) followed.

Venkatanarasimha Naidu v. *Suranna* 298

2. ——————————, **s. 13**—*'Court of competent jurisdiction':*

The term 'competent jurisdiction' in section 13 of the Civil Procedure Code has regard to the pecuniary limit as well as to the subject-matter. There is no authority for the general proposition that the competency of one Court as compared with another is affected by the circumstance that in the one case an appeal lies in the first instance to the District Court and in the other directly to the High Court. *Misir Raghobardial* v. *Sheo Buksh Singh* (I.L.R., 9 Calc., 439) cited and followed. *Vithilinga Padayachi* v. *Vithilinga Mudali* (I.L.R., 15 Mad., 111) qualified.

Subbammal v. *Huddleston* 273

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3. ——————————————————, s. 13—'Res judicata'—*Rent Recovery Act (Madras)—Act VIII of 1865—Decision of a Revenue Court—Second suit in Civil Court—Question of title :*

In a suit for land it appeared that the defendant had obtained, under the Rent Recovery Act, a judgment that the present plaintiff should accept from him a patta for the land in question and deliver to him a corresponding muchalka, and subsequently an order for ejectment, which was executed. The present plaintiff did not appear when the above orders were made. The defendant relied on these proceedings as constituting a bar to the present suit :—*Held*, following *Rama* v. *Virtasami* (I.L.R., 7 Mad., 61), that the decision of the Revenue Court was no bar to the suit.

Gangaraju v. *Kondireddiswami* 106

4. ——————————————————, s. 13—*Sivaganga sanad of* 1803—*Failure of suit alleging fraud—Possession known and acquiesced in prior to adjudication :*

The High Court of Madras dismissed on the facts a suit brought in 1886, grounded on fraud attributed to the lineal ancestor of the principal defendant, in obtaining, in 1803, the grant of the sanad of the Sivaganga Zamindari, to which the plaintiff claimed title. The plaintiff's case was that the defendant's ancestor, the younger of two brothers, had fraudulently caused the sanad to be made out in his own name, whereas it was intended to be, and ought to have been, a grant to the elder brother, who was the plaintiff's lineal ancestor. Those through whom the plaintiff claimed had not made any such charge, although they had knowledge of all the facts connected with the grant of the sanad of 1803 to the younger brother, and with the long possession by him and his descendants, among whom there had been litigation, resulting in a decision as to the ownership :—*Held*, that this suit could not be maintained to re-open the question.

Bala Gauri Vallaba Tevar v. *Periasami Udayar Tevar* 384

5. ——————————————————, ss. 13, 30—'Res judicata'—*Representation :*

Although the members of a tarwad or family may, in an irregular fashion, be represented by a karnavan of the tarwad in a suit, the decree therein does not raise an absolute estoppel against members not actually brought on the record. *Ittiachan* v. *Vellappan* (I.L.R., 8 Mad., 484, 488) and *Sri Devi* v. *Kelu Eradi* (I.L.R., 10 Mad., 79) followed.

Komappan Nambiar v. *Ukkaran Nambiar* 214

6. ——————————————————, ss. 13, 244, 312—*Powers of a Hindu son to question the alienation of an impartible estate by his father—Limitation—Suit to recover immovable family property unlawfully alienated during plaintiff's minority—Limitation Act, s. 7, illustration (b), and sched. II, arts.* 12, 44, 45, 120, 144—*Hindu Law—Succession : whether under the Mitakshara law, nearness of blood is a ground of preference as between brothers of the half and full blood respectively in case of disputed succession to impartible coparcenary property—Representation of minor heirs as defendants by including a Collector as a defendant, as their guardian* ad litem :

Where a suit is brought to set aside a sale of immovable family property unlawfully alienated during the plaintiff's minority, it must be instituted within one year of the plaintiff's attaining his majority under schedule II, article 12 of the Limitation Act. Section 7 of that Act must be read together with each article in schedule II, and when the period prescribed by the latter extends to three years or more and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full three years. But when the period of limitation prescribed is less than three years, as in article 12, and the minor has that period from the date of his majority, the prescribed period is not to be enlarged to three years. In determining the right of succession to an impartible estate, the class of kindred from whom a single heir is to be selected should be first ascertained. Next, it should be seen whether family custom or kulachar discloses a special rule of selection, and, in default of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to

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general Hindu law. Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to co-parcenary property which is partible, and it is likewise no ground of preference when such property is impartible. Where, therefore, the family property belongs to a co-parcenary family consisting of all the brothers of the deceased *propositus*, whether of the whole or half-blood, in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years. Representation by a Collector of all minor sons of a deceased Zamindar as their guardian *ad litem*, under the order of the Court, the Collector being added as a defendant in the suit, is an adequate representation of all the sons, even if the Collector could only treat, under Regulation V of 1804, the particular minor on whose behalf the Court of Wards was then managing the zamindari as their proper ward. Consequently, a suit brought by one of such minors, on his attaining majority, to set aside the sale of a portion of the zamindari property attached in execution of the decree given in the former suit, is barred by sections 136, 244 and 312 of the Code of Civil Procedure.

Subramanya Pandya Chokka Talavar v. *Siva Subramanya Pillai* 316

7. ——————————————————, ss. 25, 223—*Madras Civil Courts Act, s.* 12—*Jurisdiction of Munsiff's Court—Execution of decree of superior Court :*

As in suits so in execution proceedings the competent *forum* is ordinarily that indicated by section 12 of the Civil Courts Act, but in the five cases mentioned in section 223 of the Civil Procedure Code special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction, the object whereof is to secure to judgment-creditors in certain cases a special facility or convenience. The condition as to the jurisdiction of the Subordinate Court to which a suit can be transferred under section 25 of the Code of Civil Procedure is not laid down in section 223 of the Code, which relates to transfers of applications for execution of decrees, and was omitted therefrom for the special reasons mentioned therein. *Narasayya* v. *Venkatakrishnayya* (I.L.R., 7 Mad., 397) followed. *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee* (I.L.R., 16 Calc., 457) and *Durga Charan Mojumdar* v. *Umatara Gupta* (I.L.R., 16 Calc., 465), dissented from.

Shanmuga Pillai v *Ramanathan Chetti* 309

8. ——————————————————, s. 32—*A party to a contract joined as defendant and subsequently made a plaintiff—Limitation Act—Act XV of* 1877, *s.* 22—*Joint contractors :*

Limitation Act, s. 22, is not applicable to cases where the court of its own motion orders that a party to a contract originally joined as defendant be made a plaintiff under Civil Procedure Code, s. 32.

Khadir Moideen v. *Rama Naik* 12

9. ——————————————————, ss. 43, 244—*Hindu Law—Liability of son for father's debts—Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings—Limitation Act—Act XV of* 1877, *sch. II, arts.* 120, 122 :

A personal decree on a mortgage was passed against a Hindu (the mortgagor) and his two sons on 19th October 1877. The decree provided for payment of the secured debt in various instalments by May 1895. The mortgagor died in 1883 having discharged part of the debt. The decree-holder having attached certain family property in execution, the mortgagor's two younger sons, who had not been born at the date of the above decree, objected that their shares were not liable to attachment. This objection prevailed, the Court expressing the opinion that the matter in controversy should be determined in a regular suit. The other defendants in the suit of 1877 had both died in the interval, one of them leaving infant sons. The decree-holder (in whose sole name the mortgage stood) now sued the sons of the mortgagor and their infant nephews in 1891 and obtained a decree for the payment out of the family property of all the unpaid instalments. A plea of non-joinder was raised, *inter alia*, on the ground that the plaintiff had an undivided brother :—*Held*, (1), that since the plaint (as amended) showed that

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the plaintiff sued as managing member of his undivided family, the omission to join his brother was a merely formal error, and was not fatal to the suit; (2) that the plaintiff was not precluded from maintaining this suit against the sons of the mortgagor by Civil Procedure Code, s. 43 or s. 244; (3) that the period of limitation applicable to the suit was six years, and that time began to run for the purposes of limitation from the date when each instalment would have become due from the deceased judgment-debtor; (4) that the plaintiff was entitled to a decree for payment out of the family property of all such instalments as would have so become due at the date of the suit, and for a declaration only as to subsequent instalments.

Ramayya v. *Venkataratnam* 122

10. ——————————————————, **ss. 53, 245, 647**—*Amendment of execution petition—Appeal—Limitation:*

One, being entitled under a decree of 1809 to a share in the income of a zamindari, obtained a decree in a suit of 1887 against certain recent purchasers of the zamindari, declaring that he had a valid charge on the estate and awarding to him, besides his costs, the amount due in respect of one year. He now applied in execution of the latter decree for payment of the amount due in respect of five years as well as his costs. An application to amend the petition for execution by inserting a reference to the former decree was made after the right of the petitioner in respect of some of the years in question had become barred by limitation. This application was refused by the Court of first instance:—*Held*, that under the circumstances of the case the amendment should have been allowed to be made.

Sattappa Chetti v. *Jogi Soorappa* 67

11. ——————————————————, **ss. 231, 244**—*Order of a Court on application for execution by one or more joint decree-holders—Appeal therefrom:*

An appeal lies from an order under section 231 of the Code of Civil Procedure, such an order being one relating to the execution of a decree within the meaning of section 244. *Gooroo Doss Roy* v. *Ram Ruginee Dossia* (17 W.R., 136) and *Odhoya Pershad* v. *Mahadeo Dutt Bhandaree* (17 W.R., 415) distinguished.

Lakshmi Ammah v. *Ponnassa Menon* 394

12. ——————————————————, **s. 234**—*A stranger to a decree against a deceased person in possession of his property—'Legal representative':*

The words 'legal representative' in section 234 of the Code of Civil Procedure do not include any person who does not in law represent the estate of the deceased person. Consequently, a stranger in possession of property of a deceased person who was not a party to a decree against such person cannot be proceeded against in execution otherwise than by a regular suit.

Chathakelan v. *Govinda Karumiar* 186

13. ——————————————————, **s. 244, sub-section (c)**—*Questions arising in execution of decree—Construction of a decree as to the appointment of a manager of the property of a religious institution:*

A decree of the High Court declared its holder entitled as the Pandara Sannadhi, or religious chief, of an adhinam, to see that a competent person, from among the Tambirans who had received initiation at that institution, was appointed to fill the then vacant office of Tambiran, managing certain mutts. The decree directed that the Pandara should name a Tambiran of his adhinam for the office, whom, after inquiry as to his fitness, the Subordinate Court should appoint. If that Court found him unfit, it was to appoint a Tambiran of that adhinam upon its own selection. In execution the Pandara named a Tambiran for the office, but died before the inquiry as to his fitness. His successor, as head of the adhinam, petitioned to withdraw the nomination, naming another Tambiran. The Subordinate Court made an order disallowing the withdrawal, and, after inquiry as to the fitness of the first named Tambiran, appointed him to the office. The High Court, on the Pandara's appeal, decided that the first nomination had been competently withdrawn, and directed an inquiry as to the fitness of the person secondly named, finding on the evidence that the first-named

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was not fit:—*Held*, on the appeal of the Tambiran first-named, that the question as to his right was one that had arisen between the parties to the suit, and related to the execution of the decree, within the meaning of section 244, sub-section (*c*), Civil Procedure Code, and that he could appeal from the order made. Also, that, on the construction of the decree, the first nomination could not be withdrawn and a second one substituted before the inquiry, and that the person first named was entitled to the Court's decision as to his fitness. On the facts, the finding of the High Court that the first-named Tambiran was unfit, was not affirmed; and the order of the Subordinate Judge was maintained.

Ponnambala Tambiran v. *Sivagnana Desika Gnana Sambandha Pandara Sannadhi* 343

14. ——————————————————, **ss. 244, 278 to 283**—*Questions to be determined by the Court executing a decree—Grounds of objection:*

Where the question is whether the property in dispute belongs to the judgment-debtor or to his estate or not, and the question is raised in a proceeding in execution between parties to the suit or their representatives, it matters not on what grounds the objection is taken to the property being made the subject of execution, and the question is one to be determined in execution, and section 244 of the Code of Civil Procedure bars a separate suit. *Abeedoonissa Khatoon* v. *Ameeroonissa Khatoon* (L.R., 4 I.A., 66) followed.

Upendra Bhatta v. *Ranganatha Bhatta* 399

15. ——————————————————, **s. 257-A**—*Adjustment of decree out of Court—Instalment bond—Consideration:*

An instalment bond, executed by a judgment-debtor in favour of the decree-holder and in consideration of the benefit of the decree being given up, is not void as an agreement falling under section 257A of the Civil Procedure Code. Such an agreement is void only as far as it affects the right to execute the decree, and may be the foundation of a fresh suit. *Sellamayyan* v. *Muthan* (I.L.R., 12 Mad., 61), *Jhabar Mahomed* v. *Modan Sonahar* (I.L.R., 11 Calc., 671), and *Hukum Chand Oswal* v. *Taharunnessa Bibi* (I.L.R., 16 Calc., 504), followed.

Juji Kamti v. *Annai Bhatta* 382

16. ——————————————————, **s. 278**—*Dismissal of an application for execution—Attachment of a decree—Execution of attached decree:*

The holder of a decree, dated 1885, applied to execute it, but his application was dismissed in March 1887 on the ground that 'no further steps had been taken.' It did not appear that any notice was given to him before the order of dismissal was made. Nevertheless the decree-holder proceeded to execute a decree of the judgment-debtor attached by him and brought to sale certain property which was in question in the present suit, and it was purchased *bonâ fide* by the present defendant who obtained a sale certificate from the Court. The present plaintiff claimed as assignee from the holder of the attached decree to execute it against the same land, and now sued for a declaration that it was liable to be brought to sale by him and that the defendant's purchase was void as against him:—*Held*, (1) that under the circumstances of the case the attachment in execution of the decree of 1885 was subsisting at the time of the purchase by the defendant; (2) that a judgment-creditor who attaches a decree is competent to execute it.

Rangasami Chetti v. *Periasami Mudali* 68

17. ——————————————————, **ss. 278, 283**—*Declaratory decree—Termination of attachment by abandonment:*

The plaintiff had an attachment against certain property. Owing to his not filing a necessary affidavit, the execution petition was struck off. Subsequently he applied for the sale of the property, and the Court directed a fresh attachment to issue. It was held that these facts did not amount to an abandonment of the first attachment by the plaintiff.

Srinivasa Sastrial v. *Sami Rau* 180

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18. ——————————————————, ss. 278, 283—*Transfer of Property Act—Act IV of* 1882, *s.* 85—*Non-joinder of puisne mortgagee in a mortgage suit—Mortgage decree—Claim in execution to mortgage premises:*

A mortgagee sued on his mortgage and obtained a decree against the mortgagor for the principal, together with the interest accrued due thereon, and for the sale of the mortgage premises in default of payment. A second mortgagee, who was not a party to the suit, intervened in execution, alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognising the priority of the decree-holder's lien and giving to the second mortgagee the opportunity of discharging it. No suit was brought to question this order. The first mortgage was not paid off and the mortgage premises were brought to sale. The purchaser, who was the first mortgagee, now sued for possession of the land and his claim was resisted by the second mortgagee:—*Held*, (1) that the non-joinder of the present defendant in the suit on the mortgage constituted no bar to the present suit; (2) that the second mortgagee was estopped from now re-asserting his claim.

Krishnan v. *Chadayan Kutti Haji* 17

19. ——————————————————, s. 283—*Whether defendant may plead that the decree in question was collusively obtained:*

A defendant in a suit brought under section 283 of the Civil Procedure Code, who is connected with the judgment-debtor as being reversionary heir of the judgment-debtor's husband or as being his co-parcener, may show that the decree, in execution of which the property in dispute was attached, was collusively obtained. *Gulibai* v. *Jagannath Galvankar* (I.L.R., 10 Bom., 659) dissented from.

Naranayyan v. *Nageswarayyan* 389

20. ——————————————————, ss. 313, 315 and 316—*Execution sale—Portion of the property sold belonging to a stranger—Right of a purchaser in an execution sale:*

Where a Court-sale in execution of a decree is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by section 315 of the Civil Procedure Code. The effect of sections 313, 315 and 316 of the Code is that the right, title and interest of the judgment-debtor passes to the purchaser at a Court-sale subject, however, to the condition that the purchaser may recover back his purchase money when he finds that the judgment-debtor has no saleable interest at all. The implied warranty of title in respect of sales by private contract cannot be extended to Court-sales, except so far as such extension is justified by the processual law in India, viz., by section 315 of the Civil Procedure Code. *Dorab Ally Khan* v. *Abdool Azeez* (L.R., 5 I.A., 116) followed.

Sundara Gopalan v. *Venkata Varada Ayyangar* 228

21. ——————————————————, s. 317—*Effect of benami purchase, and purchase as execution-debtor's agent:*

Where the purchaser at an execution sale is the agent of the execution-debtor and buys the property as such, though he advances the purchase money on the understanding that he is to be repaid, a suit for possession of the property is maintainable by the latter against the former. Such a transaction is not a mere *benami* purchase, and is not a bar to such a suit under section 317 of the Civil Procedure Code.

Sankunni Nayar v. *Narayanan Numbudri* 282

22. ——————————————————, ss. 365, 367—*Representation of a deceased plaintiff:*

Section 365 of the Code of Civil Procedure presupposes that the party claiming to represent a deceased plaintiff is his legal representative, but, if the representative character is denied, or when two or more persons claim it, the procedure prescribed by section 367 of the Code should be followed.

Oula v. *Beepathee* 209

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23. ——————————————————, s. 503—*Appointment of a receiver by a Court under—Misappropriation by the receiver—Whether, subject to the receiver's liability, the creditor or judgment-debtor must bear the loss:*

In cases in which a receiver, appointed at the instance of the judgment-creditor under section 503 of the Code of Civil Procedure, misappropriates moneys collected by him, the decree is not satisfied *pro tanto*, but the loss falls on the estate or its owner, subject to the receiver's liability.

Orr v. *Muthia Chetti* 501

24. ——————————————————. ss. 510, 524—*Reference to arbitration—Refusal of person appointed arbitrator to act—Appointment of arbitrator by Judge under section* 510—*Effect of section* 524 *on such appointment:*

The words 'so far as they are consistent with any agreement so filed' in section 524 of the Code of Civil Procedure do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that a Judge may act in conformity to it, and that section 510 has otherwise no application. The reasonable construction is that the action of the Judge under section 510 should not be inconsistent with the agreement, if it contains any special provision on the subject.

Bala Pattabhirama Chetti v. *Seetharama Chetti* 498

25. ——————————————————, s. 539—*Whether a suit to remove a trustee to a charitable trust lies under the section:*

A suit to remove a trustee to a charitable trust does not lie under section 539 of the Code of Civil Procedure. *Narasimha* v. *Ayyan Chetti* (I.L.R., 12 Mad., 157) followed. *Per* SHEPHARD, J.—The language of section 539 is in part borrowed from 52 George III, cap. 101 (Sir Samuel Romilly's Act) and the decisions upon that statute are in a measure reproduced in the section. Section 539 should, accordingly, be construed in the light of the decisions on that statute, so far as they are applicable to the language of the section, and the statute having from the first been held to be inapplicable to cases in which the hostile removal of a trustee is required, section 539 is likewise inapplicable to such cases.

Rangasami Naickan v. *Varadappa Naickan* 462

26. ——————————————————, s. 544—'*Any ground common to all the plaintiffs or to all the defendants*':

Section 544 of the Civil Procedure Code presupposes a common ground of decision affecting property in which both those who have appealed and those who have not appealed have an interest direct or indirect. Thus a District Judge has no power under this section to reverse the decree of a Lower Court, given for a plaintiff in favour of a defendant who did not appeal, and in respect to property in which the other defendants who did appeal disclaim all interest. *Sriram Ghatak* v. *Braga Mohan Ghosal* (3 B.L.R., App., 41) and *Appa Rau* v. *Ratnam* (I.L.R., 13 Mad., 249) cited and followed. *Seshadri* v. *Krishnan* (I.L.R., 8 Mad., 192) and *Nagamma* v. *Subba* (I.L.R., 11 Mad., 197) distinguished.

Syed Hussain v. *Madan Khan* 265

27. ——————————————————, ss. 562, 566 and 582—*Order made on appeal to amend plaint:*

On appeal from the decision of a District Munsif in favour of the plaintiffs, in a suit for the recovery of rent, the District Judge set aside the decree of the Lower Court, ordered a new trial, and directed the amendment of the plaint by inserting the exact boundaries of the land on which the plaintiffs claimed the rent:—*Held*, that the order for amendment of the plaint was bad under section 562 of the Code of Civil Procedure, since the original Court had not 'disposed of the suit upon a preliminary point,' and that it was likewise bad under section 582, since there had been no dispute as to the boundaries of the land before the original Court. If the information was necessary, the District Judge should have sent down an issue on the point for trial under section 566 of the Code.

Krishnaya Navada v. *Panchu* 187

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28. ——————————————————, s. 566—*Remand for trial of a new issue—Malabar law—Mapillas :*

The karnavan of a tarwad in Malabar sued to recover property acquired by his sister (deceased) and now in the occupation of the defendants, her children. The parties were Mapillas. The defendants pleaded (i) that the property had been given to them and their mother jointly; (ii) that their mother was not governed by Marumakkatayam law. The Court of first instance found the first-mentioned plea to be good and dismissed the suit, and also found that the family was governed by Marumakkatayam law. The Court of first appeal dissented from the above finding as to the first plea, and, without deciding the second point, remanded the case for the trial of a general issue as to the mode of devolution of self-acquired property in Marumakkatayam Mapilla families in North Malabar, and ultimately it dismissed the suit, ruling that in Marumakkatayam Mapilla families the self-acquired property of a female descends to her children and does not lapse on her death to her tarwad :—*Held*, that the order of remand was not one which should have been made under Civil Procedure Code, s. 566, and the proceedings taken under it were irregular. Observations as to the law applicable to Mapillas.

Illika Pakramar v. *Kutti Kunhamed* 69

29. ——————————————————, s. 583—*Execution of decree—Payment of decree amount by one defendant—Reversal of decree on appeal by another defendant—Right to refund :*

In a suit for rent, together with interest thereon, brought by a mortgagee against a tenant in occupation of the mortgage premises, one claiming title against the mortgagee was joined as second defendant. The suit was dismissed in the Court of first instance, but the Court of first appeal passed a decree as prayed in the plaint: and in execution the principal amount of the rent claimed, which had been paid into Court by the first defendant with the request that it should be paid out to the person entitled to it, was paid over to the plaintiff. The first defendant preferred a second appeal against the decree, so far as it awarded interest and costs: this second appeal was dismissed. The second defendant, however, preferred against the entire decree a second appeal which was successful, and the High Court dismissed the suit throughout. On an application by the first defendant for refund of the money paid by him as stated above :—*Held*, that the applicant was not entitled to the refund claimed.

Kassim Sahib v. *Luis* 82

30. ——————————————————, ss. 588 (17), 589—*Appeal from insolvency order—Act VII of* 1888, *s.* 56—*Act X of* 1888, *s.* 3, *cl.* (*a*) :

Bearing in mind that section 589 of the Code of Civil Procedure was passed to regulate the appellate jurisdiction in appeals from orders, the words 'Court subordinate to that Court' in section 3 of Act X of 1888 must be construed with reference to its appellate jurisdiction. Consequently a District Court has no jurisdiction to hear an appeal from an order in insolvency matters, in a case where it has no jurisdiction to hear an appeal in the suit itself, as when the subject-matter of the suit is more than Rs. 5,000 in value.

Venkatrayer v. *Jamboo Ayyan* 377

31. ——————————————————, s. 622—*Land Acquisition Act—Act X of* 1870, *ss.* 3, 24, 25, 29 *and* 34—*'Material irregularity'—Mistake in regard to the principal of calculation of the value of the land acquired :*

If a Judge and assessors, sitting to determine the amount of compensation to be awarded for land acquired under the Land Acquisition Act of 1870, have refused to take into consideration any of the matters prescribed by section 24 of that Act, or have improperly taken into consideration any of the matters prohibited by section 25 thereof, such procedure would amount to material irregularity in the exercise of their jurisdiction, and would justify the intervention of the High Court under section 622 of the Code of Civil Procedure. Having regard to the definition of 'land' contained in section 3 of Act X of 1870, there is nothing illegal in a Judge taking into account the value of works on the land which make it suitable for a salt factory; and even if, in making his estimate of the market value of the land, he took into consideration the price paid for neighbouring pans, and was in error in so doing, his mistake would be only one concerning the principles of valuation and not an irregularity in the exercise of jurisdiction.

Joseph v. *The Salt Company* 371

32. ——————————————————, s. 622—*Power to call for record of cases not appealable to High Court—When a Court can be said 'to have acted in the exercise of its jurisdiction illegally or with material irregularity' :*

A District Judge disposed of some suits on a point taken by himself on appeal, without affording the parties an opportunity of proving what was necessary to meet the point, and admitted other appeals after they had become time-barred :—*Held*, that where a Subordinate Court, having applied its mind to a question of law or procedure, arrives at an erroneous decision, such decision is not by itself any ground for the exercise by a High Court of the powers given by section 622 of the Code of Civil Procedure. *Amir Hassan Khan* v. *Sheo Baksh Singh* (I.L.R., 11 Calc., 6) followed :—*Held*, further (BEST and DAVIES, JJ., *dissentiente*), that the case contemplated by the words 'act . . . illegally or with material irregularity' in section 622 of the Code of Civil Procedure is that of a perverse decision on a question of law or procedure, a decision being perverse where it is a conscious departure from ome rule of law or procedure. *Per* BEST, J.—The words in question of section 622 of the Code are applicable to illegalities or irregularities which are the result merely of ignorance of law or carelessness, and the disposal of a suit on a point taken by the Court itself on appeal, without affording the parties an opportunity of proving what is necessary to meet the point, is an irregularity in procedure within the meaning of section 622, and that the inadvertent admission of an appeal that is time-barred is an illegality in procedure within the meaning of that section. *Per* DAVIES, J.—The clause of section 622 in question is applicable only to errors of procedure, and it is not in every case that the High Court would, in the exercise of the discretionary power granted it by the section, interfere in revision. The interference would be confined to cases where the illegality or irregularity was such as had occasioned or might occasion a substantial failure of justice, as in the present case.

Kristamma Naidu v. *Chapa Naidu* 410

CONTRACT—*Executory contract involving personal considerations—Assignment—Contract consisting of distinct contracts with separate parties—Misjoinder of the parties as defendants in one suit—Grant of relief that was not prayed for—Damages—Liquidated rate of damages applicable to certain specified breaches of contract only :*

Seven salt manufacturers, the defendants, contracted with A to manufacture and store in their factory in the name of and for the benefit of A such quantities of salt as he might require them to manufacture each season for seven years, in consideration of A's paying them at the rate of Rs. 11-8-0 per garce of salt, four months' credit after each delivery being allowed to A, and of his paying Government taxes and dues, and executing all but petty repairs in the defendants' factory. B was a party with A to the contract though he was not expressly mentioned therein. A assigned his share in the contract to C. B, as first plaintiff, and C, as second plaintiff, brought a suit against the defendants alleging that the defendants had failed to fulfil their part of the contract during the second year of its continuance (1886) and praying (1) that all the defendants be directed to deliver to the plaintiffs the salt collected during 1886; (2) that defendants 2, 4 and 7 should be held liable for any damages plaintiffs might suffer through a fall in the price of salt. The Court of first instance, having held that the contract contained seven separate and distinct contracts, each defendant having contracted with reference to his own pans only, decreed (1) that the seven defendants should pay damages at the rate of Rs. 5-12-0 per garce for the salt collected by each during the years 1886 to 1889, leaving the quantity to be ascertained in the execution of the decree; (2) that the defendants should pay the plaintiffs' costs. On appeal the District Judge modified the decree by fixing the rate of damages at Rs. 45-10-0 for each garce of salt :—*Held*, on appeal, (1) that A was not competent to assign his interest in the contract to the second plaintiff, since the contract was based on personal considerations

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and that the assignment of it as an executory contract was invalid without the consent of the defendants. *Farrow* v. *Wilson* (L.R., 4 C.P., 744), *Humble* v. *Hunter* (12 R.B., R.P., 310), *Arkansas Valley Smelting Company* v. *Belden Mining Company* (127 U.S R., 379) followed; (2) that the suit was bad for misjoinder, since the case of each defendant, as a party to a distinct contract, should be decided on its own merits; (3) that the decrees of the Lower Courts were bad in making all the defendants jointly and severally liable for costs, and for damages for other years than the year 1886, and in not ascertaining the amount of damages payable by each defendant; (4) that the measure of damages was what the plaintiffs had lost by the breach of contract, but that the Lower Appellate Court was wrong in applying the rate fixed on this principle to each defendant without ascertaining the particular nature of the breach of which each defendant was guilty.

Namasivaya Gurukkal v. *Kadir Ammal* 168

3. ——————*Promissory note or bond executed in Foreign State—Liability determined by* lex loci contractus—*Suit upon consideration for the document*—Lex fori:

Where, according to the *lex loci contractus*, a promissory note or bond cannot, in the absence of registration, be a source of legal right, no action on an unregistered note or bond can be maintained. Whether a suit will lie upon the consideration for the instrument is a question of procedure, to be governed by the *lex fori*, and in British India such a claim must either be stated in the plaint as an independent ground of claim, or treated as such and an issue taken at the first hearing. *Valiappa* v. *Mahomned Khasim* (I.L.R., 5 Mad., 166) cited and followed.

Palaniappa Chetti v. *Periakaruppan Chetti* 262

3. ——————*Undue influence—Acquiescence by conduct—Lease for one year at a rental of more than Rs.* 100—*Registration—Registration Act—Act III of* 1877, *s.* 17—*Transfer of Property Act—Act IV of* 1882, *ss.* 4 *and* 107:

Where the owner of certain land exchanges it for certain other land, but takes a lease for one year of the former land and pays the rent thereof, and receives and retains the rents of the land he has acquired by the exchange, he shows so complete an acquiescence in the transaction that he cannot afterwards have it set aside on the ground of undue influence. The fact that such a lease recites the fact of the exchange of the lands does not evidence the exchange, and as such create a title in land. Nor does the fact that the rent reserved under the lease is more than Rs. 200 create an interest in land of Rs. 100 and more in value so as to necessitate registration of the lease under section 17 of the Registration Act. Such a lease falls under section 107 of the Transfer of Property Act, the provisions of which section are, by section 4 of the Act, supplemental to the Registration Act.

Seetharama Raju v. *Bayanna Pantulu* 275

CONTRACT ACT—ACT IX OF 1872, s. 23—*Marriage brokage contract—Public policy—Hindu law:*

An agreement to assist a Hindu for reward in procuring a wife is void as being contrary to public policy.

Vaithyanatham v. *Gangarazu* 9

2. ——————————, **s. 30**—*Contracts to buy and sell Government promissory notes—Whether wagering contracts or not—Admissibility of oral evidence to contradict the nature of a contract in writing—Evidence Act—Act I of* 1872, *s.* 92:

A, on various occasions, agreed to sell to B (a sowcar) certain amounts of Government of India promissory notes, amounting in all to 4½ lakhs, for delivery on the following 30th of November. On the 28th of November B agreed to sell and A to buy 4½ lakhs worth of the notes for delivery on the 30th of November. A did not perform his contract to sell, and B sued him for damages, amounting to Rs. 7,109-6-0, being the difference between the price at which he (B) had agreed to buy, and the price at which he had agreed to sell. A denied that the transactions were *bonâ fide* contracts made in the ordinary way of business, and pleaded that the real contract was only to pay differences as ascertained by the price of the Government paper on the 30th

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of November, and that such a contract being by way of wager, was void under section 30 of the Indian Contract Act:—*Held*, per DAVIES, J., that neither party intended *bonâ fide* purchases and sales for delivery, and that, therefore, the contract was void as a wagering contract:—*Held on appeal* (1), that the burden of proof that the agreements were wagers, *i.e.*, that they were not in substance what they were in form, lay on A, as the party so alleging; (2) that oral evidence is admissible to show that an agreement in writing to sell is really only an agreement by way of wager. (*See* Indian Evidence Act, s. 92). *Anupchand Hemchand* v. *Champsi Uyerchand* (I.L.R., 12 Bom., 585), followed, *Juggernath Sew Bax* v. *Ram Dyal* (I.L.R., 9 Calc., 791), dissented from; (3) *per* MUTTUSAMI AYYAR, J., that, it being proved on the evidence that it was the defendant's intention at the time he contracted to sell to pay differences only, the plaintiff either knew of this intention or he did not. In the former case the contract was a wager and therefore void, and in the latter there was no *consensus* as to a matter which was of the essence of the contract, and therefore no valid contract; (4) *per* BEST, J., that a contract is not a wagering contract unless it is the intention of *both* parties at the time of entering into the contract not to call for or give delivery from or to each other (see *Tod* v. *Lakshmidas Purshotamdas*, I.L.R., 16 Bom., 441) and *Grizewood* v. *Blane* (11 C.B., 526), and that no such common intention having been proved the contract was a valid one.

Eshoor Doss v. *Venkatasubba Rau* 480

3. ——————————*Contracts to buy and sell Government promissory notes—Whether wagering contracts or not—Contracts for payment of differences only:*

A having on various occasions sold certain amounts of Government promissory notes to B, aggregating on the whole to 2½ lakhs, for delivery on 30th November 1891, B on the 28th of November sold the same amount to A for delivery on the 30th November. On that day B, through his attorneys, called upon A to retain the 'paper' contracted to be sold by A to B in respect of that contracted to be sold by B to A, and to pay the differences in the prices of the two contracts to B, and subsequently sued him for the amount:—*Held*, per DAVIES, J., that B had admitted that the original contract sued on was for payment of differences only, and that it was a wagering contract, and therefore void:—*Held*, on appeal, *per* MUTTUSAMI AYYAR, J., that the above judgment should be confirmed; *per* BEST, J., that on the evidence it was not proved that at the time of entering into the original contract the intention of both parties was merely for payment of differences, and that consequently the contract was not a wagering contract, but a valid one.

Venkatachella Chetti v. *Venkata Subba Rau* 496

4. ——————————, **ss. 45, 263**—*Suit by surviving member of a firm alone—Succession Certificate Act—Act VII of* 1889, *s.* 4—*Suit by surviving partner and heir of deceased partner:*

In a suit on a promissory note made by the defendant in favour of two Hindus carrying on business in partnership, it appeared that one of the partners was dead, and no succession certificate or letters of administration had been obtained. The plaintiffs were the surviving partners and the undivided sons of the deceased partner:—*Held*, that a surviving partner can sue alone for the recovery of a partnership debt:—*Held further*, that such a suit may be maintained by a surviving partner jointly with the heir of the deceased partner, in which case a certificate of heirship will be necessary, unless it appears on the face of the document sued on that the debt is a co-parcenary debt.

Vidyanatha Ayyar v. *Chinnasami Naik* 108

5. ——————————, **s. 74**—*Penal sum—Mortgage—Extinguishment of encumbrances—Suit by puisne encumbrancer—Decree for sale:*

In March 1881 A purchased certain land and, in the same month, mortgaged it to B. In June the land was attached in execution of a decree. In August A discharged the judgment-debt with money borrowed from C, and he hypothecated the land to him to secure repayment of the loan. In 1882 B brought a suit on his mortgage and obtained a decree, in execution of which the land was brought to sale and purchased by him: C was not

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a party to this suit. In 1886 B sold the land to D under an instrument, which recited that out of the purchase-money Rs. 760 were retained by the purchaser for payment of prior encumbrances, and the finding was that the purchaser undertook to pay the debt owing to C. C now sued A and D to enforce his hypothecation :—*Held*, that C was entitled to a decree for sale. A stipulation in a bond that if the sum secured is not repaid with interest at 12 per cent. on a certain date, the interest shall be at 18 per cent. from the date of the bond is not unenforceable.

Narayanasami Naidu v. *Narayana Rau* 62

6. ——————————, **ss. 151, 152, 161**—*Liability of Railway Companies as bailees—Railways Act—Act IX of* 1890, *ss.* 72, 76—*Carrier's Act—Act III of* 1865 :

Subject to the provisions of Act IX of 1890, the responsibility of Railway Companies for loss of goods delivered to them for carriage is that of a bailee under sections 151, 152 and 161 of the Indian Contract Act. In a suit for damages occasioned by such a loss the plaintiff need not prove how the loss occurred, but on proof of the loss, the Company will, in absence of proof of any ground upon which it can be exonerated, be liable as a bailee.

Sesham Patter v. *L. S. Moss* 445

CONTRIBUTION, SUIT FOR—*Joint tort-feasor—Adjustment of a loss arising from an illegal contract :*

A deed of partition between A and B, members of an undivided Hindu family, provided that A, who took over all the debts due to the family, should bear the loss, if any, incurred in the appeal then pending in a suit brought by the family on a bond. The bond was held to evidence a fraudulent transaction, and the appeal was dismissed with costs. The decree for costs was executed against B and satisfied by him : he now sued the son of A (deceased) to recover the amount paid by him :—*Held*, that the plaintiff was entitled to recover, the claim not being barred by the rule against contribution between joint tort-feasors.

Lakshmana Ayyan v. *Rangasami Ayyan* 78

COSTS—*Infant—Minor—Next friend—Solicitor's costs for proceedings undertaken on the next friend's instructions—Repudiation of the proceedings by the minor on attaining majority :*

A solicitor cannot recover the costs of litigation incurred by the next friend of a minor on his behalf from the *quondam* minor, who, on coming of age, repudiates the proceedings, there being no relation of contract between them. Assuming that the legal proceedings were in the nature of necessaries, the next friend is the person responsible to the solicitor. *Watkins* v. *Dhunnoo Baboo* (I.L.R., 7 Calc., 140) distinguished.

Branson v. *Appasami* 257

2. ——————*Suit against Secretary of State in Council—Dismissal of suit with costs—Review of taxation—Remuneration of the Advocate-General and Government Solicitor by fixed salaries—Liability of party condemned in costs :*

Assuming that the arrangement between the Government and its Solicitor is that the latter should receive a salary and in addition the costs awarded to Government, this arrangement cannot affect a third party condemned in costs ; neither is it illegal or contrary to public policy.

Muhammed Alim Oollah Sahib v. *The Secretary of State for India* 162

CRIMINAL PROCEDURE CODE—ACT X OF 1882, ss. 4, 488—'*Adultery*'—*Penal Code—Act XLV of* 1860, *s.* 497 :

A wife petitioned for maintenance for herself and child against her husband under section 488 of the Criminal Procedure Code. The husband did not refuse to maintain his wife, but the petitioner refused to live with him as he kept a concubine :—*Held*, that the word 'adultery' in section 488 of the Criminal Procedure Code must, by virtue of section 4 of the Code, be construed with reference to the definition of the term in section 497 of the Indian Penal Code. Consequently a husband's immorality which does not amount to 'adultery' or involve the degradation of a married woman being

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brought into the society of a concubine is not sufficient ground for a wife's refusal to live with her husband. An offer to maintain a wife must be an offer to maintain with the consideration due to her position as a wife. *Marakkal* v. *Kandappa* (I.L.R., 6 Mad., 371) cited. *Per* BEST, J.—It is very doubtful if the framers of section 488 of the Code of Criminal Procedure intended the word 'adultery' as used therein to have the limited meaning given to it in the Penal Code. The wrong done to the wife is in no way affected by the circumstance of her husband's concubine being married or unmarried or, in case of her being married, whether it is with or without her husband's consent or collusion that she is living in such concubinage. In face, however, of section 4 of the Criminal Procedure Code, no other interpretation of the term 'adultery' is possible than the limited interpretation contained in the Penal Code.

Queen-Empress v. *Mannatha Achari* 260

2. ——————————————————, **ss. 531, 532 and 537**—*Commitment to Sessions Court by Magistrate having no jurisdiction over place where alleged offence was committed—Exercise of powers duly conferred :*

A Magistrate who commits a case for trial by a Sessions Court, does so in the exercise of powers duly conferred upon him, and the fact that he had no territorial jurisdiction over the place where the alleged offence was committed, and that an objection to the committal on this ground was taken before the commitment, is no ground for the Court to which the commitment is made quashing it under section 532 of the Criminal Procedure Code. *The Queen-Empress* v. *James Ingle* (I.L.R., 16 Bom., 200) followed.

Queen-Empress v. *Abbi Reddi* 402

DAMAGES :

See CONTRACT (1).

DEFAMATION—*Privilege of Judge :*

An action for defamation cannot be maintained against a Judge for words used by him whilst trying a cause in Court even though such words are alleged to be false, malicious and without reasonable cause.

Raman Nayar v. *Subramanya Ayyan* 87

DHARMAKARTAS OR HEADMEN OF A ROMAN CATHOLIC CHURCH—*Legal powers thereof :*

The appointment of a committee of headmen or dharmakartas in a Roman Catholic Church by the Bishop to assist the vicar in the secular affairs of the church gives the members of such committee no right to close the church or oust the vicar, and still less to appoint a priest not under the discipline and obedience to the Church of Rome.

Marian Pillai v. *Bishop of Mylapore* 447

DISTRICT MUNICIPALITIES ACT (MADRAS)—ACT IV OF 1884, ss. 53, 59, 69—*Letters Patent of the High Court, s.* 15—*Appeal—Profession tax—Trader—Provincial Small Cause Courts Act—Act IX of* 1887, *ss.* 25, 27 :

A petition for revision preferred under Provincial Small Cause Courts Act, s. 25, was heard and dismissed by one of the Judges of the High Court acting under the rules of Court framed under section 13 of the Charter Act. The petitioner preferred an appeal under Letters Patent, s. 15 :—*Held*, that the appeal was not barred under Provincial Small Cause Courts Act, s. 27, and was maintainable. One who makes it his business to sell the produce of his own land for profit is a trader within the meaning of Madras Act IV of 1884, provided the sales are conducted in a shop or place of business :—*Held by* PARKER, J., that one who has paid profession tax as a Sheristadar in one municipality is not on that account exempted from paying a further tax in respect of a trade carried on by him in another municipality under Act IV of 1884, Madras.

Venkata Reddi v. *Taylor* 100

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2. ——————————————————, s. 55—*Profession tax—What amounts to an exercise of profession or the holding of office under the section :*

An officer, whose head-quarters are within a Municipality, does not *ipso facto* exercise his profession or hold such office or appointment within the Municipality so as to render himself liable for the payment of profession tax under Madras Act IV of 1884. Accordingly an officer who is not personally present at his head-quarters in the course of duty for a period of sixty days in the half-year is not liable for the tax under section 55 of the Act.

Chairman, Ongole Municipality v. *Mounsey* 453

DIVORCE—*Caste custom—Whether immoral and therefore invalid or not :*

There is nothing immoral in a caste custom by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expenses of the latter's original marriage (*parisam*).

Sankaralingam Chetti v. *Subban Chetti* 479

DIVORCE ACT—ACT IV OF 1869, s. 7—*Nature of the marriages contemplated by the Act—Monogamous marriage :*

The petitioner and his wife married according to the rites of the Hindu religion. The wife subsequently left her husband and lived in adultery with another man. Both the husband and wife subsequently became Christians, but the wife continued to live in adultery. The husband sued under Act IV of 1869 for the dissolution of the marriage:—*Held* that, having regard to section 7, the marriages contemplated by the Act are those founded on the Christian principle of a union of one man and one woman to the exclusion of others, and that consequently the Act does not contemplate relief in cases where the parties have been married under the rites of Hindu law, a Hindu marriage not being a monogamous one. *Hyde* v. *Hyde* (L.R., P. & D., 130) and *Brinkley* v. *Attorney-General* (L.R., 15 P.D., 76), cited and followed. *Gobardhan Dass* v. *Jasadamoni Dassi* (I.L.R., 18 Calc., 252), dissented from.

Thapita Peter v. *Thapita Lakshmi* 235

ESTOPPEL—*Civil Procedure Code, ss.* 278, 283—*Transfer of Property Act—Act IV of* 1882, *s.* 85—*Non-joinder of puisne mortgagee in a mortgage suit—Mortgage decree—Claim in execution to mortgage premises :*

A mortgagee sued on his mortgage and obtained a decree against the mortgagor for the principal, together with the interest accrued due thereon, and for the sale of the mortgage premises in default of payment. A second mortgagee, who was not a party to the suit, intervened in execution, alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognising the priority of the decree-holder's lien and giving to the second mortgagee the opportunity of discharging it. No suit was brought to question this order. The first mortgage was not paid off and the mortgage premises were brought to sale. The purchaser, who was the first mortgagee, now sued for possession of the land and his claim was resisted by the second mortgagee:—*Held*, (1) that the non-joinder of the present defendant in the suit on the mortgage constituted no bar to the present suit; (2) that the second mortgagee was estopped from now re-asserting his claim.

Krishnan v. *Chadayan Kutti Haji* 17

2. ——————————*Evidence—Limitation of the doctrine in respect to a party suing as the representative of another—Stamp Act—Act I of* 1879, *s.* 39—*Whether secondary evidence of a lost document can be admitted on payment of penalty :*

Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by any one except that other person. In the case of a lost document no penalty can be levied and secondary evidence admitted, for section 39 of the Stamp Act presupposes that the document on which a penalty can be paid is forthcoming. *Kopasan* v. *Shamu* (I.L.R., 7 Mad., 440), followed.

Ranga Rau v. *Bhavayammi* 473

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3. ——————————*Execution—Fraud in conducting a sale in contravention of agreement between creditor and debtor—Estoppel of judgment-debtor by previous petition :*

The fact that a judgment-debtor, who petitions to have the sale in execution of the decree against him set aside on the ground of fraud and irregularity, has, in a petition made previous to the sale asking for its adjournment, made mention of the irregularities now relied on does not create an estoppel. *Thakoor Mahatab Deo* v. *Leelanund Singh* (I.L.R., 7 Calc., 613), followed.

Raman v. *Kunhayan* 304

EVIDENCE—*Estoppel—Limitation of the doctrine in respect to a party suing as the representative of another—Stamp Act—Act I of* 1879, *s.* 39—*Whether secondary evidence of a lost document can be admitted on payment of penalty :*

Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by any one except that other person. In the case of a lost document no penalty can be levied and secondary evidence admitted, for section 39 of the Stamp Act presupposes that the document on which a penalty can be paid is forthcoming. *Kopasan* v. *Shamu* (I.L.R., 7 Mad., 440), followed.

Ranga Rau v. *Bhavayammi* 473

EVIDENCE ACT—ACT I OF 1872, ss. 17, 18—*Sale of mittah for arrears of revenue—Purchase by Government—Subsequent sale by Government—Suit by owner of a share in the mittah for cancellation of second sale—Revenue Recovery Act (Madras)—Act II of* 1864, *ss.* 38, 59—*Limitation :*

The plaintiff was the owner of a share in a mittah which was sold on 15th February 1886 for arrears of revenue and bought by Government, who, on 16th June 1886, sold it to the first defendant, notifying the resale in the form prescribed under Madras Act II of 1864. The first defendant subsequently resold portions of the mittah to defendants 3 and 5 to 8. The plaintiff sued for cancellation of the second sale so far as his share was concerned, instituting a suit for this purpose on 31st March 1890:—*Held*, (1) that the sale of 16th June 1886 was not a sale under section 38 of Act II of 1864, although the notification of the sale was in the form prescribed by that Act, but a sale by Government of property that had become its own by reason of the purchase at the prior sale of 15th February; (2) that even assuming the sale of 16th June 1886 to have been a sale under section 38 of Act II of 1864, the suit was time-barred under section 59 of that Act, since it should have been brought within six months from the date of plaintiff's majority, viz., 29th November 1888, as proved by his horoscope, which had been a public record from a period *ante litem motam*, was relied upon by the defendants in the present suit, and was put in as an 'admission' under the Indian Evidence Act, ss. 17 and 18. *Ram Narain Kallia* v. *Monee Bibee* (I.L.R., 9 Calc., 613) and *Satis Chunder Mukhopadhya* v. *Mohendro Lal Pathuk*, (I.L.R., 17 Calc., 849) distinguished; (3) that the limitation prescribed by section 59 of Madras Act II of 1864 is applicable to sales which are illegal by reason of contravening some express law, as well as to sales which are irregular. *Gobind Lal Roy* v. *Ramjanam Misser* (I.L.R., 21 Calc., 70) relied on.

Raja Goundan v. *Raja Goundan* 134

2. ——————————————————, s. 92—*Contract Act—Act IX of* 1872, *s.* 30—*Contracts to buy and sell Government promissory notes—Whether wagering contracts or not—Admissibility of oral evidence to contradict the nature of a contract in writing :*

A, on various occasions, agreed to sell to B (a sowcar) certain amounts of Government of India promissory notes, amounting in all to 4½ lakhs, for delivery on the following 30th of November. On the 28th of November B agreed to sell and A to buy 4½ lakhs worth of the notes for delivery on the 30th of November. A did not perform his contract to sell, and B sued him for damages, amounting to Rs. 7,109-6-0, being the difference between the price at which he (B) had agreed to buy, and the price at which he had agreed to sell. B denied that the transactions were *bonâ fide* contracts made in the ordinary way of business, and pleaded that the real contract was only to pay differences as ascertained by the price of the Government paper on

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the 30th of November, and that such a contract being by way of wager, was void under section 30 of the Indian Contract Act:—*Held, per* DAVIES, J., that neither party intended *bonâ fide* purchases and sales for delivery, and that therefore, the contract was void as a wagering contract:—*Held on appeal* (1), that the burden of proof that the agreements were wagers, *i.e.*, that they were not in substance what they were in form, lay on A, as the party so alleging; (2) that oral evidence is admissible to show that an agreement in writing to sell is really only an agreement by way of wager. (*See* Indian Evidence Act, s. 92). *Anupchand Hemchand* v. *Champsi Ugerchand* (I.L.R., 12 Bom., 585), followed, *Juggernauth Sew Buz* v. *Ram Dyal* (I.L.R., 9 Calc., 791), dissented from; (3) *per* MUTTUSAMI AYYAR, J., that, it being proved on the evidence that it was the defendant's intention at the time he contracted to sell to pay differences only, the plaintiff either knew of this intention or he did not. In the former case the contract was a wager and therefore void, and in the latter there was no *consensus* as to a matter which was of the essence of the contract, and therefore no valid contract; (4) *per* BEST, J., that a contract is not a wagering contract unless it is the intention of *both* parties at the time of entering into the contract not to call for or give delivery from or to each other (see *Tod* v. *Lakshmidas Purshotamdas*, (I.L.R., 16 Bom., 441) and *Grizewood* v. *Blane* (11 C.B., 526), and that no such common intention having been proved, the contract was a valid one.

Eshoor Doss v. *Venkatasubba Rau* 480

EXECUTION—*Fraud in conducting a sale in contravention of agreement between creditor and debtor—Estoppel of judgment-debtor by previous petition:*

The fact that a judgment-debtor, who petitions to have the sale in execution of the decree against him set aside on the ground of fraud and irregularity, has, in a petition made previous to the sale asking for its adjournment, made mention of the irregularities now relied on does not create an estoppel. *Thakoor Mahatab Deo* v. *Leelanund Singh* (I.L.R., 7 Calc., 613), followed.

Raman v. *Kunhiyan* 304

2. ——————*Widow in possession of her late husband's land—Sale of the land in execution of a personal decree obtained against the widow—Suit by the nephew and reversioner of the deceased husband to recover the land from the purchaser:*

A Hindu widow sued to recover certain land which belonged to her late husband from his brother. The suit was compromised by means of a razinamah, one of the terms of which was that the widow should remain in possession of and enjoy the property, but should not alienate it without the brother's permission. Subsequently a personal decree was obtained against the widow, and the land being sold in execution, was purchased by the defendant in the present suit, in which the first plaintiff was the nephew and reversioner of the deceased husband:—*Held*, that the suit against the widow being on a personal claim, only her limited interest in the property was sold in execution, and that consequently the plaintiff was entitled to the property. *Jugul Kishori* v. *Jotendro Mohun* (I.L.R., 10 Calc., 985), distinguished, and the principle in *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (L.R., 2 I.A., 275; s.c. I.L.R., 1 Calc., 133) applied.

Narana Maiya v. *Vasteva Karanta* 208

EXECUTION SALE—*Portion of the property sold belonging to a stranger—Civil Procedure Code—Act XIV of* 1882, *ss.* 313, 315, *and* 316—*Rights of a purchaser in an execution sale:*

Where a Court-sale in execution of a decree is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by section 315 of the Civil Procedure Code. The effect of sections 313, 315 and 316 of the Code is that the right, title and interest of the judgment-debtor, passes to the purchaser at a Court-sale subject, however, to the condition that the purchaser may recover back his purchase money when he finds that the judgment-debtor has no saleable interest at all. The implied warranty of title in respect of sales by private contract cannot be extended to Court-sales except so far as such extension is justified by the processual law in India, viz., by section 315 of the Civil Procedure Code. *Dorab Ally Khan* v. *Abdool Azeez* (L.R., 5 I.A., 116), followed.

Sundara Gopalan v. *Venkata Varada Ayyangar* 228

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FOREST ACT (MADRAS)—ACT V OF 1882, ss. 2, 4, 10 and 14—*Claim to percentage of forest income—Pensions Act—Act XXIII of* 1871, *s.* 4—*'Civil Court'—Jurisdiction of Forest Settlement Officer—Jurisdiction of Appellate Court:*

A claim to a percentage of forest income is not a claim to forest produce under Madras Act V of 1882, nor is it a claim to a right specified in section 4 of that Act. A Forest Settlement officer has no jurisdiction to entertain a suit in which such a claim is made, and such a suit brought by discharged forest karnams is barred by section 4 of the Pensions Act. A Forest Settlement officer is a 'Civil Court' for the purposes of the Pensions Act. If a Court of limited jurisdiction exceeds its powers and adjudicates on a claim over which it has no jurisdiction, the Court (if any) which exercises appellate jurisdiction over it is bound to entertain an appeal preferred against the Lower Court's decision and to correct the error. A Court of competent appellate jurisdiction in such a case is not bound by an order made without jurisdiction by a Collector on an appeal to him in the same suit. Submission by the parties to his jurisdiction cannot give a Forest Settlement officer jurisdiction in a case where he has no inherent jurisdiction.

Secretary of State for India v. *Vydia Pillai* 193

GRANT OF PORTION OF IMPARTIBLE ZAMINDARI—*Construction of instrument of grant—Absolute grant—Creation of separate estate in favour of grantee as between him and grantor—Restriction in instrument contravening Hindu law of succession:*

In a suit for the recovery of possession of an estate, it appeared that the estate in question had formerly formed a portion of an impartible zamindari, but had been granted, in the year 1845, by the plaintiff's father to his younger brother, in whose name the estate was registered in the Collector's books as a separate estate. The instrument of grant provided (*inter alia*) that in case of failure of self-begotten male issue in the grantee's line, the immovable property of the grantee should be put in possession of the grantor's line. On the death of the first grantee, the property passed into the possession of his two sons, and on the death of the elder son it came into the possession of the younger son. On his death, without male issue, the estate passed into the possession of his widow, defendant in the present suit. The plaintiff contended that the grant made to respondent's father-in-law was a maintenance grant; that under its terms the estate reverted to his father (now deceased) on the death of respondent's husband, when there was a failure of male heirs in his branch; and that, notwithstanding the grant, the members of the two branches did not cease to be coparceners, and that consequently the right of survivorship of the plaintiff attached to the exclusion of the defendant:—*Held*, that, on the construction of the instrument of grant, the estate became, by virtue of that instrument, the separate and absolute property of respondent's branch of the family, and that the provision in that instrument purporting to create a special right of reversion in case of failure of female issue contravened the principle laid down in the Tagore case and was inoperative.

Sri Raja Rau Venkata Kumara Mahipati Surya Rau v. *Sri Raja Rau Chellayammi Garu* 150

GUARDIAN AND WARD—*Guardian's power to acknowledge a debt due by the minor, when not barred by limitation at the date of the acknowledgment:*

A guardian has authority to acknowledge a debt on the part of the minor, provided that the debt is not barred by limitation at the date of the acknowledgment. *Chinnaya* v. *Gurunatham* (I.L.R., 5 Mad., 169), followed. *Wajibun* v. *Kadir Buksh* (I.L.R., 13 Calc., 235) disapproved.

Sobhanadri Appa Rau v. *Sriramulu* 221

HEREDITARY OFFICE—*Regulation VI of* 1831 (*Madras*), *s.* 3—*Jurisdiction of Revenue Courts:*

A suit for 'Maniam' lands attached to the hereditary office of village carpenter is barred by the operation of section 3 of Regulation VI of 1831.

Palamalai Padayachi v. *Shanmuga Ausari* 302

HINDU LAW—*Attachment before judgment—Suit against one member of undivided Hindu family—Death of defendant before decree—Right of survivorship:*

Where, in a suit against one member of an undivided Hindu family, not as representing the family, there is an attachment before judgment of family

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property, and the defendant dies before decree is passed, the right of survivorship takes effect before the attachment becomes effectual for the purpose of execution. *Sadayappa* v. *Ponnama* (I.L.R., 8 Mad., 554) followed.

Ramanayya v. *Rangappayya* 144

2. ———*Contract Act—Act IX of* 1872, *s.* 23—*Marriage brokage contract—Public policy:*

An agreement to assist a Hindu for reward in procuring a wife, is void as being contrary to public policy.

Vaithyanatham v. *Gangarazu* 9

3. ———*Grant of portion of impartible Zamindari—Construction of instrument of grant—Absolute grant—Creation of separate estate in favour of grantee as between him and grantor—Restriction in instrument contravening Hindu law of succession:*

In a suit for the recovery of possession of an estate, it appeared that the estate in question had formerly formed a portion of an impartible zamindari, but had been granted, in the year 1845, by the plaintiff's father to his younger brother, in whose name the estate was registered in the Collector's books as a separate estate. The instrument of grant provided (*inter alia*) that in case of failure of self-begotten male issue in the grantee's line, the immovable property of the grantee should be put in possession of the grantor's line. On the death of the first grantee, the property passed into the possession of his two sons, and on the death of the elder son it came into the possession of the younger son. On his death, without male issue, the estate passed into the possession of his widow, defendant in the present suit. The plaintiff contended that the grant made to respondent's father-in-law was a maintenance grant; that under its terms the estate reverted to his father (now deceased) on the death of respondent's husband, when there was a failure of male heirs in his branch; and that, notwithstanding the grant, the members of the two branches did not fail to be coparceners, and that consequently the right of survivorship of the plaintiff attached to the exclusion of the defendant:—*Held*, that, on the construction of the instrument of grant, the estate became, by virtue of that instrument, the separate and absolute property of respondent's branch of the family, and that the provision in that instrument purporting to create a special right of reversion in case of failure of female issue contravened the principle laid down in the Tagore case and was inoperative.

Sri Raja Rau Venkata Kumara Mahipati Surya Rau v. *Sri Raja Rau Chellayammi Garu* 150

4. ———*Illatom son-in-law—Inheritance—Survivorship:*

The father since deceased of the second defendant took into his family an illatom son-in-law, who died, leaving a son. After the death of the son, one of his two daughters (who were his only children) sued to recover a one-fourth share of the property left by the second defendant's father:—*Held*, that the plaintiff was entitled to recover, in the absence of proof of a custom by which the rights of the plaintiff's father should have passed by survivorship to the second defendant.

Malla Reddi v. *Padmamma* 48

5. ———*Illegitimate son—Maintenance:*

Under the Mitakshara law an illegitimate son is entitled to maintenance as long as he lives, in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. The maintenance decreed to an illegitimate son may be secured on the family property.

Ananthaya v. *Vishnu* 160

6. ———*Inheritance—Illatom adoption—Sapratibandha property:*

There is no evidence that the custom of *illatom* adoption exists among the Kondarazu caste of the Vizagapatam district. *Sapratibandha* (liable to obstruction) property vests in the heirs in existence at the time the inheritance opens, and is not subject to variation by the subsequent birth of any co-heir.

Narasimha Razu v. *Veerabhadra Razu* 287

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7. ———*Letters of administration—Promissory note given to a firm consisting of two undivided Hindu brothers—Decease of the brothers—Suit on note by their sons without taking out letters:*

Two brothers, members of an undivided Hindu family, who traded as 'T. Iyavier and Brother,' became the holders of a promissory note given to the firm. The elder brother having died, his son joined the firm in his place, and he and his uncle filed a suit against the maker of the note, but before the action was heard the uncle died, and his son (a minor) was substituted as plaintiff for him, suing by the other plaintiff as his next friend. The plaintiffs had not taken out letters of administration to their respective fathers' estates:—*Held*, (1) that assuming that the younger brother could have sued as surviving member of the firm, on his death the necessity for taking out letters of administration could not be avoided; (2) that, if the debt was in reality due to the plaintiffs' family and not to the obligees of the bond, they could not sue upon it in their own right of survivorship without taking out letters of administration, since the promissory note did not disclose the nature of the debt, and, moreover, the other members of the family should have been joined as plaintiffs. *Venkataramanna* v. *Venkayya* (I.L.R., 14 Mad., 377) distinguished.

Chockalinga Pillai v. *Natesa Ayyar* 147

8. ———*Liability of son for father's debts—Civil Procedure Code—Act XIV of* 1882, *ss.* 43, 244—*Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings—Limitation Act—Act XV of* 1877, *sched. II, arts.* 120, 122:

A personal decree on a mortgage was passed against a Hindu (the mortgagor) and his two sons on 19th October 1877. The decree provided for payment of the secured debt in various instalments by May 1895. The mortgagor died in 1883 having discharged part of the debt. The decree-holder having attached certain family property in execution, the mortgagor's two younger sons, who had not been born at the date of the above decree, objected that their shares were not liable to attachment. This objection prevailed, the Court expressing the opinion that the matter in controversy should be determined in a regular suit. The other defendants in the suit of 1877 had both died in the interval, one of them leaving infant sons. The decree-holder (in whose sole name the mortgage stood) now sued the sons of the mortgagor and their infant nephews in 1891 and obtained a decree for the payment out of the family property of all the unpaid instalments. A plea of non-joinder was raised, *inter alia*, on the ground that the plaintiff had an undivided brother:—*Held*, (1) that since the plaint (as amended) showed that the plaintiff sued as managing member of his undivided family, the omission to join his brother was a merely formal error and was not fatal to the suit; (2) that the plaintiff was not precluded from maintaining this suit against the sons of the mortgagor by Civil Procedure Code, s. 43 or s. 244; (3) that the period of limitation applicable to the suit was six years, and that time began to run for the purposes of limitation from the date when each instalment would have become due from the deceased judgment-debtor; that the plaintiff was entitled to a decree for payment out of the family property of all such instalments as would have so become due at the date of the suit, and for a declaration only as to the subsequent instalments.

Ramayya v. *Venkataratnam* 122

9. ———*Limitation—Adverse possession:*

The holder of an impartible zamindari died in 1822, leaving two widows and a daughter. The widows entered on the estate and having successfully resisted a suit for ejectment brought by the rightful heir (the present plaintiff's great grandfather) in 1824, they and the survivor of them retained possession till 1870, when the last surviving widow died, and the daughter entered. She or the Court of Wards, on her behalf, retained possession till her death, in 1882, when the first defendant came in as the nearest then surviving sapinda of the last male holder. The plaintiff, who was the son of the elder undivided brother (deceased) of the first defendant, now sued in 1891 to recover the zamindari from him:—*Held*, that the suit was barred by limitation.

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10. ———— *Maintenance—Forfeiture of widow's right to maintenance by reason of unchastity :*

The unchastity of a widow deprives her wholly of her right to maintenance, and the fact that there has been an agreement as to maintenance makes no difference. *Valu* v. *Ganga* (I.L.R., 7 Bom., 84) and *Vishnu Shambog* v. *Manjamma* (I.L.R., 9 Bom., 108), followed.

Nagamma v. *Virabhadra* 392

11. ———— *Maintenance—Suit to recover arrears of maintenance due under a personal decree, and to establish a charge for future maintenance on the family property :*

A Hindu widow obtained a personal decree against her father-in-law for maintenance. Her late husband's five brothers were made parties to the suit, but no personal decree was made against them, nor did the widow ask that her maintenance be made a charge on the family property. On the death of her father-in-law, the family property devolved on his sons and grandsons, who sold certain of the property. There were arrears of maintenance due, and the widow instituted the present suit, in which she asked for a decree establishing her right to receive maintenance for her life and for the arrears of maintenance on the responsibility of the property :—*Held* (1) that the maintenance not having been declared a charge upon the portion of the property which had been alienated, this property was free of any charge for her maintenance ; (2) that the arrears of maintenance constituted a personal debt of the plaintiff's deceased father-in-law, and that his sons and grandsons (the defendants) incurred his liability on his decease and were bound to discharge the same out of the family property ; (3) that the right to maintenance being enforceable against the defendants, the right to have it made a charge on the family property was enforceable along with it.

Bhagirathi v. *Anantha Charia* 268

12. ———— *Partition—Maintenance—Arrears of maintenance—Wrongful withholding :*

Where, in consequence of a suit for partition of the entire family property, a portion of the property is divided, but the remaining portion is declared impartible, the family remains undivided in respect to the latter portion. In a suit for arrears of maintenance it is incumbent on the plaintiff to prove that there has been a *wrongful* withholding of the maintenance to which he is entitled. *Jivi* v. *Ramji* (I.L.R., 3 Bom., 207), *Mahalakshmamma* v. *Venkataratnamma* (I.L.R., 6 Mad., 83), and *Sri Raja Satrucharla Jagannadha Razu* v. *Sri Raja Satrucharla Ramabhadra Razu* (I.L.R., 14 Mad., 240), followed.

Mallikarjuna Prasada Naidu v. *Durga Prasada Naidu* 362

13. ———— *Powers of the head of a caste in respect of caste customs—Jurisdiction of the Civil Courts :*

In a matter relating to caste customs over which the ecclesiastical chief has jurisdiction, and exercises his jurisdiction with due care and in conformity to the usage of caste, the Civil Courts cannot interfere. A guru, as head of a caste, has jurisdiction to deal with all matters relating to the autonomy of caste according to recognised caste customs. *The Queen* v. *Sankara* (I.L.R., 6 Mad., 381) and *Murari* v. *Suba* (I.L.R., 6 Bom., 725), cited and followed.

Ganapati Bhatta v. *Bharati Swami* 222

14. ———— , *Succession—Manu, Chapter IX, slokas* 122 *and* 125*—Rule of selection as between an elder son by a wife of an inferior class of caste and a junior son by a wife equal in caste—Dagger wife—Meaning of the term* bhoga strees*—Custom showing preference in succession for the sons by a senior wife to those by a junior wife—Nearness of blood as a ground of preference between brothers of the half and full blood, respectively :*

In case of disputed succession to indivisible property between sons who are born of mothers of the same caste but of different classes therein, the right of a junior son by a first married wife, if she be of higher class, is superior to that of an elder son of a wife of lower class. Thus, when a Sudra marries

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a woman of his caste but of an inferior class, as a dagger wife, in addition to his wife equal in caste to him, the rule of selection is in favour of his son by the latter, by reason of the mother being of a higher class. A valid custom prevails among the Kambla zamindars whereby the son by a senior wife has a prior right of succession to a son by a junior wife, although the latter may be the elder son, seniority referring to the date of the marriage and not the age of the wife. Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to coparcenary property which is partible, and it is likewise no ground of preference when such property is impartible. When, therefore, family property belongs to a coparcenary family consisting of two brothers of a deceased *propositus*—one of the whole blood and one of the half-blood—in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years.

Ramasami Kamaya Naik v. *Sundaralingasami Kamaya Naik* 422

15. ———— *Succession of a daughter's daughter to her grandfather's estate :*

On the principle laid down in *Nallanna* v. *Ponnal* (I.L.R., 14 Mad., 149) a daughter's daughter is, in the absence of preferential male heirs, entitled to succeed to her grandfather as a bandhu.

Ramappa Udayan v. *Arumugath Udayan* 182

16. ———— *Succession : whether under the Mitakshara law, nearness of blood is a ground of preference as between brothers of the half and full blood respectively in case of disputed succession to impartible coparcenary property—Representation of minor heirs as defendants by including a Collector as a defendant, as their guardian* ad litem*—Code of Civil Procedure—Act XIV of* 1882, *ss.* 13, 244, 312*—Powers of a Hindu son to question the alienation of an impartible estate by his father—Limitation—Suit to recover immovable family property unlawfully alienated during plaintiff's minority—Limitation Act, s.* 7, *illustration* (*b*), *and sched. II, arts.* 12, 44, 45, 120 *and* 144 :

Where a suit is brought to set aside a sale of immovable family property unlawfully alienated during the plaintiff's minority, it must be instituted within one year of the plaintiff's attaining his majority under schedule II, article 12 of the Limitation Act. Section 7 of that Act must be read together with each article in schedule II, and when the period prescribed by the latter extends to three years or more and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full three years. But when the period of limitation prescribed is less than three years, as in article 12, and the minor has that period from the date of his majority, the prescribed period is not to be enlarged to three years. In determining the right of succession to an impartible estate, the class of kindred from whom a single heir is to be selected should be first ascertained. Next, it should be seen whether family custom or kulachar discloses a special rule of selection, and, in default of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to general Hindu law. Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to coparcenary property which is partible, and it is likewise no ground of preference when such property is impartible. Where, therefore, the family property belongs to a coparcenary family consisting of all the brothers of the deceased *propositus*, whether of the whole or half-blood, in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years. Representation by a Collector of all minor sons of a deceased Zamindar as their guardian *ad litem*, under the order of the Court, the Collector being added as a defendant in the suit, is an adequate representation of all the sons even if the Collector could only treat, under Regulation V of 1804, the particular minor on whose behalf the Court of Wards was then managing the zamindari as their proper ward. Consequently, a suit brought by one of such minors, on his attaining majority, to set aside the sale of a portion of the zamindari property attached in execution of the decree given in the former suit, is barred by sections 136, 244 and 312 of the Code of Civil Procedure.

Subramanya Pandya Chokka Talavar v. *Siva Subramanya Pillai* 316

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17. ———— *Widow in possession of her late husband's land—Sale of the land in execution of a personal decree obtained against the widow—Suit by the nephew and reversioner of the deceased husband to recover the land from the purchaser:*

A Hindu widow sued to recover certain land which belonged to her late husband from his brother. The suit was compromised by means of a razinamah, one of the terms of which was that the widow should remain in possession of and enjoy the property, but should not alienate it without the brother's permission. Subsequently a personal decree was obtained against the widow, and the land being sold in execution, was purchased by the defendant in the present suit, in which the first plaintiff was the nephew and reversioner of the deceased husband:—*Held*, that the suit against the widow being on a personal claim, only her limited interest in the property was sold in execution, and that consequently the plaintiff was entitled to the property. *Jugul Kishore* v. *Jotendro Mohun* (I.L.R., 10 Calc., 985) distinguished, and the principle in *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (L.R., 2 I.A., 275; s.c. I.L.R., 1 Calc., 133) applied.

Narana Maiya v. *Vasteva Karanta* 208

INFANT—*Minor—Next friend—Solicitor's costs for proceedings undertaken on the next friend's instructions—Repudiation of the proceedings by the minor on attaining majority:*

A solicitor cannot recover the costs of litigation incurred by the next friend of a minor on his behalf from the *quondam* minor, who, on coming of age, repudiates the proceedings, there being no relation of contract between them. Assuming that the legal proceedings were in the nature of necessaries, the next friend is the person responsible to the solicitor. *Watkins* v. *Dhunnoo Baboo* (I.L.R., 7 Calc., 140) distinguished.

Branson v. *Appasami* 257

INSOLVENT ACT—11 AND 12 VIC., CAP. 21, s. 7—*Uncertificated insolvent—After acquired landed property—Mortgage by insolvent—Rights of Official Assignee:*

The Official Assignee applied under Insolvent Act, s. 36, for the delivery up to him of a house and furniture of which the occupants were in possession under a mortgage from an insolvent, dated December 1891. It appeared that the insolvent had been adjudicated in 1888 and had received her personal discharge in 1890 and had obtained the house in question under a deed of gift in April 1891, and had died intestate in May 1892, having never obtained a discharge under section 59. The mortgagees took their mortgage with notice of the insolvency of the mortgagor. The Official Assignee did not become aware that the insolvent had acquired the property in question till September 1892 when he intervened and claimed the property free from the mortgage:—*Held*, that the Official Assignee was entitled to the mortgaged property free from the mortgage.

Rowlandson v. *Champion* 21

LAND ACQUISITION ACT—ACT X OF 1870, ss. 3, 24, 25, 29 and 34—*'Material irregularity'—Mistake in regard to the principle of calculation of the value of the land acquired—Code of Civil Procedure—Act XIV of* 1882, *s.* 622:

If a Judge and assessors, sitting to determine the amount of compensation to be awarded for land acquired under the Land Acquisition Act of 1870, have refused to take into consideration any of the matters prescribed by section 24 of that Act, o have improperly taken into consideration any of the matters prohibited by section 25 thereof, such procedure would amount to material irregularity in the exercise of their jurisdiction, and would justify the intervention of the High Court under section 622 of the Code of Civil Procedure. Having regard to the definition of 'land' contained in section 3 of Act X of 1870, there is nothing illegal in a judge taking into account the value of works on the land which make it suitable for a salt factory; and even if, in making his estimate of the market value of the land, he took into consideration the price paid for neighbouring pans, and was in error in so doing, his mistake would be only one concerning the principles of valuation and not an irregularity in the exercise of jurisdiction.

Joseph v. *The Salt Company* 371

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LANDLORD AND TENANT—*Notice to Quit—Assertion of Mulgeni (permanent) tenure.—Entitlement to notice:*

The setting up of a Mulgeni right by a tenant is not a disclaimer of title such as disentitles him to a notice to quit in determination of the tenure.

Unhamma Devi v. *Vaikunta Hegde* 219

LEGAL PRACTITIONERS' ACT—ACT XVIII OF 1879, ss. 28, 29—*Remuneration by promissory note for past professional services rendered under oral agreements—Guardian and ward—Services necessary or manifestly beneficial:*

A guardian executed a promissory note in favour of a vakil (the plaintiff) as remuneration for his past professional services rendered under oral agreements with him:—*Held*, that a suit upon the note was barred by sections 28 and 29 of Act XVIII of 1879, and that, as there was no such necessity for the proceedings in question as to render the contract binding on the minors, no suit would lie against them.

Sundararaja Ayyangar v. *Pattanathusami Tevar* 306

LETTERS PATENT OF THE HIGH COURT, s. 15—*Appeal—District Municipalities Act (Madras)—Act IV of* 1884, *ss.* 53, 59, 60—*Profession tax—Trader—Provincial Small Cause Courts Act—Act IX of* 1887, *ss.* 25, 27:

A petition for revision preferred under Provincial Small Cause Courts Act, s. 25, was heard and dismissed by one of the Judges of the High Court acting under the rules of Court framed under section 13 of the Charter Act. The petitioner preferred an appeal under Letters Patent, s. 15:—*Held*, that the appeal was not barred under Provincial Small Cause Courts Act, s. 27, and was maintainable. One who makes it his business to sell the produce of his own land for profit is a trader within the meaning of Madras Act IV of 1884, provided the sales are conducted in a shop or place of business:—*Held by* PARKER, J., that one who has paid profession tax as a Sheristadar in one municipality is not on that account exempted from paying a further tax in respect of a trade carried on by him in another municipality under Act IV of 1884, Madras.

Venkata Reddi v. *Taylor* 100

2. ———— *Appeal to two Judges—Sanction to prosecute granted by one Judge:*

Where one Judge exercising the revisional jurisdiction of the High Court, in reversal of an order of a First-class Magistrate, had granted sanction under Criminal Procedure Code, s. 195, for a prosecution under Penal Code, s. 182, an appeal was preferred from his judgment under Letters Patent, s. 15:—*Held*, that no appeal lay, that section of the Letters Patent being inapplicable in cases of criminal jurisdiction.

Srinivasa Ayyangar v. *Queen-Empress* 105

LIMITATION—*Adverse possession—Hindu Law:*

The holder of an impartible zamindari died in 1822, leaving two widows and a daughter. The widows entered on the estate and having successfully resisted a suit for ejectment brought by the rightful heir (the present plaintiff's great grandfather) in 1824, they and the survivor of them retained possession till 1870, when the last surviving widow died, and the daughter entered. She or the Court of Wards, on her behalf, retained possession till her death, in 1882, when the first defendant came in as the nearest then surviving sapinda of the last male holder. The plaintiff, who was the son of the elder undivided brother (deceased) of the first defendant, now sued in 1891 to recover the zamindari from him:—*Held*, that the suit was barred by limitation.

Koolappa Naik v. *Koolappa Naik* 34

2. ———— *Civil Procedure Code, ss.* 53, 245, 647—*Amendment of execution petition—Appeal:*

One, being entitled under a decree of 1809 to a share in the income of a zamindari, obtained a decree in a suit of 1887 against certain recent purchasers of the zamindari, declaring that he had a valid charge on the estate and awarding to him, besides his costs, the amount due in respect of one

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year. He now applied in execution of the latter decree for payment of the amount due in respect of five years as well as his costs. An application to amend the petition for execution by inserting a reference to the former decree was made after the right of the petitioner in respect of some of the years in question had become barred by limitation. This application was refused by the Court of first instance:—*Held*, that under the circumstances of the case the amendment should have been allowed to be made.

Sattappa Chetti v. *Jogi Soorappa* 67

LIMITATION ACT—ACT XV OF 1877, s. 7, illustration (*b*), and sched. II, arts. 12, 44, 45, 120, 144—*Limitation—Suit to recover immovable family property unlawfully alienated during plaintiff's minority—Hindu law—Succession: whether under the Mitakshara law, nearness of blood is a ground of preference as between brothers of the half and full blood respectively in case of disputed succession to impartible coparcenary property—Representation of minor heirs as defendants by including a Collector as a defendant, as their guardian* ad litem*—Civil Procedure Code—Act XIV of* 1882, *ss.* 13, 244, 312*—Powers of Hindu son to question the alienation of an impartible estate by his father:*

Where a suit is brought to set aside a sale of immovable family property unlawfully alienated during the plaintiff's minority, it must be instituted within one year of the plaintiff's attaining his majority under schedule II, article 12 of the Limitation Act. Section 7 of that Act must be read together with each article in schedule II, and when the period prescribed by the latter extends to three years or more and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full three years. But when the period of limitation prescribed is less than three years, as in article 12, and the minor has that period from the date of his majority, the prescribed period is not to be enlarged to three years. In determining the right of succession to an impartible estate, the class of kindred from whom a single heir is to be selected should be first ascertained. Next, it should be seen whether family custom or kulachar discloses a special rule of selection, and, in default of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to general Hindu law. Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to coparcenary property which is partible, and it is likewise no ground of preference when such property is impartible. Where, therefore, the family property belongs to a coparcenary family consisting of all the brothers of the deceased *propositus*, whether of the whole or half-blood, in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years. Representation by a Collector of all minor sons of a deceased Zamindar as the guardian *ad litum*, under the order of the Court, the Collector being added as a defendant in the suit, is an adequate representation of all the sons, even if the Collector could only treat, under Regulation V of 1804, the particular minor on whose behalf the Court of Wards was then managing the zamindari as their proper ward. Consequently, a suit brought by one of such minors, on his attaining majority, to set aside the sale of a portion of the zamindari property attached in execution of the decree given in the former suit, is barred by sections 136, 244 and 312 of the Code of Civil Procedure.

Subramanya Pandya Chokka Talavar v. *Siva Subramanya Pillai* 316

2. ——————————, **s. 6**—*Sale of land for arrears of revenue—Revenue Recovery Act (Madras)—Act II of* 1864, *s.* 36, *cl.* 2 *and s.* 59*—Sale irregular by reason of not being duly notified—Limitation—Alleged fraud affecting sale:*

When there are arrears of revenue so as to give jurisdiction to the Collector to sell under Madras Act II of 1864, the sale, however irregular, is a proceeding under that Act, for purposes of limitation, and is valid not only as between the Collector and the defaulter; but as between the Collector and the purchaser at the sale. *Venkata* v. *Chengadu* (I.L.R., 12 Mad., 168) and *Nilakandan* v. *Thandamma* (I.L.R., 9 Mad., 460) followed. The mere fact that one of the plaintiffs, in a suit brought to set aside a sale under Madras Act II of 1864, is a minor is not sufficient to save the limitation bar under section 59 of Madras Act II of 1864, when an alleged fraud affecting the sale came to the knowledge of the other plaintiffs who are majors and are jointly interested with the minor more than six months prior to the institution of the suit, section 8 of the Limitation Act being inapplicable to such cases.

Narayanan Numbudri v. *Damodaran Nambudri* 189

3. ——————————, **s. 14**—*Deduction of time during prosecution of suit with due diligence—Defect of jurisdiction—Other cause of a like nature:*

Where a previous suit by the same plaintiff against the same defendant has failed by reason of misjoinder of causes of action and parties, the plaintiff in a second suit is not entitled to the extra period of limitation allowed by section 14 of the Limitation Act, since the cause of failure of the previous suit is not due to 'defect of jurisdiction' in the Court which entertained the suit, nor is it a cause 'of a like nature' thereto. *Deo Prosad Singh* v. *Pertab Kairee* (I.L.R., 10 Calc., 86) dissented from.

Tirtha Sami v. *Seshagiri Pai* 299

4. ——————————, **s. 20**—*Suit for money—Payment on account of principal within the period of limitation—Evidence of such payment by writing made after period expired:*

The obligee of a registered mortgage bond, dated 30th January 1875, sued in February 1891 to recover from the obligor the principal and interest remaining due thereunder. In bar of limitation the plaintiff relied on entries of part-payments from time to time in an account written by the defendant. These part-payments were made at such times as to keep alive the obligee's right of suit up to the date of the last of them. The last of these payments was made on a date which was less than six years (the period of limitation for the suit) before the date of institution of the suit, but it was not entered in the defendant's accounts until after the date when the claim would otherwise have been barred by limitation:—*Held*, that the provisions of Limitation Act, s. 20, were satisfied, and that the suit was not barred by limitation.

Venkatasubbu v. *Appusundram* 92

5. ——————————, **s. 22**—*Joint contractors—Civil Procedure Code—Act XIV of* 1882, *s.* 32*— A party to a contract joined as defendant and subsequently made a plaintiff:*

Limitation Act, s. 22, is not applicable to cases where the Court of its own motion orders that a party to a contract originally joined as defendant be made a plaintiff under Civil Procedure Code, s. 32.

Khadir Moideen v. *Rama Naik* 12

6. ——————————, **s. 25**—*Date from which time runs:*

A registered lease provided that the rent should be paid on 30th Masi, Tharana. The month Masi in the year Tharana ended on the 29th day, which corresponded with 11th March 1885. A suit to recover the rent was filed on 12th March 1891:—*Held*, that the suit was not barred by limitation.

Gnanasammanda Pandaram v. *Palaniyandi Pillai* 61

7. ——————————, **s. 28**—*Limitation—Limitation in relation to persons in undisturbed possession:*

The law of limitation operates against parties who have been guilty of delay and in favour of persons in possession. Section 28 of the Limitation Act has no application to persons who are in possession and who have had no occasion to sue for recovery of possession.

Orr v. *Sundra Pandia* 255

8. ——————————, **sched. II, art. 85**—*Limitation—Mutual account:*

To constitute a mutual account there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. Thus an account consisting of entries of payments made by one party in reduction of his debt to the other, and of payments made by the latter on behalf of the former party for

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the same purpose is not a mutual account within the meaning of art. 85 of sched. II of the Limitation Act. *Hirada Basappa* v. *Gadigi Muddappa* (6 M.H.C.R., 142) cited and followed. A shifting balance is a test of mutuality, but its absence is not conclusive proof against mutuality.

Velu Pillai v. *Ghose Mahomed* 293

9. ——————————, **sched. II, art. 110**—*Whether limitation commences from date of decree or from the dates when the various sums in arrears were payable—Rent Recovery Act (Madras)—Act VIII of* 1865, s. 10—*Suit to recover arrears of rent due under a decree given under section* 10 *:*

In a suit for arrears of rent due under a decree given under section 10 of the Rent Recovery Act (Madras Act VIII of 1865) the period of limitation in article 110, schedule II of the Limitation Act, commences from the date when the plaintiff was in a position to sue for rent, *i.e.*, the date of the decree.

Sobhanadri Appa Rau v. *Chalamanna* 225

10. ——————————, **sched. II, arts. 120, 122**—*Hindu law—Liability of son for father's debts—Civil Procedure Code—Act XIV of* 1882, *ss.* 43, 244—*Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings :*

A personal decree on a mortgage was passed against a Hindu(the mortgagor) and his two sons on 19th October 1877. The decree provided for payment of the secured debt in various instalments by May 1895. The mortgagor died in 1883 having discharged part of the debt. The decree-holder having attached certain family property in execution, the mortgagors' two younger sons, who had not been born at the date of the above decree, objected that their shares were not liable to attachment. This objection prevailed, the Court expressing the opinion that the matter in controversy should be determined in a regular suit. The other defendants in the suit of 1877 had both died in the interval, one of them leaving infant sons. The decree-holder (in whose sole name the mortgage stood) now sued the sons of the mortgagor and their infant nephews in 1891 and obtained a decree for the payment out of the family property of all the unpaid instalments. A plea of non-joinder was raised, *inter alia*, on the ground that the plaintiff had an undivided brother :—*Held*, (1) that since the plaint (as amended) showed that the plaintiff sued as managing member of his undivided family, the omission to join his brother was a merely formal error and was not fatal to the suit ; (2) that the plaintiff was not precluded from maintaining this suit against the sons of the mortgagor by Civil Procedure Code, s. 43 or s. 244 ; (3) that the period of limitation applicable to the suit was six years, and that time began to run for the purposes of limitation from the date when each instalment would have become due from the deceased judgment-debtor ; (4) that the plaintiff was entitled to a decree for payment out of the family property of all such instalments as would have so become due at the date of the suit, and for a declaration only as to the subsequent instalments.

Rámayya v. *Venkataratnam* 122

11. ——————————, **sched. II, art. 124**—*Suit for having the appointment of a karnam declared void :*

A suit by existing karnams for having the appointment of another person as a karnam jointly with themselves declared void does not fall within the provision of article 124 of the Limitation Act.

Lakshminarayanappa v. *Venkataratnam* 395

12. ——————————, **sched. II, arts. 137, 138**—*Purchase at Court auction—Suit for possession of land—Date of cause of action—Construction of enactment :*

In a suit for possession of land instituted on 1st April 1891, it appeared that the land in question had been purchased by the plaintiff in a Court auction held in execution of a decree on 20th June 1878, and that the sale to the plaintiff was confirmed on 31st March 1879, which was the date upon which the certificate issued. The plaintiff failed to prove that the judgment-debtor was out of possession at or subsequently to the date of the sale :—*Held*, that the suit was governed by Limitation Act, sch. II, art. 138 ; that 'the date of the sale' in that article means the date of the actual sale not the date of the confirmation of the sale and that accordingly the suit was barred by limitation.

Venkatalingam v. *Veerasami* 89

13. ——————————, **sched. II, art. 178**—*Limitation—Applications for probate :*

The Limitation Act does not apply to applications for probate, and the applications referred to in art. 178 of sched. II of that Act are applications under the Code of Civil Procedure. *Janaki* v. *Kesavalu* (I.L.R., 8 Mad., 207), *Bai Manekbai* v. *Manekji Kavasji* (I.L.R., 7 Bom., 213), and *Ishan Chunder Roy*, in re (I.L.R., 6 Calc., 707) followed.

Gnanamuthu Upadesi v *Vana Koilpillai Nadan* 379

14. ——————————, **sched. II, art. 179**—*Step in aid of execution—Defect in application for execution :*

Where there has been in fact an application for execution made by the party entitled to make it, it is to be regarded as a step in aid of execution within the meaning of the Limitation Act, art. 179, although by mistake a deceased judgment-debtor is named as the person against whom execution is sought.

Samia Pillai v. *Chookalinga Chettiar* 76

15. ——————————, **sched. II, art. 179**—*Step in aid of execution—Request for payment of money realised in satisfaction of a decree :*

A request for the payment of money realized in satisfaction of a decree is sufficient to keep the decree alive, being a step in aid of execution. *Venkatarayalu* v. *Narasimha* (I.L.R., 2 Mad., 174) approved and followed. Whether a particular act is or is not an application for, or step in aid of execution, depends upon the nature of the act rather than the time at which it may possibly be done. *Hem Chunder Chowdhry* v. *Brojo Soondury Debee* (I.L.R., 8 Calc., 89) qualified.

Koormayya v. *Krishnamma Naidu* 165

MALABAR LAW—*Civil Procedure Code—Act XIV of* 1882, *s.* 566—*Remand for trial of a new issue—Mapillas :*

The karnavan of a tarwad in Malabar sued to recover property acquired by his sister (deceased) and now in the occupation of the defendants, her children. The parties were Mapillas. The defendants pleaded (i) that the property had been given to them and their mother jointly ; (ii) that their mother was not governed by Marumakkatayam law. The Court of first instance found the first-mentioned plea to be good and dismissed the suit, and also found that the family was governed by Marumakkatayam law. The Court of first appeal dissented from the above finding as to the first plea, and, without deciding the second point, remanded the case for the trial of a general issue as to the mode of devolution of self-acquired property in Marumakkatayam Mapilla families in North Malabar, and ultimately it dismissed the suit, ruling that in Marumakkatayam Mapilla families the self-acquired property of a female descends to her children and does not lapse on her death to her tarwad :—*Held*, that the order of remand was not one which should have been made under Civil Procedure Code, s. 566, and the proceedings taken under it were irregular. Observations as to the law applicable to Mapillas.

Illikka Pakramar v. *Kutti Kunhamed* 69

2. ——————*Makkatayam Rule of Inheritance—Tiyans—Whether compulsory partition can be effected :*

The ordinary rule of Marumakatayam against compulsory partition is equally applicable to Tiyans who follow Makkatayam, no custom to the contrary having been made out.

Raman Menon v. *Chathunni* 184

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MORTGAGE—*Extinguishment of encumbrances—Suit by puisne encumbrancer—Decree for sale—Contract Act—Act IX of* 1872, *s* 74—*Penal sum :*

In March 1881 A purchased certain land and, in the same month, mortgaged it to B. In June the land was attached in execution of a decree. In August A discharged the judgment-debt with money borrowed from C, and he hypothecated the land to him to secure repayment of the loan. In 1882 B brought a suit on his mortgage and obtained a decree, in execution of which the land was brought to sale and purchased by him: C was not a party to this suit. In 1886 B sold the land to D under an instrument, which recited that out of the purchase-money Rs. 760 were retained by the purchaser for payment of prior encumbrances, and the finding was that the purchaser undertook to pay the debt owing to C. C now sued A and D to enforce his hypothecation :—*Held*, that C was entitled to a decree for sale. A stipulation in a bond that if the sum secured is not repaid with interest at 12 per cent. on a certain date, the interest shall be at 18 per cent. from the date of the bond is not unenforceable.

Narayanasami Naidu v. *Narayana Rau* 62

2. ———— *Right of a jenmi, who is a judgment-creditor, to sell the kanom right before the expiry of twelve years :*

A jenmi, who has obtained a decree for arrears of rent, may sell the kanom before the expiry of twelve years : such a sale does not put an end to the kanom, but only transfers the kanomdar's interest to the purchaser at the execution sale.

Achutan Nayar v. *Keshavan* 571

NEGOTIABLE INSTRUMENTS ACT—ACT XXVI OF 1861, s. 13—*Promissory note—Reference in the note to collateral security, effect of :*

An instrument, signed and bearing a 1-anna stamp, was in the following terms, viz. : "on deposit of title-deeds named herein below for value received "by me I promise to pay three months after date Rs. 160 to A.B. or order," then followed the details of the title-deeds :—*Held*, that the instrument was a negotiable instrument.

Ramachandra v. *Sesha* 85

2. ————————————, **s. 46**—*Effect of an invalid endorsement of a promissory note by payee—Note recovered by, but not re-indorsed to the payee :*

The defendant gave plaintiff a promissory note payable on demand. The plaintiff endorsed the note to a third party, a creditor of his, who sued the defendant on the note on his refusal to pay. The defendant pleaded that it had been agreed between the payee and himself that the note should not take effect until the payee had performed certain conditions which remained unperformed. The suit was accordingly dismissed. The plaintiff thereupon paid the endorsee and took back the note, which, however, was not re-indorsed, and instituted the present suit against the defendant, who pleaded that the property in the note was not vested in the original plaintiff so as to enable him to maintain the suit. On the decease of the plaintiff before the trial his sons were substituted as plaintiffs :—*Held*, that, although the property in a promissory note payable to order on demand passes by endorsement and delivery, the endorsement in this case had been declared invalid in the suit referred to and must, therefore, be treated as cancelled, and consequently the property in the note was vested in the plaintiff at the date of the suit so as to enable him to maintain it.

Marimuthu Pillai v. *Krishnasami Chetti* 197

NOTICE TO QUIT—*Assertion of Mulgeni (permanent) tenure—Entitlement to notice :*

The setting up of a Mulgeni right by a tenant is not a disclaimer of title such as disentitles him to a notice to quit in determination of the tenure.

Unhamma Devi v. *Vaikunta Hegde* 218

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PARTIES—*Civil Procedure Code, ss.* 43, 244—*Hindu Law—Liability of son for father's debts—Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings—Limitation Act—Act XV of* 1877, *sch. II, arts.* 120, 122 *:*

A personal decree on a mortgage was passed against a Hindu (the mortgagor) and his two sons on 19th October 1877. The decree provided for payment of the secured debt in various instalments by May 1895. The mortgagor died in 1883 having discharged part of the debt. The decree-holder having attached certain family property in execution, the mortgagor's two younger sons, who had not been born at the date of the above decree, objected that their shares were not liable to attachment. This objection prevailed, the Court expressing the opinion that the matter in controversy should be determined in a regular suit. The other defendants in the suit of 1877 had both died in the interval, one of them leaving infant sons. The decree-holder (in whose sole name the mortgage stood) now sued the sons of the mortgagor and their infant nephews in 1891 and obtained a decree for the payment out of the family property of all the unpaid instalments. A plea of non-joinder was raised, *inter alia*, on the ground that the plaintiff had an undivided brother :—*Held*, (1), that since the plaint (as amended) showed that the plaintiff sued as managing member of his undivided family, the omission to join his brother was a merely formal error, and was not fatal to the suit ; (2) that the plaintiff was not precluded from maintaining this suit against the sons of the mortgagor by Civil Procedure Code, s. 43 or s. 244 ; (3) that the period of limitation applicable to the suit was six years, and that time began to run for the purposes of limitation from the date when each instalment would have become due from the deceased judgment-debtor ; (4) that the plaintiff was entitled to a decree for payment out of the family property of all such instalments as would have so become due at the date of the suit, and for a declaration only as to subsequent instalments.

Ramayya v. *Venkataratnam* 122

2. ———— *Civil Procedure Code, ss.* 278, 283—*Transfer of Property Act—Act IV of* 1882, *s.* 85—*Non-joinder of puisne mortgagee in a mortgage suit—Mortgage decree—Claim in execution to mortgage premises :*

A mortgagee sued on his mortgage and obtained a decree against the mortgagor for the principal, together with the interest accrued due thereon, and for the sale of the mortgage premises in default of payment. A second mortgagee, who was not a party to the suit, intervened in execution, alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognising the priority of the decree-holder's lien and giving to the second mortgagee the opportunity of discharging it. No suit was brought to question this order. The first mortgage was not paid off and the mortgage premises were brought to sale. The purchaser, who was the first mortgagee, now sued for possession of the land and his claim was resisted by the second mortgagee : *Held*, (1) that the non-joinder of the present defendant in the suit on the mortgage constituted no bar to the present suit ; (2) that the second mortgagee was estopped from now re-asserting his claim.

Krishnan v. *Chadayan Kutti Haji* 17

3. ———— *Contract—Executory contract involving personal consideration—Assignment—Contract consisting of distinct contracts with separate parties—Misjoinder of the parties as defendants in one suit—Grant of relief that was not prayed for—Damages—Liquidated rate of damages applicable to certain specified breaches of contract only :*

Seven salt manufacturers, the defendants, contracted with A to manufacture and store in their factory in the name of and for the benefit of A such quantities of salt as he might require them to manufacture each season for seven years, in consideration of A's paying them at the rate of Rs. 11-8-0 per garce of salt, four months' credit after each delivery being allowed to A, and of his paying Government taxes and dues, and executing all but petty repairs in the defendant's factory. B was a party with A to the contract though he was not expressly mentioned therein. A assigned his share in the contract to C. B, as first plaintiff, and C, as second plaintiff, brought a

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suit against the defendants alleging that the the defendants had failed to fulfil their part of the contract during the second year of its continuance (1886) and praying (1) that all the defendants be directed to deliver to the plaintiffs the salt collected during 1886; (2) that defendants 2, 4 and 7 should be held liable for any damages plaintiffs might suffer through a fall in the price of salt. The Court of First Instance, having held that the contract contained seven separate and distinct contracts, each defendant having contracted with reference to his own pans only, decreed (1) that the seven defendants should pay damages at the rate of Rs. 5-12-0 per garce for the salt collected by each during the years 1886 to 1889, leaving the quantity to be ascertained in the execution of the decree; (2) that the defendants should pay the plaintiffs' costs. On appeal the District Judge modified the decree by fixing the rate of damages at Rs. 45-10-0 for each garce of salt:—*Held*, on appeal, (1) that A was not competent to assign his interest in the contract to the second plaintiff, since the contract was based on personal considerations and that the assignment of it as an executory contract was invalid without the consent of the defendants. *Farrow* v. *Wilson* (L.R., 4 C. P., 744), *Humble* v. *Hunter* (12 R. B., R. P., 310), *Arkansas Valley Smelting Company* v. *Belden Mining Company* (127 U.S.R., 379) followed; (2) that the suit was bad for misjoinder, since the case of each defendant, as a party to a distinct contract, should be decided on its own merits; (3) that the decrees of the Lower Courts were bad in making all the defendants jointly and severally liable for costs, and for damages for other years than the year 1886, and in not ascertaining the amount of damages payable by each defendant; (4) that the measure of damages was what the plaintiffs had lost by the breach of contract, but that the Lower Appellate Court was wrong in applying the rate fixed on this principle to each defendant without ascertaining the particular nature of the breach of which each defendant was guilty.

Namasivaya Gurukkal v. *Kadir Ammal* 186

4. ————*Contract Act—Act IX of* 1872, *ss.* 45, 263—*Suit by surviving member of a firm alone—Succession Certificate Act—Act VII of* 1889, *s.* 4—*Suit by surviving partner and heir of deceased partner:*

In a suit on a promissory note made by the defendant in favour of two Hindus carrying on business in partnership, it appeared that one of the partners was dead, and no succession certificate or letters of administration had been obtained. The plaintiffs were the surviving partners and the undivided sons of the deceased partner:—*Held*, that a surviving partner can sue alone for the recovery of a partnership debt:—*Held further*, that such a suit may be maintained by a surviving partner jointly with the heir of the deceased partner, in which case a certificate of heirship will be necessary, unless it appears on the face of the document sued on that the debt is a coparcenary debt.

Vidyamatha Ayyar v. *Chinnasami Naik* 108

5. ————*Hindu law—Succession: whether under the Mitakshara law, nearness of blood is a ground of preference as between brothers of the half and full blood respectively in case of disputed succession to impartible coparcenary property—Representation of minor heirs as defendants by including a Collector as a defendant, as their guardian* ad litem—*Code of Civil Procedure—Act XIV of* 1882, *ss.* 13, 244, 312—*Powers of a Hindu son to question the alienation of an impartible estate by his father—Limitation—Suit to recover immovable family property unlawfully alienated during plaintiff's minority—Limitation Act, s.* 7, *illustration* (*b*), *and sched. II, arts.* 12, 44, 45, 120 *and* 144:

Where a suit is brought to set aside a sale of immovable family property unlawfully alienated during the plaintiff's minority, it must be instituted within one year of the plaintiff's attaining his majority under schedule II, article 12 of the Limitation Act. Section 7 of that Act must be read together with each article in schedule II, and when the period prescribed by the latter extends to three years or more and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full three years. But when the period of limitation prescribed is less than three years, as in article 12, and the minor has that period from the date of his majority, the prescribed period is not to be enlarged to three years. In determining the right of succession to an impartible estate,

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the class of kindred from whom a single heir is to be selected should be first ascertained. Next, it should be seen whether family custom or kulachar discloses a special rule of selection, and, in default of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to general Hindu law. Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to coparcenary property which is partible, and it is likewise no ground of preference when such property is impartible. Where, therefore, the family property belongs to a coparcenary family consisting of all the brothers of the deceased *propositus*, whether of the whole or half-blood, in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years. Representation by a Collector of all minor sons of a deceased zamindar as their guardian *ad litem*, under the order of the Court, the Collector being added as a defendant in the suit, is an adequate representation of all the sons, even if the Collector could only treat, under Regulation V of 1804, the particular minor on whose behalf the Court of Wards was then managing the zamindari as their proper ward. Consequently, a suit brought by one of such minors, on his attaining majority, to set aside the sale of a portion of the zamindari property attached in execution of the decree given in the former suit, is barred by sections 136, 244 and 312 of the Code of Civil Procedure.

Subramanya Pandya Chokka Talavar v. *Siva Subramanya Pillai* 316

6. ————*Letters of administration—Promissory note given to a firm of two undivided Hindu brothers—Decease of the brothers—Suit on note by their sons without taking out letters:*

Two brothers, members of an undivided Hindu family, who traded as 'T. Iyavier and Brother,' became the holders of a promissory note given to the firm. The elder brother having died, his son joined the firm in his place, and he and his uncle filed a suit against the maker of the note, but before the action was heard the uncle died, and his son (a minor) was substituted as plaintiff for him, suing by the other plaintiff as his next friend. The plaintiffs had not taken out letters of administration to their respective fathers' estates:—*Held*, (1) that assuming that the younger brother could have sued as surviving member of the firm, on his death the necessity for taking out letters of administration could not be avoided; (2) that, if the debt was in reality due to the plaintiffs' family and not to the obligees of the bond, they could not sue upon it in their own right of survivorship without taking out letters of administration, since the promissory note did not disclose the nature of the debt, and, moreover, the other members of the family should have been joined as plaintiffs. *Venkataramanna* v. *Venkayya* (I.L.R., 14 Mad., 377) distinguished.

Chockalinga Pillai v. *Natesa Ayyar* 147

7. ————*Religious Endowments Act—Act XX of* 1863, *s.* 12—*Suit by the Dharmakarta of a temple to recover possession of temple property:*

The right to bring suits for the recovery of the property of a religious or charitable institution is vested in the trustee or manager of such institution, unless he is precluded by any special law from exercising it. There is nothing in the Religious Endowments Act to take away such powers. Section 12 relates only to the rents of property transferred by Government to the committees of such institutions.

Sankaramurti Mudaliar v. *Chidambara Nadan* 143

PENAL CODE—ACT XLV OF 1860, s. 224—*Escape from custody of village officers—Regulation XI of* 1816, *s.* 5:

On a charge under Penal Code, s. 226, it appeared that the accused had been apprehended on a hue and cry being raised as he was running away after committing robbery, and that he was handed over to the village magistrate and was by him placed in the charge of taliyaries for detention till the next morning when he was to be taken to the police station, and that he escaped from the custody of the taliyaries:—*Held*, distinguishing *Queen* v. *Bojjigan* (I.L.R., 5 Mad., 22), that the accused was rightly convicted of the offence charged.

Queen-Empress v. *Fakira* 103

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2. ——————————, **s. 378, illustration (o)**—*Theft—Whether a dishonest removal by a wife of her husband's property left in her custody amounts to theft :*

There is no presumption of law that a wife and husband constitute one person in India for the purpose of criminal law. If the wife, removing her husband's property from his house, does so with dishonest intention, she is guilty of theft.

Queen-Empress v. *Butchi* 401

3. ——————————, **s. 497**—*Criminal Procedure Code—Act X of* 1882, *ss.* 4, 488—'*Adultery*' :

A wife petitioned for maintenance for herself and child against her husband under section 488 of the Criminal Procedure Code. The husband did not refuse to maintain his wife, but the petitioner refused to live with him as he kept a concubine :—*Held*, that the word 'adultery' in section 488 of the Criminal Procedure Code must, by virtue of section 4 of the Code, be construed with reference to the definition of the term in section 497 of the Indian Penal Code. Consequently a husband's immorality which does not amount to 'adultery' or involve the degradation of a married woman being brought in to the society of a concubine is not sufficient ground for a wife's refusal to live with her husband. An offer to maintain a wife must be an offer to maintain with the consideration due to her position as a wife. *Marakkal* v. *Kandappa* (I.L.R., 6 Mad., 371), cited. *Per* BEST, J.—It is very doubtful if the framers of section 488 of the Code of Criminal Procedure intended the word 'adultery' as used therein to have the limited meaning given to it in the Penal Code. The wrong done to the wife is in no way affected by the circumstance of her husband's concubine being married or unmarried or, in case of her being married, whether it is with or without her husband's consent or collusion that she is living in such concubinage. In face however of section 4 of the Criminal Procedure Code, no other interpretation of the term 'adultery' is possible than the limited interpretation contained in the Penal Code.

Queen-Empress v. *Mannatha Achari* 260

PENSIONS ACT—ACT XXIII OF 1861, s. 4—'*Civil Court*'—*Forest Act (Madras)—Act V of* 1882, *ss.* 2, 4, 10, 14—*Claim to percentage of forest income—Jurisdiction of Forest Settlement officer—Jurisdiction of Appellate Court :*

A claim to a percentage of forest income is not a claim to forest produce under Madras Act V of 1882, nor is it a claim to a right specified in section 4 of that Act. A Forest Settlement officer has no jurisdiction to entertain a suit in which such a claim is made, and such a suit brought by discharged forest karnams is barred by section 4 of the Pensions Act. A Forest Settlement officer is a 'Civil Court' for the purposes of the Pensions Act. If a Court of limited jurisdiction exceeds its powers and adjudicates on a claim over which it has no jurisdiction, the Court (if any) which exercises appellate jurisdiction over it is bound to entertain an appeal preferred against the Lower Court's decision and to correct the error: A Court of competent appellate jurisdiction in such a case is not bound by an order made without jurisdiction by a Collector on an appeal to him in the same suit. Submission by the parties to his jurisdiction cannot give a Forest Settlement officer jurisdiction in a case where he has no inherent jurisdiction.

Secretary of State for India v. *Vydia Pillai* 193

POLICE ACT (MADRAS)—ACT XXIV OF 1859, ss. 10 and 44—*Departmental punishment and prosecution under the Act :*

In the absence of any rules framed by Government under section 10 of the Madras Police Act, a departmental punishment inflicted under that section is no bar to a prosecution under section 44 of that Act.

Queen-Empress v. *Fakrudeen* 278

2. ——————————, **ss. 21, 49**—*Procession likely to cause breach of the peace—Powers of police—Removal of banners from persons in the procession :*

A procession of Hindus carried certain banners and the Superintendent of Police was of opinion that a breach of the peace would be occasioned if these

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banners continued to be displayed, and in good faith, for the purpose of preventing such breach of the peace, he took away the banners from certain persons in the procession :—*Held*, that the action of the Superintendent of Police was not justified by Madras Police Act, 1859, ss. 21, 49, and that he was accordingly liable for the trespass.

Ranganayakulu v. *Prendergast* 37

PORTS ACT—ACT X OF 1889, s. 6—*Local Government's rules thereunder—Boats plying and not plying for hire*—Ultra vires :

It is only with regard to boats plying for hire that section 6 of Act X of 1889 gives the Local Government authority to make rules. Rules purporting to make it obligatory on boat owners to ply for hire are *ultra vires.*

Queen-Empress v. *Thommayya Chetti* 397

2. ——————————, **ss. 6, 8**—*Order purporting to be made under the Act by Conservator of Port—Public body authorized by Legislature to make rules, powers of :*

The Conservator of the Port of Negapatam, purporting to act under the Indian Ports Act, s. 8, made and published an order that when a certain flag was flying at the signal station, all boats returning from the sea should cast anchor and not come inside the river. The Local Government had made a rule with reference to section 6 (*k*) of the above Act requiring boat-owners to "carry out at all times all orders issued by the Conservator in connection "with the plying of their boats and which are not inconsistent with the "regulations issued by Government." A charge was brought against two persons, being the owners and tindals of licensed cargo boats for neglecting to obey the aforesaid order, and they were convicted under Indian Ports Act, s. 8 (2), by the Conservator in his capacity as Special First-class Magistrate :—*Held*, that the order was *ultra vires* and the conviction was accordingly illegal. *Per cur.*—A public body, whether the Executive Government or a corporation, being entrusted by the Legislature with the duty of making rules, cannot relieve itself of the responsibility and depute other agencies to discharge the duty.

Queen-Empress v. *Marian Chetti* 118

PRESIDENCY SMALL CAUSE COURTS ACT—ACT XV OF 1882, ss. 22, 41—*Transfer of Property Act—Act IV of* 1882, *s.* 114 :

The plaintiff, a landlord, relying on a provision in a lease, gave the defendants, his tenants, notice to quit. Within seven days the defendants tendered rent, interest and costs. The plaintiff, nevertheless, filed this suit to eject the defendants. The defendants subsequently paid the full amount due into Court: *Held*, that, under the terms of the lease, the defendants were not liable to forfeiture, and that, since the suit should have been brought under chapter VII, section 41 of the Presidency Small Cause Courts Act, plaintiff must pay the defendants' costs as between attorney and client under section 22 of that Act: *Held*, on appeal, (1) that there having been a tender and payment into Court of the full amount due, the plaintiff proceeded with the suit at his risk under section 114 of the Transfer of Property Act; (2) that the suit not being cognizable by the Small Cause Court, section 22 of Act XV of 1882 did not apply, an application under chapter VII of that Act not being a suit under section 22 thereof.

Krishnasami Chetti v. *The Natal Emigration Board* 216

PROBATE, *Application for—Limitation Act—Act XV of* **1877**, *sched. II, art.* 178—*Limitation.*

The Limitation Act does not apply to applications for probate, and the applications referred to in art. 178 of sched. II of that Act are applications under the Code of Civil Procedure. *Janaki* v. *Kesavalu* (I.L.R., 8 Mad., 207), *Bai Manekbai* v. *Manekji Kavasji* (I.L.R., 7 Bom., 213), and *Ishan Chunder Roy, In re* (I.L.R., 6 Calc., 707) followed.

Gnanamuthu Upadesi v Vana Koilpillai Nadan 379

2. ——— *Will—Interest of defendant in testator's estate :*

In a suit brought to obtain probate of a will the defendant, before he can contest the will, must show that he has some interest in the testator's estate.

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of the Vicar Apostolic. Plaintiffs, who were members of the Goanese party, complained that, having regard to the effect of the concordat of 1886, it would be impossible for their party—even if in a majority—to elect a priest of their own party, and prayed for a division of the fund :—*Held*, that even if this were so, this fact would not justify the Court in taking away from St. Peter's Church part of its endowment.

Chinnasami Mudali v. *Advocate-General* 406

2. ——————————*Temple repairs—'Katlais' or distinct endowments—Liability for repairs—Proof of custom in absence of endowment-deeds :*

The 'panchayatdars' or managers of a temple, being directed by a Magistrate to repair the gateway of a store-house within the temple precincts and under their immediate control, spent Rs. 10-8-0 in so doing from the funds of a 'katlai' or endowment of which they were managers. They then sued the trustees of two other 'katlais' for recovery of the said sum on the ground that, by the usage of the temple, the cost of repairs was payable from the defendants' income, and asked for a declaration that the duty or executing repairs fell upon the defendants' 'katlais' :—*Held* that, in the absence of any endowment or trust-deed regarding the 'katlais' the decision must be found in the usage of the temple, upon proof of which judgment was given for the plaintiffs, and a declaration added to the effect that the defendants were liable for repairs to the temple so far as the surplus funds of their 'katlais' should permit.

Vythilinga Pandara Sannadhi v. *Somasundra Mudaliar* 199

RELIGIOUS ENDOWMENTS ACT—ACT XX OF 1863—*Regulation VII of* 1817, *s.* 13—*Discretionary power of a temple committee to appoint new trustees when the power of management is not hereditary—Trusts Act—Act II of* 1882, *s.* 49 :

A temple committee appointed under Act XX of 1863 may appoint new trustees when there is no hereditary trustee to add to the existing trustees, but this power, although discretionary, must be exercised reasonably and in good faith, and, according to the principle, which is applicable to public trusts, embodied in section 49 of the Indian Trusts Act. If it is not so exercised, the power may be controlled by a Civil Court of original jurisdiction.

Sheik Davud Saiba v. *Hussein Saiba* 212

2. ——————————————————, **s. 12**—*Suit by the Dharmakarta of a temple to recover possession of temple property :*

The right to bring suits for the recovery of the property of a religious or charitable institution is vested in the trustee or manager of such institution, unless he is precluded by any special law from exercising it. There is nothing in the Religious Endowments Act to take away such powers. Section 12 relates only to the rents of property transferred by Government to the committees of such institutions.

Sankaramurti Mudaliar v. *Chidambara Nadan* 143

3. ——————————————————, **s. 14**—*Applicability of the Act :*

In a suit, brought with the leave of the District Court under Act XX of 1863, to remove the trustees of a Hindu temple, it did not appear that the trustees were nominated by or subject to the confirmation of the Government or any public officer :—*Held*, that Act XX of 1863 was not applicable to the temple unless it was admitted or proved by evidence that the endowment was one which would have fallen under the provisions of Regulation VII of 1817.

Muthu v. *Gangathara* 95

RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865—*Civil Procedure Code—Act XIV of* 1882, *s.* 13—Res judicata—*Decision of a Revenue Court—Second suit in Civil Court—Question of title :*

In a suit for land it appeared that the defendant had obtained, under the Rent Recovery Act, a judgment that the present plaintiff should accept from him a patta for the land in question and deliver to him a corresponding muchalka, and subsequently an order for ejectment, which was executed. The present plaintiff did not appear when the above orders were made. The

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defendant relied on these proceedings as constituting a bar to the present suit :—*Held*, following *Rama* v. *Tirtasami* (I L.R., 7 Mad., 61), that the decision of the Revenue Court was no bar to the suit.

Gangaraju v. *Kondireddiswami* 106

2. ——————————————————, **ss. 1, 11**—*Sanction granted by Head Assistant Collector—Procedure—Customary rent—Restraint on building :*

A Head Assistant Collector is competent to grant a sanction for the enhancement of rent under Rent Recovery Act, s. 11. The granting of such sanction is a judicial and not a merely administrative act and such sanction should not be granted without first giving notice to both the landlord and the tenant, and hearing, and considering the contentions of both parties. In a suit by the landlord to enforce the exchange of a patta and muchalka, the tenant objected to the rate of rent imposed on part of the land, which was dry land converted into wet :—*Held*, that the finding of the Lower Appellate Court that there was an implied contract to pay rent at such rate was not open to any legal objection. It appeared that the patta tendered contained a stipulation for the payment of rent at a special rate for garden (jarib) lands watered by wells which had been constructed by the raiyat at his own cost, and also comprised a stipulation that the raiyat should not build on his holding. The Court of first appeal held that the special rate of rent above referred to was customary and had been followed for many years :—*Held*, that there was no ground for interference on second appeal with the Lower Appellate Court's decision regarding the former of the stipulations above referred to, but that the latter should be so modified as to prevent the raiyat only from raising any building incompatible with an agricultural holding.

Bhupati v. *Rajah Rangayya Appa Rau* 54

3. ——————————————————, **ss. 4, 7, 11**—*Enhanced rent on irrigated land—Customary contribution to a temple—Implied contract :*

A zamindar tendered to raiyats on his estate pattas providing (*inter alia*) for the payment of (1) certain fees to a Hindu temple, (2) rent in which the land assessment was consolidated with a water-cess in respect of certain land irrigated under the Kistna anicut. There was nothing to show that the former of these items constituted a charge on the land and the latter had not been sanctioned by the Collector under Rent Recovery Act, s. 11, but it was found that both had been paid by the raiyats for many years. The Court of first appeal held on this finding that there were implied contracts on the part of the raiyats to pay both items :—*Held*, (1) that the temple fee was *primâ facie* voluntary and should not be treated as a payment which the zamindar could compel a raiyat to make and consequently that the patta tendered to him was an improper patta ; (2) that the finding as to the existence of an implied contract to pay the second of the above items was a finding of fact and must, therefore, be accepted on second appeal ; and was a correct finding, in accordance with the ruling in *Venkatagopal* v. *Rangappa* (I L.R., 7 Mad., 365). The first proviso to Rent Recovery Act, s. 11, is not restricted in its application to rates of original rent as contradistinguished from its enhancement on account of improvements.

Siriparapu Ramanna v. *Mallikarjuna Prasada Nayudu* 43

4. ——————————————————, **ss. 9, 10**—*Suit to enforce acceptance of patta*—Bonâ fide *denial by defendant of plaintiff's title—Jurisdiction of Revenue Court :*

The plaintiff obtained a permanent lease of inam lands attached to a mosque from the four owners thereof. The defendant was a cultivating tenant on the lands and the plaintiff duly offered the defendant a patta. The defendant refused to execute corresponding muchalka on the ground that the plaintiff was not his landlord, since the first of the aforesaid owners had granted a lease for 35 years to a person who had sublet the land to the defendant. The plaintiff thereupon brought a suit to enforce acceptance of patta under section 9 of Madras Act VIII of 1865. The Deputy Collector having decided the case in the plaintiff's favour, the defendant appealed and the District Judge dismissed the suit on the ground that the defendant's contention raised a *bonâ fide* question of title which ousted the jurisdiction of

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the Deputy Collector :—*Held*, that there is no provision in Madras Act VIII of 1865, that a *bonâ fide* denial of the relationship of landlord and tenant ousts the jurisdiction of the Revenue Courts, and, with regard to section 10 of the Act, that "whenever a Court is invested with jurisdiction to determine the existence of a particular legal relation, the intention must be "taken to be to authorize it to adjudicate on every matter of fact or of law "incidental to such adjudication." *Narayana Chariar* v. *Ranga Ayyangar* (I.L.R., 15 Mad., 223) and *Ayappa* v. *Venkata Krishnamarazu* (I.L.R., 15 Mad., 485) cited and followed.

Abdul Rahiman Saheb v. *Anna Pillai* 140

5. ——————————————————————, **ss. 9, 11**—*Sanction by Collector of enhanced rates of rent—Implied contract to pay rent at a certain rate :*

In a suit brought by the Collector of a district, as receiver of a zamindari, against a tenant on the estate to enforce the exchange of patta and muchalka, it appeared that the rent demanded was assessed at an enhanced rate, and comprised a consolidated wet rate imposed on account of irrigation. To the enhancement of the rent by the addition of the water rate the sanction of the Collector required by the Rent Recovery Act, s. 11, first proviso, had not been obtained :—*Held*, that such sanction could not be implied from the fact that the Collector, as such receiver, had caused the provision in question to be inserted in the patta, and now sought to enforce it by suit. Upon the question whether from the fact that the tenant had paid the water rate in question for some years previously an implied contract to pay it for the future could be inferred :—*Held*, upon the facts of the present case that no such contract could be inferred. With reference to the Full Bench decision in *Venkatagopal* v. *Rangappa* (I.L.R., 7 Mad., 365), the Court stated what was the principle to be kept in view in considering whether an implied contract to pay enhanced rent could be inferred.

Mallikarjuna Prasada Nayudu v. *Lakshminarayana* 59

6. ——————————————————————**s. 10**—*Suit in Civil Court for enforcement of patta and other relief—Jurisdiction—Declaration as to enforceable stipulations—Rates of rent—Dry land converted into wet land :*

In a suit brought in the Court of a District Munsif by a zamindar and his lessee against a cultivating tenant to enforce the exchange of patta and muchalka and for further and other relief :—*Held*, (1) following *Ramayyar* v. *Vedachella* (I.L.R., 14 Mad., 441), that the Civil Court had jurisdiction, and that a decree should be passed containing a declaration as to the terms which the patta should contain ; (2) that a patta is enforceable which contains a stipulation that "if nunja cultivation be made on punja land permanently "converted into nunja with or without water of the landlord's tank, nunja "tirva according to the rate fixed for such cultivation shall be paid" when such stipulation is in accordance with local custom.

Sattappa Pillai v. *Raman Chetti* 1

7. ——————————————————————**s. 10**—*Suit to recover arrears of rent due under a decree given under section 10—Limitation Act—Act XV of 1877, sched. II, art. 110—Whether limitation commences from date of decree or from the dates when the various sums in arrears were payable :*

In a suit for arrears of rent due under a decree given under section 10 of the Rent Recovery Act (Madras Act VIII of 1865) the period of limitation in article 110, schedule II of the Limitation Act, commences from the date when the plaintiff was in a position to sue for rent, *i.e.*, the date of the decree.

Sobhanadri Appa Rau v. *Chalamanna* 225

8. ——————————————————————**s. 11**—*Implied contract as to rates of rent—Customary fees—Prohibition of buildings :*

In order to support the inference of a contract under the Rent Recovery Act, Madras, s. 11, from payment of the same rent for a given number of years, the intention that the same rent is payable in future years must be clear and unequivocal : it is unsafe to imply such a contract from a single lease for five years. A patta is not unenforceable by reason of its providing for the

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payment of fees to village artisans in a case when such fees are customary, or by reason of its prohibiting the tenant from erecting buildings on his holding, if such prohibition is limited to erections not compatible with the agricultural character of the holding.

Lakshmana v. *Appa Rau* 73

9. ——————————————————————**s. 76**—*Civil Procedure Code, ss. 4, 622 :*

Orders passed by a Collector under the Rent Recovery Act are not open to revision under section 622 of the Civil Procedure Code. *Velli Periya Mira* v. *Moidin Padsha* (I.L.R., 9 Mad., 332), followed.

Venkatanarasimha Naidu v. *Suranna* 298

REVENUE RECOVERY ACT—MADRAS ACT II OF 1864—*Liability of purchaser at a sale, who enters into possession of the purchased property, to account for mesne profits to the person in whose favour the decree is subsequently reversed :*

A purchaser of property at a sale under the Revenue Recovery Act, who enters into possession thereof, is in rightful possession until the decree is set aside. He is not, therefore, a trespasser and liable to make good any loss sustained by the rightful owner by being kept out of possession ; but he is bound to account for mesne profits, the calculation of which is to be based on a proper discharge of the stewardship of the property. *Dakshina Mohan Roy Chowdhry* v. *Saroda Mohun Roy Chowdhry* (L.R., 20 I.A., 160), cited and followed.

Perumal Udayar v. *Krishnama Chettyar* 251

2. ——————————————————————**s. 11**—*Whether gathered products belonging to a tenant can be distrained by Government on account of the landlord's arrears of revenue :*

Government can attach for arrears of revenue under section 11 of Madras Act II of 1864 the gathered products belonging to a tenant, provided that the products are of the land on account of which the arrears of revenue have accrued.

Krishna Chadaga v. *Govinda Adiga* 404

3. ——————————————————————**s. 35**—*Payment of arrears of village revenue by the assignee of a mortgagee of part of the village property—'Defaulter'—Registered and real owners :*

The plaintiff was assignee of a mortgagee of 38½th pangus in a village consisting of 51½th pangus. Having sued the executants of the mortgage and obtained a decree in 1885, he, in 1887 and 1888, paid certain arrears of revenue due from the village, in order to prevent its sale. In 1888, the plaintiff's 38½th pangus were sold in execution of the decree of 1885 to the 85th defendant subject to a charge for the amount of the revenue arrears paid by the plaintiff. In 1890 the plaintiff instituted the present suit to recover from the entire village and from the defendants Nos. 1 to 84 personally the amount of these arrears :—*Held*, that the 85th defendant, as also the 38⅛th shares purchased by him, were liable for the debt conjointly with the remaining shares and the other defendants, the plaintiff having by payment of the arrears acquired a charge upon the land under section 35 of the Revenue Recovery Act ; that not only registered proprietors but real owners and their holdings may be treated as defaulters within the meaning of section 35 of that Act. *Seshagiri* v. *Pichu* (I.L.R., Mad., 457) followed.

Srinivasa Thathachar v. *Rama Ayyan* 247

4. ——————————————————————, **s. 36, cl. 2 and s. 59**—*Sale of land for arrears of revenue—Sale irregular by reason of not being duly notified—Limitation—Alleged fraud affecting sale—Limitation Act—Act XV of 1877, s. 8 :*

When there are arrears of revenue so as to give jurisdiction to the Collector to sell under Madras Act II of 1864, the sale, however irregular, is a proceeding under that Act, for purposes of limitation, and is valid not only as between the Collector and the defaulter, but as between the Collector and the purchaser at the sale. *Venkata* v. *Chengadu* (I.L.R., 12 Mad. 168)

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and *Nilakandan* v. *Thandamma* (I L.R., 9 Mad., 460) followed. The mere fact that one of the plaintiffs, in a suit brought to set aside a sale under Madras Act II of 1864, is a minor is not sufficient to save the limitation bar under section 59 of Madras Act II of 1864, when an alleged fraud affecting the sale came to the knowledge of the other plaintiffs who are majors and are jointly interested with the minor more than six months prior to the institution of the suit, section 8 of the Limitation Act being inapplicable to such cases.

Narayanan Nambudri v. *Damodaran Nambudri* 189

5. ——————————————, **ss. 38, 59**—*Sale of mittah for arrears of revenue—Purchase by Government—Subsequent sale by Government—Suit by owner of a share in the mittah for cancellation of second sale—Limitation—Admissibility of horoscope—Evidence Act—Act I of* 1872, *ss.* 17, 18 :

The plaintiff was the owner of a share in a mittah which was sold on 15th February 1886 for arrears of revenue and bought by Government, who, on 16th June 1886, sold it to the first defendant, notifying the resale in the form prescribed under Madras Act II of 1864. The first defendant subsequently resold portions of the mittah to defendants 3 and 5 to 8. The plaintiff sued for cancellation of the second sale so far as his share was concerned, instituting a suit for this purpose on 31st March 1890 : *Held*, (1) that the sale of 16th June 1886 was not a sale under section 38 of Act II of 1864, although the notification of the sale was in the form prescribed by that Act, but a sale by Government of property that had become its own by reason of the purchase at the prior sale of 15th February; (2) that even assuming the sale of 16th June 1886 to have been a sale under section 38 of Act II of 1864, the suit was time-barred under section 59 of that Act, since it should have been brought within six months from the date of plaintiff's majority, viz., 24th November 1888, as proved by his horoscope, which had been a public record from a period *ante litem motam*, was relied upon by the defendants in the present suit, and was put in as an 'admission' under the Indian Evidence Act, ss. 17 and 18. *Ram Narain Kollia* v. *Monee Bibee* (I.L.R., 9 Calc., 6 3) and *Satis Chunder Mukhopadhya* v. *Mohendro Lal Pathuk* (I.L.R., 17 Calc., 849) distinguished; (3) that the limitation prescribed by section 59 of Madras Act II of 1864 is applicable to sales which are illegal by reason of contravening some express law, as well as to sales which are irregular. *Gobind Lal Roy* v. *Ramjanam Misser* (I.L.R., 21 Calc., 70) relied on.

Raja Goundan v. *Raja Gaundan* 134

SALE OF IMMOVABLE PROPERTY—*Transfer of Property Act—Act IV of* 1882, *s.* 54—*Effect of registration of sale-deed :*

Registration of a sale-deed constitutes a sufficient delivery of the deed to pass the interest in land contained therein. *Narain Chunder Chuckerbutty* v. *Dataram* (I.L.R., 8 Calc., 597), followed.

Ponnayya Goundan v. *Muttu Goundan* 146

SPECIFIC RELIEF ACT—ACT I OF 1877, s. 42—*Consequential relief—Suit by a member of a tarwad for a decree declaratory of the invalidity of a kanom granted to other members by the karnavan of the tarwad :*

Where a kanom of tarwad property is granted by the karnavan to members of the tarwad and the property in question remains in the possession of the karnavan on behalf of the tarwad, all that is necessary for a junior member to do in order to prevent the possession becoming adverse to the tarwad is to obtain a declaration that the kanom which is relied on as the cause of adverse possession is invalid. But if the kanom is granted to a stranger to the family, who is in possession, possession must then be sought for as relief consequent on the declaration. An attornment of tenants to the kanomdars does not operate as a transfer of possession from the tarwad to the kanomdars. *Subramanyan* v. *Paramaswaran* (I.L.R., 11 Mad., 116) followed, and *Bikutti* v. *Kalendan* (I.L.R., 14 Mad., 267), *Abdulkadar* v. *Muhomed* (I.L.R., 15 Mad., 15), and *Narayana* v. *Shankunni* (I.L.R., 15 Mad., 255) distinguished.

Padammah v. *Themana Ammah* 232

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STAMP ACT—ACT I OF 1879, s. 39—*Evidence—Estoppel—Limitation of the doctrine in respect to a party suing as the representative of another—Whether secondary evidence of a lost document can be admitted on payment of penalty :*

Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by any one except that other person. In the case of a lost document no penalty can be levied and secondary evidence admitted, for section 39 of the Stamp Act presupposes that the document on which a penalty can be paid is forthcoming. *Kopasan* v. *Shamu* (I.L.R., 7 Mad., 440) followed.

Ranga Rau v. *Bhavayammi* 473

2. ——————————————**sched. I, art. 4**—*' Agreement to lease ' :*

An agreement by a zamindar to execute a formal deed of lease of his zamindari which is under attachment after obtaining a certificate from the Court under section 305 of the Civil Procedure Code, is "an agreement to lease," under article 4, schedule I of the Stamp Act.

Reference under Stamp Act, s. 46 280

SUCCESSION CERTIFICATE ACT—ACT VII OF 1889, s. 4—*Contract Act—Act IX of* 1872, *ss.* 45, 263—*Suit by surviving member of a firm alone—Suit by surviving partner and heir of deceased partner :*

In a suit on a promissory note made by the defendant in favour of two Hindus carrying on business in partnership, it appeared that one of the partners was dead, and no succession certificate or letters of administration had been obtained. The plaintiffs were the surviving partners and the undivided sons of the deceased partner :—*Held*, that a surviving partner can sue alone for the recovery of a partnership debt :—*Held further*, that such a suit may be maintained by a surviving partner jointly with the heir of the deceased partner, in which case a certificate of heirship will be necessary, unless it appears on the face of the document sued on that the debt is a coparcenary debt.

Vaidyanatha Ayyar v. *Chinnasami Naik* 108

2. ——————————————**ss. 4, 17**—*Probate issued from Native Court in Cutch—Certificate of Political Agent—Suit in British India :*

A suit in British India by the executors of the will of a native of Cutch was dismissed, on its appearing that the plaintiffs were furnished only with probate issued from a Native Court, of which they produced a copy certified by the Political Agent of Cutch, and since stamped in accordance with the Court Fees Act, 1870 :—*Held*, that the plaintiffs were not entitled to a decree without taking out probate or letters of administration in British India under Act V of 1881 or a certificate under Act VII of 1889, but instead of dismissing the suit, the Court should have allowed time for the plaintiffs to have so completed their title to sue.

Manasing v. *Amad Kunhi* 14

3. ——————————————**s. 7 (3)**—*Power to grant certificate to applicant if he has the best* primâ facie *title thereto—Necessity for some inquiry prior to such a grant :*

The intention of sub-clause (3) to section 7 of the Succession Certificate Act is not to save the Court the trouble of making any inquiry at all where the applicant is not heir to the deceased, but it is to allow the *primâ facie* title to the certificate to prevail when a question of law or fact arises on inquiry too difficult to be determined in a summary proceeding.

Sivamma v. *Subbamma* 477

4. ——————————————**ss. 19 and 26**—*Appeal from an order of a District Court under section* 26 :

Section 26 of the Succession Certificate Act confers on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by section 19 on the High Court over the order of a District Court. There is no provision in the Act for a second appeal in any case.

Subba Rao v. *Palaniandi Pillai* 167

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TEMPLE REPAIRS –*'Katlais' or distinct endowments—Liability for repairs—Proof of custom in absence of endowment-deeds :*

The 'panchayatdars' or managers of a temple, being directed by a Magistrate to repair the gateway of a store-house within the temple precincts and under their immediate control, spent Rs. 10-8-0 in so doing from the funds of a 'katlai' or endowment of which they were managers. They then sued the trustees of two other 'katlais' for recovery of the said sum on the ground that, by the usage of the temple, the cost of repairs was payable from the defendants' income, and asked for a declaration that the duty or executing repairs fell upon the defendants' 'katlais':—*Held* that, in the absence of any endowment or trust-deed regarding the 'katlais' the decision must be found in the usage of the temple, upon proof of which judgment was given for the plaintiffs, and a declaration added to the effect that the defendants were liable for repairs to the temple so far as the surplus funds of their 'katlais' should permit.

Vythilinga Pandara Sannadhi v. *Somasundra Mudaliar* 199

TORT—*Injury to property—Contributary act—Test thereof :*

As in the case of contributary negligence, so an act of one party can only be contributary to the injury he complains of, if by the exercise of ordinary care the other party could not have avoided causing the injury.

Madhava Rau v. *P. M. Fernandes* 368

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, ss. 4, 107—*Contract—Undue influence—Acquiescence by conduct—Lease for one year at rental of more than Rs.* 100*—Registration—Registration Act—Act III of* 1877, *s.* 17 *:*

Where the owner of certain land exchanges it for certain other land, but takes a lease for one year of the former land and pays the rent thereof, and receives and retains the rents of the land he has acquired by the exchange, he shows so complete an acquiescence in the transaction that he cannot afterwards have it set aside on the ground of undue influence. The fact that such a lease recites the fact of the exchange of the lands does not evidence the exchange, and as such create a title in land. Nor does the fact that the rent reserved under the lease is more than Rs. 200 create an interest in land of Rs. 100 and more in value so as to necessitate registration of the lease under section 17 of the Registration Act. Such a lease falls under section 107 of the Transfer of Property Act, the provisions of which section are, by section 4 of the Act, supplemental to the Registration Act.

Seetharama Raju v. *Bayanna Pantulu* 275

2. ———————————————— **s. 54**:—*Sale of immovable property—Effect of registration of sale-deed :*

Registration of a sale-deed constitutes a sufficient delivery of the deed to pass the interest in land contained therein. *Narain Chunder Chuckerbutty* v. *Dataram* (I L.R., 8 Calc., 597), followed.

Ponnayya Goundan v. *Muttu Goundan* 146

3. ————————————————, **ss. 67** (*a*), **68** (*a*)—*Mortgagee's right to sue for mortgage money and for sale—Usufructuary mortgage—Covenant to repay mortgage money :*

The first defendant executed a usufructuary mortgage of certain land in favour of plaintiff's deceased husband. It contained a covenant to pay the mortgage money in Chittrai Kalavadi of the year 1883. This covenant was followed by these words: "If I fail to pay the mortgage amount in the "said Kalavadi, then you shall receive the said mortgage amount in the "Chittrai Kalavadi of whatever year I may pay it, deliver the said lands to "my possession having cleared off the arrears of Government revenue, and "also give back the bond." The plaintiff sued to recover the money secured from the defendant personally and also by sale of the mortgaged property:—*Held*, by a Full Bench, that the bond contained a covenant to pay, and that, therefore, the suit was maintainable.

Sivakami Ammal v. *Gopala Savundram Ayyan* 131

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4. ————————————————, **s. 68** (*a*)—*Mortgagee's right to sue for the mortgage money where he is kept out of possession by mortgagor's indirect conduct :*

Where a usufructuary mortgagee is unable to obtain possession of the mortgaged property owing to his mortgagor having executed a subsequent mortgage and placed the second mortgagee in possession, the first mortgagee may elect to sue at once for the money under section 68 of the Transfer of Property Act, instead of for possession of the land.

Linga Reddi v. *Sama Rau* 469

5. ————————————————, **s. 83**—*Deposit in Court by mortgagor—Full and unconditional tender :*

The fact that a certain sum of money tendered under section 83 of the Transfer of Property Act, and accepted by the mortgagee as the full amount due, is afterwards denied by him to be the full amount, and that the tender is accompanied by a claim to a registered receipt (to which the mortgagee agrees) and to the return of the title-deeds does not render the tender conditional and therefore invalid. *Nanu* v. *Manchu* (I.L.R., 14 Mad., 49) distinguished.

Kora Nayar v. *Ramappa* 267

6. ———————————————— **s. 85**—*Non-joinder of puisne mortgagee in a mortgage suit—Civil Procedure Code—Act XIV of* 1882, *ss.* 278, 283—*Mortgage decree—Claim in execution to mortgage premises :*

A mortgagee sued on his mortgage and obtained a decree against the mortgagor for the principal, together with the interest accrued due thereon, and for the sale of the mortgage premises in default of payment. A second mortgagee, who was not a party to the suit, intervened in execution, alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognizing the priority of the decree-holder's lien and giving to the second mortgagee the opportunity of discharging it. No suit was brought to question this order. The first mortgage was not paid off and the mortgage premises were brought to sale. The purchaser, who was the first mortgagee, now sued for possession of the land and his claim was resisted by the second mortgagee:—*Held*, (1) that the non-joinder of the present defendant in the suit on the mortgage constituted no bar to the present suit, (2) that the second mortgagee was estopped from now re-asserting his claim.

Krishnan v. *Chadayan Kutti Haji* 17

7. ————————————————, **ss. 92, 93**—*Decree for redemption—Mortgagor's failure to pay amount due within period fixed—Subsequent suit, no order under section* 93 *having been made*—Res judicata :

A decree under section 92 of the Transfer of Property Act becomes a final decree on the expiry of the time limited thereby, although no order is passed under section 93: accordingly, no subsequent suit for redemption can be maintained.

Ramasami v. *Sami* 96

8. ————————————————, **s. 108, cl. (j)**—*Lessor's right to sue both lessee and his transferee :*

The provision in section 108 of the Transfer of Property Act that a lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and that the lessee shall not, by reason of such transfer, cease to be subject to any of the liabilities attaching to the lease, does not prevent the transferee being also liable to the lessor, who may at the same time sue the lessee upon his express covenant and the transferee upon the privity of estate, though he can have execution against one only.

Kunhanujan v. *Anjelu* 296

9. ————————————————, **ss. 108, sub-s. (e), 117**—*Agricultural lease—Lease of a coffee garden—Destruction of plants by fire—Voidability of lease :*

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The plaintiff was the assignee of the right and title of the lessor and the defendant was the lessee of a coffee garden under an instrument which was held to constitute a lease of the coffee plants only. In a suit to recover the annual payment reserved under the lease, it appeared that the coffee plants had been destroyed by fire and the garden had been consequently abandoned by the defendant before the period to which the claim related:—*Held*, that the plaintiff was not entitled to recover. *Per cur.*—We are clearly of opinion that a lease of a coffee garden is not an agricultural lease within the meaning of Transfer of Property Act, s. 117.

Kunhayen Haji v. *Mayan* 98

10. ——————————————————, s. 114—*Presidency Small Cause Courts Act—Act XV of* 1882, *ss.* 22, 41:

The plaintiff, a landlord, relying on a provision in a lease, gave the defendants, his tenants, notice to quit. Within seven days the defendants tendered rent, interest and costs. The plaintiff, nevertheless, filed this suit to eject the defendants. The defendants subsequently paid the full amount due into Court:—*Held*, that, under the terms of the lease, the defendants were not liable to forfeiture, and that, since the suit should have been brought under chapter VII, section 41 of the Presidency Small Cause Courts Act, plaintiff must pay the defendants' costs as between attorney and client under section 22 of that Act:—*Held*, on appeal (1) that there having been a tender and payment into Court of the full amount due, the plaintiff proceeded with the suit at his risk under section 114 of the Transfer of Property Act; (2) that the suit not being cognizable by the Small Cause Court, s. 22 of Act XV of 1882 did not apply, an application under chapter VII of that Act not being a suit under section 22 thereof.

Krishnasami Chetti v. *The Natal Emigration Board* 216

TRUSTS ACT—ACT II OF 1882, s. 49—*Religious Endowments Act—Act XX of* 1863—*Regulation VII of* 1817, *s.* 13—*Discretionary power of a temple committee to appoint new trustees when the power of management is not hereditary:*

A temple committee, appointed under Act XX of 1863, may appoint new trustees when there is no hereditary trustee to add to the existing trustees, but this power, although discretionary, must be exercised reasonably and in good faith, and, according to the principle, which is applicable to public trusts, embodied in section 49 of the Indian Trusts Act. If it is not so exercised, the power may be controlled by a Civil Court of original jurisdiction.

Sheik Davud Saiba v. *Hussein Saiba* 212

WILL—*Probate—Interest of defendant in testator's estate:*

In a suit brought to obtain probate of a will the defendant, before he can contest the will, must show that he has some interest in the testator's estate. The fact of being a legatee under the will, or a creditor of the testator, does not amount to such an interest. But proof of a former will of the testator in which the defendant is interested is a sufficient interest to contest the will set up.

Rahamtullah Sahib v. *Rama Rau* 373

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Civil Procedure Code—Act XIV of 1882, ss. 278, 283—*Transfer of Property Act—Act IV of* 1882, *s.* 85—*Non-joinder of puisne mortgagee in a mortgage suit—Mortgage decree—Claim in execution to mortgage premises.*] A mortgagee sued on his mortgage and obtained a decree against the mortgagor for the principal, together with the interest accrued due thereon, and for the sale of the mortgage premises in default of payment. A second mortgagee, who was not a party to the suit, intervened in execution, alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognising the priority of the decree-holder's lien and giving to the second mortgagee the opportunity of discharging it. No suit was brought to question this order. The first mortgage was not paid off and the mortgage premises were brought to sale. The purchaser, who was the first mortgagee, now sued for possession of the land and his claim was resisted by the second mortgagee:—*Held,* (1) that the non-joinder of the present defendant in the suit on the mortgage constituted no bar to the present suit; (2) that the second mortgagee was estopped from now re-asserting his claim.

Krishnan v. *Chadayan Kutti Haji* .. ..

Contract Act—Act IX of 1872, s. 23—*Marriage brokage contract—Public policy—Hindu law.*] An agreement to assist a Hindu for reward in procuring a wife is void as being contrary to public policy.

Vaithyanatham v. *Gangarazu* .. ..

Insolvent Act—11 and 12 Vic., cap. 21, s. 7—*Uncertificated insolvent—After acquired landed property—Mortgage by insolvent—Rights of Official Assignee.*] The Official Assignee applied under Insolvent Act, s. 36, for the delivery up to him of a house and furniture of which the occupants were in possession under a mortgage from an insolvent, dated December 1891. It appeared that the insolvent had been adjudicated in 1888 and had received her personal discharge in 1890 and had obtained the house in question under a deed of gift in April 1891, and had died intestate in May 1892, having never obtained a discharge under section 59. The mortgagees took their mortgage with notice of the insolvency of the mortgagor. The Official Assignee did not become aware that the insolvent had acquired the property in question till September 1892 when he intervened and claimed the property free from the mortgage:—*Held,* that the Official Assignee was entitled to the mortgaged property free from the mortgage.

Rowlandson v. *Champion* .. ..

Limitation Act—Act XV of 1877, s. 22—*Joint contractors—Civil Procedure Code—Act XIV of* 1882, *s.* 32—*A party to a contract joined as defendant and subsequently made a plaintiff.*] Limitation Act, s. 22, is not applicable to cases

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where the Court of its own motion orders that a party to a contract originally joined as defendant be made a plaintiff under Civil Procedure Code, s. 32.

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RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865, s. 10—*Suit in Civil Court for enforcement of patta and other relief—Jurisdiction—Declaration as to enforceable stipulations—Rates of rent—Dry land converted into wet land.*] In a suit brought in the Court of a District Munsif by a zamindar and his lessee against a cultivating tenant to enforce the exchange of patta and muchalka and for further and other relief:—*Held*, (1) *following Ramayyar* v. *Vedachella* (*I.L.R.*, 14 *Mad.*, 441), that the Civil Court had jurisdiction, and that a decree should be passed containing a declaration as to the terms which the patta should contain; (2) that a patta is enforceable which contains a stipulation that "if nunja cultivation be made on punja land permanently converted into "nunja with or without water of the landlord's tank, nunja tirva according "to the rate fixed for such cultivation shall be paid" when such stipulation is in accordance with local custom.

Sattappa Pillai v. *Raman Chetti* .. ..

SUCCESSION CERTIFICATE ACT—ACT VII OF 1889, ss. 4, 17—*Probate issued from Native Court in Cutch—Certificate of Political Agent—Suit in British India.*] A suit in British India by the executors of the will of a native of Cutch was dismissed, on its appearing that the plaintiffs were furnished only with probate issued from a Native Court, of which they produced a copy certified by the Political Agent of Cutch, and since stamped in accordance with the Court Fees Act, 1870:—*Held*, that the plaintiffs were not entitled to a decree without taking out probate or letters of administration in British India under Act V of 1881 or a certificate under Act VII of 1889, but instead of dismissing the suit, the Court should have allowed time for the plaintiffs to have so completed their title to sue.

Manasing v. *Amad Kunhi* .. ..

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 85—*Non-joinder of puisne mortgagee in a mortgage suit—Civil Procedure Code—Act XIV of* 1882, *ss.* 278–283—*Mortgage decree—Claim in execution to mortgage premises.*] A mortgagee sued on his mortgage and obtained a decree against the mortgagor for the principal, together with the interest accrued due thereon, and for the sale of the mortgage premises in default of payment. A second mortgagee, who was not a party to the suit, intervened in execution, alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognising the priority of the decree-holder's lien and giving to the second mortgagee the opportunity of discharging it. No suit was brought to question this order. The first mortgage was not paid off and the mortgage premises were brought to sale. The purchaser, who was the first mortgagee, now sued for possession of the land and his claim was resisted by the second mortgagee:—*Held*, (1) that the non-joinder of the present defendant in the suit on the mortgage constituted no bar to the present suit (2) that the second mortgagee was estopped from now re-asserting his claim.

Krishnan v. *Chaḍayan Kutti Haji* .. ..

THE

INDIAN LAW REPORTS.

Madras Series.

APPELLATE CIVIL.

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

SATTAPPA PILLAI (DEFENDANT), APPELLANT,

v.

RAMAN CHETTI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1892. April 20

Rent Recovery Act (Madras)—Act VIII of 1865, s. 10—Suit in Civil Court for enforcement of patta and other relief—Jurisdiction—Declaration as to enforceable stipulations—Rates of rent—Dry land converted into wet land.

In a suit brought in the Court of a District Munsif by a zamindar and his lessee against a cultivating tenant to enforce the exchange of patta and muchalka and for further and other relief:

Held, (1) *following Ramayyar* v. *Vedachalla* (I.L.R., 14 Mad., 441) that the Civil Court had jurisdiction, and that a decree should be passed containing a declaration as to the terms which the patta should contain;

(2) that a patta is enforceable which contains a stipulation that "if nunja "cultivation be made on punja land permanently converted into nunja with or "without water of the landlord's tank, nunja tirva according to the rate fixed "for such cultivation shall be paid," when such stipulation is in accordance with local custom.

SECOND APPEAL against the decree of H. T. Ross, District Judge of Madura, in appeal suit No. 377 of 1887, modifying the decree of T. Venkatramayya, District Munsif of Sivaganga, in original suit No. 293 of 1886.

The plaintiffs, who were the zamindar of Naduvayal Palayapat and a lessee from him, sued to enforce acceptance of a patta and execution of a corresponding muchalka by the defendant, who was a cultivating raiyat within the limits of the zamindari. The

* Second Appeals Nos. 20, 21 and others of 1891.

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plaint also contained a prayer for such other reliefs as the Court might think fit. The defendant objected to the patta tendered as containing conditions which the landlord was not entitled to impose; the most important for the purposes of this report being a stipulation contained in paragraph 3 of the patta to the effect that "if nanja cultivation be made on punja the tirva due there-"for should be included and paid." The third, fifth and seventh issues in the suit were framed as follows:—"Are the plaintiffs "entitled to recover nanja tirva for lands converted by defendant "from punja to nanja lands?" (5) "What is the proper patta "to be tendered by plaintiffs to the defendant?" (7) "To what "relief, if any, are the plaintiffs entitled in the suit?"

The District Munsif held that the patta tendered by the plaintiffs required certain modifications indicated by him, and he passed a decree that the tenant should accept the patta as modified and execute a muchalka in accordance with it. With reference to the stipulation in paragraph 3 of the patta above referred to, he held that the defendant was bound to pay nanja tirva for achukattu nanja land and for punja land converted into nanja. On appeal the District Judge reversed the decree, dismissing the suit on the ground that the patta tendered was not one enforceable by the landlord. He said with regard to the above stipulation that in his view an implied contract to pay only dry rates for dry lands when wet crops are raised on them to which the landlord contributes nothing might be inferred from the previous pattas relating to a long series of years. Moreover he expressed the view that the liability sought to be imposed on the tenant was opposed to the policy of the Rent Recovery Act, 1865.

The plaintiffs preferred a second appeal to the High Court, which came on for hearing before MUTTUSAMI AYYAR and PARKER, JJ., together with various other second appeals which arose out of other similar suits instituted by the plaintiffs against other tenants on the same zamindari, in which similar decrees had been passed. Their Lordships pointed out that under Rent Recovery Act of 1865, s. 10, it was incumbent on the Court, when it found that a proper patta had not been tendered to proceed to determine what patta ought to be offered and to direct the tenant to accept such patta and execute a muchalka in accordance with it. They held accordingly that the Judge was not right in dismissing the suit and they set aside his decree. With reference to the evidence

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relating to the third issue, above stated, their Lordships called the attention of the District Judge to certain documentary evidence on the record and required him to record a revised finding on that issue as to which they made, among others, the following observations:—

"Passing on to the merits, the six clauses in the sample patta "B to which the tenants objected are set out by the District "Munsif in paragraph 6 of his judgment. He discussed them all "and indicated how the patta should be modified, and the Judge "concurred in his opinion except as to one condition relating to "payment of nunja tirva when wet crops are raised on dry lands. "This provision, which is the only one now in dispute, is entered "together with some other stipulations in paragraph 3 of patta B, "which runs in these terms:—

"If more or less extent of land than is hereunder specified is "cultivated, if an excess or deficiency should be found during "settlement and survey, if nunja cultivation be made on punja, "and if trees, &c., viz., mango, tamarind, cocoanut, iluppai and "jack trees become liable to taxation, the tirva, &c., due therefor "should also be included and paid."

"The appellants' case was that lands situated in Naduvayal "Palayapat are classified as (i) punja or dry, (ii) as achukattu "punja (dry land with ridges), (iii) as achukattu nanja and (iv) "as nanja, and that when superior dry crops are raised on dry "land with the aid of the ridges, the dry land is treated as achu-"kattu punja, and when wet crops are raised on such land, it is "classified and assessed as achukattu nanja, and that wet lands "irrigated from the tank in the village are classified simply as "nanja. In the cases now before us there is no objection taken "to the classification of dry land into ordinary punja and achu-"kattu punja. The respondents contend, however, that all "punja lands ought to be assessed at punja rates only, although "wet crops are raised, unless such crops are raised with the aid "of tank water. The District Munsif found that, according to the "custom prevailing in Naduvayal Palayapat and in the adjacent "Palayapats of Karisapatti and Varapoor and in the Zamindari "of Sivaganga of which they are said to be offshoots, nanja "tirva is payable for punja converted into nanja and for "punja cultivated with wet crop. He relied in support of his "finding on exhibits V series, F series, S series, Ga., H and on

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"several other documents relating to villages in the adjacent "palayapats and on the oral evidence on record. On appeal the "Judge set aside the finding and held that the landlord was not "entitled to impose upon the tenant the sweeping condition that "if wet crops are raised on dry lands, no matter how, wet rent "must be paid. He rests his decision on four grounds, viz., (i) "that the customary right proved is limited to classifying as wet "and charging wet rent upon dry lands permanently converted "into wet by means of tank water belonging to the zamindar; "(ii) that a dispute as to whether wet rent is payable is one "relating to rate of rent and falling under section 2 of Act VIII "of 1865; (iii), that for ten years at least the landlord had only, "been charging dry rent on dry lands growing wet crops by "means of the tenants' own labour and improvements, and that "it is evidence of an implied contract within the meaning of that "section; and (iv), that the liability which the appellants now "seek to impose is opposed to the policy of that enactment. "Adverting to the lands now in dispute, the Judge remarks that "wet crops are raised, if at all, simply by rain water falling on "or draining into the dry lands or by hill rivulets flowing on to "them or by subsoil moisture oozing up into them, which natural "supply is secured on the lands by the labour of the tenants in "forming the ridges to prevent its escape, and that they are not "wet lands or lands permanently converted from dry into wet, "but they are dry lands on which the tenant takes the risk, if "he likes, of trying the wet crops. It is contended in second "appeal that the investigation in the Lower Appellate Court is "defective on several material points, and that several groups of "exhibits have not been sufficiently considered and due effect "given to them whilst coming to a finding as to the custom set "up by the appellants.

"As already observed, the Judge considers that achukattu "nanja lands are dry lands not permanently cultivated with wet "crops, but lands on which tenants occasionally grow wet crops "at their own risk. The District Munsif does not treat the classi- "fication as temporary and the Judge refers to no evidence in "support of his view. The evidence of the appellants' ninth "witness, which explains how lands are classified and to which we "are referred by the appellants' pleader, as well as the fact that "lands are usually classified with reference to their ordinary

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"capacity lend weight to the suggestion that dry lands are desig- "nated as achukattu nanja only when wet crops are perma- "nently grown upon them and that the distinction between them "and ordinary nanja consists only in the latter being irrigated "from the tank, whilst the former depend for supply of water "either upon a spring channel, a hill stream, subsoil moisture or "drainage of other wet lands in the palayapat. We are not "referred for the respondents to any exhibit which shows that "land once classified as achukattu nanja has again been treated "as punja. Nor is the reference to them in the plaint as dry "lands with respect to their original condition conclusive. The "principle on which dry lands are classified as achukattu nanja "has a material bearing on the question whether the tenant is "bound to accept the classification and to pay the customary wet "rent for achukattu nanja. It is conceded for the appellants "before us that the classification has no reference to dry lands "occasionally cultivated with wet crops, and that they never "intended to claim wet rent for such crops. Again the Judge "considers the source of irrigation material, and that no dry land "is liable for wet rent unless it is irrigated from the zamindar's "tank. It is urged before us that the tank is not kept in repair "by the zamindar, that though the tenants keep it up, they "admittedly pay wet rent, and that this circumstance favours the "view that the liability to pay wet rent is a customary incident "of the tenure of the tenants' holding. The District Munsif "refers to the admission of the respondents' vakil that the source "of supply is immaterial and that it makes no difference whether "lands are watered from the tank or by percolation from the "subsoil. The Judge has apparently overlooked this admission, "though several exhibits in the F series, which specify the source "of supply, support the opinion of the District Munsif. If it has "been the practice to treat the source of irrigation as imma- "terial, whether it is a tank, a hill rivulet, or spring channel or "subsoil moisture or drainage water, it will have an important "bearing on the question of custom. If the source of supply is "not created either by the tenant or by the zamindar at his "expense, and if it is one already extant in the zamindari, it "is by no means clear that the formation of a ridge for retain- "ing the supply would debar the zamindar from demanding a "share of the crop raised by utilizing such supply if there is a

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"custom in favour of such demand. Furthermore, we find that "the documentary evidence relied on by the District Munsif has "not been sufficiently considered by the Judge."

The appeal having come on again before the District Judge, he held that the evidence established a custom which would justify the plaintiffs in inserting in the patta a stipulation that if nanja cultivation be made on punja land permanently converted into nanja with or without tank water, the nanja tirva according to the rate for such cultivation shall be paid, and he passed a decree accordingly. In his judgment he said as follows:

"(Paragraph 4.) On behalf of the landlord (plaintiffs) it is "conceded that where punja land is only temporarily converted "into nanja by the tenants making ridges to secure nature's sup- "ply of water and wet crops are raised thereon without using tank "water, nanja rates cannot be charged. On behalf of the tenant "(defendants) it is conceded that where punja land is converted "into nanja and wet crops are raised thereon with the use of tank "water, nanja rates must be paid. (Paragraph 11.) The defend- "ants' pleader in the course of the present argument stated the "willingness of defendants to pay nanja rate on any land which "appeared as achukattu nanja in any of their previous pattas. "This is tantamount to an admission that where land is once "classified as achukattu nanja wet rate is payable thereon:" "(Paragraph 12.) The custom being established, plaintiffs are "entitled to insert the clause, as reworded above in the plaint- "pattas. (Paragraph 13.) This clause is only a contingent clause "providing that if such permanent conversion and classification "into achukattu nanja takes place, nanja rate shall be paid. In "some of the present cases, there is admittedly no such land in "defendants' holdings as yet. In the remaining cases where items "of achukattu nanja are entered in the pattas and charged with "wet rates, it is not the contention of defendants that these are "not, in fact, cases of permanent conversion with nature's supply, "but their contention all along has been that they are not liable "to pay wet rates because tank water was not used."

The plaintiffs preferred this second appeal.

Parthasaradhi Ayyangar and *Sundara Ayyar* for appellants.

Subramanya Ayyar and *Bhashyam Ayyangar* for respondents.

JUDGMENT.—It is contended for the appellant that the Judge was in error in passing a decree in respondents' favour under

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section 10 of the Rent Recovery Act. Our order, dated 21st November 1889, directed him to determine what patta ought to be offered and to direct the tenant to execute a muchalka in accordance therewith. The question whether a Civil Court is competent to act under that section has been since considered by a Full Bench in *Ramayyar* v. *Vedachalla*(1). It was held by the majority of the Court that though it was not competent to a Civil Court to act under that section which conferred a special power on the Revenue Courts, yet it may declare what a proper patta is in a suit properly framed for that purpose. It is argued that there was no prayer for a declaration as part of the substantive relief, and hence that this was not a proper suit for a declaratory decree. The objection is merely formal and was not taken before; moreover the plaint contains a prayer for such other relief as the Court may think fit and a specific issue was raised in regard to it. We see no objection to varying the form of the decree so as to give a declaration as to the proper patta.

We are not prepared to attach weight either to the contention that the Judge misconstrued our order in saying that he found it impossible to differ from the appreciation of the evidence set out therein, and that it was needless for him to reproduce the same. This only amounts to a finding upon the facts against the appellant.

The inference drawn in paragraph 11 of the judgment appears to be reasonable and not open to any legal objection. The finding is that punja may be converted into achukattu nanja, though it receives no supply from the tank in the zamindari, and we cannot accede to the contention that there is no finding in that matter. Nor do we think that the decisions in *Ramayyar* v. *Vedachallu*(1) and *Apparau* v. *Narasanna*(2) are applicable in this case.

As regards the observation made by the Judge in paragraph 13 we do not consider that it is irregular to define in a patta the terms of tenancy with reference to a possible contingency which may arise in the course of the fasli for which the patta is tendered. The suggestion that the patta should contain no allusion to achukattu nanja unless such description of land actually existed at

(1) I.L.R., 14 Mad., 441. (2) I.L.R., 15 Mad., 47.

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the time the patta was tendered is not in our opinion entitled to weight.

Exhibit F series have been sufficiently considered by the Judge, and it does not appear that the appellant urged in the Court below that they were collusively got up, or that the pattas were never acted upon. As regards exhibit II series we observe that the District Munsif came to the conclusion that they were not genuine, and no specific objection appears to have been taken in the Lower Appellate Court.

This is clearly not a case of enhancement of rent by reason of additional value imparted to land by works of irrigation, and the decisions relating to lands irrigated from the Kistna channels is not in point. The question arising in this suit is whether when punja is converted into achukattu nanja the zamindar is entitled to demand wet rates according to local usage.

The contention that the measurements and names of fields is incorrect is not pressed.

We shall, therefore, vary the decree by directing that a declaration of the proper patta be substituted for the relief awarded under section 10 of the Rent Recovery Act, and that the decree be confirmed with the modification ordered in *Raman Chetti* v. *Sattappa Pillai*(1). We make no order as to costs in the appeal.

(1) Second Appeal No. 111 of 1891 (not reported) where *Muttusami Ayyar* and *Parker*, JJ., having before them a similar patta in delivering judgment said: "We shall, therefore, modify the decree and amend the patta by omitting from "clause 3 the words 'or if nanja cultivation be made on punja,' and adding at the "end of the clause the words 'if nanja cultivation be made on punja land perma-"'nently converted into nanja with or without, tank water, nanja tirva according "'to the rate fixed for such cultivation shall be paid.'"

APPELLATE CIVIL.

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

VAITHYANATHAM (PLAINTIFF), PETITIONER,

v.

GANGARAZU (DEFENDANT), RESPONDENT.*

1893. April 20, 25.

Contract Act—Act IX of 1872, *s.* 23—*Marriage brokage contract—Public policy—Hindu law.*

An agreement to assist a Hindu for reward in procuring a wife, is void as being contrary to public policy.

PETITION under Provincial Small Cause Courts Act, 1887, s. 25, praying the High Court to revise the proceedings of C. Sury Ayyar, Subordinate Judge of Cocanada, in Small Cause suit No. 293 of 1891.

Suit to recover Rs. 50. The plaintiff's case was stated in the plaint as follows:—

"Plaintiff agreed to go from place to place and select a girl "for defendant's wife. Defendant, therefore, agreed to pay plain-"tiff, on account of plaintiff's wages in the said purpose, in the "presence of certain mediators, Rs. 50. Plaintiff accordingly "selected a girl and got her married to him. Defendant failed "to pay plaintiff the said sum though demanded."

The Subordinate Judge held that the facts alleged were established by the evidence, but dismissed the suit on the ground that the contract sued on was void as being contrary to public policy.

The plaintiff preferred this petition.

Subramanya Ayyar for petitioner.

The counter-petitioner was not represented.

MUTTUSAMI AYYAR, J.—The question for determination in this case is whether the contract sued on is a marriage brokage contract, and if so, whether it is invalid. There is no reason to think that the contract in question is not a contract as found by the Court below to assist the defendant for reward in procuring a wife. The point to which the question then comes is whether the rule of public policy which invalidates marriage brokage con-

* Civil Revision Petition No. 485 of 1891.

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tracts in England is applicable to the case before us. The reason of that rule, as stated in *Hall* v. *Potter*(1), which went up to the House of Lords, is that it is conducive to public good that marriages should be procured and promoted by the mediation of relatives and friends and not by hirelings. On principle this rule appears to be of general application and not of a special or conventional character. Is there anything then in the usage of this country to preclude its operation? As far as I am aware there is nothing in the usage to the contrary; on the other hand, the interference of hirelings in bringing about marriages is regarded with disapproval. It is no doubt true that the Asura form of marriage, which involves a money payment, is valid according to Hindu law, and it was so held in *Visvanathan* v. *Saminathan*(2) that a bond given to secure such payment was valid. But the payment in that case was to be made to the father of the girl for giving her in marriage. Though this form of marriage is disapproved by text writers, yet it is upheld, as it is in accordance with established usage. It is also to be observed that the money received by the father is often applied in part to making jewels for the girl given in marriage and in part to meeting the other expenses of the marriage, and that this mode of applying the payment is also an argument in favour of the usage. But the case is otherwise when hirelings are employed, and their employment tends as much to deceit on parents in India as in England. It is true that there are child-marriages in India, but the prevalence of such marriages appears to me to require, rather than exclude, the operation of the rule designed to prevent the possibility of deceit on parents, as well as on either party to the marriage. In the absence of an established usage to the contrary, I see no good reason why an additional evil should be engrafted on this country by ignoring the rule of public policy and according a legal status to marriage brokers by a supposed analogy to Asura marriage. I would, therefore, rest my decision on two grounds, viz., that the justice of the rule of public policy is open to no question, and that no established usage precludes its application except in the case of a money payment agreed to be made to the father of the girl in the Asura form. I would dismiss this petition.

(1) 3 Lev., 411. (2) I.L.R., 13 Mad., 83.

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BEST, J.—The question for decision is whether the Subordinate Judge is right in dismissing the suit as unsustainable on the ground that the consideration for the agreement being money promised to be paid for the negotiation of a marriage, the contract is against public policy and therefore void.

In *Visvanathan* v. *Saminathan*(1) it was held by *Parker* and *Wilkinson*, JJ., that a suit would lie to recover money under a bond executed to the father of a girl in consideration of his giving his daughter in marriage to the nephew of the defendant, the executant of the bond. As remarked by *Wilkinson*, J., in that case the principles on which the English Courts act in disallowing such contract as marriage brokage contracts are not altogether applicable to this country, in which the custom of infant marriages prevails, and when, it may be, that the consideration in such cases is often received by the father for the use and benefit of the child. The case *Ram Chand Sen* v. *Audaito Sen*(2) was also one in which the agreement was to pay money to the father of the child to be given in marriage.

The present case is distinguishable from the above in that the agreement here is with a stranger in consideration of his negotiating the marriage. A case more in point is *Pitamber Ratansi* v. *Jagjivan Hansraj*(3) in which it was held by *Scott*, J., that there was good reason for adhering to the English rule and declining to give to marriage brokers a legal status such as would enable them to enforce their contracts by law. Concurring in this opinion, I agree in dismissing this petition.

(1) I.L.R., 13 Mad., 83. (2) I.L.R., 10 Calc., 1054.
(3) I.L.R., 13 Bom., 131–7.

APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Handley.

1892. Nov. 21, 22. December 1.

KHADIR MOIDEEN (DEFENDANT NO. 5), APPELLANT,

v.

RAMA NAIK AND ANOTHER (PLAINTIFFS NOS. 1 AND 2), RESPONDENTS.*

Limitation Act—Act XV of 1877, s. 22—Joint contractors—Civil Procedure Code—Act XIV of 1882, s. 32—A party to a contract joined as defendant and subsequently made a plaintiff.

Limitation Act, s. 22, is not applicable to cases where the court of its own motion orders that a party to a contract originally joined as defendant be made a plaintiff under Civil Procedure Code, s. 32.

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in appeal suit No. 104 of 1890, affirming the decree of M. A. Tirumala Chariar, District Munsif of Kulitalai, in original suit No. 212 of 1889.

Suit to redeem a mortgage. The District Munsif passed a decree as prayed, which was affirmed on appeal by the District Judge. This second appeal was preferred by defendant No. 5.

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

Ramachandra Rau Saheb and *Narasimha Chariar* for appellant.

Parthasaradhi Ayyangar for respondents.

JUDGMENT.—The facts of the case are as follows. In October 1877 the first defendant, the father of defendants 2 and 3 and brother of fourth defendant, borrowed a sum of Rs. 200 from Subba Naick, the brother of the two plaintiffs and of sixth defendant, on the security of certain immovable property of which fifth defendant has since became the purchaser. Subba Naick having died, the plaintiffs instituted the present suit to recover two-thirds of the amount due on the mortgage; as the other claimant, sixth defendant, would not join, they made him sixth defendant and relinquished one-third of the amount due. During the progress of the suit the sixth defendant was, by order of the Court, made third plaintiff, but at the time his right to recover was barred. Two contentions were raised by defendants 1–5: first, that the suit

* Second Appeal No. 300 of 1892.

was not maintainable, second; that the debt had been satisfied. Both were overruled and plaintiffs 1 and 2 obtained a decree. The fifth defendant appeals.

By section 22 of the Limitation Act it is provided that "when, "after the institution of a suit, a new plaintiff or defendant is "substituted or added, the suit shall, as regards him, be deemed to "have been instituted when he was so made a party." No doubt it has been held by both the High Courts of Bombay and of Calcutta that a suit by several persons, as to some of whom the right to sue is barred, is virtually a suit by the other plaintiff or plaintiffs alone, and that if a suit so framed will not lie, as it will not in the case of a joint cause of action, there can be no other course than to dismiss the claim; but in the cases so decided, *Ramsebuk* v. *Ramlall Koondoo*(1) and *Kalidas Kevaldas* v. *Nathu Bhagvan*(2), the suit was brought by only one of the joint contractors, the other joint contractors not being parties to the suit. But in the present case the absence of the sixth defendant is satisfactorily accounted for. He was unwilling to join his brothers in the suit. They had therefore no option but to make him a defendant and to relinquish his share of the claim. There is no authority for holding that section 22 of the Limitation Act applies when the Court of its own motion acts under section 32, Civil Procedure Code, and orders that a defendant be made a plaintiff. All that was held in *Krishna* v. *Mekamperuma*(3) was that "the "procedure of the District Judge in transforming certain defend-"ants into plaintiffs was under the circumstances of the case irre-"gular." No doubt the whole of the mortgage debt is due to the persons claiming under the original mortgage jointly and not severally and a person entitled to a moiety of the mortgage debt cannot demand to be paid that moiety (*Bishan Dial* v. *Manni Ram*(4), but that ruling does not apply to a case like the present, where all the parties are before the Court and the matter can be finally dealt with by the decree in the suit.

On the merits also the second appeal must fail. The Judge has found as a fact that the debt was not discharged and it is not contended that he has misconstrued the evidence.

The second appeal therefore fails and is dismissed with costs.

(1) I.L.R., 6 Calc., 815. (2) I.L.R., 7 Bom., 219.
(3) I.L.R., 10 Mad., 44. (4) I.L.R., 1 All., 297.

APPELLATE CIVIL.

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

1892. March 11. April 23.

MANASING AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

AMAD KUNHI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Succession Certificate Act—Act VII of 1889, *ss.* 4, 17—*Probate issued from Native Court in Cutch—Certificate of Political Agent—Suit in British India.*

A suit in British India by the executors of the will of a native of Cutch was dismissed, on its appearing that the plaintiffs were furnished only with probate issued from a Native Court, of which they produced a copy certified by the Political Agent of Cutch, and since stamped in accordance with the Court-Fees Act, 1870:

Held, that the plaintiffs were not entitled to a decree without taking out probate or letters of administration in British India under Act V of 1881 or a certificate under Act VII of 1889, but instead of dismissing the suit, the Court should have allowed time for the plaintiffs to have so completed their title to sue.

SECOND APPEAL against the decree of L. Moore, District Judge of South Malabar, in appeal suits Nos. 109 to 113, confirming the decrees of A. N. Anantha Rama Ayyar, Additional District Munsif of Calicut, in original suits Nos. 54 and 77 of 1889 and Nos. 300, 349 and 350 of 1890.

Suits brought by the plaintiffs claiming to represent the estate of one Singjo Rayasi Sait, deceased, to recover debts due by the defendants to that estate.

The testator was a native of Cutch, but the District Munsif found that he carried on business and left property within the jurisdiction of the District Court of South Malabar.

The plaintiffs were the executors appointed under his will and had obtained probate of the will in the Native Court of Bhuj, and they now produced and filed as exhibit E a true copy of the probate signed and sealed by the Political Agent at Cutch. The plaintiffs had presented this document to the District Court of South Malabar and paid stamp fees to the amount of Rs. 1,032 upon it. Both the Lower Courts held that exhibit E did not

* Second Appeals Nos. 1219 to 1223 of 1891.

establish the defendants' right to maintain the suits, which they accordingly dismissed.

The plaintiffs preferred these second appeals.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and *Rama Rau* for appellants.

Bhashyam Ayyangar, *Sankaran Nayar* and *Govinda Menon* for respondents.

JUDGMENT.—The plaintiffs (appellants 1 to 5) are the executors of the will of one Singjo Rayasi, a native of Cutch, and they sue through their agent Purushottaman Amarasi Sett to recover a debt due to the estate of the deceased.

By section 4 of Act VII of 1889 it is enacted that no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person, except on the production, by the person so claiming of (i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased or (ii) a certificate granted under this Act and having the debt specified therein.

The Lower Courts have found that the plaintiffs are not entitled to sue, inasmuch as they have produced neither probate nor letters of administration, nor a certificate granted under Act VII of 1889.

It is contended by the learned Advocate-General that the executors having obtained probate of the will and letters of administration granted by the Judge of Varisht Court of Bhuj, and being unable to claim probate in India, are entitled, on proof of the will and of their status as executors of such will, to recover debts due to the estate of the deceased.

The Court of the District Judge of South Malabar having been, by the notification published at page 253 of the *Fort St. George Gazette*, dated 30th April 1889, authorized to receive applications for probate or letters of administration under Act V of 1881, it was open to the plaintiffs (appellants) to obtain under section 5 of the Act letters of administration with a copy of the will annexed.

"In regard to the title of executors and administrators," says Story (Conflict of Laws, 8th Edn., § 512) "derived from a "grant of administration in the country of the domicil of the "deceased, it is to be considered that that title cannot, *de jure*,

"extend, as a matter of right, beyond the territory of the govern-
"ment which grants it. It has hence become a general doctrine
"of the common law that no suit can be brought or maintained
"by an executor or administrator in his official capacity in the
"Courts of any other country except that from which he derives
"his authority to act, in virtue of the probate and letters testa-
"mentary or the letters of administration there granted to him.
"If he desires to maintain a suit in any foreign country, he
"must obtain new letters of administration and give new security
"according to the rules of law prescribed in that country before
"the suit is brought."

The probate or letters of administration referred to in section 4, clause (i) of Act VII of 1889, must be probate or letters of administration granted under Act V of 1881, and as the plaintiffs have not obtained such, they were not entitled to a decree. Then it is argued that the provisions of Act VII of 1889 have been substantially complied with, as a certificate in the form, as nearly as circumstances admit, of the second schedule has been granted to the plaintiffs 1 to 5 by the Political Agent of Cutch, and such certificate has been stamped in accordance with the provisions of the Court Fees Act of 1870.

We think the Lower Courts were right in holding that the copy of probate produced by plaintiffs and marked exhibit E is not a certificate granted by a British representative in a foreign state within the meaning of section 17 of Act VII of 1889. There is nothing to show that the Political Agent when he affixed his signature to the true copy of the probate intended to grant such a certificate as is required by Act VII of 1889. If he had no such intention, but merely affixed his signature with reference to the provisions of section 86 of the Evidence Act, the payment of the Court fees required by the Court Fees Act, 1870, although it proves the *bona fides* of the plaintiffs, will not validate the grant of letters of administration as a certificate.

We think, therefore, that the Lower Courts were right in holding that plaintiffs were not entitled to a decree, but were wrong in dismissing their suit. They should have allowed time for the plaintiffs to take out probate or letters of administration or to produce such a certificate as is required by the Act.

We set aside the decrees of the Courts below and remand the suit to the Court of First Instance, which will grant the plaintiffs a reasonable time within which to comply with the provisions of Act VII of 1889, failing which the suit must be dismissed.

All questions of costs must stand over until a final decision is given.

MANASING v. AMAD KUNHI.

APPELLATE CIVIL.

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

KRISHNAN (PLAINTIFF), APPELLANT,

v.

CHADAYAN KUTTI HAJI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1892. March 12. April 25.

Transfer of Property Act—Act IV of 1882, *s.* 85—*Non-joinder of puisne mortgagee in a mortgage suit—Civil Procedure Code—Act XIV of* 1882, *ss.* 278–283—*Mortgage decree—Claim in execution to mortgage premises.*

A mortgagee sued on his mortgage and obtained a decree against the mortgagor for the principal, together with the interest accrued due thereon, and for the sale of the mortgage premises in default of payment. A second mortgagee, who was not a party to the suit, intervened in execution, alleging that the land was not liable to be attached and sold by reason of his mortgage, and the Court made an order recognising the priority of the decree-holder's lien and giving to the second mortgagee the opportunity of discharging it. No suit was brought to question this order. The first mortgage was not paid off and the mortgage premises were brought to sale. The purchaser, who was the first mortgagee, now sued for possession of the land and his claim was resisted by the second mortgagee:

Held, (1) that the non-joinder of the present defendant in the suit on the mortgage constituted no bar to the present suit; (2) that the second mortgagee was estopped from now re-asserting his claim.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, in appeal suit No. 472 of 1887, reversing the decree of J. A. deRozario, District Munsif of Pynad, in original suit No. 178 of 1886.

Suit instituted in April 1886 to recover certain land with mesne profits.

In original suit No. 124 of 1875 one Koyotti obtained a decree for the redemption of a kanom on the land now in question. To enable him to effect the redemption, he borrowed Rs. 3,000 from

* Second Appeal No. 234 of 1891.

KRISHNAN v. CHADAYAN KUTTI HAJI.

the present plaintiff in 1879, and to secure this amount, executed in his favour a mortgage of the same land, undertaking to hand over possession, but possession was not delivered. Koyotti having redeemed the kanom, mortgaged portions of the land as security for various loans to defendant No. 1 and four others, and placed them respectively in possession. The plaintiff brought a suit (original suit No. 18 of 1883) against his mortgagor to recover the amount due on the mortgage and obtained a decree for the amount sued for and for sale of the mortgage premises. The subsequent mortgagees were not joined as parties to that suit. They intervened in execution and orders were made recognising the priority of the plaintiff's mortgage, but giving them the opportunity of discharging it. The plaintiff's mortgage, however, remained undischarged, and the land was brought to sale in execution of the decree and purchased by the plaintiff on 11th December 1884. The order made on the intervention of the present first defendant was dated October 1884 and no steps were taken by him to have this order vacated or the sale cancelled.

The District Munsif passed a decree for ejectment as prayed, holding, *inter alia*, that the claim of defendant No. 1 was barred by limitation. The Subordinate Judge on appeal reversed this decree on the ground that defendant No. 1 should have been made a party to the suit of 1883, holding that Civil Procedure Code, ss. 278 and 283 were inapplicable to the case on the authority of *Deefholts* v. *Peters*(1), and that the omission to join him in the suit of 1883 was fatal to the present case on the authority of *Venkata* v. *Kannam*(2).

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Govinda Menon* for appellant.

Ryru Nambiar for respondent No. 1.

JUDGMENT.—There are two questions for determination in this second appeal, first, whether the provisions of sections 278—283 of the Code are applicable to the case, and, secondly, whether the failure of plaintiff to make first defendant, the puisne mortgagee, a party to his suit No. 18 of 1883 is fatal to his present suit.

The facts are as follows:—In July 1879 plaintiff advanced Rs. 3,000 to one Koyotti to enable him to pay off the kanom and

(1) I.L.R., 14 Calc., 631. (2) I.L.R., 5 Mad., 184.

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value of improvements which, by the decree in original suit No. 124 of 1875, he had been ordered to pay to the tenants in possession. As security Koyotti, executed in favour of the plaintiff a mortgage deed of the land, agreeing to pay interest at 12 per cent. until he put plaintiff in possession. Although Koyotti, in execution of his decree in original suit No. 124 of 1875, obtained possession early in 1880, he failed to put plaintiff in possession and mortgaged the lands with possession to first defendant and others. In 1883 plaintiff instituted a suit against Koyotti for the recovery of the Rs. 3,000 with interest from Koyotti personally and by sale of the property in the schedule. He obtained a decree and attached the properties. Thereupon the defendant No. 1 and the other subsequent encumbrancers advanced their claim to hold the land, alleging that they had enabled Koyotti to pay off the amount of the decree in original suit No. 124 of 1875 and that they had made improvements.

The Subordinate Judge allowed their claim for improvements, but refused to reserve their mortgage right on the ground that the plaintiff's mortgage being prior in date must prevail. The property was then put up for sale and purchased by plaintiff, who now sues for possession.

The case relied on by the Subordinate Judge (*Deefholts* v. *Peters*(1), is not in point. There a decree had been obtained under sections 86–88 of the Transfer of Property Act and the Court held that proceedings by way of claim under section 278 only applied in cases of money decrees where the property of the judgment-debtor had been attached. But original suit No. 18 of 1883 was a suit brought by plaintiff under section 68 of the Transfer of Property Act to recover the money due to him by Koyotti who had failed to deliver the property to him. He obtained a decree for money recoverable either from Koyotti or by sale of the property in schedule. Koyotti having failed to satisfy the decree, plaintiff attached the land and a proclamation of sale was issued. Thereupon defendant No. 1 preferred a claim on the ground that the property was not liable to attachment, as he held it on mortgage. His claim was, after due inquiry, rejected under section 281, and that order not having been questioned in a regular suit, defendant No. 1 is now estopped from

(1) I.L.R., 14 Calc., 631.

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setting up the same claim in the present suit—*Velayuthan* v. *Lahsmana* (1).

With reference to the second question, we do not think the case of *Venkata* v. *Kannam*(2) is an authority for holding that because defendant No. 1 was not a party to original suit No. 13 of 1883, plaintiff's suit must be dismissed. As he was no party to the decree obtained by the plaintiff, he is not bound by it. But all that he can ask as puisne mortgagee is that he shall be allowed an opportunity of redeeming—*Radha Pershad Misser* v. *Monchur Das*(3), *Naru* v. *Gulabsing*(4), and *Radhabai* v. *Shamrav Vinayak*(5). The first defendant's later-created right was subject to the right of the plaintiff, the prior mortgagee. The plaintiff had a right to maintain a suit for the sale of the land to satisfy his mortgage, but having notice of the first defendant's possession as mortgagee ought to have made him a party to the suit. It was competent to Koyotti to deal with the interest remaining in him after the mortgage to plaintiff and the result of the transfer to first defendant was that first defendant acquired as against plaintiff the rights of the mortgagor, in other words the right of redemption. As defendant No. 1 was no party to plaintiff's suit for sale, he would have been entitled to be afforded an opportunity to redeem had not his right been barred by his having taken no steps to set aside the order passed on his claim petition.

The decree of the Subordinate Judge must be reversed and the appeal remanded for the decision of the appeal on its merits. The appellant is entitled to his costs in this Court, and the costs in the Lower Appellate Court will abide and follow the result.

(1) I.L.R., 8 Mad., 506.
(2) I.L.R., 5 Mad., 184.
(3) I.L.R., 6 Calc., 317.
(4) I.L.R., 4 Bom., 83.
(5) I.L.R., 8 Bom., 168.

APPELLATE CIVIL.

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

ROWLANDSON, APPELLANT,

v.

CHAMPION AND ANOTHER, RESPONDENTS.*

1893. August 1 September 6

Insolvent Act—11 and 12 Vic., cap. 21, s. 7—Uncertificated insolvent—After acquired landed property—Mortgage by insolvent—Rights of Official Assignee.

The Official Assignee applied under Insolvent Act, s. 36, for the delivery up to him of a house and furniture of which the occupants were in possession under a mortgage from an insolvent, dated December 1891. It appeared that the insolvent had been adjudicated in 1888 and had received her personal discharge in 1890 and had obtained the house in question under a deed of gift in April 1891, and had died intestate in May 1892, having never obtained a discharge under section 59. The mortgagees took their mortgage with notice of the insolvency of the mortgagor. The Official Assignee did not become aware that the insolvent had acquired the property in question till September 1892 when he intervened and claimed the property free from the mortgage:

Held, that the Official Assignee was entitled to the mortgaged property free from the mortgage.

APPEAL against the judgment of COLLINS, C.J., as Commissioner of the Insolvent Court, in insolvent case No. 21 of 1888.

Application by the Official Assignee under Insolvent Act, s. 26, that a certain house and the furniture therein be delivered up to him as constituting part of the estate of an insolvent who had died without obtaining a final discharge. The house had been conveyed to the insolvent after she had obtained her personal discharge and was now in the possession of mortgagees under a mortgage from her which comprised also the furniture in the house.

Mr. *K. Brown* for Official Assignee.

Mr. *R. F. Grant* for the mortgagees.

COLLINS, C.J.—This was an application by Mr. Kenworthy Brown on behalf of the Official Assignee under section 26 of 11 Vic., cap. 21, for an order directing Messrs. Champion and Short, Attorneys of the High Court, to deliver over to the Official Assignee certain property alleged to be the property of one

* Original Side Appeal No. 35 of 1892.

ROWLANDSON v. CHAMPION.

Annie Smith, an insolvent debtor. The facts of the case are as follows:—

Annie Smith, in February 1888, filed a petition in the Insolvent Court and was duly adjudged an insolvent. She received a personal discharge in February 1890, but no final discharge was granted. No assets were realized under the estate by the Official Assignee.

On the 3rd day of April 1891 one McLintock, by a deed of gift, conveyed to Annie Smith a certain house and land situated in the district of Chingleput and called River Ville. The deed of gift to Annie Smith was duly registered. Annie Smith was also possessed of certain articles of furniture in and about the said house. In December 1891 Annie Smith executed a deed of mortgage to Messrs. Champion and Short, Solicitors of Madras, mortgaging the said house and land and furniture for the sum of Rs. 3,500. The mortgage deed contained a power to sell "the said mortgaged property upon giving to the said mort-"gagor, her heirs, executors, administrators or assigns, or leaving "on the said premises a notice in writing to pay off the said "mortgage, and if default shall have been made in such payment "for three calendar months after such notice." It is stated that Annie Smith died on the 31st day of May 1892 intestate. The Administrator-General was cited to appear on this application, but took no part in the argument, and makes no claim to the property, and no administration appears to have been taken out to the estate of the said Annie Smith. It appears that Messrs. Champion and Short on the 1st June 1892 took possession of the said house, premises and furniture, and have, since June, let the house for short periods to tenants. There is no evidence before me under what authority they so took possession, or that they have given at any time to the said Annie Smith, her heirs, executors, administrators or assigns, or left on the premises the notice in writing referred to in the mortgage deed.

Mr. Kenworthy Brown contends that as Annie Smith had not received her final discharge from the Insolvent Court, any property that she might have acquired subsequent to her insolvency by section 7 of 11 Vic., cap. 21, vested in the Official Assignee absolutely, and any mortgage or other encumbrance on such property executed by the said Annie Smith was void against the Official Assignee. It is further contended that Messrs.

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Champion and Short were aware of Annie Smith's insolvency and knew that she had not obtained her final discharge. In support of the former proposition *Kerakoose* v. *Brooks*(1) is relied on. Mr. Robert Grant for Messrs. Champion and Short submits that a summary order under section 26 of the Act should not be made, but that the Official Assignee should be referred to a regular suit (*Umbica Nundun Biswas in re*(2)), and he contends that after-acquired property of an insolvent may be dealt with by such insolvent until the Official Assignee intervenes, and if such transaction be *bonâ fide* and for value, the Official Assignee is bound by such transaction, and he cites *Kristocomul Mitter* v. *Suresh Chunder Deb*(3), *Fatima Bibi* v. *Fatima Bibi*(4), *Herbert* v. *Sayer*(5), *Cohen* v. *Mitchell*(6).

I find the following facts to be proved:—that Annie Smith was duly adjudicated an insolvent in 1888 and had not received her final discharge from the Insolvent Court. That on the 3rd day of April 1891 an absolute deed of gift of the property in question was made to Annie Smith. That in December 1891 a mortgage of the property in question was executed by Annie Smith to Messrs. Champion and Short, that such mortgage was executed *bonâ fide* and for valuable consideration. That Messrs. Champion and Short were aware that Annie Smith had been adjudicated an insolvent and had reasonable means of knowing that she had not obtained her final discharge from such Court. That the Official Assignee did not intervene in any manner until 8th September 1892.

Upon these facts the question arises what are the respective rights of the Official Assignee and the mortgagees to the property in question. I agree with the observation of *Garth*, C.J., in *Umbica Nundun Biswas in re*(2) that a case in which difficult questions of law and fact are involved, should not be summarily decided by an Insolvency Commissioner under section 26 of the Insolvent Act, but the questions should be decided in a regular suit. It appears to me, however, that in this case the facts are simple, and the question of law is one that an Insolvent Commissioner should decide, more especially as his decision is subject to an appeal to a Division Bench.

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(1) 8 M.I.A., 339. (2) I.L.R., 3 Calc., 434. (3) I.L.R., 8 Calc., 556.
(4) I.L.R., 16 Bom., 452. (5) 5 Q.B., 965. (6) L.R., 25 Q.B.D., 262.

Kerakoose v. *Brooks*(1) is not in point; the only question there decided was that an insolvent's after-acquired property was, under the circumstances of that case, subject to the lien of the person who had advanced to the insolvent money to purchase that property; and the judgment of Lord *Kingsdown* as to the rights of an Official Assignee to after-acquired property of insolvents cannot be said to be exhaustive on the subject, I agree with *Wilson*, J., that that case is, however, clear authority that the Indian statute, 11 Vic., cap. 21, is to be construed on the same principles as those contained in the various English decisions as to the rights and claims of the Official Assignee to insolvent's after-acquired property—*Kristocomul Mitter* v. *Suresh Chunder Deb*(2).

The cases reported in the Indian Law Reports on this subject are few, and the only cases referred to at the Bar are decisions of single Judges. In *Kristocomul Mitter* v. *Suresh Chunder Deb*(2) *Wilson*, J., held that, subject to the right and claim of the Official Assignee, and so long as he does not interfere, an insolvent who has not obtained his final discharge has power, with respect to after-acquired property, to do all acts which he could have done before his insolvency, and in *Fatima Bibi* v. *Fatima Bibi*(3) *Farran*, J., does not dissent from the Calcutta case. It will be necessary to examine the English decisions on this question. It has always, since 5 Geo. II, cap. 30, been held that after-acquired property passes to the Assignee in bankruptcy, and that no new assignment was necessary (*Kitchen* v. *Bartsch*(4)), yet it has also always been held that after-acquired property continued in the bankrupt until the Assignees interfered to claim it, and a bankrupt could, for valuable consideration, part with his after-acquired property so as to give a good title to his alienee, see *Drayton* v. *Dale*(5). The case relied on by the counsel for the Official Assignee (*Meggy* v. *Imperial Discount Company*(6)) is the decision of a single Judge sitting at *nisi prius*, and that case in the opinion of Lord *Esher*, M.R., does not touch the point in question. In *Cohen* v. *Mitchell* the Court of Appeal reviewed the principal authorities on the respective rights of an Official Assignee and bankrupt over after-acquired property, and decided that until

(1) 8 M.I.A., 339. (2) I.L.R., 8 Calc., 556. (3) I.L.R., 16 Bom., 452.
(4) 7 East, 53. (5) 2 B. & C., 293. (6) L.R., 3 Q.B.D., 711.

the Trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value in respect of his after-acquired property, whether with or without knowledge of his bankruptcy, are valid against the trustee.

I hold, therefore, that the English decisions are applicable to cases arising under 11 Vic., cap. 21 (see *Kerakoose* v. *Brooks*(1)), and I agree with the judgment of the Master of the Rolls and the Lords Justices in *Cohen* v. *Mitchell*(2). I, therefore, order that Messrs. Champion and Short do deliver up to the Official Assignee as being part of the estate and effects of the insolvent Annie Smith, upon payment to them of their mortgage debt amounting to Rs. 3,500 and interest to the 8th September 1892 amounting to Rs. 301-12-10 and a further sum of Rs. 37 agreed to be paid by the Official Assignee, the hereditaments and premises and other property mentioned in the mortgage deed of the 17th December 1891, and I do further order that Messrs. Champion and Short pay to the said Official Assignee the sum of Rs. 103-8-0, rents and profits of the said premises received by them up to the 8th September 1892.

I make no order at present as to costs.

The Official Assignee preferred this appeal.

Mr. *K. Brown* for appellant.

Mr. *R. F. Grant* for respondents.

BEST, J.—The question for decision in this appeal is whether the mortgage of a house and land made by an adjudicated insolvent with regard to whose property a vesting order had been passed under section 7 of the Insolvent Act, 11 and 12 Vic., cap. 21, prior to the acquisition of the property by the insolvent, is binding on the Official Assignee so that the latter can only get possession of the property (under section 26 of the Act) on paying to the mortgagees the mortgage amount with interest.

The findings are that one Annie Smith was duly adjudicated an insolvent in 1888 and had not received a final discharge (under section 57 of the Act) up to the time of her death (which is said to have taken place in or about May 1892); that on the 3rd April 1891 she acquired the property in question under an absolute deed of gift; that in December 1891 she mortgaged the

(1) 8 M.I.A., 339. (2) L.R., 25 Q.B.D., 262.

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same to the respondents; that such mortgage was executed *bonâ fide* and for valuable consideration; but that the respondents were aware that their mortgagor had been adjudicated an insolvent, and had reasonable means of knowing that she had not obtained her final discharge.

The learned Commissioner of the Insolvent Court has, on the above findings, held, the mortgage to be valid as against the Official Assignee. He has so held on the authority of the English Court of Appeal in *Cohen* v. *Mitchell*(1), in which the following proposition was laid down and adopted, viz., "Until the "trustee intervenes, all transactions by a bankrupt after his bank- "ruptcy with any person dealing with him *bonâ fide* and for value "in respect of his after-acquired property, whether with or without "knowledge of the bankruptcy, are valid against the trustee." Our attention has, however, been called by appellant's counsel to a more recent English case *in re New Land Development Association and Gray*(2), in which the Court of Appeal concurred with *Chitty*, J., in thinking the proposition laid down in *Cohen* v. *Mitchell*(1) to be inapplicable to real estate. However this may be, the proposition as laid down in *Cohen* v. *Mitchell*(1) is admittedly in terms "wider than appears to have been laid down "before." *See per* Lord *Esher*, M.R. In fact in *Herbert* v. *Sayer* (3), which is cited in support of the above proposition, it was merely held that the bankrupt "acquires property, and "contracts for the assignees, who may, whenever they please, "disaffirm his act; but until they do so, his acts are all valid."

As observed by *Fry*, L.J., in the proposition as laid down in *Cohen* v. *Mitchell*(1) the word 'intervene' is substituted for the words 'disaffirm his acts' in the rule as stated in *Herbert* v. *Sayer*(3), the object of the alteration being admittedly to deprive the trustee who intervenes of the "power retrospec- "tively to disaffirm what has otherwise been validly done by the "bankrupt."

The facts of *Cohen* v. *Mitchell*(1) were as follows:—One Arthur Cohen became bankrupt, and subsequently, and before he obtained his discharge, carried on business in buying and selling agricultural machines, and, to enable him to do so, obtained advances of several sums of money from Hyam Cohen. One

(1) L.R., 25 Q.B.D., 262. (2) [1892], L.R., 2 Ch., 138. (3) 5 Q.B., 965.

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Foale seized some of the machines, and the bankrupt brought an action against him for a wrongful conversion of the machines so seized. The bankrupt, having no money with which to carry on the action, assigned the cause of action to Hyam Cohen in consideration of the money already due to him and the further sum necessary to carry on the action. The action resulted in a verdict for the plaintiff. The trustee in bankruptcy of Arthur Cohen then intervened and demanded the money of Foale as part of the property of the bankrupt. Hyam Cohen also claimed the amount under an assignment. Foale consequently interpleaded and paid the money into Court, whereupon the issue was tried between Hyam Cohen as plaintiff and the trustee as defendant. It was with reference to these circumstances that the Court of Appeal laid down the proposition quoted above "in terms wider than it "had been laid down before" in order to preclude the trustee from disaffirming retrospectively what had "otherwise been validly "done by the bankrupt."

It was held by the Privy Council in *Kerakoose* v. *Brooks*(1) with reference to the property acquired by an insolvent subsequent to his adjudication as an insolvent and prior to his final discharge that the assignee's right under 11 & 12 Vic., cap. 21, is subject to the following two qualifications: (i) property acquired subject to liens and obligations remains subject to those charges and equities even when taken by the assignee; and (ii) if the insolvent carries on trade with the assent of the assignee, the property acquired in such trade will be subject to the charge of the creditors in that trade in priority to the claim of the Official Assignee.

The second of these qualifications requires that the trade shall have been carried on "with the assent of the assignee." It was the want of this assent, I imagine, in *Cohen* v. *Mitchell*(2) that necessitated the adoption of the proposition there laid down, the object being to prevent an "otherwise valid" claim being defeated, and as remarked by *Chitty*, J., in the more recent case "it is a "fair observation to make on all *dicta* of this kind that they are "enunciated with reference to the particular question then before "the Court." The reason for the rule as recognized in *Herbert* v. *Sayer*(3) is stated by the Lord Chief Justice of the Common Pleas

(1) 8 M.I.A., 339. (2) L.R., 25 Q.B.D., 252. (3) 5 Q.B., 965.

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to be that "otherwise there would be no protection to persons "dealing with an uncertificated bankrupt; not only would they "acquire no title by purchases from him, but payments for such "purchases and for all other debts due to the uncertificated bankrupt would be invalidated."

The question for decision in *Herbert* v. *Sayer*(1) was merely as to the right of the bankrupt to maintain a suit as indorsee of a bill of exchange, and all that was then decided was that he had such right "except as against the assignees"; and this is all that was decided in *Fowler* v. *Down*(2) and the other cases cited in *Herbert* v. *Sayer*(1). So also in *Drayton* v. *Dale* referred to by the learned Commissioner and in *Fatima Bibi* v. *Fatima Bibi*(3). As remarked by *Kay*, L.J., in the recent case of *in re New Land Development Association and Gray*(4)—the rule was only applied in *Cohen* v. *Mitchell*(5) for the purpose of protecting persons who had been "trading with the bankrupt and dealing with personal "estate."

The only case brought to our notice in which the rule has been applied to real estate is *Kristocomul Mitter* v. *Suresh Chunder Deb*(6), in which *Wilson*, J., upheld as against a subsequent purchaser from the Official Assignee the claim of a prior purchaser from an undischarged insolvent, of the latter's share in family property which presumably was or at least included real property. This decision purports to proceed on the authority of *Herbert* v. *Sayer*(1), but, as already observed, the only question in that case was the right of the bankrupt to maintain a suit in the absence of the trustee. It was, however, expressly held in *Herbert* v. *Sayer*(1) that all acquisitions and contracts made by an adjudicated bankrupt were made for the trustee and subject to disaffirmance by the trustee.

On a consideration of the various cases that we have been referred to, the conclusion at which I arrive is that in order to be binding on the Official Assignee a charge on after-acquired property created by an adjudicated insolvent, who has not obtained his final discharge, must come within the scope of one or other of the two qualifications stated in *Kerakoose* v. *Brooks*(7), and that

(1) 5 Q.B., 965.
(2) 1 Bos. & Pul., 44.
(3) I.L.R., 16 Bom., 452.
(4) [1892] L.R., 2 Ch., 138.
(5) L.R., 25 Q.B.D., 262.
(6) I.L.R., 8 Calc., 556.
(7) 8 M.I.A., 339.

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Cohen v. *Mitchell*(1) is merely authority for the proposition that when an insolvent is allowed to carry on trade or other business, the Official Assignee's assent thereto (required under the second of the two qualifications mentioned in *Kerakoose* v. *Brooks*(2) will be presumed up to such time as he may intervene.

As the mortgage to the respondents in the present case does not come within either of these qualifications, I would allow this appeal and set aside so much of the order of the learned Commissioner of the Insolvent Court as directs the Official Assignee to pay to the respondents the mortgage amount and interest thereon.

Respondents must pay the Official Assignee's costs both in this Court and in the Court below.

MUTTUSAMI AYYAR, J.—I come to the same conclusion, though not upon the same ground. The facts of the case are shortly these:—In February 1888 Annie Smith was declared an insolvent and a vesting order was made under 11 & 12 Vic., cap. 21, s. 7. In April 1891 she obtained under a deed of gift a house and land called River Ville and she was also possessed of certain articles of furniture in and about the house. In December 1891 she mortgaged the said property to Messrs. Champion and Short for a sum of Rs. 3,500 with a power of sale. In May 1892 Annie Smith died intestate, and she had never obtained her final discharge under section 59 of the Insolvency Act. In June 1892 Messrs. Champion and Short took possession of the house, land and furniture, and they have since let the house from time to time to tenants for short periods. The learned Commissioner has found that the mortgagees were aware that Annie Smith had been adjudicated an insolvent and had reasonable means of knowing that she had not obtained her final discharge. The Official Assignee stated in his petition that on the 7th September 1892 he saw a notice in the *Madras Times* whereby the house in question was advertised for sale as the property of the late Mrs. Annie Smith. On the 8th September 1892 he intervened and claimed the property free of the mortgage. The question arising for determination upon these facts was whether the mortgage was binding on the Official Assignee, and the learned Commissioner determined it in the affirmative, the ground of decision

(1) L.R., 25 Q.B.D., 262.
(2) 8 M.I.A., 339.

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being that the decisions on a similar question arising under the English Bankruptcy Acts are applicable to cases arising under 11 & 12 Vic., cap. 21, that according to those decisions the after-acquired property continued in the insolvent until the Assignee interfered to claim it, and that meanwhile the insolvent could, for valuable consideration, part with it so as to give a good title to his alienee. Hence this appeal.

For the appellant it is contended (i) that the English decisions relied on by the learned Commissioner do not apply to cases arising under the Indian Insolvency Act; (ii) that assuming that they are applicable, the decision under appeal is at variance with the case of *re New Land Development Association and Gray*(1), and (iii) that according to the true construction of 11 & 12 Vic., cap. 21, s. 7, and to the decision of the Privy Council in *Kerakoose* v. *Brooks*(2) property acquired by the insolvent subsequent to the vesting order and prior to his final discharge vests at once in the Official Assignee, whether he intervenes or not, and that it is not competent to the insolvent to mortgage or otherwise alienate it.

The main question for decision is, what is the true interpretation of 11 & 12 Vic., cap. 21, s. 7, as regards the mode of vesting in the Official Assignee of property acquired by the insolvent subsequent to the vesting order and prior to his final discharge. The language of the section throws no light on the point beyond the fact that the word 'vest' is used both with reference to property already in existence and to after-acquired property. There is no doubt that property which is in existence when the insolvent files his petition vests at once in the Official Assignee, and no one but the Assignee is since competent to alienate it. In the case of subsequently-acquired property however there is this peculiarity. The insolvent being the acquirer, it must vest in him at least for an instant and then vest in the Official Assignee. The exact point for consideration is, as stated by the learned Chief Justice of the Common Pleas, this:—"Is it the "intention of the Legislature that such property should vest in "the insolvent as acquirer but for an instant and then vest in the "Official Assignee, or is it the intention that the Official Assignee "should have the beneficial interest and the insolvent should "acquire such property for his benefit in the capacity of an agent

(1) [1892] L.R., 2 Ch., 138. (2) 8 M.I.A., 339.

"so as to be competent to deal with it subject to the intervention "of the Official Assignee?"

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The latter is declared to be the real intention of the Legislature in cases decided under the English Bankruptcy Acts. *Herbert* v. *Sayer*(1) and *Cohen* v. *Mitchell*(2) are the leading cases on the subject. The reasons for adopting the latter intention as the real intention are lucidly explained in the first-mentioned case by the learned Chief Justice of the Court of Common Pleas in the following terms:—"The effect of the statutory enactments "may be either to transfer immediately such property or con- "tracts from the bankrupt to the asignees, vesting the property "in the bankrupt for an instant only, or to give the assignees "the beneficial interest and to make the bankrupt acquire property "or contract for their benefit only in the nature of an agent. "The cases accord with the latter construction of the statute, "and it is most consistent with convenience; for, otherwise, "there would be no protection to persons dealing with an uncerti- "ficated bankrupt. Not only would they acquire no title by "purchases from him, but payments for such purchases, and for "all debts due to the uncertificated bankrupt would be invalidated. "The Legislature, by several statutes, have protected all such "payments by and to, and all dealings and transactions with, "the bankrupt *bonâ fide* made or entered into without notice of "the act of bankruptcy before the fiat; but there is no provision by "the statute law for such payments, dealings or transactions, after "the fiat; and the only way by which they can be rendered valid "and great confusion, inconvenience and hardship prevented, is "by adopting the latter construction, and holding that the bank- "rupt acquires the property, and contracts, for the asignees, who "may, whenever they please, disaffirm his act, but until, they do "so, his acts are all valid." It is thus clear that the English cases deal with the question as one of reasonable construction, and it appears to me that the whole of the reasoning is applicable under the Indian Insolvency Act. I see no substantial difference on the point now before us between the Indian Insolvency Act and the English Bankruptcy Acts, viz., 6 Geo. IV, cap. 16, ss. 63 and 127, 1 & 2 Will. IV, cap. 56, s. 25, and the Bankruptcy Act, 1883, ss. 44, 58 and 118. The provisions as to vesting are similar.

(1) Q.B. 965. (2) L.R., 25 Q.B.D., 262.

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I agree with the learned Chief Justice that they are applicable under 11 & 12 Vic., cap. 21, especially as the question is one of reasonable construction to be put on similar provisions. I also agree in the opinion that the decision of the Privy Council in *Kerakoose* v. *Brooks*(1) is not an authority against their applicability, and that, on the other hand, it is a clear authority in favour of their applicability. In that case, the uncertificated Insolvent borrowed money for the purpose of purchasing goods to carry on a business; and in order to secure the advances, gave a bond and agreed in writing to execute a mortgage of the goods so purchased to the lender to secure repayment. He afterwards executed an assignment of the goods for that purpose. The business was carried on with the knowledge of, and without any objection by, the Official Assignee. The lender had never possession of the goods assigned to him by the insolvent and the same remained in possession of the insolvent until his death. The Privy Council held that the insolvent's after-acquired property was subject to the lien of the lender and that such lien was paramount to any claim of the Official Assignee under the insolvency. In their judgment the Lords of the Privy Council said :—"The Assignee's "right to the subsequently-acquired property is subject to two "qualifications. In the first place, if the insolvent has acquired "property subject to liens and obligations, then any property "taken by the assignee under that state of things is taken subject "to those charges and equities which affect the property in the "hands of the insolvent. The second qualification is this, that if "the insolvent carries on trade at a subsequent period with the "assent of the assignee of the estate under the Act, in the first "instance the property which is acquired in the subsequent trade "will be subject in equity to the charge of the creditors in that "trade, in priority to the claim of the assignee under the first "insolvency." These qualifications are enunciated with reference to the particular facts of the case, and I agree in the opinion of the learned Commissioner that they are not exhaustive.

The substantial question is whether according to the recent case of the *New Land Development Association and Gray*(2), the rule laid down in *Herbert* v. *Sayer*(3) and *Cohen* v. *Mitchell*(4)

(1) 8 M.I.A., 339. (2) [1892], L.R., 2 Ch. D., 138.
(3) 5 Q.B., 965. (4) L.R, 25 Q.B.D., 262.

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is applicable to immovable or real property and is not limited in its scope to movable property.

This case was decided in April 1892 and does not appear to have been cited before the learned Commissioner. The facts of that case were that a testatrix devised her real estate to her nephews, William Shurley and Joseph Shurley, as tenants in common. The nephews purported to convey the estate to a land company, who, in May 1891, entered into a contract for its sale to a purchaser. The purchaser discovered before completion that in 1888 William Shurley had been adjudicated bankrupt and that he was still undischarged. The trustee in bankruptcy then intervened and claimed to be entitled to a moiety of the estate. The question for decision was whether an undischarged bankrupt could, even before the intervention of the trustee in bankruptcy, convey real estate acquired after the bankruptcy, to a *bonâ fide* purchaser for value, so as to give a good title to the purchaser as against the trustee. Whether the rule laid down in *Cohen* v. *Mitchell*(1) was not limited to goods was considered by *Chitty*, J., and by the Lords Justices on appeal. They all held that it was so limited. *Chitty*, J., referring to the argument that after-acquired real estate vests in the bankrupt and remains vested in him till the trustee intervenes and claims it, said :—"I see no justification "in the statute or the authorities for holding that the legal estate "will first vest in the bankrupt and then shift to the trustee when "he intervenes."

On appeal the Lords Justices expressed the same opinion. Lord Justice *Kay* considered that "where a bankrupt is carrying "on business and dealing with personal property, such dealing will "to some extent consume it. And if the trustee looks on and does "not intervene, then the consumption of the property goes on "as a consequence of the carrying on of the business by the bank-"rupt." He thought that it had nothing to do with real estate. Lord Justice *Lindley* said, "there is some sense in the doctrine as "to personal estate. But I have never heard it suggested by any-"body that it had the slightest application to real estate which "passes by conveyance and not by delivery." This case clearly limits the rule in *Herbert* v. *Sayer*(2) and *Cohen* v. *Mitchell*(1) to personal estate. Though there was also another ground on which

(1) L.R., 25 Q.B.D., 262. (2) 5 Q.B., 965.

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the decision was supported, I feel myself bound to adopt the proposition laid down in that case by the Court of Appeal, even assuming that it was in the nature of a *dictum*.

The property in the case before us being what is known to English law as real property, I concur in the order proposed by my learned colleague.

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1882—XIV : *See* CIVIL PROCEDURE CODE.

CIVIL PROCEDURE CODE—ACT XIV OF 1882, s. 273—*Dismissal of an application for execution—Attachment of a decree—Execution of attached decree.*] The holder of a decree dated 1885 applied to execute it, but his application was dismissed in March 1887 on the ground that "no further steps had been taken." It did not appear that any notice was given to him before the order of dismissal was made. Nevertheless the decree-holder proceeded to execute a decree of the judgment-debtor attached by him and brought to sale certain property which was in question in the present suit, and it was purchased *bonâ fide* by the present defendant who obtained a sale certificate from the Court. The present plaintiff claimed as assignee from the holder of the attached decree to execute it against the same land and now sued for a declaration that it was liable to be brought to sale by him and that the defendant's purchase was void as against him :—*Held*, (1) that under the circumstances of the case the attachment in execution of the decree of 1885 was subsisting at the time of the purchase by the defendant ; (2) that a judgment-creditor who attaches a decree is competent to execute it.

Rangasami Chetti v. *Periasami Mudali* 58

HINDU LAW—*Illatom son-in-law—Inheritance—Survivorship.*] The father since deceased of the second defendant took into his family an illatom son-in-law, who died, leaving a son. After the death of the son, one of his two daughters (who were his only children) sued to recover a one-fourth share of the property left by the second defendant's father :—*Held*, that the plaintiff was entitled to recover, in the absence of proof of a custom by which the rights of the plaintiff's father should have passed by survivorship to the second defendant.

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2. ——*Limitation—Adverse possession.*] The holder of an impartible zamindari died in 1822, leaving two widows and a daughter. The widows entered on the estate and having successfully resisted a suit for ejectment brought by the rightful heir (the present plaintiff's great grandfather) in 1824, they and the survivor of them retained possession till 1870, when the last surviving widow died, and the daughter entered. She or the Court of Wards, on her behalf, retained possession till her death, in 1882, when the first defendant came in as the nearest then surviving sapinda of the last male holder. The plaintiff, who was the son of the elder undivided brother (deceased) of the first defendant, now sued in 1891 to recover the zamindari from him :—*Held*, that the suit was barred by limitation.

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LIMITATION—*Adverse possession—Hindu Law.*] The holder of an impartible zamindari died in 1822, leaving two widows and a daughter. The widows entered on the

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estate and having successfully resisted a suit for ejectment brought by the rightful heir (the present plaintiff's great grandfather) in 1824, they and the survivor of them retained possession till 1870, when the last surviving widow died, and the daughter entered. She or the Court of Wards, on her behalf, retained possession till her death, in 1882, when the first defendant came in as the nearest then surviving sapinda of the last male holder. The plaintiff, who was the son of the elder undivided brother (deceased) of the first defendant, now sued in 1891 to recover the zamindari from him :—*Held*, that the suit was barred by limitation.

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LIMITATION ACT—ACT XV OF 1877, s. 25—*Date from which time runs.*] A registered lease provided that the rent should be paid on 30th Masi Tharana. The month Masi in the year Tharana ended on the 29th day, which corresponded with 11th March 1885. A suit to recover the rent was filed on 12th March 1891 :—*Held*, that the suit was not barred by limitation.

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POLICE ACT (MADRAS)—ACT XXIV OF 1859, ss. 21, 49—*Procession likely to cause breach of the peace—Powers of police—Removal of banners from persons in the procession.*] A procession of Hindus carried certain banners and the Superintendent of Police was of opinion that a breach of the peace would be occasioned if these banners continued to be displayed, and in good faith, for the purpose of preventing such breach of the peace, he took away the banners from certain persons in the procession :—*Held*, that the action of the Superintendent of Police was not justified by Madras Police Act, 1859, ss. 21, 49, and that he was accordingly liable for the trespass.

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RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865, ss. 1, 11—*Sanction granted by Head Assistant Collector—Procedure—Customary rent—Restraint on building.*] A Head Assistant Collector is competent to grant a sanction for the enhancement of rent under Rent Recovery Act, s. 11. The granting of such sanction is a judicial and not a merely administrative act and such sanction should not be granted without first giving notice to both the landlord and the tenant, and hearing, and considering the contentions of both parties. In a suit by the landlord to enforce the exchange of a patta and muchalka, the tenant objected to the rate of rent imposed on part of the land, which was dry land converted into wet :—*Held* that the finding of the Lower Appellate Court that there was an implied contract to pay rent at such rate was not open to any legal objection. It appeared that the patta tendered contained a stipulation for the payment of rent at a special rate for garden (jarib) lands watered by wells which had been constructed by the raiyat at his own cost, and also comprised a stipulation that the raiyat should not build on his holding. The Court of first appeal held that the special rate of rent above referred to was customary and had been followed for many years :—*Held*, that there was no ground for interference on second appeal with the Lower Appellate Court's decision regarding the former of the stipulations above referred to, but that the latter should be so modified as to prevent the raiyat only from raising any building incompatible with an agricultural holding.

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2. ——————————————————————, ss. 4, 7, 11—*Enhanced rent on irrigated land—Customary contribution to a temple—Implied contract.*] A zamindar tendered to raiyats on his estate pattas providing (*inter alia*) for the payment of (1) certain fees to a Hindu temple, (2) rent in which the land assessment was consolidated with a water-cess in respect of certain land irrigated under the Kistna anicut. There was nothing to show that the former of these items constituted a charge on the land and the latter had not been sanctioned by the Collector under Rent Recovery Act, s. 11, but it was found that both had been paid by the raiyats for many years. The Court of first appeal held on this finding that there were implied contracts on the part of the raiyats to pay both items :—*Held*, (1) that the temple fee was *primâ facie* voluntary and should not be treated as a payment which the zamindar could compel a raiyat to make and consequently that the patta tendered to him was an improper patta ; (2) that the finding as to the existence of an implied contract to pay the second of the above items was a finding of fact and must, therefore, be accepted on second appeal ; and was a correct finding, in accordance with the ruling in *Venkatagopal* v. *Rangappa* (I.L.R., 7 Mad., 365). The first proviso to Rent Recovery Act, s. 11, is not restricted in its application to rates of original rent as contradistinguished from its enhancement on account of improvements.

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3. ——————————————————————, ss. 9, 11—*Sanction by Collector of enhanced rates of rent—Implied contract to pay rent at a certain rate.*] In a suit brought by the Collector of a district, as receiver of a zamindari, against a tenant on the estate to enforce the exchange of patta and muchalka, it appeared that the rent demanded was assessed at an enhanced rate, and comprised a consolidated wet rate imposed on account of irrigation. To the enhancement of the rent by the addition of the water rate the sanction of the Collector required by the Rent Recovery Act, s. 11, first proviso, had not been obtained :—*Held*, that such sanction could not be implied from the fact that the Collector, as such receiver, had caused the provision in question to be inserted in the patta, and now sought to enforce it by suit. Upon the question whether from the fact that the tenant had paid the water rate in question for some years previously an implied contract to pay it for the future could be inferred :—*Held* upon the facts of the present case that no such contract could be inferred. With reference to the Full Bench decision in *Venkatagopal* v. *Rangappa* (I.L.R., 7 Mad., 365), the Court stated what was the principle to be kept in view in considering whether an implied contract to pay enhanced rent could be inferred.

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is applicable to immovable or real property and is not limited in its scope to movable property.

This case was decided in April 1892 and does not appear to have been cited before the learned Commissioner. The facts of that case were that a testatrix devised her real estate to her nephews, William Shurley and Joseph Shurley, as tenants in common. The nephews purported to convey the estate to a land company, who, in May 1891, entered into a contract for its sale to a purchaser. The purchaser discovered before completion that in 1888 William Shurley had been adjudicated bankrupt and that he was still undischarged. The trustee in bankruptcy then intervened and claimed to be entitled to a moiety of the estate. The question for decision was whether an undischarged bankrupt could, even before the intervention of the trustee in bankruptcy, convey real estate acquired after the bankruptcy, to a *bonâ fide* purchaser for value, so as to give a good title to the purchaser as against the trustee. Whether the rule laid down in *Cohen* v. *Mitchell*(1) was not limited to goods was considered by *Chitty*, J., and by the Lords Justices on appeal. They all held that it was so limited. *Chitty*, J., referring to the argument that after-acquired real estate vests in the bankrupt and remains vested in him till the trustee intervenes and claims it, said :—"I see no justification "in the statute or the authorities for holding that the legal estate "will first vest in the bankrupt and then shift to the trustee when "he intervenes."

On appeal the Lords Justices expressed the same opinion. Lord Justice *Kay* considered that "where a bankrupt is carrying "on business and dealing with personal property, such dealing will "to some extent consume it. And if the trustee looks on and does "not intervene, then the consumption of the property goes on "as a consequence of the carrying on of the business by the bank-"rupt." He thought that it had nothing to do with real estate. Lord Justice *Lindley* said, "there is some sense in the doctrine as "to personal estate. But I have never heard it suggested by any-"body that it had the slightest application to real estate which "passes by conveyance and not by delivery." This case clearly limits the rule in *Herbert* v. *Sayer*(2) and *Cohen* v. *Mitchell*(1) to personal estate. Though there was also another ground on which

(1) L.R., 25 Q.B.D., 262. (2) 5 Q.B., 965.

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the decision was supported, I feel myself bound to adopt the proposition laid down in that case by the Court of Appeal, even assuming that it was in the nature of a *dictum*.

The property in the case before us being what is known to English law as real property, I concur in the order proposed by my learned colleague.

APPELLATE CIVIL.

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

1893. July 25, 26, 27. Aug. 8.

KOOLAPPA NAIK (PLAINTIFF), APPELLANT,

v.

KOOLAPPA NAIK AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation—adverse possession—Hindu Law.

The holder of an impartible zamindari died in 1822, leaving two widows and a daughter. The widows entered on the estate and having sucessfully resisted a suit for ejectment brought by the rightful heir (the present plaintiff's great grandfather) in 1824, they and the survivor of them retained possession till 1870, when the last surviving widow died, and the daughter entered. She or the Court of Wards, on her behalf, retained possession till her death, in 1882, when the first defendant came in as the nearest then surviving sapinda of the last male holder. The plaintiff, who was the son of the elder undivided brother (deceased) of the first defendant, now sued in 1891 to recover the zamindari from him :

Held, that the suit was barred by limitation.

APPEAL against the decree of T. Narayanasami Ayyar, Subordinate Judge of Madura, West, in original suit No. 26 of 1891.

Suit for possession of an estate.

The facts of the case are stated sufficiently for the purposes of this report in the judgment of the High Court.

The plaintiff preferred this appeal.

Bhashyam Ayyangar and *Desika Chariar* for appellant.

Subramaniya Ayyar for respondents Nos. 1, 4, 5 and 6.

Rajagopala Ayyar for respondents Nos. 2 and 3.

JUDGMENT.—The question in this appeal is whether the suit is barred by limitation. Vijayagopal, the last undisputed male

* Appeal No. 61 of 1892.

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holder of the impartible zamindari of Sundayur, died in 1822, leaving no sons, but only two widows and a daughter. His rightful successor in the enjoyment of the zamindari was Kuppayasami Koolappa and, in 1824, he brought a suit against the two widows Ettakkammal and Krishnammal, but without success, and so the zamindari remained in the possession of the widows and the survivor of them till the death of Ettakkammal in 1870. The plaintiff is the great grandson of Kuppayasami and, in 1891, claims in virtue of the same right as was asserted by him in 1824. His suit having been dismissed, it is now contended in appeal that the suit is not barred by limitation, and that, although otherwise it would so be barred, the circumstances under which the defendants came into possession give the plaintiff a right of action against them. This latter point may be disposed of first. It is said that the defendant who belongs to the same branch of the family with the plaintiff, being his father's younger brother, recovered the zamindari after the death of Vijayagopal's daughter in 1882 as a member of the undivided family and for the family. Having recovered it on this footing, he is bound, it is contended, to deliver it up to the plaintiff, who, as the son of an elder brother of the defendant, has the preferential claim. It is true that if the zamindari had descended in the ordinary course and had not been usurped by the widows of Vijayagopal, the plaintiff is the member of the family who would be entitled to hold it; but assuming that the law of limitation does not allow the plaintiff to put forward this claim on its own merits, his Vakil relies on the alleged conduct of the defendant. The claim does not appear to have been put on this footing in the plaint, and there is, in fact, no foundation for it. The defendant's claim to the zamindari was based on the fact of his being the nearest sapinda entitled after the death of Ettakkammal's step-daughter, and there is no evidence to show that he assumed possession as trustee for the family or otherwise than in his title of heir.

Apart from this contention, it is argued that the suit is not barred by limitation, because in 1870, when Ettakkammal died, the right of the other branch was not barred, and since that date the zamindari has not been held adversely by any one person or by persons claiming in succession to each other for more than twelve years. The fact is that since Ettakkammal's death the zamindari has been in the enjoyment, first, of her step-daughter

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till 1882 and subsequently of the defendant. The respondents' Vakil relies on the case of *Vijayasami* v. *Periasami*(1) and contends that the suit is barred by limitation, time having begun to run in 1822, and nothing having since occurred to revive the plaintiff's right of suit. In the case cited the Zamindar Gouri Vallabba Tevar died in 1829, and thereupon, according to the plaintiff's case, his father ought to have succeeded. The latter's claim was, however, ignored, there was litigation between other claimants in which Kathama Nachiar, a daughter of the late zamindar, was victorious; she was in possession till her death in 1877, and since that date the defendant, the son of her elder sister. It was held that the suit brought against him in 1881 was barred by limitation, because time began to run in 1829 and continued to run without interruption as against the descendants of the zamindar by his alleged wife the plaintiff's mother. An attempt is made to distinguish this case from the present by pointing out that, whereas Kathama Nachiar died in 1877 after the Limitation Act of 1871 came into force, Ettakkammal died in 1870 before the Legislature had laid down, in express terms, the rule which is contained in section 29 of the Act of 1871. The judgment in the reported case does not, however, rest on this circumstance and does not refer to section 29 or the principle embodied in it. Nor do we understand how the supposed alteration of the law in 1871 could affect the rights of the parties either in this case or in the reported case. The difficulty of the plaintiff's position is to explain how, when time once began to run against his lineal ancestors and their right of suit had become barred, it can be said that time has ceased to run or the right of suit been revived. No question of the plaintiff's right to be restored to his original title arises, because he has not succeeded in recovering possession. It is hardly necessary, therefore, for us to express an opinion with regard to the view held in Bengal with reference to the question whether under the Act of 1859 the right was extinguished by an adverse possession exceeding twelve years (see *Gossain Dass Chunder* v. *Issur Chunder Nath*(2), *Gunga Gobind Mundul* v. *The Collector of the Twenty-four Pergunnahs*(3), and cases cited in *Radhabai* v. *Anantrav Bhagvant Deshpande*(4). In our opinion, the case cannot be distinguished from *Vijayasami* v. *Periasami*(1). The plaintiff's claim

(1) I.L.R., 7 Mad., 242.
(2) I.L.R., 3 Calc., 224.
(3) 11 M.I.A., 345.
(4) I.L.R., 9 Bom., 228.

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cannot, like the defendants' title, be reconciled with the lawfulness of Ettakkammal's possession. Her holding of the zamindar was adverse to the plaintiff's ancestor, and from the date of its commencement when his cause of action arose, time began to run, and it has continued to run without intermission. The appeal is dismissed with costs.

APPELLATE CIVIL.

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

RANGANAYAKULU AND OTHERS (PLAINTIFFS NOS. 1 and 4 and REPRESENTATIVE OF PLAINTIFF NO. 3), APPELLANTS,

v.

PRENDERGAST (DEFENDANT), RESPONDENT.*

1893. Aug. 10, 11. Sept. 19.

Police Act (Madras)—Act XXIV of 1859, ss. 21, 49—Procession likely to cause breach of the peace—Powers of police—Removal of banners from persons in the procession.

A procession of Hindus carried certain banners and the Superintendent of Police was of opinion that a breach of the peace would be occasioned if these banners continued to be displayed, and in good faith, for the purpose of preventing such breach of the peace, he took away the banners from certain persons in the procession:

Held, that the action of the Superintendent of Police was not justified by Madras Police Act, 1859, ss. 21, 49, and that he was accordingly liable for the trespass.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 1167 of 1892, modifying the decree of O. V. Nanjundayyar, District Munsif of Masulipatam, in original suit No. 19 of 1890.

The facts of the case were stated in paragraphs 2 and 3 of the District Judge's judgment as follows:—

"This is a suit by four Hindu residents of Masulipatam town "against the Superintendent of Police of the Kistna district, who "interfered with a procession in the streets of Masulipatam on "October 3rd, 1889. Plaintiffs ask for a declaration that they may "pass in procession through the streets 'with dress, music, symbols "and other accompaniments,' and they claim Rs. 100 as damages

* Second Appeal No. 1679 of 1892.

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"for the interference. The District Munsif gave plaintiffs a decla-
"ratory decree, but refused to give any damages. The District
"Munsif, at the same time, ordered the Superintendent of Police
"to bear all the costs of the suit. Against this decision the defen-
"dant appeals, and an objection memorandum is lodged on behalf
"of respondents claiming the damages that were asked for in the
"suit and asking that the declaratory decree be made more definite.

"The facts in this case are few and simple. Certain Muham-
"madans of Masulipatam informed the Superintendent of Police
"that there was a bad feeling among some Muhammadans in the
"town, because of an idea that the Hindus in the procession at
"the Hindu festival caricatured Muhammadan emblems: an
"anonymous petition to the same effect was sent to the District
"Magistrate, and he sent this petition to the Superintendent of
"Police with the following note:—'I suppose you are keeping
"your eye on the Dasara performances to prevent any differences
"with the Muhammadans, *vide* the enclosed.' On this paper the
"Superintendent wrote an order to the Town Inspector, directing
"him to give notice by beat of tom-tom that persons were not to
"imitate Muhammadan disguises without a license from the Super-
"intendent. On the same day a Hindu procession was stopped in
"the streets by the Town Inspector and Station Officer. They
"sent word to the Superintendent, and he at once came to the spot.
"The Town Magistrate, a Brahman, was also present. The Super-
"intendent inspected the *Sivamandiram* and decided that it did
"not resemble a Muhammadan taboot and, therefore, let it pass.
"He caused a flag to be unrolled on its staff, so that it should no
"longer resemble a Muhammadan 'pir.' He took possession of
"two banners which bore on one side the device of the crescent
"and the star. He turned out of the procession some singers
"who were clad in tinsel caps and robes. He then permitted the
"procession to proceed. On the following day he refused to recon-
"sider his decision and to grant licenses to plaintiff except on
"conditions."

The District Judge held that the defendant had acted *bonâ fide*.

The District Munsif passed a decree as follows:—

"It is decreed that the plaintiffs' right to celebrate in the
"public streets of Bandar town the festivals with jundas (flags)
"and Ramabajana *as it was done in the year 1889* is established,

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"that the said festival be allowed to be celebrated on proper
"occasions and in a proper manner without causing obstruc-
"tion either to the worship of people of other religions or to the
"festivals relating to them *and that the defendant or his subordinates*
"*do refrain from causing obstruction at any time except when there*
"*may be breach of peace.*"

The District Judge modified this decree by striking out the words which are printed above in italics.

The plaintiffs preferred this second appeal.

Pattabhirama Ayyar and *Sriramulu Sastri* for appellants.

The *Acting Government Pleader* (*Subramanya Ayyar*) for respondent.

COLLINS, C.J.—This was a suit brought by four Hindus against a Police Superintendent of the Kistna district, asking for a declaration that they have a right to celebrate a festival in the public streets of Masulipatam with such music, garments, ensigns, &c., as the plaintiffs may like, for an injunction restraining defendant and his subordinates from interfering with such procession and for damages for taking possession of certain banners and removing certain caps, &c., from some of the processionists. Both the Lower Courts agreed in granting the plaintiffs a declaration that they had a right to celebrate in the public streets a certain festival, but an injunction was refused and no damages awarded for taking possession of the banners.

The only point that was argued in second appeal was that the plaintiffs were entitled in all events to nominal damages for the wrongful act of the Police Superintendent in taking away the plaintiffs' banners. It was not disputed that the banners were taken away by the orders of the defendant, but it was contended that the defendant acted in good faith, that he was justified in so doing, as he believed these particular banners were obnoxious to the Muhammadans, and if carried, would produce a breach of the peace.

It is not disputed by the Government Pleader that the plaintiffs had a right to pass in procession through the streets of Masulipatam, and the only question that arises is, was the defendant justified in taking possession of the banners which undoubtedly he removed from the procession. I carefully guard myself in this judgment by stating that it is the powers of the police in this district alone that I am dealing with, and both Mr. Patta-

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bhirama Ayyar, the Vakil for the appellants, and the Government Pleader admit that the powers of the police over processions are defined by the Madras Police Act XXIV of 1859. Section 49 of that Act defines the powers of the police—they may *direct the conduct* of all assemblies and processions in the public streets, prescribe the routes by which and the time at which such processions may pass, keep order in the public streets and prevent obstructions; they may also regulate the use of music in the streets on the occasion of native festivals and may direct crowds of twelve or more persons to disperse when they have reason to apprehend any breach of the peace. The powers thus given to the police are large and set out with particularity, but I fail to see that the Superintendent of Police has any power to remove from the procession any banners belonging to the processionists and to order those banners to be taken to the police station. I am of opinion, therefore, that the respondent in taking possession of the banners committed in law a tortious act, but under the circumstances I give only nominal damages, viz., one rupee: in fact only nominal damages has been asked for. The decree must be modified accordingly, and in other respects I would dismiss the appeal.

It is also alleged that the defendant turned out of the procession certain persons wearing tinsel caps and robes. Whatever right of action these persons may have against the defendant, it is impossible to say that the plaintiffs are entitled to damages. The action was really brought for a declaration and also an injunction against the defendant. The plaintiffs have succeeded in obtaining a declaration against the Superintendent of Police, and no question was raised before us whether such a declaration was a proper one or whether the four plaintiffs could jointly bring such an action. The District Munsif has found that the plaintiffs preferred a seriously false allegation that their procession was entirely stopped, and taking into consideration all the circumstances of the case, I would direct that each party bear his and their own costs throughout.

SHEPHARD, J.—As is observed by the District Judge, this case is really a simple one. It has been unnecessarily complicated by the nature of the relief asked for and by the defence set up by the defendant. The simple question is whether the plaintiffs have suffered any wrong at the hands of the defendant, and, if so, to

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what damages they are entitled. That is the only question that ought to have been tried, for the case is not one in which a declaration or injunction is either necessary or proper. On the contrary, such relief is obviously futile, for it could bind only the defendant personally. There is, however, no appeal filed on his behalf, and it is only necessary to mention it as a reason for dismissing the appeal so far as it seeks to obtain any relief of that character for the plaintiffs.

We must take the finding of fact as recorded by the District Judge in paragraph 3 of his judgment. There it is found that the defendant took possession of two banners, and that he turned out of the procession some singers, and then permitted the procession to proceed. It is of these acts that the plaintiffs complained in the 9th paragraph of the plaint. It is not explained how the plaintiffs come to treat these acts of the defendant as torts for which they have a joint right of action. No objection, however, was taken on that ground. The District Judge holds that the defendant was justified in doing what he did, because there was danger of breach of the peace and the action was taken in good faith to prevent it. It is this ruling which is questioned in the appeal before us.

Primâ facie the act of the defendant in taking away banners from the hands of the plaintiffs and keeping them is wrongful. That is the only act of which the plaintiffs personally complain. Such an act constitutes a trespass, and however laudable the motive may have been, the injured person is entitled to damages. The defendant can only be excused from liability if it is shown that, as a Superintendent of Police, he was by law justified in doing what otherwise would have been wrongful.

The 49th section of the Madras Police Act gives the Superintendent power, as occasion requires, to direct the conduct of all assemblies and processions and prescribe the routes by which they may pass. It also gives him power to regulate the use of music in the streets on the occasion of festivals and ceremonies, and lastly to direct all crowds of twelve or more persons to disperse when he has reason to apprehend any breach of the peace.

Section 21 of the same Act declares the general duties of police officers including that of using their best endeavours to preserve the peace. It is argued on behalf of the respondent that these provisions of the Act justified him in taking away the banners

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from the plaintiffs, and that, although an express power to do such acts is not given by the Act, it must be taken to be included in the larger powers which are conferred. It may not unreasonably be said that on occasions serious inconvenience and risk of disturbance is likely to occur if the police does not possess the power of depriving persons of banners, emblems or other objects which are calculated to provoke a breach of the peace on the part of persons to whom they are obnoxious. We must, however, see whether such a power is conferred by the legislature. With regard to processions express provisions are made of a particular character, and under certain conditions power is given to disperse crowds. The latter provision does not, in my opinion, relate to processions. With regard to processions the Superintendent may, as occasion requires, do certain things, but the Act does not say he may take away flags or obnoxious devices carried by members of the procession, and I do not see on what principle it can be said that the legislature intended to give this power by implication. On the contrary, the mention of specific things which may be done is unfavourable to any inference in favour of measures which are not mentioned.

In my opinion the respondent has failed to show that his acts are rendered legal by the provision of the Police Act, and it is not said that there is any other statute under which he can claim immunity. Chapter XIII of the Criminal Procedure Code gives the police certain powers in the way of preventive action, but the present case cannot be brought within its provisions. It follows that the District Judge was wrong in refusing to give damages, but having regard to the other findings of the District Judge and the finding of the District Munsif on the question of damages, I think that nominal damages only should be awarded.

I would modify the decree of the District Judge by giving the plaintiffs one rupee damages. In other respects I would dismiss the appeal, and I would direct each party to bear his own cost, throughout.

APPELLATE CIVIL.

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

SIRIPARAPU RAMANNA (PLAINTIFF), APPELLANT,

v.

MALLIKARJUNA PRASADA NAYUDU (DEFENDANT), RESPONDENT.*

1893. April 26. March 20.

Rent Recovery Act (Madras)—Act VIII of 1865, *ss.* 4, 7, 11—*Enhanced rent on irrigated land—Customary contribution to a temple—Implied contract.*

A zamindar tendered to raiyats on his estate pattas providing (*inter alia*) for the payment of (1) certain fees to a Hindu temple, (2) rent in which the land assessment was consolidated with a water-cess in respect of certain land irrigated under the Kistna anicut. There was nothing to show that the former of these items constituted a charge on the land and the latter had not been sanctioned by the Collector under Rent Recovery Act, s. 11, but it was found that both had been paid by the raiyats for many years. The Court of first appeal held on this finding that there were implied contracts on the part of the raiyats to pay both items:

Held (1) that the temple fee was *primâ facie* voluntary and should not be treated as a payment which the zamindar could compel a raiyat to make and consequently that the patta tendered to him was an improper patta;

(2) that the finding as to the existence of an implied contract to pay the second of the above items was a finding of fact and must, therefore, be accepted on second appeal; and was a correct finding, in accordance with the ruling in *Venkatagopal* v. *Rangappa* (I.L.R., 7 Mad., 365).

The first proviso to Rent Recovery Act, s. 11, is not restricted in its application to rates of original rent as contradistinguished from its enhancement on account of improvements.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 176 of 1889, reversing the decision of S. H. Habibuddin, Special Assistant Collector of Kistna, in summary suit No. 2 of 1889.

Suit by a tenant to set aside a distraint.

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

The plaintiff preferred this second appeal.

Parthasaradhi Ayyangar for appellant.

Pattabhirama Ayyar for respondent.

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* Second Appeal No. 557 of 1891.

SIRIPARAPU RAMANNA v. MALLIKARJUNA PRASADA NAYUDU.

JUDGMENT.—This is a second appeal from the decree of the District Judge of Kistna, disallowing appellant's claim with costs. Respondent is the zamindar of Devarakota and appellant is a *jirayati* raiyat in his zamindari. A *patta* was tendered for fasli 1297 by the former, but the latter refused to accept it. The zamindar then distrained the raiyat's property for arrears of rent which he claimed for 1297 and the tenant sued to set aside the distraint as being illegal. The question for determination was whether the *patta* tendered, exhibit I, was one which appellant was bound to accept and the requirement of section 7, Act VIII of 1865, was thereby complied with. Appellant objected to two items in exhibit I, viz., the rate of Rs. 9-8-0 *per* acre charged on dry land irrigated under the Kistna anicut, and the fee entered as payable to a temple at Sivaganga. The Special Assistant Collector considered that the consolidated wet assessment of Rs. 9-8-0 *per* acre was too high and that the usual dry rate of Rs. 2-2-0 *plus* a water rate of Rs. 4 *per* acre was the proper charge. As to the contribution claimed for the Sivaganga goddess, he thought its inclusion in the patta to be unobjectionable, as he found it to be a charge warranted by established usage. On the former ground he held that appellant's refusal to accept the *patta* was justifiable and decreed his claim with costs. On appeal, however, the District Judge found that the *patta* tendered for 1297 was similar to *pattas* tendered in previous faslis, that they all contained the fee payable to the Sivaganga temple and imposed a consolidated wet rate of Rs. 9-8-0 *per* acre on lands irrigated with Kistna water, and that the consolidated rate and fee had been paid for twelve years or more. He concluded that payment of rent at a particular rate and of a fee for a series of years created a presumption of a contract and that the tenant did not rebut the presumption. Adverting to the evidence that appellant had twice asked the zamindar to reduce the rate, the Judge observed that it was not sufficient that the raiyat murmured against the rate now and then, but that it was incumbent upon him to get it lowered by the Revenue Courts. In the result he reversed the decree of the Special Assistant Collector and dismissed respondent's suit with costs. Hence this second appeal.

For the appellant, it is contended (1) that the Collector's sanction not having been obtained for enhancing the rent, the *patta* tendered was not a proper *patta*, (2) that in the circumstances of

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this case there was no presumptive evidence of a contract to which Courts can give effect, and (3) that the fee entered in the *patta* for the Sivaganga goddess was unauthorized. As regards the fee payable to the temple at Sivaganga, it can only be included in the *patta* under section 4 of Act VIII of 1865 on the ground that it is payable with rent according to established usage or law. A duty to contribute to the expense of a temple is not an ordinary incident of the relation of landlord and tenant, nor has it any connection with the *jirayati* tenure on which the raiyat holds his land. *Primâ facie*, the contribution is voluntary and unless the fee is shown to be a charge on the land, it cannot be treated as a payment which the zamindar can legally compel the raiyat to make. Suppose the raiyat to be a Muhammadan or a Christian it is obvious that in no sense would he be bound to make it. Moreover a tenant may, at his pleasure, discontinue a voluntary payment although he may have made it for several years, and there is nothing in this case to show that the fee is a charge on the land. We do not agree in the opinion of the Judge that appellant was under a contractual obligation to pay the fee claimed for the goddess at Sivaganga.

As regards the consolidated wet rate on land irrigated with Kistna water, there can be no doubt that before imposing it on the tenant against his will, the zamindar ought to obtain the sanction of the Collector under the first *proviso* of section 11 of Act VIII of 1865. That section provides that nothing contained in it shall affect the right of any landholder, with the sanction of the Collector, to raise the rent upon any land in consequence of additional value imparted to it by works of irrigation or other improvements executed at his own expense or constructed at the expense of Government and for which an additional revenue is levied from him. *Ramesam* v. *Bhanappa*(1) and *Narasimha Naidu* v. *Ramasami*(2) are authorities for the proposition that the addition of water-cess to land assessment is an enhancement of rent within the meaning of the *proviso* and that the addition, in whatever form it is made, whether as a consolidated wet rate or as water rate in addition to the prior rent, requires the sanction of the Collector. The principle is that land assessment and water-tax are designated revenue when they are paid to the Government, whilst they are

(1) I.L.R., 7 Mad., 182. (2) I.L.R., 14 Mad., 44.

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called rent when paid to the zamindar. In the case before us, it is conceded that no such sanction has been obtained and the real question therefore is whether a contract can be inferred from the facts found to pay a consolidated wet rate for the future. In this connection two subsidiary questions arise for consideration, viz.; (1) whether the first *proviso* in section 11 is restricted in its application to rates of original rent as contradistinguished from its enhancement on account of improvements, and (2) whether in the circumstances of this case, the Judge properly inferred a contract to pay the consolidated wet rate. As to the first, we see no reason why a contract between the landlord and tenant should not bind them in the case of enhancement of rent, whilst it is binding when it relates to the original rent. Having regard to the words of the *proviso* "Nothing herein contained shall affect "the right to raise the rent," &c., we think the intention was not to preclude the parties from regulating the enhancement as well as the original rent by contract, but to constitute the Collector's sanction as conclusive evidence that the enhancement is proper in cases in which there is no contract. Further the sanction of the Collector is prescribed for protecting the tenant against undue or excessive enhancement, and when there is a binding contract the tenant needs no such protection as he is a party to the contract.

The second question is whether upon the facts found a contract can be lawfully implied. Those facts are (1) that the tenant has paid the consolidated wet rate for twelve years or more, (2) that he has accepted *pattas* in the previous faslis providing for payment at that rate and that though the raiyat asked the zamindar to reduce the rate twice without success, he has taken no action in the Revenue Courts in order to get the rate lowered during the long interval of twelve years or more. It is also in evidence that the sharing system was in force in this village till fasli 1278, that fixed money rents were introduced in fasli 1279, and that the raiyat since paid the rates mentioned in the *patta* tendered up to fasli 1296. On the other hand, the usual dry rate is Rs. 2-2-0 *per* acre and if Rs. 4 are added to it for water rate, the total charge would amount to Rs. 6-2-0 *per* acre, whereas the consolidated water rate is Rs. 9-8-0, Rs. 3-6-0 in excess of the revenue which raiyats have to pay in Government villages. The Judge's finding amounts in substance to this, viz., when a

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consolidated rate had been paid for seventeen years, a contract to pay at the same rate in future years may be reasonably inferred and such contract precludes an enquiry how far that rate is excessive in comparison with the rates paid by raiyats in Government villages. Again, the question whether there was an implied contract or not is one of fact and we are bound to accept the finding. In the Full Bench case (*Venkatagopal* v. *Rangappa*(1)) it was held that a contract was properly implied from payment of the same rate of money rent for a period of fourteen years. In that case the history of rent law as to rates of rent was considered by the Full Court, and it was pointed out in what cases a contract to pay a particular rate may be presumed and how the presumption may be rebutted. In the case before us no change of circumstances and no special causes are shown which may be accepted as rebutting the presumption of an implied contract. The decision of the Judge that there was a contract to pay the consolidated wet rate entered in the *patta* is correct.

We are, however, constrained to hold that the *patta* tendered was not a proper *patta*, as it contained the fee payable to the temple at Sivaganga, and reversing the decree of the District Court, we set aside the distraint.

As the appeal has failed in regard to the consolidated rent, which is the most important item in dispute, we direct that each party bear his own costs throughout.

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

APPELLATE CIVIL.

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

1892. November 15. 1893. July 24.

MALLA REDDI AND ANOTHER (DEFENDANTS NOS. 2 AND 1), APPELLANTS,

v.

PADMAMMA AND ANOTHER (PLAINTIFFS NOS. 1 AND 2), RESPONDENTS.*

Hindu law—Illatom son-in-law—Inheritance—Survivorship.

The father since deceased of the second defendant took into his family an illatom son-in-law, who died, leaving a son. After the death of the son, one of his two daughters (who were his only children) sued to recover a one-fourth share of the property left by the second defendant's father:

Held, that the plaintiff was entitled to recover, in the absence of proof of a custom by which the rights of the plaintiff's father should have passed by survivorship to the second defendant.

SECOND APPEAL against the decree of C. Ramachandra Ayyar, Acting District Judge of Nellore, in appeal suit No. 62 of 1889, confirming the decree of T. Ramachandra Rau, District Munsif of Nellore, in original suit No. 282 of 1887.

The first plaintiff was mother of the second plaintiff and sister of the first defendant, and they were the sole descendants of the illatom son-in-law (deceased) of the second defendant's father. The second defendant was the husband of the first defendant, and he was in possession of the property left by his father. The present suit was brought to recover a one-fourth share of the property.

The second defendant claimed to have become entitled to the whole estate, as the last surviving member of a Hindu coparcenary, on the death, without male issue, of the first plaintiff's father, the son of the illatom son-in-law above referred to.

The Lower Courts held that the first plaintiff and the first defendant were jointly entitled to a moiety of the property in question and passed decrees as prayed.

* Second Appeal No. 1945 of 1891.

The defendants preferred this second appeal.

Seshagiri Ayyar for appellants.

Ramachandra Rau Saheb for respondents.

ORDER.—The father of Lakshmi Narasa Reddi (grandfather of the first plaintiff and the first defendant) was taken into the family of the second defendant's father as illatom son-in-law. Lakshmi Narasa Reddi died without male issue, leaving two daughters, the first plaintiff and the first defendant. The first plaintiff and her son claimed both by virtue of wills said to have been executed by Lakshmi Narasa Reddi and his wife and also by Hindu law.

As no evidence was adduced on either side the claim so far as it was based upon the alleged wills failed, and the only question now is whether the first plaintiff is entitled to one-fourth, *i.e.*, half of the half share of her late father. Both Courts have decreed in her favour and defendants have appealed.

For the purposes of the present appeal it may be taken that the property was the property of the second defendant's father's family in which plaintiff's grandfather was an illatom son-in-law. He was, therefore, entitled to equal rights therein with the second defendant's father, and the question is whether, on the death of Lakshmi Narasa Reddi, these rights passed by survivorship to the second defendant. Ordinarily under Hindu Law the relation of coparcenary, of which the right of survivorship is an incident, is only possible between descendants of a common paternal ancestor. In *Hanumantamma* v. *Rami Reddi*(1) it was considered unsafe (p. 283) to infer that the affiliation by illatom is analogous to adoption in any other respect save in the circumstance that the illatom son-in-law is regarded for purposes of inheritance as a member of the family into which he is admitted. In *Chenchamma* v. *Subbaya*(2) an issue was sent as to whether there can be coparcenary between an adopted son and an illatom son-in-law, but no evidence being produced it was held that in the absence of proof that the right of survivorship is an incident of custom it cannot be treated as such. The decision of Scotland, C.J., and Innes, J., in *Mopur Ademma* v. *Dhamavarapu Subba Reddi*(3) is

(1) I.L.R., 4 Mad., 272. (2) I.L.R., 9 Mad., 114.
(3) Appeal No. 103 of 1868, unreported.

MALLA REDDI v. PADMAMMA.

no doubt in conflict with the later decisions, but no evidence was taken in that case, and it was inferred that there was coparcenary, because the illatom custom was a mode of affiliation.

We think it is not safe to attach to the usage all the incidents of adoption without specific evidence. We shall, therefore, ask the District Judge to try the following issue:—

"Whether according to illatom custom the second defendant "excluded the daughters of Lakshmi Narasa Reddi from succes- "sion, and whether their father's undivided interest survived to "the second defendant?"

The finding is to be returned within two months from the date of the receipt of this order; and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

The finding of the District Judge was as follows:—

"I am of opinion that the evidence adduced is not sufficient to "find upon the issue sent down by the High Court for the second "defendant."

This Second Appeal having come on again for final hearing, the Court delivered judgment as follows.

JUDGMENT.—We accept the finding and dismiss the appeal.

APPELLATE CIVIL.

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

1893. March 20. April 26.

MALLIKARJUNA PRASADA NAYUDU (PLAINTIFF), APPELLANT,

v.

LAKSHMINARAYANA (DEFENDANT), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, ss. 9, 11—Sanction by Collector of enhanced rates of rent—Implied contract to pay rent at a certain rate.

In a suit brought by the Collector of a district, as receiver of a zamindari, against a tenant on the estate to enforce the exchange of patta and muchalka, it appeared that the rent demanded was assessed at an enhanced rate, and comprised a consolidated wet rate imposed on account of irrigation. To the enchancement of the rent by the addition of the water rate the sanction of the Collector required by the Rent Recovery Act, s. 11, first proviso, had not been obtained:

Held, that such sanction could not be implied from the fact that the Collector, as

* Second Appeal No. 1695 of 1891.

such receiver, had caused the provision in question to be inserted in the patta, and now sought to enforce it by suit. MALLIKARJUNA PRASADA NAYUDU v. LAKSHMINARAYANA.

Upon the question whether from the fact that the tenant, had paid the water rate in question for some years previously an implied contract to pay it for the future could be inferred, *Held* upon the facts of the present case that no such contract could be inferred.

With reference to the Full Bench decision in *Venkatagopal* v. *Rangappa*(1), the Court stated what was the principle to be kept in view in considering whether an implied contract to pay enhanced rent could be inferred.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 762 of 1890, modifying the decision of C. Venkata Jagga Rau, Assistant Collector of Kistna, in summary suit No. 107 of 1890.

Suit to enforce the exchange of patta and muchalka.

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

Plaintiff preferred this second appeal.

Pattabhirama Ayyar for appellant.

Parthasaradhi Ayyangar for respondent.

JUDGMENT.—These second appeals arise from suits brought by the receiver of the Devarkota estate to enforce the acceptance of pattas for fasli 1298 by raiyats in the Jirayati village of Nidumole. The raiyats objected to three items in the pattas tendered to them, viz., Nayakvadi fees, tax on palmyra trees, and consolidated wet rates imposed on lands irrigated by the anicut channels from the Kistna. As regards the first two items, both the Courts below decided in favour of the zamindar, and the raiyats have not appealed from their decision. As for the wet rate, it is conceded no sanction has been obtained from the Collector as required by the first proviso to section 11, Act VIII of 1865; but it is contended that such sanction was not necessary, and that, even if necessary, it must be taken to have been accorded, the wet rates being inserted in the pattas under the orders of the Collector, who was the receiver. The first proviso to section 11 expressly prescribes the sanction of the Collector as a condition precedent to a valid enhancement of rent on account of improvements, and the intention is to protect the raiyats against excessive rates by requiring sanction by an officer competent to hold the balance even between the zamindar and the raiyats. Nor do we consider the institution of these summary suits by the Collector in the

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

capacity of receiver to be equivalent to such sanction, the sanction contemplated by section 11 being one judicially accorded upon consideration of the rights of both parties to what is deemed a fair and equitable rate. In *Ramesâm* v. *Bhanappa*(1), it has been held that the addition of water-cess to the prior rent is an enhancement of rent within the meaning of the section. We consider, therefore, that the Judge was right in holding that, in the absence of a contract, the sanction of the Collector was indispensable, and that no such sanction, as is contemplated by Act VIII of 1865, has been given in the cases before us.

The next contention is that the Judge was in error in refusing to infer from the facts found a contract to pay the wet rate, and we do not think that it is tenable. The leading case on the subject is *Venkatagopal* v. *Rangappa*(2). The general rule laid down in that case is that payment of rent in a particular form, or at a certain rate for a number of years, is presumptive evidence of a contract to pay rent in that form or at that rate for future years so long as the relation of landlord and tenant may continue. It was also there held that the presumption may be repelled by proof (1) that the rate in question was paid under a mistake, (2) that it was intended to be paid only for a certain term of years, and that, on the expiration of that term, the parties meant to revert to their original rights, (3) that there has been a diminution in the extent of the holding, (4) that its value has diminished by the deterioration of irrigation or other works which the landlord was bound to maintain, and (5) that there was some change of circumstances which would entitle the parties to the agreement to an alteration in its terms without necessarily putting an end to the relation of landlord and tenant. The Court also observed that when there is no proof of such special cause for alteration of the terms heretofore subsisting between the parties, it must be decided that so long as the tenant elects to retain the holding, he is liable to the obligations in respect of rent which, it is to be inferred, from his past conduct that he has accepted. With reference to the general rule, the Judge considers that it is vague so far as it does not mention a specific number of years as sufficient to raise the inference of a contract and draws attention to *Narasimha* v. *Ramasami*(3), wherein it was held that no contract as to future years

(1) I.L.R., 7 Mad., 182. (2) I.L.R., 7 Mad., 365. (3) I.L.R., 14 Mad., 44.

could be inferred from a single lease extending over the brief period of five years. Again, in *Apparau* v. *Narasanna*(1), it was considered that the fact that the tenant paid rent at a certain rate for six years was not sufficient to establish an implied covenant to continue to do so for the future. The Judge appears to have ruled in some cases that a period of three years was sufficient as under the Bengal Tenancy Act, and observes that he is inclined to hold in the cases now under consideration that nothing less than seven years will be long enough to satisfy the principle laid down in *Venkatagopal* v. *Rangappa*(2). In the case last mentioned, which was a Full Bench case, a contract was implied, as money rent was found to have been paid for not less than fourteen years. We do not think that, in the absence of an express enactment applicable to this Presidency, the Judge is right in fixing three or seven years as the period contemplated by the Full Bench case. The decision whether a contract can be implied must depend on the circumstances of each case. The principle, which ought to be kept in view, is that the distinction between an express and an implied contract consists only in the mode of proof, and that the circumstances from which a contract may lawfully be implied must be such as will satisfy a reasonable mind that the real intention of the parties was that the particular rate in question should be the rate in future years so long as the relation of landlord and tenant may subsist between the parties, unless there is some special circumstance, such as is indicated in the Full Bench case rebutting the presumption. It may be that payment of rent at the rate in dispute for five or six years is not sufficient where such payment is the only fact in evidence. It may also be that even when a particular rate has been paid for a longer period, there may be other circumstances which repel the presumption. In the cases now before us, however, there is no sufficient reason to doubt that the Judge has arrived at a correct finding. Apart from the fact that the wet rate in dispute has been paid in no case for more than seven years, in many cases for four or five years only, and in some even for one and three years, it is found that the raiyats paid the rate with reluctance and much protest. It is found, further, that the areas over which it has been paid are in many cases small and have varied from year to year. Moreover,

(1) I.L.R., 15 Mad., 47. (2) I.L.R., 7 Mad., 365.

MALLIKARJUNA PRASADA NAYUDU v. LAKSHMINARAYANA.

it does not appear that the zamindar has incurred any expenditure in connection with works of irrigation.

We are unable, therefore, to uphold the contention that the Judge was in error in holding that it was not the intention of the raiyats that they should continue to pay the wet rate in dispute in all future years.

The appeals fail, and we dismiss them with costs.

APPELLATE CIVIL.

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

1893. March 20, 21. April 21.

BHUPATHI (DEFENDANT), APPELLANT,

v.

RAJAH RANGAYYA APPA RAU (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, ss. 1, 11—Sanction granted by Head Assistant Collector—Procedure—Customary rent—Restraint on building.

A Head Assistant Collector is competent to grant a sanction for the enhancement of rent under Rent Recovery Act, s. 11.

The *granting of* such sanction is a judicial and not a merely administrative act and such sanction should not be granted without first giving notice to both the landlord and the tenant, and hearing, and considering the contentions of both parties.

In a suit by the landlord to enforce the exchange of a patta and muchalka, the tenant objected to the rate of rent imposed on part of the land, which was dry land converted into wet. *Held* that the finding of the Lower Appellate Court that there was an implied contract to pay rent at such rate was not open to any legal objection.

It appeared that the patta tendered contained a stipulation for the payment of rent at a special rate for garden (jarib) lands watered by wells which had been constructed by the raiyat at his own cost, and also comprised a stipulation that the raiyat should not build on his holding. The Court of first appeal held that the special rate of rent above referred to was customary and had been followed for many years:

Held, that there was no ground for interference on second appeal with the Lower Appellate Court's decision regarding the former of the stipulations above referred to, but that the latter should be so modified as to prevent the raiyat only from raising any building incompatible with an agricultural holding.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 520 of 1888, modifying the

* Second Appeal No. 681 of 1891.

BHUPATHI v. RAJAH RANGAYYA APPA RAU.

decision of L. M. Wynch, Head Assistant Collector of Kistna, in summary suit No. 761 of 1887.

Suit by the landlord to enforce the exchange of patta and muchalka.

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

The defendant preferred this second appeal.

Parthasaradhi Ayyangar for appellant.

Subramanya Ayyar for respondent.

JUDGMENT.—Plaintiff, respondent, is the zamindar of Nuzvid and appellants are raiyats in the *Jeroyati* village of Mantena comprised in his zamindari. The contest between them is whether the *pattas* tendered for fasli 1296 were such as the raiyats were bound to accept. The first objection urged by them was that the land taken up for excavating Uppaleru drainage channel was not deducted from their holdings on the ground that the Government had paid no compensation for the land so taken up to the zamindar. Both the Courts below allowed this objection, and the zamindar has not appealed from their decision.

The next *item* to which the raiyats object is the rate *per* acre imposed on dry land converted into wet. The rate claimed by the zamindar was Rs. 9-2-8 *per* acre, and the raiyats contended that the proper rate was the rate which had prevailed at the time of permanent settlement in 1802. The Head Assistant Collector and the Judge inferred, from the facts which they accepted as proved, a contract to pay every year Rs. 9-2-8 *per* acre. The contention on appellants' behalf is that no contract can be lawfully implied, the rate of Rs. 9-2-8 having been paid not voluntarily, but under protest and with remonstrance.

The finding that there was an implied contract being one of fact, the question we have to consider on second appeal is whether it is open to any legal objection. The Judge considers it proved that there has been a continuous payment of Rs. 9-2-8 *per* acre from the year 1871 to 1885, and in the Full Bench case of *Venkatagopal* v. *Rangappa*(1) in which it was held that there was an implied contract, the same rate had been paid for fourteen years. It is then argued that the management of the Nuzvid estate has always been oppressive and that the raiyats

(1) I.L.R., 7 Mad., 373.

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protested against the rate of Rs. 9-2-8 in 1871 and in 1880. We think that the expression of discontent now and then was not sufficient and that the omission to resort to the Revenue Courts for redress for so long a period is significant. Again, the Judge observes that the same rate had been paid down to 1885 and subsequent to the dates of the alleged remonstrance, and that the reasonable inference is that the matter was settled between the parties. In this there is no error of law to justify our interference with the finding. Moreover, there was a similar question raised with reference to the *pattas* tendered for the previous *fasli*, viz., 1295, and it was also decided against appellants. Further, the Judge observes, and we think, very properly, that if it is reasonable for the raiyats to seek to revert to the *faisal* rate which prevailed in 1802, the zamindar may as reasonably go back to the sharing system which is not agreeable to them. We are of opinion that the objection to the inference of a contract to pay at the rate of Rs. 9-2-8 cannot be supported.

The next question is whether the Judge was right in treating as valid the sanction given by the Head Assistant Collector, Ramachandra Rau, for enhancing the rate to Rs. 9-2-8 for fasli 1296 in the cases from which second appeals Nos. 681 and 682 of 1891 arise. In connection with the *patta* tendered for 1295, appellants in those cases objected to the rate and contended that, as they had excavated a distribution channel at a cost of Rs. 115, the zamindar was not at liberty to enhance the rent without the sanction of the Collector. The Head Assistant Collector upheld their objection and directed in his judgment that the cost of excavating the sub-channel be deducted from the *sist* payable to the zamindar. After this deduction had been made, the zamindar applied for sanction to raise the rent to Rs. 9-2-8 *per* acre on lands under the channel, and on 23rd June 1887 the Head Assistant Collector granted the sanction; but without sending notice to the raiyats and calling upon them to show cause why sanction should not be granted. Appellants in second appeals Nos. 681 and 682 of 1891 questioned the validity of the sanction on three grounds, viz., (1) that the Head Assistant Collector was not competent to grant the sanction, (2) that the increase sanctioned was unreasonable, and (3) that the sanction was given without notice to them; but the Judge disallowed these grounds of objection. The term Collector as defined in section 1,

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Act VIII of 1865, includes the Head Assistant Collector and the first objection therefore is entitled to no weight. As regards the omission to give notice, it was clearly an irregularity, for the act of giving sanction is a judicial act intended on the one hand to protect the raiyat against excessive enhancement and on the other to secure to the zamindar what may be considered a fair and an equitable increase. A sound decision can, therefore, only be arrived at after hearing both parties and considering what is urged in the interest of each. The sanction prescribed by the *proviso* in section 11 has the force of a binding contract not only for any particular *fasli*, but also for future years, and the power to give such sanction is vested in the Collector as the officer competent to hold the balance evenly between the zamindar and the raiyat. In our judgment, it can only be properly exercised after hearing both sides and after consideration of the rights of both parties under Act VIII of 1865. We are unable to accede to the contention on behalf of the zamindar that the granting of sanction under section 11 is an administrative act and not defective by reason of the raiyats not having been heard. We agree, however, with the Judge that in the present case the irregularity was not material since the Head Assistant Collector had heard what the raiyats had to say in the suit of *fasli* 1295. There is the further fact that the cost of excavating the distribution channel has been deducted from the *sist* payable by the raiyats to the zamindar, and that the rate charged in the case of those raiyats, who had incurred no similar expenditure was Rs. 9-2-8 *per* acre.

Another *item* to which exception is taken in all the second appeals is the rate charged for garden lands watered by wells sunk by the raiyats at their own expense. The Head Assistant Collector found that the *jarib* rates now claimed were customary and that they had been paid for a long series of years, and the Judge has accepted the finding. In the case of *Venkatagiri Raja* v. *Pitchana*(1), it was held that while in the case of lands watered by wells newly constructed by a tenant at his own expense he cannot be deprived of the benefit of the improvements made at his own expense, he cannot, on the other hand, insist on a reduction of the assessment in the case of old garden lands which had paid a

(1) I.L.R., 9 Mad., 80.

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mamul garden rate. There are no grounds for interference in second appeal.

The next objection taken by the raiyats is as to the stipulation that the raiyats shall not build houses on the land, and the Judge has allowed the stipulation to stand. The question whether a tenant can build on his lands was discussed in *Ramanadhan* v. *Zamindar of Ramnad*(1), and the decision arrived at in that case was that the tenant was not at liberty to turn land originally let for cultivation into a house site without the consent of the zamindar, and that he is only entitled to raise such buildings as are not incompatible with the character of his holding as an agricultural holding. The stipulation in the *patta* should be so modified as to prevent the raiyat from raising any building incompatible with an agricultural holding.

The last objection taken is as to the tenant's right to cut down trees, and on this point the Judge has decided in accordance with the decision of this Court in *Appa Rau* v. *Ratnam*(2).

We modify the decrees of the District Judge so far as they relate to building on the land as indicated above and confirm them in other respects. The appeals having substantially failed, appellants will pay respondent's costs in second appeals Nos. 681 and 682. The respondent not being represented in the other appeals, we make no order as to costs.

APPELLATE CIVIL.

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

1893. January 31. February 1.

RANGASAMI CHETTI (PLAINTIFF), APPELLANT,

v.

PERIASAMI MUDALI (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 273—*Dismissal of an application for execution—Attachment of a decree—Execution of attached decree.*

The holder of a decree dated 1885 applied to execute it, but his application was dismissed in March 1887 on the ground that "no further steps had been taken."

(1) I.L.R., 16 Mad., 407. (2) I.L.R., 13 Mad., 249.

* Second Appeal No. 555 of 1892.

RANGASAMI CHETTI v. PERIASAMI MUDALI.

It did not appear that any notice was given to him before the order of dismissal was made. Nevertheless the decree-holder proceeded to execute a decree of the judgment-debtor attached by him and brought to sale certain property which was in question in the present suit, and it was purchased *bonâ fide* by the present defendant who obtained a sale certificate from the Court. The present plaintiff claimed as assignee from the holder of the attached decree to execute it against the same land and now sued for a declaration that it was liable to be brought to sale by him and that the defendant's purchase was void as against him:

Held, (1) that under the circumstances of the case the attachment in execution of the decree of 1885 was subsisting at the time of the purchase by the defendant,

(2) that a judgment-creditor who attaches a decree is competent to execute it.

SECOND APPEAL against the decree of C. Venkoba Chariar, Subordinate Judge of Tanjore, in appeal suit No. 382 of 1891, confirming the decree of A. Kuppusami Ayyangar, District Munsif of Kumbaconam, in original suit No. 193 of 1890.

In June 1887 the father (since deceased) of the plaintiff became the assignee of a decree passed by the District Munsif of Kumbaconam in 1881, and in execution he attached certain land as property of the judgment-debtor. The present defendant objected that the land was his property. The plaintiff now sued for a declaration that the land in question was not the property of the defendant and was liable to be attached in execution of the decree of 1881.

It appeared that a suit was brought in 1885 against the assignor of the above-mentioned decree and that the plaintiff therein obtained against him a decree which was subsequently assigned to one Ramachandra Rau. In execution of the last-mentioned decree Ramachandra Rau attached the decree of 1881 under Civil Procedure Code, s. 273, and having proceeded to execute it he brought to sale the land in question in this suit and the present defendant became the purchaser and obtained a sale certificate in 1888.

Ramachandra Rau's application to execute the decree of 1885 was dismissed by an order made on the 19th March 1887 on the ground that "no further steps had been taken," but it did not appear that any previous notice had been given to the execution-creditor before that order was made, and it was found that the defendant was a *bonâ fide* purchaser.

The plaintiff contended that the order of 19th March 1887 put an end to the attachment and that for that reason the defendant acquired no title by his purchase at the subsequent court-sale.

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Both of the lower Courts overruled this contention and the suit was dismissed.

The plaintiff preferred this appeal.

Sankaran Nayar and *Panchapagesa Sastriar* for appellant.

Sankara Narayana Sastri for respondent.

JUDGMENT.—We think the order appealed against is right. Both Courts considered that the attachment in execution of the decree in original suit No. 75 of 1885 of the decree in original suit No. 252 of 1881 was subsisting at the date of the purchase by defendant at the court-sale on 5th July 1888. It is contended that an order was made on 19th March 1887 to the effect that the application for execution of the decree in original suit No. 75 of 1885 was dismissed on the ground that no further steps had been taken and that this order put an end to the attachment; whether the attachment ceased at the date of this order or continued to subsist is a matter to be decided with reference to the circumstances of each case as observed by the Privy Council in *Puddomonee Dossee* v. *Roy Muthooranath Chowdhry*(1).

We observe that up to 16th March 1887 some steps had been taken and the application was dismissed on 19th March, and it does not appear that any previous notice was given to the execution-creditor before the order of 19th March was made. Moreover, defendant was a *bonâ fide* purchaser at a court-sale of the lands in question, and any irregularity in the proceedings which led to the sale cannot be relied on as a ground for setting aside the sale after it had been confirmed and a certificate issued. See *Rewa Mahton* v. *Ram Kishen Singh*(2) and *Mothura Mohun Ghose Mondul* v. *Akhoy Kumar Mitter*(3). Another contention for appellant is that under section 273 of the Civil Procedure Code the decree-holder in original suit No. 75 of 1885 was not competent to execute the decree in original suit No. 252 of 1881 attached by him. Section 273 expressly authorizes the Court in such a case to apply the proceeds of the decree attached in satisfaction of the decree sought to be executed. This direction clearly implies that the attaching decree-holder is entitled to take all steps necessary for the realization of the proceeds of the attached decree by the Court. The same view is taken by the Calcutta

(1) 12 B.L.R., 411; s.c., 20 W.R., 133. (2) I.L.R., 14 Calc., 18.
(3) I.L.R., 15 Calc., 557.

RANGASAMI CHETTI v. PERIASAMI MUDALI.

High Court in *Peary Mohun Chowdhry* v. *Romesh Chunder Nundy* (1). In the view of the case which we take, it is not necessary to consider whether article 12 or 11 of the second schedule to the Limitation Act governs the case.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

GNANASAMMANDA PANDARAM (PLAINTIFF), PETITIONER,

v.

PALANIYANDI PILLAI (DEFENDANT), RESPONDENT.*

1893. Sept. 11.

Limitation Act—Act XV of 1877, *s.* 25—*Date from which time runs.*

A registered lease provided that the rent should be paid on 30th Masi Tharana. The month Masi in the year Tharana ended on the 29th day, which corresponded with 11th March 1885. A suit to recover the rent was filed on 12th March 1891:

Held, that the suit was not barred by limitation.

PETITION under Provincial Small Cause Courts Act, 1887, section 25, praying the High Court to revise the proceedings of T. M. Ranga Chari, District Munsif of Trichinopoly, in small cause suit No. 538 of 1891.

Suit for rent. The District Munsif dismissed the suit as barred by limitation. He said:—"The rent sued on was payable "within 30th Masi Tharana according to the rent deed. Now, "there was no such day as 30th Masi in the year Tharana, the "month having ended with 29th Masi. Therefore time began "to run from 29th Masi Tharana, equivalent to 11th March "1885. See on this point *Migotti* v. *Colvill*(2), quoted in Mitra's "Limitation, 2nd Edition. The rent deed being registered, plaintiff had six years from 11th March 1885. Plaintiff should have "launched this suit on 11th March 1891, whereas the plaint was "put into Court only on the succeeding day, namely, 12th March "1891. The suit is then time-barred. On this ground the suit "is dismissed with costs."

(1) I.L.R., 15 Calc., 371. * Civil Revision Petition No. 257 of 1892.
(2) L.R., 4 C.P.D., 233.

GNANASAM-MANDA PANDARAM v. PALANIYANDI PILLAI.

Plaintiff preferred this petition.

Krishnasawmi Ayyar for petitioner.

Parthasaradhi Ayyanyar and

Srirangachariar for respondent.

JUDGMENT.—The question is whether the claim is barred by limitation. If there had been thirty days in Masi of the year Tharana, the suit would not be barred; but in the year Tharana there happened to have been only twenty-nine days in Masi. Following the decision in *Almas Banee* v. *Mahomed Ruja*(1), we hold that the suit brought on the 12th March 1891 is not barred. The decision in *Migotti* v. *Colvill*(2), referred to by the District Munsif, relates to computation of a sentence on a prisoner and is not in point.

We set aside the decree of the District Munsif and remand the suit for disposal on merits.

The costs hitherto will abide and follow the result.

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(1) I.L.R., 6 Calc., 239. (2) L.R., 4 C.P.D., 233.

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1882—IV: *See* Transfer of Property Act.
„ —XIV: *See* Civil Procedure Code.

Civil Procedure Code—Act XIV of 1882, ss. 53, 245, 647—*Amendment of execution petition—Appeal—Limitation.*] One, being entitled under a decree of 1809 to a share in the income of a zamindari, obtained a decree in a suit of 1887 against certain recent purchasers of the zamindari, declaring that he had a valid charge on the estate and awarding to him, besides his costs, the amount due in respect of one year. He now applied in execution of the latter decree for payment of the amount due in respect of five years as well as his costs. An application to amend the petition for execution by inserting a reference to the former decree was made after the right of the petitioner in respect of some of the years in question had become barred by limitation. This application was refused by the Court of first instance:—*Held,* that under the circumstances of the case the amendment should have been allowed to be made.

Sattappa Chetti v. *Jogi Soorappa* 67

2. ——————————————, s. 566—*Remand for trial of a new issue—Malabar law—Mapillas.*] The karnavan of a tarwad in Malabar sued to recover property acquired by his sister (deceased) and now in the occupation of the defendants, her children. The parties were Mapillas. The defendants pleaded (i) that the property had been given to them and their mother jointly; (ii) that their mother was not governed by Marumakkatayam law. The Court of first instance found the first-mentioned plea to be good and dismissed the suit, and also found that the family was governed by Marumakkatayam law. The Court of first appeal dissented from the above finding as to the first plea, and, without deciding the second point, remanded the case for the trial of a general issue as to the mode of devolution of self-acquired property in Marumakkatayam Mapilla families in North Malabar, and ultimately it dismissed the suit, ruling that in Marumakkatayam Mapilla families the self-acquired property of a female descends to her children and does not lapse on her death to her tarwad:—*Held,* that the order of remand was not one which should have been made under Civil Procedure Code, s. 566, and the proceedings taken under it were irregular. Observations as to the law applicable to Mapillas.

Illika Pakramar v. *Kutti Kunhamed* 69

3. ——————————————, s. 583—*Execution of decree—Payment of decree amount by one defendant—Reversal of decree on appeal by another defendant—Right to refund.*] In a suit for rent, together with interest thereon, brought by a mortgagee against a tenant in occupation of the mortgage premises, one

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claiming title against the mortgagee was joined as second defendant. The suit was dismissed in the Court of first instance, but the Court of first appeal passed a decree as prayed in the plaint: and in execution the principal amount of the rent claimed, which had been paid into Court by the first defendant with the request that it should be paid out to the person *entitled* to it, was paid over to the plaintiff. The first defendant preferred a second appeal against the decree, so far as it awarded interest and costs: this second appeal was dismissed. The second defendant, however, preferred against the entire decree a second appeal which was successful, and the High Court dismissed the suit throughout. On an application by the first defendant for refund of the money paid by him as stated above:—*Held*, that the applicant was not entitled to the refund claimed.

Kassim Saib v. *Luis* 82

CONTRACT ACT—ACT IX OF 1872, s. 74—*Penal sum—Mortgage—Extinguishment of encumbrances—Suit by puisne encumbrancer—Decree for sale.*] In March 1881 A purchased certain land and, in the same month, mortgaged it to B. In June the land was attached in execution of a decree. In August A discharged the judgment-debt with money borrowed from C, and he hypothecated the land to him to secure repayment of the loan. In 1882 B brought a suit on his mortgage and obtained a decree, in execution of which the land was brought to sale and purchased by him: C was not a party to this suit. In 1886 B sold the land to D under an instrument, which recited that out of the purchase-money Rs. 769 were retained by the purchaser for payment of prior encumbrances, and the finding was that the purchaser undertook to pay the debt owing to C. C now sued A and D to enforce his hypothecation:—*Held*, that C was entitled to a decree for sale. A stipulation in a bond that if the sum secured is not repaid with interest at 12 per cent. on a certain date, the interest shall be at 18 per cent. from the date of the bond is not unenforceable.

Narayanasami Naidu v. *Narayana Rau* 62

CONTRIBUTION SUIT FOR—*Joint Tort-feasor—Adjustment of a loss arising from an illegal contract.*] A deed of partition between A and B, members of an undivided Hindu family, provided that A, who took over all the debts due to the family, should bear the loss, if any, incurred in the appeal then pending in a suit brought by the family on a bond. The bond was held to evidence a fraudulent transaction, and the appeal was dismissed with costs. The decree for costs was executed against B and satisfied by him: he now sued the son of A (deceased) to recover the amount paid by him:—*Held*, that the plaintiff was entitled to recover, the claim not being barred by the rule against contribution between joint tort-feasors.

Lakshmana Ayyan v. *Rangasami Ayyan* 78

DEFAMATION—*Privilege of Judge.*] An action for defamation cannot be maintained against a Judge for words used by him whilst trying a cause in Court even though such words are alleged to be false, malicious and without reasonable cause.

Raman Nayar v. *Subramanya Ayyan* 87

LIMITATION ACT—ACT XV OF 1877, s. 20—*Suit for money—Payment on account of principal within the period of limitation—Evidence of such payment by writing made after period expired.*] The obligee of a registered mortgage bond, dated

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30th January 1875, sued in February 1891 to recover from the obligor the principal and interest remaining due thereunder. In bar of limitation the plaintiff relied on entries of part-payments from time to time in an account written by the defendant. These part-payments were made at such times as to keep alive the obligee's right of suit up to the date of the last of them. The last of these payments was made on a date which was less than six years (the period of limitation for the suit) before the date of institution of the suit, but it was not entered in the defendant's accounts until after the date when the claim would otherwise have been barred by limitation :—*Held*, that the provisions of Limitation Act, s. 20, were satisfied, and that the suit was not barred by limitation.

Venkatasubbu v. *Appusundram* 92

2. ——————————, s. 25—*Date from which time runs.*] A registered lease provided that the rent should be paid on 30th Masi Tharana. The month Masi in the year Tharana ended on the 29th day, which corresponded with 11th March 1885. A suit to recover the rent was filed on 12th March 1891 :—*Held*, that the suit was not barred by limitation.

Gnanasammanda Pandaram v. *Palainyandi Pillai* 61

3. ——————————, SCH. II, ARTS. 137, 138—*Purchase at Court auction —Suit for possession of land—Date of cause of action—Construction of enactment.*] In a suit for possession of land instituted on 1st April 1891, it appeared that the land in question had been purchased by the plaintiff in a Court auction held in execution of a decree on 20th June 1878, and that the sale to the plaintiff was confirmed on 31st March 1879, which was the date upon which the certificate issued. The plaintiff failed to prove that the judgment-debtor was out of possession at or subsequently to the date of the sale :—*Held*, that the suit was governed by Limitation Act, sch. II, art. 138 ; that "the date of the sale" in that article means the date of the actual sale not the date of the confirmation of the sale and that accordingly the suit was barred by limitation.

Venkatalingam v. *Veerasami* 89

4. ——————————, SCH. II, ART. 179—*Step in aid of execution—Defect in application for execution.*] Where there has been in fact an application for execution made by the party entitled to make it, it is to be regarded as a step in aid of execution within the meaning of the Limitation Act, art. 179, although by mistake a deceased judgment-debtor is named as the person against whom execution is sought.

Samia Pillai v. *Chockalinga Chettiar* 76

MALABAR LAW—*Civil Procedure Code—Act XIV of* 1882, *s.* 566—*Remand for trial of a new issue—Mapillas.*] The karnavan of a tarwad in Malabar sued to recover property acquired by his sister (deceased) and now in the occupation of the defendants, her children. The parties were Mapillas. The defendants pleaded (i) that the property had been given to them and their mother jointly ; (ii) that their mother was not governed by Marumakkatayam law. The Court of first instance found the first-mentioned plea to be good and dismissed the suit, and also found that the family was governed by Marumakkatayam law. The Court of first appeal dissented from the above finding as to the first plea, and, without deciding the second point, remanded the case for the trial of a general issue

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as to the mode of devolution of self-acquired property in Marumakkatayam Mapilla families in North Malabar, and ultimately it dismissed the suit, ruling that in Marumakkatayam Mapilla families the self-acquired property of a female descends to her children and does not lapse on her death to her tarwad: —*Held*, that the order of remand was not one which should have been made under Civil Procedure Code, s. 566, and the proceedings taken under it were irregular. Observations as to the law applicable to Mapillas.

Illikka Pakramar v. *Kutti Kunhamed* 69

MORTGAGE—*Extinguishment of encumbrances—Suit by puisne encumbrancer—Decree for sale—Contract Act—Act IX of* 1872, *s.* 74—*Penal sum.*] In March 1881 A purchased certain land and, in the same month, mortgaged it to B. In June the land was attached in execution of a decree. In August A discharged the judgment-debt with money borrowed from C, and he hypothecated the land to him to secure repayment of the loan. In 1882 B brought a suit on his mortgage and obtained a decree, in execution of which the land was brought to sale and purchased by him: C was not a party to this suit. In 1886 B sold the land to D under an instrument, which recited that out of the purchase-money Rs. 760 were retained by the purchaser for payment of prior encumbrances, and the finding was that the purchaser undertook to pay the debt owing to C. C now sued A and D to enforce his hypothecation:—*Held*, that C was entitled to a decree for sale. A stipulation in a bond that if the sum secured is not repaid with interest at 12 per cent. on a certain date, the interest shall be at 18 per cent. from the date of the bond is not unenforceable.

Narayanasami Naidu v. *Narayana Rau* 62

NEGOTIABLE INSTRUMENTS ACT—ACT XXVI OF 1861, s. 13—*Promissory note—Reference in the note to collateral security, effect of.*] An instrument, signed and bearing a 1-anna stamp, was in the following terms, viz., "on deposit of title-"deeds named herein below for value received by me I promise to pay three "months after date Rs. 160 to A.B. or order," then followed the details of the title-deeds:—*Held*, that the instrument was a negotiable instrument.

Ramachandra v. *Sesha* 85

RELIGIOUS ENDOWMENTS ACT—ACT XX OF 1863, s. 14—*Applicability of the Act.*] In a suit, brought with the leave of the District Court under Act XX of 1863, to remove the trustees of a Hindu temple, it did not appear that the trustees were nominated by or subject to the confirmation of the Government or any public officer:—*Held*, that Act XX of 1863 was not applicable to the temple unless it was admitted or proved by evidence that the endowment was one which would have fallen under the provisions of Regulation VII of 1817.

Muthu v. *Gangathara* 95

RENT RECOVERY ACT—MADRAS ACT VIII OF 1865, s. 11—*Implied contract as to rates of rent—Customary fees—Prohibition of buildings.*] In order to support the inference of a contract under the Rent Recovery Act, Madras, s. 11, from payment of the same rent for a given number of years, the intention that the same rent is payable in future years must be clear and unequivocal: it is unsafe to imply such a contract from a single lease for five years. A patta is not unenforceable by reason of its providing for the payment of fees to village artisans in a case when such fees are customary, or by reason of its prohibiting the

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tenant from erecting buildings on his holding, if such prohibition is limited to erections not compatible with the agricultural character of the holding.

Lukshmana v. *Appa Rau* 73

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, ss. 92, 93—*Decree for redemption—Mortgagor's failure to pay amount due within period fixed—Subsequent suit, no order under section* 93 *having been made*—Res judicata.] A decree under section 92 of the Transfer of Property Act becomes a final decree on the expiry of the time limited thereby, although no order is passed under section 93: accordingly, no subsequent suit for redemption can be maintained.

Ramasami v. Sami 96

2. ——————————————, ss. 108, SUB-S. (*e*), 117—*Agricultural lease—Lease of a coffee garden—Destruction of plants by fire—Voidability of lease.*] The plaintiff was the assignee of the right and title of the lessor and the defendant was the lessee of a coffee garden under an instrument which was held to constitute a lease of the coffee plants only. In a suit to recover the annual payment reserved under the lease, it appeared that the coffee plants had been destroyed by fire and the garden had been consequently abandoned by the defendant before the period to which the claim related: —*Held*, that the plaintiff was not entitled to recover. *Per cur.*—We are clearly of opinion that a lease of a coffee garden is not an agricultural lease within the meaning of Transfer of Property Act, s. 117.

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High Court in *Peary Mohun Chowdhry* v. *Romesh Chunder Nundy* (1). In the view of the case which we take, it is not necessary to consider whether article 12 or 11 of the second schedule to the Limitation Act governs the case.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

GNANASAMMANDA PANDARAM (PLAINTIFF), PETITIONER,

1893. Sept. 11.

PALANIYANDI PILLAI (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, *s.* 25—*Date from which time runs.*

A registered lease provided that the rent should be paid on 30th Masi Tharana. The month Masi in the year Tharana ended on the 29th day, which corresponded with 11th March 1885. A suit to recover the rent was filed on 12th March 1891:

Held, that the suit was not barred by limitation.

PETITION under Provincial Small Cause Courts Act, 1887, section 25, praying the High Court to revise the proceedings of T. M. Ranga Chari, District Munsif of Trichinopoly, in small cause suit No. 538 of 1891.

Suit for rent. The District Munsif dismissed the suit as barred by limitation. He said:—"The rent sued on was payable "within 30th Masi Tharana according to the rent deed. Now, "there was no such day as 30th Masi in the year Tharana, the "month having ended with 29th Masi. Therefore time began "to run from 29th Masi Tharana, equivalent to 11th March "1885. See on this point *Migotti* v. *Colvill*(2), quoted in Mitra's "Limitation, 2nd Edition. The rent deed being registered, plain-"tiff had six years from 11th March 1885. Plaintiff should have "launched this suit on 11th March 1891, whereas the plaint was "put into Court only on the succeeding day, namely, 12th March "1891. The suit is then time-barred. On this ground the suit "is dismissed with costs."

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(1) I.L.R., 15 Calc., 371.

(2) L.R., 4 C.P.D., 233.

* Civil Revision Petition No. 257 of 1892.

GNANASAM-MANDA PANDARAM v. PALANIYANDI PILLAI.

Plaintiff preferred this petition.

Krishnasawmi Ayyar for petitioner.

Parthasaradhi Ayyangar and *Srirangachariar* for respondent.

JUDGMENT.—The question is whether the claim is barred by limitation. If there had been thirty days in Masi of the year Tharana, the suit would not be barred; but in the year Tharana there happened to have been only twenty-nine days in Masi. Following the decision in *Almas Banee* v. *Mahomed Ruja*(1), we hold that the suit brought on the 12th March 1891 is not barred. The decision in *Migotti* v. *Colvill*(2), referred to by the District Munsif, relates to computation of a sentence on a prisoner and is not in point.

We set aside the decree of the District Munsif and remand the suit for disposal on merits.

The costs hitherto will abide and follow the result.

APPELLATE CIVIL.

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

1893. April 17. September 13.

NARAYANASAMI NAIDU (DEFENDANT No. 3), APPELLANT,

v.

NARAYANA RAU (PLAINTIFF), RESPONDENT.*

Mortgage—Extinguishment of incumbrances—Suit by puisne incumbrancer—Decree for sale—Contract Act—Act IX of 1872, s. 74—Penal sum.

In March 1881 A purchased certain land and, in the same month, mortgaged it to B. In June the land was attached in execution of a decree. In August A discharged the judgment-debt with money borrowed from C, and he hypothecated the land to him to secure repayment of the loan.

In 1882 B brought a suit on his mortgage and obtained a decree, in execution of which the land was brought to sale and purchased by him: C was not a party to this suit. In 1886 B sold the land to D under an instrument, which recited that out of the purchase-money Rs. 760 were retained by the purchaser for payment of prior encumbrances, and the finding was that the purchaser undertook to pay the debt owing to C. C now sued A and D to enforce his hypothecation:

Held, that C was entitled to a decree for sale.

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(1) I.L.R., 6 Calc., 239. (2) L.R., 4 C.P.D., 233.

* Second Appeal No. 338 of 1892.

NARAYANA-SAMI NAIDU v. NARAYANA RAU.

A stipulation in a bond that if the sum secured is not repaid with interest at 12 per cent. on a certain date, the interest shall be at 18 per cent. from the date of the bond is not unenforceable.

SECOND APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in appeal suit No. 69 of 1891, modifying the decree of T. Ramasami Ayyar, District Munsif of Tiruttarapundi, in original suit No. 219 of 1889.

Suit to recover principal and interest due on a hypothecation bond. The instrument sued on was dated 29th August 1881 and it provided for the repayment of the amount secured "with "interest at Re. 1 per cent. per mensem within 30th August 1883 "and in default with interest at Rs. 1-8-0 per cent. per mensem "from the date of the bond."

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

The District Munsif passed a personal decree only. The Subordinate Judge on appeal passed a decree for sale of the property hypothecated.

Defendant No. 3 preferred this second appeal.

Bhashyam Ayyangar, *Desika Chariar* and *Tiruvenkata Chariar* for appellant.

Subramaniya Ayyar for respondent.

MUTTUSAMI AYYAR, J.—The parties to this appeal are prior and subsequent mortgagees of the land in dispute, which is 17 maws and odd in extent. The land in question originally belonged to Saminatha Bosalai and his co-parceners. On the 10th March 1881 they sold it, together with other property, to first defendant for Rs. 1,500 (exhibit J). The purchaser mortgaged it and other property to one Vengusami for Rs. 3,000 under exhibit I, dated the 19th March 1881. The mortgagee instituted original suit No. 84 of 1882 and obtained a mortgage decree, in execution of which he purchased the seven velies mortgaged to him (including the land in dispute) and other land and obtained possession of the same on the 2nd October 1885. On the 20th January 1886 the purchaser at the execution sale sold the lands to appellant's father for Rs. 3,750 by exhibit H. This document recites that out of the purchase-money, viz., Rs. 3,750, Rs. 760 were retained by the purchaser for payment of prior encumbrances. Thus appellant's claim as the purchaser at the Court-sale in original suit No. 84 of 1882 has to be traced to the mortgage executed to

NARAYANA-SAMI NAIDU v. NARAYANA RAU.

Vengusami on the 19th March 1881. The plaintiff-respondent's hypothecation bond A was executed by the first defendant in plaintiff's favour on the 29th August 1881 about five months subsequently to the mortgage in favour of Vengusami. This hypothecation was executed to pay off the debt under the decree in original suit No. 185 of 1872 on the file of the Additional Munsif of Tanjore, in execution of which the land now in dispute and other lands were under attachment since the 7th June 1881. Thus, respondent's claim is derived from the mortgage of the 29th August 1881. To original suit No. 84 of 1882 the plaintiff-respondent was not made a party, and he is not, therefore, debarred from enforcing his charge. Upon these facts the Lower Appellate Court held that respondent had a right to redeem the prior mortgage or to bring the mortgaged property to sale, and decreed, *inter alia*, that unless appellant paid the sum due to respondent and redeemed the mortgage in six months, the mortgaged property be sold in satisfaction of respondent's claim. For appellant it is contended that there ought to be no decree for sale, and that a puisne encumbrancer's remedy as against a prior encumbrancer is limited to a right to redeem and does not include a right to bring the property to sale. I do not consider this contention to be tenable. That a second mortgagee has a right to redeem a prior mortgage is not disputed, the real question being whether he can also claim a direction that the property be sold so as to throw the burden of redemption on the prior instead of the subsequent mortgagee. He is certainly entitled to say that the mortgage property is sufficient for payment of both debts, that if sold on account of them there will be a surplus after satisfying the prior mortgage, and that that surplus should be appropriated in payment of the second mortgage. The only ground on which the prior mortgagee could resist such demand is that the property in question was not sufficient to satisfy both mortgages, and that it was exhausted in satisfying the first mortgage, which has a priority of claim to payment. Upon the finding that Rs. 760 was reserved out of the purchase-money for payment of prior encumbrances, this defence is not available to the appellant. In *Perumal* v. *Kaveri*(1) no portion of the purchase-money was reserved for paying off the prior encumbrances, and there was no

(1) I.L.R., 16 Mad., 121.

NARAYANA-SAMI NAIDU v. NARAYANA RAU.

undertaking to pay the second mortgage as in this case. Moreover, the second transaction in this case was a hypothecation which created a charge on the property, and there is no reason why the charge should not be satisfied when a portion of the purchase-money was retained for meeting prior encumbrances. As regards interest, the Subordinate Judge's decree is in accordance with the decision in *Basavayya* v. *Subbarazu*(1).

I would dismiss this appeal with costs.

BEST, J.—The finding of the Subordinate Judge is that the third and fourth defendants (it should be third defendant's father and fourth defendant) undertook to pay plaintiff's debt, "and "retained money for that purpose." On this finding there can be no question as to the propriety of the decree, which makes the debt a charge on the property mortgaged of which third defendant is now the sole owner.

The case is distinguishable from *Gokuldoss Gopaldoss* v. *Rambux Seochand*(2), because, according to the Subordinate Judge's finding, the appellant's father when purchasing from Vengusami bound himself to pay off the plaint debt and retained Rs. 760 of the purchase-money for the purpose of paying off the debt. For the same reason this case is also distinguishable from *Perumal* v. *Kaveri*(3) to which our attention was called by the appellant's vakil.

As to the contention that exhibit M has been misconstrued by the Subordinate Judge, it appears from M that third defendant's father and fourth defendant then ignored Subbammal's debt and expressly denied the liability of the plaint property for that debt, whereas their present plea is that the Rs. 760 were retained for the payment of that very debt.

The only other objection urged on behalf of appellant is as to the interest awarded at 18 per cent. It is objected that this is a penal rate and therefore not enforceable. The bond, which is dated 29th August 1881, stipulates for payment of the principal amount on the 30th August 1883 with interest at 12 per cent. per annum, and provides that in default of payment on the above date, the interest shall be at the enhanced rate of 18 per cent. *from the date of the bond.* The question has recently been considered by a Full Bench of the Allahabad High Court in *Banke*

(1) I.L.R., 11 Mad., 294. (2) L.R., 11 I.A., 126. (3) I.L.R., 16 Mad., 121.

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Behari v. *Sundar Lal*(1) and the conclusion arrived at is that such stipulations in contracts substituting in a given state of circumstances a higher for a lower rate of interest cannot be treated as penalties, but must be interpreted—as other parts of a written contract should be interpreted—according to the expressed intention of the parties. To the same effect also is the decision of this Court in *Appa Rau* v. *Suryanarayana*(2), where the true principle of decision is stated to be that a Court "should not "interfere to protect persons who, with their eyes open, choose "knowingly to enter into even somewhat extortionate bargains, "but that it is only when a person has entered into such a bargain "in ignorance of the unfair nature of the transaction, advan-"tage having been taken of youth, ignorance or credulity, that a "Court of Equity is justified in interfering." See also *Basavayya* v. *Subbarazu*(3) and the decision of the Privy Council in *Balkishen Das* v. *Run Bahadur Singh*(4).

As observed by the Privy Council in *Dimech* v. *Corlett*(5) "the hinge on which the decision in every particular case turns "is the intention of the parties collected from the language they "have used." In the present case the language is clear enough, and there is no reason for supposing that the executant of the bond when he expressly stated that in default of paying the principal with interest at 12 per cent. on the date agreed upon for the payment, the interest should be payable "from the date of "the bond" at the higher rate of 18 per cent. did not understand or intend what he said.

I would, therefore, uphold the Subordinate Judge's decree in its entirety and dismiss this appeal with costs.

(1) I.L.R., 15 All., 232. (2) I.L.R., 10 Mad., 203. (3) I.L.R., 11 Mad., 294.
(4) I.L.R., 10 Calc., 305. (5) 12 Moo. P. C. Cases, 229.

APPELLATE CIVIL.

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

SATTAPPA CHETTI AND ANOTHER (DEFENDANTS Nos. 2 AND 3), APPELLANTS,

v.

JOGI SOORAPPA (PLAINTIFF), RESPONDENT.*

1893. February 9.

Civil Procedure Code—Act XIV of 1882, *ss.* 53, 245, 647—*Amendment of execution petition—Appeal—Limitation.*

One, being entitled under a decree of 1809 to a share in the income of a zamindari, obtained a decree in a suit of 1887 against certain recent purchasers of the zamindari, declaring that he had a valid charge on the estate and awarding to him, besides his costs, the amount due in respect of one year. He now applied in execution of the latter decree for payment of the amount due in respect of five years as well as his costs. An application to amend the petition for execution by inserting a reference to the former decree was made after the right of the petitioner in respect of some of the years in question had become barred by limitation. This application was refused by the Court of First Instance:

Held, that under the circumstances of the case the amendment should have been allowed to be made.

APPEAL against the order of T. Weir, District Judge of Madura, in civil miscellaneous appeal No. 34 of 1891, reversing the order of P. Narayanasami Ayyar, Subordinate Judge of Madura, West, made on execution petition No. 94 of 1891.

Petition for execution of a decree. The petitioner was entitled to a share of the income of a certain zamindari under the terms of a compromise entered into in a suit of 1809. The respondents purchased the zamindari in 1885 and resisted the claim of the petitioner, who accordingly brought a suit against them in 1887. In that suit a decree was passed declaring the right of the present petitioner to a charge on the zamindari in respect of his claim and awarding to him payment on account of one year and also costs. By the present petition execution was sought in respect of the payments due for five years and for costs. The petition was made in the suit of 1887 only. It was objected that the relief sought could not be obtained under the decree in that suit, and the

* Appeal against Appellate Order No. 76 of 1891.

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Subordinate Judge upheld this objection and refused an application to amend the petition by inserting a reference to the decree of 1809. On appeal the District Judge allowed this amendment to be made, and directed the Subordinate Judge "to restore the "application to the file and proceed to dispose of it according to "law."

The judgment-debtors preferred this appeal.

Desikachariar for appellants.

Subramanya Ayyar and *Sundara Ayyar* for respondent.

JUDGMENT.—The application for execution was certainly defective, the error being not merely one of form. So far as respondent's claim to one-fourth of the future profits of the zamindari was concerned, the decree in original suit No. 16 of 1887 was only declaratory and therefore incapable of execution, except for the mesne profits for fasli 1295. The decree that was capable of execution, as regards the mesne profits for other faslis claimed in the proceedings the subject of this appeal, was the compromise in the suit of 1809, which has been treated as a decree from its date. This, therefore, was the decree which should have been mentioned in the application as the decree sought to be executed as regards the faslis subsequent to 1295. The substantial question is whether, in the peculiar circumstances of this case, the amendment ought to have been allowed.

We cannot agree with the contention of appellant's pleader that section 245 of the Civil Procedure Code is a bar to the amendment. That section is, in our opinion, analogous to the provisions of section 53, which directs the Court to return plaints before filing for amendment in certain particulars. It does not, therefore, take away the power of the Court under section 647, by analogy to section 53, to amend the application for execution at any time before disposal.

The next contention is that the amendment ought not to be allowed, because at the date it was applied for the right to profits for some of the faslis—the subject of the original application—was barred. No doubt the ordinary rule is that an amendment should be allowed only if it can be without prejudice to the rights of the opposite parties as existing at the time of the application for amendment. But this principle is to be applied with reference to

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the special circumstances of each case. See *Weldon* v. *Neal*.(1) In the present case we are of opinion that there are peculiar circumstances which take it out of the ordinary rule. The object of the application was perfectly clear, although there was an error in the reference to the decree, an error not unnatural, considering the complicated nature of the previous proceedings. We also observe that even execution for fasli 1295 to which respondent was clearly entitled on his application as it stood was not granted by the Subordinate Judge. Four objection petitions were presented by appellants, and it was not until the last of them was presented, nearly a year after the application for execution was first made, that the present objection was taken. We are of opinion that the general principle laid down by the Privy Council in *Bissessur Lall Sahoo* v. *Maharaja Luchmessur Singh*(2) should be followed unless its application is precluded by express provisions of the legislature. Looking, therefore, at the substance of the application and the prior proceedings which are of a complicated character, we think that the decision of the District Judge was right, and we dismiss this appeal, but under the circumstances each party will bear his own costs.

APPELLATE CIVIL.

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

ILLIKKA PAKRAMAR AND OTHERS (PLAINTIFFS NOS. 1 AND 3 TO 13), APPELLANTS,

v.

KUTTI KUNHAMED AND OTHERS (DEFENDANTS NOS. 1 AND 3 TO 9), RESPONDENTS.*

1893. August 3. September 15.

Civil Procedure Code—Act XIV of 1882, s. 566—Remand for trial of a new issue—Malabar law—Mapillas.

The karnavan of a tarwad in Malabar sued to recover property acquired by his sister (deceased) and now in the occupation of the defendants, her children. The

(1) L.R., 19 Q.B.D., 395. (2) L.R., 6 I.A., 233.

* Second Appeal No. 1586 of 1892.

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parties were Mapillas. The defendants pleaded (i) that the property had been given to them and their mother jointly; (ii) that their mother was not governed by Marumakkatayam law. The Court of first instance found the first-mentioned plea to be good and dismissed the suit, and also found that the family was governed by Marumakkatayam law. The Court of first appeal dissented from the above finding as to the first plea, and, without deciding the second point, remanded the case for the trial of a general issue as to the mode of devolution of self-acquired property in Marumakkatayam Mapilla families in North Malabar, and ultimately it dismissed the suit, ruling that in Marumakkatayam Mapilla families the self-acquired property of a female descends to her children and does not lapse on her death to her tarwad:

Held, that the order of remand was not one which should have been made under Civil Procedure Code, s. 566, and the proceedings taken under it were irregular.

Observations as to the law applicable to Mapillas.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 359 of 1891, confirming the decree of A. Venkatarâmana Pai, District Munsif of Tellicherry, in original suit No. 329 of 1890.

The plaintiff sued as karnavan of a Mapilla tarwad in North Malabar to recover property acquired by his late sister and now in the possession of her children.

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

Ryru Nambiar for appellants.

Sankaran Nayar for respondents Nos. 2 to 5.

JUDGMENT.—The suit is brought by the karnavan of a tarwad, alleged by him to follow Marumakkatayam law, to recover property acquired by the plaintiffs' late sister, Mamotti. The defendants, who include the children of Mamotti, raise, among other defences, two pleas, either of which is a complete answer to the plaintiffs' claim. They say that Mamotti did not follow Marumakkatayam law, and that it was not to her only, but to her and her children that the property sought to be recovered was given. On the latter plea the defendants succeeded on the trial of the suit by the District Munsif, though he also found that the family was governed by Marumakkatayam law. There was, as he observed, no evidence to the contrary. Against the District Munsif's decree dismissing the suit, the plaintiff appealed, and he was successful in obtaining a reversal of the finding as to the title of Mamotti. The District Judge found on the first issue in the plaintiff's favour, and that finding we are bound to accept. Instead, however, of proceeding to consider the other issue and expressing

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his agreement or disagreement with the District Munsif thereon, the District Judge—whether on his own motion or at the instance of the defendants does not appear—framed a new issue and directed the District Munsif to take fresh evidence and return a finding thereon. The issue so framed was as follows:—Whether in Marumakkatayam Mapilla families in North Malabar the devolution of self-acquired property is governed by ordinary Muhammadan law, or whether on the death of the acquirer it lapses to the tarwad?

If this issue had been one of mere fact, the procedure of the District Judge might not have been open to exception; it would have been a question whether the issue was raised by the pleadings, and whether the District Judge had exercised a wise discretion in giving an opening for a fresh inquiry; certainly his reasons for allowing a new case to be set up are not satisfactory. But the issue raised by the District Judge was not a mere issue of fact. It was not even a question as to the custom prevailing in a particular family, but, as he himself says, a question as to what is the ordinary customary law in Mapilla families. The cases *Vishnu* v. *Krishnan*(1) and *Vayidinada* v. *Appu*(2) are authorities for the proposition that such an inquiry is allowable under certain circumstances. In those cases too, among others, the tests and the standard to which the evidence adduced to support an alleged usage should conform are given. In the present case, however, it does not appear that the Judge had before him a particle of evidence (excepting the opinions of two text writers) to justify an inquiry into the law regulating Mapilla families. In our opinion, therefore, the order of remand is one which ought not to have been passed under section 566 of the Code, and the proceedings taken under it are wholly irregular. Mr. Sankara Nayar has referred us to decisions of this Court in support of his contention that the conclusion at which the Judge has arrived is the right one. In *Panangatt Unda Pakramar* v. *Vadakkel Suppi*(3) this same question, viz., as to the descent of self-acquired property in a Mapilla family was raised. There was an inquiry, and it was found that Mapillas are governed in that respect by the ordinary Marumakkatayam law as declared in *Kallati Kunju Menon* v. *Palat Erracha Menon*(4). That finding was accepted by the

(1) I.L.R., 7 Mad., 3.
(2) I.L.R., 9 Mad., 44.
(3) Second Appeal No. 576 of 1883, unreported.
(4) 2 M.H.C.R., 162.

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High Court. In 1886 *Kunhi Pathumma* v. *Mama*(1), the question was raised again, an inquiry was again directed, and the finding was this time in favour of the deviation from Marumakkatayam law. The High Court accepted that finding so far as it concerned the particular family, holding that there was, as regards it, sufficient evidence of a special custom. As far as we are aware, the question has not been raised since in this Court, although there have been cases in which the contention now made would be relevant. In *Kunhacha Umma* v. *Kutti Mammi Hajee*(2), the question referred to a Full Bench was as to the nature of the interest taken by a Mapilla woman and her children in a gift made to them. If, by the ordinary law of inheritance, the children, and not the tarwad generally, would succeed to the mother, the probability is that the gift would be made simply to her; but however that may be, the fact that such was the rule would have been strong to indicate that the tarwad took no interest under the gift. The evidence taken in the present case, so far as it is discussed in the judgments, certainly does not convince us of the existence of the alleged custom. The District Munsif gives good reason for holding it to be vague and uncertain, and the District Judge overruling that finding does not explain how evidence almost exclusively composed of recent documents can suffice to prove an ancient custom; nor indeed does he profess to hold that it is of a character to prove a custom in the manner required by a series of decided cases. Being of opinion that the order of remand was improperly made, and seeing that both the defences set up by the defendants have failed, we must hold that the plaintiff is entitled to judgment. We must accordingly reverse the decrees of the Courts below and remand the case to the Court of first instance for trial on the seventh issue.

Respondents to pay costs of this appeal: other costs to be provided for in the revised decree.

(1) Appeal No. 125 of 1885, unreported. (2) I.L.R., 16 Mad., 201.

APPELLATE CIVIL.

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

LAKSHMANNA (DEFENDANT), APPELLANT,

v.

APPA RAU (PLAINTIFF), RESPONDENT. *

1893. March 21 April 26.

Rent Recovery Act—Madras Act VIII of 1865, *s.* 11—*Implied contract as to rates of rent—Customary fees—Prohibition of buildings.*

In order to support the inference of a contract under the Rent Recovery Act, Madras, section 11, from payment of the same rent for a given number of years, the intention that the same rent is payable in future years must be clear and unequivocal: it is unsafe to imply such a contract from a single lease for five years.

A patta is not unenforceable by reason of its providing for the payment of fees to village artisans in a case when such fees are customary, or by reason of its prohibiting the tenant from erecting buildings on his holding, if such prohibition is limited to erections not compatible with the agricultural character of the holding.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 405 of 1890, modifying the decision of L. M. Wynch, Acting Head Assistant Collector of Kistna.

Suit by a zamindar against a tenant on his estate to enforce acceptance of a patta. The Head Assistant Collector directed certain alterations to be made in the patta tendered and his decision was modified by the District Judge.

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

The defendant preferred this second appeal.

Parthasaradhi Ayyangar for appellant.

Subbramanya Ayyar for respondent.

JUDGMENT.—These second appeals relate to suits brought by the zamindar of Nuzvid to compel the raiyats in the village of Kuyur to accept pattas for fasli 1297. The raiyats are the appellants and the zamindar is the respondent before us. The items in the pattas to which appellants object in second appeal are (i) the consolidated wet rate; (ii) the fees to village artisans; (iii) the tax on trees; (iv) the condition that no land should be cultivated without first obtaining a patta; (v) that no building

* Second Appeal No. 683 of 1891.

LAKSHMANNA v. APPA RAU.

should be erected on lands in appellant's possession; (vi) that no remissions are to be allowed, and (vii) that interest shall be paid on instalments of rent from the dates on which they fall due according to the kistbundi.

The first item is the most important and the history of the rates which prevailed in the village from fasli 1265 is given by the Head Assistant Collector in his judgment. It will be observed that the sharing system was in force till fasli 1264, that the money rates varied from faslis 1265 to 1292, and that from faslis 1292 to 1296 the raiyats accepted a five-years' lease. The rates mentioned in the patta tendered are those for which five-years' leases were accepted, but the appellants objected to those rates on the ground that they had executed the leases upon respondent's promise to repair certain channels and that the promise had not been kept. Their contention was that they should revert to the rates which prevailed at earlier periods, even as far back as the date of the permanent settlement. But it was in evidence that the rates paid from faslis 1285 to 1291 were Rs. 2-11-4 for dry land, Rs. 10 for mamul or old wet, and Rs. 8 for dry converted into wet, whereas from faslis 1292 to 1295 they were raised to Rs. 3 for dry land, Rs. 9, including water-tax, for dry converted into wet, and Rs. 10 for mamul wet land. Though appellants denied that there was any mamul wet land in the village, the Head Assistant Collector found, and the Judge agreed in the finding, that their allegation was not true, and that the mamul wet as entered in the pattas from faslis 1285 to 1291 extended to acres 358·32. The Head Assistant Collector refused to infer a contract from the five-years' lease and considered that Rs. 10 per acre for mamul wet, Rs. 2-11-4 for dry land and Rs. 2-11-4 *plus* the water-rate of Rs. 4 an acre for dry converted into wet were the proper rates to be inserted in the pattas. On appeal, the Judge inferred a contract from the five-years' lease, and rejected as not trustworthy the evidence produced by appellants to show that they took the lease for five years because the zamindar promised to excavate the channels. The Judge also expressed it as his opinion with reference to appellant's wish to revert to the rates which prevailed at the permanent settlement, that the rates paid from faslis 1285 to 1291 were at all events binding upon appellants if not the rates mentioned in the five-years' lease. The contention before us on appellant's behalf is that no contract can be lawfully implied

Held, per *Davies*, J., that neither party intended *bonâ fide* purchases and sales for delivery, and that, therefore, the contract was void as a wagering contract:

Held on Appeal (1), that the burden of proof that the agreements were wagers, *i.e.*, that they were not in substance what they were in form, lay on A, as the party so alleging;

(2) that oral evidence is admissible to how that an agreement in writing to sell is really only an agreement by way of wager. (*See* Indian Evidence Act, s. 92.) *Anupchand Hemchand* v. *Champsi Ugerchand* (I.L.R., 12 Bom., 585) followed: *Juggernauth Sew Bux* v. *Ram Dyal* (I.L.R., 9 Calc., 791), dissented from;

(3) per *Muttusami Ayyar*, J., that, it being proved on the evidence that it was the defendant's intention at the time he contracted to sell to pay differences only, the plaintiff either knew of this intention or he did not. In the former case the contract was a wager and therefore void, and in the latter there was no *consensus* as to a matter which was of the essence of the contract, and therefore no valid contract;

(4) per *Best*, J., that a contract is not a wagering contract unless it is the intention of *both* parties at the time of entering into the contract not to call for or give delivery from or to each other; see *Tod* v. *Lakshmidas Purshotamdas* (I.L.R., 13 Bom., 441) and *Grizewood* v *Blane* (11 C.B., 526) and that such common intention having been proved, the contract was a valid one.

APPEAL from the decree of Davies, J., sitting on the original side of the High Court in civil suit No. 74 of 1892.

The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgments of the High Court.

DAVIES, J., dismissed the plaintiff's suit, and the plaintiff preferred this appeal.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and Mr. *R. F. Grant* for appellant.

Mr. *Wedderburn* for respondent.

MUTTUSAMI AYYAR, J.—This is a regular appeal from the decree of Mr. Justice Davies. Plaintiff (appellant) is a sowcar and defendant (respondent) is a Pleader of the High Court, both residing at Madras. On divers dates between the 24th October and the 4th November 1891, the former agreed to buy and the latter to sell promissory notes of the Government of India, 4 per cent. loan, to the extent of 4¼ lakhs of rupees at premia varying from Rs. 5—4 to Rs. 5—11 per cent., the promissory notes themselves being deliverable on the 30th November 1891. On the 28th November 1891, two days prior to the date fixed for delivery, defendant agreed to buy and plaintiff to purchase a similar amount of securities of the same kind to be delivered on the same date but at a premium of 7 per cent. The plaint

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stated that defendant broke his contract to sell and thereby became liable to pay plaintiff a compensation of Rs. 7,109-6-0, which represents the difference between the price at which he was bound to buy and the price at which he was bound to sell. Defendant denied the claim *in toto* though he admitted the execution of the agreements. He contended that they were only nominal transactions, that neither he nor plaintiff ever intended that there should be an actual sale or transfer of Government paper, that the real contract was only to pay the differences, and that such contract, being by way of wager on the varying prices of Government promissory notes in the market, was not actionable. Another ground of defence was that plaintiff had agreed not to claim the difference until the expiration of six months from the date on which it became due, and consequently that the suit was premature. It was further urged by defendant that plaintiff neither tendered the price of the securities which he had agreed to buy nor the promissory notes which he had agreed to sell, and that he was not ready or willing to do either. The first four issues raised the question whether the agreements sued on were contracts of sale made *bonâ fide* in the ordinary course of business or by way of wager, and the fifth and sixth issues related to two other questions, viz., whether the suit was premature and whether the plaintiff was ready and willing to perform his part of the agreement on the 30th November 1891. The learned Judge decided the fifth issue against the defendent, and all the other issues in his favour and in the result he dismissed the suit but without costs. Hence this appeal.

Three questions of law arise for consideration in this appeal and on each of them the decision of the learned Judge is correct. The first is as to the burden of proof. The contracts sued upon are in form agreements to sell promissory notes of the Government of India, and there can be no doubt that it is the party who alleges that those agreements are not in substance what they purport to be, that ought to prove his case. In the absence of proof to the contrary, the presumption is that a transaction is in substance what it is in form. The second question is whether oral evidence is admissible for the purpose of showing that an agreement in writing to sell Government paper is really an agreement made by way of wager on its market price on a future day. On this point, there is a conflict of opinion, the High Court at

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In a suit for arrears of maintenance it is incumbent on the plaintiff to prove that there has been a *wrongful* withholding of the maintenance to which he is entitled.

Jivi v. *Ramji*(1), *Mahalakshmamma* v. *Venkataratnamma*(2), *and Sri Raja Satrucharla Jagannadha Razu* v. *Sri Raja Satrucharla Ramabhadra Razu*(3) followed.

APPEALS against the decrees of G. T. Mackenzie, District Judge of Kistna, in original suits Nos. 10 and 13 of 1891.

These two suits were filed by the younger brothers of the Zamindar of Challapalli or Devarakota, who was the defendant in both suits. The plaints were similar, and set forth that plaintiffs and defendant were members of an undivided Hindu family; that their father died on 6th April 1875, leaving these three sons; that disputes arose and plaintiffs lived apart from defendant from 1st May 1875; that their father left a valuable zamindari estate, regarding the partition of which the parties engaged in litigation, which terminated with the decision of the Privy Council dated 1st May 1890, that the zamindari was impartible; that the plaintiffs, while engaged in the partition litigation, did not ask for or receive maintenance from defendant; that defendant in a written statement and in an affidavit admitted his liability to give plaintiffs maintenance; that each plaintiff received Rs. 19,500 as maintenance during the pendency of the partition suit by order of Court; that each plaintiff claimed Rs. 2,000 per mensem as maintenance from defendant, with arrears bearing interest, and sums for the marriages of their children, furniture and residence; that this was demanded by a letter, dated 30th March 1891, and had not been given; and the plaintiffs prayed for a decree for these sums as a charge upon the zamindari with costs and subsequent interest.

The defendant filed similar written statements in the two suits. He pleaded that plaintiffs had been divided from defendant since 30th September 1882, the date of the decree of the District Court in the partition suit, and that they had no claim upon defendant for maintenance. Defendant denied that he had ever made any admission that he was liable to maintain plaintiffs after a decree for partition. Defendant pleaded that the amount of maintenance claimed was excessive, and that the other sums claimed were contrary to law and custom. Defendant also submitted that the

(1) I.L.R., 3 Bom., 207. (2) I.L.R., 6 Mad., 83.
(3) I.L.R., 14 Mad., 240.

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Court must take into account the amount of property which has come into the hands of plaintiffs from other sources, and suggested that Rs. 3,000 per annum to each plaintiff would be a sufficient grant. Defendant also stated that the plaintiffs were maintained until February 1879 out of the estate funds, and that defendant was ready and willing to maintain the plaintiffs in the family house in the accustomed manner. The defendant contended that plaintiffs by their acts and omissions had deprived themselves of the right to claim arrears of maintenance, and that the claim for arrears was for the most part barred. If arrears were granted, they ought not to be at the rate of Rs. 2,000 per mensem, and they ought not to bear interest, and that the maintenance ought not to be a charge upon the zamindari.

The District Judge decreed in favour of the plaintiffs and the defendant preferred thereupon [illegible] preferred this appeal.

Pattabhirama Ayyar for appellant.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and *Venkatarama Sarma* for respondent.

JUDGMENT.—The plaintiffs and defendant are sons of the late Raja Ankinidu, Zamindar of Challapalli, who died in the month of April 1875. The zamindari, as it has now been finally decided by the Privy Council, is an impartible one, and consequently the eldest son of the late zamindar, that is the defendant, is in enjoyment. The present suits are brought against him for maintenance.

The main question raised by the defendant is whether the family has, in consequence of proceedings in the suit ultimately determined by the Privy Council, become a divided one.

A larger question was raised by the defendant's vakil with regard to the right of a younger brother of the holder of an impartible zamindari to any maintenance at the hands of the zamindar for the time being. Having regard to the pleadings and issues, this general contention, we think, cannot properly be allowed on this appeal. If it could have been successfully maintained, it ought to have been raised in the Court of First Instance. The plaintiff would then have had an opportunity of meeting it by showing that at any rate in this family it has been usual for the reigning zamindar to make provision for the other members of his family, and there are some indications that such was in fact the case. Moreover, in his written statement in the partition suit, the zamindar admitted his liability in this respect.

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The real defence is based on the admitted fact that in 188[illegible] the plaintiffs brought a suit against the defendant for partition of the entire family property, and, so far as the partible property was concerned, obtained a decree. It is said that the effect of a partition of any part of the property of a Hindu family is to sever the joint ownership in respect of the whole property, and that it is not legally possible for a family to divide a portion of their family estate and yet to remain undivided in respect of the remainder. It is true that, when a partition is effected in a family either by agreement or by decree, the result generally is to bring about a complete severance of the coparcenary, and that this consequence may follow, although in fact a portion of the property remains undivided. In the case however of division by consent of parties, it is clear that they may, if they choose, reserve and keep undivided part of the property. With regard to such part they must necessarily retain the status of undivided family. (See *Sri Raja Satrucharla Jaggannadha Razu* v. *Sri Raja Satrucharla Ramabhadra Razu*(1). No authority for the contrary proposition was cited by the zamindar's vakil In the present case, with regard to the property which remains undivided, there was on the plaintiff's side a demand that it should be divided, but that demand was ineffectual because in point of law the property was not partible. No partition has taken place either by decree or by consent, and therefore, in our judgment, the rights of the junior members of the family remain as they were before any demand was made. That is to say, they retain "such right and "interest in respect of maintenance and possible rights of succes-"sion as belong to the junior members of a raj or other impartible "estate descendible to a single heir." (See *Sartaj Kuari* v. *Deoraj Kuari*(2). If the plaintiff is entitled to maintenance he is, we think, entitled to have it charged on the zamindari property or part of it. (See *Coomara Yettapa Naikar* v. *Venkateswara Yettia*)(3). In view of the liberty of disposition enjoyed by the zamindar there is no other way in which the rights of junior members can be secured. No reason was suggested why in this respect any distinction should be made between the male and female members of a family, and in the case of women there is no

(1) I.L.R., 14 Mad., 240. (2) I.L.R., 10 All., 285.
(3) 5 M.H.C.R., 405.

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doubt that a decree for maintenance in their favour is generally accompanied with a direction making it chargeable on certain specified property. We think, however, that the zamindar is justified in objecting to the decree as framed by the District Judge, inasmuch as it fetters him unnecessarily in the disposition of his property. It is sufficient that the decree should make the maintenance chargeable on certain villages, and if the parties cannot agree, we must ask the Judge to find what particular property will form sufficient security.

The next question is as to the rate at which maintenance should properly be allowed. It was contended on behalf of the zamindar that in estimating the rate the Court should take into account the property alleged to be in the hands of the plaintiff, and the finding of the Judge with regard to that property was impugned.

The zamindar's vakil relied particularly on certain letters put in by the plaintiff himself and admitted in some unaccountable way, although the writer of them was not called and was admittedly alive. The case made for the zamindar was that lanka lands of considerable value had been acquired by the plaintiff in his own name, and in June 1890, when the unfavourable judgment of the Privy Council had been heard of, transferred *benami* to Janakiramayya, the District Munsif. We do not think this is proved, and agree with the conclusion stated by the Judge in the 41st paragraph of his judgment. Janakiramayya's letters, some written to the zamindar's brother Ramalinga and some to the plaintiff's servant Suryaprakasa (11th witness), cannot fairly be construed as implying that the lands belonged to the plaintiff or his brother. The District Judge has found that a monthly allowance of Rs. 500, with an additional Rs. 250 in lieu of any provision for a house, furniture, cattle or occasional expenses, *e.g.*, on account of marriages, is an adequate and fair allowance. The plaintiff had asked for a much larger sum, viz., Rs. 2,000, and the defendant had named a smaller one, viz., Rs. 250. It appears from the notes that the quantum of the allowance was in a great measure left to the Judge, and considering his experience in the district, we should be slow to disturb his judgment in the matter. On the part of the plaintiff it is urged that the allowance ought to be raised at least to Rs. 1,000 per mensem, and that some provision ought to be made from the allotment to the plaintiff of a house and garden. On the other hand, it is contended for the

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property passed into the possession of his two sons, and on the death of the elder son it came into the possession of the younger son. On his death, without male issue, the estate passed into the possession of his widow, defendant in the present suit. The plaintiff contended that the grant made to respondent's father-in-law was a maintenance grant; that under its terms the estate reverted to his father (now deceased) on the death of respondent's husband, when there was a failure of male heirs in his branch; and that, notwithstanding the grant, the members of the two branches did not cease to be co-parceners, and that consequently the right of survivorship of the plaintiff attached to the exclusion of the defendant:

Held, that, on the construction of the instrument of grant, the estate became, by virtue of that instrument, the separate and absolute property of respondent's branch of the family, and that the provision in that instrument purporting to create a special right of reversion in case of failure of male issue contravened the principle laid down in the Tagore case and was inoperative.

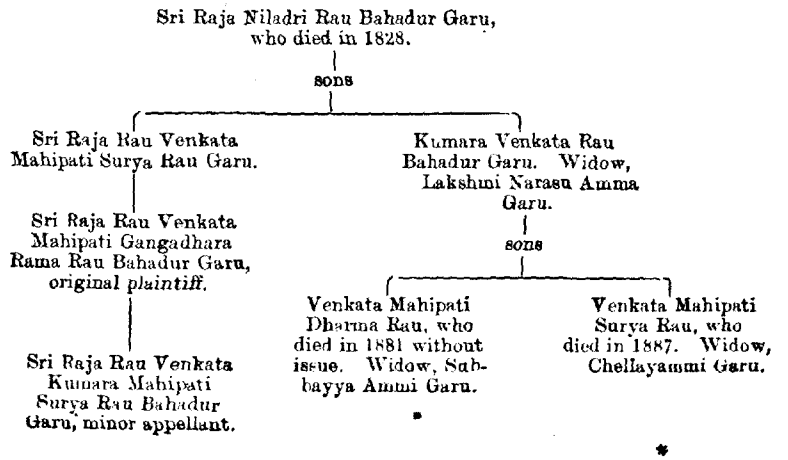
APPEAL against the decree of the Subordinate Judge's Court of Cocanada in original suit No. 27 of 1888.

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

Bhashyam Ayyangar for appellant.

Subramanya Ayyar for respondent.

JUDGMENT.—This was a suit brought by the late Zamindar of Pithapuram to recover possession of an estate called the Kolanka estate. The plaint prayed also for a decree for *mesne* profits at the rate of Rs. 26,400 per annum for fasli 1297 and subsequent years till delivery of possession. The appellant is the present minor Zamindar of Pithapuram, and respondent is his paternal grandfather's brother's son's widow. The subjoined pedigree shows how the parties are related to each other and to the other members of their family :—



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The estate of Kolanka had, prior to 1845, formed part of the zamindari of Pithapuram which is impartible property belonging to appellant's family and descending in accordance with the rule of primogeniture. Exhibit I declares that it was the ancient custom of the family for the eldest male in the eldest line to manage the zamindari, and for the other members to receive from him a periodical money allowance on account of their maintenance. On the 26th April 1845, appellant's grandfather severed nine villages from the zamindari, constituted the group into a separate estate and granted it to his younger brother who was respondent's father-in-law.

Exhibit I is the instrument whereby the grant was made, and it is in these terms :—

"Kararnamah (agreement) executed on Saturday the 5th "Chaitra Bahula of Visvavasu, corresponding to 26th April 1845, "by (one) Sri Raja Rau Venkata Surya Rau Bahadur, Zamindar "of Pithapuram, &c., in favour of my younger brother, Raja "Kumara Venkata Rau.

"The conditions agreed to by us are as follow :—

"1. As from the days of the person who first acquired the said "zamindari, it has been the unbroken custom in our family for "the eldest to manage the raj in the eldest line, and for the rest "to receive maintenance in cash from the person exercising the "powers of the raj, and as the zamindari has been put in my "possession this year after I ceased to be a minor, and as it is "difficult for me to pay maintenance annually in cash as has been "done by our ancestors, and difficult for you, too, if I should fail to "pay it regularly, it appears convenient to me to give to you and "your descendants, on account of maintenance, the following nine "villages, viz., (i) Kolanka, (ii) Mungetooru, (iii) Veeraraghava-"puram, (iv) Raipuroo, (v) Chanduroo, (vi) Vunnapoody, (vii) "Kaddavaly, (viii) Gokivanda, (ix) Jagapatirajapooram, attached "to Gollaprolu Mutta acquired by our father and paying a cist of "Rs. 18,494 a year up to fasli 1254. You have also consented to "this. I will get registered and give you, on account of mainte-"nance, the said villages for hereditary enjoyment. From the "date of this kararnamah you should conduct all the affairs of "these villages for fasli 1255. The Collector of Rajahmundry "should collect from you from fasli 1255, according to kistbundi, "the permanent peshcush already fixed, until a permanent beriz

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from the facts found that no sanction was obtained from the Collector under the first proviso of section 11, Act VIII of 1865, for enhancing the rates, and that the Lower Appellate Court acted illegally in enhancing the rates in these cases in which no memoranda of objections were filed by the zemindar.

We are of opinion that the decision of the Judge that there was an implied contract cannot be supported. In order to sustain the inference of a contract from payment of the same rate for a given number of years, the intention that the same rate is payable in future years, must be clear and unequivocal. Neither should the period be very short, nor should there be any other circumstance in the case inconsistent with such intention. The presumption is a matter of positive law under the Bengal Tenancy Act but under Act VIII of 1865 it is one of fact. In *Appárau* v. *Narasanna*(1) it was pronounced to be unsafe to imply a contract from a single lease extending to five years. It appears from later cases decided by the Judge that he considered nothing less than seven years was long enough to support the presumption. In the Full Bench case, there had been a continuous payment of the same rate for a period of not less than fourteen years. Again, the presumption arising from the duration of payment should also be tested by the other circumstances in evidence. In *Siriparapu Ramanna* v. *Mallikarjuna Prasada Nayudu*(2) we have pointed out that in the absence of a contract, the sanction of the Collector is indispensable. The decision of the Judge must be set aside and that of the Head Assistant Collector restored in so far as it relates to the rates.

As regards the fees to village artisans the Judge finds that they are customary and there are no grounds for interference in second appeal. As regards the condition about building, the tenant is clearly not entitled to build a house except for purposes not incompatible with the character of the holding as an agricultural holding. With respect to the other considerations the Judge has followed the decision of the High Court in the *Mustabad Mantena* suits, dated the 29th October 1889 and 3rd March 1890.

The decree of the Judge will be set aside so far as it relates to rates of rent and that of the Head Assistant Collector restored,

(1) I.L.R., 15 Mad., 47. (2) See *ante*, p. 43.

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and as regards the prohibition to build, the words "except for "purposes not incompatible with the character of the holding as an agricultural holding" will be inserted, and in other respects the decree of the Judge is confirmed. The appeal has succeeded in part and failed in part, and we direct each party to bear his own costs.

APPELLATE CIVIL.

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

1893. October 18.

SAMIA PILLAI (DEFENDANT No. 2), APPELLANT,

v.

CHOCKALINGA CHETTIAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Limitation Act—Act XV of 1877, sch. II, art. 179—Step in aid of execution—Defect in application for execution.

Where there has been in fact an application for execution made by the party entitled to make it, it is to be regarded as a step in aid of execution within the meaning of the Limitation Act, art. 179, although by mistake a deceased judgment-debtor is named as the person against whom execution is sought.

APPEAL against the order of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in civil miscellaneous petition No. 628 of 1891.

This was an application made on the 20th August 1891 for execution of a decree obtained by the petitioner in original suit No. 30 of 1883 against three defendants. In February 1891 a petition was filed praying for execution of the decree against defendant No. 1, who was then in fact dead. The Subordinate Judge held that the petitioners were at that time aware of the death of defendant No. 1 and that his name was inserted in the petition through a *bonâ fide* mistake. In this view he held that that petition should be treated as a step taken in aid of execution for the purposes of limitation, and he accordingly directed that execution should issue.

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* Appeal against Order No. 84 of 1892.

SAMIA PILLAI v. CHOCKALINGA CHETTIAR.

The judgment-debtor preferred this appeal.

Parthasaradhi Ayyangar for appellant.

Rama Rau for respondents.

JUDGMENT.—The question for decision in this case is whether the last application for execution made on the 6th February 1891 was in accordance with law within the meaning of section 179 of schedule II of the Limitation Act so as to amount to a step in aid of execution sufficient to prevent the present application being time barred.

That the application was presented by the party entitled to execute the decree and in order to obtain execution is not denied, but it is contended that as first defendant who was dead at the time was named as the party against whom execution was sought, the application must be treated as a nullity and consequen tly the present application held to be time barred.

The Subordinate Judge observes that the mention of the deceased first defendant's name in column 9 of the application was probably a mistake made by the Vakil's gumastah. It was no doubt a *bonâ fide* mistake. Where there has been in fact an application for execution made by the party entitled to make it, the mere fact of a mistake having been made in giving the particulars required by section 235 of the Code of Civil Procedure cannot, we think, have the effect of rendering the application a nullity. This is also the view adopted in *Ramanadan* v. *Periatambi*(1) and *Fuzloor Ruhman* v. *Altaf Hossen*(2). In this view the application of 6th February 1891 is sufficient to save limitation both against first defendant's legal representatives and also against his joint judgment-debtors.

We dismiss this appeal with costs.

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(1) I.L.R., 6 Mad., 250. (2) I.L.R., 10 Calc., 541.

APPELLATE CIVIL.

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

1893. July 26. September 19.

LAKSHMANA AYYAN (DEFENDANT), APPELLANT,

v.

RANGASAMI AYYAN (PLAINTIFF), RESPONDENT.*

Contribution suit for—Joint tort-feasor—Adjustment of a loss arising from an illegal contract.

A deed of partition between A and B, members of an undivided Hindu family, provided that A, who took over all the debts due to the family, should bear the loss if any incurred in the appeal then pending in a suit brought by the family on a bond. The bond was held to evidence a fraudulent transaction, and the appeal was dismissed with costs. The decree for costs was executed against B and satisfied by him: he now sued the son of A (deceased) to recover the amount paid by him:

Held that the plaintiff was entitled to recover, the claim not being barred by the rule against contribution between joint tort-feasors.

SECOND APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 350 of 1891, modifying the decree of T. M. Audinarayana Chettiar, District Munsif of Mannargudi, in original suit No. 169 of 1890.

The plaintiff and the father of the defendant were undivided brothers, and, in 1884, they brought a suit to recover Rs. 6,000 on the footing of a hypothecation bond. This suit was dismissed, and an appeal was preferred to the High Court. During the pendency of the appeal they entered into a partition, by which it was provided, *inter alia*, that the defendant's father should take over the debts due to the family and should bear alone the cost of the litigation above referred to. The appeal to the High Court was dismissed with costs on the ground that the bond in suit was supported by no consideration. The decree for costs was executed against the present plaintiff, and having satisfied the decree he now sued the infant son of his brother, since deceased, to recover, with interest, the amount so paid by him. The District Munsif passed a decree, as prayed, and this decree was upheld except as to the rate of interest by the Subordinate Judge.

* Second Appeal No. 1414 of 1892.

LAKSHMANA AYYAN *v.* RANGASAMI AYYAN.

The defendant preferred this second appeal.

Mr. *R. F. Grant* for appellant.

Krishnasami Ayyar for respondent.

MUTTUSAMI AYYAR, J.—Appellant and respondent are the sons of two brothers. On the 25th October 1887 the latter and the father of the former entered into a partition. An appeal was then pending in the High Court from the decision of the Subordinate Court of Negapatam in original suit No. 63 of 1884, which had been brought by them on a hypothecation bond executed in their favor by one Chokkammal Annee of Kulikarai. The partition deed provided, *inter alia*, that appellant's father should take for his share all the debts due to the joint family including the amount of the hypothecation bond, and that, if the appeal then pending was decided against them, appellant's father should pay all the costs of that litigation both in the Original and Appellate Courts. The appeal was dismissed in January 1889, and both the appellant's father and respondent were directed to pay Chokkammal's costs. One of her judgment-creditors took out execution against the judgment-debtors in original suit No. 63 of 1884, and recovered the costs from the respondent. The respondent's case was that he was entitled to recover the money paid by him from the appellant, and both the Courts below decreed the claim. It is urged in second appeal that the decree for contribution recognizes a claim contrary to public policy, and that the present suit is in the nature of a suit for contribution brought by one wrong doer against another. Original Suit No. 63 of 1884 was dismissed on the ground that the hypothecation bond was executed without consideration, and that it evidenced a fraudulent transaction. It is no doubt a clear proposition of law that one tort-feasor cannot recover contribution from another, but it is subject to this important qualification, viz., that where the loss arising from the illegal contract is adjusted, so that the adjustment is equivalent to a payment, the adjustment cannot be disturbed. It was so held in *Owens* v. *Denton*(1). In that case, the price due for malt illegally sold by plaintiff was included in an account stated and settled between the parties, and it was held by Lord Abinger that the adjustment was equivalent to payment in cash, and that it came within the rule that money paid in pursuance of

(1) 1 C.M. & R., 712.

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an illegal contract shall not be claimed back again. No contribution is allowed between joint tort-feasors because the community of wrong between them is the foundation of the action, but the same community of wrong precludes the defendant from recovering what he has paid in consequence of the illegal act. If the loss arising from the wrongful act is adjusted by an account stated between the parties or by a partition deed, as in this case, it is equivalent to payment since it is no longer necessary for the plaintiff to rely on the community of wrong in support of his claim.

The same community of wrong that would prevent the plaintiff from claiming contribution, if there were no adjustment by partition likewise prevents the defendant from disturbing the adjustment which is equivalent to payment. The loss arising from the decision in original suit No. 63 of 1884 was a loss which devolved on the coparcenary family, and the partition deed under which the party who took all the debts due to the family agreed to bear the loss, if any, arising from the failure of the suit brought by the family to recover one of those debts is an adjustment which the defendant is not at liberty to go behind for raising a defence from the community of wrong in which he participated. The fact that the partition was made pending the decision of the appeal makes no difference in principle.

No other question is argued on appeal, and I would dismiss the second appeal with costs.

BEST, J.—The point urged before us is that plaintiff's suit is not maintainable, as the agreement sued on is opposed to public policy and therefore void.

The agreement sued on is part and parcel of the partition deed, under which plaintiff and his uncle, the father of the appellant (defendant) divided the family property.

This division took place pending original suit No. 50 of 1887 in this Court.

That was an appeal against the decree of the Subordinate Judge of Negapatam, which dismissed a suit brought by plaintiff and his uncle (the father of defendants) for the recovery of a sum of Rs. 4,000 and interest as due under a hypothecation bond executed by one Murugattal Annee. This Murugattal Annee (as first defendant) admitted the then plaintiff's claim, but one Chockkammal Annee, who was the second defendant, denied the

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executant's right to encumber the property, and pleaded that the hypothecation bond was fictitious. The finding of this Court was that the hypothecation sued on was a colorable transaction. The appeal was therefore dismissed with costs.

As already observed, it was, while that appeal was pending, that this plaintiff and the father of defendant effected a partition of their family property; and in the deed of partition after mentioning the pending appeal, and after allotting the debt in question to this appellant's father exclusively, it is stipulated that the latter shall pay the entire costs of that suit in both Courts in case the appeal should fail, and it is further stipulated that "if "Naranappien (appellant's father) does not pay the same, and if "any sums are collected from Ramasawmi Iyen (present respond-"ent) in execution proceedings, those sums shall be collected from "Naranappien by Ramasawmi Iyen amicably or through the Court." It is this contingency that has happened; and the question is whether plaintiff is debarred from recovering the costs paid by him by reason of the same having been incurred in a suit brought on a bond which was found to be a colorable transaction.

This is not a suit for "contribution" like *Manja* v. *Kadugochen*(1), and *Suput Singh* v. *Imrit Tewari*(2); but for the enforcement of one of the terms of the partition deed, appellant's father would have been exclusively entitled to the whole of the amount then sued for had the appeal succeeded, and he could not have been allowed to disclaim his liability for the costs merely because the appeal failed. The contract is part and parcel of the partition deed from which it is inseparable, and, unless the partition can also be set aside, it is not open to the appellant to deny his liability for the amount now sought to be recovered from him.

This appeal must be dismissed with costs.

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(1) I.L.R., 7 Mad., 89. (2) I.L.R., 50 Calc., 720.

APPELLATE CIVIL.

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

1893. Oct. 12, 17.

KASSIM SAIB (COUNTER-PETITIONER), APPELLANT,

v.

LUIS (PETITIONER), RESPONDENT.*

Execution of decree—Payment of decree amount by one defendant—Reversal of decree on appeal by another defendant—Right to refund—Civil Procedure Code, s. 583.

In a suit for rent, together with interest thereon, brought by a mortgagee against a tenant in occupation of the mortgage premises, one claiming title against the mortgagee was joined as second defendant. The suit was dismissed in the Court of first instance, but the Court of first appeal passed a decree as prayed in the plaint: and in execution the principal amount of the rent claimed, which had been paid into Court by the first defendant with the request that it should be paid out to the person entitled to it, was paid over to the plaintiff. The first defendant preferred a second appeal against the decree, so far as it awarded interest and costs: this second appeal was dismissed. The second defendant, however, preferred against the entire decree a second appeal which was successful, and the High Court dismissed the suit throughout. On an application by the first defendant for refund of the money paid by him as stated above:

Held, that the applicant was not entitled to the refund claimed.

APPEAL against the order of W. C. Holmes, District Judge of South Canara, in civil miscellaneous appeal No. 51 of 1891, confirming the order of U. Babu Rau, District Munsif of Udipi, in civil miscellaneous petition No. 493 of 1891.

In 1886 a suit was brought by a plaintiff, since deceased and now represented by the respondent to the above petition, to receive from J. Luis, the present petitioner, a sum of money on account of rent accrued due on certain land in the defendant's possession. The plaintiff claimed to be the mortgagee of the land in question from the late trustee of the Puttigi Mutt. The trustee who had succeeded to office at the time of the suit, and who had been included in the suit as the second defendant, disputed the validity of the mortgage and claimed to be entitled to the rent in question. The Court of first instance passed a decree dismissing the suit, but this decree was reversed by the District Court and in execution of the appellate decree, the

* Appeal against Appellate Order No. 36 of 1892.

plaintiff received out of Court a sum, which had been paid in by Luis as the principal sum with the request that it should be paid out to the party entitled to it. Against the decree of the District Court, however, Luis preferred a second appeal, on the ground that he was not liable to pay interest and costs: and the second defendant preferred a second appeal against the appellate decree in its entirety impleading both the plaintiff and Luis. Luis' second appeal was dismissed, but on the second appeal preferred by second defendant, the High Court restored the original decree in the suit by which, as above stated, the suit was dismissed. KASSIM SAIB v.

The present petition was preferred by Luis to recover the sum paid by him under the circumstances appearing above. Both the Lower Courts held that he was entitled to the refund claimed. The representative to the plaintiff preferred this second appeal.

The further facts of the case appear sufficiently for the purposes of this report from the judgment of Mr. JUSTICE BEST.

Narayana Rau for appellant.

Ranga Rau for respondent.

BEST, J.—This is an appeal against an order of the District Judge, directing the appellant, who was plaintiff in the suit, to refund to the respondent, who was the first defendant, money paid by the latter on account of rent admittedly due on the land, of which respondent was tenant. The land belongs to the Puttigi Mutt at Udipi, and had been mortgaged to the appellant by Sumatindra Swami as trustee of the Mutt. The validity of Sumatindra's appointment to the trusteeship was under litigation at the time of the mortgage, and was eventually decided against him. The rent, in question, was claimed also by Sudindra Swami, who was eventually declared the rightful trustee. He was consequently included as second defendant in the suit. The money was deposited in Court by the respondent with the request that it might be paid to whichever of the claimants might be found entitled to it. The Court of first instance dismissed the plaintiff's, *i.e.*, appellant's suit, but on appeal that decision was reversed, and thereupon the money was paid to appellant. But in second appeal preferred by Sudindra Swami, the second defendant in the suit, this Court reversed the decree of the Lower Appellate Court and restored that of the District Munsif. Hence the application out of which the present appeal has arisen, for restitution to first defendant of the money wrongly paid to plaintiff. The District

KASSIM SAIB v. LUIS.

Court has upheld the order of the District Munsif in favour of the respondent, and from that order this second appeal is preferred by the plaintiff.

It is contended on behalf of appellant that respondent is not entitled to restitution under section 583 of the Code of Civil Procedure, as there is no decree in his favour, he not having been an appellant, but merely a respondent (jointly with the present appellant) in the second appeal No. 657 of 1889, in which was passed this Court's decree dismissing the present appellant's suit; whereas the appeal (second appeal No. 778 of 1889) preferred by this respondent from the same decree (which appeal was dismissed) related only to interest and costs.

The contention on behalf of appellant is that the respondent "was not declared entitled to any benefit under any decree so as "to claim restitution." I do not understand this contention to mean that restitution can only be made under section 583 of the Code, in cases in which it is expressly directed by the decree; such a contention would clearly be bad. *Balvantrav Oze* v. *Sadrudin*(1). I understand the contention on behalf of appellant to be that respondent is not entitled to the restitution sought, as there is *no decree whatever in his favour*. This contention is, I think, valid. The decree in second appeal No. 657 of 1889 was a decree in favour of the second defendant in that suit; and if, as the result of that decree, it happens that the money was wrongly paid to the present appellant, it is for that second defendant to ask the Court to get it back and pay it to himself as the party entitled to the same, it having been paid into Court by this respondent for payment to whichever of the two claimants before it in the same suit might be found entitled to the same.

Respondent having paid the money into Court in a suit to which both the claimants were parties, is fully discharged from all liability; and in the absence of a decree in his favour, he is entitled to no refund from the appellant. I would, therefore, allow the appeal and, setting aside the order of both the Courts below, dismiss respondent's application with costs throughout.

MUTTUSAMI AYYAR, J.—I agree. The payment was not made into Court under chapter XXIII of the Code of Civil Procedure, for such payment pre-supposes an admission of the plaintiff's

(1) I.L.R., 13 Bom., 485.

KASSIM SAIB v. LUIS.

claim to the extent of the payment. In the present case the payment was made with the request that the money should be paid out to the party really entitled to the rent. It is a payment made under the impression that the suit though brought by the plaintiff might be treated as being in the nature of an interpleader proceeding under section 490, Civil Procedure Code. The Munsif was wrong in ordering the money to be paid out to the plaintiff without security before the decision of the second appeal, and the party entitled to put him in motion in order to rectify this error, and to call for a refund is the second defendant. The first defendant is, therefore, not entitled to ask for a refund, and I concur in the order proposed by my learned colleague.

APPELLATE CIVIL.

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

RAMACHANDRA AND OTHERS (PLAINTIFFS), PETITIONERS, 1893. Apl. 20, 24, 27.

v.

SESHA (DEFENDANT), RESPONDENT.*

Negotiable Instruments Act—Act XXVI of 1861, *s.* 13—*Promissory note—Reference in the note to collateral security, effect of.*

An instrument, signed and bearing a 1-anna stamp, was in the following terms, viz., "on deposit of title-deeds named herein-below for value received by "me I promise to pay three months after date Rs. 160 to A.B. or order," then followed the details of the title-deeds:

Held, that the instrument was a negotiable instrument.

PETITION under Provincial Small Cause Courts' Act, s. 25, praying the High Court to revise the proceedings of G. Ramasami Ayyar, District Munsif of Coimbatore, in small cause suit No. 213 of 1892.

The plaintiffs, who carried on business in partnership, under the name of Srinivasa and Company, sued to recover principal and interest due under an instrument signed by the defendant and dated 13th October 1827. The instrument in question

* Civil Revision Petition No. 646 of 1892.

RAMA-CHANDRA v. SESHA.

bore a 1-anna stamp, and was in the following terms:—"On deposit "of title-deeds noted herein-below for value received by me, I "promise to pay three months after date Rs. 160 to the Coim-"batore Native Money Savings Bank (Limited) or order;" then follow the details of the title-deeds. It was objected by the defendant that the above instrument was a promissory note transferable only by endorsement, whereas the plaintiffs not being endorsees sued under an assignment of all the assets and credits of the bank in question.

The District Munsif upheld the contention of defendant and dismissed the suit as not being maintainable by the plaintiffs, and he referred to *Pattat Ambadi Marar* v. *Krishnan*(1).

The plaintiffs preferred this petition.

Pattabhirama Ayyar and *Venkatarama Sarma* for petitioners.

Ramachandra Rau Saheb for respondent.

JUDGMENT.—It is urged on petitioners' behalf that the document sued upon is not a negotiable instrument but an instrument of pledge. It is in these terms:—"On deposit of title-deeds I "promise to pay you or order Rs. 160 for value received." The words 'or order,' show that the intention was that the promissory note should circulate from hand to hand, and the question therefore is, whether the terms 'on deposit of title-deeds' control its operation and restrain its negotiability. Deposit of title-deeds as a collateral security does not make a promissory note the less a negotiable instrument, and it was so held in *Wise* v. *Charlton*(2). Do the words 'on deposit of title-deeds,' import in the case before us more than that a collateral security is also given, or in any way restrain the operation of the promissory note as a negotiable instrument? We do not think an allusion to the mere deposit of title-deeds makes the payment contingent or otherwise qualifies the operation of the document as a negotiable instrument. In our opinion it is not material whether the words occur in the same sentence which expresses the promise, as in this case, or in an additional sentence as in *Wise* v. *Charlton*(2). The language of the instrument in its plain ordinary sense only signifies that a loan was made and that title-deeds were deposited as a collateral security, and there is nothing to show that the intention was to qualify the operation of the note as a negotiable instrument or to

(1) I.L.R., 11 Mad., 290.

(2) 4 Ad. & E., 790.

regard the pledge as the primary transaction and the promissory note only as a further security. This is the only point argued, and we dismiss this petition with costs.

RAMA-CHANDRA v. SESHA.

APPELLATE CIVIL.

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

RAMAN NAYAR (PLAINTIFF), APPELLANT,

v.

SUBRAMANYA AYYAN (DEFENDANT), RESPONDENT.*

1893. April 11, 13.

Defamation—Privilege of Judge.

An action for defamation cannot be maintained against a Judge for words used by him whilst trying a cause in Court even though such words are alleged to be false, malicious and without reasonable cause.

APPEAL against the order of A. Thompson, District Judge of North Malabar, in original suit No. 1 of 1892, rejecting a plaint under Civil Procedure Code, s. 4 (*c*), on the ground that the suit was barred by the provisions of Act XVIII of 1850.

The plaintiff had been a party to certain suits pending in the Court of a District Munsif, and it was averred in the present plaint that when the suits came on for hearing the District Munsif used certain expressions "in connection with me wilfully and unneces-"sarily with a malicious intention of putting me to disgrace and "without reasonable cause." The above-mentioned words, it was averred, were used neither in the judicial capacity of a Judge who was going on with the trial nor for the purpose of the suit under trial. The plaintiff now sought a decree for damages against the defendant, the said District Munsif, on account of the defamation above referred to. The plaint having been rejected as above stated, the plaintiff preferred this appeal.

Mr. *Wedderburn* for appellant.

The Acting Government Pleader (*Subramanya Ayyar*) and *Sundara Ayyar* for respondent.

* Appeal No. 77 of 1892.

RAMAN NAYAR v. SUBRAMANYA AYYAN.

JUDGMENT.—This was an action for slander, and it was alleged in the plaint that the words complained of were uttered by the defendant, who is the Munsif of Payoli, during the hearing of a suit to which the plaintiff was a party.

The District Judge rejected the plaint under section 54 (*c*), Civil Procedure Code, holding that the suit was barred under a positive rule of law, and that Act XVIII of 1850 applied.

The real question for our decision is, can an action for slander be maintained against a Judge for words used by him whilst trying a cause in Court even though such words were alleged to be false, malicious and without reasonable cause.

This question has long been decided in the negative by the Courts in England on the grounds of public policy, and we think that the English law is applicable to Courts in India. In *Scott* v. *Stansfield*(1), the facts were very similar to the present case, and the Court of Exchequer consisting of Kelly, C.B., and Martin, Bramwell and Channell, B.B., unanimously decided that such an action would not lie; the reasons given were that it is essential in all Courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges do exercise their functions with independence and without fear of consequences. In *Dawkins* v. *Lord Rokeby*(2), the Court of Exchequer Chamber consisting of ten Judges held that the authorities are clear, uniform and conclusive that no action of slander lies against Judges . . . . for words spoken in the ordinary course of any proceeding before any Court or Tribunal recognised by law. A Full Bench of the Madras High Court has held that the English authorities on this subject apply to Judges and Courts in India. See *Sullivan* v. *Norton*(3).

Act XVIII of 1850 quoted by the District Judge does not appear to apply in a case like the present.

We dismiss the appeal with costs.

(1) L.R., 3 Ex., 220. (2) L.R., 8 Q.B., 255. (3) I.L.R., 10 Mad., 28.

APPELLATE CIVIL.

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

VENKATALINGAM (PLAINTIFF), APPELLANT,

v.

VEERASAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1893. April 28. September 13.

Limitation Act—Act XV of 1877, sch. II, arts. 137, 138—Purchase at Court auction—Suit for possession of land—Date of cause of action—Construction of enactment.

In a suit for possession of land instituted on 1st April 1891, it appeared that the land in question had been purchased by the plaintiff in a Court auction held in execution of a decree on 20th June 1878, and that the sale to the plaintiff was confirmed on 31st March 1879, which was the date upon which the certificate issued. The plaintiff failed to prove that the judgment-debtor was out of possession at or subsequently to the date of the sale:

Held, that the suit was governed by Limitation Act, sch. II, art. 138; that "the date of the sale" in that article means the date of the actual sale not the date of the confirmation of the sale and that accordingly the suit was barred by limitation.

SECOND APPEAL against the decree of B. Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 433 of 1891, confirming the decree of V. Krishnamurthi Pantulu in original suit No. 109 of 1891.

Suit for land. The property in question was brought to sale in execution of the decree in original suit No. 654 of 1873 and had been purchased at Court auction by the present plaintiff on 20th June 1878. The sale was confirmed and certificate issued on 31st March 1879. Delivery of the property, however, was not made through the Court or otherwise, and the auction purchaser now sued to recover the property in question. The plaint was filed on 1st April 1891 and the defendants raised a plea of limitation. This plea prevailed in the Lower Courts. The Subordinate Judge observed that an averment in the memorandum of appeal filed in his Court to the effect that the defendants had been out of possession for four years after the sale did not appear in the plaint and appeared to have been made as an after-thought in order to bring the suit within Limitation Act, sch. II, art. 137.

* Second Appeal No. 1441 of 1892.

VENKATA-LINGAM v. VEERASAMI.

The plaintiff preferred this second appeal.

Pattabhirama Ayyar for appellant.

Sriranga Charyar for respondents.

JUDGMENT.—The facts of this case as found by the Courts below are shortly these :—Appellant purchased the land in dispute at the Court-sale held in execution of the decree in original suit No. 654 of 1873 on the file of the District Munsif of Narsapur. The property was put up to sale and knocked down to appellant as the highest bidder on the 20th June 1878. It was, however, on the 31st March 1879 that the sale was confirmed. The sale certificate bears that date whilst this suit was brought on 1st April 1891. The question for determination is whether the Courts below are right in holding that the suit was barred by article 138 of the second schedule of the Act of Limitation. For appellant (plaintiff) it is urged first, that there is no evidence to show that the judgment-debtor was in possession of the property in dispute at the date of the Court-sale, and that even if that article applied, the sale referred to in the third column is not the actual sale but the sale which has been confirmed and became absolute.

Article 137 premises an execution sale at the time when the judgment-debtor is out of possession, and article 138 presupposes a case in which the judgment-debtor is in possession of the property sold. According to the former the time from which the period begins to run is when the judgment-debtor becomes first entitled to possession and according to the latter time runs from the date of the sale. Referring to appellant's contention that defendants were out of possession for four years after the sale, the Subordinate Judge observes that the plaint did not state so, and that the allegation in the memorandum of appeal was an after-thought. The first issue fixed in this case was whether the suit was barred, and it was thus open to appellant to have proved that the judgment-debtor had been out of possession for four years after the sale, but he tendered no evidence on the point. The *onus* of proof was on appellant, and we cannot say that the Subordinate Judge was in error in considering his allegation as untrustworthy, especially when the plaintiff himself stated before the District Munsif that he asked the defendants to quit the land in dispute until four or five years after taking the certificate and not subsequently.

The next question is whether assuming that article 138 is

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applicable to this suit, the claim is barred. If the word sale in the third column of that article means actual sale, the claim is clearly barred; but, if it means the sale which is confirmed the suit is in time. In its plain ordinary meaning the word sale means the auction-sale itself, and it is used in article 166 in that sense. Article 12, which refers to a sale that is confirmed, indicates also that the Legislature intentionally used the word without any qualification.

But it is argued that under section 316 of the Code of Civil Procedure the title to the immovable property purchased vests in the purchaser from the time when the sale is confirmed and not before, and as no purchaser can sue for possession before the property passes to him the term sale in column 3 of article 138 must be taken to signify as in article 12 the sale which is confirmed. The direction in section 316 of the Code of Civil Procedure concerning the date on which the title to immovable property purchased at a Court-sale vests is not to be found in Act X of 1877, of which the corresponding section provides for the grant of a certificate, stating "the name of the person who, at the time of "sale, is declared to be the purchaser and the date of such sale." With reference to that section it has been held that when the sale is confirmed it relates back to the auction-sale, and the property vests in the purchaser from the date of such sale. It was so held by the High Court at Calcutta in *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal*(1), and by a Full Bench of the same Court in *Bhyrub Chunder Bundopadhya* v. *Soudamini Dabee*(2). It was by Act XII of 1879 that the clause "title shall vest in the "purchaser from the time when the sale is confirmed" was introduced into section 316. Though it was then open to the Legislature to have altered the word sale in the third column of article 138 of the Limitation Act, yet they have not done so. The same word cannot mean the actual sale in one place and the sale which is confirmed in another place in the same Act. The omission to alter the word sale into sale which is confirmed may be due to oversight, but the result of the grammatical interpretation must in law prevail when there is no ambiguity. We observe also that the sale in this case took place in June 1878, whereas section 316 was not modified till 1879.

(1) I.L.R., 14 Calc., 644. (2) I.L.R., 2 Calc., 145.

VENKATA-LINGAM v. VEERASAMI.

We are of opinion that the Courts below are right in holding that the suit is barred by article 138 of the Indian Limitation Act, and we dismiss this appeal with costs.

APPELLATE CIVIL.

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

1893. July 12.

VENKATASUBBU AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

APPUSUNDRAM (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, s. 20—Suit for money—Payment on account of principal within the period of limitation—Evidence of such payment by writing made after period expired.

The obligee of a registered mortgage bond, dated 30th January 1875, sued in February 1891 to recover from the obligor the principal and interest remaining due thereunder. In bar of limitation the plaintiff relied on entries of part-payments from time to time in an account written by the defendant. These part-payments were made at such times as to keep alive the obligee's right of suit up to the date of the last of them. The last of these payments was made on a date which was less than six years (the period of limitation for the suit) before the date of institution of the suit, but it was not entered in the defendant's accounts until after the date when the claim would otherwise have been barred by limitation:

Held, that the provisions of Limitation Act, section 20, were satisfied, and that the suit was not barred by limitation.

APPEAL against the judgment of Mr. JUSTICE BEST sitting on the Original Side of the Court in civil suit No. 32 of 1891.

The facts of the case appear sufficiently for purposes of this report from the judgment of Mr. JUSTICE BEST.

BEST, J.—The suit is for Rs. 4,442–5–6, balance of principal and interest due to plaintiff under the registered mortgage bond A, dated 30th January 1875, executed by first defendant for a sum of Rs. 9,100. Second defendant is the son of first defendant. Defendants pleaded that they were entitled to credit for a further sum of Rs. 191–4–11 being amount of assessment and quit-rent

* Original Side Appeal No. 30 of 1892.

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paid by them on account of plaintiff's property. They further pleaded that the suit is time-barred, in that it is merely for a personal decree against the defendants for a debt payable so far back as 31st December 1877.

It must here be noticed that plaintiff has explained in the plaint his reason for asking for a simple money decree, viz., because the defendants have from time to time taken from the plaintiff all the title-deeds of the properties mentioned above and mortgaged them with others using the money so raised for a deposit with Messrs. DeClosets and Co., where the second defendant was employed as a Dubash.

The following are the issues recorded on the above pleadings:—

I. Is the suit barred by limitation?

II. Are defendants entitled to a credit of Rs. 191–4–11 as in paragraph 1 of the written statement mentioned?

Plaintiff now admits that defendants are entitled to credit for Rs. 191–4–11 as claimed by them. This disposes of the second issue.

The only point for consideration is, therefore, whether the suit for a merely money decree is time-barred.

Plaintiff has produced the account B as containing in the handwriting of first defendant himself admissions of part-payments sufficient under section 20 of the Limitation Act to keep alive the claim for a simple money decree. This account B, plaintiff swears, was given to him by second defendant. It begins with an entry of Rs. 7,050 as due on the 31st December 1881 which amount is gradually reduced by payments made from time to time, on several occasions in each year from 1882 to 1888, leaving on the 31st December 1888 a balance of Rs. 2,073–14–10; to which a sum of Rs. 1,995–2–1 is added, as the total of interest due, calculated up to that date. Plaintiff swears that the entries up to 15th June 1888 are in the handwriting of first defendant, and it is contended that, as the suit is brought within six years from that date, Exhibit A being a registered document, it is not open to the objection of the limitation bar.

On the other hand it is contended on behalf of defendants that in order to be of use under section 20 of the Limitation Act, the handwriting of the person making the payment referred to in

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the proviso in section 20 must have come into existence before the expiration of the prescribed period, within which the part-payment must be made. To hold thus would be to import into the proviso (clause 4) words that are not to be found in it. It seems to me that if the fact of the part-payment having been made within the prescribed period appears in the handwriting of the person making it, the mere fact of this handwriting coming into existence after the period prescribed for the payment will not render such handwriting useless for the purpose of saving a claim from the limitation bar. The payments entered in B were made either on account of principal or on account of interest. If the latter, the mere fact of the payment would be sufficient for the purposes of section 20. But as it does not appear from B that the payments were made on account of the interest as such, they must be taken to have been made as part-payment of the principal amount; and the fact of such payment appearing in the handwriting of first defendant as proved by plaintiff (and not rebutted by the defendants), I find that this suit is not barred.

I give plaintiff a money decree, therefore, for the amount claimed less the Rs. 191–4–11 referred to in the second issue, and less a further sum of Rs. 112–10–0 which plaintiff admits has been paid to him subsequent to the institution of this suit.

Defendants are directed to pay the above amount to plaintiff with further interest on the same at 6 per cent. per annum from date of suit to date of payment, as also plaintiff's costs on the above amount, and plaintiff will pay defendants' costs on Rs. 191–4–11.

The defendants preferred this appeal.

Sundaram Sastri for appellants.

Bhashyam Ayyangar and *Sivagnana Mudaliar* for respondent.

JUDGMENT.—We think the learned Judge was right. The section does not require that the writing should be made before the expiration of the period. It only requires a writing as the mode of proving the fact of payment. The appeal must be dismissed with costs.

APPELLATE CIVIL.

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

MUTHU AND ANOTHER (DEFENDANTS) APPELLANTS,

v.

GANGATHARA (PLAINTIFF), RESPONDENT.*

1893. January 24. February 8.

Religious Endowments Act—Act XX of 1863, *s.* 14—*Applicability of the Act.*

In a suit, brought with the leave of the District Court under Act XX of 1863, to remove the trustees of a Hindu temple, it did not appear that the trustees were nominated by or subject to the confirmation of the Government or any public officer:

Held, that Act XX of 1863 was not applicable to the temple unless it was admitted or proved by evidence that the endowment was one which would have fallen under the provisions of Regulation VII of 1817.

APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in original suit No. 3 of 1891.

The plaintiff sued for a decree removing the defendants from the office of trustees of a temple at Alagumangalam having previously obtained the sanction of the District Court under Act XX of 1863. The first issue framed raised the question whether that Act was applicable to the temple in question. The District Judge held with reference to *Fakurudin Sahib* v. *Ackeni Sahib*(1) that he had jurisdiction in the case and he passed a conditional decree in the form employed in *Sivasankara* v. *Vadagiri*(2).

Defendants preferred this appeal.

Venkatasubba Ayyar for appellants.

Sivagnana Mudaliar for respondent.

JUDGMENT.—The first contention raised by the appellants, both at the grant of sanction and at the hearing of the suit, was that the provisions of Act XX of 1863 do not apply to the plaint temple. The District Judge overruled this objection, on the ground that it was not denied that the public have a right of service in the plaint temple.

The suit was disposed of without taking any evidence, and we can find no note of the Judge or anything else on the record to show

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* Appeal No. 40 of 1892. (1) I.L.R., 2 Mad., 197. (2) I.L.R., 13 Mad., 6.

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that any such admission was made. On the contrary, the second paragraph of the written statement commences with a denial that the temple is a common place of worship, either for plaintiff or other Kammalas or for other Hindu castes. It does not appear that the trustees were nominated by or subject to the confirmation of the Government or any public officer. Unless, therefore, the endowment was one which would have fallen under the provisions of Regulation VII of 1817, it will not fall under the provisions of Act XX of 1863. See *Fakurudin Sahib* v. *Ackeni Sahib*(1) *and Jan Ali* v. *Ram Nath Mundul*(2). We do not think this case can be disposed of without recording evidence. We must, therefore, set aside the decree of the District Judge and remand the suit for rehearing. The costs will follow the result.

APPELLATE CIVIL.

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

1893. August 29.

RAMASAMI (PLAINTIFF), APPELLANT,

v.

SAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, *ss.* 92, 93—*Decree for redemption—Mortgagor's failure to pay amount due within period fixed—Subsequent suit, no order under section* 93 *having been made*—Res judicata.

A decree under section 92 of the Transfer of Property Act becomes a final decree on the expiry of the time limited thereby, although no order is passed under section 93 : accordingly, no subsequent suit for redemption can be maintained.

SECOND APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in appeal suit No. 365 of 1892, affirming the decree of T. M. Adinarayana Chettiar, District Munsif of Mannargudi, in original suit No. 66 of 1891.

Suit for redemption of a mortgage executed in 1886 by the plaintiff's vendor to the predecessor in title of the defendants under which it appeared that possession had passed to the mortgagee.

(1) I.L.R., 2 Mad., 197. (2) I.L.R., 8 Calc., 32.

* Second Appeal No. 241 of 1893.

RAMASAMI v. SAMI.

The plaintiff had previously brought original suit No. 241 of 1886 on the file of the District Munsif of Mannargudi for the redemption of the same mortgage, and on 30th September 1887 a decree was passed which directed that "on the plaintiff paying to the "defendants Nos. 2 to 7 or depositing in Court within three "months from this date Rs. 67, he will be entitled to take "possession of the plaint items Nos. 1 to 6, and in default, he will "be debarred from redeeming them thereafter." This decree was affirmed on appeal and in 1889 the plaintiff applied in execution for an order that possession be delivered to him on payment of the amount specified. He obtained the order sought and gained possession of the land, but the High Court reversed the order and dismissed his application on the ground that it was too late.

The prayer of the present plaint was for a decree "directing "the defendants to receive from plaintiff the mortgage debt and to "return to him all the documents relating to the mortgage, and "holding that the mortgage has been redeemed and for such other "relief as the nature of the suit may admit." The third issue framed in the suit was as follows:—"Whether the plaintiff's "right of redemption has been extinguished by the decree in the "former suit No. 241 of 1886?" The plaintiff's contention was that the equity of redemption was kept alive by reason of the fact that no order had been made under Transfer of Property Act, s. 93.

The District Munsif decided this issue in favour of the defendant pointing out that the mortgage in question was not in his view a usufructuary mortgage and also expressing the opinion that the Transfer of Property Act was inapplicable to the suit, and he accordingly dismissed the suit.

The Subordinate Judge on appeal affirmed this decree concurring in the opinion that the Transfer of Property Act was inapplicable, and observing "the deed of mortgage is not on "record and it is not easy to say what the real nature of the "mortgage is, but as it is merged in the decree, the latter is the "proper guide for determining the question."

Narasimha Chariar for appellant.

Krishnasami Ayyar for respondent.

JUDGMENT.—We consider that the decree in suit No. 241 of 1886 on the Mannargudi Munsif's file was a final decree inasmuch as it decreed according to the last clause of section 92 of the Transfer of Property Act, that in case of default in payment

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within the stipulated time, the plaintiff was to be debarred of his right of redemption. Orders passed under section 93 are, in our opinion, merely supplementary to the decree under section 92, showing whether the terms of the decree have or have not been fulfilled. It is clear that in this case when the three months' time allowed in the decree had elapsed without payment being made, no extension of time for payment having been granted, the decree became a final decree without any further orders being required. That decree then being a final one after confirmation in appeal, the present suit being based on precisely the same cause of action as that suit is, of course, barred as *res judicata*.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

1893. August 8.

KUNHAYEN HAJI (PLAINTIFF), APPELLANT,

v.

MAYAN (DEFENDANT No. 2), RESPONDENT. *

Transfer of Property Act—Act IV of 1882, *ss.* 108, *sub-s.* (*e*), 117—*Agricultural lease—Lease of a coffee garden—Destruction of plants by fire—Voidability of lease.*

The plaintiff was the assignee of the right and title of the lessor and the defendant was the lessee of a coffee garden, under an instrument which was held to constitute a lease of the coffee plants only. In a suit to recover the annual payment reserved under the lease, it appeared that the coffee plants had been destroyed by fire and the garden had been consequently abandoned by the defendant before the period to which the claim related :

Held, that the plaintiff was not entitled to recover.

Per cur : We are clearly of opinion that a lease of a coffee garden is not an agricultural lease within the meaning of Transfer of Property Act, s. 117.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of North Malabar, in appeal suit No. 823 of 1891 reversing the decree of J. A. De'Rozario, District Munsif of Vytri in original suit No. 41 of 1891.

The plaintiff sued as the assignee of the title and interest o

* Second Appeal No. 1624 of 1892.

The defendant preferred this second appeal.

LAKSHMANA AYYAN v. RANGASAMI AYYAN.

Mr. *R. F. Grant* for appellant.

Krishnasami Ayyar for respondent.

MUTTUSAMI AYYAR, J.—Appellant and respondent are the sons of two brothers. On the 25th October 1887 the latter and the father of the former entered into a partition. An appeal was then pending in the High Court from the decision of the Subordinate Court of Negapatam in original suit No. 63 of 1884, which had been brought by them on a hypothecation bond executed in their favor by one Chokkammal Annee of Kulikarai. The partition deed provided, *inter alia*, that appellant's father should take for his share all the debts due to the joint family including the amount of the hypothecation bond, and that, if the appeal then pending was decided against them, appellant's father should pay all the costs of that litigation both in the Original and Appellate Courts. The appeal was dismissed in January 1889, and both the appellant's father and respondent were directed to pay Chokkammal's costs. One of her judgment-creditors took out execution against the judgment debtors in original suit No. 63 of 1884, and recovered the costs from the respondent. The respondent's case was that he was entitled to recover the money paid by him from the appellant, and both the Courts below decreed the claim. It is urged in second appeal that the decree for contribution recognizes a claim contrary to public policy, and that the present suit is in the nature of a suit for contribution brought by one wrong doer against another. Original suit No. 63 of 1884 was dismissed on the ground that the hypothecation bond was executed without consideration, and that it evidenced a fraudulent transaction. It is no doubt a clear proposition of law that one tort-feasor cannot recover contribution from another, but it is subject to this important qualification, viz., that where the loss arising from the illegal contract is adjusted, so that the adjustment is equivalent to a payment, the adjustment cannot be disturbed. It was so held in *Owens* v. *Denton*(1). In that case, the price due for malt illegally sold by plaintiff was included in an account stated and settled between the parties, and it was held by Lord Abinger that the adjustment was equivalent to payment in cash, and that it came within the rule that money paid in pursuance of

(1) 1 C.M & R., 712.

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an illegal contract shall not be claimed back again. No contribution is allowed between joint tort-feasors because the community of wrong between them is the foundation of the action, but the same community of wrong precludes the defendant from recovering what he has paid in consequence of the illegal act. If the loss arising from the wrongful act is adjusted by an account stated between the parties or by a partition deed, as in this case, it is equivalent to payment since it is no longer necessary for the plaintiff to rely on the community of wrong in support of his claim.

The same community of wrong that would prevent the plaintiff from claiming contribution if there were no adjustment by partition likewise prevents the defendant from disturbing the adjustment which is equivalent to payment. The loss arising from the decision in original suit No. 63 of 1884 was a loss which devolved on the coparcenary family, and the partition deed under which the party who took all the debts due to the family agreed to bear the loss, if any, arising from the failure of the suit brought by the family to recover one of those debts is an adjustment which the defendant is not at liberty to go behind for raising a defence from the community of wrong in which he participated. The fact that the partition was made pending the decision of the appeal makes no difference in principle.

No other question is argued on appeal, and I would dismiss the second appeal with costs.

BEST, J.—The point urged before us is that plaintiff's suit is not maintainable, as the agreement sued on is opposed to public policy and therefore void.

The agreement sued on is part and parcel of the partition deed, under which plaintiff and his uncle, the father of the appellant (defendant) divided the family property.

This division took place pending appeal suit No. 50 of 1887 in this Court.

That was an appeal against the decree of the Subordinate Judge of Negapatam, which dismissed a suit brought by plaintiff and his uncle (the father of defendants) for the recovery of a sum of Rs. 4,000 and interest as due under a hypothecation bond executed by one Murugattal Annee. This Murugattal Annee (as first defendant) admitted the then plaintiff's claim, but one Chokkammal Annee, who was the second defendant, denied the

executant's right to encumber the property, and pleaded that the hypothecation bond was fictitious. The finding of this Court was that the hypothecation sued on was a colorable transaction. The appeal was therefore dismissed with costs.

LAKSHMANA AYYAN v. RANGASAMI AYYAN.

As already observed, it was, while that appeal was pending, that this plaintiff and the father of defendant effected a partition of their family property; and in the deed of partition after mentioning the pending appeal, and after allotting the debt in question to this appellant's father exclusively, it is stipulated that the latter shall pay the entire costs of that suit in both Courts in case the appeal should fail, and it is further stipulated that "if "Naranappien (appellant's father) does not pay the same, and if "any sums are collected from Ramasawmi Iyen (present respond-"ent) in execution proceedings, those sums shall be collected from "Naranappien by Ramasawmi Iyen amicably or through the Court." It is this contingency that has happened; and the question is whether plaintiff is debarred from recovering the costs paid by him by reason of the same having been incurred in a suit brought on a bond which was found to be a colorable transaction.

This is not a suit for "contribution" like *Manja* v. *Kadugochen*(1), and *Suput Singh* v. *Imrit Tewari*(2), but for the enforcement of one of the terms of the partition deed. Appellant's father would have been exclusively entitled to the whole of the amount then sued for had the appeal succeeded, and he could not have been allowed to disclaim his liability for the costs merely because the appeal failed. The contract is part and parcel of the partition deed from which it is inseparable, and, unless the partition can also be set aside, it is not open to the appellant to deny his liability for the amount now sought to be recovered from him.

This appeal must be dismissed with costs.

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(1) I.L.R., 7 Mad., 89. (2) I.L.R., 5 Calc., 720.

APPELLATE CIVIL.

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

1893.
Oct. 12, 17.

KASSIM SAIB (COUNTER-PETITIONER), APPELLANT,

v.

LUIS (PETITIONER), RESPONDENT.*

Execution of decree—Payment of decree amount by one defendant—Reversal of decree on appeal by another defendant—Right to refund—Civil Procedure Code, s. 583.

In a suit for rent, together with interest thereon, brought by a mortgagee against a tenant in occupation of the mortgage premises, one claiming title against the mortgagee was joined as second defendant. The suit was dismissed in the Court of first instance, but the Court of first appeal passed a decree as prayed in the plaint: and in execution the principal amount of the rent claimed, which had been paid into Court by the first defendant with the request that it should be paid out to the person entitled to it was paid over to the plaintiff. The first defendant preferred a second appeal against the decree, so far as it awarded interest and costs: this second appeal was dismissed. The second defendant, however, preferred against the entire decree a second appeal which was successful, and the High Court dismissed the suit throughout. On an application by the first defendant for refund of the money paid by him as stated above:

Held, that the applicant was not entitled to the refund claimed.

APPEAL against the order of W. C. Holmes, District Judge of South Canara, in civil miscellaneous appeal No. 51 of 1891, confirming the order of U. Babu Rau, District Munsif of Udipi, in civil miscellaneous petition No. 493 of 1891.

In 1886 a suit was brought by a plaintiff, since deceased and now represented by the respondent to the above petition, to receive from J. Luis, the present petitioner, a sum of money on account of rent accrued due on certain land in the defendant's possession. The plaintiff claimed to be the mortgagee of the land in question from the late trustee of the Puttigi Mutt. The trustee who had succeeded to office at the time of the suit, and who had been included in the suit as the second defendant, disputed the validity of the mortgage and claimed to be entitled to the rent in question. The Court of first instance passed a decree dismissing the suit, but this decree was reversed by the District Court and in execution of the appellate decree, the

* Appeal against Appellate Order, No. 36 of 1892.

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Civil Procedure Code—Act XIV of 1882, s. 13—Res judicata—*Rent Recovery Act (Madras)—Act VIII of* 1865—*Decision of a Revenue Court—Second suit in Civil Court—Question of title.*] In a suit for land it appeared that the defendant had obtained, under the Rent Recovery Act, a judgment that the present plaintiff should accept from him a patta for the land in question and deliver to him a corresponding muchalka, and subsequently an order for ejectment, which was executed. The present plaintiff did not appear when the above orders were made. The defendant relied on these proceedings as constituting a bar to the present suit :—*Held*, following *Rama* v. *Tirtasami* (I.L.R., 7 Mad., 61), that the decision of the Revenue Court was no bar to the suit.

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2. ——————————, ss. 43, 244—*Hindu law—Liability of son for father's debts—Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings—Limitation Act—Act XV of* 1877, *sch. II, arts.* 120, 122.] A personal decree on a mortgage was passed against a Hindu (the mortgagor) and his two sons on 19th October 1877. The decree provided for payment of the secured debt in various instalments by May 1895. The mortgagor died in 1883 having discharged part of the debt. The decree-holder having attached certain family property in execution, the mortgagor's two younger sons, who had not been born at the date of the above decree, objected that their shares were not liable to attachment. This objection prevailed, the Court expressing the opinion that the matter in controversy should be determined in a regular suit. The other defendants in the suit of 1877 had both died in the interval, one of them leaving infant sons. The decree-holder (in whose sole name the mortgage stood) now sued the sons of the mortgagor and their infant nephews in 1891 and obtained a decree for the payment out of the family property of all the unpaid instalments. A plea of non-joinder was raised, *inter alia*, on the ground that the plaintiff had an undivided brother :—*Held*, (1) that since the plaint (as amended) showed that the plaintiff sued as managing member of his undivided family, the omission to join his brother was a merely formal error, and was not fatal to the suit; (2) that the plaintiff was not precluded from maintaining this suit against the

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sons of the mortgagor by Civil Procedure Code, s. 43 or s. 244; (3) that the period of limitation applicable to the suit was six years, and that time began to run for the purposes of limitation from the date when each instalment would have become due from the deceased judgment-debtor; (4) that the plaintiff was entitled to a decree for payment out of the family property of all such instalments as would have so become due at the date of the suit, and for a declaration only as to subsequent instalments.

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CONTRACT ACT—ACT IX OF 1872, ss. 45, 263—*Suit by surviving member of a firm alone—Succession Certificate Act—Act VII of* 1889, *s.* 4—*Suit by surviving partner and heir of deceased partner.*] In a suit on a promissory note made by the defendant in favour of two Hindus carrying on business in partnership, it appeared that one of the partners was dead, and no succession certificate or letters of administration had been obtained. The plaintiffs were the surviving partners and the undivided sons of the deceased partner:—*Held*, that a surviving partner can sue alone for the recovery of a partnership debt:—*Held further*, that such a suit may be maintained by a surviving partner jointly with the heir of the deceased partner, in which case a certificate of heirship will be necessary, unless it appears on the face of the document sued on that the debt is a coparcenary debt.

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DISTRICT MUNICIPALITIES ACT (MADRAS)—ACT IV OF 1884, ss. 53, 59, 60—*Letters Patent of the High Court*, s. 15—*Appeal—Profession tax—Trader—Provincial Small Cause Courts Act—Act IX of* 1887, *ss.* 25, 27.] A petition for revision preferred under Provincial Small Cause Courts Act, s. 25, was heard and dismissed by one of the Judges of the High Court acting under the rules of Court framed under section 13 of the Charter Act. The petitioner preferred an appeal under Letters Patent, s. 15:—*Held*, that the appeal was not barred under Provincial Small Cause Courts Act, s. 27, and was maintainable. One who makes it his business to sell the produce of his own land for profit is a trader within the meaning of Madras Act IV of 1884, provided the sales are conducted in a shop or place of business:—*Held by Parker*, J., that one who has paid profession tax as a Sheristadar in one municipality is not on that account exempted from paying a further tax in respect of a trade carried on by him in another municipality under Act IV of 1884, Madras.

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HINDU LAW—*Liability of son for father's debts—Civil Procedure Code—Act XIV of* 1882, *ss.* 43, 244—*Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings—Limitation Act—Act XV of* 1877, *sch. II, arts.* 120, 122.] A personal decree on a mortgage was passed against a Hindu (the mortgagor) and his two sons on 19th October 1877. The decree provided for payment of the secured debt in various instalments by May 1895. The mortgagor died in 1883 having discharged part of the debt. The decree-holder having attached certain family property in execution, the mortgagor's two younger sons, who had not been born at the date of the above decree, objected that their shares were not liable to attachment. This objection prevailed, the Court expressing the opinion that the matter in controversy

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should be determined in a regular suit. The other defendants in the suit of 1877 had both died in the interval, one of them leaving infant sons. The decree-holder (in whose sole name the mortgage stood) now sued the sons of the mortgagor and their infant nephews in 1891 and obtained a decree for the payment out of the family property of all the unpaid instalments. A plea of non-joinder was raised, *inter alia*, on the ground that the plaintiff had an undivided brother:—*Held*, (1) that since the plaint (as amended) showed that the plaintiff sued as managing member of his undivided family, the omission to join his brother was a merely formal error and was not fatal to the suit; (2) that the plaintiff was not precluded from maintaining this suit against the sons of the mortgagor by Civil Procedure Code, s. 43 or s. 244; (3) that the period of limitation applicable to the suit was six years, and that time began to run for the purposes of limitation from the date when each instalment would have become due from the deceased judgment-debtor; (4) that the plaintiff was entitled to a decree for payment out of the family property of all such instalments as would have so become due at the date of the suit, and for a declaration only as to the subsequent instalments.

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LETTERS PATENT OF THE HIGH COURT, s. 15—*Appeal—District Municipalities Act (Madras)—Act IV of* 1884, *ss.* 53, 59, 60—*Profession tax—Trader—Provincial Small Cause Courts Act—Act IX of* 1887, *ss.* 25, 27.] A petition for revision preferred under Provincial Small Cause Courts Act, s. 25, was heard and dismissed by one of the Judges of the High Court acting under the rules of Court framed under section 13 of the Charter Act. The petitioner preferred an appeal under Letters Patent, s. 15:—*Held*, that the appeal was not barred under Provincial Small Cause Courts Act, s. 27, and was maintainable. One who makes it his business to sell the produce of his own land for profit is a trader within the meaning of Madras Act IV of 1884, provided the sales are conducted in a shop or place of business:—*Held by Parker*, J., that one who has paid profession tax as a Sheristadar in one municipality is not on that account exempted from paying a further tax in respect of a trade carried on by him in another municipality under Act IV of 1884, Madras.

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2. ———————————————, *Appeal to two Judges—Sanction to prosecute granted by one Judge.*] Where one Judge exercising the revisional jurisdiction of the High Court, in reversal of an order of a First-class Magistrate, had granted sanction under Criminal Procedure Code, s. 195, for a prosecution under Penal Code, s. 182, an appeal was preferred from his judgment under Letters Patent, s. 15:—*Held*, that no appeal lay, that section of the Letters Patent being inapplicable in cases of criminal jurisdiction.

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LIMITATION ACT—ACT XV OF 1877, SCH. II, ARTS. 120, 122—*Hindu law—Liability of son for father's debts—Civil Procedure Code—Act XIV of* 1882, *ss.* 43, 244—*Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings.*] A personal decree on a mortgage was passed against a Hindu (the mortgagor) and his two sons on 19th October 1877. The decree provided for payment of the secured debt in various

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PENAL CODE—ACT XLV OF 1860, s. 224—*Escape from custody of village officers—Regulation XI of* 1816, *s.* 5. On a charge under Penal Code, s. 226, it appeared that the accused had been apprehended on a hue and cry being raised as he was running away after committing robbery, and that he was handed over to the village magistrate and was by him placed in the charge of taliyaries for detention till the next morning when he was to be taken to the police station, and that he escaped from the custody of the taliyaries :—*Held*, distinguishing *Queen* v. *Bojjigan* (I.L.R., 5 Mad., 22), that the accused was rightly convicted of the offence charged.

Queen-Empress v. *Fakira* 103

PORTS ACT—ACT X OF 1889, ss. 6, 8—*Order purporting to be made under the Act by Conservator of port—Public body authorized by Legislature to make rules, powers of.*] The Conservator of the Port of Negapatam, purporting to act under the Indian Ports Act, s. 8, made and published an order that when a certain flag was flying at the signal station, all boats returning from the sea should cast anchor and not come inside the river. The Local Government had made a rule with reference to section 6 (*k*) of the above Act requiring boat owners to "carry out at all times all orders issued by the Conservator in connection with "the plying of their boats and which are not inconsistent with the regulations "issued by Government." A charge was brought against two persons, being the owners and tindals of licensed cargo boats for neglecting to obey the aforesaid order, and they were convicted under Indian Ports Act, s. 8 (2), by the Conservator in his capacity as Special First-class Magistrate :—*Held*, that the order was *ultra vires* and the conviction was accordingly illegal. *Per cur.*—A public body, whether the Executive Government or a corporation, being

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entrusted by the Legislature with the duty of making rules, cannot relieve itself of the responsibility and depute other agencies to discharge the duty.

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PROVINCIAL SMALL CAUSE COURTS ACT—ACT IX OF 1887, ss. 25, 27—*Letters Patent of the High Court, s.* 15—*Appeal—District Municipalities Act (Madras)—Act IV of* 1884, *ss.* 53, 59, 60—*Profession tax—Trader.*] A petition for revision preferred under Provincial Small Cause Courts Act, s. 25, was heard and dismissed by one of the Judges of the High Court acting under the rules of Court framed under section 13 of the Charter Act. The petitioner preferred an appeal under Letters Patent, s. 15:—*Held*, that the appeal was not barred under Provincial Small Cause Courts Act, s. 27, and was maintainable. One who make it his business to sell the produce of his own land for profit is a trader within the meaning of Madras Act IV of 1884, provided the sales are conducted in a shop or place of business:—*Held by Parker*, J., that one who has paid profession tax as a Sheristadar in one municipality is not on that account exempted from paying a further tax in respect of a trade carried on by him in another municipality under Act IV of 1884, Madras.

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REGULATION XI OF 1816 : *See* Penal Code, s. 224.

RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865—*Civil Procedure Code—Act XIV of* 1882, *s.* 13—Res judicata—*Decision of a Revenue Court—Second suit in Civil Court—Question of title.*] In a suit for land it appeared that the defendant had obtained, under the Rent Recovery Act, a judgment that the present plaintiff should accept from him a patta for the land in question and deliver to him a corresponding muchalka, and subsequently an order for ejectment, which was executed. The present plaintiff did not appear when the above orders were made. The defendant relied on these proceedings as constituting a bar to the present suit:—*Held*, following *Rama* v. *Tirtasami* (I.L.R., 7 Mad., 61), that the decision of the Revenue Court was no bar to the suit.

Gangaraju v. *Kondireddiswami* 106

SUCCESSION CERTIFICATE ACT—ACT VII OF 1889, *s.* 4—*Contract Act—Act IX of* 1872, *ss.* 45, 263—*Suit by surviving member of a firm alone—Suit by surviving partner and heir of deceased partner.*] In a suit on a promissory note made by the defendant in favour of two Hindus carrying on business in partnership, it appeared that one of the partners was dead, and *no* succession certificate or letters of administration had been obtained. The plaintiffs were the surviving partners and the undivided sons of the deceased partner:—*Held*, that a surviving partner can sue alone for the recovery of a partnership debt:—*Held further*, that such a suit may be maintained by a surviving partner jointly with the heir of the deceased partner, in which case a certificate of heirship will be necessary, unless it appears on the face of the document sued on that the debt is a coparcenary debt.

Vaidyanatha Ayyar v. *Chinnasami Naik* 108

defendant No. 1 by whom as it was alleged a portion of coffee estate held on kulikanapattam had been leased to defendant No. 2 in consideration of an annual payment which had fallen into arrears. The defendant No. 2 alleged that he had been admitted as a partner in the first defendant's share in the estate and that he was liable only for a proportionate part of the jemmabogam assessed thereon. This, he averred, he had paid up to 1883, when a conflagration occurred destroying all the coffee bushes on the estate, which had since been overgrown with thick jungle. The District Munsif held that the defendant No. 2 was nevertheless liable to the plaintiff and accordingly passed a decree as prayed. This decree was reversed on appeal by the Subordinate Judge and the plaintiff preferred this second appeal.

Sankaran Nayar and *Ryru Nambiar* for appellant.

Sankara Menon and *Govindan Nambiar* for respondent.

JUDGMENT.—We are clearly of opinion that a lease of a coffee garden is not an agricultural lease within the meaning of section 117 of the Transfer of Property Act. It is argued that section 108 does not apply, because the money sought to be recovered is not rent and the property was not destroyed. Looking at the plaint and the karar B, we think the relation of lessor and lessee was asserted and in fact existed. It is rent which the plaintiff seeks to recover. It is not disputed that the whole of the plants situated in the part included in the karar was absolutely destroyed, and the second defendant in consequence abandoned the garden. If, as a matter of fact, the land only had been the subject of the demise it might be doubtful whether section 108, Transfer of Property Act, applied. But that is not the case. As far as we can gather from karar B the lease was of the coffee plants only. We think, therefore, the Subordinate Judge is right and accordingly dismiss the appeal with costs.

APPELLATE CIVIL.

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

1893. August 21.

VENKATA REDDI (PETITIONER), APPELLANT,

v.

W. TAYLOR (COUNTER-PETITIONER), RESPONDENT.*

Letters Patent of the High Court, s. 15—Appeal—District Municipalitie Act (Madras) —Act IV of 1884, ss. 53, 59, 60—Profession tax—Trader—Provincial Small Cause Courts Act—Act IX of 1887, ss. 25, 27.

A petition for revision preferred under Provincial Small Cause Courts Act, s. 25, was heard and dismissed by one of the Judges of the High Court acting under the rules of Court framed under s. 13 of the Charter Act. The petitioner preferred an appeal under Letters Patent, s. 15:

Held, that the appeal was not barred under Provincial Small Cause Courts Act, s. 27, and was maintainable.

One who makes it his business to sell the produce of his own land for profit is a trader within the meaning of Madras Act IV of 1884, provided the sales are conducted in a shop or place of business.

Held by Parker, J., that one who has paid profession tax as a Sheristadar in one municipality is not on that account exempted from paying a further tax in respect of a trade carried on by him in another municipality under Act IV of 1884, Madras.

APPEAL under Letters Patent, s. 15, against the judgment of Mr. Justice Parker on civil revision petition No. 27 of 1892.

That was a petition under Provincial Small Cause Courts Act IX of 1887, s. 25, praying the High Court to revise the proceedings of K. Somayajulu Pantulu, District Munsif of Sompeta, in small cause suit No. 133 of 1891.

The plaintiff was the Taluk Sheristadar, and as such had paid profession tax under Act IV of 1884 (Madras) to the Municipality of Chittoor. Subsequently he was assessed to pay a further tax as a trader in Parlakimedi. He paid the amount demanded under protest and brought the present suit against the Chairman of the Municipal Council of Parlakimedi to recover the amount so paid. The suit was dismissed by the District Munsif and the plaintiff preferred the petition above referred to. The

* Letters Patent Appeal No. 8 of 1893.

petition was dismissed by Mr. JUSTICE PARKER, who delivered judgment as follows:—

PARKER, J.—The petitioner is a Taluk Sheristadar at Chicacole and has paid one rupee profession tax in that municipality. He has now been assessed as a grain merchant at Parlakimedi and sues to recover from the Chairman of that municipal council the amount which has been levied from him.

It is first urged that petitioner does not carry on trade in grain since the paddy which he sold was grown on his own lands. I am unable to accede to this contention. The petitioner contends that he cannot be said to trade in grain unless he bought the grain before he sold it. If this be so, no owner of a tea or coffee estate could be said to trade. The term 'trade' is not defined in the Act, but the meaning of the term as given in Wharton's Law Lexicon includes the exchange of goods for other goods or for money. I am of opinion that the petitioner does trade in grain.

The next contention is that as petitioner has paid profession tax at Chicacole, he cannot be taxed at Parlakimedi for the same year under section 60, Madras Act IV of 1884. In support of this contention I am referred to decisions in *Tuticorin Municipality* v. *South Indian Railway*(1) and *Municipal Council of Tellicherry* v. *Bank of Madras*(2). In the first of these cases it was held that a railway company having paid profession tax at Negapatam was not liable to be assessed for the same half-year at Tuticorin. In the second case it was held that the Bank of Madras having paid profession tax at Negapatam was not liable for the same tax at Tellicherry. But in both these cases it was the same business that was carried on, though in two different places. In the present case the petitioner carries on one business at Chicacole and another at Parlakimedi. He does not carry on grain trade at Chicacole or his work as Sheristadar at Parlakimedi. He cannot, therefore, be taxed in either municipality under section 59 upon his aggregate income from both sources, nor can he be assessed under section 53 upon more than one source of income in each municipality. Section 60 exempts a person from paying in a second municipality the tax which has been assessed under section 53 in another municipality. But petitioner has not been assessed, nor could he be assessed as a

(1) I.L.R., 13 Mad., 78. (2) I.L.R., 15 Mad., 153.

VENKATA REDDI v. TAYLOR.

trader in grain at Chicacole under section 53, and therefore he is not exempted by section 60 from paying at Parlakimedi.

The petition is dismissed with costs.

The petitioner preferred the present appeal under Letters Patent, s. 15.

Mr. *Anderson* and *Sriranga Chariar* for appellant.

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

JUDGMENT.—The preliminary objection is taken that the petitioner's remedy is exhausted by the order passed by Mr. Justice Parker under section 25 of the Small Cause Court's Act, from which it is contended no appeal is allowable by reason of section 27, which declares the decrees or orders of the Small Cause Court to be final, subject to the provisions of that Act. We observe that the revision contemplated in section 25 is by the 'High Court.' Mr. Justice Parker exercised such revisional jurisdiction under the rules of this Court framed under section 13 of the Charter Act. The judgment is, therefore, subject to the appeal provided by section 15 of the Letters Patent.

The preliminary objection must consequently be disallowed.

Passing on to the merits, we see no reason to differ from the learned Judge in holding that any person who makes it his business to sell for profit is a 'trader' within the meaning of the Municipal Act IV of 1884. We do not think the fact of what he sells being the produce of his own land makes him the less a trader, provided the sales are conducted in a shop or place of business as in this case. The other point is not pressed. The appeal fails and is dismissed with costs.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

FAKIRA.*

1893. October 25.

Penal Code—Act XLV of 1860, *s.* 224—*Escape from custody of village officers—Regulation XI of* 1816, *s.* 5.

On a charge under Penal Code, s. 226, it appeared that the accused had been apprehended on a hue and cry being raised as he was running away after committing robbery, and that he was handed over to the village magistrate and was by him placed in the charge of taliyaries for detention till the next morning when he was to be taken to the police station, and that he escaped from the custody of the taliyaries:

Held, distinguishing Queen v. *Bojjigan* (I.L.R., 5 Mad., 22), that the accused was rightly convicted of the offence charged.

CASE referred for the orders of the High Court under Criminal Procedure Code, s. 438, by the District Magistrate of Bellary.

The case was stated as follows:—

"One Korcha Fakira *alias* Donga Hanuma took to his heels "on 8th November last after robbing two Marwari merchants on "the tank bund of Hanisi, a village in Kudlighi taluk. He was "pursued, arrested and brought to the village chavadi by a washer-"man, who made him over to the village magistrate. Korcha "Fakira was illegally tied to a post of the chavadi and two tali-"yaries and two madigas were placed to watch him with a view to "make him over to the police. Before sunrise, while it was still "dark, the accused Fakira, on the pretence that he wanted to go "out for purposes of nature, was loosened and at once ran away. "He was thereupon charged before the Stationary Sub-Magistrate, "Kudlighi, under section 224, Indian Penal Code. The sub-"magistrate convicted the accused and sentenced him to undergo "imprisonment for four months.

"The custody of the taliyaries and madigas in this case does "not constitute lawful custody, inasmuch as the offence of daceity "was not committed in their presence. *Queen* v. *Bojjigan* (1).

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* Criminal Revision Case No. 487 of 1893.

(1) I.L.R., 5 Mad., 22

QUEEN-EMPRESS v. FAKIRA.

"Under these circumstances the conviction appears to be bad "in law, and I respectfully recommend that it may be reversed."

Counsel were not instructed.

BEST, J.—It appears that the accused had been apprehended on a hue and cry being raised as he was running away after committing a robbery. He was handed over to the village magistrate and was by the latter placed in charge of the taliyaries for detention till next morning, when he was to be taken to the police station. Early in the morning he asked to be allowed to go and ease himself, and availing himself of this opportunity, made his escape. He has been convicted under section 224 of the Penal Code and sentenced to four months' rigorous imprisonment. The district magistrate has referred the case under section 438 of the Code of Criminal Procedure with a view to the conviction being set aside as illegal on the authority of *Queen* v. *Bojjigan*(1).

In that case the accused had escaped from the custody of a taliyari and a toti by whom he had been arrested on suspicion. The custody was held to be not lawful, because the taliyari and toti, not being police officers, could not legally make the arrest for an offence not committed in their presence.

The present case is distinguishable, in that the prisoner on being arrested on the hue and cry was handed over to the village magistrate and was in custody of the taliyaries under his orders with a view to being handed over to the police. See *Queen-Empress* v. *Potadu*(2).

I do not think the conviction is illegal.

MUTTUSAMI AYYAR, J.—I am of the same opinion. By section V, Regulation XI of 1816, heads of villages are authorized and directed to apprehend all persons charged with committing crimes and to forward them to the police officer of the district. The arrest being legal and the detention at night being necessary to his being forwarded to the police officer, the principle laid down in *Queen* v. *Bojjigan*(1) is not applicable. There it was the village taliyari and toti who arrested the accused, and the arrest and therefore the subsequent custody were unlawful.

(1) I.L.R., 5 Mad., 22. (2) I.L.R., 11 Mad., 480.

APPELLATE CIVIL.

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

SRINIVASA AYYANGAR (COUNTER-PETITIONER), APPELLANT, 1893. October 6.

v.

QUEEN EMPRESS.

Letters Patent, s. 15—Appeal to two Judges—Sanction to prosecute granted by one Judge.

Where one Judge exercising the revisional jurisdiction of the High Court, in reversal of an order of a First-class Magistrate, had granted sanction under Criminal Procedure Code, s. 195, for a prosecution under Penal Code, s. 182, an appeal was preferred from his judgment under Letters Patent, s. 15:

Held, that no appeal lay, that section of the Letters Patent being inapplicable in cases of criminal jurisdiction.

APPEAL under Letters Patent, s. 15, from the judgment of Mr. Justice Best in criminal revision case No. 152 of 1893.

In that case his Lordship, in exercise of the revisional jurisdiction of the High Court, reversed an order of the First-class Sub-divisional Magistrate of Mannargudi and granted sanction under Criminal Procedure Code, s. 195, for the prosecution of the counter-petitioner for an offence under section 182, Penal Code. The counter-petitioner preferred the present appeal under Letters Patent, s. 15.

Parthasaradhi Ayyangar for appellant.

JUDGMENT.—The clause of the Letters Patent to which the petitioner refers has nothing to do with criminal jurisdiction. It does not, therefore, justify the appeal. The case of *Navivahoo* v. *Narotamdas Candas*(1) has been cited. This point, however, is only mentioned incidentally and does not seem to have been considered. We are unable to agree with the decision. Section 195 of the Criminal Procedure Code is also inapplicable.

The petition is therefore dismissed.

* Letters Patent Appeal No. 25 of 1893. (1) I.L.R., 7 Bom., 5.

APPELLATE CIVIL.

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

1893, August 30.

GANGARAJU AND OTHERS (DEFENDANTS NOS. 1, 4, 5 AND 6), APPELLANTS,

v.

KONDIREDDISWAMI AND OTHERS (PLAINTIFFS NOS. 1 AND 2, AND DEFENDANT NO. 2), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 13—Res judicata—*Rent Recovery Act (Madras)—Act VIII of* 1865—*Decision of a Revenue Court—Second suit in Civil Court—Question of title.*

In a suit for land it appeared that the defendant had obtained, under the Rent Recovery Act, a judgment that the present plaintiff should accept from him a patta for the land in question and deliver to him a corresponding muchalka, and subsequently an order for ejectment, which was executed. The present plaintiff did not appear when the above orders were made. The defendant relied on these proceedings as constituting a bar to the present suit:

Held, following *Rama* v. *Tirtasami* (I.L.R., 7 Mad., 61), that the decision of the Revenue Court was no bar to the suit.

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in appeal suit No. 197 of 1892, confirming the decree of V. Krishnamurthi Pantulu, District Munsif of Tanuku, in original suit No. 95 of 1891.

Suit to recover land with mesne profits. It appeared that on the 6th May 1890 the first defendant, who was the father of the other defendants, brought a summary suit against the present plaintiff under Rent Recovery Act (Madras), 1865, to enforce the exchange of patta and muchalka for the land in question. The present plaintiff did not appear before the Head Assistant Collector who passed an *ex parte* judgment against him. The decision of the Revenue Court was not complied with, and the present first defendant obtained and executed a warrant of ejectment. The present plaintiff moved the Revenue Court to set aside his decision, but this application was rejected on the ground that the summons had been duly served before the case was disposed of. The plaintiff thereupon brought the present suit, alleging that he

* Second Appeal No. 63 of 1893.

was the owner of the property in question and that the summary decision of the Revenue Court had been obtained in fraud of his rights.

The District Munsif passed a decree as prayed overruling the contention of the defendant that the decision of the Revenue Court was a bar to the suit. He referred to *Rama* v. *Tirtasami*(1), *Chunder Coomar Mundal* v. *Numee Khanum*(2), *Debi Prasad* v. *Jafar Ali*(3), *Boistub Churn Sein* v. *Trahee Ram Sein*(4), *Manappa Mudali* v. *McCarthy*(5), *Venkatachalapati* v. *Krishna*(6).

On appeal the Subordinate Judge affirmed this decree. The defendants preferred this second appeal.

Srirangachariar for appellants.

Venkatarama Sarma for respondents.

JUDGMENT.—Assuming that the suit was maintainable there can be no doubt that the decision is correct on the facts found.

It is contended, however, that the suit is not sustainable by reason of the decree in summary suit No. 72 of 1890 on the file of the Head Assistant Collector and of the order for ejectment under section 10 of Act VIII of 1865 (Madras).

The first plaintiff did not appear to defend that suit and a subsequent application of his to have the *ex-parte* decree set aside was dismissed. Hence the present suit on title.

As was held in *Rama* v. *Tirtasami*(1) the decision of a question of title by a Revenue Court is merely incidental, and no bar to a fresh suit on title in a Civil Court. Our attention has been called to the decision in *Ragava* v. *Rajagopal*(7). The learned Judges who decided that case held that the decision and order of a Revenue Court under section 10 of Act VIII of 1865 would bar a subsequent suit on title in the Civil Courts. But it does not appear that the decision in *Rama* v. *Tirtasami*(1) was brought to their notice. We are of opinion that the principle laid down in *Rama* v. *Tirtasami*(1) is correct.

We, therefore, dismiss this appeal with costs.

(1) I.L.R., 7 Mad., 61.
(2) 11 B.L.R., 434.
(3) I.L.R., 3 All., 40.
(4) 15 W.R., 32.
(5) I.L.R., 3 Mad., 192.
(6) I.L.R., 13 Mad., 291.
(7) I.L.R., 9 Mad., 39.

APPELLATE CIVIL.

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

1893. September 4.

VAIDYANATHA AYYAR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

CHINNASAMI NAIK (DEFENDANT), RESPONDENT.*

Contract Act—Act IX of 1872, s. 45, 263—Suit by surviving member of a firm alone—Succession Certificate Act—Act VII of 1889, s. 4—Suit by surviving partner and heir of deceased partner.

In a suit on a promissory note made by the defendant in favour of two Hindus carrying on business in partnership, it appeared that one of the partners was dead, and no succession certificate or letters of administration had been obtained. The plaintiffs were the surviving partners and the undivided sons of the deceased partner :

Held, that a surviving partner can sue alone for the recovery of a partnership debt :

Held further, that such a suit may be maintained by a surviving partner jointly with the heir of the deceased partner, in which case a certificate of heirship will be necessary, unless it appears on the face of the document sued on that the debt is a coparcenary debt.

CASE referred for the orders of the High Court by P. Srinivasa Rau, Second Judge of the Presidency Small Cause Court under Civil Procedure Code, s. 617.

The case was stated as follows :—

"This is a suit for the recovery of Rs. 91–14–6 on a promissory note alleged to have been executed by the defendant to a mercantile firm, of which the first plaintiff and one T. Viswanatha Ayyan were the partners.

The said T. Viswanatha Ayyan having died, the suit is brought by his representatives and the first plaintiff.

It is admitted that the said representatives have not obtained letters of administration or a certificate of succession. The defendant has allowed the suit to go *ex parte*. Nevertheless, as under section 4 of the Succession Certificate Act VII of 1889, no decree can be passed in plaintiff's favour unless he produces letters of administration or a certificate of succession, in cases where such production

* Referred Case No. 42 of 1892.

is required by law, I feel myself bound to consider whether this is a case in which the production of the letters or certificate is necessary.

The plaintiff's Vakil, Mr. K. Krishnamachariar, contends that such production is not necessary on two grounds:—*firstly*, the deceased person and the first and other plaintiffs being members of an undivided Hindu family, the plaintiffs, upon the death of the deceased member, became possessed of the estate by right of survivorship, and not by succession, so that the Succession Certificate Act does not apply to this case; and *secondly*, the first plaintiff and the deceased person were carrying on business as partners, so that, on the death of the latter, the former, as the surviving partner, can alone maintain the suit, without joining the deceased's representatives as parties to the suit, and without obtaining letters of administration or certificate in favour of such representatives. I entertain serious doubts as to the validity of these two grounds. As to the first ground, I was under the impression that the matter was concluded by the authority of the ruling of the Madras High Court in *Venkataramanna* v. *Venkayya*(1); but I am told that there are other decisions of our High Court to the contrary. These decisions are not reported; and it seems pretty clear that the aforesaid decision in *Venkataramanna* v. *Venkayya*(1) remains still unsuperseded. Nevertheless, I consider that it would be highly presumptuous on my part to take upon myself to decide the point one way or the other, when the existence of conflicting decisions of our High Court is brought to my notice. And, as to the second ground advanced by the plaintiff's Vakil, the decision of the Allahabad High Court, in *Gobind Prasad* v. *Chandar Sekhar*(2) is quite opposed to that of the Calcutta High Court in *Ram Narain Nursing Doss* v. *Ram Chundar Jankee Loll*(3), and I find no ruling of our own High Court on the subject in the published reports. Under these circumstances, I consider it very desirable to obtain a decisive ruling of the High Court upon the points in question, especially as such points arise in numerous suits in this Court. I, therefore, respectfully submit the following questions for the opinion of the High Court :—

(1) Whether the Succession Certificate Act VII of 1889 applies to a Hindu, who alleges that the claim to recover the money sued for in the suit has devolved upon him by right of survivorship

(1) I.L.R., 14 Mad., 377. (2) I.L.R., 9 All., 486.
(3) I.L.R., 16 Calc., 86.

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(and not of succession) upon the death of an undivided member of his family.

(2) Whether upon the death of one of the partners of a trading firm, the surviving partners can sue for the partnership debt, without joining in the suit the representatives of the deceased, and without obtaining letters of administration or a certificate in favour of the representatives :—*firstly*, in cases where they sue as members of the old firm, engaged in winding up the Partnership business ; and *secondly*, in cases where they take a new partner and bring the suits in their own names and in the name of the new member.

In regard to the first question, I think the Succession Certificate Act applies to the case of survivorship as well as to the case of succession. The Act makes no distinction between those cases in section 4. It is true that in section 1 the Act is called the Succession Certificate Act, and the preamble sets forth that one of the objects of the Act is to facilitate collection of debts on succession ; but I do not think that the word succession is used there in the sense in which it is technically used in the English translations of the Hindu laws, as distinguished from a right of survivorship. As the Act is applicable to all classes of Her Majesty's subjects in British India, the Legislature seems to have chosen the word 'succession' as applicable to all the classes, without reference to the peculiar character of the estate which one takes upon the death of another.

Further, the language used in section 4 of the Succession Certificate Act is too comprehensive to include cases of survivorship as well as those of succession. For the right of survivorship arises only upon the death of some one, and that right is inseparably coupled with the idea of property in which the deceased had an interest ; so that when a person brings a suit on the ground of his right of survivorship, claiming the money lent by or in the sole name of the person who is since dead, he is practically claiming to be entitled to the effects of the deceased person within the meaning of the said section. It cannot be otherwise ; he cannot say that he is claiming his own money ; for this would not be true.

In the foregoing views, I am confirmed by the decision of the Calcutta High Court in *Mussamut Josoda Koonwur* v. *Gourie Byjonath Sohae Sing*(1), passed in 1866 (only a few years after

(1) 6 W.R., 139.

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the passing of the old Act XXVII of 1860, the wording in which is the same as that in section 4 of the Act now in force). There the Court observed :—"We attach but little weight to the argument that, if the estate were joint, Gouri Byojonath took "any debts outstanding in the sole name of Joy Kurran (the "deceased), like the rest of the joint estate by survivorship, and "therefore a certificate was unnecessary and could not be granted. "We are of opinion that whether the nephew takes his uncle's "share by mere survivorship or by inheritance, if he takes on the "ground of their being joint in estate, he succeeds to and becomes "entitled to the effects of the deceased within the meaning of "Act XXVII of 1860."

That this is the correct interpretation of the law is also evident from the main object of the law, namely, the protection of the debtor against liability to pay debts twice over. For, if a certificate is needed for the protection of a debtor, in the case in which the person who demands payment happens to be one who has succeeded to the deceased creditor's estate, it is equally needed where the claimant is one who has acquired a right of survivorship ; the result in both the cases being the same ; in both the cases the plaintiffs seek to recover money lent by the deceased ; and in both the cases the defendants run the risk of paying the debts twice over, if not properly protected by the law.

The case, however, would have been different if one of the objects of the Succession Certificate Act were to establish the exclusive right of any person to recover the moneys lent by a deceased person ; but such does not seem to be the case. For, although some inquiry is made for ascertaining whether the applicant for a certificate is entitled to have it or not, yet no question of title is judicially determined as the result of such inquiry. In administering the provisions of Act XXVII of 1860 (the Act which was in force prior to Act VII of 1889), it was observed by the High Court of Madras that "it has not been the practice of the Courts to enter on "the determination of intricate questions of law or fact "—*Surfoji* v. *Kamakshiamba*(1). Similarly the High Court of Allahabad are of opinion that "it is clear that the issue of joint certificates (to "two or more persons) would ordinarily defeat, instead of subserving "both the objects of the Act" ; the duty of the Judge is to determine

(1) I.L.R., 7 Mad., 452.

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which of the applicants has the better right—*Madan Mohan* v. *Ramdial*(1). Then according to the Calcutta High Court the person who has the largest interest in the estate is entitled to a certificate—*Azeem Khan* v. *Mussamut Ameerun*(2). For, says the same Court in another case, "the Court has by the law a discretion "as to whom it shall entrust with this important duty, out of the "several heirs who have a right to it"—*Abdool Ali* v. *Abidunnissa Khatoon*(3). The reason for granting the certificate to any one of the heirs and not necessarily to all who have a right to recover the debt is to be found in another judgment of the same High Court where it is observed that "the objects of the Act are to "enable debtors to get sufficient acquittances when they pay money "due to the estate of a deceased; and to preserve that estate from "loss by giving some one the right to collect the debts, lest they "should be lost, *e.g.*, by the operation of the Law of Limitation "or otherwise. This latter object is also contemplated by the "provision that security is to be taken from the person who obtains "the certificate. In effect the holder of the certificate is a trustee, "liable to account for moneys received by him, to the legal heir "or representative of the deceased,"—*in the matter of the petition of Nobodip Chunder Biswas*(4). The spirit of all these rulings is embodied in clause (3), section 7 of the Succession Certificate Act VII of 1889, which is now in force, and which provides that "if the "Court cannot decide the right to the certificate, without determin-"ing questions of law or fact, which seem to be too intricate and "difficult for determination in a summary proceeding, it may, "nevertheless, grant a certificate to the applicant if he appears "to be the person having *primâ facie* the best title thereto."

Under these circumstances, it seems to me that in granting a certificate under the Act in question, it is quite unnecessary to consider whether the applicant is one upon whom the estate has devolved by right of survivorship, or is one who has succeeded to the estate. All that the Court has to do is to invest one person as a trustee, as it were, for all who may be interested in the matter, with the power of collecting debts and giving complete discharges to the debtors.

Looked at in this light, the question whether the plaintiff in

(1) I.L.R., 5 All., 195. (2) 12 W. R., 38.
(3) W.R., 1864., Misc., 41. (4) I.L.R., 8 Calc., 868.

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any suit claims the money by right of survivorship or of succession becomes quite irrelevant, and the liability of the debtor to pay the debts only to the person who holds the certificate and not to others becomes quite apparent.

Furthermore, it is worthy of notice that the objects aimed at by the Legislature in enacting the Succession Certificate Act appear to be two, viz., the facilitation of the collection of debts, and the protection of debtors against all future liability. These two are coupled by a copulative conjunction and not separated by a disjunctive one in the Act, so that, unless effect is given to both those objects, the provisions of the Act are not satisfied. If we hold that a person who relies upon his right of survivorship is not bound to obtain a certificate, we are only dealing with one of the two objects of the Act, viz., the object which is in favour of the creditor; but the other object, which has reference to the protection of the debtor would remain unsatisfied, unless we insist that the plaintiff shall obtain a certificate and afford good protection to the defendant thereby. This is what the Madras High Court held in *Venkataramanna* v. *Venkayya*(1) their Lordships observe that "though Act VII of 1889 applies only to cases of succession, "it states in the preamble that it is intended to afford protection "to parties paying debts to the representatives of deceased persons. "It would naturally impair the protection intended to be afforded "by the statute to throw in every case on the debtor the obliga-"tion of making an inquiry at the time of payment, whether the "person claiming to recover the debt claims by right of survivor-"ship or of inheritance. Our answer, therefore, is that defend-"ant is entitled to insist upon the production of a certificate "under Act VII of 1889, unless it appears on the face of the bond "that the debt was due to the joint family consisting of the father "and son."

The unreasonableness of throwing upon the debtor the duty of making inquiries as to the particular nature of the estate taken by the representative of the person with whom he dealt would be quite evident when we consider the most complicated nature of the Hindu law of inheritance. The descent or devolution of property differs materially not only with reference to the status of the members of the family, as divided or undivided, and as sons

(1) I.L.R., 14 Mad., 377.

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of the body or sons adopted, but also with reference to the mode in which the acquisition of the property was made, *e.g.*, whether it was acquired by the forefathers, or by any individual member himself; or whether it was inherited from a person related to all the members in an equal degree, or related to one of them only in particular. It would be impossible for a stranger like the debtor to ascertain all such intricate matters; and even supposing that he found it possible to make the inquiries, and believed conscientiously that such and such member of the family was entitled to collect the debt from him; or going a step further, even supposing that a Court of Justice, in a suit brought by one of the members of the family, determines that he is entitled to recover the debt, this would not in any way tend to exonerate the debtor from liability to pay the debt once more, if another member of the family, who was not a party to the first suit, and upon whom therefore the judgment was not binding, sues the debtor for the same debt, and proves that he, and not the plaintiff in the former suit, was the rightful party to recover the debt.

This hardship would be much greater when the debtors happen to be corporations or companies, in which the really interested parties are not the managers, but others who may be far away from the scene of the transactions and utterly unacquainted with persons dealing with their firms—as fairly illustrated in the case of *Muttammal* v. *The Bank of Madras*(1). There a Hindu widow sued the Bank for the return of certain Government promissory notes deposited by her deceased husband, and the Bank declined to return the deposit to the widow, unless she obtained letters of administration. The High Court was of opinion that there was no reasonable doubt as to the plaintiff being a party entitled to recover the deposit; and yet allowed the Bank's objections to prevail with the following observations:—"The circumstances are "that the money in question, and no doubt very much larger sums "are in the charge of the Bank, on behalf of shareholders and "depositors, in whose interest the Directors and Secretary act. It "is their duty to see that any moneys they pay out are paid to the "parties legally and rightly entitled thereto, and to obtain proper "receipts and discharges therefor. The Directors do not indi-"vidually owe such moneys but are mere trustees. They have

(1) I.L.R., 7 Mad., 115.

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"large claims to pay constantly to representatives of deceased "shareholders and depositors. If any such payments are made to "persons not properly qualified to give discharges, the interests of "the shareholders and possibly of the depositors may suffer."

Thus, it seems to me that it is clear that the protection which is intended to be given to debtors by the Succession Certificate Act would be lost, if, for any reason whatsoever, they be compelled to pay debts to persons who have not obtained certificate or letters of administration; and thus one of the objects of the Act is defeated.

Nor, is the other object of the Act, viz., the facilitation of the recovery of debts, gained if the creditor, under any circumstances, fails to obtain a certificate or letters of administration in respect of outstandings due to a deceased person. For, he will be under the necessity of proving his title to recover the money in every suit which he might institute against the several debtors of the deceased person; and chances are that judgments will be in his favour in some cases and not in others, for the quantity and quality of the testimony may not be the same in all the cases.

The only thing that facilitates the collection of the deceased person's debts on one hand and gives protection to the debtors on the other is the certificate or letters of administration; and if this is dispensed with, both the creditor and debtor would suffer, and the highly beneficial objects of the Succession Certificate Act frustrated.

It is contended that section 4 of the Probate and Administration Act V of 1881 is against granting of letters of administration to a person who has the right of survivorship. But I do not think that this section has any such effect. It provides for the vesting of the property in the person who possesses the right of survivorship in preference to the one who holds letters of administration; and I have shown above that the granting of letters or certificate does not alter the line of succession or affect the existing rights in any way. It simply enables its holder to collect debts as a trustee for the benefit of himself and others who may have a right to participate therein, giving proper acquittances to the debtors at the same time. This is evident from section 23 of the said Act, which (second clause) provides that "when several "such persons (*i.e.*, representatives) apply for administration, it "shall be in the discretion of the Court to grant it to any one or "more of them." This shows that the grantee of the letters of

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administration is not necessarily the only person entitled to the effects of the deceased; or in words it shows that he is simply a trustee for self and others in the same way as the holder of a certificate is. Hence I am of opinion that section 4 of the Probate and Administration Act is no bar to the granting of a certificate to any one of the representatives without reference to the character of the estate he takes.

As to the second question:—In this Court we have always acted upon the principle of the English law, that in trading partnerships "although the right of the deceased partner devolves on his "executors, the remedy survives to his co-partner, who alone must "enforce the remedy by action, and who will be liable on recovery "to account to the executors or administrators for the share of the "deceased." Williams on Executors, 8th Edition, page 850, referred to in *McClean* v. *Kennard*(1). This is in consonance with the Indian Contract Act, which provides (section 253, clause 7) that by death of one of the partners, the partnership is dissolved as between all other members by the operation of law, and that (section 263) after such dissolution, the rights of the partners continue in all things necessary for winding up the business of partnership; so that it is quite competent for the surviving members to sue in their own names for the recovery of the partnership debt, and it seems to me that section 45 of the Contract Act, which provides that when a promise is made to two persons jointly, the right to claim performance rests with them jointly, and after the death of one of them, with his representatives and the survivor, does not apply to partnership transactions, which are governed by special rules as already indicated. These views are supported by the ruling of the Allahabad High Court in *Gobind Prasad* v. *Chandar Sekhar*(2), where all the authorities upon the subject have been reviewed; and the inconvenience of insisting upon the representatives of the deceased partner being joined with the surviving partner in bringing the suit has been fully pointed out. But this judgment of the Allahabad High Court has been dissented from by the High Court of Calcutta in *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll*(3), in which it is held that the representatives of the deceased are necessary parties in a suit brought by

(1) L.R., 9 Ch. App., 346. (2) I.L.R., 9 All., 486.
(3) I.L.R., 18 Calc., 86.

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the surviving partners for the recovery of a partnership debt; and that such representatives should obtain certificate of succession. I find no reported decision of the Madras High Court on this point.

Further, it seems to me very doubtful whether even according to the decision of the Allahabad High Court, the surviving partners of a firm can alone sue for the partnership debt in cases where they take new partners and constitute in fact a new firm altogether. The new firm has no claim against persons who owed moneys to the old firm, and the representatives of the deceased partners of the old firm can have no right to compel the new firm to account for moneys due to them by the old firm. It would in such cases be, I think, necessary to protect the interests of the representatives of the deceased partners by making them parties to the suit.

The fact of the partnership firm in this case being composed of the members of a Hindu undivided family does not, I think, make much difference. These members possess a double character, their firm being carried on as the creature of relationship and of contract as well. Their rights and obligations are different in each of these two conditions; and they cannot take advantage of the privileges common to one of the said two capacities when dealing under the capacity."

Sadagopachariar and *Krishnasami Ayyangar* for plaintiffs.

The defendant was not represented.

OPINION.—There can be no doubt that a surviving partner can sue alone for the recovery of a partnership debt, and, in that case, no certificate will be necessary. On this point we agree with the Bombay High Court in *Motilal Bechardoss* v. *Ghelabhai Hariram*(1).

We are also of opinion that the suit is maintainable if brought by the surviving partner conjointly with the heir of the deceased partner. In the latter case a certificate of heirship will be necessary, unless it appears, on the face of the document sued on, that the debt is a coparcenary debt—compare *Venkataramanna* v. *Venkayya*(2).

The above is, we think, a sufficient answer to the questions referred to us.

(1) I.L.R., 17 Bom., 6. (2) I.L.R., 14 Mad., 377.

APPELLATE CRIMINAL.

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

1893. October 27. November 1.

QUEEN-EMPRESS

v.

MARIAN CHETTI AND ANOTHER.*

Indian Ports Act—Act X of 1889, *ss.* 6, 8, *order purporting to be made under the Act by Conservator of port—Public body authorized by Legislature to make rules, powers of.*

The Conservator of the Port of Negapatam, purporting to act under the Indian Ports Act, s. 8, made and published an order that when a certain flag was flying at the signal station, all boats returning from the sea should cast anchor and not come inside the river. The Local Government had made a rule with reference to sec. 6 (*k*) of the above Act requiring boat owners to "carry out at all times all orders issued by the Conservator in connection with the plying of their boats and which are not inconsistent with the regulations issued by Government." A charge was brought against two persons, being the owners and tindals of licensed cargo boats for neglecting to obey the aforesaid order, and they were convicted under Indian Ports Act, s. 8 (2), by the Conservator in his capacity as Special First-class Magistrate:

Held, that the order was *ultra vires* and the conviction was accordingly illegal.

Per cur. A public body, whether the Executive Government or a corporation, being entrusted by the Legislature with the duty of making rules, cannot relieve itself of the responsibility and depute other agencies to discharge the duty.

CASE referred for the orders of the High Court by H. M. Winterbotham, Acting District Magistrate of Tanjore, under Criminal Procedure Code, s. 438.

Together with this case was taken up for disposal a petition preferred by the accused persons under Criminal Procedure Code, ss. 435 and 439, praying for the intervention of the High Court in revision.

The case was referred as follows:—

"The two accused are owners and tindals of two licensed "cargo boats plying at the Negapatam port. They have been con- "victed under section 8 (2) of the Indian Ports Act, 1889, of "wilfully and without lawful excuse neglecting to obey a lawful "direction of the Conservator, and have been fined Rs. 30 and Rs.

* Criminal Revision Cases Nos. 273 and 318 of 1893.

"40 respectively. The facts proved against them are that they "brought their boats from the sea into the river while a certain "flag marked W was flying at the port signal station. On April "23rd, 1891, the Port Officer appears to have published a notice "in Tamil, of which a copy is with the record of the case. I "also enclose a translation. This notice directs that when a flag "marked W is hoisted at the signal station, all boats returning "from the sea should cast anchor and not come inside the river. "The notice purports to lay down a standing rule applicable to "all boats at all times. The object of the rule (apart from the "question of its legality) is not clear, but however laudable its "object may be, it appears obviously improper to apply one and "the same restriction to all boats, whether loaded or unloaded, "and irrespective of the depth of water they draw.

"As to the legality of the rule, the judgment states that it "was framed and published under section 8 of the Indian Ports "Act. There is nothing in this section which confers on the Con- "servator the power to frame rules, and if the Conservator had "the power, it would not be necessary specially to invest the Local "Government therewith as is done in section 6.

"Rule 16 of the boat rules sanctioned by Government em- "powers the registering officer 'to prevent any registered boat "from leaving the shore when in his judgment danger would be "incurred by so doing.' Rule 17 forbids any registered boat to "ply 'in rough weather' if loaded with passengers or cargo "greater in number or quantity than that 'authorized for the "occasion' by the registering officer, but it is, I think, beyond "the Port Officer's authority to lay down a general rule that no "boat shall enter the river when a certain flag is flying, and I "think the punishment of the accused for disobeying the rules is "illegal.

"On general principles it appears objectionable that the special "magistrate should try persons for an offence committed in con- "tempt of his own authority, but in respect of offences punishable "under the Indian Ports Act, there appears to be no legal prohi- "bition similar to that in section 487, Criminal Procedure Code. "The interest of a magistrate in enforcing obedience to an order "issued by him in another capacity is, I think, not a personal "interest within the meaning of section 555, Criminal Procedure "Code.

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"The two accused ought not to have been tried jointly, but "with reference to section 61 of the Indian Ports Act this is not a "material irregularity.

"The special magistrate has not been empowered to try cases "summarily (*vide* notification No. 387, *Fort Saint George Gazette*, "December 16th, 1890, page 1041, Part I). He should, there-"fore, have observed the directions of sections 243 and 364, Crimi-"nal Procedure Code.

Mr. *W. Grant* and *Narayana Ayyangar* for the accused.

The *Acting Public Prosecutor* (*Subramanya Ayyar*) in support of the conviction.

JUDGMENT.—The act charged as an offence is the bringing a boat into the Negapatam river in disregard of a general order passed by the Port Conservator to the effect that boats should not be brought in while the flag W is flying. This act is said to be punishable under section 8 of the Ports Act. That section authorizes the Conservator to give directions for carrying into effect any rule passed under section 6 of the same Act, and goes on to make it penal to disobey any such lawful direction. It has therefore to be seen whether the Conservator was carrying into effect any valid rule passed under the Act. The rules to which we have been referred are those numbered V and VIII, being rules passed with reference to clauses (*f*) and (*k*) of section 6 respectively. In our opinion there is clearly no connection between the former of these rules and the direction which in this case has been disobeyed.

Rule VIII is a rule of wider scope, for it requires boat owners to "carry out at all times all orders issued by the Conservator in "connection with the plying of their boats and which are not "inconsistent with the regulations issued by Government."

In order to put an interpretation on the rule VIII, and to see whether it covers the present case, we think that the rule must be read with the clause of the Act under which it is framed and the other clauses specifying the matter in respect of which rules may be made by the Government. It must be presumed that the Government intended to pass a rule which they were authorized to pass by the terms of clause (*k*) of the section, and a construction which has the effect of extending the operation of the rule to matters not covered by clause (*k*) ought, we think, if possible to be avoided. Now when it is seen that by clause (*a*) of the

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section the Government is empowered to make rules for regulating the time at which vessels are to enter or leave any port, it seems tolerably clear that the rules to be framed under clause (*k*) were not intended to regulate the entry or exit of vessels in the matter of time. This being so, we do not think that the rule VIII passed with reference to the latter clause can be taken to refer to such matters. Accordingly the direction of the Conservator not to bring boats into the river when a certain flag is flying cannot be a direction for carrying into effect the rule in question, and therefore no lawful direction was disobeyed. In referring to clause (*a*), we do not overlook the fact that boats may go out of the river without leaving the port. That may be so. We should still be disposed to think that the regulation intended by clause (*k*) was a regulation different in kind from that intended by clause (*a*).

There is however another reason why the conviction cannot be supported. The charge is not based immediately on an alleged breach of rule VIII; indeed no rule at all is mentioned in the charge. The conviction can only be supported on the ground that the direction of the Conservator which was disobeyed was a direction lawfully given in pursuance of an authority lawfully conferred on him by rule VIII or some other rule. To support the conviction it has to be shown that the Government is by section 6 of the Act authorized to empower other persons to make rules such as the one which has been disobeyed in the present case. In our opinion, the contention cannot rightly be maintained, and if rule VIII or any other rule purports to give the Conservator authority to make such rules, that rule is to that extent *ultra vires* and therefore void. In the case of power being by statute given to the Government or other public body to make rules having the force of law, the maxim *delegatus non potest delegare* must, we think, be applied. When the legislature entrusts to some public body, it may be the Executive Government or a corporation, the duty of making rules, such public body cannot, in our judgment, relieve itself of the responsibility and depute other agencies to discharge the duty. The authority to make rules must remain in the hands to which it was entrusted. It is absurd to suppose that the legislature intended this important authority to be exercised by any person whom the Government might choose to select. The rule laid down by the Conservator

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may be a perfectly reasonable one, and it may be one which the Local Government may make under section 6. On this we offer no opinion. At present it is enough to say there is no such rule having the force of law, and therefore the conviction as for breach of it must fall to the ground.

For these reasons we think the conviction should be set aside and the fine, if paid, refunded. We would add that in these cases where the charge in effect relates to an alleged breach of a rule passed under an Act, care ought to be taken to specify the particular rule said to have been infringed.

APPELLATE CIVIL.

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

1893. September 13. October 31.

RAMAYYA AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

VENKATARATNAM (PLAINTIFF), RESPONDENT.*

Hindu law—Liability of son for father's debts—Civil Procedure Code—Act XIV of 1882, *ss.* 43, 244—*Suit for money—Non-joinder of plaintiff's undivided brother—Suit against sons of a deceased judgment-debtor—Decree for money against father to be discharged by instalments—Previous execution proceedings—Limitation Act—Act XV of* 1877, *sch. II, arts.* 120, 122.

A personal decree on a mortgage was passed against a Hindu (the mortgagor) and his two sons on 19th October 1877. The decree provided for payment of the secured debt in various instalments by May 1895. The mortgagor died in 1883 having discharged part of the debt. The decree-holder having attached certain family property in execution, the mortgagor's two younger sons, who had not been born at the date of the above decree, objected that their shares were not liable to attachment. This objection prevailed, the Court expressing the opinion that the matter in controversy should be determined in a regular suit. The other defendants in the suit of 1877 had both died in the interval, one of them leaving infant sons.

The decree-holder (in whose sole name the mortgage stood) now sued the sons of the mortgagor and their infant nephews in 1891 and obtained a decree for the payment out of the family property of all the unpaid instalments. A plea of non-joinder was raised, *inter alia*, on the ground that the plaintiff had an undivided brother:

Held, (1) that since the plaint (as amended) showed that the plaintiff sued as

* Appeal No. 91 of 1892.

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managing member of his undivided family, the omission to join his brother was a merely formal error and was not fatal to the suit;

(2) that the plaintiff was not precluded from maintaining this suit against the sons of the mortgagor by Civil Procedure Code, s. 43 or s. 244;

(3) that the period of limitation applicable to the suit was six years, and that time began to run for the purposes of limitation from the date when each instalment would have become due from the deceased judgment-debtor;

(4) that the plaintiff was entitled to a decree for payment out of the family property of all such instalments as would have so become due at the date of the suit, and for a declaration only as to the subsequent instalments.

APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in original suit No. 7 of 1891.

In original suit No. 5 of 1877 the plaintiff brought a suit on a mortgage of 1873 against Chidambarayyar and his two sons and obtained a money decree of which the amount was made payable by instalments. Part only of the judgment-debt was discharged and Chidambarayyar died in 1883, two more sons having been born to him since the date of the decree. In 1888 the decree-holder applied for execution against his four sons and attached part of their family property. The two younger sons objected to the attachment so far as it affected their shares: their objection prevailed in the District Court and the attachment was accordingly raised. On an appeal by the decree-holder the High Court upheld the order of the District Judge in the view that the matter in controversy was one that should be determined in a regular suit and not in execution proceedings. In the meantime the other defendants in the previous suits had died, one of them leaving two minor sons.

The decree-holder now sued the two younger sons who had objected to the attachment, and also the infant sons of their brother, for a decree "declaring that the defendants are bound to "pay at once on the liability of the entire family property includ-"ing the defendants' property already caused to be attached by "the plaintiff, the amount with interest of the past instalments "due up to date and the amounts of the future instalments "according to their respective instalments, &c."

The defendants raised various pleas which are stated in the following judgment, including a plea that the suit was bad for non-joinder of an undivided brother of the plaintiff. This was the subject of the fifth issue which the District Judge decided in favour of the plaintiff on the ground that the mortgage sued on in 1877 was executed in favour of the plaintiff only. The third issue

raised the question when the younger sons of Chidambarayyar were born, and the District Judge found that they had not been born at the date of the decree in the previous suit. There was no plea or evidence that the secured debt had been incurred for immoral purposes, although it was averred that it had not been contracted for the benefit of the family. As to the question whether the suit was maintainable the District Judge in paragraph 14 of his judgment (which is expressly referred to by their Lordships) said:—"I have no hesitation in deciding that the suit will "lie. This was a debt incurred for family purposes by the father "of the first and second defendants, the grandfather of the third "and fourth defendants. The defendants have by survivorship "taken the family property. I can see no reason why this is not "a good suit. The Bombay cases cited *Merwanji Nowroji* v. "*Ashabai*(1) and *Bhavanishankar Shevakram* v. *Pursadri Kalidas*(2) "refer to decrees which could be executed, but this previous "decree cannot be executed against these defendants."

The District Judge passed a decree against all the defendants for payment out of the family property of all the instalments down to May 1895. The two defendants, who had objected to the attachment as above stated, preferred this appeal.

Pattabhirama Ayyar and *Venkatarama Sarma* for appellants.

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

JUDGMENT.—Appellants' father, Maddi Chidambarayyar, was judgment-debtor and respondent Venkataratnam was execution-creditor in original suit No. 5 of 1877 on the file of the District Court of Kistna. Besides the minor appellants, who are twins, Chidambarayyar had two other sons named Veerayya and Rama Murti and subsequent to the decree in the above suit, the former died in coparcenary without issue and the latter died leaving him surviving two minor sons, the third and fourth defendants in the present suit. Prior to 1873, Chidambarayyar had dealings with Venkataratnam for several years, and on the 19th March of that year the former executed in favour of the latter the mortgage exhibit A as security for the sum of Rs. 8,000 then found due by the one to the other. It was upon this mortgage, original suit No. 5 of 1877 was brought against Chidambarayyar and his two elder sons Veerayya and Rama Murti, but only a money decree

(1) I.L.R., 8 Bom., 1. (2) I.L.R., 6 Bom., 292.

was obtained against them. The decree directed them to pay respondent Rs. 9,677-2-5 with interest at 6 per cent. per annum from date of suit to date of decree, Rs. 6,000 odd in three specified instalments in 1877 and 1878 and the balance 4,250 by yearly instalments of Rs. 250 commencing with the 1st May 1879. The decree was passed on the 19th October 1877 and Chidambarayyar died on the 28th December 1883 after having paid part of the debt. On the 19th April 1888, respondent applied for execution against Chidambarayyar's four sons, viz., Veerayya and Rama Murti, who were parties to the decree, and against appellants who, as alleged by respondent, are twins born subsequent to the suit, and in pursuance of this application he attached some of the property belonging to Chidambarayyar's family. On appellants objecting to the attachment so far as it affected their shares, the District Court raised it on the ground that the younger sons were not parties to the decree under execution and that a fresh decree should be obtained against them before the property which passed to them by survivorship could be proceeded against in execution. The District Court made its order on the 18th September 1889, and on appeal preferred from that order under section 244, Civil Procedure Code, the High Court confirmed it on the 21st October 1890. Hence this suit.

In his plaint, respondent prayed for a decree declaring that defendants are bound to pay at once on the liability of the entire family property including their interest and already caused to be attached Rs. 1,792, the amount of six past instalments from 1st May 1885 to 1st May 1890 and Rs. 1,250, the amount of five future instalments when they become due with the condition of paying interest in default of payment on the due date as per terms of the decree in original suit No. 5 of 1877. The plaint prayed also for an injunction, for costs of the suit and for such other reliefs as the Court may deem it proper to grant.

Respondent's case was that, as sons taking ancestral property by survivorship on the death of their father, appellants were liable for the debt sued for. The sons resisted the claim on the following grounds, viz., (1) that the suit is bad for non-joinder of respondent's brother, (2) that at the date of the former suit, appellants were alive and the suit is therefore barred by section 43, Civil Procedure Code, (3) that the claim is time-barred, and (4) that the debt in question is not binding upon them. The District

Judge gave judgment for respondent with costs and directed that defendants Nos. 1, 2, 3 and 4 do pay plaintiff Rs. 1,792 (the six past instalments and interest thereon), together with interest at 6 per cent. per annum from date of plaint to date of payment from the property of the family in the hands of the defendants and ordered further that the defendants do pay the five future instalments on the respective dates on which they fell due with interest at 6 per cent. from those dates from the property in their hands. Against this decree, first and second defendants have appealed and they reiterate the grounds of defence in support of their appeal and also urge that the suit is either not maintainable at all or at least in its present form. On the merits, there can be no doubt that appellants are liable to pay their father's debt. Respondent deposed that the debt in dispute was contracted on account of the trade which Chidambarayyar carried on and of the cultivation of his lands. Appellants offered no evidence to show that the debt was either illegal or immoral, nor did they allege either that no ancestral property came to them by survivorship or that such property as so came was not sufficient to satisfy respondent's claim. The contest in appeal has reference in the main to several preliminary objections urged against the claim and the first of them is the non-joinder of respondent's undivided brother as a co-plaintiff. This formed the subject of the fifth issue, and the Judge determined it in respondent's favour observing that no evidence need be brought on that issue. It appears that appellants and respondent's undivided brother asked that the latter should be included in the suit, but that their application was refused on the ground that he was not a necessary party. The procedure followed by the Judge cannot be reconciled with the policy of section 32, Civil Procedure Code, as explained in *Vydianadayyan* v. *Sitaramayyan*(1) and with the principle that, when the debt sued for is due to a joint Hindu family, the debtor is entitled to insist that all the joint creditors, from whom he can claim a discharge, ought to be parties to the suit in order that the decree which may be passed therein may effectually discharge him as against all. It appears, however, that respondent amended the plaint by describing himself as managing coparcener and representative of the joint family. The omission, therefore, to make respondent's brother a party to

(1) I.L.R., 5 Mad., 52.

the suit is by reason of the amendment a mere formal error by which appellants cannot be prejudiced. As regards the second preliminary objection that this suit does not lie, the Judge very properly disallowed it for the reasons mentioned in paragraph 14 of his judgment. The right which respondent seeks to enforce is that of the creditor to recover the debt of a deceased Hindu father from his sons to the extent they take ancestral property by survivorship, and the ground of action is that by Hindu law it is the pious obligation of the latter to discharge, so far as ancestral property permits, the debt which the former died without paying. The present suit is not a suit to enforce the original mortgage because it has merged in the money decree in original suit No. 5 of 1877. Nor is it a suit to enforce the decree in that suit which can only operate *inter partes*. It is a suit to enforce an obligation imposed by Hindu law on the son to pay upon his father's death his debt in certain contingencies, an obligation which was not adjudicated upon in the previous suit and which can only be enforced by a fresh suit. In *Arunachala* v. *The Zamindar of Sivagiri*(1) and *Natasayyan* v. *Ponnusami*(2), this Court allowed such obligation to be enforced by a new suit. In *Hanumantha* v. *Hanumayya*(3) the Full Bench observed that, to enforce the liability of ancestral property in the hands of sons to satisfy their father's debt, the holder of a money decree must have recourse to a separate suit.

The third preliminary objection is that the question whether ancestral property is liable or not for the father's debt in the present suit is one which relates to execution of the decree in original suit No. 5 of 1877, and that the order whereby this attachment was raised was an order made under section 244, Civil Procedure Code, and that no fresh suit can be brought. This contention is however at variance with the order of this Court passed in an appeal preferred under section 244 on the 21st October 1890. It must also be observed that this order is in accordance with the principle laid down by the Full Bench in *Hanumantha* v. *Hanumayya*(3). It may also be noted here that, under section 234, Civil Procedure Code, an execution-creditor can only proceed against the property of a deceased debtor in the hands of his representatives and not against the property of the representative. It is loosely said at times that joint ancestral property

(1) I.L.R., 7 Mad., 328. (2) I.L.R., 16 Mad., 99. (3) I.L.R., 5 Mad., 232.

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in the hands of a son is under the Mitakshara law assets for the payment of the father's debt, but it is not so *per se*, but assets only when the debt is either admitted to be binding or when in case of a *bonâ fide* dispute, it is finally adjudicated in a fresh suit to be neither illegal nor immoral.

Another preliminary objection is that the order passed by the Judge on the 18th September 1889 and confirmed by the High Court on the 21st October 1890 was an order made under section 280 of the Civil Procedure Code and that a declaratory suit is the only one which can be maintained under section 283 for the purpose of rendering that order inoperative. That was clearly not an order made under section 280. It purported to be made under section 241, and there was an appeal to the High Court and the final adjudication there was to the effect that the matter then in controversy was one which ought to be dealt with not in execution, but in a regular suit.

The fifth preliminary objection is that appellants were in existence before the date of suit No. 5 of 1877, and that the present suit against them is consequently barred by section 43 of the Civil Procedure Code. We are not prepared to attach weight to this objection for two reasons, viz., (1) because the cause of action in the present suit is not the same as in the previous suit and (2) because we concur in the Judge's finding that appellants were born subsequent to the former suit. We adopt the reasons mentioned in paragraph 8 of the Lower Court's judgment.

Two more objections are argued in support of this appeal. It is urged that the plaint asked only for a declaratory decree and that the Judge passed a decree for payment not only of instalments which had accrued due prior to suit but also those which had not then become due. So far as it relates to future instalments, the decree should have been merely declaratory, and it was not competent to the Judge to direct payment of a debt in respect of which the cause of action had not arisen at the date of suit. The clause in the plaint which prays for a decree declaring that defendants are bound at once to pay Rs. 1,792, the amount of the past six instalments, is ambiguous, but it prays also for such relief as the Court may deem proper and a direction that the instalments which had become due be paid awards only such as are properly claimable on the facts of the case. However imperfect the wording of the clause may be, there is reason to think

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that the intention was to claim consequential relief in respect of past instalments. The payment of the full institution fee, the words 'are bound at once to pay' and the prayer for such other relief as the Court may grant show that a reasonable construction has been placed on the plaint and that the decree is substantially correct in so far as it relates to past instalments.

The last preliminary objection is that the suit is time-barred. The Judge holds that time began to run from the date on which each instalment fell due and that the period of limitation is twelve years under article 122, schedule II of the Act of Limitations. But it is clear that article 122 is not applicable, for this is not a suit upon a judgment, and under the Civil Procedure Code no second suit will lie upon a previous judgment, the remedy provided being its execution in the manner therein prescribed. As was observed in *Natasayyan* v. *Ponnusami*(1), it is article 120 that governs the suit and the statutory period is six and not twelve years as considered by the Judge. According to article 120, time begins to run from the date when the right to sue accrues and applying this principle to the case before us, we agree with the Judge that time begins to run from the date on which each instalment becomes due. To this view, appellants' pleader objects first on the ground that the son's obligation to pay the father's debts arose immediately on the father's death, which in this case occurred on the 28th December 1883, whereas the present suit was not brought till the 3rd February 1891. But this objection is not sound inasmuch as the father's obligation was only incohate at the date of his death and the words 'right to sue' presuppose the existence of an obligation which is no longer incohate, but is perfected and clothed with a right of action. It is not correct to say that the obligor's death perfects all his inconate obligations which devolve on his heir and renders them enforceable at once without reference to the contract or rule of law which originated them. Suppose that the father executed an instalment bond for Rs. 10,000 payable in ten yearly instalments and died before the first instalment became due, leaving considerable separate property for his son to inherit, may the creditor demand the whole debt saying that the father's death perfected all his incohate obligations as against the heir? The general principle is

(1) I.L.R., 16 Mad., 99.

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that the son succeeds to the father's assets and liabilities as they are at the death of the latter and that the father's death does not alter either the nature or extent of the rights or liabilities transmitted to the son. Why should the case then be otherwise where the obligation attaches to ancestral instead of separate property in the hands of the son? The theory of the son's pious obligation rests on this basis, that the non-payment of a debt is a sin and that so long as it remains unpaid is it is a source of torment to the *manes* of the father which it is the son's duty to relieve him against. The object is to afford relief to the father by discharging his debt when it becomes due, and not to benefit the creditor by making the debt more onerous against the son than it was against the father. The answer to the question when an obligation ceases to be immature and becomes actionable must depend upon the contract or the rule of law which is its cause, and not upon any new contract to be made by the Court for the parties concerned. In the case of a pious obligation devolving on the son under Hindu law when ancestral property survives, the obligation devolves on the son in the condition in which it would be enforceable against the father if he had been still alive. It is no doubt correct to say that the father's debt is binding on the son when ancestral property survives to him upon the father's death, but it is not correct to hold that the debt becomes always payable at once on the father's death. In most cases the debt may be, and is, one due at the date of the father's death, but cases may arise in which it may fall due some years after that event. It is, no doubt, stated in *Natasayyan* v. *Ponnusami*(1) that time runs from the date of the father's death, but it should not be forgotten that in that case the debt was overdue when the father died. We are therefore of opinion that the suit is not time-barred.

The result is that the decree of the Judge will be modified by omitting the direction about the payment of future instalments and by substituting for it a declaration that appellants are liable to pay future instalments as they fall due, and the decree is confirmed in other respects. The appeal having substantially failed, appellants will pay respondent's costs.

(1) I.L.R., 16 Mad., 99.

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ATTACHMENT BEFORE JUDGMENT—*Suit against one member of undivided Hindu family—Death of defendant before decree—Right of survivorship.*] Where, in a suit against one member of an undivided Hindu family, not as representing the family, there is an attachment before judgment of family property, and the defendant dies before decree is passed, the right of survivorship takes effect before the attachment becomes effectual for the purpose of execution. *Sadayappa* v. *Ponnama* (I.L.R., 8 Mad., 554) followed.

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GRANT OF PORTION OF IMPARTIBLE ZAMINDARI—*Construction of instrument of grant—Absolute grant—Creation of separate estate in favour of grantee as between him and grantor—Restriction in instrument contravening Hindu law of succession.*] In a suit for the recovery of possession of an estate, it appeared that the estate in question had formerly formed a portion of an impartible zamindari, but had been granted, in the year 1845, by the plaintiff's father to his younger brother, in whose name the estate was registered in the Collector's books as a separate estate. The instrument of grant provided (*inter alia*) that in case of failure of self-begotten male issue in the grantee's line, the immovable property of the grantee should be put in possession of the grantor's line. On the death of the first grantee, the property passed into the possession of his two sons, and on the death of the elder son it came into the possession of the younger son. On his death, without male issue, the estate passed into the possession of his widow, defendant in the present suit. The plaintiff contended that the grant made to respondent's father-in-law was a maintenance grant ; that under its terms the estate reverted to his father (now deceased) on the death of respondent's husband, when there was a failure of male heirs in his branch ; and that, notwithstanding the grant, the members of the two branches did not fail to be coparceners, and that consequently the right of survivorship of the plaintiff attached to the exclusion of the defendant :—*Held*, that, on the construction of the instrument of grant, the estate became, by virtue of that instrument, the separate and absolute property of respondent's branch of the family, and that the provision in that instrument purporting to create a special right of reversion in case of failure of female issue contravened the principle laid down in the Tanjore case and was inoperative.

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LETTERS OF ADMINISTRATION—*Promissory note given to a firm consisting of two undivided Hindu brothers—Decease of the brothers—Suit on note by their sons without taking out letters.*] Two brothers, members of an undivided Hindu family, who traded as 'T. Iyavier and Brother,' became the holders of a promissory note given to

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the firm. The elder brother having died, his son joined the firm in his place, and he and his uncle filed a suit against the maker of the note, but before the action was heard the uncle died, and his son (a minor) was substituted as plaintiff for him, suing by the other plaintiff as his next friend. The plaintiffs had not taken out letters of administration to their respective fathers' estates :—*Held*, (1) that assuming that the younger brother could have sued as surviving member of the firm, on his death the necessity for taking out letters of administration could not be avoided ; (2) that, if the debt was in reality due to the plaintiffs' family and not to the obligees of the bond, they could not sue upon it in their own right of survivorship without taking out letters of administration, since the promissory note did not disclose the nature of the debt, and, moreover, the other members of the family should have been joined as plaintiffs. *Venkataramanna* v. *Venkayya* (I.L.R., 14 Mad., 377) distinguished.

Chockalinga Pillai v. *Natesa Ayyar* 147

RELIGIOUS ENDOWMENTS ACT : *See* Suit by Dharmakarta of a Temple.

RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865, ss. 9, 10—*Suit to enforce acceptance of pattah*—Bonâ fide *denial by defendant of plaintiff's title—Jurisdiction of Revenue Court.*] The plaintiff obtained a permanent lease of inam lands attached to a mosque from the four owners thereof. The defendant was a cultivating tenant on the lands and the plaintiff duly offered the defendant a pattah. The defendant refused to execute corresponding muchilika on the ground that the plaintiff was not his landlord, since the first of the aforesaid owners had granted a lease for 35 years to a person who had sublet the land to the defendant. The plaintiff thereupon brought a suit to enforce acceptance of pattah under section 9 of Madras Act VIII of 1865. The Deputy Collector having decided the case in the plaintiff's favour, the defendant appealed and the District Judge dismissed the suit on the ground that the defendant's contention raised a *bonâ fide* question of title which ousted the jurisdiction of the Deputy Collector :—*Held*, that there is no provision in Madras Act VIII of 1865 that a *bonâ fide* denial of the relationship of landlord and tenant ousts the jurisdiction of the Revenue Courts, and, with regard to section 10 of the Act, that "whenever a Court is invested with jurisdiction to determine the existence "of a particular legal relation, the intention must be taken to be to authorize "it to adjudicate on every matter of fact or of law incidental to such adjudi-"cation." *Narayana Chariar* v. *Ranga Ayyangar* (I.L.R., 15 Mad., 223) and *Ayappa* v. *Venkata Krishnamarazu* (I.L.R., 15 Mad., 485) cited and followed.

Abdul Rahiman Sahib v. *Anna Pillai* 140

REVENUE RECOVERY ACT : *See* Sale of Mittah for Arrears of Revenue.

SALE OF IMMOVABLE PROPERTY—*Transfer of Property Act—Act IV of* 1882, *s.* 54—*Effect of registration of sale-deed.*] Registration of a sale-deed constitutes a sufficient delivery of the deed to pass the interest in land contained therein. *Narain Chunder Chuckerbutty* v. *Dataram* (I.L.R., 8 Calc., 597), followed.

Ponnayya Goundan v. *Muttu Goundan* 146

SALE OF MITTAH FOR ARREARS OF REVENUE—*Purchase by Government—Subsequent sale by Government—Suit by owner of a share in the mittah for cancellation of second sale—Revenue Recovery Act—Madras Act II of* 1864, *ss.* 38, 59—*Limitation—Admissibility of horoscope—Indian Evidence Act—Act I of* 1872, *ss.* 17 *and* 18.] The plaintiff was the owner of a share in a mittah which was sold on 15th

February 1886 for arrears of revenue and bought by Government, who, on 16th June 1886, sold it to the first defendant, notifying the resale in the form prescribed under Madras Act II of 1864. The first defendant subsequently resold portions of the mittah to defendants 3 and 5 to 8. The plaintiff sued for cancellation of the second sale so far as his share was concerned, instituting a suit for this purpose on 31st March 1890 :—*Held*, (1) that the sale of 16th June 1886 was not a sale under section 38 of Act II of 1864, although the notification of the sale was in the form prescribed by that Act, but a sale by Government of property that had become its own by reason of the purchase at the prior sale of 16th February ; (2) that even assuming the sale of 16th June 1886 to have been a sale under section 38 of Act II of 1864, the suit was time-barred under section 59 of that Act, since it should have been brought within six months from the date of plaintiff's majority, viz., 29th November 1888, as proved by his horoscope, which had been a public record from a period *ante litem motam*, was relied upon by the defendants in the present suit, and was put in as an 'admission' under the Indian Evidence Act, ss. 17 and 18. *Ram Narain Kallia* v. *Monee Bibee* (I.L.R., 9 Calc., 613), and *Satis Chunder Mukhopadhya* v. *Mohendro Lal Pathuk* (L.L.R., 17 Calc., 849), distinguished ; (3) that the limitation prescribed by section 59 of Madras Act II of 1864 is applicable to sales which are illegal by reason of contravening some express law, as well as to sales which are irregular. *Gobind Lal Roy* v. *Ramjanam Misser* (I.L.R., 21 Calc., 70) relied on.

Raja Goundan v. *Raja Goundan* 134

SUIT BY THE DHARMAKARTA OF A TEMPLE TO RECOVER POSSESSION OF TEMPLE PROPERTY—*Religious Endowments Act—Act XX of 1863, s. 12.*] The right to bring suits for the recovery of the property of a religious or charitable institution is vested in the trustee or manager of such institution, unless he is precluded by any special law from exercising it. There is nothing in the Religious Endowments Act to take away such powers. Section 12 relates only to the rents of property transferred by Government to the committees of such institutions.

Sankara Murti Mudaliar v. *Chidambara Nadan* 143

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 67 (*a*) 68 (*a*)—*Mortgagee's right to sue for mortgage money and for sales—Usufructuary mortgage—Covenant to repay mortgage money.*] The first defendant executed a usufructuary mortgage of certain land in favour of plaintiff's deceased husband. It contained a covenant to pay the mortgage money in Chittrai Kalavadi of the year 1883. This covenant was followed by these words : "If I fail to pay the mortgage "amount in the said Kalavadi, then you shall receive the said mortgage "amount in the Chittrai Kalavadi of whatever year I may pay it, deliver the "said lands to my possession having cleared off the arrears of Government "revenue, and also give back the bond." The plaintiff sued to recover the money secured from the defendant personally and also by sale of the mortgaged property :—*Held*, by a Full Bench, that the bond contained a covenant to pay, and that, therefore, the suit was maintainable.

Sivakami Ammal v. *Gopala Savundram Ayyan* 131

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 54 : *See* Sale of Immovable Property.

APPELLATE CIVIL—FULL BENCH.

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

SIVAKAMI AMMAL (PLAINTIFF), APPELLANT,

v.

GOPALA SAVUNDRAM AYYAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1891. December 14. 1893. November 24. December 7.

Transfer of Property Act—Act IV of 1882, s. 67 (a) 68 (a)—Mortgagee's right to sue for mortgage money and for sales—Usufructuary mortgage—Covenant to repay mortgage money.

The first defendant executed a usufructuary mortgage of certain land in favour of plaintiff's deceased husband. It contained a covenant to pay the mortgage money in Chittrai Kalavadi of the year 1883. This covenant was followed by these words: "If I fail to pay the mortgage amount in the said Kalavadi, then you "shall receive the said mortgage amount in the Chittrai Kalavadi of whatever year "I may pay it, deliver the said lands to my possession having cleared off the arrears "of Government revenue, and also give back the bond." The plaintiff sued to recover the money secured from the defendant personally and also by sale of the mortgaged property:

Held, by a Full Bench, that the bond contained a covenant to pay, and that, therefore, the suit was maintainable.

APPEAL against the decree of H. H. O'Farrell, Acting District Judge of Trichinopoly, in original suit No. 26 of 1889.

The first defendant executed a mortgage of certain land in favour of plaintiff's deceased husband. The instrument, after describing the property in question and giving details regarding the payments comprising the mortgage sum, proceeded as follows: "As I have properly received this sum of three thousand rupees as "per the above particulars, you shall yourself enjoy the said lands "comprised under the mortgage, with possession in lieu of interest on "the said sum and shall yourself pay the Sircar teerwah, the village "Suvantiram (perquisites), Oobyam (service fees), &c. There are "no arrears due to Government on the said lands up to the current "Fasli 87. I shall pay you the said mortgage amount of Rs. "3,000 in Chittrai Kalavadi (cultivation season of Chittrai) of the

* Appeal No. 25 of 1891.

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"year 1883 and take back this deed of mortgage with possession "and the cancelled bonds mentioned above. If I fail to pay the "mortgage amount in the said Kalavadi (cultivation season), then "you shall receive the said mortgage amount in the Chittrai Kala- "vadi (cultivation season of Chittrai) of whatever year I may pay "it, deliver the said lands to my possession having cleared off the "arrears of Government revenue and also give back this bond."

Puttabhirama Ayyar for appellant.

Mr. *H. G. Wedderburn* for respondents.

This appeal came on for hearing before their Lordships Mr. Justice Parker and Mr. Justice Shephard on Monday, the 14th day of December 1891, when the Court made the following

ORDER OF REFERENCE TO FULL BENCH:—The District Judge has held that the mortgage executed by the first defendant in favour of the plaintiff's late husband is purely a *usufructuary* mortgage, and that, therefore, the suit which is brought to recover the money secured against the defendant personally and by sale of the property is not maintainable.

If the mortgage instrument contains a covenant on the part of the defendant to pay the money, we think there can be no doubt that the action lies. The clause on which the plaintiff relies is as follows:

"I shall pay you the said mortgage amount of Rs. 3,000 in "Chittrai Kalavadi of the year 1883 and take back this deed of "mortgage with possession and the cancelled bonds mentioned "above." The mortgage instrument is dated 16th May 1873. Clearly the clause quoted imports a covenant to pay the mortgage money. But it is said that the clause which immediately follows shows that no covenant was intended. That clause runs thus:

"If I fail to pay the mortgage amount in the said Kalavadi, "then you shall receive the said mortgage amount in the Chittrai "Kalavadi of whatever year I may pay it, deliver the said lands to "my possession having cleared off the arrears of Government "revenue and also give back the bond."

We are unable to see that the clause is in any way inconsistent with the preceding one.

By the first clause, the mortgagor covenants to repay the money in the cultivation season of 1883: by the second clause, it is stipulated that on the mortgagor's default to pay the money in 1883, the mortgagee shall accept payment of the same in any late

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cultivation season. In other words, this second clause, which, like the first, is for the immediate benefit of the mortgagee, limits the discretion of the mortgagor to repay the money and redeem the land.

Naturally the mortgagee was anxious not to be called upon to give up his security except at a season when the land could not, in the nature of things, be bringing him in any profit.

In our opinion the covenant to pay is not affected by the clause, but inasmuch as in the case cited (appeal No. 4 of 1891) the Chief Justice and Wilkinson, J., have taken a different view of the manner in which a similar document (the terms of which we are unable to distinguish) should be construed, we refer to a Full Bench the question, "Whether plaintiff is entitled to sue for sale under "the provisions of the Transfer of Property Act"?

In pursuance of the above reference, the case came on for hearing on Friday, the 24th November 1893, before a Full Bench, consisting of the Honorable the Chief Justice, Justice Sir T. Muttusami Ayyar and Mr. Justice Shephard, when the Court expressed the following

OPINION:—"We are clearly of opinion that the mortgage "contains a covenant to pay and that therefore a suit for sale lies."

This appeal came on for hearing this day, when the Court delivered the following

JUDGMENT:—We must reverse the decree (see Full Bench decision) and remand the suit for disposal. Costs to be provided for in the revised decree.

APPELLATE CIVIL.

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

1893. August 24, 25, 29, 30. November 16.

RAJA GOUNDAN (PLAINTIFF), APPELLANT,

v.

RAJA GOUNDAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Sale of mittah for arrears of revenue—Purchase by Government—Subsequent sale by Government—Suit by owner of a share in the mittah for cancellation of second sale—Revenue Recovery Act—Madras Act II of 1864, *ss.* 38, 59—*Limitation—Admissibility of horoscope—Indian Evidence Act—Act I of* 1872, *ss* 17 *and* 18.

The plaintiff was the owner of a share in a mittah which was sold on 15th February 1886 for arrears of revenue and bought by Government, who, on 16th June 1886, sold it to the first defendant, notifying the resale in the form prescribed under Madras Act II of 1864. The first defendant subsequently resold portions of the mittah to defendants 3 and 5 to 8. The plaintiff sued for cancellation of the second sale so far as his share was concerned, instituting a suit for this purpose on 31st March 1890 :

Held, (1) that the sale of 16th June 1886 was not a sale under section 38 of Act II of 1864, although the notification of the sale was in the form prescribed by that Act, but a sale by Government of property that had become its own by reason of the purchase at the prior sale of 15th February;

(2) that even assuming the sale of 16th June 1886 to have been a sale under section 38 of Act II of 1864, the suit was time-barred under section 59 of that Act, since it should have been brought within six months from the date of plaintiff's majority, viz., 29th November 1888, as proved by his horoscope, which had been a public record from a period *ante litem motam*, was relied upon by the defendants in the present suit, and was put in as an 'admission' under the Indian Evidence Act, ss. 17 and 18. *Ram Narain Kallia* v. *Monee Bibee*(1) and *Satis Chunder Mukhopadhya* v. *Mohendro Lal Pathuk*(2) distinguished;

(3) that the limitation prescribed by section 59 of Madras Act II of 1864 is applicable to sales which are illegal by reason of contravening some express law, as well as to sales which are irregular. *Gobind Lal Roy* v. *Ramjanam Misser*(3) relied on.

APPEAL against the decree of P. Dorasawmy Aiyar, Subordinate Judge of Bellary and Salem, in original suit No. 6 of 1890.

The facts of the case are stated sufficiently for the purposes of this report in the judgment of the High Court. The decree

* Appeal No. 24 of 1892.

(1) I.L.R., 9 Calc., 613.
(2) I.L.R., 17 Calc., 849.
(3) I.L.R., 21 Calc., 70.

of the Lower Court was for the defendants. The plaintiff preferred this appeal.

Sadagopachariar for appellant.

The *Acting Government Pleader* (*Subramanya Ayyar*), *Bhashyam Ayyangar*, and *T. Subramanya Ayyar* for respondents.

BEST, J.— The appellant was plaintiff in the Lower Court, his suit being (1) for cancellation, so far as his share of the Puthur mittah (in Salem district) is concerned, of a sale held on the 16th June 1886 by which the entire mittah was sold; or (2) in case it is found that the sale is not liable to be set aside, for a declaration that defendants hold the plaintiff's share as trustees and for a decree directing them to convey to plaintiff his share of the mittah and of the income thereof since the date on which defendants got possession of the same.

The Subordinate Judge has found that plaintiff's suit was not barred by limitation, and that if the suit had been for the purpose of setting aside the *first* sale held in February 1886, plaintiff would have been entitled to a decree, but that the second sale (of June 1886) is not one that is open to question by the plaintiff, as it was a sale of property no longer belonging to plaintiff, but belonging to Government as purchaser at the sale of February 1886.

As is seen from exhibit I, the mittah in question was put up for sale, for arrears of revenue, on 15th February 1886, when there being no other bidders, it was purchased on behalf of Government for Rs. 1,000 and this fact was reported to the Board of Revenue on the following day (see exhibit T); and orders were also issued at once to the treasury to credit this sum of Rs. 1,000 towards the arrears of the said mittah (see exhibit XXXIX, also exhibits XL and III). The mittah was again sold, on 16th June 1886, on the Collector's recommendation contained in his letter to the Board of Revenue which is filed as exhibit H (dated 11th March 1886), the resale being sanctioned by the Revenue Board's Proceedings, dated 2nd April 1886 (see exhibit I).

The Collector's letter H is as follows: "Since reporting the "result of the sales of the Puthur and Tammakurichi mittahs, I "have the honour to inform the Board that I have received two "offers, one for Rs. 35,000 for the two mittahs that have been "sold. As only a certain number of the villages of each mittah "(though not separately registered) belongs to the minor proprie- "tors for whose default they were sold, and as the owners of the "other villages have regularly paid their share, I would strongly

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"recommend a resale to enable Kylasa Goundan who has offered "the Rs. 35,000 or some other co-sharers to secure these old- "standing mittahs and thus arrange among themselves to clear "of all encumbrances. This Kylasa Goundan proposes to do. "Government can in no case be loser."

It must here be noticed that Tammakurichi mittah was also sold on the 15th February 1886 when Puthur was sold, and bought like Puthur on behalf of Government for Rs. 1,000, but plaintiff does not appear to claim any interest in that mittah, his case being (*vide* paragraph 2 of the plaint) that there had been a partition between his branch of the family and that of defendants 1 and 3 to 8, though the registry continued joint. By I "the "resale of the mittahs is sanctioned as recommended" with the proviso that "Kylasa Goundan's offer should be fixed as the upset "price."

The mittahs were accordingly resold on the 16th June 1886, when first defendant became the purchaser: this is the sale that is now sought to be set aside, and which the Subordinate Judge has held to be not a sale under section 38 of Act II of 1864, but a sale by Government of property that had already become its own by reason of the purchase at the prior sale of 15th February.

The first question for consideration in this appeal is whether the Subordinate Judge is right in thus holding? The answer to this question must, I think, be in the affirmative. As pointed out by the Subordinate Judge, no order passed by the Collector cancelling the sale of February, with reference to the provisions of section 38 of Act II of 1864 as amended by Act III of 1884, has been produced. On the contrary, it is admitted that no such order was passed; but the Collector's letter H (above set out in full) is referred to as being equivalent to such an order. Neither in this letter however nor in the Revenue Board's order thereon (exhibit I) is there anything said about setting aside the previous sale, and the mere use of the word *resale* clearly implies nothing more than a second sale. It is clear also from exhibits II and V that the resale was with reference to Standing Order No. 111 of the Board of Revenue which deals with lands bought in by Government. No doubt the notification of this resale was issued in the form prescribed under Act II of 1864 for sales on account of arrears of revenue; but it is explained, on behalf of the respondents, that no form had then been prescribed for sales under Standing Order No. 111. Be this as it may, the circumstance

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that in the notification A (clause 2) the current revenue payable by the purchaser is entered as *nil*, when compared with the corresponding entry in B, the notification of the sale of 15th February (in which the sum is stated to be Rs. 8,532-1-7) places beyond doubt the fact that the 'resale' was not on account of arrears of revenue, but of property that belonged to Government as purchasers at the previous sale. Such being the case, the order (exhibit O) is of no weight. This suit which is for setting aside the sale of 16th June 1886 for irregularities *in such sale* must therefore fail.

But even if the suit did not fail on this ground, it must do so as time-barred in so far as cancellation of the sale is sought. The period of limitation for a suit of this kind is six months from the date of the sale (see section 59 of Act II of 1864 and *Venkata* v. *Chengadu*(1). The appellant's contention that the limitation prescribed by the above section is inapplicable to sales which are open to the objection of illegality (as distinguished from mere irregularities) by reason of their contravening some express law—such as Regulation X of 1831, as alleged in the present case, is opposed to the recent ruling (dated 8th July 1893) of the Privy Council in *Gobind Lal Roy* v. *Ramjanam Misser*(2), where a similar contention in the case of a sale under Act XI of 1859 was disallowed on the ground that "a sale is a sale made under "the Act within the meaning of the Act, when it is a sale for arrears "of Government revenue, held by the Collector or other officer "authorized to hold sales under the Act, although it may be con- "trary to the provisions of the Act either by reason of some "irregularity in publishing or conducting the sale, *or in conse- "quence of some express provision for exemption having been directly "contravened.*"

It was therefore incumbent on appellant to have brought his suit before the expiration of six months from the date of his attaining majority. If it were a fact, as alleged in the plaint, that plaintiff was a minor till October 1889, this suit, which was brought on 31st March 1890, would be in time. But the Subordinate Judge has found—and no doubt rightly—that plaintiff was born on 29th November 1870 and consequently attained his majority on the 29th November 1888, which is sixteen months prior to the institution of this suit.

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(1) I.L.R., 12 Mad., 168. (2) I.L.R., 21 Calc., 70.

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The fact of plaintiff's birth having taken place in November 1870 is proved from his horoscope (exhibit XXV), which was produced by his mother before the Tahsildar in November 1880. It is initialled by the Tahsildar with the addition of the date, 10th November 1880, and in the deposition VII of Kaliyammal (appellant's mother), dated 9th idem, she is found to have stated that there was a copy of the horoscope with Rama Krishnier and that she would "send a person and get it this night." Rama Krishnier has been examined as defendants' third witness and identifies exhibit XXV as the copy which he then gave to Kaliyammal. It is now produced from the public records where it appears to have been kept ever since its production in November 1880. Moreover, there is no room for doubt as to its identity with the horoscope produced before the Tahsildar, for in his report (X) to the Collector, which is dated 12th November 1880, he gives the plaintiff's age as 9 years 11 months and 11 days on the 18th idem, and in the Collector's letter VIII (of 13th December 1880) to the Board of Revenue the plaintiff is stated to be a minor 'now aged 10 years.' As at the time of the deposition VII and production of XXV there was no reason for misrepresenting the age of plaintiff, the evidence thus afforded may be safely relied on. It is also in accordance with the age of the plaintiff as stated in exhibits V and LIII, the former of which is a deposition of Kaliyammal, dated 22nd March 1879, when she stated the plaintiff's age to be eight years, and the latter a petition of the same Kaliyammal, dated 7th December 1879, in which her son's age is given as nine years. This petition is proved by defendants' eighth witness Ramalinga Aiyan, by whom it was presented on behalf of Kaliyammal under the vakalat (exhibit LII). These documents give support to the evidence of defendants' fourth witness Ramasawmi Aiyen, who was manager under plaintiff's father from Akshaya (1866-67) till his death in Iswara (1877-78). He states that plaintiff was born in the year Pramoduta (1870-71). It has been contended on behalf of appellant that the horoscope is inadmissible in evidence and in support of this contention we have been referred to the rulings of the Calcutta High Court in *Ramnarain Kallia* v. *Monee Bibee*(1) and *Satis Chunder Mukhopadhya* v. *Mohendro Lal Pathuk*(2). Those cases are not on all fours with the present one. In both the Calcutta cases

(1) I.L.R., 9 Calc., 513. (2) I.L.R., 17 Calc., 949.

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the horoscopes were produced then for the first time and by the parties relying on them; whereas in the present case defendants are relying on a horoscope produced by plaintiff's mother and which has been a public record from a period *ante litem motam*. It is not put in here as evidence admissible under section 32 of the Evidence Act, but more as an 'admission,' to which sections 17 and 18 of that Act are applicable. The date of plaintiff's birth is found to be 29th November 1870 and this finding is well supported by the evidence. The suit so far as it seeks for cancellation of the sale is consequently time-barred under section 59 of Act II of 1864.

It is therefore unnecessary to consider the alleged illegalities or irregularities in the conduct of the sale.

But it is further contended on behalf of appellant that, even if plaintiff is not entitled to a decree setting aside the sale, the first defendant should be held to have purchased as a trustee on plaintiff's behalf and a decree should be passed awarding to plaintiff his share of the zemindari. First defendant was in no sense a trustee for the plaintiff, and there is no reason whatever for holding that the sale was brought about by fraud on the part of the defendants. As is seen from the Collector's letter (exhibit H), the arrears of revenue on account of which the mittah was sold were entirely due on the villages which constituted the share of plaintiff's branch, and the shares of defendants 3 to 8 were sold only because they were also liable in consequence of their not being separately registered. It was because the revenue due on the other shares had been 'regularly paid' that the Collector recommended the resale "to enable Kylasa Goundan or some "other co-sharer to secure these long-standing mittahs and to "arrange among themselves to clear off all encumbrances." There is therefore no ground for presuming fraud from the circumstance of first defendant having, subsequently to his purchase on 16th June 1886, resold portions to defendants 3 and 5 to 8 respectively under exhibits G and F.

I would dismiss this appeal with costs (two sets).

MUTTUSAMI AYYAR, J.—I concur.

APPELLATE CIVIL.

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

1883. Oct. 16, 23.

ABDUL RAHIMAN SAHEB (PLAINTIFF), APPELLANT,

v.

ANNA PILLAI (DEFENDANT), RESPONDENT.*

Rent Recovery Act—(Madras)—Act VIII of 1865, *ss.* 9, 10—*Suit to enforce acceptance of pattah*—Bonâ fide *denial by defendant of plaintiff's title—Jurisdiction of Revenue Court.*

The plaintiff obtained a permanent lease of inam lands attached to a mosque from the four owners thereof. The defendant was a cultivating tenant on the lands, and the plaintiff duly offered the defendant a pattah. The defendant refused to execute corresponding muchilika on the ground that the plaintiff was not his landlord, since the first of the aforesaid owners had granted a lease for 35 years to a person who had sublet the land to the defendant. The plaintiff thereupon brought a suit to enforce acceptance of pattah under section 9 of Madras Act VIII of 1865. The Deputy Collector having decided the case in the plaintiff's favour, the defendant appealed and the District Judge dismissed the suit on the ground that the defendant's contention raised a *bonâ fide* question of title which ousted the jurisdiction of the Deputy Collector.

Held, that there is no provision in Madras Act VIII of 1865 that a *bonâ fide* denial of the relationship of landlord and tenant ousts the jurisdiction of the Revenue Courts, and, with regard to section 10 of the Act, that "whenever a Court is "invested with jurisdiction to determine the existence of a particular legal relation, "the intention must be taken to be to authorize it to adjudicate on every matter "of fact or of law incidental to such adjudication." *Narayana Chariar* v. *Ranga Ayyangar*(1) and *Ayappa* v. *Venkata Krishnamarazu*(2) cited and followed.

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in appeal suit No. 79 of 1891, reversing the decision of the Court of the Deputy Collector in summary suit No. 4 of 1890.

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

The plaintiff preferred this second appeal.

Balajee Rau for appellant.

Sunkara Menon for respondent.

* Second Appeal No. 1425 of 1892.

(1) I.L.R., 15 Mad., 223. (2) I.L.R., 15 Mad., 485.

JUDGMENT.—This was a suit to enforce the acceptance of a pattah under Act VIII of 1865. The land in respect of which the pattah was tendered admittedly belongs to a mosque called Kazi Abdulla Asari's mosque. Appellant claimed to be respondent's landlord under a permanent lease granted to him by one Abdul Rahiman and his three sisters whom he described to be entitled to the land. He further alleged that respondent was a tenant cultivating about 4 acres of land. It was conceded that appellant duly tendered a pattah, but respondent denied that the former was his landlord. He contended that Abdul Rahiman granted a lease for 35 years to one Ragavendra Rao, who sublet the land to him. The first issue in the case was whether appellant's lessors were competent to execute the permanent lease in his favour, and the Deputy Collector decided the question in appellant's favour, observing that Abdul Rahiman, who granted the lease to Ragavendra Rao, was only one of four inamdars, whilst all the four inamdars granted the permanent lease to appellant, that Ragavendra's lease was further a benamee transaction and that it was never acted upon. On appeal, the Judge dismissed the suit and rested his decision on the ground that respondent's contention raised a *bonâ fide* question of title which ousted the jurisdiction of the Deputy Collector. It is argued on appellant's behalf that the Judge is in error in dismissing the suit for the reason that there was a *bonâ fide* dispute as to title and that he should have proceeded, as was done by the Deputy Collector, to adjudicate upon it. It is provided by section 10, Act VIII of 1865, that the Collector shall first inquire whether the party was bound to accept a pattah and give a muchilika and that, unless this is proved, the suit shall be dismissed with costs. Whilst it is thus clear that the Judge is bound to decide whether there is the relation of landholder and tenant for the year for which the pattah is tendered, there is no provision in the Act that a *bonâ fide* denial of that relation is a good defence or ousts the jurisdiction of Revenue Courts.

Whenever a Court is invested with jurisdiction to determine the existence of a particular legal relation, the intention must be taken to be to authorize it to adjudicate on every matter of fact or of law incidental to such adjudication. The Judge ought to have determined whether Raghavendra Rao's lease was acted upon, whether it was not a benamee transaction, or whether the actual relation of landlord and tenant existed as between appellant

ABDUL RAHIMAN SAHEB v. ANNA PILLAI.

and respondent, otherwise a tenant who was originally let into possession by A. and paid him rent for a series of years may collude with an adverse claimant and render his landlord's right to tender a pattah infructuous.

The decision in *Narayana Chariar* v. *Ranga Ayyangar*(1) proceeds on this principle. There the suit was brought by the tenant and the landlord denied the tenancy. The Head Assistant Collector dismissed the suit observing "as a question regarding "the existence or otherwise of the relationship of landlord and "tenant has arisen in this case, the matter must be determined in "the regular way."

The District Judge concurred in that opinion, but the High Court remanded the case for trial on the merits, and the learned Judges observed: "The Judge is to try the case. The plaintiff's "case is that he is a tenant and entitled to a pattah which "defendant denies. To say that the Collector is to hold his hand "and make no further inquiry merely because the landholder "denies that plaintiff is his tenant, is to put it in the power of "the landholder always to deprive the tenant of the remedy by "summary suit given him by section 8."

Again, in *Ayappa* v. *Venkata Krishnamarazu*(2), the tenant's defence was that, though he was a tenant in the zemindari, the plaintiff was a member of an undivided family together with three other persons, that the defendant had already accepted pattah and executed a muchilika made out in the names of the plaintiff and his two coparceners. The District Judge held that the plaintiff being the registered zemindar, had a right to compel defendant to accept the pattah, and the High Court upheld the decision as correct. These are the latest decisions on the question and the principle on which they rest appears to be open to no objection.

We set aside the decree of the District Court and remand the case for trial on the merits.

Costs of this appeal will abide and follow the result.

(1) I.L.R., 15 Mad., 223. (2) I.L.R., 15 Mad., 485.

APPELLATE CIVIL.

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

SANKARAMURTI MUDALIAR (PLAINTIFF'S REPRESENTATIVE), APPELLANT,

v.

CHIDAMBARA NADAN (DEFENDANT), RESPONDENT.*

1893. February 15.

Suit by the Dharmakarta of a temple to recover possession of temple property—Religious Endowments Act—Act XX of 1863, *s.* 12.

The right to bring suits for the recovery of the property of a religious or charitable institution is vested in the trustee or manager of such institution, unless he is precluded by any special law from exercising it. There is nothing in the Religious Endowments Act to take away such powers. Section 12 relates only to the rents of property transferred by Government to the committees of such institutions.

SECOND APPEAL against the decree of P. Dorasawmy Iyer, Second Subordinate Judge of Tinnevelly, in appeal suit No. 229 of 1890, affirming the decision of S. Krishnasawmy Aiyar, District Munsif of Srivilliputtur, in original suit No. 308 of 1889.

The plaintiff, who had been appointed as Dharmakarta of a temple by a committee constituted under Act XX of 1863, sued to recover from the defendant possession of certain property belonging to the temple. The Lower Courts held that only committees are empowered by section 12 of Act XX of 1863 to bring such suits, and that no authority is given them to delegate that power, and that consequently the plaintiff could not maintain the suit. Against the decree of the Second Subordinate Judge the plaintiff preferred this appeal.

Desikachariar for appellant.

The respondent was not represented.

JUDGMENT.—The Lower Courts are in error in supposing that the present suit is of the nature of the suits which the committee are authorized to bring by section 12 of Act XX of 1863. That section relates only to the rents of property transferred by the Board of Revenue or local agents of Government to the committee, and it is not alleged that the property in question in this

* Second Appeal No. 882 of 1892.

SANKARA-MURTI MUDALIAR v. CHIDAMBARA NADAN.

suit was so transferred, and moreover this is not a suit for rent. The right to bring suits for the recovery of the property of a religious or charitable institution is vested as an ordinary incident of his office in the trustee or manager of such institution unless he is precluded by any special law from exercising it. There is nothing in the Act to take away such right from trustees appointed by the committee, and therefore plaintiff is entitled to maintain this suit. We reverse the decrees of the Courts below and remand the suit to the Court of First Instance for disposal on the merits. Costs hitherto incurred including costs of this appeal will be costs in the cause.

APPELLATE CIVIL.

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

1893. March 17.

RAMANAYYA (PLAINTIFF), APPELLANT,

v.

RANGAPPAYYA AND ANOTHER (DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Attachment before judgment—Suit against one member of undivided Hindu family—Death of defendant before decree—Right of survivorship.

Where, in a suit against one member of an undivided Hindu family, not as representing the family, there is an attachment before judgment of family property, and the defendant dies before decree is passed, the right of survivorship takes effect before the attachment becomes effectual for the purpose of execution. *Sadayappa* v. *Ponnama*(1) followed.

SECOND APPEAL against the decree of S. Subbaiyar, Subordinate Judge of South Canara, in appeal suit No. 188 of 1890, confirming the decree of S. Raghunathaiya, District Munsif of Karkal, in original suit No. 41 of 1890.

Suit to recover Rs. 1,078–8–0 due under a registered bond executed by defendant No. 1 in plaintiff's favour. Defendant No. 1 died after the institution of the suit and before the summons was served on him, but after certain land belonging to him, and defendants Nos. 2 and 3, had been provisionally attached. Defendants Nos. 2 and 3 were then sued as the personal representatives

* Second Appeal No. 829 of 1892.

(1) I.L.R., 8 Mad., 554.

RAMANAYYA v. RANGAPPAYYA.

of defendant No. 1. The Lower Courts passed decrees in favour of the defendants and the plaintiff preferred this second appeal.

Pattabhirama Ayyar for appellant.

Ramachandra Rau Saheb and *Ranga Rau* for respondents.

JUDGMENT.—It is argued before us that the debt contracted by the deceased first defendant was a family debt and is therefore binding on the respondents, and that the Subordinate Judge is in error in omitting to record a finding on this point.

The suit was originally brought against first defendant alone upon a bond executed by him. He does not appear to have been sued as representing the family, and defendants Nos. 2 and 3 were only brought in after his death as his legal representatives. In the view that the debt was a family debt, the contention in the Courts below as to the effect of the attachment on survivorship was immaterial. This contention is at variance with the case on which the parties proceeded to trial in the Courts below.

As to the effect of the attachment on survivorship, it is to be observed that the attachment in question was one before judgment, and intended to protect the property from alienation by the defendant pending the decision of the suit. Till decree was passed it could not operate to render the attached property available for sale in execution. In the case before us there was no decree when the respondents' right of survivorship accrued on the death of the first defendant, and the principle laid down in *Sadayappa* v. *Ponnama*(1), we think, governs this case; consequently the right of survivorship took effect before the attachment became effectual for the purpose of execution. The result is that the appeal fails and is dismissed with costs.

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(1) I.L.R., 8 Mad., 554.

APPELLATE CIVIL.

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

1893. September 25.

PONNAYYA GOUNDAN (PLAINTIFF), APPELLANT,

v.

MUTTU GOUNDAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Sale of immovable property—Transfer of Property Act—Act IV of 1882, s. 54—Effect of registration of sale-deed.

Registration of a sale-deed constitutes a sufficient delivery of the deed to pass the interest in land contained therein. *Narain Chunder Chuckerbutty* v. *Dataram*(1) followed.

SECOND APPEAL against the decree of L. A. Campbell, District Judge of Coimbatore, in appeal suit No. 62 of 1892, reversing the decree of the Court of the District Munsif of Udamalpet in original suit No. 136 of 1891.

The plaintiff sued for a decree establishing his right to certain immovable property and for the possession thereof; for the recovery of a sale-deed executed and registered by the first defendant in respect of the said property, and for the cancellation and delivery to the plaintiff of a sale-deed executed and given by the first defendant to the second defendant. The plaintiff having agreed to purchase certain immovable property of the first defendant, paid to him Rs. 60 for earnest money and expenses, and it was agreed between them that the first defendant should write the sale-deed and get it registered on that very day and deliver it to the plaintiff within five days, upon which the balance of the purchase money should be paid. Defendant executed and got the document registered on the day agreed upon, and thereupon he proceeded to sell the property to the second defendant, and executed and registered a sale-deed in respect of the second sale.

The District Munsif decreed the cancellation of the second sale-deed and specific performance of the contract to sell the property to the plaintiff.

* Second Appeal No. 22 of 1893.

(1) I.L.R., 8 Calc., 597.

PONNAYYA GOUNDAN v. MUTTU GOUNDAN.

The District Judge set aside the decree of the Lower Court and dismissed the suit, on the ground that the plaintiff had failed to perform his part of the contract, inasmuch as he neither tendered nor paid the balance of the purchase money on the execution and registration of the document.

The plaintiff preferred this appeal.

Bhashyam Ayyangar for appellant.

Kothandaramayyar for respondents.

JUDGMENT.—We are of opinion that the registration of the sale-deed to plaintiff effected a transfer of the property to him by virtue of section 54 of the Transfer of Property Act. It has been held in *Narain Chunder Chuckerbutty* v. *Dataram*(1) that a registered transfer without delivery of possession will pass any interest in land, and we consider that registration constitutes a sufficient delivery of the deed to pass such interest, otherwise the object of registration would be defeated, that object being to let all the world know in whom the title to property lies. We must therefore reverse the decree of the District Judge and restore that of the Munsif, the plaintiff still being liable for the balance of the unpaid purchase money. The defendants must pay the plaintiff's costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

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

1893. July 11, 14.

CHOCKALINGA PILLAI (DEFENDANT), APPELLANT,

v.

NATESA AYYAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Letters of administration—Promissory note given to a firm consisting of two undivided Hindu brothers—Decease of the brothers—Suit on note by their sons without taking out letters.

Two brothers, members of an undivided Hindu family, who traded as 'T. Iyavier and Brother,' became the holders of a promissory note given to the firm. The elder brother having died, his son joined the firm in his place, and he and

(1) I.L.R., 5 Calc., 597.

* Appeal No. 19 of 1892.

CHOCKALINGA PILLAI v. NATESA AYYAR.

his uncle filed a suit against the maker of the note, but before the action was heard the uncle died, and his son (a minor) was substituted as plaintiff for him, suing by the other plaintiff as his next friend. The plaintiffs had not taken out letters of administration to their respective fathers' estates:

Held, (1) that assuming that the younger brother could have sued as surviving member of the firm, on his death the necessity for taking out letters of administration could not be avoided;

(2) that, if the debt was in reality due to the plaintiffs' family and not to the obligees of the bond, they could not sue upon it in their own right of survivorship without taking out letters of administration, since the promissory note did not disclose the nature of the debt, and, moreover, the other members of the family should have been joined as plaintiffs. *Venkataramanna* v. *Venkayya*(1) distinguished.

APPEAL against the judgment of Handley, J., in civil suit No. 150 of 1889 on the file of the High Court, Original Side.

The plaintiffs sued to recover the sum of Rs. 3,096-10-8 due on a promissory note under the following circumstances. T. Iyavier, the deceased father of the second plaintiff, and Visvanadha Ayyar, the deceased father of the first plaintiff, were undivided Hindu brothers, who carried on business under the firm and style of T. Iyavier and Brother. In 1884, in the course of business, the firm lent the sum of Rs. 2,000 to one P. A. Chockalingam Pillai, defendant in the present suit, taking from him a promissory note for the amount and interest thereon at 12 per cent. per annum. T. Iyavier having died, his son, T. I. Vythinatha Ayyar, the second plaintiff, joined the firm in his place, and in 1887 the defendant endorsed on the note a renewal of his promise to pay. In 1889 the firm filed a suit against the defendant to recover the amount of the loan and interest, but, before the hearing, the first plaintiff died and his son, T. Natesa Aiyar (a minor) appeared as plaintiff in his stead by his next friend the second plaintiff. The plaintiffs had not taken out letters of administration to their respective fathers' estates.

Handley, J., delivered judgment for the plaintiff on the ground, *inter alia*, that letters of administration were not necessary for the maintenance of the suit since it was a suit by a surviving partner to recover a debt due to the *firm*, and not a suit to recover a debt due to a deceased person. The defendant preferred this appeal.

Branson and *Branson* for appellant.

Sadagopachariar and *Krishnamachariar* for respondents.

(1) I.L.R., 14 Mad., 377.

CHOCKALINGA PILLAI v. NATESA AYYAR.

JUDGMENT.—The document, which is in the nature of a bond, is executed by the appellant in favour of Visvanadha, originally a plaintiff on the record, but now deceased, and Iyavier, who died before action brought.

The question is whether the suit is maintainable, no letters of administration having been taken out to Visvanadha or Iyavier. The learned Judge has held that letters were not required because the action was not to recover a debt due to a deceased person, but was an action by the surviving member of a firm. In saying this, however, he overlooked the fact that the surviving partner also was, at the time of trial himself, dead and that the actual plaintiff Natesa was seeking to recover a debt due to his deceased father Visvanadha. Assuming, therefore, that the latter could have sued alone as the surviving partner, we fail to see how, on death, the necessity of taking out letters of administration can be avoided. But it has been argued that the money was really owing to the family and not to the obligees of the bond, and that the plaintiffs as members of the family were entitled to sue in their own right of survivorship without obtaining letters of administration. *Venkataramanna* v. *Venkayya*(1) was cited in favour of this contention. What was said, however, in *Venkataramanna* v. *Venkayya*(1) was that, if, on the face of the document, it appeared that the debt was a family debt, the surviving member might sue in his own interest, the money being due to the family. In the present case the bond does not show the nature of the debt and therefore the decision is really not applicable.

Moreover, if it was competent to the plaintiffs as being themselves primarily and not in a representative character interested in the claim, the other members of the family ought to have been joined, and no application to join them was made though the objection of non-joinder was taken at the earliest opportunity.

It is said that the second plaintiff became a member of the firm on the death of Iyavier and that as such he is entitled to sue, but that contention is clearly unsound. The right originally vested in Iyavier might have been assigned to the plaintiffs or, on Iyavier's death, might have passed to his representative. But it certainly did not pass to him owing to the mere fact that he joined

(1) I.L.R., 14 Mad., 377.

CHOCKALINGA PILLAI v. NATESA AYYAR.

the firm. In our opinion the plaintiff's suit was not properly framed and ought to have been dismissed.

If Visvanadha Ayyar and Iyavier were partners of a firm constituted in the ordinary way by contract, as appears to have been the case, for otherwise the second plaintiff would not have been said to have joined the firm on his father's death (see *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll*(1)), then it is clear that their representatives or at least the representative of the survivor must establish his character as such in the legal way by taking out letters of administration. In that case the Act clearly applies.

On the other hand, if it is said that the money was due to the family and that the plaintiffs as surviving members of the family were suing to recover it, they are met with the difficulties already mentioned.

We must reverse the decree and dismiss the suit directing the plaintiffs to pay the costs throughout.

APPELLATE CIVIL.

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

1893.
April 25.
October 20.

SRI RAJA RAU VENKATA KUMARA MAHIPATI SURYA RAU (PLAINTIFF), APPELLANT,

v.

SRI RAJA RAU CHELLAYAMMI GARU (DEFENDANT), RESPONDENT.*

Grant of portion of impartible zamindari—Construction of instrument of grant—Absolute grant—Creation of separate estate in favour of grantee as between him and grantor—Restriction in instrument contravening Hindu law of succession.

In a suit for the recovery of possession of an estate, it appeared that the estate in question had formerly formed a portion of an impartible zamindari, but had been granted, in the year 1845, by the plaintiff's father to his younger brother, in whose name the estate was registered in the Collector's books as a separate estate. The instrument of grant provided (*inter alia*) that in case of failure of self-begotten male issue in the grantee's line, the immovable property of the grantee should be put in possession of the grantor's line. On the death of the first grantee, the

(1) I.L.R., 18 Calc., 86.

* Appeal No. 44 of 1892.

SRI RAJA RAU VENKATA KUMARA MAHIPATI SURYA RAU v. SRI RAJA RAU CHELLAYAMMI GARU.

property passed into the possession of his two sons, and on the death of the elder son it came into the possession of the younger son. On his death, without male issue, the estate passed into the posesssion of his widow, defendant in the present suit. The plaintiff contended that the grant made to respondent's father-in-law was a maintenance grant; that under its terms the estate reverted to his father (now deceased) on the death of respondent's husband, when there was a failure of male heirs in his branch; and that, notwithstanding the grant, the members of the two branches did not fail to be co-parceners, and that consequently the right of survivorship of the plaintiff attached to the exclusion of the defendant:

Held, that, on the construction of the instrument of grant, the estate became, by virtue of that instrument, the separate and absolute property of respondent's branch of the family, and that the provision in that instrument purporting to create a special right of reversion in case of failure of male issue contravened the principle laid down in the Tanjore case and was inoperative.

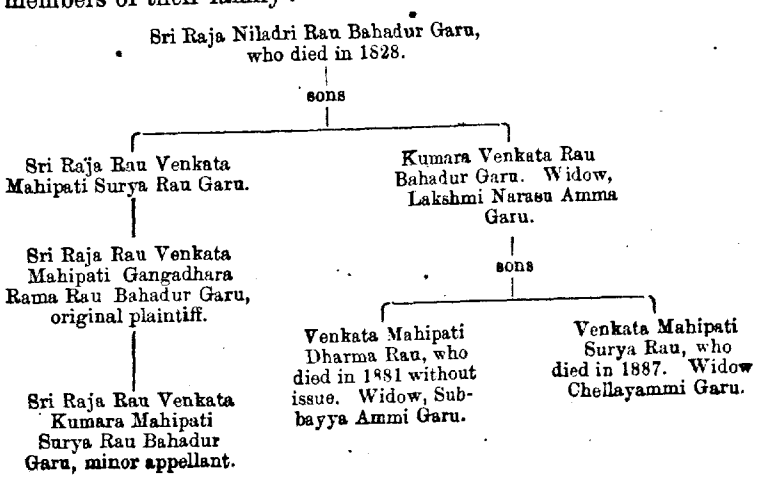
APPEAL against the decree of the Subordinate Judge's Court of Cocanada in original suit No. 27 of 1888.

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

Bhashyam Ayyangar for appellant.

Subramanya Ayyar for respondent.

JUDGMENT.—This was a suit brought by the late Zamindar of Pithapuram to recover possession of an estate called the Kolanka estate. The plaint prayed also for a decree for *mesne* profits at the rate of Rs. 26,400 per annum for fasli 1297 and subsequent years till delivery of possession. The appellant is the present minor Zamindar of Pithapuram, and respondent is his paternal grandfather's brother's son's widow. The subjoined pedigree shows how the parties are related to each other and to the other members of their family:—



SRI RAJA RAU VENKATA KUMARA MAHIPATI SURYA RAU v. SRI RAJA RAU CHELLAYAMMI GARU.

The estate of Kolanka had, prior to 1845, formed part of the zamindari of Pithapuram which is impartible property belonging to appellant's family and descending in accordance with the rule of primogeniture. Exhibit I declares that it was the ancient custom of the family for the eldest male in the eldest line to manage the zamindari, and for the other members to receive from him a periodical money allowance on account of their maintenance. On the 26th April 1845, appellant's grandfather severed nine villages from the zamindari, constituted the group into a separate estate and granted it to his younger brother who was respondent's father-in-law.

Exhibit I is the instrument whereby the grant was made, and it is in these terms:—

"Kararnamah (agreement) executed on Saturday the 5th "Chaitra Bahula of Visvavasu, corresponding to 26th April 1845, "by (me) Sri Raja Rau Venkata Surya Rau Bahadur, Zamindar "of Pithapuram, &c., in favour of my younger brother, Raja "Kumara Venkata Rau.

"The conditions agreed to by us are as follow:—

"1. As from the days of the person who first acquired the said "zamindari, it has been the unbroken custom in our family for "the eldest to manage the raj in the eldest line, and for the rest "to receive maintenance in cash from the person exercising the "powers of the raj, and as the zamindari has been put in my "possession this year after I ceased to be a minor, and as it is "difficult for me to pay maintenance annually in cash as has been "done by our ancestors, and difficult for you, too, if I should fail to "pay it regularly, it appears convenient to me to give to you and "your descendants, on account of maintenance, the following nine "villages, viz., (i) Kolanka, (ii) Mungetooru, (iii) Veeraraghava-"puram, (iv) Raipuroo, (v) Chanduroo, (vi) Vunnapoody, (vii) "Kaddavaly, (viii) Gokivanda, (ix) Jagapatirajapooram, attached "to Gollaprolu Mutta acquired by our father and paying a cist of "Rs. 18,494 a year up to fasli 1254. You have also consented to "this. I will get registered and give you, on account of mainte-"nance, the said villages for hereditary enjoyment. From the "date of this kararnamah you should conduct all the affairs of "these villages for fasli 1255. The Collector of Rajahmundry "should collect from you from fasli 1255, according to kistbundi, "the permanent peshoush already fixed, until a permanent beriz "is fixed by him for the sub-division and after wards the perma-"nent beriz which may be fixed for it and grant receipts in your "name. Henceforward, inayatnamahs relating to those villages "should be addressed to you. As I have written an arzi this day "to the Collector of Rajahmundry specifying the terms under "which you and your descendants should enjoy those villages for "maintenance, you must yourself manage hereafter the affairs of "those villages for the ensuing fasli 1255, and enjoy all the "profits hereditarily from son to grand-son, paying to the Govern-"ment the permanent beriz each year from the said fasli.

SRI RAJA RAU VENKATA KUMARA MAHIPATI SURYA RAU v. SRI RAJA RAU CHELLAYAMMI GARU.

"2. Till the said nine villages given to you by me are formed "into a sub-division and a permanent beriz is fixed therefor, you "should yourself from this date manage all the affairs of the "villages, such as leasing them for fasli 1255, &c., and pay from "the said fasli every year the permanent beriz already fixed "without allowing it to fall in arrears. As I have been collecting "the rents for fasli 1254, I will continue to do so to the end of the "year and pay the peshoush due to Government up to the end of "this fasli paying the money due for all remaining instalments so "that there may be no arrears. It is also settled that I myself "should take the profit and loss for fasli 1254. You have nothing "to do with it. Therefore, we must pay the permanent beriz to "the Collector of Rajahmundry as stipulated above.

"3. If while [the peshoush] is being paid to the Collector as "stated above, the Government should take under its own manage-"ment the said villages dispossessing you of the same, owing to "arrears which may accrue since fasli 1255 by reason of adverse "season or for any other reason, you should be responsible for it. "I have nothing to do with it.

"4. As referred to in the first paragraph of this kararnamah, "I have sent a petition to have registered in your name the said "nine villages given to you by me. We both must, therefore, "submit to any amount that may be fixed as permanent beriz for "the said nine villages and not quarrel that it is high or low.

"5. If owing to your failure to pay and obtain receipts for the "permanent beriz which may be fixed as stated in paragraph 4 for "the nine villages which I have resolved to get registered in your "name on account of maintenance, according to the instalments, "or for any other reason, the said villages should be attached and

"sold, neither you nor your heirs shall again claim from me or "my heirs maintenance or make any kind of demand.

"6. It is agreed that water should every year continue to flow "through the channels issuing from Yelaru to the nine villages "given to you by me and to the other villages in the manner in "which it used to flow for the past up to fasli 1254.

"7. If I should be in arrears of peshcush due to the Govern-"ment on account of the zamindari of Pithapuram or if there "should be outstandings due by me to people or litigation in "Courts, you have nothing whatever to do with them and the like. "Nor have I anything to do with the arrears due by you to "Government or with the outstanding due by you to people or "with any litigation in Courts and the like. As we have entered "into a settlement as indicated above, we will never have any "pecuniary claim against each other with reference to the above "conditions.

"8. Your assets and liabilities and your property, movable and "immovable, belong to you and to your heirs and my assets and "liabilities and my property, movable and immovable, belong to "me and my heirs. Neither of us need therefore be responsible "for the affairs of the other.

"9. In whatever manner you may hereafter acquire property, "movable and immovable, I will have nothing to do with it. "In whatever manner I may hereafter acquire property, movable "and immovable, you shall have nothing to do with it.

"10. As to the immovable property belonging to us both, "the said immovable property should in case of the failure of "'aurasa' (self-begotten) male issue in either of these two lines, "*i.e.*, either for yourself or in your line of 'aurasa' sons or in "my line of 'aurasa' sons be put in possession of the other line, "but it should not be alienated by making adoption and the like.

"11. We both having resolved to carry out the provisions of "this kararnamah, you have this day executed to me a karar-"namah with the above conditions and I too have executed this "kararnamah to you.

"This kararnamah has been executed of my own full accord."

Subsequent to the grant, the nine villages were registered in the Collector's books as a separate estate in the name of the grantee Kumara Venkata Rau. They were also charged with proportionate peshcush and became under Regulation I of 1819 an

independent permanently assessed estate. From the year 1845 to the year 1887, they had been in the possession, first of the grantee, Kumara Venkata Rau; next of his son Venkata Mahipati Dharma Rau and respondent's husband; and since the former's death in 1881, in the possession of respondent's husband alone till his death in 1887 when the villages passed into the possession of his widow, the respondent.

During this period, there occurred three events in the family which require to be noticed in this judgment. The first is another grant of three villages made in December 1869 by the original plaintiff for the maintenance of his own younger brother when the latter executed a document in favour of the former, similar in terms to exhibit I. The next event is the litigation in the family commencing with original suit No. 11 of 1879 on the file of the District Court of Godavari and ending with the judgment of the Privy Council, dated the 29th September 1886 (exhibits A, B, C, D, II, III and IV). Respondent's late husband brought that suit to set aside an adoption made by appellant's father, the late Zamindar of Pithapuram, on the ground that such adoption was contrary to the ancient custom of the family and to the agreement made in 1845, which it was alleged, precluded the Zamindar for the time being from excluding by adoption or the like, the next heir male from succession. Referring to the 10th article of the agreement, the Judicial Committee observed, "It is clear that the "father of Gangadhara could not bind his son, who was then in "existence, *not* to adopt or legally stipulate that if he should adopt, "the son so adopted should not inherit. The words are 'In case of "the failure of self-begotten male issue.' Mr. Mayne has been "forced to admit that those words meant an indefinite failure of "issue; and that an adopted son should not even take by descent "from his father. It appears to their Lordships that that would be "entirely altering the law of descent and contrary to the principle "laid down in the Tagore case." The third event is the will left by respondent's husband on the 6th January 1887 granting her authority to adopt and constituting her his successor until such authority was exercised. The testator died on the 22nd January 1887 and this suit was instituted on the 2nd July 1888.

The appellant's case is (I) that the grant made to respondent's father-in-law was a maintenance grant; (II) that under its terms the estate reverted to his father on the death of respondent's husband when there was a failure of male heirs in his branch;

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(III) that notwithstanding the grant, the members of the two branches did not cease to be co-parceners and by right of survivorship, the original plaintiff was entitled under Hindu law to take the Kolanka estate to the exclusion of a childless widow like the respondent. It is also contended for the appellant that on the question of subsisting co-parcenary between the two branches, the adjudication in the suit of 1879 and in the appeals which arose from it is conclusive.

On the other hand, it is urged for the respondent that by reason of the grant, the Kolanka estate became the separate property of her branch of the family; that article 10 of the agreement I is inoperative and does not support appellant's claim; that the two branches were since then divided in interest; and that the decisions in the suit of 1879 had reference to the zamindari of Pithapuram. The Subordinate Judge upheld respondent's contention and dismissed the suit with costs; hence this appeal.

It is urged on behalf of the appellant that the Subordinate Judge is in error in holding that the Kolanka estate was the separate property of Kumara Venkata Rau's branch and that the grant made to him in 1845 was not a mere maintenance grant. We do not consider this contention to be tenable. Our decision must depend on the legal effect of exhibit I as to the nature and extent of the estate which was thereby intended to be granted. The object with which the grant was made was certainly a desire to assign land in lieu of money allowance which was previously paid for maintenance, but that object might legally be effectuated either by an absolute grant in full satisfaction of the claim to maintenance or by an annual grant of the income for one or more lives. The question, therefore, is one of construction as to the intention of the parties to the agreement I. What was actually given under that instrument was a group of villages and the intention was to transfer the property therein to the grantee and not merely its income. The villages are described as 'given'; they were further constituted into a separate mitta; and the mitta was registered in the name of Kumara Venkata Rau as proprietor. Possession was also transferred to him at once and his right of independent management and his right to the whole of the profit was recognised. Moreover, the grant was declared to be hereditary from son to grandson or to be 'Putra poutra paramparyam' which are words of inheritance and mean the grantee and his heirs.

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Again, there are several provisions which make the Kolanka estate independent of the zamindari of Pithapuram and the one is severed from the other as completely as it can be severed by partition. The words in article 5 'to you and your heirs,' and 'me and my heirs' show that the agreement was intended to be in force between the future representatives of the two branches as well as between the parties themselves. Exhibit I is manifestly not a grant either for one life or a specific number of lives, but it is a permanent grant made for hereditary enjoyment. In this connection appellant's pleader argues that the grant was made for a *specific* number of lives, but the grant suggests no determinate number of lives. Again, he draws our attention to article 10 of the agreement and urges that it was a grant to Kumara Venkata Rau and to the heirs male of his branch. But that article which relates to the immovable property owned by the appellant's grandfather and by the grantee purports to create a special right of reversion in respect of such property for each branch, in case there was failure of male issue in the other and forbids its alienation by adoption and the like. It was held to be inoperative in the previous suit by their Lordships of the Privy Council so far as it prohibits adoption, and in our judgment it is equally inoperative so far as it excludes female heirs from succession. Both restrictions alike contravene the principle laid down in the Tagore case, viz., that when property is once given absolutely, the grantor is not competent to restrict its descent in accordance with the law of inheritance which is applicable to the parties concerned. The conclusion to which we come is that by agreement, property in the Kolanka estate was given to Kumara Venkata Rau and his heirs absolutely, that as between appellant and respondent it is the separate property of the latter's branch, and that article 10 which forbids its descent in accordance with the Mitakshara law to the widow of the last male holder is inoperative.

Another ground upon which the Subordinate Judge relies is that even assuming that article 10 is not inoperative, the intention was, upon its true construction, *not* to exclude the respondent from succession.

In support of this view he observes that respondent, though a childless widow in Kumara Venkata Rau's branch, was entitled to maintenance like its male representatives, and that there is, therefore, no reason to think that she is not of that class of persons for whose benefit the grant was made. Adverting to a similar provision

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in exhibit VIII which is a grant made by appellant's father on account of the maintenance of his own brother, the Subordinate Judge refers to an admission made by the former that the article was designed to prevent the estate passing to strangers outside the family and not to shut out from succession wives of the grantee's male heirs. So far as the inference from the object of the grant is concerned, the reasoning does not appear to be conclusive. So far as the original plaintiff's admission regarding the effect of a similar article in exhibit VIII is concerned, it cannot be used against the appellant in favour of the respondent who was no party to it if, upon the true construction of Article 10 of agreement I, it excludes females. The words are "on failure of "aurasa or self-begotten male issue in either of these two lines, the "immovable property should be put in possession of the other "line," and they are wide enough to bear the interpretation that the contingency contemplated is either an adoption from outside the family or the failure of male representatives. We prefer to rest our decision on the ground that article 10 being inoperative should be expunged from the instrument and that the agreement I when read without that article clearly evidences a permanent grant to Kumara Venkata Rau and his lawful heirs of whom respondent is one.

Another contention urged on behalf of the appellant is that when respondent's husband died, the Kolanka estate was co-parcenary property and that by right of survivorship the appellant is a preferable heir. It is further stated that the decisions in the previous suit of 1879 are conclusive on this matter.

The decision of the Privy Council in the previous suit proceeded on the ground that a custom prohibitive of adoption was not made out as found by the District Court and the High Court and that article 10 which forbade adoption was illegal and in operative. The High Court, whilst it rested its decision on the custom not being proved, expressed also an opinion that there was co-parcenary among the parties to that suit. But that opinion was expressed with reference to the zamindari of Pithapuram to which the adopted son was an heir previous to the birth of the appellant, and it is not conclusive as argued for the appellant in respect of the Kolanka estate which forms the subject of the present suit.

It may well be that the zamindari of Pithapuram is an impartible estate from which male co-parceners of a junior branch have a right to exclude a childless widow of the last male Zamindar and

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CIVIL PROCEDURE CODE—ACT XIV OF 1882, ss. 13, 30—'Res judicata'—*Representation.*] Although the members of a tarwad or family may, in an irregular fashion, be represented by a karnavan of the tarwad in a suit, the decree therein does not raise an absolute estoppel against members not actually brought on the record. *Ittiachan* v. *Vellappan*(1) and *Sri Devi* v. *Kelu Eradi*(2) followed.

Komappan Nambiar v. *Ukkaran Nambiar* 214

2. ——————————, s. 234—*A stranger to a decree against a deceased person in possession of his property—'Legal representative.'*] The words 'legal representative' in s. 234 of the Code of Civil Procedure do not include any person who does not in law represent the estate of the deceased person. Consequently, a stranger in possession of property of a deceased person who was not a party to a decree against such person cannot be proceeded against in execution otherwise than by a regular suit.

Chathakelan v. *Govinda Karumiar* 186

3. ——————————, ss. 365, 367—*Representation of a deceased plaintiff.*] Section 365 of the Code of Civil Procedure presupposes that the party claiming to represent a deceased plaintiff *is* his legal representative, but, if the representative character is denied, or when two or more persons claim it, the procedure prescribed by s. 367 of the Code should be followed.

Oula v. *Beepathee* 210

4. ——————————, ss. 562, 566 AND 582—*Order made on appeal to amend plaint.*] On appeal from the decision of a District Munsif in favour of the plaintiffs, in a suit for the recovery of rent, the District Judge set aside the decree of the Lower Court, ordered a new trial, and directed the amendment of the plaint by inserting the exact boundaries of the land on which the plaintiffs claimed the rent:—*Held*, that the order for amendment of the plaint was bad under s. 562 of the Code of Civil Procedure, since the original Court had not "disposed of the suit upon a preliminary point," and that it was likewise bad under s. 582, since there had been no dispute as to the boundaries of the land before the original Court. If the information was necessary, the District Judge should have sent down an issue on the point for trial under s. 566 of the code.

Krishnaya Navada v. *Panchu* 187

CONTRACT—*Executory contract involving personal considerations—Assignment—Contract consisting of distinct contracts with separate parties—Misjoinder of the parties as*

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defendants in one suit—Grant of relief that was not prayed for—Damages—Liquidated rate of damages applicable to certain specified breaches of contract only.] Seven salt manufacturers, the defendants, contracted with A to manufacture and store in the factory in the name of and for the benefit of A such quantities of salt as he might require them to manufacture each season for seven years, in consideration of A's paying them at the rate of Rs. 11-8-0 per garce of salt, four months' credit after each delivery being allowed to A, and of his paying Government taxes and dues, and executing all but petty repairs in the defendants' factory. B was a party with A to the contract though he was not expressly mentioned therein. A assigned his share in the contract to C. B, as first plaintiff, and C, as second plaintiff, brought a suit against the defendants alleging that the defendants had failed to fulfil their part of the contract during the second year of its continuance (1886) and praying (1) that all the defendants be directed to deliver to the plaintiffs the salt collected during 1886; (2) that defendants 2, 4 and 7 should be held liable for any damages plaintiffs might suffer through a fall in the price of salt. The Court of first instance, having held that the contract contained seven separate and distinct contracts, each defendant having contracted with reference to his own pans only, decreed (1) that the seven defendants should pay damages at the rate of Rs. 5-12-0 per garce for the salt collected by each during the years 1886 to 1889, leaving the quantity to be ascertained in the execution of the decree; (2) that the defendants should pay the plaintiffs' costs. On appeal the District Judge modified the decree by fixing the rate of damages at Rs. 45-10-0 for each garce of salt:—*Held*, on appeal (1) that A was not competent to assign his interest in the contract to the second plaintiff, since the contract was based on personal considerations and that the assignment of it as an executory contract was invalid without the consent of the defendants. *Farrow* v. *Wilson*(1), *Humble* v. *Hunter*(2), *Arkansas Valley Smelting Company* v. *Belden Mining Company*(3), followed; (2) that the suit was bad for misjoinder, since the case of each defendant, as a party to a distinct contract, should be decided on its own merits; (3) that the decrees of the Lower Courts were bad in making all the defendants jointly and severally liable for costs, and for damages for other years than the year 1886, and in not ascertaining the amount of damages payable by each defendant; (4) that the measure of damages was what the plaintiffs had lost by the breach of contract, but that the Lower Appellate Court was wrong in applying the rate fixed on this principle to each defendant without ascertaining the particular nature of the breach of which each defendant was guilty.

Namasivaya Gurukkal v. *Kadir Ammal* 168

DECLARATORY DECREE—CODE OF CIVIL PROCEDURE—ACT XIV OF 1882, ss. 278 AND 283—*Termination of attachment by abandonment.*] The plaintiff had an attachment against certain property. Owing to his not filing a necessary affidavit, the execution petition was struck off. Subsequently he applied for the sale of the property, and the Court directed a fresh attachment to issue. It was held that these facts did not amount to an abandonment of the first attachment by the plaintiff.

Srinivasa Sastrial v. *Sami Rau* 180

MADRAS FOREST ACT—ACT V OF 1882, ss. 2, 4, 10 AND 14—*Claim to percentage of forest income—The Pensions Act—Act XXIII of* 1871, *s.* 4—*'Civil Court'*—

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Jurisdiction of Forest Settlement Officer—Jurisdiction of Appellate Court.] A claim to a percentage of forest income is not a claim to forest produce under Madras Act V of 1882, nor is it a claim to a right specified in s. 4 of that Act. A Forest Settlement Officer has no jurisdiction to entertain a suit in which such a claim is made, and such a suit brought by discharged forest karnams is barred by s. 4 of the Pensions Act. A Forest Settlement Officer is a 'Civil Court' for the purposes of the Pensions Act. If a Court of limited jurisdiction exceeds its powers and adjudicates on a claim over which it has no jurisdiction, the Court (if any) which exercises appellate jurisdiction over it is bound to entertain an appeal preferred against the Lower Court's decision and to correct the error. A Court of competent appellate jurisdiction in such a case is not bound by an order made without jurisdiction by a Collector on an appeal to him in the same suit. Submission by the parties to his jurisdiction cannot give a Forest Settlement Officer jurisdiction in a case where he has no inherent jurisdiction.

Secretary of State for India v. *Vydia Pillai* 193

HINDU LAW—*Illegitimate son—Maintenance.*] Under the Mitakshara law an illegitimate son is entitled to maintenance as long as he lives, in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. The maintenance decreed to an illegitimate son may be secured on the family property.

Ananthaya v. *Vishnu* 160

2.————*Succession of a daughter's daughter to her grandfather's estate.*] On the principle laid down in *Nallanna* v. *Ponnal*(2), a daughter's daughter is, in the absence of preferential male heirs, entitled to succeed to her grandfather as a bhandu.

Ramappa Udayan v. *Arumugath Udayan* 182

LIMITATION— ACT XV OF 1877, SCHED. II, ART. 179—*Step in aid of execution—Request for payment of money realized in satisfaction of a decree.*] A request for the payment of money realized in satisfaction of a decree is sufficient to keep the decree alive, being a step in aid of execution. *Venkatarayalu* v. *Narasimha*(3) approved and followed. Whether a particular act is or is not an application for or step in aid of execution, depends upon the nature of the act rather than the time at which it may possibly be done. *Hem Chunder Chowdhry* v. *Brojo Soondury Dabee*(4) qualified.

Koormayya v. *Krishnamma Naidu* 165

MAKKATAYAM RULE OF INHERITANCE—*Tiyans—Whether compulsory partition can be effected.*] The ordinary rule of Marumakatayam against compulsory partition is equally applicable to Tiyans who follow Makkatayam, no custom to the contrary having been made out.

Raman Menon v. *Chathunni* 184

NEGOTIABLE INSTRUMENTS ACT—ACT XXVI OF 1881, s. 46—*Effect of an invalid endorsement of a promissory note by payee—Note recovered by, but not re-indorsed to the payee.*] The defendant gave plaintiff a promissory note payable on demand. The plaintiff endorsed the note to a third party, a creditor of his, who sued the defendant on the note on his refusal to pay. The defendant pleaded that it had been agreed between the payee and himself that the note should

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not take effect until the payee had performed certain conditions which remained unperformed. The suit was accordingly dismissed. The plaintiff thereupon paid the endorsee and took back the note, which, however, was not re-indorsed, and instituted the present suit against the defendant, who pleaded that the property in the note was not vested in the original plaintiff so as to enable him to maintain the suit. On the decease of the plaintiff before the trial his sons were substituted as plaintiffs :—*Held*, that, although the property in a promissory note payable to order on demand passes by endorsement and delivery. (Act XXVI of 1881, s. 46), the endorsement in this case had been declared invalid in the suit referred to and must, therefore, be treated as cancelled, and consequently the property in the note was vested in the plaintiff at the date of the suit so as to enable him to maintain it.

Marimuthu Pillai v. *Krishnasami Chetti* 197

NOTICE TO QUIT—*Assertion of Mulgeni (permanent) tenure—Entitlement to notice.*] The setting up of a Mulgeni right by a tenant is not a disclaimer of title such as disentitles him to a notice to quit in determination of the tenure.

Unhamma Devi v. *Vaikunta Hegde* 219

RELIGIOUS ENDOWMENTS ACT—ACT XX OF 1863—*Regulation VII of 1817, s. 13—Discretionary power of a temple committee to appoint new trustees when the power of management is not hereditary—Trusts Act—Act II of 1882, s. 49.*] A temple committee appointed under Act XX of 1863 may appoint new trustees when there is no hereditary trustee to add to the existing trustees, but this power, although discretionary, must be exercised reasonably and in good faith, and, according to the principle, which is applicable to public trusts, embodied in s. 49 of the Indian Trusts Act. If it is not so exercised, the power may be controlled by a Civil Court of original jurisdiction.

Sheik Davud Saiba v. *Hussein Saiba* 212

SALE OF LAND FOR ARREARS OF REVENUE—REVENUE RECOVERY ACT—MADRAS ACT II OF 1864, s. 36, CL. 2 AND s. 59—*Sale irregular by reason of not being duly notified—Limitation—Alleged fraud affecting sale—Limitation Act—Act XV of 1877, s. 8.*] When there are arrears of revenue so as to give jurisdiction to the Collector to sell under Madras Act II of 1864, the sale, however irregular, is a proceeding under that Act, for purposes of limitation, and is valid not only as between the Collector and the defaulter, but as between the Collector and the purchaser at the sale. *Venkata* v. *Chengadu*(1) and *Nilakandan* v. *Thandamma*(2) followed. The mere fact that one of the plaintiffs, in a suit brought to set aside a sale under Madras Act II of 1864, is a minor is not sufficient to save the limitation bar under s. 59 of Madras Act II of 1864, when an alleged fraud affecting the sale came to the knowledge of the other plaintiffs who are majors and are jointly interested with the minor more than six months prior to the institution of the suit, s. 8 of the Limitation Act being inapplicable to such cases.

Narayanan Nambudri v. *Damodaran Nambudri* 189

SUCCESSION CERTIFICATE ACT—ACT VII OF 1889, ss. 19 AND 26—*Appeal from an order of a District Court under s. 26.*] Section 26 of the Succession Certificate Act confers on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by s. 19 on the High Court over the order

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of a District Court. There is no provision in the Act for a second appeal in any case.

Subba Rao v. *Palaniandi Pillai* 167

SUIT AGAINST SECRETARY OF STATE IN COUNCIL—*Dismissal of suit with costs—Review of taxation—Remuneration of the Advocate-General and Government Solicitor by fixed salaries—Liability of party condemned in costs.*] Assuming that the arrangement between the Government and its Solicitor is that the latter should receive a salary and in addition the costs awarded to Government, this arrangement cannot affect a third party condemned in costs; neither is it illegal or contrary to public policy.

Muhammed Alim Ooliah Sahib v. *The Secretary of State for India* 162

TEMPLE REPAIRS—*'Katlais' or distinct endowments—Liability for repairs—Proof of custom in absence of endowment-deeds.*] The 'panchayatdars' or managers of a temple, being directed by a Magistrate to repair the gateway of a store-house within the temple precincts and under their immediate control, spent Rs. 10-8-0 in so doing from the funds of a 'katlai' or endowment of which they were managers. They then sued the trustees of two other 'katlais' for recovery of the said sum on the ground that, by the usage of the temple, the cost of repairs was payable from the defendants' income, and asked for a declaration that the duty or executing repairs fell upon the defendants' 'katlais':—*Held* that, in the absence of any endowment or trust-deed regarding the 'katlais' the decision must be found in the usage of the temple, upon proof of which judgment was given for the plaintiffs, and a declaration added to the effect that the defendants were liable for repairs to the temple so far as the surplus funds of their 'katlais' should permit.

Vythilinga Pandara Sannadhi v. *Somasundara Mudaliar* 199

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 114—*Presidency Small Cause Courts Act—Act XV of* 1882, *ss.* 22, 41.] The plaintiff, a landlord, relying on a provision in a lease, gave the defendants, his tenants, notice to quit. Within seven days the defendants tendered rent, interest and costs. The plaintiff, nevertheless, filed this suit to eject the defendants. The defendants subsequently paid the full amount due into Court:—*Held*, that, under the terms of the lease, the defendants were not liable to forfeiture, and that, since the suit should have been brought under chapter VII, s. 41 of the Presidency Small Cause Courts Act, plaintiff must pay the defendants' costs as between attorney and client under s. 22 of that Act:—*Held*, on appeal (1) that there having been a tender and payment into Court of the full amount due, the plaintiff
with the suit at his risk under s. 114 of the Transfer of Property Act; (2) that the suit not being cognizable by the Small Cause Court, s. 22 of Act XV of 1882 did not apply, an application under chapter VII of that Act not being a suit under s. 22 thereof.

Krishnasami Chetti v. *The Natal Emigration Board* 216

WIDOW IN POSSESSION OF HER LATE HUSBAND'S LAND—*Sale of the land in execution of a personal decree obtained against the widow—Suit by the nephew and reversioner of the deceased husband to recover the land from the purchaser.*] A Hindu widow sued to recover certain land which belonged to her late husband from his brother. The suit was compromised by means of a razinamah, one of the terms of which was that the widow should remain in possession of and enjoy the

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property, but should not alienate it without the brother's permission. Subsequently a personal decree was obtained against the widow, and the land being sold in execution, was purchased by the defendant in the present suit, in which the first plaintiff was the nephew and reversioner of the deceased husband:—*Held*, that the suit against the widow being on a personal claim, only her limited interest in the property was sold in execution, and that consequently the plaintiff was entitled to the property. *Jugul Kishori* v. *Jotendro Mohun*(1) distinguished, and the principle in *Baijun Doobey* v. *Brij Bhookun Lall Awusti*(2) applied.

Narana Maiya v. *Vasteva Karanta* 208

yet with respect to all other properties the two may be divided in interest. Unlike the zamindari, the Kolanka estate is property carved out of it and made the subject of a recent grant. We have already stated our reasons for holding that under the terms of the grant, it is, as between the parties to this appeal, the separate property of Kumara Venkata Rau's branch. This does not rest on mere inference for article 8 of the agreement refers to the property owned then by each branch and describes its *status* in relation to it in these terms—" your assets and liabilities and your property, " movable and immovable, belong to you and your heirs, and my " assets and liabilities and property, movable and immovable, belong " to me and my heirs. Neither of us need therefore be responsible " for the affairs of the other." They are words of severed interest and several liability and are inconsistent with community of interest in the absence of which no co-parcenary can subsist.

Article 9 relates to after-acquired movable and immovable property and provides with reference to it in these terms—" in " whatever manner you may hereafter acquire property, movable " and immovable, I will have nothing to do with it. In whatever " manner I may hereafter acquire property, movable and immov- " able, you shall have nothing to do with it." It appears to be a reasonable inference from these two articles that, from the date of the agreement, the parties by mutual consent determined their *status* as co-parceners, for from that day forward, it is clear there was to be neither unity of interest nor of enjoyment either in the Kolanka estate or in after-acquired property. In paragraph 44 of his judgment, the Subordinate Judge discusses also the conduct of the parties both prior and subsequent to the agreement and comes to the conclusion that it likewise denotes determination of co-parcenary from the date of the agreement I. We do not desire to be understood as expressing any opinion regarding the zamindari of Pithapuram which is an ancient impartible zamindari, but we entirely agree with the Subordinate Judge that as regards the Kolanka estate, the after-acquired and other property of the respondent's branch, the co-parcenary or joint interest of the appellant's branch has ceased from the date of the agreement I.

For these reasons, we are of opinion that this appeal cannot be supported and that it must be dismissed with costs.

APPELLATE CIVIL.

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

1893. October 25. December 22.

ANANTHAYA (DEFENDANT), APPELLANT,

v.

VISHNU (PLAINTIFF), RESPONDENT.*

Hindu law—Illegitimate son—Maintenance.

Under the Mitakshara law an illegitimate son is entitled to maintenance as long as he lives, in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. The maintenance decreed to an illegitimate son may be secured on the family property.

SECOND APPEAL against the decree of W. C. Holmes, Acting District Judge of South Canara, in appeal suit No. 178 of 1891, modifying the decree of M. Mundappa Bangera, District Munsif of Mangalore.

The plaintiff, an illegitimate son of the defendant's father, a Brahmin by caste, sued to recover from defendant his maintenance as a charge on certain immovable family property. Both the Lower Courts decreed in favour of the plaintiff, and the defendant preferred this appeal.

Pattabhirama Ayyar for appellant.

Parthasaradhi Ayyangar for respondent.

JUDGMENT.—Both Courts have found that respondent is the illegitimate son of appellant's father Krishnaraya, who was a Brahmin by caste. As observed by the District Munsif, it is a settled rule of Hindu law that among the regenerate classes illegitimate sons are entitled to maintenance. The District Judge considered Rs. 4 a month to be a suitable provision for respondent and decreed to him future maintenance and arrears of maintenance for fourteen months before suit at the rate of Rs. 4 per mensem. From this decision the defendant has preferred this second appeal.

There can be no doubt that under the Mitakshara law, by which the parties are governed, an illegitimate son is entitled to

* Second Appeal No. 239 of 1893.

maintenance among the regenerate classes. The Smriti of Yajnyavalkya and its exposition in the Mit., chapter I, section XII, leaves no room for doubt on this point. An illegitimate son is one of that class of persons who, by reason of their exclusion from inheritance, are allowed maintenance by the Hindu law, and this is clear from the facts that among Sudras he shares his father's property together with the legitimate son. It is urged on appellant's behalf that respondent is not entitled to maintenance after he attains his age, but we are unable to accede to this contention. The Smriti of Yajnyavalkya awards maintenance to an illegitimate son not as a provision against starvation and vagrancy, but in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. As in the case of females of the family or of disqualified heirs, an illegitimate son is entitled to maintenance as long as he lives. We do not, however, desire to be understood as holding that his earnings, when he is able to earn, should not be considered in fixing the rate at which maintenance should be paid.

Another contention is that maintenance can only be decreed subject to the condition that he is 'docile' and our attention is drawn to the decision in *Hargobind Kuari* v. *Tharam Singh*(1) and to the words in Mit., chapter I, section XII, sloka 3, "but if he "be docile, he receives a simple maintenance." By docility, cited above in the text, is meant nothing more than showing such consideration and rendering such reasonable service as are ordinarily due to the head of the family by its members. It is not necessary to consider, for the purposes of this appeal, whether the text is more than directory, as there was no plea in the Courts below based on this ground.

The third contention is that the maintenance should not be made a charge on any immovable property belonging to the family. As the maintenance awarded is the result of exclusion from inheritance, and as the Hindu theory is that family property constitutes assets from which charges in the nature of maintenance, &c., are to be met, the maintenance decreed to an illegitimate son may be secured on the family property, as in the case of a female member, by being declared to be a charge.

The fourth contention for the appellant is that respondent's

(1) I.L.R., 6 All., 329.

ANANTHAYA v. VISHNU.

mother was a dancing girl by caste. But both Courts find that respondent is the illegitimate son of his father, and as this is a question of fact, the finding is binding upon us. The position of the mother as a dancing girl by caste is only important as showing that her connection with the father was casual and *not* continued concubinage, but in the present case the Judge referred to evidence showing that respondent's mother was the concubine of his father for a long period of years. This appeal cannot be supported and we dismiss it with costs.

APPELLATE CIVIL.

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

1893 July 10.

MUHAMMED ALIM OOLLAH SAHIB (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT.*

Suit against Secretary of State in Council—Dismissal of suit with costs—Review of taxation—Remuneration of the Advocate-General and Government Solicitor by fixed salaries—Liability of party condemned in costs.

Assuming that the arrangement between the Government and its Solicitor is that the latter should receive a salary and in addition the costs awarded to Government, this arrangement cannot affect a third party condemned in costs; neither is it illegal or contrary to public policy.

APPEAL against the judgment of Wilkinson, J., sitting on the Original Side in civil suit No. 128 of 1891.

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

WILKINSON, J.—"This is an application to review the taxa-"tion of the defendant's bill of costs in the above suit to set aside "the allocation of the taxing officer and to lay down the mode "in which and the principle on which the bill should be taxed.

"The suit was one by a private individual against the Secre-"tary of State. At the first hearing the Secretary of State was

* Appeal No. 16 of 1892.

MUHAMMED ALIM OOLLAH SAHIB v. THE SECRETARY OF STATE FOR INDIA.

"represented by the Advocate-General, instructed by the Gov-"ernment Solicitor, and the suit was dismissed, the plaintiff "being ordered to pay the costs of the Secretary of State.

"The taxing officer's notes show that before him the plaintiff "objected to defendant's bill of costs on the ground that defend-"ant had incurred no costs 'unless for the time of their officers' "(whatever that may mean). The Government Solicitor replied "that the taxing officer was not at liberty to go behind the order "to tax, that costs were given as a penalty, and that it had for "more than thirty years been the invariable practice of the Court "to tax Government bills of costs in the same way as other bills "of costs. The taxing officer accepted the plea of the Govern-"ment Solicitor and taxed the costs as between party and party.

"Mr. Norton appears for the plaintiff and argues that as "Government pay the Government Solicitor a fixed monthly salary "to do its legal work, the Secretary of State, the defendant in this "case, cannot be said to have incurred any cost; that, as the "Government Solicitor cannot recover from the Government the "items mentioned in the bill of costs, Government cannot recover "them from the plaintiff, and that the principle upon which the "Court ought to proceed in fixing costs is to ascertain what was "the actual damnification caused to the successful party and to "award to him the sum which he is actually out of pocket. Mr. "Norton's argument proceeds on the assumption that the plaintiff "is entitled to the benefit of any arrangement entered into by the "Government with the Solicitor whose services the Government "see fit to retain by the payment of a monthly salary. I do not "think that he is. The principle applicable in cases like the "present appears to be that laid down in the case relied on by the "Advocate-General, *Raymond* v. *Lakeman*(1). In that case the "Taxing Master allowed a company which employed standing "solicitors at a fixed salary such costs as the company would "be bound to pay to their solicitors. It was argued before the "Court that as the standing solicitors were paid a fixed salary, "the company had no right to charge the unsuccessful party "more than their own standing solicitors could have charged "them. The Master of the Rolls maintained the order of the "Taxing Master, holding that the unsuccessful party could not

(1) 34 Beav., 584.

MUHAMMED ALIM OOLLAH SAHIB v. THE SECRETARY OF STATE FOR INDIA.

"have the benefit of any private arrangement between the solici-
"tor and the company as to costs. The case appears to me on all
"fours with the present case. The unsuccessful party, the plain-
"tiff, has been ordered to pay to the defendant the costs incurred
"by him. The defendant asserts that costs have been incurred by
"the employment of a solicitor to receive the summons, to instruct
"counsel, put in written statements, &c. It is not denied that the
"costs which the present defendant claims to recover from the
"plaintiff are such as any other defendant must have incurred in
"defending the suit and would be bound to pay to his solicitor.
"But it is argued that unless the Government Solicitor proves that
"he can recover the costs from Government, Government cannot
"recover them from plaintiff. This is entirely beside the question,
"which is one between plaintiff and defendant, not one between
"plaintiff and the Government Solicitor as Mr. Norton suggests.
"The plaintiff has no right to assume that the defendant has
"not expended these sums, nor is he entitled to call upon the
"defendant to prove the nature of the contract between him and
"his solicitor. The case of *Barnes* v. *Attwood*(1) is not really
"in point, as there the taxing officer had been induced by false
"affidavits to allow a larger sum as expenses to commissioners
"than had actually been paid. It is true that Mr. Norton's whole
"argument proceeded on the assumption that the bill of costs put
"in by the defendant in this case represents absolutely fictitious
"transactions as between the Government Solicitor and the Gov-
"ernment. But it is unnecessary to consider that question. The
"only question is—Has the defendant incurred any, and if so,
"what costs. The answer is—The defendant has employed a
"solicitor, who has done certain acts and is entitled to charge for
"his time and work, and the defendant is liable to remunerate the
"solicitor. Whether Government chooses to do by a fixed salary
"and whether the costs, if recovered, go to the Government treasury
"or into the solicitor's pocket is not a matter into which the
"taxing officer is competent to inquire.

"The petition must be dismissed with costs."

The plaintiff (appellant) preferred this appeal.

Messrs. *Branson* and *Branson* for appellant.

(1) 5 C.B., 164.

MUHAMMED ALIM OOLLAH SAHIB v. THE SECRETARY OF STATE FOR INDIA.

The Government Solicitor (Messrs. *Barclay*, *Morgan* and *Orr*) for respondent.

JUDGMENT.—It is by no means clear what are the exact terms on which contentious business is done as between the Government Solicitor and Government. Assuming, however, that the arrangement is that he should receive a salary and, in addition, the costs recoverable from third parties in those cases in which costs are awarded to Government, we are unable to see how that arrangement can affect a third party who is condemned in costs. *Raymond* v. *Lakeman*(1).

The arrangement does not appear to be contrary to public policy, and there is no Act under which it is made illegal. *Jennings* v. *Johnson*(2).

The appeal is dismissed with costs.

APPELLATE CIVIL.

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

KOORMAYYA AND OTHERS (PETITIONERS), APPELLANTS,

v.

KRISHNAMMA NAIDU AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

1893. September 4.

Limitation—Act XV of 1877, sched. II, art. 179—Step in aid of execution—Request for payment of money realized in satisfaction of a decree.

A request for the payment of money realized in satisfaction of a decree is sufficient to keep the decree alive, being a step in aid of execution. *Venkatarayalu* v. *Narasimha* (3) approved and followed.

Whether a particular act is or is not an application for, or step in aid of execution, depends upon the nature of the act rather than the time at which it may possibly be done. *Hem Chunder Chowdhry* v. *Brojo Soondury Dabee*(4) qualified.

APPEAL against the order of H. G. Joseph, Acting District Judge of Ganjam, in original suit No. 2 of 1883.

The plaintiff, holder of a decree dated 14th October 1884,

* Appeal against Order No. 53 of 1892.

(1) 34 Beav., 584. (2) L.R., 8 C.P., 425.
(3) I.L.R., 2 Mad., 174. (4) I.L.R., 8 Calc., 89.

KOORMAYYA v. KRISHNAMMA NAIDU.

presented a petition, dated 14th April 1891, to show good reasons why the decree had not been barred by limitation. It appeared that the plaintiff applied for and was paid certain moneys through the Court under receipts dated 15th May and 28th October 1889. The District Judge held on the authority of *Fazal Iman* v. *Metta Singh*(1) that such an application was not a step in execution within the meaning of clause 4 of article 179, schedule II of Act XV of 1877, and that consequently the limitation was not saved.

The petitioner preferred this appeal.

Pattabhirama Ayyar for appellants.

The respondents were not represented.

JUDGMENT.—It must be inferred, from the Sheristadar's report on the receipts of 1889 and the Judge's subsequent order thereon, that there was a request for payment of the money realized in satisfaction of the decree, and such request is sufficient to keep the decree alive, as held in *Venkatarayalu* v. *Narasimha*(2).

Though the Judge considers the opinion expressed in *Venkatarayalu* v. *Narasimha*(2) to be a mere *obiter dictum*, it was certainly one of the grounds of decision in the case, and we agree with it. With reference to the observation in *Hem Chunder Chowdhry* v. *Brojo Soondury Dabee*(3) that the money may be drawn at any time, it seems to us that in deciding whether any particular act is or is not an application for, or step in aid of execution, it is the nature of the act that must be looked to, and not the time at which it may possibly be done.

We set aside the order of the District Judge and direct that the execution be proceeded with.

(1) I.L.R., 10 Calc., 549. (2) I.L.R., 2 Mad., 174.
(3) I.L.R., 8 Calc., 89.

APPELLATE CIVIL.

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

SUBBA RAO (PETITIONER), APPELLANT,

v.

PALANIANDI PILLAI (COUNTER-PETITIONER), RESPONDENT.*

1893. October 12.

Succession Certificate Act—Act VII of 1889, *ss.* 19 *and* 26—*Appeal from an order of a District Court under section* 26.

Section 26 of the Succession Certificate Act confers on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by section 19 on the High Court over the order of a District Court. There is no provision in the Act for a second appeal in any case.

APPEAL against the decree of R. S. Benson, District Judge of South Malabar, in civil miscellaneous appeal No. 63 of 1892, confirming the order of the Subordinate Judge of Palghat in civil miscellaneous petition No. 7 of 1892.

The petitioner applied for a certificate of heirship under section 6 of the Succession Certificate Act. The Subordinate Judge rejected the petition. The petitioner appealed to the District Court under section 26 of that Act and his appeal was dismissed. He then preferred this appeal.

Sundra Ayyar for appellant.

Krishna Menon for respondent.

JUDGMENT.—The preliminary objection is taken that no second appeal lies. The language of section 26 appears to us to support the contention. The intention was, we think, to confer on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by section 19 on the High Court over the order of a District Court.

There is no provision in the Act for a second appeal in any case. Both section 19 and section 26 declare that the orders of District Courts shall be final.

The material words in section 19, clause 3, are "subject to the "provisions of sub-section 1 and of chapters 46 and 47 of the Code "of Civil Procedure as applied by section 647 of that Code, an order

* Appeal against Appellate Order No. 5 of 1893.

SUBBA RAO v. PALANIANDI PILLAI.

"of the District Court, under this section, shall be final." Section 26, clause 3, is to the same effect, but the words 'subject to the 'other provisions of this Act,' are omitted.

It is contended that the word final is intended to preclude any other suit. This may be. But we are of opinion that it also precludes a further appeal except when such is expressly allowed.

The use of the words subject to the other 'provisions of this 'Act' in section 19 and their omission in section 26 is significant.

We are of opinion that the preliminary objection must prevail.

This appeal is, therefore, dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Davies.

1893. July 12, 13. October 5.

NAMASIVAYA GURUKKAL AND OTHERS (DEFENDANTS NOS. 1 to 6), APPELLANTS,

v.

KADIR AMMAL AND OTHERS (1ST PLAINTIFF'S REPRESENTATIVES AND PLAINTIFFS NOS. 3 AND 4), RESPONDENTS.*

Contract—Executory contract involving personal considerations—Assignment—Contract consisting of distinct contracts with separate parties—Misjoinder of the parties as defendants in one suit—Grant of relief that was not prayed for—Damages—Liquidated rate of damages applicable to certain specified breaches of contract only.

Seven salt manufacturers, the defendants, contracted with A to manufacture and store in the factory in the name of and for the benefit of A such quantities of salt as he might require them to manufacture each season for seven years, in consideration of A's paying them at the rate of Rs. 11-8-0 per garce of salt, four months' credit after each delivery being allowed to A, and of his paying Government taxes and dues, and executing all but petty repairs in the defendants' factory. B was a party with A to the contract though he was not expressly mentioned therein. A assigned his share in the contract to C. B, as first plaintiff, and C, as second paintiff, brought a suit against the defendants alleging that the defendants had failed to fulfil their part of the contract during the second year of its continuance (1886) and praying (1) that all the defendants be directed to deliver to the plaintiffs the salt collected during 1886; (2) that defendants 2, 4 and 7 should be held liable for any damages plaintiffs might suffer through a fall in the price of salt. The Court of first instance, having held that the contract contained seven separate and distinct contracts, each defendant having contracted with reference to his own

* Second Appeals Nos. 93 to 114 of 1892.

NAMASIVAYA GURUKKAL v. KADIR AMMAL.

pans only, decreed (1) that the seven defendants should pay damages at the rate of Rs. 5-12-0 per garce for the salt collected by each during the years 1886 to 1889, leaving the quantity to be ascertained in the execution of the decree; (2) that the defendants should pay the plaintiffs' costs. On appeal the District Judge modified the decree by fixing the rate of damages at Rs. 45-10-0 for each garce of salt:

Held on appeal (1) that A was not competent to assign his interest in the contract to the second plaintiff, since the contract was based on personal considerations, and that the assignment of it as an executory contract was invalid without the consent of the defendants. *Farrow* v. *Wilson*(1), *Humble* v. *Hunter*(2), *Arkansas Valley Smelting Company* v. *Belden Mining Company*(3), followed;

(2) that the suit was bad for misjoinder, since the case of each defendant, as a party to a distinct contract, should be decided on its own merits;

(3) that the decrees of the Lower Courts were bad in making all the defendants jointly and severally liable for costs, and for damages for other years than the year 1886, and in not ascertaining the amount of damages payable by each defendant;

(4) that the measure of damages was what the plaintiffs had lost by the breach of contract, but that the Lower Appellate Court was wrong in applying the rate fixed on this principle to each defendant without ascertaining the particular nature of the breach of which each defendant was guilty.

SECOND APPEALS against the decree of T. Weir, District Judge of Madura, in appeal suits Nos. 225, 240 and 304 to 325 of 1890, modifying the decree of A. Ramasawmy Sastrial, Additional District Munsif of Sivaganga, in referred suit No. 137 of 1888.

The facts of the case appear sufficiently for the purpose of this report from the above and from the judgment of the High Court. The contract in question was as follows:—

"1. As we have bound ourselves to present petitions and store "up in your name, for seven years, from 11th April 1885 to 10th "April 1892, *all the salt* manufactured by us under the license, in "accordance with the new excise rules, in the salt-pans of the "Vattanam factory which were in our forefathers' enjoyment "before and which are in our enjoyment now, we will manufac- "ture salt for the said seven years according to the instructions "given by you or your agent and, according to the Circar rules, "present petitions in your name beforehand and store up salt and "preserve them by putting them in heaps according to the in- "structions given by you or your agent, use clay for those heaps "according to the Circar rules and use sand for the cracks, &c.; "and within four months from the date of our giving over the salt

(1) L.R., 4 C.P., 744. (2) 12 Q.B., R.P., 310. (3) 127 U.S.R., 379.

"to you in the abovesaid manner you are to pay each of us at "11½ rupees per garce and take receipts from us.

"2. Either you or your agent must give to each of us a kachat "then and there for the salt stored up after measurement and "secured or preserved in the manner stated in para. 1.

"3. We are to execute, at our own cost, the repairs of 'kadal "vaikal,' 'kanni vaikal' (channels, the water of which is used "for watering the salt-pans), 'kéni' (a sort of well), patti (salt-"pans), panni, &c., places where salt is manufactured, and we "will ourselves execute the repairs that have now to be done.

"4. All the taxes or duties that we have to pay to the Salt "department according to the license under the new system "shall be paid by yourselves.

"5. Out of the repairs that we might be ordered to execute under "the rules that might be framed by the Government, you are to "execute all sorts of repairs excepting those stated in para. 3.

"6. You are not only to accept for the said seven years the salt "manufactured by us according to the 'dittum' (*standard* or "estimate, so translated by Mr. Winslow) prescribed by you, but "also to exercise all the rights that we possess in the factory, as "our representatives.

"7. You are yourselves to sell the salt mentioned above. If we "lay waste the salt-pans mentioned below without manufacturing "salt, and if we do not show, in the matter of storing up of salt, "satisfactory reasons, such as the unfavourable circumstances of "the weather and the like, each of us will be responsible and pay "you at Rs. 5¾ per garce for the loss that might accrue to you "(by the non-manufacture of salt) and the salt being below the "standard or estimate.

"8. At the end of the term, after all the salt stored up in "your name has been sold away, we will sell at our pleasure the "salt that we might manufacture subsequently.

"9. This agreement, containing the above conditions, was "executed by us with our free consent."

The Lower Courts decreed in favour of the plaintiffs, and the defendants preferred this appeal.

Subramanya Ayyar for appellant No. 2.

Sivasami Ayyar and *Krishnasami Ayyar* for appellants.

Parthasaradhi Ayyangar, *Bhashyam Ayyangar* and *Tiruvenkata Chariar* for respondents.

JUDGMENT.—The seven defendants were salt manufacturers holding pans in the factory at Vattanam, and they entered into the contract A, dated the 16th November 1884, with one Nur Mahomed engaging themselves in consideration of the said Nur Mahomed discharging the Government taxes and executing certain repairs and paying them at the rate of Rs. 11-8-0 per garce of salt, to manufacture and store in the factory in the name of, and for the benefit of the said Nur Mahomed such quantities of salt as he might require them to manufacture each season for seven years from 11th April 1885 to 10th April 1892.

It has been found as a fact by both the Lower Courts on the fourth issue raised in the case that the first plaintiff Mahomed Aliar Rowther (now deceased, but represented by respondents 1 to 4) was a party with Nur Mahomed to the contract, though he is not expressly mentioned therein. The first plaintiff's share was 2 in $5\frac{3}{8}$ shares; and Nur Mahomed's share was the balance $3\frac{3}{8}$ shares. Nur Mahomed assigned his $3\frac{3}{8}$ shares to second plaintiff (now deceased, but represented by respondents 5 and 6) under the deed of assignment Z, dated 11th January 1886.

This suit was brought in February 1887 against the seven defendants alleging that, while the contract had been fulfilled on both sides for the season 1885 up to the 14th January 1886, the defendants had failed to fulfil their part of it for the season 1886 and praying that all the defendants should be directed to deliver to plaintiffs the salt they had collected and heaped in 1886, and that defendants Nos. 2, 4 and 7 should be specially held liable for any damages plaintiffs might suffer through a fall in the price of salt. There was also an incidental prayer that each defendant should be directed to execute a separate power of attorney to the plaintiffs as required by the Salt department in lieu of a single instrument that had been jointly executed by them, and for a general declaration of plaintiffs' rights. Several issues of law and of fact were raised at the trial, all of which have been found in favour of plaintiffs except that the agreement A was held good so far as the stamp duty was concerned only as against one of the defendants, and penalties were levied upon it in regard to the other six defendants, it being rightly held that it contained seven separate and distinct contracts, each defendant having entered into a separate engagement in regard to his own pans only. The decree of the Court of first instance after a general

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declaration of plaintiffs' rights including the right of the second plaintiff to sue as the assignee of Nur Mahomed and a direction for each defendant to execute a separate power of attorney as prayed in the plaint, further directed each of the seven defendants to pay plaintiffs' damages for the years 1886 to 1889 (the decree being dated 10th day of January 1890) at the rate of Rs. 5-12-0 per garce for the salt collected by each of them during those years, leaving the quantity to be ascertained in the execution of the decree, and also directed the defendants to pay the plaintiffs' costs.

It may as well at once be noted that this decree is bad in three different respects:—*first*, in decreeing damages for the four years 1886 to 1889, and that against all the seven defendants, when in the plaint, damages for the year 1886 alone were or could be asked for, and that against only defendants Nos. 2, 4 and 7, the claim against the others being only for the delivery of specific salt; *secondly*, in reserving for determination in execution what was necessary for determination by the decree itself, namely the amount of each defendant's liability to damages; and *thirdly*, in making the defendants jointly and severally liable to plaintiffs' costs, when, as it had been found that the contract of each was separate, they were liable only to pay costs on the amount of damages assessed against each of them separately. The decree of the Appellate Court, without remedying any of the defects noticed, perpetuates and even aggravates them. Thus another year—the year 1885—is added to the other four years 1886, 1887, 1888 and 1889 for which all the defendants are to pay damages apparently jointly and severally, and they are again in appeal also made severally and jointly liable for the plaintiffs' costs; the amount of their liability in damages being still left for determination in execution. The Appellate Court also enhanced the rate to be paid as damages from Rs. 5-12-0 to Rs. 45-10-0 per garce.

The chief points taken in second appeal by the first six defendants are as follows:—

(1) that the second plaintiff had no right of suit on the assignment,

(2) that the suit was bad for misjoinder,

(3) that the decrees are defective in regard to the matters just pointed out, and

(4) that the rate allowed by the Appellate Court for damages is opposed to the terms of the contracts between the parties.

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As to the first objection, it is that Nur Mahomed was not competent to assign his interest in the contract A. It is argued that the contract was based on personal considerations and that the rights conferred upon Nur Mahomed by the contract were coupled with liabilities and that on both these grounds the contract was not assignable. In support of this contention the appellants' pleader relied on *Farrow* v. *Wilson*(1), *Humble* v. *Hunter*(2) and *Arkansas Valley Smelting Company* v. *Belden Mining Company*(3). In *Farrow* v. *Wilson* (1) the contract in suit was an agreement whereby the plaintiff undertook to serve one Pugh as farm bailiff, the agreement being terminable upon six months' notice on either side. The question for decision was whether the death of Pugh put an end to the contract, which did not contain the word 'assigns,' and it was held that it did. The ground of decision was that, in contracts for personal service, it is an implied condition that death of either party should dissolve the contract. Mr. Justice Willis laid down the principle which governed the case in these terms:—"Where personal considerations are of "the foundation of the contract, as in cases of principal and agent "and of master and servant, the death of either party puts an end "to the relation." The contract in *Humble* v. *Hunter*(2) was a charter-party signed by the plaintiff's son on the one part and by the defendant on the other, and it recited that the son was the owner of the ship. The question was whether the plaintiff might show that she was the real principal and that her son, though he signed the contract, was really agent. Two principles were discussed, viz., (1) that a principal may come in and take the benefit of a contract made by his agent, and (2) that no parol evidence shall be admitted to contradict a written contract. It was held that the evidence was not admissible, the reason being that the son gave himself a special description and asserted a title to the ship as owner, and that this circumstance took the case out of the general rule, that a principal may sue upon the contract made by his agent. Lord Denman, C.J., referred to the general principle that a party to a contract has a right to the benefit he contemplates from the character, credit and substance

(1) L.R., 4 C.P., 744. (2) 12 Q.B., R.P., 310. (3) 127 U.S.R., 379.

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of the party with whom he contracted. In the American case, the contract was to sell and deliver lead ore from time to time at the smelting works of a firm of partners, that the ore was to become upon delivery the property of the partnership, and that it was to be paid for after a subsequent assay of the ore and ascertainment of the price. The question was whether the partnership might assign the contract as to future deliveries and it was determined in the negative. The Court stated that every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It also referred to the principle mentioned by Lord Denman, namely, "you have the right to the benefit you anti-"cipate from the character, credit and substance of the party with "whom you contract." It referred to the rule in Pollock's *Treatise on Contracts* (fourth edition, page 425) that rights arising out of a contract cannot be transferred if they are coupled with liabilities or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he confided. Applying that principle to the case before them the Court remarked that during the time that must elapse between the delivery of the ore and the ascertainment and payment of the price the defendant had no security for the payment except in the character and solvency of Billing and Eilers, the parties with whom he made the original contract. The defendant therefore could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom he had contracted.

Now in this case it will be seen from the terms of the contract A, which are set forth in full in the judgment of the Lower Appellate Court, and need not therefore be repeated here, that by article 1 the defendants were to allow Nur Mahomed four months' time for payment after delivery of their salt to him, by article 4 that he was liable to pay the Government taxes and dues, by article 5 that he was to execute all but petty repairs, and by article 6 that he was to fix the quantity of salt to be delivered by defendants. There is therefore not only credit given to Nur Mahomed in the matter of payment, but other liabilities are thrown upon him, the discharge of which depended upon his solvency, and there is also a certain discretion vested in him in

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regard to be the quantity of salt to be demanded. Further, the assignment Z upon which the second plaintiff was suing was an assignment of an executory or continuing contract. The assignment was made on the 11th January 1886 and the breach of contract sued upon was for a breach subsequent to that date. So that we have here all the elements which we find in the principles above laid down for holding that the contract was based on personal considerations and that the assignment of it as an executory contract was invalid without the assent of the defendants. It is not pretended that such assent was expressly given, nor is there evidence on the record of such a character as would amount to a novation of the contract such as is contemplated by section 62 of the Indian Contract Act. It is contended for the second plaintiff that after the assignment to him the defendants accepted payment from him for salt delivered as is shown by entries in the accounts C to C 4 and D. But those accounts are kept in the name of the first plaintiff as well as of the second plaintiff, so that they afford no distinct proof of a direct recognition of the second plaintiff's rights as assignee. On the grounds that have been stated we must allow the objection that the contract was one not capable of assignment to second plaintiff, and therefore that he had no right of suit under it.

The second objection that the suit was bad for misjoinder was taken with reference to the joinder of the six defendants in one suit, when the contracts of each were found to be individual and separate. The District Judge disallowed the objection on the ground that it was not taken at the earliest possible moment, namely in the written statement, and that no prejudice to the interest of the defendants from their joinder in one suit could have occurred. Enough however has already appeared in the faulty decrees that have been passed to show how much the defendants have been prejudiced by their several cases being lumped together as one, and though the plea of misjoinder was not taken in the written statement, it was taken at the settlement of issues before the trial of the suit. And it will further be shown under the fourth head of objection how the liability of each defendant to pay the Rs. 5-12-0 rate per garce for damages or a higher rate will depend entirely upon the nature of the particular default, if any, that each has committed. As the case of each defendant must be decided on its own merits without any reference to the case of another, and as the cases of each will be different (as even

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the plaint itself shows), we are of opinion that the misjoinder has affected and must effect the merits of each man's case and cannot therefore be passed over as a mere irregularity and condoned as such under section 578 of the Code of Civil Procedure. It must also be borne in mind that this misjoinder of defendants is now coupled with a misjoinder of plaintiffs according to our finding under the first objection, and with this double misjoinder of parties before us, we must allow the second objection also that the suit is bad for misjoinder.

The validity of the third objection, as to the decrees granting relief that was not prayed for and not granting the relief that was prayed for, cannot but be conceded by the other side. In making all the defendants liable jointly and severally for costs and for damages (as the decree of the Lower Appellate Court certainly seems to do), in awarding damages for other years than the single year 1886, and in not ascertaining in the suit and incorporating in the decree the amount of damages payable by each defendant, but leaving the matter for determination in execution, the decrees are not maintainable and must at least be reversed in these respects.

It is contended on the fourth objection that article 7 of the contract A provides a uniform rate of Rs. 5–12–0 per garce as the rate at which damages are to be assessed; and that while the Munsif adopted this rate, the District Judge has allowed the difference between the contract price to be paid to defendants and the selling price in the market to be taken as the measure of damages, that is the profit the plaintiffs would have made on each garce duly delivered to them which, he finds, would have been Rs. 45–10–0. The question is whether the rate fixed in article 7 governs every breach of the contract or only certain breaches therein specified. We are of opinion upon a construction of the clause that it was meant only to cover the special default therein mentioned, namely a short delivery or non-delivery of the amount fixed for delivery by the plaintiff, owing to failure either to manufacture or to store in the factory the quantity manufactured. The language used is not such as to cover every breach of the contract. The contract contemplates other acts than those referred to in clause 7, and they are not referred to in clause 7 either generally or by implication. The contingency of the repudiation of the contract altogether does not seem to have been in the contemplation of the parties. The contract presupposes a *bonâ fide* intention to keep it. For these reasons, we agree that in such a case as that put by the District Judge where the defendants actually manufactured salt and then sold it to others, the measure of damages would not be the liquidated rate mentioned in clause 7 of the contract, but what the plaintiffs had lost by the wilful breach of the engagement. At the same time, it has to be pointed out that the Judge was wrong in applying the rate fixed on the latter principle to every defendant in this suit and in the connected suits, without first ascertaining the particular nature of the breach of which each defendant was guilty. Those who defaulted under the terms of article 7 only were clearly liable only to the rate therein fixed, and it is a matter of evidence in each case whether any other kind of breach not falling under that article has been committed before the measure of damages as against any defendant can be fixed. The decree of the Lower Appellate Court is, therefore, further bad in this respect also, that is, in its not determining at what particular rate each defendant, according to the nature of his default, was subject to pay. And the decree of the Munsif was equally wrong in fixing the uniform rate of Rs. 5–12–0 without first determining that all the cases of breach of contract fell within the terms of article 7. Both rates—that of the Munsif and that of the District Judge—must, therefore, be expunged from the decrees. There is another point to be considered in the cases of those defendants whose default is only under article 7 of the contract, and that is whether they can be held liable for non-delivery or short delivery in the absence of any estimate framed or 'dittam' fixed by the plaintiffs as to the quantity of salt to be delivered by each defendant. We have no doubt that the word 'dittam' refers to the quantity. The contention of respondents' Vakil that it refers only to quality is not only opposed to the plain meaning of the term, but is inconsistent with the provision of the uniform rate for damages fixed in article 7. In cases where the breach was not under article 7, the question of the dittam is not material, the defendants having contracted in article 1 to sell to plaintiffs all the salt manufactured and stored by them.

Our judgment in this second appeal governs the judgment in all the connected second appeals Nos. 94 to 114 of 1892, and it only remains to pass our final orders in each of these appeals.

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In the present second appeal No. 93, we have found there was a misjoinder which does not apply to the other second appeals. On this ground, we must reverse the decrees of the Lower Courts and dismiss the plaintiffs' suit with costs throughout, for it is too late now to allow the plaint to be returned for amendment.

All the other second appeals follow the judgment in No. 93 in respect to the inability of the second plaintiff to sue, the errors in the decree, and the method of determining the measure of damages, but with regard to four of them, viz., second appeals Nos. 94, 99, 105 and 113, special points arise which will be separately noticed. As to the remainder, that is, second appeals Nos. 95, 96, 97, 98, 100, 101, 102, 103, 104, 106, 107, 108, 109, 110, 111, 112 and 114, the suits will be dismissed so far as the second plaintiff's suit is concerned with defendants' costs throughout; but they will be allowed to proceed so far as the first plaintiff is concerned. The decrees of both Courts as they at present stand are, however, so generally defective in respect to the practical question, that is, the consequential relief claimed, that we consider it necessary to set them aside and to order a new trial. Besides decreeing things not asked for and not decreeing what was asked for, several of the material issues have not been satisfactorily tried. We therefore reverse the decrees in these cases and remand them for proper trial by the light of the observations we have recorded. It will be necessary in each case to determine according to the prayer in the plaint what is exactly the relief sought for and the enquiry as to the nature of the default will be confined to the year 1886. It will further be necessary to determine by what measure of damages the default (if any) found on the part of each defendant is to be ruled. Then, when the actual total amount is so determined, it is to be reduced to what the first plaintiff is entitled to claim as his proportionate share of two shares out of $5\frac{3}{4}$ shares, and the amount so arrived at entered in the revised decree, together with any other reliefs as to declaration and so on that may be found necessary.

In second appeal No. 94, the Munsif dismissed the plaintiffs' suit as barred by *res judicata*, but the Judge reversed the Munsif's decree without apparently noticing this point. The appellant in this second appeal now urges that this suit should be dismissed on the ground stated, but we do not agree with the Munsif that

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the case was *res judicata* by reason of the decision in a similar suit of the previous year (No. 447 of 1886). Not only was that a suit of a small cause nature and therefore not open to second appeal, *Govind Bin Lakshman Shet* v. *Dhondbarav Bin Ganbarav Tambye*(1) followed in *Vithilinga Padayachi* v. *Vithilinga Mudali*(2), but the simple issue therein decided was that plaintiff was not entitled to relief as he had not executed repairs. It was not decided that the contract was void or had been rescinded, and the cause of action now, though upon the same contract, being for a different year, there is no *res judicata*. We therefore disallow this objection and, as the other special objection is abandoned, this second appeal falls to be treated like the bulk of them, and will be dealt with accordingly by a reversal and remand with similar directions to find out and decree what actual amount is due by defendant to first plaintiff.

In second appeal No. 99 of 1892, the second defendant's name must be struck out if he is no party to the agreement sued on, as it is stated he is not, and this second appeal will be dealt with like the bulk of them with the separate issue for trial whether second defendant is liable to the suit or not.

In second appeal No. 105 of 1892, an exactly similar order to that just given in second appeal No. 99 is passed.

In second appeal No. 113 of 1892, the defendant signed the contract as guardian of a minor. The Judge has thereupon directed that the decree be made against the property of the minor, but as the minor was not a party to the suit, only the defendant's name appearing therein, the Judge's order was obviously wrong. Under our powers of revision (section 622 of the Code of Civil Procedure), we cancel this portion of the decree and the result will be that the suit should proceed against the defendant named therein. The decree in this case will accordingly be reversed and remanded like the bulk of them with similar directions, and a separate issue should be taken as to defendant's liability.

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(1) I.L.R., 15 Bom., 104. (2) I.L.R., 15 Mad., 111.

APPELLATE CIVIL.

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

1893. Jan. 23, 24.

SRINIVASA SASTRIAL (DEFENDANT), APPELLANT,

v.

SAMI RAU (PLAINTIFF), RESPONDENT.*

Declaratory decree—Code of Civil Procedure—Act XIV of 1882, *ss.* 278 *and* 283—*Termination of attachment by abandonment.*

The plaintiff had an attachment against certain property. Owing to his not filing a necessary affidavit, the execution petition was struck off. Subsequently he applied for the sale of the property, and the Court directed a fresh attachment to issue. It was held that these facts did not amount to an abandonment of the first attachment by the plaintiff.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 454 of 1891, modifying the decree of S. Ramasamy Iyengar, District Munsif of Tiruvadi, in original suit No. 63 of 1888.

The lands in dispute in this case originally belonged to one Krishnasami Moitay, against whom the plaintiff in this suit obtained a decree in 1887 and the lands were attached in execution thereof, but the execution petition was subsequently struck off the file owing to the plaintiff's default in filing a necessary affidavit. In 1889 the plaintiff applied for the sale of the property attached in 1887, and the Court directed a fresh attachment to issue. The defendant then came forward and alleged that he had purchased the property prior to the second attachment and obtained an order in his favour. The plaintiff alleged that the defendant's sale having been subsequent to the first attachment, was not valid against the plaintiff, and that the defendant was bound by the terms of his sale to pay the plaintiff the debt decreed in 1887, and that the said debt was therefore a charge on the said property in the defendant's hands. Hence this suit.

The District Munsif decreed in favour of the plaintiff, declaring the subsistence of the attachment of 1887 of the plaint properties and his rights to realize his money by a sale of those properties.

* Second Appeal No. 541 of 1892.

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On appeal against the District Munsif's decree by the defendant, the District Judge delivered the following judgment:—

"The test question in these cases is has there been an abandonment of the first attachment either in fact or constructively. "Now in this case there was no actual withdrawal from the first "attachment, and there was no order for releasing that attachment, so there was no abandonment in fact. The delay in "following up the attachment is satisfactorily explained by the "plaintiff's taking of other legal proceedings, so on the score of "delay on abandonment cannot be presumed. Nor can such presumption arise from the Munsif's order directing a second "attachment which plaintiff accordingly made, for that was the "act of the Court and not of the party. I therefore agree with "the Munsif for the further voluminous reasons given by him "that plaintiff's attachment of 1887 never ceased to exist and consequently defendant's sale was subject to it under section 376 of "the Code of Civil Procedure.

"It is further urged in appeal that plaintiff being able upon "the terms of that sale to sue defendant for the recovery of his "money had no right to seek for a mere declaration that his "attachment was in force, but should also have sued for the recovery of the money due to him under the sale-deed to defendant. But this is a vain contention, because plaintiff was not "a party to the contract of sale, and could not, therefore, have "enforced its provisions.

"The appeal, therefore, fails and is dismissed with costs."

The defendants preferred this appeal, alleging that the plaintiff's suit was not maintainable under either section 283 of the Civil Procedure Code, nor under section 42 of the Specific Relief Act; that an appeal should have been preferred against the order of the District Munsif directing a second attachment; and that the first attachment did not continue to subsist at the time of the defendant's sale-deed.

Sivaswami Ayyar for appellant.

Pattabhirama Ayyar for respondent.

JUDGMENT.—We have no doubt that a suit for a declaratory decree is maintainable. The plaintiff's petition was put in under section 278 of the Code of Civil Procedure and a suit under section 283 is his only possible remedy.

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The next point urged is that an appeal should have been preferred against the order of the District Munsif directing a second attachment. But that order was a mere direction of the Court without notice to either party and in no case could defendant have been made a party to the appeal if there had been one.

The decision quoted in *Puddomonee Dossee* v. *Roy Muthooranath Chowdhry*(1) lays down no general rule, but the effect of it is that it is a matter of inference in the particular case whether the striking off of an execution petition terminates an attachment. We agree with the District Judge that in this case there was no intention to abandon or to terminate the attachment. This may be inferred not only from plaintiff's subsequent conduct, but from the very terms of the sale-deed under which the defendant purchased, provision being therein made that defendant should pay off the balance of the decree debt in the suit in which the attachment had been made. No mention in terms is made of the attachment, but it is a legitimate inference that it was then regarded as subsisting.

We dismiss the second appeal with costs.

APPELLATE CIVIL.

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

1893. September 15. October 24.

RAMAPPA UDAYAN (DEFENDANT No. 1), APPELLANT,

v.

ARUMUGATH UDAYAN (PLAINTIFF), RESPONDENT. *

Hindu law—Succession of a daughter's daughter to her grandfather's estate.

On the principle laid down in *Nallanna* v. *Ponnal* (2), a daughter's daughter is, in the absence of preferential male heirs, entitled to succeed to her grandfather as a bhandu.

SECOND APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 7 of 1892,

* Second Appeal No. 23 of 1893.

(1) 12 B.L.R., 411. (2) I.L.R., 14 Mad., 149.

RAMAPPA UDAYAN v. ARUMUGATH UDAYAN.

reversing the decree of A. Ramalingam Pillai, District Munsif of Tiruvalur, in original suit No. 480 of 1890.

Suit for the possession of certain property. It was admitted on both sides that the property in dispute was originally the property of a Hindu, who dying left a widow (Kamalam) and two daughters. The plaintiff contended that, Kamalam and one of the daughters having died, the surviving daughter Meenakshi inherited her grandfather's property. Meenakshi sold the property to one Swarnum, who sold it to plaintiff, both conveyances being registered. The defendants alleged that Kamalam had previously sold the property, which in its turn was sold to defendant No. 1, both defendants being now in possession of it. Kamalam's conveyance was not registered.

The District Munsif dismissed the suit, but his decree was reversed by the Subordinate Judge, who held that Meenakshi was heir to her grandfather, and that her registered conveyance defeated the prior unregistered deed of her mother.

The first defendant preferred this appeal.

Sivasami Ayyar for appellant.

The respondent was not represented.

JUDGMENT.—We think the case quoted by the Subordinate Judge, *Nallanna* v. *Ponnal*(1), is sufficient authority for holding that a daughter's daughter is a bhandu on the principle there laid down that consanguinity may be recognized as the basis of title to succession in the absence of preferential male heirs. Meenakshi was a direct relation by blood to her grandfather through her mother his daughter.

The second appeal therefore fails and it is dismissed.

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(1) I.L.R., 14 Mad., 149.

APPELLATE CIVIL.

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

1893. January 9. August 15.

RAMAN MENON (PLAINTIFF), APPELLANT,

v.

CHATHUNNI (DEFENDANT No. 2), RESPONDENT.*

Makkatayam rule of inheritance—Tiyans—Whether compulsory partition can be effected.

The ordinary rule of Marumakatayam against compulsory partition is equally applicable to Tiyans who follow Makkatayam, no custom to the contrary having been made out.

SECOND APPEAL against the decree of E. R. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 1054 of 1890, reversing the decree of A. N. Ananta Ram Iyen, Additional District Munsif of Calicut, in original suit No. 211 of 1890.

The defendants 1 to 4 were Tiyans following the Makkatayam rule of inheritance. The plaintiff, having obtained a small cause decree against the first defendant, in execution thereof, attached the family properties. The second defendant, karnavan of the tarwad, intervened and put in a petition alleging that the properties were impartible. The claim was allowed and the attachment removed. The plaintiff brought this suit to declare that, according to the law prevailing among the Tiyans, the first defendant had a definite share in the properties, and that such share was liable to be sold for his decree. The District Munsif decreed in favour of the plaintiff, whilst the Subordinate Judge, on appeal, reversed the decree.

The plaintiff preferred this appeal.

Sankara Menon for appellant.

Govinda Menon for respondent.

JUDGMENT.—The plaintiff's case was that, accordingto the customary law prevailing among the Tiyans, the first defendant was entitled to a definite share in the property. The defendants denied the alleged custom and pleaded that the properties were indivisible. The issue (fifth) on the point was too vague to direct

* Second Appeal No. 142 of 1892.

the attention of the parties to the real question which had to be tried, and the evidence adduced was inconclusive. The Subordinate Judge remarks that the witnesses were not asked the real question at issue, but on the authority of two unreported cases has come to the conclusion that the ordinary rule of Marumakatayam against compulsory partition is equally applicable to Tiyans who follow Makkatayam. We do not think that a question of such general importance should have been decided in this way, and we shall, therefore, ask the present Subordinate Judge to return a finding on the following issue:—Whether, according to the customary law followed by the parties to this suit, compulsory partition can be effected according to the wish of one member of the tarwad.

Fresh evidence may be taken.

In compliance with the above order the Subordinate Judge submitted a finding in which, on the authority of *Rarichan* v. *Perachi*(1), he held that there was no presumption that the Hindu Law rule of partibility of family property applied to the case of Makkatayam Tiyans, that there was no written evidence forthcoming in support of any such custom, and that the oral evidence was quite unsatisfactory or insufficient to establish any custom followed by the parties to the suit whereby compulsory partition could be effected according to the wish of one member of the tarwad.

JUDGMENT.—The finding is that, according to the customary law of the parties, compulsory partition cannot be effected at the will of one member of the tarwad.

This is in accordance with the finding in regular appeal No. 164 of 1891.

Accepting it, we dismiss this appeal.

(1) I.L.R., 15 Mad., 281.

APPELLATE CIVIL.

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

1893. November 16.

CHATHAKELAN (PETITIONER), APPELLANT,

v.

GOVINDA KARUMIAR (COUNTER-PETITIONER), RESPONDENT. *

Code of Civil Procedure—Act XIV of 1882, *s.* 234—*A stranger to a decree against a deceased person in possession of his property—'Legal representative.'*

The words 'legal representative' in s. 234 of the Code of Civil Procedure do not include any person who does not in law represent the estate of the deceased person. Consequently, a stranger in possession of property of a deceased person who was not a party to a decree against such person cannot be proceeded against in execution otherwise than by a regular suit.

APPEAL against the order of R. S. Benson, District Judge of South Malabar, in civil miscellaneous appeal No. 17 of 1892, confirming the order of V. Ramasastri, District Munsif of Palghat, in miscellaneous petitions Nos. 380 and 2325 of 1891.

The petitioner in this case had obtained a decree for money against one Edathara Valaya since deceased, and now sought to enforce the decree to the extent of Rs. 170 against his successor in stanam, the counter-petitioner, who had collected the said money for the Malikhana due to his predecessor. Both the Lower Courts decreed in favour of the petitioner, the District Judge holding that, although "the term 'legal representative' in section 234, "Civil Procedure Code, is not defined, there is authority for hold-"ing that in the absence, as in this case, of any claim by the next-"of-kin, the words 'legal representative' will include, for the "purposes of this section, the person who has taken possession of "the property of the deceased."

Sankaran Nayar for appellant.

Desika Chariar for respondent.

JUDGMENT.—Though the Judge says there is authority for holding that the words 'legal representative' in section 234 of the Code of Civil Procedure include any person who has taken possession of the property of the deceased judgment-debtor, he

* Appeal against Appellate Order No. 51 of 1892.

CHATHAKELAN *v.* GOVINDA KARUMIAR.

has not cited any such authority. It was held in *Dunput Sing Bahadoor* v. *Ranee Rajesuree*(1) in that property in the possession of others than the legal representative might be taken in execution of a decree; but it was so held with reference to the language of section 210 of the Code of 1859, which allowed of execution being taken either against the legal representative or the estate of the deceased judgment-debtor. But in section 234 of the present code the words 'against the estate of the deceased debtor' are not to be found, and execution is allowed only against the legal representative and "to the extent of the property of the "deceased which has come to his hands and has not been duly "disposed of."

We do not think that the words legal representative can be taken to include any person who does not in law represent the estate of the deceased. The wording of section 234 seems to point to the intention that a stranger in possession of property who was not a party to the decree ought not to be proceeded against in execution or otherwise than by a regular suit.

We must set aside the orders of the Courts below with costs throughout.

APPELLATE CIVIL.

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

1893. September 18.

KRISHNAYA NAVADA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

PANCHU AND OTHERS (DEFENDANTS), RESPONDENTS. *

Code of Civil Procedure—Act XIV of 1882, *ss.* 562, 566 *and* 582—*Order made on appeal to amend plaint.*

On appeal from the decision of a District Munsif in favour of the plaintiffs, in a suit for the recovery of rent, the District Judge set aside the decree of the Lower Court, ordered a new trial, and directed the amendment of the plaint by inserting the exact boundaries of the land on which the plaintiffs claimed the rent:

(1) 15 W. R., 476.

* Appeal against Order No. 117 of 1892.

KRISHNAYA NAVADA v. PANCHU.

Held, that the order for amendment of the plaint was bad under s. 562 of the Code of Civil Procedure, since the original Court had not "disposed of the suit "upon a preliminary point," and that it was likewise bad under s. 582, since there had been no dispute as to the boundaries of the land before the original Court. If the information was necessary, the District Judge should have sent down an issue on the point for trial under s. 566 of the code.

APPEAL against the order of W. C. Holmes, Acting District Judge of South Canara, in appeal suit No. 233 of 1891, reversing the decree of U. Babu Row, District Munsif of Udipi, in original suit No. 387 of 1888.

On appeal against the decree of the District Munsif in a suit for recovery of rent given in favour of the plaintiffs, the District Judge, having set aside the decree and ordered a new trial, directed the amendment of the plaint by the insertion of the exact boundaries of the land on which the plaintiffs claimed rent, a point on which there had been no dispute in the Lower Court.

The plaintiffs preferred this appeal.

Pattabhirama Ayyar for appellants.

The respondents were not represented.

JUDGMENT.—If the order is an order under section 562 of the Code of Civil Procedure, as contended for by appellants, it is clearly bad, as the original Court had not disposed of the suit on a preliminary point. The course the Judge should have adopted in order to ascertain the boundaries of the plaint land, if that information was necessary, was to have sent down an issue on the point for trial under section 566 of the code.

It is however contended on the other side that the order was one merely for the amendment of the plaint in the matter of boundaries and was passed under section 582 of the code as an order that should have been passed by the original Court. But the answer is that there was no dispute as to the boundaries of the land before the original Court, and, therefore, that that Court could have had no ground for returning the plaint for amendment. We are of opinion that this fact takes the case out of the purview of section 582 even if that section is at all applicable. It follows that the remand must have been under section 562, and as such it was an illegal order. We, therefore, reverse it and direct the Judge to dispose of the appeal on its merits.

APPELLATE CIVIL.

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

NARAYANAN NAMBUDRI AND OTHERS (PLAINTIFFS AND FIRST PLAINTIFF'S REPRESENTATIVE), APPELLANTS,

v.

DAMODARAN NAMBUDRI AND OTHERS (DEFENDANTS NOS. 1 AND 3 to 5, 7, 8, AND SIXTH DEFENDANT'S HEIR), RESPONDENTS.*

1893. February 10. September 17. October 23.

Sale of land for arrears of revenue—Revenue Recovery Act—Madras Act II of 1864, s. 36, cl. 2 and s. 59—Sale irregular by reason of not being duly notified—Limitation—Alleged fraud affecting sale—Limitation Act—Act XV of 1877, s. 8.

When there are arrears of revenue so as to give jurisdiction to the Collector to sell under Madras Act II of 1864, the sale, however irregular, is a proceeding under that Act, for purposes of limitation, and is valid not only as between the Collector and the defaulter, but as between the Collector and the purchaser at the sale. *Venkata* v. *Chengadu*(1) and *Nilakandan* v. *Thandamma*(2) followed.

The mere fact that one of the plaintiffs, in a suit brought to set aside a sale under Madras Act II of 1864, is a minor is not sufficient to save the limitation bar under s. 59 of Madras Act II of 1864, when an alleged fraud affecting the sale came to the knowledge of the other plaintiffs who are majors and are jointly interested with the minor more than six months prior to the institution of the suit, s. 8 of the Limitation Act being inapplicable to such cases.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 513 of 1890, affirming the appeal of P. Govinda Menon, District Munsif of Betutnad, in original suit No. 367 of 1889.

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

Both the Lower Courts decreed in favour of the defendants.

The plaintiffs preferred this appeal.

Subramanya Ayyar and *Sundara Ayyar* for appellants.

Govinda Menon for respondent No. 6.

This second appeal coming on for hearing before Shephard and Best, JJ., on Friday the 10th day of February 1893, the Court made the following

* Second Appeal No. 1872 of 1891. (1) I.L.R., 12 Mad., 168.
(2) I.L.R., 9 Mad., 460.

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ORDER.—"The Subordinate Judge has not considered the "question whether the sale was notified as required by the Act "which was the fourth ground of appeal before him. The Dis- "trict Munsif considered this point and found on it in favour of the "defendants.

"We must ask the Subordinate Judge to submit a finding on "this issue within one month from date of receipt of this order; "and seven days will be allowed for filing objections after the "finding has been posted up in this Court"

In compliance with the above order, the Subordinate Judge submitted the following

FINDING.—"I am directed to submit a finding on the point "'whether the sale was notified as required by the Act?'

"The Revenue Recovery Act II of 1864, s. 36, cl. 2, pre- "scribes the mode of notifying sale under the Act. A notice of "the sale in English and in the language of the district shall be "fixed up one month at least before the sale in the Collector's "office, in the taluk cutcherry, in the nearest police station and "on some conspicuous part of the land. There is no evidence "whatever to prove such publication. Instead of producing the "process server's return or other record to show that copies of the "sale notice were affixed to the above-mentioned four places, the "seventh defendant's vakil refers me to a number of documents "and to the depositions of witnesses which do not support his case. "The exhibits referred to contain no evidence on the point. "The evidence of the Menon and the Adhikari (eighth defendant) "examined as plaintiffs' witnesses 15 and 18 is insufficient and "unreliable. The Menon makes the vague statement that 'there "was a regular attachment.' The Adhikari (eighth defendant) "deposes that a copy of the notice of sale was affixed to a con- "spicuous place, though he cannot say where. Bearing in "mind that this defendant, whom the plaintiff accuses to be the real "purchaser, took care not to affix to the land the copy of the attach- "ment notice, his statement that the sale notice had been affixed "'in some conspicuous place' is not entitled to weight. Defen- "dants' second and sixth witnesses are the Revenue Inspector and "village peon respectively. The former does not depose regarding "the sale notice. The latter states that he served the notice by "affixing a copy presumably to the plaintiffs' house. This is all "the evidence referred to by the vakils.

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"The plaintiffs' vakil points out that the attachment was not "effected in the only legal mode in which it could be effected under "section 7 of the Act, viz., by affixing a copy of the notice to the "land attached and by notifying it by public proclamation on the "land as well as in the *District Gazette*. The omission to affix "the copy to the land is admitted by the Adhikari, the eighth "defendant. There is no evidence that it was posted on the land. "Plaintiffs' vakil contends that there can be no valid notification "of sale without the preliminary process of attachment, but I "hardly think this objection can be considered in deciding the "point referred to me for a finding, viz., whether the sale was "*notified* as required by the Act.

"I find that the sale was not notified as required by the Act."

This second appeal coming on again for final hearing on Tuesday, the 17th ultimo, on return to the order of this Court, dated 10th February 1893, and having stood over for considera- tion till this day, the Court delivered the following judgment :—

MUTTUSAMI AYYAR, J.—This was a suit to set aside a revenue sale held under Act II of 1864. The sale was held in June 1888 and this suit was brought on the 12th August 1889. It is found that at the date of sale there were arrears of revenue due to the Government to the extent of Rs. 54-1-7, and it is clear that the Collector had jurisdiction to sell the land under Act II of 1864. It is found, however, by the Lower Appellate Court that the sale was not duly notified as required by the Act and to this extent the procedure followed by the Collector was irregular. Both the Lower Courts find that the seventh defendant purchased the land *benami* for the eighth and ninth defendants, of whom the former is the Adhikari of the amsom wherein the land brought to sale is situated. Appellants imputed fraud to the Adhikari, but the Courts below have negatived it. It is further found that appellants were aware of the sale and its confirmation more than six months before suit. The question for decision in this appeal is whether, upon the foregoing facts, the Courts below were correct in holding that the sale was a proceeding within the meaning of section 59 of Act II of 1864 and that the suit was therefore barred by limitation. The contention in second appeal is that the sale, though valid as between the Collector and appel- lants, is not so as between the latter and the purchaser on the

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ground of fraud The decision of the Lower Courts is in accordance with the principles laid down in *Nilakandan* v. *Thandamma*(1), and in *Venkata* v. *Chengadu*(2). The decision in the last-mentioned case is that of four Judges who held that the revenue sale in that case, however irregular it was, was a proceeding under the Act for purposes of limitation, as the Collector had jurisdiction to sell. It was also pointed out in that case that the decision in *Nilakandam* v. *Thandamma*(1) proceeded on the ground that there were really no arrears of revenue and that the sale was really without jurisdiction. Both decisions recognize the general principle that a revenue sale is a statutory sale and that when there are arrears of revenue so as to give jurisdiction to the Collector to sell, the sale, however irregular, must be treated as a proceeding under the Act. I am unable to reconcile the contention of appellants' pleader with the principle that statutory sales depend for their validity upon the pre-requisites prescribed by the statute and not on matters which lie outside its purview. I would decline to order any further enquiry whether the price realized was adequate and whether any substantial injury resulted from the sale not having been duly notified, and dismiss the second appeal on the ground that the sale in this case was a proceeding under section 59 of Act II of 1864 and that the suit is time-barred.

BEST, J.—The finding on the issue sent for trial is that the sale was not notified as required by Act II of 1864. This is a finding of fact which we must accept. It is contended, however, on behalf of respondents that the suit is time-barred by section 59 of the Act. The mere fact of second plaintiff being a minor is not sufficient to save the limitation bar when the alleged fraud came to the knowledge of others jointly interested with the minor more than six months prior to the institution of the suit; for, as observed in *Seshan* v. *Rajagopala*(3), section 8 of the Limitation Act is inapplicable, the object of that section being the same as that of the corresponding section 4 of the English Act, 3 and 4 William IV., Chapter 42, which, as remarked by Lord Kenyon in *Perry* v. *Jackson*(4), "was introduced into the statute in order to protect

(1) I.L.R., 9 Mad., 460. (2) I.L.R., 12 Mad., 168.
(3) I.L.R., 13 Mad., 236. (4) 4 T.R., 516 at p. 519.

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"the interests of those persons which there was no one of com-"petent age, competent understanding, or competent in point of "residence in the country to protect." See also *Vigneswara* v. *Bapayya*(1). As was held in *Venkata* v. *Chengadu*(2), the period of limitation for a suit such as the present is six months from the date on which the fraud was discovered, and, as the present suit was brought more than six months after the alleged fraud came to the knowledge of plaintiffs' father and also of first plaintiff himself, it is clearly time-barred.

The appeal fails therefore and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Davies.

SECRETARY OF STATE FOR INDIA (DEFENDANT), APPELLANT,

v.

VYDIA PILLAI AND ANOTHER (CLAIMANTS), RESPONDENTS.*

1893. July 14. August 16.

Madras Forest Act—Act V of 1882, *ss.* 2, 4, 10 *and* 14—*Claim to percentage of forest income—The Pensions Act—Act XXIII of* 1871, *s.* 4—*'Civil Court'—Jurisdiction of Forest Settlement Officer—Jurisdiction of Appellate Court.*

A claim to a percentage of forest income is not a claim to forest produce under Madras Act V of 1882, nor is it a claim to a right specified in s. 4 of that Act.

A Forest Settlement Officer has no jurisdiction to entertain a suit in which such a claim is made, and such a suit brough by discharged forest karnams is barred by s. 4 of the Pensions Act.

A Forest Settlement Officer is a 'Civil Court' for the purposes of the Pensions Act.

If a Court of limited jurisdiction exceeds its powers and adjudicates on a claim over which it has no jurisdiction, the Court (if any) which exercises appellate jurisdiction over it is bound to entertain an appeal preferred against the Lower Court's decision and to correct the error.

A Court of competent appellate jurisdiction in such a case is not bound by an order made without jurisdiction by a Collector on an appeal to him in the same suit.

Submission by the parties to his jurisdiction cannot give a Forest Settlement Officer jurisdiction in a case where he has no inherent jurisdiction.

(1) I.L.R., 16 Mad., 436. (2) I.L.R., 12 Mad., 168.

* Second Appeal No. 586 of 1892.

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SECOND APPEAL against the decree of C. Ramachendra Iyer, District Judge of Nellore, in appeal suit No. 241 of 1890, confirming the decision of I. Sarabhalingam Naidu, Forest Settlement Officer of Nellore and Bellary, in claim No. 847 of 1887.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court. The Forest Settlement Officer decreed in favour of the plaintiff, and, on appeal by the defendant, the District Judge held that he had no jurisdiction to entertain the appeal, and dismissed it. The defendant preferred this appeal.

The *Acting Government Pleader* (*Subramanya Ayyar*) for appellant.

Seshagiri Ayyar for respondents.

JUDGMENT.—This is a claim made to a percentage of the net revenue of the reserved forest at Sriharicotta under Madras Forest Act V of 1882. The appellant before us is the Secretary of State for India in Council represented by the District Forest Officer, and respondents are two mirasi karnams who had served as such in connection with the forest till 1884, when the Forest Officer dispensed with their services. The claimants stated that from time immemorial their family had been enjoying the *rusum* and rendering services as karnams in relation to the forest, and that in return a commission of Rs. 5-7-6 on every 100 rupees of the net income of the forest had been paid to them. The appellant repudiated the claim, but did not object to the jurisdiction of the Forest Settlement Officer. On the 31st May 1888, the Forest Settlement Officer held that he had no jurisdiction to entertain the claim, the right asserted by respondents being neither a right in and over the forest nor a right to forest produce. He further held that the claim was barred by section 4 of the Pensions Act, XXIII of 1871. The respondents appealed from this decision to the Collector of the district, who considered that the right set up by the claimants was not outside the provisions of the Forest Act, that the Forest Settlement Officer was not a Civil Court for the purposes of the Pensions Act, and that the G.O., No. 389, dated 26th May 1886, referred the claimants to the Forest Settlement Officer. The appellant denied the Collector's jurisdiction to entertain the appeal, but his objection was overruled, and in the result the Collector remanded the case for disposal on the merits. Thereupon, the Forest Settlement Officer investigated the merits

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and decreed the claim. From his decision the Secretary of State preferred an appeal to the District Court, but the District Judge held that he had no jurisdiction to entertain the appeal and dismissed it with costs. Hence this second appeal.

The jurisdiction created by the Forest Act being a limited jurisdiction, the first question is whether, as held by the Judge, the right claimed is a right specified in section 4 of the Forest Act. That section describes the rights which the Forest Settlement Officer is authorized to deal with as rights in and over the land comprised within the limits of the forest or to any forest produce of such land. The Judge determines the question in the negative. Assuming that his decision is correct, it does not follow that he had no jurisdiction to entertain the appeal preferred by the appellant. If a Court of limited jurisdiction exceeds its powers and adjudicates on a claim over which it has no jurisdiction, it is an error which the Court, if any, exercising appellate jurisdiction over it is bound to correct, as every Court of appeal has all the powers of a Court of revision. In the case before us, it is clear that the Forest Settlement Officer exercised jurisdiction by reason of the Collector Mr. Macleane's decision that the right in contest was not outside the provisions of the Forest Act. Under section 14 of the Forest Act, the Collector has appellate jurisdiction only when the right adjudicated on by the Forest Settlement Officer is a right excepted from the provisions of section 10 which, among other things, constitutes the District Court as the Court of appeal in regard to any right in and over the forest save the excepted rights. We agree with the Judge that the right claimed does not amount to an interest in land. It is not similar to the grant of melvaram right in land in the possession of the grantee, or of some one else as in the case of inams. But it is similar to the right to a mera to be paid to a karnam by the ryots of the village out of the produce of the lands in their possession, and it cannot be said that the right creates a joint interest on the part of the karnam in the holding of each ryot. Again, an agreement to pay a certain percentage of the profits of partnership as wages to a servant of the firm does not make him a partner. Looking to the relation of the parties as master and servant and to the character of the *rusum* as a money payment out of the income of the forest in the possession of the Government, it is not reasonable to impute any intention to create an interest in the lands.

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Another question for decision is whether the Collector had appellate jurisdiction in this case under section 14 or whether the right adjudicated on is a right to forest produce. The Judge holds that it is not, and on referring to section 2 which explains that right, we concur in his opinion. Section 2 describes the right as the right to certain specific forest products, which it enumerates, and the fact that the enumeration is not exhaustive can only justify other rights of the same description being included in the section. But the right asserted by the respondents is a right not to any specific jungle product, but to a percentage of the forest income from certain sources. In this connection, the Judge observes that he has no power to hear an appeal from the decision of the Collector. If the right claimed is not a right to forest produce and the Collector had no appellate jurisdiction, the order made by him is one made without jurisdiction, and it is not incompetent to a Court of competent appellate jurisdiction to say that it is not bound by an order made without jurisdiction by the Collector in the same suit. The Government denied his jurisdiction and cannot be said to have submitted to it. We are, therefore, of opinion that the Judge was in error in declining to entertain the appeal and that he ought to have entertained it and adjudicated thereon.

The Judge states that in his opinion the claim was also barred by the Pensions Act of 1871, though he does not rest his decision upon it. By section 4 of that Act, no Civil Court shall entertain any suit relating to any grant of money or land revenue made by the British or any former Government, whatever may have been the consideration for any such grant and whatever may have been the nature of the payment, claim or right for which such grant may have been substituted. Nor was any certificate produced before the Forest Settlement Officer as provided by section 6 and the endorsement referred to by Mr. Macleane cannot be treated as a certificate within the meaning of section 6. The Judge is therefore well founded in saying that even if the right is a right in and over the land, the Pensions Act would be a bar. The Collector is in error in saying that the Forest Settlement Officer is not a Civil Court for the purposes of the Pensions Act. It is not necessary that the Forest Settlement Officer should be a Civil Court for all purposes, but it is sufficient if the jurisdiction exercised by a Civil Court over a civil right is transferred to him and he is authorized to exercise it as a subordinate tribunal in its place, though a special

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procedure is prescribed for his guidance by a special Act. Nor can submission give jurisdiction in a case like this, in which the Forest Settlement Officer has no inherent jurisdiction, but has only a limited jurisdiction as provided by the Forest Act.

The conclusion we come to is that the District Judge should have adjudicated on the appeal and set aside the decree of the Forest Settlement Officer on the ground that the suit was barred by the Pensions Act, and also that that officer had no jurisdiction to entertain it under the Forest Act. As the question to be decided is one of law, we proceed to do what the District Judge ought to have done and accordingly we set aside the decrees of both the Courts below and dismiss the claim with costs throughout.

APPELLATE CIVIL.

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

1893. Dec. 5, 6.

MARIMUTHU PILLAI (DEFENDANT), APPELLANT,

v.

KRISHNASAMI CHETTI AND OTHERS (PLAINTIFFS NOS. 2, 3, 4), RESPONDENTS.*

Negotiable Instruments Act—Act XXVI of 1881, *s.* 46—*Effect of an invalid endorsement of a promissory note by payee—Note recovered by, but not re-indorsed to the payee.*

The defendant gave plaintiff a promissory note payable on demand. The plaintiff endorsed the note to a third party, a creditor of his, who sued the defendant on the note on his refusal to pay. The defendant pleaded that it had been agreed between the payee and himself that the note should not take effect until the payee had performed certain conditions which remained unperformed. The suit was accordingly dismissed. The plaintiff thereupon paid the endorsee and took back the note, which, however, was not re-indorsed, and instituted the present suit against the defendant, who pleaded that the property in the note was not vested in the original plaintiff so as to enable him to maintain the suit. On the decease of the plaintiff before the trial his sons were substituted as plaintiffs:

Held, that, although the property in a promissory note payable to order on demand passes by endorsement and delivery (Act XXVI of 1881, s. 46), the endorsement in this case had been declared invalid in the suit referred to and must therefore be treated as cancelled, and consequently the property in the note was vested in the plaintiff at the date of the suit so as to enable him to maintain it.

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* Appeal No. 25 of 1893.

MARIMUTHU PILLAI v. KRISHNASAM CHETTI.

APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in original suit No. 30 of 1890.

The suit was brought by one Lakshmana Chetti, the payee of a promissory note, and the respondents, his legal representatives, against the defendant—appellant, the maker of the note. The other facts of the case are stated sufficiently for the purpose of this report in the judgment of the High Court.

The District Judge decreed in favour of the plaintiffs and the defendant preferred this appeal.

Rama Rau for appellant.

Bhashyam Ayyangar and *Tiruvenkata Chariar* for respondents.

Krishnasami Ayyar for respondent No. 1.

JUDGMENT.—The question is whether property in the promissory note vested in Lakshmana Chetti at the date of suit so as to enable him to maintain it. The facts, so far as they bear on this point, are shortly these: Lakshmana Chetti endorsed the promissory note to one Patnam Subbaiyar, but appellant refused to pay when the note was presented for payment. Thereupon, Subbaiyar applied to a notary public at Trichinopoly for noting the dishonour and the note was accordingly protested. Thereupon the endorsee sued the maker in No. 37 of 1888 on the file of the District Court, but appellant pleaded the agreement now set up and contended further that the endorsee paid no consideration for the endorsement and that there was, therefore, no valid transfer of the promissory note. The District Judge upheld his contention and dismissed the suit without entering on the question whether any and what consideration passed from the payee to the maker. On the dismissal of this suit Lakshmana Chetti paid Subbaiyar and got back the note, but it was not re-indorsed in his favour. As appellant's fourth witness Subbaiyar states that the note was endorsed to him in part payment of a debt due by Lakshmana Chetti, and that, when the suit failed, Lakshmana Chetti paid him the amount due under it and got back the dishonored note, it is no doubt true, as argued by appellant's pleader, that the property in a promissory note payable to order on demand passes by endorsement and delivery. So it was held in *Pattat Ambadi Marar* v. *Krishnan*(1), and it is also expressly provided for by section 46 of Act XXVI of 1881. But, in the case before us, the endorsement

(1) I.L.R., 11 Mad., 290.

MARIMUTHU PILLAI v. KRISHNASAMI CHETTI.

in favour of Subbaiyar was declared by the decree in original suit No. 37 of 1888 invalid and must, therefore, be treated as cancelled. Moreover the payee of a promissory note is entitled to pay an endorsee when the note is dishonored and, striking out the endorsement, to sue the maker for compensation or to re-issue the note. See Byles on *Bills of Exchange*, fourteenth edition, page 195. The objection that respondents have not taken out a certificate to collect the debts due to Lakshmana Chetti is not pressed, the certificate being produced before us.

This appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

VYTHILINGA PANDARA SANNADHI AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SOMASUNDARA MUDALIAR AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1893. Oct. 18, 20, 26.

Temple repairs—'Katlais' or distinct endowments—Liability for repairs—Proof of custom in absence of endowment-deeds.

The 'panchayatdars' or managers of a temple, being directed by a Magistrate to repair the gateway of a store-house within the temple precincts and under their immediate control, spent Rs. 10-8-0 in so doing from the funds of a 'katlai' or endowment of which they were managers. They then sued the trustees of two other 'katlais' for recovery of the said sum on the ground that, by the usage of the temple, the cost of repairs was payable from the defendants' income, and asked for a declaration that the duty of executing repairs fell upon the defendants' 'katlais':

Held that, in the absence of any endowment or trust-deed regarding the katlais,' the decision must be found in the usage of the temple, upon proof of which judgment was given for the plaintiffs, and a declaration added to the effect that the defendants were liable for repairs to the temple so far as the surplus funds of their 'katlais' should permit.

APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in original suit No. 45 of 1890.

The defendants preferred this appeal.

* Appeal No. 64 of 1892.

VYTHILINGA PANDARA SANNADHI v. SOMASUNDARA MUDALIAR.

The facts of this case appear sufficiently for the purposes of this report from the following judgments of the High Court :—

MUTTUSAMI AYYAR, J.—There is an ancient temple called Sri Tiyagaraja Swami temple in the town of Tiruválúr in the Negapatam taluk of the district of Tanjore. Respondents are its 'panchayatdars' or managers, and appellants are trustees of two of the 'katlais' attached thereto called Abhisheka Katlai and Rajan *alias* Saba Katlai. In ordinary parlance, the term 'katlai, as applied to temple endowments, signifies a special endowment for certain specific service or religious charity in the temple. Ardajama Katlai or endowment for midnight service is an instance of the former and Annadana Katlai or an endowment for distributing gratis food to the poor is an example of the latter. In this sense, the word katlai is used in contradistinction to the endowment designed generally for the upkeep and maintenance of the temple. In the case of some important temples, the sources of their income are classified into distinct endowments according to their importance, each endowment is placed under a separate trustee, and specific items of expenditure are assigned to it as legitimate charges to be paid therefrom. Each of such endowments is called also a katlai and the trustee who administers it is called the katlaigar or the stanik of the particular katlai. The term 'katlai' is used in the present suit in this sense and exhibit R enumerates the several katlais that exist in connection with the temple at Tiruválúr together with their average income from fasli 1221 to fasli 1228. When the institution was under the immediate control of officers of the Government, it appears from that exhibit that 'Abhisheka Katlai' under first appellant's management had an average income per year of 8,734 pons 2⅝ fanams or Rs. 13,647-3-11. and that Rajan Katlai and Annadana Katlai, which are under second appellant's management, yielded an annual income of 10,208 pons 9 fanams or Rs. 15,951-6-6, while the 'Ulthurai Katlai,' which is under the direct management of the panchayatdars, produced an income of pons 6,247 or Rs. 9,760-15-0. It is these four katlais that are important, the other katlais having only small endowments whose average income is not likely to be in excess of their current expenses. The contest in this suit is as to appellants' liability to provide from the endowments in their charge for the necessary repairs of the temple and of the large tank outside called Kamalalayam which is attached to it.

VYTHILINGA PANDARA SANNADHI v. SOMASUNDARA MUDALIAR.

The facts which have given rise to this litigation are shortly these. Within the precincts of the temple there is a building, called the Kottaram, used as the store-room or store-house wherein provisions required for the use of the temple are usually secured by the panchayatdars. About November 1887, it came to the knowledge of the Head Assistant Magistrate in charge of the Negapatam taluk that the gateway giving entrance into the store-room was in such a state of repair as to endanger the safety of persons using it or passing near it. He called upon appellants to remove this source of danger under section 133 of the Criminal Procedure Code, but they alleged that respondents were the parties bound to execute the necessary repair according to the usage of the temple. After hearing both parties, the Magistrate declined to decide the question and held that the store-house being under the immediate control and in the charge of respondents as trustees of the Ulthurai Katlai, they were bound, under the Code of Criminal Procedure, to execute such repairs as were necessary to prevent danger to the public and made an order to that effect on the 23rd August 1888. From the 4th to the 7th October 1888 respondents spent Rs. 10-8-0 from the funds of the 'Ulthurai' Katlai under their management and repaired the gateway in obedience to the above order. On the 10th December 1888 they instituted this suit to recover the amount so spent by them from the funds of the katlais under appellants' management. Their case is that the two katlais under appellants' management consist of landed properties of the temple yielding an annual income of Rs. 30,000 and 20,000 respectively, that, by the usage of the institution, the cost of repairing the temple and the tank and of erecting necessary buildings is payable from that income, that appellants were bound to contribute to the cost of such repairs and structures in the proportion of two-thirds from the Abhisheka Katlai and one-third from the Rajan Katlai. They prayed for a decree directing appellants to pay them Rs. 10-8-0 with subsequent interest and costs, and declaring that the duty of executing repairs, as mentioned in the plaint, devolved on appellants by the usage of the temple. These, however, denied their liability and contended that there were various katlais attached to the temple in question, that they had separate buildings assigned to them within the precincts of the temple, and that it was the duty of katlaigars or trustees of the katlais to keep their own buildings in repair. They pleaded also to the

jurisdiction of the Subordinate Court alleging that the present suit was cognizable by a Small Cause Court and that the staniks of the Ulthurai Katlai should be co-plaintiffs. But they admitted that "on certain occasions, when funds were available, certain repairs "were executed by them," adding that they were so executed at their will and pleasure and that respondents had no right to compel them to execute such repairs.

The two preliminary objections taken to this suit are that it is cognizable by a Court of Small Causes and that the staniks of the Ulthurai Katlai ought to have been made parties to it. They form the subject of the first and fourth issues, which the Subordinate Judge has determined against appellants. The plaint contains a prayer for a declaratory decree, which a Court of Small Causes is not competent to pass. Nor is it shown that the staniks of the Ulthurai Katlai are not mere temple servants subordinate to the panchayatdars. There is also no doubt that as dharmakartas respondents are bound to see that the temple is kept in proper repair by those who are bound to do so according to usage. In my judgment the Subordinate Judge has properly disallowed both the preliminary objections. Again, it is not seriously denied that Rs. 10–8–0 have not been spent by respondents upon the repair of the Kottaram as found by the Subordinate Judge and the substantial question argued on appeal is as to appellants' liability to make the repair out of the funds of the katlais under their management. This forms the subject of the second issue and the Subordinate Judge has determined it in favour of respondents. No endowment or trust-deed is forthcoming in regard to the katlais and it is conceded that the rule of decision must be found in the usage of the temple. The contention in appeal, therefore, is that the evidence does not warrant the finding of the Subordinate Judge in respondents' favour.

In support of the finding there is first the admission made by appellants themselves. In their written statements they averred that they executed repairs when funds were available. Though they qualified this admission by stating that they were under no obligation to do so, I agree with the Subordinate Judge that this statement is entitled to no weight. As katlaigars, appellants are trustees and they can only spend the income of the trust property upon the particular trusts attached to those katlais, and the explanation that they executed repairs *at their pleasure* is *not* intelligible. Further, the first defendant stated in his evidence that the lands under his management as katlaigar are properties originally granted for the use of the temple by former sovereigns of Tanjore and that their income is first applied to the expenses of daily worship and of festivals and that the surplus is then spent on repairs. Adverting to a temple building called Porpandara, he deposed that it was in the exclusive possession of respondents and the expenses of its repair, as of several other buildings in the possession of respondents, were borne by the two katlais in the proportion of two-thirds and one-third. Moreover, it is in evidence that the katlai lands were in the possession of the Collectors of the district till 1847, when they were formally made over to appellants' predecessors. The muchalkas which these executed on that occasion contain a distinct acknowledgment that the katlai lands were originally granted to Sri Tiyagaraja Swami and an undertaking to apply the income derived therefrom to the said temple. This is significant as showing that the repair of the temple was a trust to which the surplus income had to be devoted according to the original grant. I have already referred to exhibit R and showed that, so far as the amount of average income is concerned, Abhisheka Katlai, Rajan Katlai and Ulthurai Katlai are the most prominent as being in a position to have a surplus at their disposal. It appears, however, from the sanad G and exhibit T and it is also conceded for appellants that the mohini or money allowance paid by the Government to the panchayatdars which (as is seen from exhibit N1) forms the largest portion of the income of the Ulthurai Katlai is not chargeable with the cost of repairs, as it is an endowment for meeting certain defined items of expenditure. As argued by respondents' pleader, it is antecedently probable that if appellants' katlais alone bear the cost of repair, they do so because their large income is likely to leave a surplus available for being laid out on repairs.

Exhibit H1 is an account dated July 1839, and it enumerates the various duties which devolve on the katlaigars and in the case of appellants looking after repairs is specified as one of them, whilst in the case of Ulthurai Katlai no similar duty is mentioned. Again, the same account shows that so early as 1829 an establishment for carrying out ordinary repairs was kept up by appellants' katlais and its cost was paid out of the funds of those katlais.

Another group of documents, exhibits J to Q, is referred to by

the Subordinate Judge in paragraph 11 of his judgment as evidencing actual execution of repairs at the cost of appellants' katlais. Their genuineness is not questioned in appeal and their contents show that both appellants or one of them executed repairs from time to time in 1829, 1831 and 1832. It is argued on behalf of appellants that they merely superintended the execution of the repairs, but that they were paid for from the funds provided by the Collectors of the district as per estimates previously sanctioned by them. The exhibits specify the estimated amount sanctioned by the Collectors under it, the amount expended on repairs on each occasion and are signed by the staniks of both katlais or by one of them and countersigned by taluk officials. It is not explained why the representatives of these katlais were always selected to execute the repairs in preference to panchayatdars if their katlai funds were not spent under previously sanctioned estimates. The Subordinate Judge naturally presumes that the course of business consisted in the katlaigars submitting estimates of repairs, obtaining the Collector's sanction for the outlay from the katlai funds and then executing the repairs from such funds in accordance with the estimate. I cannot say that this inference is, under the circumstances, unreasonable.

Moreover, exhibit Y shows that in 1849 the Collector sanctioned the expenditure of Rs. 10,000 upon repairs on applications and estimates submitted by the katlaigars. Though, as argued by appellants' pleader, the exhibit does not mention the names of the katlaigars, yet it is material in so far as sanction is sought for laying out the income of katlais on repairs.

It appears further from exhibit D that so recently as 1886 the trustee of the Abhisheka Katlai corresponded with the Deputy Tahsildar of Tiruvarur acting on behalf Ulthurai Katlai on the subject of certain repairs.

It appears that first appellant did not repudiate his liability to repair, but entered in to an explanation why it was not then necessary to do the repairs.

There is again exhibit H which shows the amount required in August 1833 for consecrating an idol which was lost in 1802 and discovered in 1833. It purports to be a dittam or estimate of necessary expenses submitted to the Collector, and the amount entered as received from the Huzur is Rs. 586 which is divided

between the Abhisheka Katlai and Rajan Katlai, viz., Rs. 386 for Abhisheka Katlai and Rajan Katlai and Rs. 200 for Annadana Katlai. It is clear that the Collector did not sanction the outlay from the public treasury; whence did he then get the necessary funds? It is not unreasonable to infer from exhibit H1 that the funds came from those katlais among the trusts of which the repair or Tiruppani of the temple finds a place.

On the other hand, our attention is drawn to certain facts by appellants' pleader as favoring their contention. The first fact to which reference is made is the preparation in 1820 of a new dittam or 'standing budget estimate' under the order of the Collector of Tanjore who then exercised control over the management of Hindu temples in the district. By exhibit T he directed that the various sources of income should be estimated and that 20 per cent. should be deducted therefrom and kept as a reserve fund for meeting loss from floods, from withering of crops, from high prices and other unlooked for causes and observed that, even if there were no such loss, the reserve fund was needed for the purpose of repairing the temples and preserving them in the same condition. Exhibits N1, O1, P and R enumerate the several sources of income for the three principal katlais and for the whole temple including all the katlais and the 20 per cent. deduction is entered against all sources of income except the mohini allowance paid by Government for the daily and festival expenses of the temple. In exhibit O1, which is the dittam account for the Abhisheka Katlai, there is an entry under the head of extra expenses in the column of remarks "cost of repairs not included "in the new dittam. Hence the decrease." This is referred to on respondents' behalf as suggesting the inference that, prior to the preparation of the new dittam account, such cost formed part of the old dittam of the katlai. However this may be, these exhibits do not throw light on the ancient usage of the temple before us. The constitution of a reserve fund such as was suggested by the Collector might be an administrative improvement conducive to beneficial management. Under what authority the Collector issued the order T in regard to trust properties is not clear. It had no especial reference to the temple at Tiruvarur nor was its primary object to create a fund for repairs or to supersede any pre-existing obligation in that respect. There is further no evidence to show that a reserve fund was so constituted and since

kept up. It is indeed suggested that it was not so kept up and the absence of allusion to it in the later accounts of 1830 favours the suggestion. It is noteworthy that appellants did not refer to any such fund in their written statements, or say that repairs were to be made from that fund; their case being that the katlais in their charge were not responsible for undertaking temple repairs and *not* that they as well as the other katlais were bound to meet the cost of repairs in proportion to the income. The contention, therefore, that the exhibits now under consideration negative appellants' liability appears to be an afterthought.

Another matter on which appellants' pleader lays stress is that it is natural that each katlai should repair the buildings in its charge as alleged by them. I am not prepared to attach importance to this contention, or exhibits T to K show that appellants executed repairs to buildings in the temple which are not in their possession, but are in the immediate charge of the panchyatdars and among others to the kottaram or store-room now under consideration.

Another piece of evidence is exhibit VII referred to by the Subordinate Judge in paragraph 16 of his judgment. There is no evidence to show when it was prepared, nor are we referred to any other document which refers to contribution by other katlais towards the cost of repairs. On the whole, the weight of testimony appears to me to be in favour of the conclusion at which the Subordinate Judge has arrived. It is true that there is no endowment deed forthcoming. It is also true that no accounts are produced to show execution of repairs by appellants except for a few years. But it should be remembered that the accounts are with appellants and their omission to produce them is open to remark. But there is the fact that all the katlai lands are lands originally granted for the use of the temple and there is an undertaking to apply their income to the temple. There is next the admission that the surplus income was spent on repairs and there is also the presumption that, unless the execution of repairs was one of the trusts of the katlais, the surplus would not have been so spent. Having regard to the fact that the katlais under appellants contribute also to the daily and festival expenses, the statement that the surplus is alone utilized in carrying out repairs is not improbable. There is further the fact that looking after repairs is entered in H1 among the duties devolving on the

representatives of appellants' katlais. There is also positive evidence as to appellants having actually executed repairs to various temple buildings in 1829–31 and 1832. There is some evidence of conscious liability to execute the necessary repairs in 1849 and 1886. Whilst these facts convey the impression that the katlai funds were spent on repairs because there was an obligation so to spend them, there is no evidence of any other katlai besides having regularly contributed to the cost of the repair. Exhibit VII, which contains a single entry to that effect, is not sufficient evidence of the usage of the temple. The exemption of the mohini allowance from liability for the cost of the repair and a comparison of the average income of the various katlais mentioned in exhibit R raise also a presumption that the liability devolved on the Atheenam Katlais by reason of their being able to command a surplus income. Again, the allusion to the reserve fund, which the Collector proposed to organize in 1820, is an afterthought. There is no evidence that such fund is in existence nor was it referred to by appellants in their written statements. The suggestion that each katlai repairs the buildings in its charge is incompatible with the documentary evidence, which shows that appellants' predecessors repaired various temple buildings which are not under their control and kept up a standing establishment for carrying out small repairs. There is no trace in the evidence of other katlais having regularly contributed to the cost of repairs. Under these circumstances, I am unable to accede to the contention that the finding of the Subordinate Judge on the second issue is contrary to the weight of evidence. The decree of the Subordinate Judge must therefore be affirmed, but a declaration must be added to the effect that defendants are liable for repairs to the temple so far as the surplus funds of their katlais shall permit. The appeal having substantially failed, appellants will pay respondents' costs and bear their own costs.

BEST, J.—I concur.

APPELLATE CIVIL.

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

1893. October 25.

NARANA MAIYA (DEFENDANT), APPELLANT,

v.

VASTEVA KARANTA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Widow in possession of her late husband's land—Sale of the land in execution of a personal decree obtained against the widow—Suit by the nephew and reversioner of the deceased husband to recover the land from the purchaser.

A Hindu widow sued to recover certain land which belonged to her late husband from his brother. The suit was compromised by means of a razinamah, one of the terms of which was that the widow should remain in possession of and enjoy the property, but should not alienate it without the brother's permission. Subsequently a personal decree was obtained against the widow, and the land being sold in execution, was purchased by the defendant in the present suit, in which the first plaintiff was the nephew and reversioner of the deceased husband:

Held, that the suit against the widow being on a personal claim, only her limited interest in the property was sold in execution, and that consequently the plaintiff was entitled to the property. *Jugul Kishore* v. *Jotendro Mohun*(1) distinguished, and the principle in *Baijun Doobey* v. *Brij Bhookun Lall Awusti*(2) applied.

SECOND APPEAL against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 236 of 1891, reversing the decree of J. P. Fernandez, District Munsif of Kundapur, in original suit No. 152 of 1890.

The District Munsif decreed in favour of the defendant, but the District Judge on appeal by the plaintiffs reversed the decree.

The defendant preferred this appeal.

The facts of the case are stated above sufficiently for the purposes of this report.

Pattabhirama Ayyar for appellant.

Madhava Rau for respondents.

JUDGMENT.—There is nothing to show that the decree was obtained against the widow Mahalakshmi as the representative of her husband's estate, nor are we referred to any proceedings in that suit showing that the decree was not a personal one simply.

* Second Appeal No. 213 of 1893.

(1) I.L.R., 10 Calc., 985. (2) L.R., 2 I. A., 275; s.c. I.L.R., 1 Calc., 133.

In *Jugul Kishore* v. *Jotendro Mohun Tagore*(1), the decree was passed against the husband. In *Bisto Beharee Sahoy* v. *Lalla Byjnath Pershad*(2) the husband's property was expressly made liable by the decree. Neither of these cases is, therefore, on all fours with the present one, which is governed by the principle laid down by the Privy Council in *Baijun Doobey* v. *Brij Bhookun Lall Awusti*(3).

The razinamah does not, on its true construction, amount to a gift of an absolute estate to the widow. It merely recognizes the widow's right to possess the property during her life without making alienations.

The dismissal of the claim petition cannot affect the plaintiffs' claim as reversioner, a claim which only became enforceable on the widow's death in 1888. Further, the claim was dismissed without inquiry.

It is finally contended that the debt in question was due from the husband, as is also found by the District Munsif, and that the District Court was wrong in considering this point immaterial.

This was not the case of a voluntary sale by a widow in discharge of her husband's debt, but of a Court-sale in execution of a personal decree obtained against the widow. The Judge is therefore right.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

1893. Sept. 15, 18.

OULA AND OTHERS (COUNTER-PETITIONERS), APPELLANTS,

v.

BEEPATHEE AND ANOTHER (PETITIONERS), RESPONDENTS.*

Code of Civil Procedure—Act XIV of 1884, ss. 365, 367—Representation of a deceased plaintiff.

Section 365 of the Code of Civil Procedure presupposes that the party claiming to represent a deceased plaintiff is his legal representative, but, if the represen-

* Appeal against Orders Nos. 65 and 66 of 1892.

(1) I.L.R., 10 Calc., 985. (2) 16 W.R., 49.

(3) L.R., 2 I. A., 275; s.c. I.L.R., 15 Calc., 133.

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tative character is denied, or when two or more persons claim it, the procedure prescribed by section 367 of the Code should be followed.

APPEALS against the orders of S. Subbayar, Subordinate Judge of South Canara, dated 18th January 1892, passed on civil miscellaneous petition Nos. 572 and 573 of 1891.

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

Ramachandra Rau Saheb and *Pattabhirama Ayyar* for appellants.

Naraina Rau for respondents.

JUDGMENT.—This was a suit brought by one Kutti Hammad upon a bond executed by his late uncle Abdul Rahiman Kutti. Hammad having since died, Beepathee and Kunhipathu, claiming to be his sisters by adoption, applied to have their names entered on the record in place of the deceased plaintiff. The third defendant denied the adoptions, but the Subordinate Judge granted the application without proper inquiry, and ordered that the suit be proceeded with; hence this appeal. It is contended for the appellants that the Subordinate Judge gave them no opportunity to disprove the alleged adoptions, and that the admission made by the deceased plaintiff is not binding upon them. It is also urged that before respondents were admitted as supplemental plaintiffs, the procedure prescribed by section 367 had not been complied with and the factum of the adoptions determined. On the other hand, the contention for respondents is that the Subordinate Judge has acted in accordance with the provision of section 365, and that no appeal lies from the order made under that section.

As regards the preliminary objection that no appeal lies, it cannot be maintained. In this case the third defendant denied that Beepathu and Kunhipathu were the legal representatives of the deceased plaintiff, and it falls, therefore, under section 367. An appeal is allowed from the order made under that section by section 588, clause 18. I am unable to accede to the contention that section 367 applies only when two or more persons claim to be legal representatives of the deceased plaintiff, and that it is not applicable where there is but one claimant, and the defendant denies his representative character. Section 365 provides that in case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of the deceased may, where the right to sue survives, apply to the Court to have his name entered on the record in place of the deceased plaintiff, and the Court shall, there-

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upon, enter his name accordingly and proceed with the suit. The section presupposes that the claimant *is* the legal representative, and then prescribes the procedure which ought to be followed. Section 367 enacts that, if any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit or decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit. The language is wide enough to include a sole claimant, whose representative character is denied by the defendant. Reading the two sections together, they show that when there is no dispute as to the applicant being the legal representative, the procedure prescribed by section 365 is to be followed, and, either when the representative character is denied or when two more persons claim it, the procedure prescribed by section 867 should be followed. The bringing in of a representative on the record is not a mere formal act, and there must be a complete judicial inquiry and determination as to whether the claimant is the proper representative. This is further made clear by the procedure prescribed when the legal representative of a deceased sole defendant is brought on the record. In that case the Court is bound to enter on the record the name of the person who is alleged by the plaintiff to be the legal representative, liberty being reserved to the person who is so made defendant to object that he is not the legal representative. When the plaintiff makes the application and causes a new defendant to be put on the record, he does so at his own peril, and if the new defendant is not really the representative of the deceased defendant, the plaintiff will not be able to execute the decree. On the other hand, when a person is substituted for the deceased plaintiff, it is the act of the Court and the substituted person realizes the deceased's estate. The Court must, therefore, satisfy itself that the substituted person is the real representative at or before the hearing of the suit and then deal with it according to law. In the case before us, the Subordinate Judge admitted two documents and a judgment in evidence, and acted upon them without giving the defendants an opportunity to prove their allegation, and I cannot say that there was a proper judicial inquiry. The order of the Subordinate Judge is set aside, and he is directed to hear all the evidence which the parties may adduce and, after holding a proper judicial inquiry

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to determine whether petitioners are entitled to be admitted as the legal representatives of the deceased Kutti Hammad for the purpose of prosecuting the suit, and then deal with the suit according to law. Costs of this appeal will abide and follow the result, and be provided for in the revised judgment or order.

APPELLATE CIVIL.

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

1893. September 28. December 21.

SHEIK DAVUD SAIBA AND OTHERS (PLAINTIFFS NOS. 1, 3 AND 4), APPELLANTS,

v.

HUSSEIN SAIBA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Religious Endowments Act—Act XX of 1863—*Regulation VII of* 1817, *s.* 13—*Discretionary power of a temple committee to appoint new trustees when the power of management is not hereditary—Trusts Act—Act II of* 1882, *s.* 49.

A temple committee appointed under Act XX of 1863 may appoint new trustees when there is no hereditary trustee to add to the existing trustees, but this power, although discretionary, must be exercised reasonably and in good faith, and, according to the principle, which is applicable to public trusts, embodied in section 49 of the Indian Trusts Act. If it is not so exercised, the power may be controlled by a Civil Court of original jurisdiction.

SECOND APPEAL against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 171 of 1891, reversing the decree of J. P. Fernandez, District Munsif of Coondapoor, in original suit No. 73 of 1890.

The plaintiffs were four of five trustees of a mosque. The eighth and ninth defendants were members of the committee who had appointed the first to sixth defendants additional trustees. The seventh defendant was the fifth original trustee and khazi of the mosque, who had been dismissed from his office by the four other trustees, a proceeding which, *inter alia*, gave rise to rioting, in which two of the plaintiffs took part. The committee then appointed the additional trustees in order to counterbalance the influence of the plaintiff trustees in the management.

* Second Appeal No. 38 of 1893.

SHEIK DAVUD SAIBA v. HUSSEIN SAIBA.

The District Munsif decreed that the appointment was unnecessary and collusively made by the eighth and ninth defendants, which decree was reversed on appeal by the defendants by the District Judge.

The plaintiffs preferred this appeal.

Ranga Rau for appellants.

Pattabhirama Ayyar for respondents Nos. 1, 2, 4 to 7 and 9.

JUDGMENT.—It is urged on appellants' behalf that the committee constituted under Act XX of 1863 acted *ultra vires* in appointing six additional trustees to the plaint temple without any necessity for so doing.

It is certainly competent to the committee, when there is no hereditary trustee, to add to the number of the existing trustees and it has the same powers which the Board of Revenue had under Regulation VII of 1817. Section 13 of that Regulation authorizes the Board of Revenue to make provision for the administration of religious and charitable endowments. It was also held by this Court in Regular Appeal 31 of 1888 that the committee might validly appoint new trustees where the right of management is not hereditary. It is then contended, with regard to the power conferred on the committee, that it is bound to exercise it reasonably and in good faith in furtherance of beneficial administration, and this contention is entitled to weight. The power conferred on the committee is no doubt discretionary, but the principle embodied in section 49 of the Indian Trusts Act, viz., that when such discretionary power is not exercised reasonably and in good faith, such power may be controlled by a Civil Court of original jurisdiction, is equally applicable to public trusts. There is nothing in Act XX of 1863 or in Regulation VII of 1817 to support respondents' suggestion that the power is absolute.

The second issue raised the question and the District Munsif held that the committee exercised the power otherwise than reasonably and in good faith. But the Judge has expressed no opinion. Before disposing of this second appeal we shall ask the Judge to return a finding as to whether the appointment of the additional trustees was a reasonable *bonâ fide* exercise of their power conducive to beneficial management. Additional evidence may be admitted.

APPELLATE CIVIL.

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

1893. August 22. September 5.

KOMAPPAN NAMBIAR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

UKKARAN NAMBIAR AND OTHERS (DEFENDANTS NOS. 1—6), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 13, 30—'Res judicata'—*Representation.*

Although the members of a tarwad or family may, in an irregular fashion, be represented by a karnavan of the tarwad in a suit, the decree therein does not raise an absolute estoppel against members not actually brought on the record.

Ittiachan v. *Vellappan*(1) and *Sri Devi* v. *Kelu Eradi*(2) followed.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 227 of 1892, reversing the decree of S. Subramaniya Iyer, District Munsif of Payoli, in original suit No. 13 of 1892.

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

The District Munsiff decreed in favour of the plaintiffs, and the District Judge reversed the decree on appeal by the defendants. The plaintiffs preferred this appeal.

Sundara Ayyar for appellants.

Narayana Rau for respondents Nos. 2 to 6.

JUDGMENT.—The present suit is brought by twelve persons alleged to belong with Chathu Nambiar, the twelfth defendant, to a branch tarwad. They claim a property held under lease by the thirteenth defendant. In 1887 the first defendant in the suit who is karnavan of the tarwad, brought a suit to recover the same property. In that suit the tenant was joined as first defendant and the other two defendants were the above-mentioned Chathu Nambiar and another member of the branch, Raman Nambiar. The main contention in that suit was that these two, Chathu and

* Second Appeal No. 1548 of 1892.

(1) I.L.R., 8 Mad., 484, 488. (2) I.L.R., 10 Mad., 79.

Raman, belonged to a branch having no community of interest with the main tarwad. That contention was overruled and a decree was passed in favour of the then plaintiff, the karnavan. This decree, it has been held by the District Judge, is binding on the present plaintiffs, because in the former suit they were represented by Chathu and Raman, respectively, the karnavan and senior anandravan of their branch. The District Judge held that the question sought to be raised in the present suit is *res judicata*. In our opinion the judgment cannot be sustained. In the first place, the statement that the two members, Chathu and Raman, represented anybody but themselves seems to be a mere assumption. The only part of the record in the previous suit which is produced is the judgment, and from that it would be difficult to say that the then defendants were impleaded by the then plaintiff or put themselves forward in a representative character. At any rate, the mere fact that they are branch karnavan and senior anandravan is no ground for raising any inference. It must be remembered that the case for the then plaintiff was that there is no such thing as an independent branch existent and Chathu was joined as a defendant, because he happened to have taken a part in granting the demise.

Under these circumstances we are of opinion that there really is no foundation for the statement of the Judge on which he rests his conclusion as to the applicability of section 30 of the Civil Procedure Code. In drawing that conclusion also the Judge is clearly in error. It has been more than once decided that although the members of a tarwad or family may, in an irregular fashion, be represented by a karnavan of the tarwad, the decree does not raise an absolute estoppel against members not actually brought on the record, see *Ittiachan* v. *Vellappan*(1), *Sri Devi* v. *Kelu Eradi*(2), and second appeal No. 93 of 1885.

We must, therefore, reverse the decree of the District Judge and remand the appeal for disposal. The plaintiffs are entitled to the costs of the appeal. For other costs provision will be made in the revised decree.

(1) I.L.R., 8 Mad., 484, 488. (2) I.L.R, 10 Mad., 79.

APPELLATE CIVIL.

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

1893. August 22.

KRISHNASAMI CHETTI (PLAINTIFF), APPELLANT,

v.

THE NATAL EMIGRATION BOARD (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, *s.* 114—*Presidency Small Cause Courts Act—Act XV of* 1882, *ss.* 22, 41.

The plaintiff, a landlord, relying on a provision in a lease, gave the defendants, his tenants, notice to quit. Within seven days the defendants tendered rent, interest and costs. The plaintiff, nevertheless, filed this suit to eject the defendants. The defendants subsequently paid the full amount due into Court:

Held, that, under the terms of the lease, the defendants were not liable to forfeiture, and that, since the suit should have been brought under chapter VII, section 41 of the Presidency Small Cause Courts Act, plaintiff must pay the defendants' costs as between attorney and client under section 22 of that Act:

Held, on appeal (1) that there having been a tender and payment into Court of the full amount due, the plaintiff proceeded with the suit at his risk under section 114 of the Transfer of Property Act;

(2) that the suit not being cognizable by the Small Cause Court, section 22 of Act XV of 1882 did not apply, an application under chapter VII of that Act not being a suit under section 22 thereof.

APPEAL against the judgment of Wilkinson, J., sitting on the original side of the High Court in civil suit No. 242 of 1892. The facts of the case appear sufficiently for the purpose of this report from the judgment delivered by Mr. Justice Wilkinson.

WILKINSON, J.—"The plaintiff is one of three brothers, "from whom the defendant company leased certain property in "1887. There was subsequently litigation between the brothers "which terminated in plaintiff becoming the sole owner of the "property. Thereupon, in March 1891, plaintiff applied to the "defendants' head clerk for instructions as to the form in which "he should draw up the bills for rent. First witness supplied him "with a form (II-A), and from the 18th March 1891 up to 16th

* Appeal No. 8 of 1893.

"March 1892 plaintiff duly presented a bill for rent on or about "the 15th of each month and was duly paid. No bill was presented "in April 1892 for the rent due, and the defendants omitted to "send a cheque for it. Thereupon the plaintiff, on the 10th May, "sent a notice to the defendant to quit, relying on a provision in the "lease that 'if any part of the rent reserved should be in arrear "'for 21 days, whether the same shall have been legally demanded "'or not, the lessors may re-enter and the demise shall absolutely "'determine.' On the 17th May, the defendants through their "attorneys tendered rent with interest and costs, but the plain-"tiff refused to accept it and has filed the present suit in this Court, "notwithstanding the provisions of section 41 of the Presidency "Small Cause Court Act. The first question is whether there has "been any breach of the condition of the lease. Strictly speaking, "there does not appear to me to have been any such breach, for, "according to the terms of the lease, rent is payable on the 1st of "each month and the defendant has 21 days' grace. The last "cheque which the plaintiff accepted was one dated 4th April. "The next cheque was dated 13th May. It was in time, but was "refused. But it is argued that according to the course of dealing "which has grown up between the parties, as proved by the evi-"dence of the defendants' witness and by exhibits II and III, ever "since the plaintiff has been sole owner, the custom has been for "the plaintiff to send or present his bill for rent on or about the "15th of the month and for the defendants to issue a cheque on "the day on which bill was presented or the day after. Plaintiff "having omitted to present his bill on or about the 15th April, no "cheque for the rent was issued, but I do not think that the defend-"ants are, therefore, liable to forfeiture. The strict terms of the "lease had, by the consent of the plaintiff, been departed from, and "as the defendants were always ready and willing to pay, it would "be most inequitable to hold that their omission to send a cheque "for the rent in April entitles plaintiff to cancel the lease. Admit-"tedly the defendant company have always been most regular in "the payment of rent, and though, legally speaking, they were not "entitled to a bill, but were bound to pay rent as stipulated, yet I "hold that, looking at all the circumstances of the case, they would "not be liable to forfeiture even if they had been bound to pay on "15th April and had omitted to pay till 10th May. The suit is "one which ought to have been brought in the Small Cause Court,

KRISHNASAMI CHETTI v. THE NATAL EMIGRATION BOARD.

"and in dismissing it with costs, I direct plaintiff to pay defend-"ants' costs as between attorney and client."

Krishnasami Chetti for appellant.

Mr. *W. Grant* for respondents.

JUDGMENT.—It appears that on 13th May 1892 there was a valid tender of rent, interest and costs, and that on 3rd November there was a payment into Court of the full amount due up to the 15th November. This being so, the defendants have brought themselves within the terms of section 114 of the Transfer of Property Act. After the tender on the 13th May the plaintiff proceeded with the suit at his risk. The only other question is as to costs between Attorney and client given by the learned Judge. In our opinion this suit was not cognizable by the Small Cause Court and therefore section 22 of the Act does not apply. An application under chapter VII is not a suit within the meaning of section 22.

We must vary the decree accordingly. Each party will bear his own costs of this appeal.

Wilson and King, Attorneys for respondents.

APPELLATE CIVIL.

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

1893. Sept. 12, 18.

UNHAMMA DEVI (PLAINTIFF), APPELLANT,

v.

VAIKUNTA HEGDE AND OTHERS (DEFENDANTS), RESPONDENTS.*

Notice to quit.—Assertion of Mulgeni (permanent) tenure—Entitlement to notice.

The setting up of a Mulgeni right by a tenant is not a disclaimer of title such as disentitles him to a notice to quit in determination of the tenure.

SECOND APPEAL against the decree of W. C. Holmes, Acting District Judge of South Canara, in appeal suit No. 405 of 1890, confirming the decree of S. Raghunathaya, District Munsif of Karkal, in original suit No. 323 of 1889.

* Second Appeal No. 34 of 1893.

UNHAMMA DEVI v. VAIKUNTA HEGDE.

The Lower Courts having decreed in favour of the defendants, the plaintiff preferred this appeal.

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

Narayana Rau for appellant.

Madhava Rau for respondents Nos. 2, 4, 5, 6, 7 and 10.

JUDGMENT.—This was a suit brought by appellant to eject respondents. Both Courts concur in finding that respondents 2 to 4 are, and have long been, in possession as tenants. Their case was that they were Mulgeni tenants and they set up their Mulgeni right in 1880, long prior to the suit. The District Munsif considered that they did not prove the Mulgeni right but, on appeal, the Judge thought it unnecessary to determine the question. But both Courts found that no notice to quit had been served upon respondents 2 to 10, and upon that finding, the Judge dismissed the suit with costs. For appellant it is contended that, as respondents set up a Mulgeni right, he was absolved from his obligation to give them notice to quit. There is no doubt that a tenant from year to year is entitled to reasonable notice; as was held in *Abdulla Rawutan* v. *Subbarayyar*(1), the reason being that the duration of a tenancy from year to year is indefinite, and that it is part of the landlord's case to show that he had determined the tenancy prior to suit by sufficient notice to quit. Nor is there any doubt that the tenant forfeits this right to notice by denying the landlord's title prior to suit. It is also settled law that the denial of title for the first time in the suit does not disentitle the tenant to notice, for the reason that the plaintiff is bound to show that at the date of suit he had a complete cause of action; and subsequent denial of title, even if false, does not release the landlord from proving his case or amount to a waiver by the defendant of his right to notice, *Subba* v. *Nagappa*(2). The question, therefore, arising for decision is whether setting up a Mulgeni right is a disclaimer of title such as disentitles to notice. As far as we are aware, this is the first time this question arises in this Court. When a Mulgeni right is set up, the landlord's title is, in fact, not denied; on the other hand, the relation of landlord and tenant is admitted, what is denied being the particular kind of tenancy under which the tenant holds possession. This denial

(1) I.L.R., 2 Mad., 346. (2) I.L.R., 12 Mad., 353.

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includes no doubt a denial of the contract or the tenure under which the tenant commenced to hold, but it is not, we think, on that ground a denial of title. As pointed out in Woodfall's *Landlord and Tenant*, page 325 (13th edition), there must be a direct repudiation of the relation of landlord and tenant or an assertion of facts which are, either expressly or by necessary implication, incompatible with the existence of such relation. For the appellant, however, our attention is drawn to *Vivian* v. *Moat*(1) and to the observations of Mr. Justice Firy. The ground of decision in that case was that the claim to hold at a customary rent was inconsistent with the ordinary relationship of landlord and tenant, and that it amounted to a suggestion that the landlord was not an ordinary landlord, but either lord of the manor or owner of some other right which gave him a right to customary rent and to nothing more. We cannot say that in the case of a Mulgeni in South Canara, the landlord is in the position of a lord of the manor in England or that the rent reserved is not often substantial. The tenures are not alike, and we do not think it safe to extend the rule land down in *Vivian* v. *Moat*(1) to this country, especially as the rule is substantially one of forfeiture. The High Court at Calcutta considered that *Vivian* v. *Moat*(1) was not applicable in Bengal in *Kali Krishna Tagore* v. *Golam Ally*(2). It was also held by the Bombay High Court in *Haji Sayyad* v. *Venkta*(3) that the defendants' unsuccessful attempt to prove himself a Mulgenidar did not exonerate the plaintiff from proving the lawful determination of the Chalgeni holding. The decision of the Judge is right, and we dismiss the second appeal with costs.

(1) L.R., 16 Ch. D., 730. (2) I.L.R., 13 Calc., 248, 254.
(3) I.L.R., 15 Bom., 410.

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CIVIL PROCEDURE CODE—ACT XIV OF 1882, ss. 313, 315 AND 316—*Execution sale—Portion of the property sold belonging to a stranger—Right of a purchaser in an execution sale.*] Where a Court-sale in execution of a decree is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by section 315 of the Civil Procedure Code. The effect of sections 313, 315 and 316 of the Code is that the right, title and interest of the judgment-debtor passes to the purchaser at a Court-sale subject, however, to the condition that the purchaser may recover back his purchase money when he finds that the judgment-debtor has no saleable interest at all. The implied warranty of title in respect of sales by private contract cannot be extended to Court-sales, except so far as such extension is justified by the processual law in India, viz., by section 315 of the Civil Procedure Code. *Dorab Ally Khan* v. *Abdool Azeez* (L.R., 5 I.A., 116) followed.

Sundara Gopalan v. *Venkata Varada Ayyangar* 228

DIVORCE—DIVORCE ACT IV OF 1869, s. 7—*Nature of the marriages contemplated by the Act—Monogamous marriage.*] The petitioner and his wife married according to the rites of the Hindu religion. The wife subsequently left her husband and lived in adultery with another man. Both the husband and wife subsequently became Christians, but the wife continued to live in adultery. The husband sued under Act IV of 1869 for the dissolution of the marriage :—*Held* that, having regard to section 7, the marriages contemplated by the Act are those founded on the Christian principle of a union of one man and one woman to the exclusion of others, and that consequently the Act does not contemplate relief in cases where the parties have been married under the rites of Hindu law, a Hindu marriage not being a monogamous one. *Hyde* v. *Hyde* (L.R., P. & D., 130) and *Brinkley* v. *Attorney-General* (L.R., 15 P.D., 76), cited and followed. *Gobardhan Dass* v. *Jasadamoni Dassi* (I.L.R, 18 Calc., 252), dissented from.

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EXECUTION SALE—*Portion of the property sold belonging to a stranger—Civil Procedure Code—Act XIV of 1882, ss. 313, 315 and 316—Rights of a purchaser in an execution sale.*] Where a Court-sale in execution of a decree is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by section 315 of the Civil Procedure Code. The effect of sections 313, 315 and 316 of the Code is that the right, title and interest of the judgment-debtor passes to the purchaser at a Court-sale subject, however, to the condition that the purchaser may recover back his purchase money when he finds that the judgment-debtor has no saleable interest at all. The implied warranty of title

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in respect of sales by private contract cannot be extended to Court-sales except so far as such extension is justified by the processual law in India, viz., by section 315 of the Civil Procedure Code. *Dorab Ally Khan* v. *Abdool Azeez* (L.R., 5 I.A., 116) followed.

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GUARDIAN AND WARD—*Guardian's power to acknowledge a debt due by the minor, when not barred by limitation at the date of the acknowledgment.*] A guardian has authority to acknowledge a debt on the part of the minor, provided that the debt is not barred by limitation at the date of the acknowledgment. *Chinnaya* v. *Gurunatham* (I.L.R., 5 Mad., 169) followed. *Wajibun* v. *Kadir Buksh* (I.L.R., 13 Calc., 235) disapproved.

Sobhanadri Appa Rau v. *Sriramulu* 221

HINDU LAW—*Powers of the head of a caste in respect of caste customs—Jurisdiction of the Civil Courts.*] In a matter relating to caste customs over which the ecclesiastical chief has jurisdiction, and exercises his jurisdiction with due care and in conformity to the usage of caste, the Civil Courts cannot interfere. A guru, as head of a caste, has jurisdiction to deal with all matters relating to the autonomy of caste according to recognised caste customs. *The Queen* v. *Sankara* (I.L.R., 6 Mad., 381) and *Murari* v. *Suba* (I.L.R., 6 Bom., 725) cited and followed.

Ganapati Bhatta v. *Bharati Swami* 222

RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865, s. 10—*Suit to recover arrears of rent due under a decree given under section* 10, *Limitation Act—Act XV of* 1877, *sched. II, art.* 110—*Whether limitation commences from date of decree or from the dates when the various sums in arrears were payable.*] In a suit for arrears of rent due under a decree given under section 10 of the Rent Recovery Act (Madras Act VIII of 1865) the period of limitation in article 110, schedule II of the Limitation Act, commences from the date when the plaintiff was in a position to sue for rent, *i.e.*, the date of the decree.

Sobhanadri Appa Rau v. *Chalamanna* 225

REVENUE RECOVERY ACT—MADRAS ACT II OF 1864, s. 35—*Payment of arrears of village revenue by the assignee of a mortgagee of portion of the village property—'Defaulter'—Registered and real owners.*] The plaintiff was assignee of a mortgagee of 38½th pangus in a village consisting of 51½th pungus. Having sued the executants of the mortgage and obtained a decree in 1885, he, in 1887 and 1888, paid certain arrears of revenue due from the village, in order to prevent its sale. In 1888, the plaintiff's 38½th pungus were sold in execution of the decree of 1885 to the 85th defendant subject to a charge for the amount of the revenue arrears paid by the plaintiff. In 1890 the plaintiff instituted the present suit to recover from the entire village and from the defendants Nos. 1 to 84 personally the amount of these arrears:—*Held*, that the 85th defendant, as also the 38½th shares purchased by him, were liable for the debt conjointly with the remaining shares and the other defendants, the plaintiff having by payment of the arrears acquired a charge upon the land under section 35 of the Revenue Recovery Act; that not only registered proprietors but real owners and their holdings may be treated as defaulters within the meaning of section 35 of that Act. *Seshagiri* v. *Pichu* (I.L.R., 11 Mad., 457) followed.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

SOBHANADRI APPA RAU (PLAINTIFF), PETITIONER,

v.

SRIRAMULU (DEFENDANT), RESPONDENT.*

1893. Sept. 22, 26.

Guardian and ward—Guardian's power to acknowledge a debt due by the minor, when not barred by limitation at the date of the acknowledgment.

A guardian has authority to acknowledge a debt on the part of the minor, provided that the debt is not barred by limitation at the date of the acknowledgment. *Chinnaya* v. *Gurunatham* (I.L.R., 5 Mad., 169) followed. *Wajibun* v. *Kadir Buksh* (I.L.R., 13 Calc., 295) disapproved.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in Small Cause Suit No. 368 of 1891.

This was a suit to recover from the defendant (a minor) a sum of money on a bond executed by the mother of the defendant as his guardian in revival of an old debt due to the plaintiff's father, which debt was time-barred at the date of the suit. The Subordinate Judge, relying on *Wajibun* v. *Kadir Buksh*(1), held that the mother had no authority to make a fresh contract and give thereby a fresh cause of action for limitation to the original obligation, and dismissed the suit.

The plaintiff preferred this petition.

Subramanya Ayyar for petitioner.

Respondent was not represented.

JUDGMENT.—This was a suit upon a bond executed by the defendant's mother as his guardian in renewal of an old debt. The Subordinate Judge dismissed the suit on the ground that, but for the new bond, the old debt would be barred by limitation at the date of suit, and that a guardian was not competent to make an acknowledgment on behalf of his ward so as to give a fresh start for the period of limitation. The decision of the High Court at Calcutta in *Wajibun* v. *Kadir Buksh*(1) is not consistent with

* Civil Revision Petition No. 456 of 1892.

(1) I.L.R., 13 Calc., 295.

SOBHANADRI APPA RAU v. SRIRAMULU.

the principle and the decision of the Full Bench of this Court in *Chinnaya* v. *Gurunatham*(1). According to the last-mentioned decision, the manager of a joint Hindu family, in which there may be minors, has authority to acknowledge a debt, provided that it is not barred at the date of acknowledgment. In my opinion such an acknowledgment may often be necessary to obtain an extension of time for payment of minor's debt and thereby prevent imminent pressure on the minor's property, and I see no reason to think that it is not an act within the general power of a guardian to do what is either necessary in the interest of the minor or what is manifestly for his benefit. Following the principle of the decision of the Full Bench of the Madras High Court, I set aside the decree of the Subordinate Judge and remand the case for disposal on the merits. Costs incurred hitherto will abide and follow the result and be provided for in his revised judgment.

APPELLATE CIVIL.

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

1893. November 14. 1894. February 7.

GANAPATI BHATTA (PLAINTIFF), APPELLANT,

v.

BHARATI SWAMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu law—Powers of the head of a caste in respect of caste customs—Jurisdiction of the Civil Courts.

In a matter relating to caste customs over which the ecclesiastical chief has jurisdiction, and exercises his jurisdiction with due care and in conformity to the usage of caste, the Civil Courts cannot interfere.

A guru, as head of a caste, has jurisdiction to deal with all matters relating to the autonomy of caste according to recognised caste customs. *The Queen* v. *Sankara*(2) and *Murari* v. *Suba*(3) cited and followed.

SECOND APPEAL against the decree of S. Subbayyar, Subordinate Judge of South Canara, in appeal suit No. 37 of 1891, affirming the decree of M. Mundappa Bangera, District Munsif of Mangalore, in original suit No. 245 of 1889.

(1) I.L.R., 5 Mad., 169.
(2) I.L.R., 6 Mad., 381.
(3) I.L.R., 6 Bom., 725.
* Second Appeal No. 1603 of 1892.

GANAPATI BHATTA v. BHARATI SWAMI.

The Lower Courts decreed in favour of the defendants. The plaintiff preferred this appeal.

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

Pattabhirama Ayyar for appellants.

Ramachandra Rau Saheb for respondents.

JUDGMENT.—The parties to this appeal are Havik Brahmans, who form a sub-division of the Brahman community in South Canara. First respondent is the head or the ecclesiastical chief of the sub-caste; the second is his parupathyagar or manager; and appellant is a member of the caste subject to the spiritual jurisdiction of first respondent. On the 17th May 1887, first respondent issued against appellant a provisional order of excommunication and communicated it to the Vaidikas and Grahastas, secular and lay Brahmans of Mangalore. Three caste offences are mentioned in the order. The first is that when the guru went to appellant's division or hobli, appellant neglected to visit him and pay the kanike or fee as other Havik Brahmans did, though he was duly apprised of first respondent's arrival; the second is that when the people of Vittal remonstrated with him against his conduct and advised him to see his guru, he referred to his disapproval of the excommunication of one Sham Bhatta and others of the Bayar village and to his promise to those persons to continue in caste communion with them, and declared that it was not necessary for him either to see the first respondent or to pay to him the arrears of kanike or fee. The third caste offence is that he associated with persons already excommunicated in defiance of first respondent's authority as the chief of his sub-caste. The order proceeds then to state that it shall be in force until appellant attends before first respondent and obtains an order disposing of the matters mentioned therein. It purports to be signed by second respondent under the orders of first respondent.

Appellant brought this suit to have it declared that the order passed against him is unjust and invalid on the ground that it was issued without notice to him and that he suffered thereby both in his property and reputation. In defence respondents admitted the order, but alleged that it was only provisional and that it was fully competent to first respondent as the head and chief of his caste to issue such order. The District Munsif considered that first respondent was at liberty to deal with questions relating

GANAPATI BHATTA v. BHARATI SWAMI.

to caste and religious usages, and that the Civil Courts ought not to interfere to prevent first respondent from correcting caste misconduct. On this view, the District Munsif dismissed the suit with costs; and on appeal the Subordinate Judge confirmed the decision. He observed (i) that the order was provisional in its nature; (ii) that the decisions marked as exhibits I to III and VI and that reported in *The Queen* v. *Sankara*(1) showed that as guru first respondent had authority to inquire into the misconduct of his disciples and to punish them for caste offences and derelictions. He was also of opinion that appellant's liability to pay kanike or subscription or fee was a caste matter and that appellant had no right to complain unless the fee demanded was unreasonable or extortionate, which it was not in the case before us as evidenced by exhibit XIV. He found further that due notice was given to appellant, and that if no inquiry was held, it was because of appellant's contumacious conduct in refusing to attend such inquiry. He also remarked that appellant asked but for a declaratory decree in regard to a temporary interdict or an *ad interim* order in respect of certain caste imputations, and that in his judgment this was a case in which he, in the exercise of the discretion vesting in him under section 42 of the Specific Relief Act, might properly refuse to pass a merely declaratory decree. Hence this second appeal.

For appellant it is contended that upon the facts found, the decision of the Subordinate Judge is wrong in law; but we are unable to accede to this contention. The relation between appellant and first respondent is that of a member and the ecclesiastical chief of his caste. Whether the disciple should visit his guru and make his obeisance, whether the former should pay the latter a kanike or fee by virtue of the spiritual relation, and whether the disciple should abstain from intercourse with persons already excommunicated by his guru are matters relating to the autonomy of caste with which, as the head of the caste, first respondent has jurisdiction to deal according to recognized caste custom. It was held in *The Queen* v. *Sankara*(1) and *Murari* v. *Suba*(2) that a guru's jurisdiction extends over such matters. This being so, the facts found show that first respondent exercised his jurisdiction *bonâ fide*. It is found that the fee demanded

(1) I.L.R., 6 Mad., 381. (2) I.L.R., 6 Bom., 725.

GANAPATI BHATTA v. BHARATI SWAMI.

was neither unreasonable nor extortionate. It is not denied that appellant did violate the duty which he owed to first respondent by refusing to visit him. The provisional nature of the order shows that care was taken to see that the punishment by way of excommunication which, as ecclesiastical chief, first respondent was competent to inflict, was not more extensive than was necessary to enforce obedience to caste duties. As observed by the Subordinate Judge, if there has been no inquiry, its absence is due to appellant's contumacious refusal to attend for such inquiry. In a matter relating to caste customs over which the ecclesiastical chief has jurisdiction and exercises his jurisdiction with due care and in conformity to the usage of caste, the Civil Courts cannot interfere.

The decision of the Courts below is open to no legal objection, and we dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

SOBHANADRI APPA RAU (PLAINTIFF), PETITIONER.,

v.

CHALAMANNA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1893. April 6. September 12.

Rent Recovery Act (Madras) —Act VIII of 1865, *s.*10—*Suit to recover arrears of rent due under a decree given under s.* 10—*Limitation Act—Act XV of* 1877, *sched. II, art.* 110—*Whether limitation commences from date of decree or from the dates when the various sums in arrears were payable.*

In a suit for arrears of rent due under a decree given under section 10 of the Rent Recovery Act (Madras Act VIII of 1865) the period of limitation in article 110, schedule II of the Limitation Act, commences from the date when the plaintiff was in a position to sue for rent, *i.e.*, the date of the decree.

THESE were petitions under section 25 of Act IX of 1887 praying the High Court to revise the decree of C. Rangayya, District Munsif of Bezwada, in Small Cause Suits Nos. 502, 503 and 505 to 511 of 1891.

The facts of the case (petition No. 42 of 1892) which governed the other petitions were as follows.

* Civil Revision Petitions Nos. 42 to 50 of 1892.

SOBHANADRI APPA RAU v. CHALAMANNA.

On the refusal of a tenant to accept a patta tendered by his landlord for fasli 1296, the latter instituted in 1886 a suit to enforce acceptance thereof. The suit was finally decided on 15th May 1888, a decree being given under section 10 of the Rent Recovery Act modifying the terms of the patta. In the meanwhile the defendant had paid such rent from time to time as he thought he was bound to pay. On 15th May 1891 the landlord instituted the present suit to recover the difference between the rent due according to the amended patta and the amount paid by the defendant previous to the decree. The defendant pleaded that the suit was barred by limitation since it had been brought more than three years after the expiration of the dates upon which the rents should be paid according to the *kistbandi*. The District Munsif decided in favour of the defendant and the plaintiff preferred this petition.

Sundara Ayyar for petitioner.

Respondents were not represented.

JUDGMENT in Civil Revision Petition No. 42 of 1892.—The plaintiff is a minor zamindar under the care of the Court of Wards and the defendant is his tenant. The present suit was brought on the small cause side of the District Munsif's Court of Bezwada to recover the balance of sist due for fasli 1296. It was admitted by both parties that according to the *kistbandi*, rent was payable every year in instalments from October to March of each fasli. The plaintiff's father tendered patta for fasli 1296, but the defendant refused to accept it. Thereupon the plaintiff's father instituted a suit in the Revenue Court to enforce acceptance of the patta and the parties joined issue on the question whether the patta tendered was proper or such as the tenant was bound to accept. It was only in May 1888 that the summary suit instituted in 1886 before the Head Assistant Collector was dealt with by the District Judge on appeal. He held that the patta tendered was not a proper one and passed a decree under section 10 of Act VIII of 1865. In accordance with the provisions of that section, he declared the terms of the patta which ought to be offered, and passed a judgment ordering the defendant to execute a muchilka in accordance with it. The plaintiff then brought this suit to recover the difference between the rent due according to the patta as amended by the decree and the payments made on account of rent by the defendant previous to the decree. The defendant

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resisted the claim and pleaded, *inter alia*, that it was barred by limitation. The District Munsif upheld the defendant's contention and dismissed the suit with costs. It is argued in revision that the suit was not barred by limitation and, in support of the contention, reliance is placed on the decisions in *Court of Wards* v. *Darmalinga*(1), *Kullayappa* v. *Lakshmipathi*(2) and *Appayasami* v. *Subba*(3).

As observed by the District Munsif, the petitioner is not entitled to any deduction of time under sections 14 and 15 of the Limitation Act. The cases contemplated by those sections are those in which a former suit failed from defect of jurisdiction or other cause of a like nature, or the former suit was stayed by injunction or order. In the case before me, the summary suit did not fail but was adjudicated upon. Nor was the cause of action or the relief claimed in the former suit the same as in the present suit. The District Munsif is also right in holding that the suit to recover arrears of rent is governed by article 110 of the Limitation Act, which prescribes three years from the time when the arrears become due. The substantial question, therefore, is when did the arrears become due and whether it was from the date when they should be paid according to the *kistbandi*, or from the date on which the plaintiff was in a position to sue for rent.

In *Court of Wards* v. *Darmalinga*(1) it was held that the landholder is not bound to tender a patta for acceptance as amended by the decree before suing to enforce the terms thereof, and no question of limitation arose in that suit. The point determined in *Kullayappa* v. *Lakshmipathi*(2) was that a landlord could not attach the saleable interest of a defaulting tenant under section 38 of Act VIII of 1865 until the expiry of the current revenue year. The decision in *Appayasami* v. *Subba*(3) is only an authority for the proposition that the unit for the special rule of limitation prescribed by the Rent Recovery Act, s. 2, for proceedings by the landlord was the aggregate rent in arrears at the end of the fasli. This is not a suit falling under section 2 of Act VIII of 1865, and none of the cases cited appear to me to be in point.

The real question, as already observed, is when did the arrears of rent claimed by petitioner become due. By section 7 no suit

(1) I.L.R., 8 Mad., 2. (2) I.L.R., 12 Mad., 467. (3) I.L.R., 13 Mad., 468.

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can be sustained to recover rent until a patta is tendered and accepted or a proper patta is tendered, and the tender of a proper patta is a condition precedent to the contract between the parties becoming actionable. It is a contradiction in terms to say that rent is due before the landlord is in a position to sue. When the landlord may sue for rent must depend on the terms of the contract in each case, and when the Legislature renders any contract actionable only on the occurrence of a particular event, no obligation can arise till that event occurs. By section 10 the amended patta relates back to the date of the suit brought for the enforcement of acceptance of the patta. In cases in which the landlord sues in time to enforce the acceptance of a patta, the landlord is not in a position to sue for rent until the decree passed under section 10 either amends the patta or declares it to be a proper patta. Otherwise a suit to enforce the acceptance of a proper patta may be pending in a Revenue Court for several years, and the claim for rent may be barred before the landlord acquires a right of action.

I am therefore of opinion that this suit is not barred. I set aside the decree of the District Munsif and remand the case for disposal on the merits. The costs hitherto incurred will abide and follow the result and be provided for in the revised judgment.

Civil Revision Petitions Nos. 43 to 50 follow.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

1893. September 22, 25.

SUNDARA GOPALAN (DEFENDANT), PETITIONER,

v.

VENKATAVARADA AYYANGAR AND ANOTHER (PLAINTIFF AND HIS REPRESENTATIVE), RESPONDENTS.*

Execution sale—Portion of the property sold belonging to a stranger—Civil Procedure Code—Act XIV of 1882, *ss.* 313, 315 *and* 316—*Rights of a purchaser in an execution sale.*

Where a Court sale in execution of a decree is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by s. 315 of the

* Civil Revision Petition No. 458 of 1892.

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Civil Procedure Code. The effect of ss. 313, 315 and 316 of the Code is that the right, title and interest of the judgment-debtor passes to the purchaser at a Court sale subject, however, to the condition that the purchaser may recover back his purchase money when he finds that the judgment-debtor has no saleable interest at all.

The implied warranty of title in respect of sales by private contract cannot be extended to Court sales except so far as such extension is justified by the processual law in India, viz., by s. 315 of the Civil Procedure Code.

Dorab Ally Khan v. *Abdool Azeez* (L.R., 5 I.A., 116), followed.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of P. Narayanasami, Subordinate Judge of Madura (West) in Small Cause suit No. 950 of 1891.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court. The lower Court decreed in favour of the plaintiffs, and the defendant preferred this petition.

Sundara Ayyar for petitioner.

Biligiri Ayyangar for respondent.

JUDGMENT.—The petitioner is the judgment-creditor in original suit No. 25 of 1881 on the file of the Subordinate Court (West) at Madura, and the counter-petitioner is the purchaser at the Court sale held in execution of the decree passed therein against one B. Krishnasami Chetty. The auction sale was held on the 27th July 1885, and it was since found that a portion of the property sold, valued at Rs. 60, belonged to one Velayudam at the date of the sale. The counter-petitioner thereupon claimed a refund of the purchase money, and the Subordinate Judge decreed the claim on the Small Cause side. It is contended for the petitioner that as Krishnasami Chetty had some saleable interest in the property sold, the counter-petitioner is entitled to no refund at all. It is true that in *Kunhamed* v. *Chathu*(1), it was held that where the judgment-debtor had some saleable interest in the property sold the Court had no jurisdiction to make an order under section 315 for refund of the purchase money or any part thereof, but the question that now arises for determination is whether the purchaser may, in a regular suit, claim a refund in proportion to the extent to which the judgment-debtor had no interest in the property sold. With reference to a Sheriff's sale the Privy Council held in *Dorab Ally Khan* v. *Abdool Azeez*(2) that in India the vendor's liability to refund the purchase money in respect of a private sale is

(1) I.L.R., 9 Mad., 437.

(2) L.R., 5 I.A., 116.

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governed by the English law relating to the sale of chattels and that law, as laid down in *Eichholz* v. *Bannister*(1), is that there is an implied warranty on the part of the seller that he is the owner of the goods. This is in accordance with the law as laid down in section 55, sub-section 2 of Act IV of 1882. But in the case before me, the sale was not a sale by private contract, but a sale in *invitum*, and under legal process it must, therefore, be governed by rules applicable to execution sales. The effect of a Court sale, as stated in section 316, Code of Civil Procedure, is that "so far as regards the parties to the suit and persons claiming "through or under them, the title to the property sold vests in the "purchaser," &c. The Court sale then is a sale of the judgment-debtor's interest such it was at the date of the sale according to section 316. By section 313, however, the purchaser is enabled to apply to the Court to set aside the sale on the ground that the person whose property purported to be sold had no saleable interest therein, and the Court is authorized to make such order as it thinks fit. By section 315 it is provided that when it was found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money (with or without interest) from any person to whom the purchase money has been paid. The result of the above-mentioned sections is that what passes to the purchaser at a Court sale is the right, title and interest of the judgment-debtor subject, however, to this condition, viz., that the purchaser may recover back his purchase money when he finds that the judgment-debtor had no saleable interest at all. The English rule, as stated by Lord St. Leonards, is that if a conveyance of real property is actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover back the purchase money either at law or in equity, and referring to that rule as governing all sales by private contract, the Privy Council point out in the case cited above that it is not applicable to a Sheriff's sale under a *fieri facias* in which the sale, as regards the owner of the thing sold, is in *invitum*, and made under colour of legal process. They say that a purchaser at a Sheriff's sale has at least very inadequate means of investigating the title of the judgment-debtor; all that is sold and bought is the right, title and interest of the judgment-debtor with all its defects, and the Sheriff who sells and executes the bill of sale is never called upon, and, if called upon, would refuse to execute any covenant of title. They observe then "it is perfectly clear that when the property has "been sold under a regular execution and the purchaser is evicted "afterwards under a title paramount to that of the judgment-"debtor, he has no remedy either against the Sheriff or the judg-"ment-debtor." Such being the law of England applicable to Sheriff's sales under a *fieri facias*, the question is whether it is not applicable in India by reason of the fact that there is an implied warranty of title in India as is the case in the sale of chattels in England. The decision of the Privy Council seems to me to be an authority for the proposition that the implied warranty of title in respect of sales by private contract cannot be extended to Court sales, except so far as such extension is justified by the processual law in India.

(1) 34 L.J., C.B., 105.

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I do not desire to be understood as suggesting that in case of fraud there would be no remedy, but this is not that case. What I hold is that where the Court sale is not vitiated by fraud, the only extent, to which the purchaser can claim relief, is that indicated by section 315 which recognizes the equity on which *Hitchcock* v. *Giddings*(1) was decided, viz., that the sale may be rescinded on the ground of mistake whether there was no saleable interest at all, even after a conveyance has been executed.

It follows, therefore, that the judgment-creditor cannot be treated as if he was the vendor, and the Court sale cannot be treated as if there was an implied warranty of title as in a private sale, except so far as is warranted by the language of section 315. The decree of the Subordinate Judge is set aside and the suit is dismissed with costs throughout.

(1) 4 Price, 135.

APPELLATE CIVIL.

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

1893. Nov. 21. 1894. Feb. 19.

PADAMMAH AND OTHERS (DEFENDANTS NOS. 2 to 7), APPELLANTS,

v.

THEMANA AMMAH AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Specific Relief Act—Act I of 1877, s. 42—Consequential relief—Suit by a member of a tarwad for a decree declaratory of the invalidity of a kanom granted to other members by the karnavan of the tarwad.

Where a kanom of tarwad property is granted by the karnavan to members of the tarwad and the property in question remains in the possession of the karnavan on behalf of the tarwad, all that is necessary for a junior member to do in order to prevent the possession becoming adverse to the tarwad is to obtain a declaration that the kanon which is relied on as the cause of adverse possession is invalid. But if the kanom is granted to a stranger to the family, who is in possession, possession must then be sought for as relief consequent on the declaration.

An attornment of tenants to the kanomdars does not operate as a transfer of possession from the tarwad to the kanomdars. *Subramanyan* v. *Paramaswaran*(1) followed; and *Bikutti* v. *Kalendan*(2), *Abdulkadar* v. *Mahomed*(3), and *Narayana* v. *Shankunni*(4) distinguished.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 562 of 1881, confirming the decree of O. Chandu Menon, Principal District Munsif of Calicut, in original suit No. 670 of 1890.

The first defendant was the karanavati of a tarwad. On the 4th August 1890 she granted a kanom of Rs. 479-10-0 in respect of 45 parcels of land belonging to the tarwad in favour of her younger daughters, second and third defendants, and her grand-daughter, fourth defendant.

The plaintiffs, who were the first defendant's eldest daughter and her children, contended that the kanom was not granted for proper purposes of the tarwad and sought for a declaration that it was null and void as against the tarwad. The suit was resisted by the defendants who contended that the grant was a proper and

* Second Appeal No. 423 of 1893.

(1) I.L.R., 11 Mad., 116. (2) I.L.R., 14 Mad., 267.
(3) I.L.R., 15 Mad., 15. (4) I.L.R., 15 Mad., 255.

bonâ fide one, and that the suit was one in which consequential relief in the shape of possession of the properties comprised in the kanom grant ought to have been sought and the Court fee on the value of such properties paid. This point was decided by the lower Courts against the defendants, the Subordinate Judge holding that the possession of the properties was in the tarwad, of which the management vested in the first defendant as karnavati; that the plaintiffs had no objection to her possession as karnavati; and that if the second to fourth defendants had, since the grant of the kanom complained of, obtained attornment from tenants, it was an attornment on a title viciously acquired.

The defendants preferred this appeal.

Sankara Menon for appellants.

Sundara Ayyar for respondents.

JUDGMENT.—This was a suit to have it declared that a kanom granted by the first defendant to second and third defendants was not binding on the plaintiffs' tarwad. The first defendant, since deceased, was the karnavati of the tarwad and both appellants and respondents were her anandravars. It was contended for defendants, *inter alia*, that a suit for merely a declaratory decree could not be maintained and both the Courts below disallowed the contention. The District Munsif observed that as the first defendant was karnavati, the plaintiffs were not entitled to possession and that possession really remained where it was before the demise on kanom. The Subordinate Judge found that possession of the properties demised on kanom was held by the first defendant on behalf of the tarwad, that the plaintiffs had no objection to her possession, and that if second and third defendants obtained attornment from tarwad tenants subsequent to the kanom, it was inoperative as an attornment acquired 'on a vicious title.' The contention on appellants' behalf is that such attornment operates as a transfer of possession from the tarwad to the kanomdars and that the plaintiffs ought to have sued to recover possession, and not merely for a declaration, under section 42 of Specific Relief Act; but we do not consider that this view can be supported. So long as the property continues in the possession of the karnavan as a member of the tarwad, it is *primâ facie* that of the tarwad; and all that is necessary for a junior member to do in order to prevent its becoming adverse to the tarwad is to obtain a declaration that the kanom which is relied on as the

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cause of adverse possession is invalid. When the kanom is granted to a stranger to the family and he is in possession, the doctrine of unity of possession is not applicable and possession must then be sued for as relief consequent on the declaration. Our attention is called to the decisions in *Subramanyan* v. *Paramaswaran*(1), *Bikutti* v. *Kalendan*(2), *Abdulkadar* v. *Mahomed*(3), and *Narayana* v. *Shankunni*(4). It was held in *Subramanyan* v. *Paramaswaran*(1) that where a title is in dispute, there may be third parties who are honestly in doubt and ready to acknowledge the title of either claimant, or who, having attorned to one, may be ready to acknowledge the person declared by the Court to have the title, and that in such a case, a suit for a declaratory decree will lie. This decision is against the appellants. In *Bikutti* v. *Kalendan*(2), it was held that according to the plaintiffs' case, the land being in the possession of strangers, it was clearly the right of the plaintiff, as of the other members of the tarwad, to have the land restored to the possession of the tarwad. The decision in *Abdulkadar* v. *Mahomed*(3) proceeded on the ground that the office of Sheik and its emoluments were in the possession of the defendant and the doctrine of unity of possession had no application. Nor is the decision in *Narayana* v. *Shankunni*(4) in point.

Another contention on appellants' behalf is that the consideration for the kanom was in part-payment of tarwad debts and our attention is drawn in this connection to exhibit IX and other documents. The Subordinate Judge observes in his judgment that if the appellants have paid any premium for the kanom grant, they may have a lien to that extent on the property. Though respondents may be entitled to have the kanom declared not binding on the tarwad, appellants are entitled to have any part of the consideration, which benefited the tarwad, or extinguished any of its debts, declared a charge in their favour. The Subordinate Judge has not come to any finding on this point. He is directed to try the following issue, viz., whether any, and what, debts due by the tarwad were discharged by the kanomdars from their private funds?

In compliance with the above order the Subordinate Judge

(1) I.L.R., 11 Mad., 116. (2) I.L.R., 14 Mad., 267.
(3) I.L.R., 15 Mad., 15. (4) I.L.R., 15 Mad., 255.

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having returned a finding to the effect that tarwad debts had been discharged by the kanomdars to the extent of Rs. 695 from their private funds, the High Court delivered judgment as follows :—

JUDGMENT.—The finding being one of fact must be accepted. We, therefore, modify the decree of the Courts below by declaring the kanom by first defendant to defendants 2 to 4 to be invalid, but that these defendants have a charge on the property to the extent of Rs. 695 with interest thereon at 6 per cent. per annum from the several dates of payment particularized in the finding.

Plaintiffs must pay the costs of the defendants 2 to 4 on the issue sent for trial. In other respects, the appeal is dismissed with costs.

APPELLATE CIVIL—FULL BENCH.

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

THAPITA PETER (PLAINTIFF), APPELLANT,

v.

THAPITA LAKSHMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1893. Nov. 23. 1894. Jan. 26.

Divorce—Divorce Act IV of 1869, *s.* 7—*Nature of the marriages contemplated by the Act—Monogamous marriage.*

The petitioner and his wife married according to the rites of the Hindu religion. The wife subsequently left her husband and lived in adultery with another man. Both the husband and wife subsequently became Christians, but the wife continued to live in adultery. The husband sued under Act IV of 1869 for the dissolution of the marriage :

Held that, having regard to section 7, the marriages contemplated by the Act are those founded on the Christian principle of a union of one man and one woman to the exclusion of others, and that consequently the Act does not contemplate relief in cases where the parties have been married under the rites of Hindu law, a Hindu marriage not being a monogamous one. *Hyde* v. *Hyde*(1) and *Brinkley* v. *Attorney-General*(2) cited and followed. *Gobardhan Dass* v. *Jasadamoni Dassi*(3) dissented from.

CASE referred under section 17, Act IV of 1869, by G. T. Mackenzie District Judge of Kistna, for confirmation of his decree in original

* Referred (Matrimonial) Case No. 5 of 1893.
(1) L.R., 1 P. & D., 130. (2) L.R., 16 P.D., 76. (3) I.L.R., 18 Calc., 262.

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suit No. 1 of 1893 declaring the marriage of the plaintiff with defendant No. 1 to be dissolved, subject to confirmation by the High Court.

The facts of the case appear sufficiently for the purposes of this report from the judgments delivered by the High Court.

The parties were not represented.

COLLINS, C.J.—Thapita Peter brought a suit against Thapita Lakshmi, his wife, alleging her adultery with Lunkapalli Gauth, and praying, therefore, that his marriage may be dissolved. The District Judge of Kistna granted a decree dissolving the marriage under the provisions of Act IV of 1869, and the decree now comes before the High Court for confirmation under section 17 of Act IV of 1869.

The petitioner and his wife were married according to the rites of the Hindu religion in 1879, petitioner and his wife being Hindus at that time. About a year after the marriage the petitioner's wife left him and has since been living in adultery with the second respondent. In 1882 the petitioner became a Christian, and about 1890 his wife and the second respondent also became Christians. The question to be decided is—can the Courts of this country pass a decree dissolving his marriage under Act IV of 1869.

Section 1 of the Act enables relief to be granted where the petitioner professes the Christian religion.

Section 7 directs that the Courts in India shall act and give relief in all suits and proceedings hereunder on principles and rules which, in the opinion of the said Courts, are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England acts and gives relief.

Divorce is unknown to the Hindu law, but it is clear that if Act IV of 1869 was intended to apply to Hindu marriages, the petitioner would be entitled to relief. Act XXI of 1866 has no application to this case. That Act provides a relief from the marriage tie when one of the parties becomes a Christian, the other still remaining a Hindu.

A Hindu marriage is not a monogamous one. The man may lawfully be the husband of many wives at the same time. It is therefore a ceremony inconsistent with marriage as understood in Christendom that the husband should have more than one wife. If the Act IV of 1869 applies to Hindu marriages; a case may

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arise where a Hindu with more wives than one becomes a Christian and his wives also embrace Christianity. In that case could one of the wives sue her husband for a divorce because he continues to cohabit with one or more of his other wives, as the conversion of the parties to Christianity would not dissolve or make void the husband's previous marriages, or could the Christian husband sue for a divorce from one of his wives on the ground that she had committed adultery.

The point to be decided is not without difficulty, but I think that if marriages celebrated according to Hindu rites were intended to be within the scope of the Act, express provision would have been made to meet the difficulties that must arise owing to the fact that the Hindu marriage is not a monogamous one. There are two English cases which serve to illustrate in what cases the English Divorce Court will give relief. In *Brinkley* v. *Attorney-General*(1), a British subject married a Japanese woman in Japan according to the forms required by the law of that country, and it was proved that by such a marriage the husband was precluded from marrying any other woman during the subsistence of the marriage. A declaration was granted by the President of the Probate Division declaring (under 21 and 22 Vic., cap. 93) that such marriage was a valid one. In the judgment the President says : "marriage must be that of one man and one woman to the "exclusion of all others. Throughout the judgments that have "been given on this subject the phrase 'Christian marriage,' "'marriage in Christendom' or some equivalent phrase has been "used : that has only been for convenience to express the idea. "But the idea that was to be expressed was this that the only "marriage recognized in Christian countries and in Christendom "is the marriage of the exclusive kind mentioned."

In *Hyde* v. *Hyde*(2), the petitioner, an English subject, married in Utah in the United States of America a Miss Hawkins according to the rites of the Mormons. At the time of the celebration of the marriage, polygamy was a part of the Mormon doctrine and was the common custom in Utah. The marriage was a valid marriage according to the *lex loci* and polygamy was then lawful in Utah. The petitioner and his wife were both single and the petitioner had never taken a second wife. The petitioner

(1) L.R., 15 P.D., 76. (2) L.R., 1 P. & D., 130.

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sometime after the marriage renounced Mormonism, was excommunicated, and his wife declared free to marry again. The wife did marry again and the petitioner then petitioned the Divorce Court for a dissolution of his marriage on account of his wife's adultery. The counsel for the petitioner argued, *inter alia*, that this was not a polygamous marriage, for both the parties were single at the time when it was contracted; but the Judge Ordinary observed that it would be extraordinary if a marriage in its essence polygamous should be treated as a good marriage by an English Court, and held that marriage as understood in Christendom may be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

By section 7 of Act IV of 1869 the High Court and District Courts *shall* act and give relief on principles and rules on which the Court for Divorce and Matrimonial causes in England for the time being acts and gives relief. It is clear to my mind that the Divorce Court would not grant the relief the petitioner prays for, on the ground that the marriage being a polygamous one cannot be recognized as a marriage by that Court; and, being also of opinion that Act IV of 1869 does not contemplate relief in cases where the parties have been married under the rites and ceremonies of Hindu law, I hold that the District Court had no jurisdiction to entertain this suit, and I would dismiss it. I am aware that the Judges of the Calcutta High Court have arrived at a different conclusion (see *Gobardhan Dass* v. *Jasadamoni Dassi*(1). Section 7 of Act IV of 1869 does not seem to have been specially brought to the notice of the Court, as the judgment is silent upon the principles and rules on which the Courts shall give relief. However, be that as it may, I am unable, with the greatest respect to the learned Judges, to agree with them, and therefore decline to follow the case in *Gobardhan Dass* v. *Jasadamoni Dassi*(1).

MUTTUSAMI AYYAR, J.—The question which it is necessary to determine in this suit is whether the plaintiff is entitled to a decree for divorce on the ground of his wife's adultery under Act IV of 1869. The facts which give rise to this question are shortly these. The plaintiff was born in 1862. In 1879 he married the first defendant by Hindu rites, both being then Hindus by religion. In 1880 the wife left her husband and commenced to live in

(1) I.L.R., 16 Calc., 252.

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adultery with the second defendant, to whom she has since borne four children. In 1882 the plaintiff embraced Christianity, and about two years prior to this suit, which was brought in 1893, the defendants also became Christians. After her conversion to Christianity, the first defendant continued to live with the second defendant and repeat her adultery with him till date of suit. Upon these facts, it is clear that the plaintiff would be entitled to a decree for divorce if Act IV of 1869 applied to this case. The real question is whether the Act is applicable to a Hindu marriage after both parties to such marriage have become Christians.

In connection with a Hindu marriage, there are several legal incidents as to which no doubt can possibly exist. The first is that such marriage is in its nature *not* monogamous, and is not the voluntary union for life of one man with one woman to the exclusion of all others. It is true that as regards the Hindu wife, her union with her husband is a voluntary union for her life with one man to the exclusion of all others; but the Hindu husband may marry several wives at one and the same time, or may marry two or more wives during the lifetime of the first wife. The real point for consideration, therefore, is whether the Act is applicable to a Hindu marriage.

Another matter as to which there is also no doubt is that conversion to Christianity does not dissolve the prior Hindu marriage, and that the latter continues to be valid even after the parties to it become Christians for many purposes. So it was held in *Administrator-General of Madras* v. *Anandachari*(1) and in other cases to which it is hardly necessary to refer. Act XXI of 1866 is framed on the view that a marriage, though contracted by Hindu rites, is binding upon the parties to it even after they become Christians, and prescribes a procedure whereby a decree for dissolution of such marriage may be obtained in certain cases. That Act is applicable to cases in which the husband or the wife continues to be a Hindu by religion whilst the other has become a Christian.

It was further held in *Perianayakam* v. *Pottukannu*(2), that a pariah who was converted to Christianity was not entitled to a decree for divorce on the ground of adultery committed by his wife before his conversion, and that the Court had no jurisdiction to entertain his petition under Act IV of 1869. The ground of

(1) I.L.R., 9 Mad., 466. (2) I.L.R., 14 Mad., 382.

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decision was that the Act applied only to Christian marriages. Having regard to the decision in *Brinkley* v. *Attorney-General*(1) the expression 'Christian marriages' must be taken to convey the idea, *not* that the parties must profess Christianity, but that the marriage must be of a kind recognized in Christian countries, viz., that the marriage must be that of one man and one woman for life to the exclusion of all others. That was a case in which the petitioner was a British subject with an Irish domicile of origin. When he temporarily resided in Japan, he married a Japanese woman in Japan according to the forms required by the law of that country. It was proved in that case that according to the law of Japan it was a valid marriage, and by that law the petitioner was also precluded from marrying any other woman during the subsistence of that marriage. The learned Judge recognized the Japanese marriage as valid under the Legitimacy Declaration Act (21 and 22 Vic., cap. 93) and explained the ground of decision in these terms: "This case is clear from the difficulties which arose "in the Mormon case and in the South African case, because in both "these cases there was an attempt to establish as a valid marriage "a marriage with another person than the first spouse. The principle laid down by these cases is that a marriage which is not that "of one man and one woman to the exclusion of all others, though "it may pass by the name of marriage, is not the status which the "English law contemplates when dealing with the subject of marriage." But in this case, it has been proved by the law of Japan, "marriage does involve this idea, viz., that one man unites himself "to one woman to the exclusion of all others. Therefore, though "throughout the judgments which have been given on the subject, "the phrase Christian marriage, or marriage in Christendom or some "equivalent expression has been used, that has been used only for "the sake of convenience, and the idea which has to be expressed was "this—that the only marriage recognized in Christian countries "or in Christendom is the marriage of the exclusive kind." This decision is clear authority on the one hand for construing the expression 'Christian marriage' used in *Perianayakam* v. *Pottukanni*(2) in the sense indicated above, and on the other, for the opinion that the Court for Divorce and Matrimonial Causes in England gives relief in such causes subject to two conditions, viz.,

(1) L.R., 15 P.D., 76. (2) I.L.R., 14 Mad., 382.

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that the marriage is valid according to the *lex loci*, and that the idea of the union of one man and one woman to the exclusion of others is present in it, as in marriages between persons professing the Christian religion and thereby implies the status contemplated by the English law whilst dealing with the subject of marriage. Turning to the case before us, I do not think that the Act is applicable to it. In a Hindu marriage the idea of the exclusive union of one man and one woman for life is not present as in a marriage recognized by the Court for Divorce and Matrimonial Causes in England, and section 7 of Act IV of 1869 directs that we should give relief under Act IV of 1869 on principles and rules which may be conformable to the principles and rules by which that Court gives relief. The preamble of the Act states that it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and the second paragraph of section 2 declares that nothing herein contained shall authorize any Court to grant any relief under this Act, except in cases where the petitioner professes the Christian religion. These provisions render it probable that the marriage which the Act purported to deal with was marriage founded on the Christian principle. Again in section 2, clause 8, marriage with another woman is stated to mean marriage of any person being married during the life of the former wife, and it is provided by section 18 that a marriage may be declared null and void on the ground, *inter alia*, that the former wife was living at the time of the marriage and that the marriage with the former wife was then in force. Take for instance the case of a Hindu with two or more wives becoming Christians, and suing under the Act to have it declared that all his marriages but one are null and void. Are we to pass a decision in his favour? If so, which of his several marriages is to be declared null, and if we are to declare all marriages except the first null and void, are we not acting in contravention of the rule that conversion to Christianity does not dissolve prior marriages valid by the *lex loci*? If the legislature had intended to bring Hindu marriages within the scope of the Act, they would probably have inserted express provisions relating to questions which arise from their polygamous character. It is true that the plaintiff has married only one wife, though whilst a Hindu he was at liberty to have married several wives at the same time, and it may be suggested that the particular Hindu marriage now before us may be treated as monogamous in

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fact, entitling the plaintiff to the relief claimed. There are two objections to the adoption of this suggestion. The first is that what we have to consider is, the status consequent on a marriage as regulated by the *lex loci* or the legal conception of the marriage, and *not* whether the plaintiff in a given case has in fact married one wife or several wives. Another objection is that the suggestion is not the natural result of interpretation which can be put on the Act, though it may form an appropriate subject of legislation. I do not see my way to hold that Hindu marriages are marriages contemplated by the Act.

As for the argument that it is hard that the legislature should have intended to place Hindu husbands who become Christians at a disadvantage, I am not prepared to attach much weight to it. Divorce affects the wife as well as the husband, and no such thing as divorce is known to the Hindu law. Thus wives other than the first might justly complain if their marriages were declared invalid by reason of their conversion as polygamous and their intercourse with their husbands characterised as adulterous, since divorce was not in their contemplation as a possible incident of their marriages when they were contracted. Possibly on this ground the legislature did not intend to include such marriages in the Act. However this may be, I am aware of no decided case in India which is on all fours with this case except the one reported in *Gobardhan Dass* v. *Jasadamoni Dassi*(1), wherein the difficulties that arise from considering the Act to be applicable to a marriage such as the one before us are not considered and explained. The point decided in the matter of *Ram Kumari*(2) is that a Hindu wife who first embraces Mahomedanism and then marries a Mahomedan husband without notice to her Hindu husband is guilty of bigamy, and it is not therefore a case in point. Relying, therefore, on the English decision already cited and on the construction of Act IV of 1869, I hold that the Act is not applicable to Hindu marriages.

SHEPHARD, J.—This is a suit by the husband for the divorce of his wife on the ground of her adultery. At the date of their marriage the parties were Hindus, and the Judge finds that the marriage was solemnized according to Hindu custom. Since that date both husband and wife have become Christians.

(1) I.L.R., 18 Calc., 252. (2) I.L.R., 18 Calc., 264.

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The question is whether the marriage being a marriage of Hindus according to the Hindu rites is of such a character as to entitle the husband to a decree of dissolution of it under the provisions of Act IV of 1869.

The authorities are conflicting: on the one hand, the decision of the High Court of Bengal, *Gobardhan Dass* v. *Jasadamoni Dassi*(1); on the other hand, a decision of the North-West Provinces High Court, *Moola* v. *Nundy*(2), and one of this Court in which I took part. The facts in this latter case differ materially from those with which we have now to deal.

The Act distinctly requires that any person seeking for relief under it shall, at the time when his or her petition is presented, profess the Christian religion. The Act does not require in terms that the parties or either of them shall have been Christians at the time of the solemnization of the marriage. There are provisions in the Act which presuppose Christianity as the religion of the parties at the time of the marriage, but it cannot be said that adherence to that religion at that time is made a condition precedent to the obtaining of relief under the Act. It by no means follows that the provisions of the Act can be made applicable to any marriage between non-Christians, although it may be a marriage which, according to the law governing them, is valid and legal. In applying the provisions of the Act, section 7 directs that the Court shall act and give relief on principles and rules which are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

In my opinion the direction given in this section has to be kept in view by the Court when considering whether a given marriage should be recognized as such for the purposes of the Act. The question then is whether on a petition for divorce by the husband a marriage of Hindus according to Hindu ritual could be recognized by the English Divorce Court. Now, in order to satisfy the English Divorce Court, while it is not necessary to prove that the marriage was celebrated with any specifically Christian ceremonies, or even that both the parties were Christians, it is necessary to show that the union was a union for life of one man with one woman to the exclusion of others. That is what is meant by a

(1) I.L.R., 18 Calc., 252. (2) 4 N.-W.P., 109.

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Christian marriage or a marriage in Christendom. See *Hyde* v. *Hyde*(1) and *Brinkley* v. *Attorney-General*(2).

This definition of marriage clearly excludes from the category of marriage as understood for the purposes of the Divorce Court alliances such as the one which took place between the parties to the present suit, for according to Hindu law and custom, by which at the time they were governed, it was permissible to the husband to take a second wife. As far as he was concerned the marriage did not possess that character of exclusiveness which the law of Christendom presupposes in the institution of marriage.

It may be suggested that although the husband might, as a Hindu, have contracted a second marriage, he did not in fact do so and could not lawfully have done so after he became a Christian. It may be said that in consequence of the conversion of the parties to Christianity the marriage has come to acquire the necessary character of exclusiveness which it did not possess before.

Similar arguments were used in the arguments in *Hyde* v. *Hyde*(1) and considered by Lord Penzance. It was proved in that case that the petitioner's marriage in Utah would, if valid in Utah, be recognized as valid by the Supreme Court of the United States, and it had been argued that the matrimonial law of England might properly be applied to the first of a series of Mormon marriages. Lord Penzance deals with this argument and points out the inconsistencies that might result if it were adopted.

In the present case it is true that the petitioner had married only one wife. Let it be supposed, however, that either when he married the respondent he already had a wife living, or that after so marrying her he had taken a second wife.

In the first case there can be no doubt that the marriage of the respondent could not be recognized, at least for the purposes of the Divorce Act, whether or not the first wife were still alive when the suit was brought.

Nor, it is conceived, could the second wife come into Court to ask that her marriage be declared void on the ground that her husband's former wife was alive at the date of the marriage, for section 19 of the Act relates to cases in which the marriage is void *ab initio*, and in the case supposed the marriage would not have been so void. In the other case supposed, the first wife, if she is

(1) L.R., 1 P. & D., 130. (2) L.R., 15 P.D., 76.

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to be deemed the legal wife for all the purposes of the Act, would under section 10 be entitled to treat her husband's second marriage as bigamous and on the strength of it to seek dissolution of her marriage on the ground of a connection which, at the time it was formed, was perfectly lawful.

No doubt it is true that persons who have married as Hindus and subsequently become Christians subject themselves to the law prevailing among Christians, so that the husband may be convicted of bigamy if he goes through a form of marriage with another woman. In re *Millard*(1). In the matter of *Ram Kumari*(2); see minute of Sir H. Maine. Ceasing to be a Hindu or Mahomedan as the case may be and becoming a Christian he sacrifices the liberty which heretofore he had according to the law of his birth—certainly the liberty of taking another wife and presumably the liberty of divorce, which if he had been Mahomedan, the Mahomedan law gave him. See *Lopez* v. *Lopez*(3).

It does not, however, follow that the convert is, in compensation for his sacrifice, entitled to a relief under the Act or to any divorce except under the provisions of Act XXI of 1866.

Any argument founded on the circumstance that the Hindu or Mahomedan marriage is, for some purposes, recognized after the parties became Christians really proves too much, for I conceive that the second of two wives married at the same time would, if she survived the first and became a Christian with her husband, be recognized as his lawful wife and her children would be legitimate; see Mayne's Hindu Law, para. 55. What would become of the second wife if both being alive, either or both of them became Christians with the husband it would be difficult to say. Assuming that the second wife only survived, I apprehend, as already observed, that there is no doubt that her marriage contracted in the lifetime of another wife would not be recognized for the purposes of the Act.

Again if a marriage, according to the Hindu custom, may be dissolved under the Act, it may also be declared null and void for any of the reasons mentioned in section 19. One of the reasons there specified is that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity. Those

(1) I.L.R., 10 Mad., 218. (2) I.L.R., 18 Calc., 269.
(3) I.L.R., 12 Calc., 706.

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words, which, excepting the bracketed words, are to be found in the Marriage Act, s. 48, are words habitually used in connection with Christian marriages, although it may be correct to hold that they do not involve the application of English rules to all Christians (see *Lopez* v. *Lopez*(1)). If it be right to hold that the liberty of choice possessed by Hindus adopting Christianity extends to the law relating to marriage (*Lopez* v. *Lopez*(1)) the Court might have to apply either the rules of Hindu law or the English rules of prohibited degrees in determining whether a marriage was valid or not. It would be a strange consequence if the Court constituted to administer the law in matters matrimonial to persons professing the Christian religion had to declare void a marriage which according to Christian usage was valid or to declare void a marriage which was valid according to the law governing the parties at the time of its solemnization.

The origin of the jurisdiction must not be lost sight of. As the English Divorce Court exercises the jurisdiction originally vested in the Ecclesiastical Court, so the jurisdiction exercised by the Supreme Court sitting on the ecclesiastical side is extended under certain conditions to the District Courts. See *Lopez* v. *Lopez*(1). There is no reason whatever for holding that this matrimonial jurisdiction, for which a new forum was thus created, was intended to be enlarged, so as to include marriages which would not come within the scope of the English Act. See *Ardaseer Cursetjee* v. *Perozeboye*(2) as to the law before the Act.

In the present case, there being no evidence of any marriage except a marriage according to Hindu rites, I am of opinion that the Act does not apply, and that the District Court had no jurisdiction to decree dissolution.

(1) I.L.R., 12 Calc., 706. (2) 10 Moore's P.C., 375

APPELLATE CIVIL.

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

SRINIVASA THATHACHAR (DEFENDANTS), APPELLANTS,

v.

RAMA AYYAN AND ANOTHER (PLAINTIFF AND DEFENDANT No. 85), RESPONDENTS.*

1893. March 23. September 7.

Revenue Recovery Act—(Madras) Act II of 1864, *s.* 35—*Payment of arrears of village revenue by the assignee of a mortgagee of portion of the village property—'Defaulter'—Registered and real owners.*

The plaintiff was assignee of a mortgagee of 38⅛th pangus in a village consisting of 51⅛th pangus. Having sued the executants of the mortgage and obtained a decree in 1885, he, in 1887 and 1888, paid certain arrears of revenue due from the village, in order to prevent its sale. In 1888, the plaintiff's 38⅛th pangus were sold in execution of the decree of 1885 to the 85th defendant subject to a charge for the amount of the revenue arrears paid by the plaintiff. In 1890 the plaintiff instituted the present suit to recover from the entire village and from the defendants Nos. 1 to 84 personally the amount of these arrears:

Held, that the 85th defendant, as also the 38⅛th shares purchased by him, were liable for the debt conjointly with the remaining shares and the other defendants, the plaintiff having by payment of the arrears acquired a charge upon the land under s. 35 of the Revenue Recovery Act;

that not only registered proprietors but real owners and their holdings may be treated as defaulters within the meaning of s. 35 of that Act. *Seshagiri* v. *Pichu*, I.L.R., 11 Mad., 457, followed.

APPEAL against the decree of L. A. Campbell, District Judge of Salem, in original suit No. 9 of 1890.

The District Judge decreed in favour of the plaintiff and the 85th defendant, and dismissed the suit as against certain other defendants. The remaining defendants preferred this appeal.

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

Pattabhirama Ayyar for appellants.

Govinda Menon for respondent No. 2.

Parthasaradhi Ayyangar and *Tiruvenkatachariar* for respondent No. 1.

BEST, J.—The following are the facts of the case. The plaintiff (now respondent) was assignee of the mortgagee of 38⅛th

* Appeal No. 151 of 1891.

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out of 51¼th pangus of the agraharam of Byrojee effected by some of the pangudars on 8th January 1881 for a sum of Rs. 8,245–7–5, borrowed to pay off the assessment, &c., due on the whole agraharam. As such assignee plaintiff brought a suit (original suit No. 2 of 1884) against the executants of the mortgage and obtained a decree on 22nd June 1885. While the above suit was pending, the agraharam was again advertised for sale for arrears of revenue, &c., which plaintiff paid off and instituted original suit No. 2 of 1886 for recovery of the amount so paid and obtained a decree for the same with interest on 27th August 1888. While original suit No. 2 of 1886 was pending, arrears accrued for subsequent faslies, and to prevent the sale of the properties for such arrears plaintiff paid a sum of Rs. 3,618–2–7 on the 13th April 1887, and a further sum of Rs. 1,707–7–0 on the 4th May 1888. In execution of the decree in original suit No. 2 of 1884, the 38⅛th pangus were sold on 24th September 1888, when 85th defendant purchased the same for Rs. 11,000. The suit, out of which the present appeal has arisen, was instituted by plaintiff in 1890 to recover from the entire agraharam and from defendants 1 to 84 personally the amounts paid in 1887 and 1888, with interest costs and further interest.

The District Judge has found some of the defendants to have no interest in the agraharam and therefore to be not liable, but against the rest, except the 85th defendant, he has given a personal decree. He has also exempted from liability for the debt the 38⅛th pangus purchased by 85th defendant at the sale in execution of the decree in original suit No. 2 of 1884, but has made the debt a charge on the remaining 13 pangus. Hence this appeal by defendants 1, 4, 5, 16, 17, 58 to 62, 66, 69, 74, 78 and 81.

The first objection urged on behalf of the appellants is that in purchasing the 38⅛th pangus at the sale in execution of the decree in original suit No. 2 of 1884, 85th defendant was merely a benamidar for the plaintiff, and that the latter being the real purchaser, the charge is extinguished under section 101 of the Transfer of Property Act. On the issue whether the plaintiff was the real purchaser of the 38⅛th shares, the District Judge's finding is that, though there are reasonable grounds for the defendants suspecting such to be the case, they have failed to prove it. Such also is our finding after a careful consideration of the

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evidence on both sides. It is, therefore, unnecessary to consider the question raised with reference to section 101 of the Transfer of Property Act.

Other contentions on behalf of the appellants are (i) that none but registered holders of shares in the agraharam can be held personally liable for the claim of the plaintiffs, and (ii) that the District Judge has erred in exonerating from such liability the 85th defendant and the 38⅛th shares of the village purchased in his name.

The District Judge's finding is that the 38⅛th shares were sold subject to these encumbrances, but that nevertheless the shares must be held to be not liable for the same. His reasons for this finding are as follows:—A payment made by a mortgagee or other incumbrancer to save lands from sale for arrears of assessment is declared by section 35 of Act II of 1864 (Madras) to be a charge upon the land which should "only take priority over "other charges according to the date at which the payment was "made." Plaintiff is, therefore, *qua* such payment in the position of a mortgagee, and the decision in *Shaik Abdulla Saiba* v. *Haji Abdulla*(1) is authority for the position that what is sold by the Court in such cases is the right, title, and interest of the mortgagor as it stood at the date of the mortgage, and such being the case, it cannot be affected by the statement in the sale proclamation that the auction sale was subject to such incumbrances. It is difficult to follow the Judge's reasoning. It being found as a fact that the 38⅛th shares were sold subject to the charge, there seems no reason why the purchaser at such sale should be allowed to hold the same free of the charge.

As the arrears were due on these 38⅛th shares as well, there is no reason whatever for exonerating them from liability for a proportionate share of the charge in any case.

As to the contention that only registered owners can be treated as defaulters within the meaning of section 25 of the Revenue Recovery Act, and consequently the Lower Court's decree is bad in so far as it makes defendants who are not registered holders also liable for the money due to plaintiff, the answer is to be found in *Seshagiri* v. *Pichu*(2). As there pointed out, the right which the Government has to proceed against the registered pro-

(1) I.L.R., 5 Bom., 13. (2) I.L.R., 11 Mad., 462.

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prietor in no way alters the liability of the real owner or of his holding for the arrears of revenue. Registered holders and their property are declared liable at the option of Government, in order that Government may not be hampered in the collection of revenue by being compelled to hold complicated inquiries as to real ownership. But, nevertheless, the revenue is a debt due from the real defaulter and a charge on the holding.

The remaining question is whether the decree is correct in so far as it makes the defaulters jointly and severally liable. As the entire holding was liable for the revenue to Government, it must, I think, be held to be similarly liable to the plaintiff who has, by payment of the arrears, acquired a charge upon the land under the provisions of section 35 of the Revenue Recovery Act.

As to the liability of defendants 58 to 60 (appellants Nos. 6 to 8) no issue appears to have been asked for in the Lower Court.

The result is that the 85th defendant, as also the 38⅛th shares purchased by him, must be held liable for the decree debt conjointly with the remaining shares and the other defendants. The Lower Court's decree will be modified accordingly.

The appellants must pay the 1st respondent's (plaintiff's) costs of this appeal. They are entitled to their costs on the 38⅛th shares from second respondent (85th defendant) and must themselves bear the rest of their costs.

As to the memorandum of objections, I find the Judge has given no reasons for disallowing interest subsequent to the date of the suit.

I am of opinion that plaintiff is entitled to interest at 12 per cent. per annum till the date of decree, and at 6 per cent. per annum from that date to date of payment on the amount decreed, including costs.

The decree will be further modified accordingly.

MUTTUSAMI AYYAR, J.—I concur.

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CIVIL PROCEDURE CODE—ACT XIV OF 1882, s. 13—*'Court of competent jurisdiction.'*] The term 'competent jurisdiction' in s. 13 of the Civil Procedure Code has regard to the pecuniary limit as well as to the subject-matter. There is no authority for the general proposition that the competency of one Court as compared with another is affected by the circumstance that in the one case an appeal lies in the first instance to the District Court and in the other directly to the High Court. *Misir Raghobardial* v. *Sheo Baksh Singh* (I.L.R., 9 Calc., 439) cited and followed. *Vithilinga Padayachi* v. *Vithilinga Mudali* (I.L.R., 15 Mad., 111) qualified.

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2. ——————————————————, s. 544—*'Any ground common to all the plaintiffs or to all the defendants.'*] Section 544 of the Civil Procedure Code presupposes a common ground of decision affecting property in which both those who have appealed and those who have not appealed have an interest direct or indirect. Thus a District Judge has no power under this section to reverse the decree of a Lower Court, given for a plaintiff in favour of a defendant who did not appeal, and in respect to property in which the other defendants who did appeal disclaim all interest. *Sriram Ghatak* v. *Braga Mohan Ghosal* (3 B.L.R., App., 41) and *Appa Rau* v. *Ratnam* (I.L.R., 13 Mad., 249) cited and followed. *Seshadri* v. *Krishnan* (I.L.R., 8 Mad., 192) and *Nagamma* v. *Subba* (I.L.R., 11 Mad., 197) distinguished.

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CONTRACT—*Promissory note or bond executed in Foreign State—Liability determined by* lex loci contractus—*Suit upon consideration for the document*—Lex fori.] Where, according to the *lex loci contractus*, a promissory note or bond cannot, in the absence of registration, be a source of legal right, no action on an unregistered note or bond can be maintained. Whether a suit will lie upon the consideration for the instrument is a question of procedure, to be governed by the *lex fori*, and in British India such a claim must either be stated in the plaint as an independent ground of claim, or treated as such and an issue taken at the first hearing. *Valiappa* v. *Mahommed Kasim* (I.L.R., 5 Mad., 166) cited and followed.

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2.——— *Undue influence—Acquiescence by conduct—Lease for one year at a rental of more than Rs.* 100—*Registration—Registration Act—Act III of* 1877, *s.* 17—*Transfer of Property Act—Act IV of* 1882, *ss.* 4 *and* 107.] Where the owner of certain land exchanges it for certain other land, but takes a lease for one year of the former land and pays the rent thereof, and receives and retains the rents of the land he has acquired by the exchange, he shows so complete an acquiescence in the transaction that he cannot afterwards have it set aside on the ground of undue influence. The fact that such a lease recites the fact of the exchange of the lands does not evidence the exchange, and as such create a title in land. Nor does the fact that the rent reserved under the lease is more than Rs. 200 create an interest in land of Rs. 100 and more in value so as to necessitate registration of the lease under s. 17 of the Registration Act. Such a lease falls under s. 107 of the Transfer of Property Act, the provisions of which section are, by s. 4 of the Act, supplemental to the Registration Act.

Seetharama Raju v. *Bayanna Pantulu* 275

CRIMINAL PROCEDURE CODE—ACT X OF 1882, ss. 4, 488—'*Adultery*'—*Indian Penal Code—Act XLV of* 1860, *s.* 497.] A wife petitioned for maintenance for herself and child against her husband under s. 488 of the Criminal Procedure Code. The husband did not refuse to maintain his wife, but the petitioner refused to live with him as he kept a concubine:—*Held*, that the word 'adultery' in s. 488 of the Criminal Procedure Code must, by virtue of s. 4 of the Code, be construed with reference to the definition of the term in s. 497 of the Indian Penal Code. Consequently a husband's immorality which does not amount to 'adultery' or involve the degradation of a married woman being brought into the society of a concubine is not sufficient ground for a wife's refusal to live with her husband. An offer to maintain a wife must be an offer to maintain with the consideration due to her position as a wife. *Marakkal* v. *Kandappa* (I.L.R., 6 Mad., 371) cited. *Per* BEST, J.—It is very doubtful if the framers of s. 488 of the Code of Criminal Procedure intended the word 'adultery' as used therein to have the limited meaning given to it in the Penal Code. The wrong done to the wife is in no way affected by the circumstance of her husband's concubine being married or unmarried or, in case of her being married, whether it is with or without her husband's consent or collusion that she is living in such concubinage. In face, however, of s. 4 of the Criminal Procedure Code, no other interpretation of the term 'adultery' is possible than the limited interpretation contained in the Penal Code.

Queen-Empress v. *Mannatha Achari* 260

HINDU LAW—*Maintenance—Suit to recover arrears of maintenance due under a personal decree, and to establish a charge for future maintenance on the family property.*] A Hindu widow obtained a personal decree against her father-in-law for maintenance. Her late husband's five brothers were made parties to the suit, but no personal decree was made against them, nor did the widow ask that her maintenance be made a charge on the family property. On the death of her father-in-law, the family property devolved on his sons and grandsons, who sold certain of the property. There were arrears of maintenance due, and the widow instituted the present suit, in which she asked for a decree

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establishing her right to receive maintenance for her life and for the arrears of maintenance on the responsibility of the property:—*Held* (1) that the maintenance not having been declared a charge upon portion of the property which had been alienated, this property was free of any charge for her maintenance; (2) that the arrears of maintenance constituted a personal debt of the plaintiff's deceased father-in-law, and that his sons and grandsons (the defendants) incurred his liability on his decease and were bound to discharge the same out of the family property; (3) that the right to maintenance being enforceable against the defendants, the right to have it made a charge on the family property was enforceable along with it.

Bhagirathi v. *Anantha Charia* 268

INFANT—*Minor—Next friend—Solicitor's costs for proceedings undertaken on the next friend's instructions—Repudiation of the proceedings by the minor on attaining majority.*] A solicitor cannot recover the costs of litigation incurred by the next friend of a minor on his behalf from the *quondam* minor, who, on coming of age, repudiates the proceedings, there being no relation of contract between them. Assuming that the legal proceedings were in the nature of necessaries, the next friend is the person responsible to the solicitor. *Watkins* v. *Dhunnoo Baboo* (I.L.R., 7 Calc., 140) distinguished.

Branson v. *Appasami* 257

LIMITATION—LIMITATION ACT—ACT XV OF 1877, s. 28—*Limitation in relation to persons in undisturbed possession.*] The law of limitation operates against parties who have been guilty of delay and in favour of persons in possession. Section 28 of the Limitation Act has no application to persons who are in possession and who have had no occasion to sue for recovery of possession.

Orr v. *Sundra Pandia* 255

MORTGAGE—*Right of a jenmi, who is a judgment-creditor, to sell the kanom right before the expiry of twelve years.*] A jenmi, who has obtained a decree for arrears of rent, may sell the kanom before the expiry of twelve years; such a sale does not put an end to the kanom, but only transfers the kanomdar's interest to the purchaser at the execution sale.

Achutan Nayar v. *Keshavan* 271

PENAL CODE—*see* Criminal Procedure Code.

POLICE (MADRAS) ACT XXIV OF 1859, ss. 10 AND 44—*Departmental punishment and prosecution under the Act.*] In the absence of any rules framed by Government under section 10 of the Madras Police Act, a departmental punishment inflicted under that section is no bar to a prosecution under section 44 of that Act.

Queen-Empress v. *Fakrudeen* 278

REGISTRATION ACT—*see* Contract, 2.

REVENUE RECOVERY ACT—MADRAS ACT II OF 1864—*Liability of purchaser at a sale, who enters into possession of the purchased property, to account for mesne profits to the person in whose favour the decree is subsequently reversed.*] A purchaser of property at a sale under the Revenue Recovery Act, who enters into possession thereof, is in rightful possession until the decree is set aside. He is not,

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therefore, a trespasser and liable to make good any loss sustained by the rightful owner by being kept out of possession; but he is bound to account for mesne profits, the calculation of which is to be based on a proper discharge of the stewardship of the property. *Dakshina Mohun Roy Chowdhry* v. *Saroda Mohun Roy Chowdhry* (L.R., 20 I. A., 160), cited and followed.

Perumal Udayar v. *Krishnama Chettyar* 251

STAMP ACT—ACT I OF 1879, SCHED. I, ART. 4—'*Agreement to lease.*'] An agreement by a zamindar to execute a formal deed of lease of his zamindari which is under attachment after obtaining a certificate from the Court under s. 305 of the Civil Procedure Code, is an agreement to lease" under art. 4, sched. I of the Stamp Act.

Reference under Stamp Act, s. 46 260

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 83—*Deposit in Court by mortgagor—Full and unconditional tender.*] The fact that a certain sum of money tendered under s. 83 of the Transfer of Property Act, and accepted by the mortgagee as the full amount due, is afterwards denied by him to be the full amount, and that the tender is accompanied by a claim to a registered receipt (to which the mortgagee agrees) and to the return of the title-deeds does not render the tender conditional and therefore invalid. *Nanu* v. *Manchu* (I.L.R., 14 Mad., 49) distinguished.

Kora Nayar v. *Ramappa* 267

APPELLATE CIVIL.

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

PERUMAL UDAYAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KRISHNAMA CHETTYAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1894. January 29. March 6.

Revenue Recovery Act—Madras Act II of 1864*—Liability of purchaser at a sale, who enters into possession of the purchased property, to account for mesne profits to the person in whose favour the decree is subsequently reversed*

A purchaser of property at a sale under the Revenue Recovery Act, who enters into possession thereof, is in rightful possession until the decree is set aside. He is not, therefore, a trespasser and liable to make good any loss sustained by the rightful owner by being kept out of possession; but he is bound to account for mesne profits, the calculation of which is to be based on a proper discharge of the stewardship of the property. *Dakshina Mohun Roy Chowdhry* v. *Saroda Mohun Roy Chowdhry*(1) cited and followed.

APPEAL against the decree of P. Dorasawmy Ayyar, Subordinate Judge of Salem, in original suit No. 13 of 1891.

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

The Subordinate Judge dismissed the suit, and the plaintiffs preferred this appeal.

The *Advocate-General* (Hon. Mr. *Spring Branson*), Mr. *Norton* and *Subramanya Ayyar* for appellants.

Bhashyam Ayyangar and *Desikachariar* for respondents.

JUDGMENT.—The defendants were in possession of the mittah of Sundamangalam for the faslis 1293 to 1298 as purchasers in a sale made under the Revenue Recovery Act. It was ultimately held in a suit brought by the plaintiffs that the sale was irregular, and they were reinstated in the mittah as part-proprietors thereof. They now sue for their share of the mesne profits derived while the defendants were in possession.

The Subordinate Judge found that they were entitled to recover the same, but, on taking accounts, it was found that defendants

* Appeal No. 24 of 1893.

(1) L.R., 20 Ind. App., 160.

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had realized no net profits, their expenses having exceeded their receipts, and plaintiffs' claim was therefore dismissed.

Plaintiffs appeal on two main grounds. The first is a point of law, that defendants were in the position of trespassers and wrong-doers, and were, therefore, liable to account to plaintiffs for such loss as they sustained by being kept out of possession, and the question was not what amount of profits the defendants had actually realized, but what they might and ought to have realized. The learned Advocate-General, in support of the plaintiffs' contention, first referred to Mayne *On Damages* (page 417) for the authority that an "action for mesne profits is in origin an action "of trespass brought after a judgment in ejectment to recover "damages for the previous occupation of the land." And he then referred to several decided cases *Bijnath Pershad* v. *Badhoo Singh*(1), *Hurruck Lall Shaha* v. *Sreenibash Karmottar*(2), *Ghoogly Sahoo* v. *Chundee Pershad Misser*(3), *Tiluck Chand* v. *Soudamini Dasi*(4), *Brojendro Coomar Roy* v. *Madhub Chunder Ghose*(5), and *Shitab Dei* v. *Ajudhia Prasad*(6), where it has been held that the possession of a party who had no right to possession was the possession of a wrong-doer, and that the party entitled to the possession was entitled to recover as mesne profits all loss sustained by him by being kept out of possession, whether or not the party in possession had himself derived profits. But we are referred, on the other hand, to a late ruling of the Privy Council where a different view of the matter is taken *Dakshina Mohun Roy Chowdhry* v. *Saroda Mohun Roy Chowdhry*(7). In that case it was held that the party in possession was in *bonâ fide* possession, because he was in possession under a decree of Court, and, until that decree was reversed, he was in rightful possession. In this case the defendants' possession was obtained from the Revenue authorities and it was confirmed by a decree of the Salem District Court. They were, therefore, in rightful possession until that decree was reversed, as it was by this Court on appeal, not however on the merits, but on a technical irregularity in the sale. Their Lordships then lay down this rule: "Of course "he is bound to account for mesne profits, for all rents and

(1) 10 W.R., 486. (2) 15 W.R., 428. (3) 21 W.R., 246.
(4) I.L.R., 4 Calc., 566. (5) I.L.R., 8 Calc., 343. (6) I.L.R., 10 All., 13.
(7) L.R., 20 Ind. App., 160.

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"profits which he has received or which without wilful default "he might have received. But if owing to circumstances beyond "his control, and still more if, in consequence of some wrong-"ful conduct on the part of his opponent, he has received less "than what he has had to pay for the preservation of the estate, it "would seem to be in accordance with justice, equity and good "conscience, there being no specific rule to the contrary, that he "should recover the difference on the final adjustment of accounts." This is a clear exposition of the law applicable to this case, and the question therefore is not what damages are plaintiffs entitled to, but whether the defendants have conducted themselves properly in their stewardship. That is the second main ground of the appeal. It is contended that as regards collections the defendants were negligent, and as regards expenses were extravagant. Nothing has been urged to convince us that the Subordinate Judge was wrong in his conclusion that the defendants used all due diligence to collect the rents. His reasons are stated in paragraphs 14 to 16 of his judgment, and we concur in them. The defendants were Chettis who had paid a large sum for the mittah, and it stands to reason that, for their own benefit, they would have done their best to get every penny they could out of the ryots, and if they did not get more it was due to the obstruction caused by the plaintiffs themselves, who, it is said, instigated the tenants by various means to resist the defendants and put difficulties in their way. (*Vide* the evidence of the second defendant as defence sixth witness and of the defence seventh witness, one of the mittahdars.) Moreover it would appear that the collections made by the plaintiffs since they have been in possession do not on an average nearly come up to those made by the defendants. The defendants admit a sum of Rs. 32,000 odd as their collections for the six years they were in occupation, and the correctness of this sum has not been seriously impugned, but it seems that during the three years the plaintiffs have regained possession only Rs. 8,000 have been collected (see second defendant's evidence), which is on an average only half the amount that was collected by the defendants per annum, and this is a favorable estimate, for plaintiffs' own twelfth witness says the plaintiffs' half share of the collections for the three years has been only Rs. 3,200, making a total collection of only Rs. 6,400 in three years as compared with the defendants' collection of Rs. 32,000 in six years. So that there is no ground whatever for holding

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that the defendants were remiss in gathering in the rents. As regards the expenses, objection is chiefly taken to the law charges which defendants put down at Rs. 6,208-9-8. The Subordinate Judge, disallowing certain items, reduced the claim by some Rs. 1,500 to Rs. 4,725-15-10. We have no reason to consider the amount allowed to be excessive. The defendants were bound to exchange pattahs and muchilikas with the tenants before they could recover their rents, and it was owing to the contumaciousness of the tenants, instigated in some instances by the plaintiffs, that these expenses in litigation were incurred. Considering that the cases went to three Courts—the Revenue Court, the District Court and the High Court—the amount allowed as proved to have been spent was not unreasonable. Whether they were suits rightly brought or wrongly brought it is now impossible to decide, for in the second appeal to the High Court they were thrown out on the simple ground that the defendants had been held in the other suit not to be the landlords. There is nothing to show that the defendants were not justified in bringing these suits, and it is highly probable that if they had not brought them, they would not have collected as much as they did, and then the plaintiffs would have turned round and charged them, and perhaps rightly charged them, with wilful default. The charges incurred for establishments were also objected to, but they were pretty much the same as had hitherto been incurred, and were found to be reasonable and necessary. We therefore disallow the appeal on the merits also.

A plea of bar by limitation to the plaintiffs' suit was overruled by the Lower Court, but was again urged in this Court. We agree with the Subordinate Judge that the decision of the point in question, namely the year of age at which first plaintiff was to be considered as having attained his majority, is governed by the case cited, *Rudra Prokash Misser* v. *Bhola Nath Mukherjee*(1), and that there was, therefore, no bar to his suit. The result, however, is that the appeal fails and it is dismissed with costs.

(1) I.L.R., 12 Calc., 612.

APPELLATE CIVIL.

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

ORR AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SUNDRA PANDIA (PLAINTIFF), RESPONDENT.*

1893. Dec. 12, 22.

Limitation—Limitation Act—Act XV of 1877, *s.* 28—*Limitation in relation to persons in undisturbed possession.*

The law of limitation operates against parties who have been guilty of delay and in favour of persons in possession. Section 28 of the Limitation Act has no application to persons who are in possession and who have had no occasion to sue for recovery of possession.

SECOND APPEAL against the decree of T. Weir, District Judge of Madura, in appeal suit No. 16 of 1892, reversing the decree of Venkata Rengaiyar Avergal, Subordinate Judge of Madura (East), in original suit No. 38 of 1890.

The plaintiff in this suit sued for possession of a certain village which he alleged had been leased to him by the zemindar in 1883. The defendants, the lessees of the zemindari, alleged that the lease had been obtained by fraud. The Subordinate Judge dismissed the plaintiff's suit, but the District Judge reversed the decree and gave a decree in favour of the plaintiff, on the ground that the zemindar, from whom the defendants derived their rights, had failed to obtain the cancellation of the plaintiff's lease on the ground of fraud within three years of its execution, and that the defendants were barred by the Limitation Act from contesting the suit on the ground of fraud.

Hence this appeal by the defendants.

Bhashyam Ayyangar for appellant.

Mr. *K. Brown* for respondent.

JUDGMENT.—The District Judge has disposed of the appeal on a point of law without deciding the issues of fact which are raised. Assuming that the execution of the lease by the late zemindar

* Second Appeal No. 406 of 1893.

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in the plaintiff's favour was obtained by fraud, he has held that, with reference to the fifth issue, it is not open to the defendants now to raise the plea of fraud, because a suit by them to set aside the plaintiff's lease would be barred by limitation.

The case cited by the District Judge certainly furnishes some authority for the view adopted by him (*Jugaldas* v. *Ambashankar*(1), *Hargovandas Lakhmidas* v. *Bajibhai Jijibhai*(2), and *Sundaram* v. *Sithammal*(3)). In our opinion, however, this view involving the proposition that a party in possession may be affected prejudicially by the law of limitation is unsound and cannot be maintained.

The Act XV of 1877 is an Act relating to the limitation of suits and does not in terms refer to defences. Section 28 presupposes a person who by force of limitation has already lost his remedy by suit for possession, for such a person it declares that his right to the property shall be extinguished. To persons who are in possession and have had no occasion to sue for recovery of it, the section can have no application. If it was intended that the right to property should be lost in all cases where the time for enforcing the remedy had expired, section 28 would have been unnecessary or would have been differently worded. In addition to the circumstance that defences are not generally brought within the scope of the Act (see *In re Marshfield*(4), the case of set off being an exceptional one, the principles on which the law of limitation is founded do not justify its extension to a case like the present (*Edmunds* v. *Waugh*(5)). Generally the law of limitation operates against parties who have been guilty of delay and in favour of persons in possession. One of the main objects of the law is to quiet long-continued possession and to obviate the injustice which may ensue upon the enforcement of stale demands. Here the defendants, who for the purposes of this judgment may be identified with the zemindar, are in possession. Being in full enjoyment of the property, and not being attacked by the plaintiff, they had no occasion to seek for the judicial cancelment of the lease under which the plaintiff claims. If either party can be said to have been guilty of delay in prosecuting his remedy, it certainly was not the defendants, and it is they, rather than the plaintiff, who are likely to suffer by the lapse of time for the burden of

(1) I.L.R., 12 Bom., 501. (2) I.L.R., 14 Bom., 222. (3) I.L.R., 16 Mad., 311.
(4) L.R., 34 Ch. D., 721. (5) L.R., 1 Eq., 418.

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proving the fraud, and thereby displacing the plaintiff's title rests on the defendants. The construction which it is sought to put on the Limitation Act would tend to defeat the policy of the Act and to disturb rather than quiet possession (see remarks of JARDINE, J., in *Hargovandas Lakhmidas* v. *Bajibhai Jijibhai*(1)). In our opinion the defence which the defendants raise is not affected by the Act of Limitation and therefore the appeal must be remanded for trial on the merits. We must point out that the acts of the zemindar after the execution of the lease to the defendants can have no material bearing on the case. The question is whether after having notice of the fraud and before executing that lease, he elected to avoid the lease to the plaintiff or not to avoid it. If he made no election, the right to rescind remained to him (*Clough* v. *London and North-Western Railway Company*(2) and *The Lindsay Petroleum Company* v. *Hurd*(3). The decree must be reversed and the appeal remanded. Costs to abide result.

APPELLATE CIVIL.

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

BRANSON (PLAINTIFF), APPELLANT,

v.

APPASAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1894. Feb. 22, 23.

Infant—Minor—Next friend—Solicitor's costs for proceedings undertaken on the next friend's instructions—Repudiation of the proceedings by the minor on attaining majority.

A solicitor cannot recover the costs of litigation incurred by the next friend of a minor on his behalf from the *quondam* minor, who, on coming of age, repudiates the proceedings, there being no relation of contract between them.

Assuming that the legal proceedings were in the nature of necessaries, the next friend is the person responsible to the solicitor. *Watkins* v. *Dhunnoo Baboo* (4) distinguished.

APPEAL against the decree of Mr. Justice Wilkinson sitting on the original side of the High Court in civil suit No. 126 of 1891.

(1) I.L.R., 14 Bom., 222. (2) L.R., 7 Ex., 35. (3) L.R., 5 P.C., 221.
(4) I.L.R., 7 Calc., 140. * Original Special Appeal No. 16 of 1893.

BRANSON v. APPASAMI.

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

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

Mr. *K. Brown* for respondents.

JUDGMENT.—This is an action by a solicitor to recover from the defendant costs incurred by the next friend of the defendant in litigation undertaken on his behalf. The principal suit thus prosecuted in the interests of the defendant was instituted in 1882, and was still pending in 1887, when, in the month of November, the defendant came of age. In January 1888 the defendant having resolved to abandon the suit, caused an application to be made by other solicitors for the dismissal of the suit. The learned Judge, who tried the case now under appeal, found with regard to the first issue that it was not shown that the proceedings undertaken on the defendant's behalf were necessary and proper for the protection of his interest, and it was argued before us that this finding was contrary to the weight of evidence. In the view taken by us it is not necessary to discuss this question, for assuming that the circumstances relating to the defendants' estate were such as to justify and require the proceedings taken by the next friend, we are of opinion that the present action at the suit of the solicitor against the defendant cannot be maintained. It must be observed that on question arises as to the rights of the next friend against the *quondam* minor plaintiff, nor as to the right of the solicitor against the next friend. In the order made on the application of the present respondent dismissing the suit of 1883, provision was made in accordance with the terms of section 452 of the Civil Procedure Code for the payment by him of the costs which might have been paid by his next friend. It is not necessary for us to say whether under any circumstances the next friend might, notwithstanding the language of that section, be entitled to any further rights against the *quondam* minor. On the other hand, as regards the right of the solicitor against the next friend, there can be no doubt, and he has in fact obtained a decree against him in the present suit. Not contented with that, he also asks for relief against the *quondam* minor. We are at a loss to understand on what principle a person who has contracted with A can have a right of action against B when it appears that, at the time of the contract. B was not competent to appoint an agent; and, moreover,

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that immediately on attaining majority, he has repudiated the acts of A. The general rule is that "liabilities are not to be forced on "a man behind his back" (per Bowen, L.J., in *Falcke* v. *Scottish Imperial Insurance Company*(1), and the present case cannot be brought within the case provided for by section 70 of the Contract Act, to which section, indeed, no reference was made in the argument. It was contended that the services rendered by the plaintiff to the minor were in the nature of necessaries and that, therefore, the action would lie, but there is really no analogy between the cases, for here there was the next friend responsible to the plaintiff and from him, if necessary, funds might have been obtained. The fact that he was unwilling or unable to supply funds is no reason for giving the plaintiff a supplementary right of action against another person. The decision in *Watkins* v. *Dhunnoo Baboo*(2) has no bearing on the present case, for there the defendant was still a minor and there had been no repudiation of the acts done for the protection of his estate. Seeing that there was not, and in point of law could not be, any relation of contract between the plaintiff and the defendant, and that there was such relation between the plaintiff and another person, and considering moreover that the services in respect of which the act is brought were not accepted, but repudiated by the defendant on his attaining majority, we are of opinion that no obligation to pay the plaintiff in respect of those services has been established. In addition it appears that any cause of action which the plaintiff might have had is barred by limitation. As has been shown notice of the defendants' resolve to abandon the litigation was given in January 1888, and the present suit was not brought till April 1891. By that notice in our judgment there was effected a determination of the suit or business within the meaning of article 84 of the schedule to the Limitation Act. It is immaterial that the order passed on the defendants' application was not issued till a later date. For these reasons we think the suit was rightly dismissed and we dismiss the appeal with costs.

Grant, attorney for plaintiff.

Champion & Biligiri, attorneys for defendants.

(1) L.R., 34 Ch. D., 248. (2) I.L.R., 7 Calc., 140.

APPELLATE CRIMINAL.

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

1893. October 27.

QUEEN-EMPRESS

v.

MANNATHA ACHARI.*

Criminal Procedure Code—Act X of 1882, *ss.* 4, 488—'*Adultery*'—*Indian Penal Code—Act XLV of* 1860, *s.* 497.

A wife petitioned for maintenance for herself and child against her husband under section 488 of the Criminal Procedure Code. The husband did not refuse to maintain his wife, but the petitioner refused to live with him as he kept a concubine:

Held, that the word 'adultery' in section 488 of the Criminal Procedure Code must, by virtue of section 4 of the Code, be construed with reference to the definition of the term in section 497 of the Indian Penal Code. Consequently a husband's immorality which does not amount to 'adultery' or involve the degradation of a married woman being brought into the society of a concubine is not sufficient ground for a wife's refusal to live with her husband.

An offer to maintain a wife must be an offer to maintain with the consideration due to her position as a wife. *Marakkal* v. *Kandappa* (1) cited.

Per BEST, J.—It is very doubtful if the framers of section 488 of the Code of Criminal Procedure intended the word 'adultery' as used therein to have the limited meaning given to it in the Penal Code. The wrong done to the wife is in no way affected by the circumstance of her husband's concubine being married or unmarried or, in case of her being married, whether it is with or without her husband's consent or collusion that she is living in such concubinage. In face however of section 4 of the Criminal Procedure Code, no other interpretation of the term 'adultery' is possible than the limited interpretation contained in the Penal Code.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code by M. Hammick, Acting District Magistrate of South Arcot.

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

Parties were not represented.

MUTTUSAMI AYYAR, J.—The term 'adultery' in section 488, Criminal Procedure Code, must be construed with reference to its definition in section 497 of the Indian Penal Code. There is no

* Criminal Revision Case No. 499 of 1893.

(1) I.L.R., 6 Mad., 371.

finding in the present case that the concubine is a married woman, and the Joint Magistrate seems to suppose that every illicit connection with a woman, whether she is married or not, and whether, if married, with her husband's consent or connivance or not, is adulterous. This view cannot be accepted as the legal conception of adultery, and the ground on which the Joint Magistrate rests his decision cannot be supported without further inquiry. The complainant stated in her evidence that her husband insisted on her getting her meals from the concubine, and it was held in *Marakkal* v. *Kandappa*(1) that the offer to maintain must be an offer to maintain with the consideration due to her position as wife. A question may therefore arise, if the complaint is well founded, whether the offer made is sufficient within the meaning of the proviso of section 488. In his explanation to the District Magistrate the Joint Magistrate states that he has never followed the ruling of the High Court in criminal revision case No. 574 of 1884, because, in his opinion, it is directly opposed to the wording of the section and has always seemed to him unintelligible. I would here point out to the Joint Magistrate that it was his duty to have either followed the ruling of the High Court, or if he doubted its correctness, to have referred the matter to that Court for reconsideration. There may be cases in which the husband may not bring the concubine into the family house, or may arrange for the concubine not coming into contact with his wife and for the society of the former not being forced on the latter. I am not prepared to hold that either the husband's immorality, which does not amount to adultery or involve the degradation of a married woman being brought into the society of a concubine, is sufficient ground for the wife's refusal to live with her husband. I would set aside the order of the Joint Magistrate and direct him to re-hear the case and pass fresh orders with reference to the foregoing observations.

BEST, J.—It seems to me to be very doubtful if the framers of section 488 of the Code of Criminal Procedure intended the word 'adultery' as used therein to have the limited meaning given to it in defining the offence of adultery in the Penal Code. The offence is against the husband, as is recognized in section 199 of the Code of Criminal Procedure, which prohibits the Court from

(1) I.L.R., 6 Mad., 371.

QUEEN-EMPRESS v. MANNATHA ACHARI.

taking cognizance of such offence except in the complaint of the husband or of some person on his behalf. Hence the necessity for the existence of a husband and absence of consent or connivance on his part to constitute such offence. But so far as a wife seeking an order for maintenance under chapter XXXVI of the Code of Criminal Procedure is concerned, the wrong done to her is in no way affected by the circumstance of her husband's concubine being married or unmarried, or in case of her being married, whether it is with or without her husband's consent or collusion that she is living in such concubinage.

However, any other than the limited interpretation of the word as defined in the Penal Code is impossible in the face of the concluding clause of section 4 of the Code of Criminal Procedure, which directs that "all words and expressions used herein and "defined in the Indian Penal Code and not hereinbefore defined "(and the word adultery is not one of those hereinbefore defined) "shall be deemed to have the meanings respectively attributed to "them by that code."

I concur, therefore, in the order proposed by my learned colleague.

APPELLATE CIVIL.

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

1894. January 18.

PALANIAPPA CHETTI AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

PERIAKARUPPAN CHETTI (PLAINTIFF), RESPONDENT.*

Contract—Promissory note or bond executed in Foreign State—Liability determined by lex loci contractus—*Suit upon consideration for the document*—Lex fori.

Where, according to the *lex loci contractus*, a promissory note or bond cannot, in the absence of registration, be a source of legal right, no action on an unregistered note or bond can be maintained. Whether a suit will lie upon the consideration for the instrument is a question of procedure, to be governed by the *lex fori*, and in British India such a claim must either be stated in the plaint as an independent ground of claim, or treated as such and an issue taken at the first hearing. *Valiappa v. Mahommed Khasim*(1) cited and followed.

* Second Appeal No. 797 of 1893.

(1) I.L.R., 5 Mad., 166.

PALANIAPPA CHETTI v. PERIA-KARUPPAN CHETTI.

SECOND APPEAL against the decree of T. Weir, District Judge of Madura, in appeal suit No. 1 of 1892, confirming the decree of S. Gopala Chariar, Subordinate Judge of Madura (East), in original suit No. 8 of 1890.

Suit to recover Rs. 2,793-13-6, being principal and balance of interest due on a plain cadjan kaikkanakku alleged to have been executed to the plaintiff by the first defendant, the undivided father of defendants 2 and 3, on 16th Kartigai of Sarvajittu (30th November 1887) for Rs. 2,587-0-6, after deducting Rs. 5 said to have been paid on account of interest on 22nd Thai of Virothi (2nd February 1890).

The instrument in question was as follows :—

Received from Kulupirai Nachiappa Chetti's son Peria Karuppan by Palaniappan, son of Sevvalpatti Murugappan, on 16th Kartigai of Sarvajittu year (30th November 1887). On looking into the account in respect of the memorandum of interest which had been executed on 20th Arpisi of Tarana last (3rd November 1884), the sum found due (to you by me) is Rs. (2,587-0-6) two thousand five hundred and eighty-seven and pies six. I shall pay this principal sum, together with interest thereon, at the rate of $\frac{5}{16}$ per cent. per mensem within the limited time of twelve months from this date and get back this memorandum of interest. To this effect

(Signed) PALANIAPPAN.

Witness—

(„) KULIPARAI,
Pa. La. Vi. Ra.

(„) CHIDAMBARAM CHETTI,
I know.

The lower Courts decreed in favour of the plaintiff and the defendants preferred this second appeal.

Mahadeva Ayyar for appellants.

Bhashyam Ayyangar and *Thiruvenkatachariar* for respondent.

JUDGMENT.—We agree with the Judge that the document is not an account stated, but a promissory note or bond. The balance acknowledged to be due upon the memorandum of interest is referred to therein only as the consideration for the promise to pay it with interest within twelve months after date. It is the *lex loci contractus* that determines the validity of a contract made in a foreign state. The document being executed in the Puducotta

PALANIAPPA CHETTI v. PERIA-KARUPPAN CHETTI.

territory, and no bond or promissory note being, according to the law of that state, operative for the purpose of creating any legal right unless it is registered, the suit cannot be supported as an action on the document.

The only other question which arises for decision is whether the decree can be supported by treating the suit as one brought upon the consideration for the document. It is not necessary to decide for our present purpose whether it is a bond or promissory note. In either case it is not, in the absence of registration, a source of legal right according to the law of Puducotta. We are of opinion that the question whether a judgment may be given for respondent upon the consideration for the document is one of procedure governed by the *lex fori*. Though the account stated is mentioned in the plaint, it is mentioned as part of the transaction evidenced by the document and not as a distinct ground of claim, the date on which the cause of action arose being described as the date mentioned for payment in the document. But it is argued that a judgment may be given upon the consideration, though the plaint does not refer to it as a distinct count or as an additional ground of claim, and though no issue was taken in regard to it.

According to English practice, a common count upon the consideration and special count on the bill are inserted in the declaration; but in India we are not governed by technical rules of pleadings. It is, however, necessary that it should be either stated in the plaint as an independent ground of claim or treated as such and an issue taken at the first hearing.

As the plaintiff did neither in this case, the decree could not be supported as a decree upon the case disclosed by the plaint or as amended by the issues on which the parties proceeded to trial. This view is in accordance with the decision in *Valiappa* v. *Mahommed Khasim*(1). We allow the appeal and, setting aside the decrees of the Courts below, direct that the suit be dismissed.

Under the circumstances of this case we order that each party do bear his costs throughout.

(1) I.L.R., 5 Mad., 166.

APPELLATE CIVIL.

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

SYED HUSSAIN (PLAINTIFF), APPELLANT,

v.

MADAN KHAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1894. Jan. 22, 23.

Civil Procedure Code—Act XIV of 1882, *s.* 544—'*Any ground common to all the plaintiffs or to all the defendants.*'

Section 544 of the Civil Procedure Code presupposes a common ground of decision affecting property in which both those who have appealed and those who have not appealed have an interest direct or indirect. Thus a District Judge has no power under this section to reverse the decree of a Lower Court, given for a plaintiff in favour of a defendant who did not appeal, and in respect to property in which the other defendants who did appeal disclaim all interest. *Sriram Ghatak* v. *Braga Mohan Ghosal*(1) and *Appa Rau* v. *Ratnam*(2) cited and followed. *Seshadri* v. *Krishnan*(3) and *Nagamma* v. *Subba*(4) distinguished.

SECOND APPEAL against the decree of Manavedan Raja, Acting District Judge of Kurnool, in appeal suit No. 64 of 1892, reversing the decree of V. Ranga Row in original suit No. 79 of 1891.

The plaintiff sued to establish his right to certain property and to recover from the defendants possession of the same. The property consisted of two plots of ground marked respectively A and C in the survey of the village. All the defendants except the sixth defendant laid claim to plot A only, whilst the sixth defendant laid claim to plots A and C. The plaintiff claimed the property on the ground that his late father had purchased it from the former owner, and the District Munsif decreed in his favour. All the defendants except the sixth thereupon appealed, and the District Judge reversed the decree of the Lower Court in respect to the whole property on the ground that the alleged sale to the plaintiff's father had not been established.

The plaintiff preferred this appeal.

Venkatasubbayyar for appellant.

Ramachandra Rau Saheb, *Sriramulu Sastriar* and *Venkatarama Sarma* for respondents.

* Second Appeal No. 1470 of 1893.

(1) 3 B.L.R., App. 41. (2) I.L.R., 13 Mad., 249. (3) I.L.R., 8 Mad., 192. (4) I.L.R., 11 Mad., 197.

SYED HUSSAIN v. MADAN KHAN.

JUDGMENT.—The Judge's finding is that there was no completed sale. He gives his reasons for so finding, and it is not open to us in second appeal to consider that question of fact. This appeal, so far as the plot A is concerned, must therefore fail.

It is contended further with regard to the plot C, in which the other respondents disclaim all interest, that sixth defendant not having appealed from the District Munsif's decree, the District Judge could not disturb that decree so far as it affected this plot C. On the other hand the fifth respondent's vakil refers to the cases in *Seshadri* v. *Krishnan*(1) and *Nagamma* v. *Subba*(2) and urges that when the ground of decision is common, the Court is entitled under section 544 of the Code of Civil Procedure to alter a decree in favour of a party who has not appealed, even in respect of property in which those who have appealed disclaim all interest. We are not prepared to accept this contention. Section 544 appears to us to presuppose a common ground of decision affecting property in which both those who have appealed and those who have not appealed have an interest either direct or indirect. This was the ground on which the decisions proceed in the two cases cited. The present case is on all fours with that in *Appa Rau* v. *Ratnam*(3). The principle is that laid down by Jackson, J., in *Sriram Ghatak* v. *Braga Mohan Ghosal*(4) that the section applies only to decrees incapable of division and relates to property in which all the plaintiffs or all the defendants are interested.

We therefore set aside the Lower Appellate Court's decree so far as the land C is concerned and affirm it with regard to the land A.

Appellant must pay the costs in this Court of the respondents other than the sixth defendant, who and appellant will bear their own costs.

(1) I.L.R., 8 Mad., 192. (2) I.L.R., 11 Mad., 197.
(3) I.L.R., 18 Mad., 249. (4) 3 B.L.R., App., 41.

APPELLATE CIVIL.

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

KORA NAYAR (PLAINTIFF), APPELLANT,

v.

RAMAPPA (DEFENDANT), RESPONDENT.*

1893. December 7

Transfer of Property Act—Act IV of 1882, *s.* 83—*Deposit in Court by mortgagor—Full and unconditional tender.*

The fact that a certain sum of money tendered under section 83 of the Transfer of Property Act, and accepted by the mortgagee as the full amount due, is afterwards denied by him to be the full amount, and that the tender is accompanied by a claim to a registered receipt (to which the mortgagee agrees) and to the return of the title-deeds does not render the tender conditional and therefore invalid. *Nana* v. *Manchu*(1) distinguished.

SECOND APPEAL against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 137 of 1892, reversing the decree of J. Lobo, District Munsif of Kassargod, in original suit No. 329 of 1891.

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

The District Judge, setting aside the decree of the District Munsif in favour of the plaintiff, passed a decree for the defendant.

The plaintiff preferred this appeal.

Narayana Rau for appellant.

Madhava Rau for respondent.

JUDGMENT.—The Judge's finding that the full amount was not tendered cannot be accepted. It is clear from the plaintiff's petition that the amount of Rs. 674-3-9 was tendered in full discharge of what was due under the mortgage. Defendant agreed to accept the amount and to pass a receipt. He did not then say that the tender was deficient by Annas 4-4 as is now pleaded. Reading the two petitions together, the reasonable inference is that defendant agreed to accept the tender in full satisfaction as provided in section 83 of the Transfer of Property Act. That such was the case is clear from the receipt registered by him on the

* Second Appeal No. 437 of 1893. (1) I.L.R., 14 Mad., 49.

KOMA NAYAR v. RAMAPPA.

day that the present suit was brought, in which he has accepted this very amount in full discharge of the mortgage.

It is next argued that the tender was conditional. No doubt section 83 is silent as to a receipt. But defendant not only waived the objection to this demand, but, acceding to it, produced a draft receipt for approval. Nor do we think that the request for return of the title-deeds was a condition vitiating the tender, as the section requires that the title-deeds should be deposited before the mortgagee takes out the money.

As to the case in *Nanu* v. *Manchu*(1) the mortgagor in that case appears to have insisted on the return of documents other than those which the mortgagee was bound to deposit under section 83.

We therefore set aside the decree of the Lower Appellate Court and restore that of the District Munsif.

Respondent must pay appellant's costs in this Court and in the Lower Appellate Court.

APPELLATE CIVIL.

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

1893. October 2. December 22.

BHAGIRATHI (PLAINTIFF), APPELLANT,

v.

ANANTHA CHARIA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Maintenance—Suit to recover arrears of maintenance due under a personal decree, and to establish a charge for future maintenance on the family property.

A Hindu widow obtained a personal decree against her father-in-law for maintenance. Her late husband's five brothers were made parties to the suit, but no personal decree was made against them, nor did the widow ask that her maintenance be made a charge on the family property. On the death of her father-in-law, the family property devolved on his sons and grandsons, who sold certain of the property. There were arrears of maintenance due, and the widow instituted the present suit, in which she asked for a decree establishing her right to receive maintenance for her life and for the arrears of maintenance on the responsibility of the property:

Held (1) that the maintenance not having been declared a charge upon the portion of the property which had been alienated, this property was free of any charge for her maintenance;

(1) I.L.R., 14 Mad., 49.

* Second Appeal No. 304 of 1893.

BHAGIRATHI v. ANANTHA CHARIA.

(2) that the arrears of maintenance constituted a personal debt of the plaintiff's deceased father-in-law, and that his sons and grandsons (the defendants) incurred his liability on his decease and were bound to discharge the same out of the family property;

(3) that the right to maintenance being enforceable against the defendants, the right to have it made a charge on the family property was enforceable along with it.

SECOND APPEAL against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 131 of 1892, reversing the decree of U. Babu Row, District Munsif of Udipi, in original suit No. 335 of 1891.

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

The District Munsif decreed in favour of the plaintiff, but the District Judge reversed the decree. The plaintiff preferred this appeal.

Narayana Rau for appellant.

Ramachandra Rau Saheb for respondents.

MUTTUSAMI AYYAR, J.—Appellant is a Hindu widow and defendants 1 to 16 are her husband's brothers and nephews. In original suit No. 137 of 1870 the former obtained a personal decree against Vadiraja Charia, her father-in-law, for maintenance at the rate of Rs. 30 per annum. To that suit her husband's five brothers were also made parties, but there was no personal decree against them. Nor did appellant then ask that her maintenance be made a charge on ancestral or family property. Vadiraja Charia died since and defendants 1 to 16 repudiated their liability to pay maintenance under the decree passed against him. On the death of Vadiraja Charia, the family property devolved on respondents, and at the date of the suit there were arrears of maintenance under the former decree to the extent of Rs. 90. The first 16 defendants sold items of property 3 and 4 to the 17th defendant, and appellant's case is that the alienation can only be upheld subject to her claim for maintenance. The plaint prayed for a decree establishing her right to receive maintenance for her life at the rate of Rs. 30 per annum as per decree in original suit No. 137 of 1870, and Rs. 90 for arrears of maintenance on the responsibility and by the sale of the properties 1 to 4 mentioned in schedule A attached to the plaint, and such other relief as the Court might deem fit to grant in the circumstances of this case. The District Judge considered that

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appellant was bound to have asked in the former suit that her maintenance be made a charge on the family property, and held that the present suit was barred by section 43 of the Code of Civil Procedure. The District Judge further held that appellant's claim against the 17th defendant must fail, and in support of his opinion he relied upon the decisions in *Saminatha* v. *Rangathammal*(1) and *Rangamma* v. *Voballayya*(2). I do not think that the decision of the Judge can be supported except so far as it relates to the 17th defendant.

Appellant's maintenance has not been declared a charge on the property alienated, and the District Judge was right in upholding the alienation against her claim. I am also of opinion that neither of the cases relied on by the Judge is in point. In *Saminatha* v. *Rangathammal*(1) both suits were brought against the same person, and it was held that no second suit should be brought to recover arrears of maintenance which might have been recovered in execution of the decree passed in the prior suit. The point decided in *Rangamma* v. *Vohalayya*(2) was that a personal decree for maintenance and a declaration that it is a charge on family property are two remedies referable to the same cause of action, viz., the right to receive maintenance, and that two separate suits cannot be brought in respect of the two remedies against the same defendant.

In the present case appellant rests her claim to arrears on the ground that they constitute a personal debt of Vadiraja Charia and his sons and grandsons. Defendants 1 to 16 are bound to discharge it under Hindu law from the family property which has devolved on them by right of survivorship. Their liability to pay their father's and grandfather's debt arose only on the death of Vadiraja Charia.

As regards plaintiff's claim to future maintenance, it is tenable against defendants 1 to 16, the ancestral property surviving to them and passing into their management only on the death of Vadiraja Charia. The right to maintenance being enforceable against them, the right to have it made a charge on family property is also enforceable along with it.

Though several grounds of claim are united in this suit, each ground of claim is good as against all respondents. It is urged on respondent's behalf that the suit is framed as if it was a suit

(1) I.L.R., 12 Mad., 285. (2) I.L.R., 11 Mad., 127.

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to execute the decree already passed in original suit No. 137 of 1870; but the clause in the plaint which contains the prayer is open to the construction that it prays for relief similar to those in the former decree. I would, therefore, set aside the decree of the Judge and remand the case for disposal on the merits. The costs incurred in this Court will abide and follow the result and be provided for in the revised decree.

APPELLATE CIVIL.

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

ACHUTAN NAYAR (DEFENDANT No. 4), APPELLANT,

1893. November 8.

v.

KESHAVAN (PLAINTIFF), RESPONDENT.*

Mortgage—Right of a jenmi, who is a judgment-creditor, to sell the kanom right before the expiry of twelve years.

A jenmi, who has obtained a decree for arrears of rent, may sell the kanom before the expiry of twelve years: such a sale does not put an end to the kanom, but only transfers the kanomdar's interest to the purchaser at the execution sale.

SECOND APPEAL against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in appeal suit No. 374 of 1892, modifying the decree of J. F. Pereira, District Munsif of Angadipuram, in original suit No. 45 of 1892.

This was a suit to recover the sum of Rs. 63-14-2, being principal and interest on account of arrears of porapad for the years 1065, 1066 and a portion of 1067, alleged to be due by the defendants on a kanom kychit executed by the first defendant to plaintiff's elder brother, the late Neelakandan Musad, on the 7th Edavom 1048 (19th May 1883).

The plaintiff sued to recover the aforesaid arrears from first defendant personally, from the properties of first to third defendants' tarwad, and by the sale of the kanom and value of improvements on the properties demised.

Defendants 1 to 3 and 5 were *ex parte*.

The fourth defendant answered that the demise sued upon was

* Second Appeal No. 417 of 1893.

ACHUTAN NAYAR v. KESHAVAN.

true; that the kyohit simply provides for the payment of arrears of porapad with interest; that the value of kuyikoor improvements being an unascertained amount could not be sold for arrears of porapad; that first to third defendants and others mortgaged the plaint properties on a panayom right of 324 rupees and 528 paras of paddy to him (fourth defendant) on the 6th April 1884, and on a further panayom rights of 174 paras of paddy on the 18th April 1887; that these rights were admitted by the plaintiff in the matter of the execution of decree in original suit No. 70 of 1889; that, therefore, the kanom and the value of improvements were liable in the first instance for the above debts; that plaintiff could not have the kanom right sold before the expiry of twelve years allowed by the demise.

The District Munsif decreed in favour of the plaintiff, but dismissed the suit against the fourth defendant. The Subordinate Judge set aside the decree dismissing the suit as against the fourth defendant, and decreed that, in default of the defendants paying the amount awarded by the Lower Courts, the plaintiff should recover the same by the sale of the first to third defendants' interest as mortgagees under the plaintiff, free of the encumbrance created by the first defendant in favour of the fourth defendant, as well as from the first defendant personally, and from first to third defendants' tarwad properties.

The fourth defendant preferred this appeal.

Sankara Menon for appellant.

Kannan Nambiar for respondent.

JUDGMENT.—It is contended that the kanom right is not liable to be sold in satisfaction of the decree before the expiry of twelve years from the date of the kanom to first defendant. No doubt, according to the custom of the country, a kanom is, in the absence of a contract to the contrary, redeemable only after the expiry of the period of twelve years. But this custom cannot supersede the general rule of processual law that a judgment-creditor is entitled to attach and sell the judgment-debtor's property. It is not denied that an ordinary judgment-creditor, who is not the jenmi, would be entitled to bring the kanom right to sale even before the expiry of twelve years. We see no reason why a jenmi, who is a judgment-creditor, should be in a different position. The right to set off arrears of rent against the kanom debt and value of improvements when the kanom becomes redeemable is

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an additional security for the benefit of the jenmi, but it does not follow that he cannot sell the kanom at an earlier date if he has obtained a decree for arrears of rent. Such sale will not ordinarily put an end to the kanom, but only transfer the kanomdar's interest, such as it is, to the purchaser at the execution sale. If the jenmi himself becomes the purchaser, he will be in no better position, except in that he will have a priority of claim as against fourth defendant's panayams for arrears of rent, one of the customary incidents of the kanom.

The decree of the Lower Appellate Court must be modified by striking out the words "free of the encumbrance created by first "defendant in favour of fourth defendant." In other respects the decree is affirmed.

The cases referred to at the hearing, viz., *Achuta* v. *Kali*(1) and *Kanna Pisharodi* v. *Kombi Achen*(2) and *Unnian* v. *Rama*(3) are not in point, inasmuch as the question here did not arise in those cases.

Under the circumstances of this case we direct each party to bear his own costs of this appeal.

APPELLATE CIVIL.

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

SUBBAMMAL (PLAINTIFF), APPELLANT,

v.

HUDDLESTON AND OTHERS (DEFENDANTS), RESPONDENTS.*

1894. March 7, 12.

Civil Procedure Code—Act XIV of 1882, *s.* 13—'*Court of competent jurisdiction.*'

The term 'competent jurisdiction' in section 13 of the Civil Procedure Code has regard to the pecuniary limit as well as to the subject-matter. There is no authority for the general proposition that the competency of one Court as compared with another is affected by the circumstance that in the one case an appeal lies in the first instance to the District Court and in the other directly to the High Court. *Misir Raghobardial* v. *Sheo Buksh Singh*(4) cited and followed. *Vithilinga Padayachi* v. *Vithilinga Mudali*(5) qualified.

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(1) I.L.R., 7 Mad., 547. (2) I.L.R., 8 Mad., 381. (3) I.L.R., 8 Mad., 415.
* Appeal No. 66 of 1893. (4) I.L.R., 9 Calc., 439. (5) I.L.R., 15 Mad., 111.

SUBBAMMAL v. HUDDLESTON.

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of Malabar, in original suit No. 26 of 1891.

The plaintiff in this suit sued to recover certain land and mesne profits, resting his title thereto on a karar dated 14th July 1864. In a former suit in the same Court between the plaintiff and the first defendant it had been decided that the karar in question was a forgery, and the Subordinate Judge held that the present suit was barred by section 13 of the Civil Procedure Code and dismissed the suit.

The plaintiff preferred this appeal.

Anandacharlu for appellant.

Mr. *Gover* for respondents.

JUDGMENT.—We fully agree with the Subordinate Judge that the plaintiff is not entitled to any relief except with reference to the allegations made in the plaint. In the plaint the plaintiff alleges as his title to the land, in respect of which he sues, a karar executed on the 14th of July 1864. If the plaintiff fails, or is unable to prove the execution of this karar by his lessor, it is clear that the suit must be dismissed. It is pleaded by the defendants that the question of the genuineness of this karar has already been decided in a suit between plaintiff and the first defendant, and that therefore it is not now open to the plaintiff to rely on that title. The former suit was brought in the same Court and the issue tried with regard to this karar was identically the same as that raised in the present suit. It is objected, however, on behalf of the appellant that the Court which heard the former suit was not competent to try the present suit, because in the former suit the value of the subject-matter was such that an appeal lay not to this Court, but to the District Court. In support of this objection, we are referred to certain decisions in which it has been held that the judgment in a suit cognizable as a Small Cause Court suit is not binding in a regular suit between the same parties subsequently brought with regard to the same matter. In the present case, where it was the very same Court that heard the two suits, we do not think that those decisions are applicable. In *Vithilinga Padayachi* v. *Vithilinga Mudali*(1) reference is made to the language of the Judicial Committee in the case in *Misir Raghobardial* v. *Sheo Buksh Singh*(2). It appears to have been

(1) I.L.R., 15 Mad., 111. (2) I.L.R., 9 Calc., 439.

SUBBAMMAL v. HUDDLESTON.

thought that, in considering the question of the competency of a Court within the meaning of section 13 of the code, the Judicial Committee had regard to the question as to the tribunal to which an appeal would lie from such Court. We do not think that the language of the Judicial Committee really bears this meaning. In their judgment reference is made to the anomaly which would arise if the decree of the District Munsif were held to be binding on a superior Court, and it is observed that this anomaly would not be removed by the fact that from both the Courts there would be an appeal, because from the judgment of the Munsif the appeal would lie to the District Court, and a second appeal only on questions of law would lie to the High Court. In the next sentence of the judgment their Lordships explain the meaning of the expression 'concurrent or competent jurisdiction.' The term has regard to the pecuniary limit as well as the subject-matter, and with respect to both those conditions it is plain that in the present case the Court which heard the former suit was equally competent to hear the present suit. There is no authority for the general proposition that the competency of one Court as compared with another is affected by the circumstance that in the one case an appeal lies in the first instance to the District Court and in the other directly to the High Court. In our opinion the suit was rightly dismissed. The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

SEETHARAMA RAJU (DEFENDANT), APPELLANT,

v.

BAYANNA PANTULU (PLAINTIFF), RESPONDENT.*

1894. February 27.

Contract—Undue influence—Acquiescence by conduct—Lease for one year at a rental of more than Rs. 100*—Registration—Registration Act—Act III of* 1877, *s.* 17*—Transfer of Property Act—Act IV of* 1882, *ss.* 4 *and* 107.

Where the owner of certain land exchanges it for certain other land, but takes a lease for one year of the former land and pays the rent thereof, and receives and

* Appeal No. 71 of 1893.

SEETHARAMA RAJU v. BAYANNA PANTULU.

retains the rents of the land he has acquired by the exchange, he shows so complete an acquiescence in the transaction that he cannot afterwards have it set aside on the ground of undue influence.

The fact that such a lease recites the fact of the exchange of the lands does not evidence the exchange, and as such create a title in land. Nor does the fact that the rent reserved under the lease is more than Rs. 200 create an interest in land of Rs. 100 and more in value so as to necessitate registration of the lease under s. 17 of the Registration Act. Such a lease falls under s. 107 of the Transfer of Property Act, the provisions of which section are, by s. 4 of the Act, supplemental to the Registration Act.

APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in original suit No. 33 of 1891.

The District Judge decreed in favour of the plaintiff and the defendant preferred this appeal.

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

Ramachandra Rau Saheb for appellant.

Mr. *Wedderburn* and *Rangachariar* for respondent.

JUDGMENT.—The defendant owned some land called Burripollem Agraharam, which, in 1875, he exchanged for the plaint land situated in the village of Thandraugi. In 1888 a re-exchange of these same lands was made between the defendant and the plaintiff, but the defendant then took upon lease for one year the Thandrangi lands, the ownership of which he had parted with in the re-exchange, and executed a cowle to the plaintiff, agreeing to give the land up if so required at the end of his year's lease, which expired on the 31st March 1889. Defendant having failed either to take a fresh lease of the land or to vacate it, this suit was brought for the recovery of its possession, together with the mesne profits for the two years for which the defendant had held over. The lower Court decreed for the plaintiff as prayed.

Defendant appeals on several grounds, his chief contention being that he was not willing to make the re-exchange, and that the cowle he executed, admitting his tenancy of the plaint land for one year only, was obtained from him by the undue influence of the plaintiff and his servants, and he is, therefore, not bound by it. He further contends that it is not admissible in evidence, not being registered. The lease being set at nought on these grounds, he contends that he is entitled to retain possession of the plaint land, because he had been in adverse possession of it for

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more than twelve years in 1888 even should the exchange of 1875 be found not to have been operative.

There are two grounds on which it is urged that the cowle is inadmissible for want of registration. The first is that the document must be treated as evidencing the re-exchange of the lands, and as such it creates a title in land of Rs. 100 in value. But we cannot accept this view of the document, which is nothing more than it purports to be, namely, a lease for one year. The reference to the exchange is merely a recital therein as to how the plaintiff obtained his title as landlord from the defendant. The actual exchange of the lands is not effected by this document. The second objection is that, although the lease is only for a year, yet as it creates an interest in land of Rs. 100 and more in value, the amount of the rent being Rs. 206-4-0, it requires to be registered under section 17 of the Registration Act. But section 107 of the Transfer of Property Act disposes of this objection. After laying down that leases of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument it provides that "all other "leases of immoveable property may be made either by an instru- "ment or by oral agreement." Section 4 of that Act declares that this section 107 shall be read as supplemental to the Registration Act. It follows that the lease in this case did not require to be registered.

As to the allegation of 'undue influence' which the defendant urges as voiding his execution of the cowle, he certainly has adduced evidence showing that pressure was brought to bear upon him. It is highly probable too that it was not with his full and free consent that he gave way to the wishes of the plaintiff, a powerful landholder, in whose employ he also was at the time. A contract made under such pressure is, however, not void, but only voidable. Had the defendant done nothing beyond executing the lease deed, we should probably have found him entitled to relief on this score. But instead of attempting to repudiate it by not acting up to it or by other means, we find the defendant not only paid the rent due under it for the whole year, but he also received and kept the rents of the Burripollem land. All this indicates so complete an acquiescence in the arrangements that had been made subsequent thereto, that we are unable to declare that the defendant is not now bound by them for want of

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his consent. A great deal of argument was expended both in this and in the lower Court as to whether the defendant was or was not estopped under section 116 of the Evidence Act from denying the plaintiff's title. It was contended on the strength of the decision in *Lal Mahomed* v. *Kallanus*(1) that that section applied only to cases in which the tenants had been put into possession of the tenancy by the person to whom they have attorned and not to a case such as this, in which the tenant was previously in possession. We are, however, not called upon to decide the question, which is one not altogether free from difficulty, for we find that as a fact the defendant became the tenant of the plaintiff under the document. So that even if the defendant were allowed to dispute the plaintiff's title, it would be found against him as a matter of fact that the plaintiff was his landlord.

Another objection taken to the suit that it was not brought in the name of the Maharajah of Vizianagram, but of his agent, is frivolous, for we find the plaint is actually signed by the Maharajah. The appeal accordingly fails and it is dismissed with costs.

APPELLATE CRIMINAL.

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

1894 January 25.

QUEEN-EMPRESS

v.

FAKRUDEEN.*

Police (Madras) Act XXIV of 1859, *ss.* 10 *and* 44—*Departmental punishment and prosecution under the Act.*

In the absence of any rules framed by Government under section 10 of the Madras Police Act, a departmental punishment inflicted under that section is no bar to a prosecution under section 44 of that Act.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code by K. C. Manavedan Raja, Acting District Magistrate of Anantapur.

(1) I.L.R., 11 Calc., 519.

* Criminal Revision Case No. 614 of 1893.

QUEEN-EMPRESS v. FAKRUDEEN.

The case stated was as follows :—

"The accused, a police constable attached to the Guntakul "junction station, was on sentry duty on the night of the 9th July "1893 from 12 to 3 a.m. guarding the road goods consisting of "88 articles received that night into the station at about 9 p.m. "At the end of the period of his watch it was his duty to awake "his successor to get himself relieved and to hand over charge of "the articles to the relieving officer ; but, instead of doing this, he "fell asleep and failed, therefore, to discharge the above duties. "Next morning, on examination of the articles by the road goods "clerk, it was found that a portion of a bag of jaggery had been "extracted. This was alleged to be due to the wilful neglect of "the sentinel. The Taluk Magistrate who tried the case acquitted "the accused under section 245, Criminal Procedure Code, on "the sole ground that the man had already been punished depart-"mentally by the Superintendent of Police by receiving a black "mark.

"Whether he ought to receive double punishment was not the "question for the Magistrate to decide. Having received one pun-"ishment, it may not seem to be necessary that he should be "charged in a Magistrate's Court. But the charge having been "brought, the Sub-Magistrate should have taken evidence and dis-"posed of it on its merits.

"It has been further held by the High Court in its proceedings "No. 1074 of 13th June 1872 that a conviction of a police con-"stable under section 44, Act XXIV of 1859, for going to sleep "on duty is legal on the ground that the violation of duty was of "a class which was not and could not be provided for by rules "framed under section 10 of the Act. (Also High Court's Pro-"ceedings, No. 1601, dated 3rd October 1878)."

Mr. *Wedderburn* for the Crown.

BEST, J.—No rules sanctioned by Government under section 10 of Act XXIV of 1859 have been brought to our notice, and in the absence of such rules the accused is liable to be prosecuted under section 44. The mere fact of a departmental punishment having been awarded is not sufficient to exonerate from liability under section 44, though the circumstance may be taken into consideration in passing sentence. I would set aside the order of acquittal and direct the Magistrate to dispose of the case on its merits.

QUEEN-EMPRESS v. FAKRUDEEN.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. In the absence of any rules framed by Government, the departmental punishment inflicted on the accused under section 10 of Act XXIV of 1859 does not bar his prosecution under section 44 of the same Act, unless the Magistrate thinks that the breach of duty is not grave but trivial. It is a grave violation of duty on the part of a police officer to go to sleep whilst on guard, and I would follow the principle laid down by this Court in its proceedings, dated the 3rd October 1878, No. 1601. Weir, p. 569. I would *also* set aside the order of acquittal and order a re-trial with reference to the foregoing observations.

APPELLATE CIVIL—FULL BENCH.

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

1894. March 1.

REFERENCE UNDER STAMP ACT, s. 46.*

Stamp Act—Act I of 1879, sched. I, art. 4—'Agreement to lease.'

An agreement by a zamindar to execute a formal deed of lease of his zamindari which is under attachment, after obtaining a certificate from the Court under s. 305 of the Civil Procedure Code, is an 'agreement to lease' under art. 4, sched. I of the Stamp Act.

CASE referred for the decision of the High Court under section 46 of Act I of 1879 by the Board of Revenue, Madras. The case stated was as follows:—

"On the 11th January 1886, the Zamindar of Sivaganga en-"tered into an agreement (marked A) with the Rajah of Nilambur "and another to lease the zamindari to the latter in consideration "of his debts, to the extent of 16 lakhs of rupees, being discharged "by them. At the time of the agreement the zamindari was "under attachment and the zamindar undertook to execute a "formal deed of lease after obtaining a certificate from the Court "under section 305 of the Civil Procedure Code. The agree-"ment in question was engrossed on an eight-anna stamp paper,

* Referred Case No. 4 of 1894.

REFERENCE UNDER STAMP ACT, S. 46.

"apparently under article 5 (*c*) of schedule I. The question at "issue is whether the stamp was sufficient, and if not, under what "article of schedule I the instrument ought to have been stamped?

"The main grounds on which it is contended that the agree-"ment was properly stamped are that as the zamindari was under "attachment, the document was not and could never have been in-"tended to operate as a lease, and that the subsequent conduct of "the parties resulting eventually in the execution of a formal and "duly stamped deed of lease makes it clear that the agreement of "the 11th January 1886 was intended as a mere agreement and "nothing else.

"The Board, while conceding that the agreement was not in-"tended to operate as a lease, is unable to accept the conclusion "that it is, therefore, not liable to duty under article 4, schedule I "of the Stamp Act. In that article it is clearly stated that an "agreement to lease is chargeable with the same duty as a lease, "and there is no saving clause to indicate that the intention (which "in the present case may be admitted) subsequently to execute a "regular lease makes any difference. The charge of the full duty "both on an agreement to lease and on a lease executed in pur-"suance thereof is guarded against by the proviso to article 39. "The Board considers that the law may be read as meaning that "an agreement to lease is chargeable as a lease, whether an actual "lease is subsequently executed or not and notwithstanding any "*bonâ fide* intention on the part of the executants of the former "subsequently to execute the latter; otherwise the proviso to "article 39 would be superfluous."

The *Government Pleader* (Mr. *E. B. Powell*) for the Crown.

Mr. *W. Grant* for plaintiff.

JUDGMENT.—We are of opinion that the document is an agreement for a lease, and that it must be stamped as such under article 4 notwithstanding that another instrument was intended to be executed.

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1877—XV : *See* LIMITATION ACT.

1879—XVIII : *See* LEGAL PRACTITIONERS' ACT.

1882—IV : *See* TRANSFER OF PROPERTY ACT.

„ —XIV : *See* CIVIL PROCEDURE CODE.

CIVIL PROCEDURE CODE—ACT XIV OF 1882, ss. 25, 223—MADRAS CIVIL COURTS ACT, s. 12—*Jurisdiction of Munsiff's Court—Execution of decree of superior Court.*] As in suits so in execution proceedings the competent *forum* is ordinarily that indicated by section 12 of the Civil Courts Act, but in the five cases mentioned in section 223 of the Civil Procedure Code special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction, the object whereof is to secure to judgment-creditors in certain cases a special facility or convenience. The condition as to the jurisdiction of the Subordinate Court to which a suit can be transferred under section 25 of the Code of Civil Procedure is not laid down in section 223 of the Code, which relates to transfers of applications for execution of decrees, and was omitted therefrom for the special reasons mentioned therein. *Narasayya* v. *Venkatakrishnayya* (I.L.R., 7 Mad., 397) followed. *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee* (I.L.R., 16 Calc., 457) and *Durga Charan Mojundar* v. *Umatara Gupta* (I.L.R., 16 Calc., 465), dissented from.

Shanmuga Pillai v. *Ramanathan Chetti* 309

2. ———————————, s. 317—*Effect of benami purchase, and purchase as execution-debtor's agent.*] Where the purchaser at an execution sale is the agent of the execution-debtor and buys the property as such, though he advances the purchase money on the understanding that he is to be repaid, a suit for possession of the property is maintainable by the latter against the former. Such a transaction is not a mere *benami* purchase, and is not a bar to such a suit under section 317 of the Civil Procedure Code.

Sankunni Nayar v *Narayanan Nambudri* 282

EXECUTION—*Fraud in conducting a sale in contravention of agreement between creditor and debtor—Estoppel of judgment-debtor by previous petition.*] The fact that a judgment-debtor, who petitions to have the sale in execution of the decree against him set aside on the gronnd of fraud and irregularity, has, in a petition made previous to the sale asking for its adjournment, made mention of the irregularities now relied on does not create an estoppel. *Thakoor Mahatab Deo* v. *Leelanund Singh* (I.L.R., 7 Calc., 613) followed.

Raman v. *Kunhayan* 304

HEREDITARY OFFICE—REGULATION VI OF 1831 (MADRAS), s. 3—*Jurisdiction of Revenue Courts.*] A suit for 'Maniam' lands attached to the hereditary office of village carpenter is barred by the operation of section 3 of Regulation VI of 1831.

Palamalai Padayachi v. *Shanmuga Ausari* 302

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HINDU LAW—*Inheritance—Illatom adoption—Sapratibandha property.*] There is no evidence that the custom of *illatom* adoption exists among the Kondarazu caste of the Vizagapatam district. *Sapratibandha* (liable to obstruction) property vests in the heirs in existence at the time the inheritance opens, and is not subject to variation by the subsequent birth of any co-heir.

Narasimha Razu v. *Veerabhadra Razu* 287

LEGAL PRACTITIONERS' ACT—ACT XVIII OF 1879, ss. 28, 29—*Remuneration by promissory note for past professional services rendered under oral agreements—Guardian and ward—Services necessary or manifestly beneficial.*] A guardian executed a promissory note in favour of a vakil (the plaintiff) as remuneration for his past professional services rendered under oral agreements with him:—*Held*, that a suit upon the note was barred by sections 28 and 29 of Act XVIII of 1879, and that, as there was no such necessity for the proceedings in question as to render the contract binding on the minors, no suit would lie against them.

Sundararaja Ayyangar v. *Pattanathusami Tevar* 306

LIMITATION ACT: *See* LIMITATION.

LIMITATION—LIMITATION ACT—ACT XV OF 1877, SCHED. II, ART. 85—*Mutual account.*] To constitute a mutual account there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. Thus an account consisting of entries of payments made by one party in reduction of his debt to the other, and of payments made by the latter on behalf of the former party for the same purpose is not a mutual account within the meaning of article 85 of schedule II of the Limitation Act. *Hirada Basappa* v. *Gadigi Muddappa* (6 M.H.C.R., 142) cited and followed. A shifting balance is a test of mutuality, but its absence is not conclusive proof against mutuality.

Velu Pillai v. *Ghose Mahomed* 293

2. ——————————, s. 14—*Deduction of time during prosecution of suit with due diligence—Defect of jurisdiction—Other cause of a like nature.*] Where a previous suit by the same plaintiff against the same defendant has failed by reason of misjoinder of causes of action and parties, the plaintiff in a second suit is not entitled to the extra period of limitation allowed by section 14 of the Limitation Act, since the cause of failure of the previous suit is not due to 'defect of jurisdiction' in the Court which entertained the suit, nor is it a cause 'of a like nature' thereto. *Deo Prosad Singh* v. *Pertab Kairee* (I.L.R., 10 Calc., 86) dissented from.

Tirtha Sami v. *Seshagiri Pai* 299

3. ——————*Suit to recover immovable family property unlawfully alienated during plaintiff's minority—Limitation Act, s. 7, illustration (b), and sched. II, arts. 12, 44, 45, 120 and 144—Hindu law—Succession: whether under the Mitakshara law, nearness of blood is a ground of preference as between brothers of the half and full blood respectively in case of disputed succession to impartible co-parcenary property—Representation of minor heirs as defendants by including a Collector as a defendant, as their guardian* ad litem*—Code of Civil Procedure—Act XIV of 1882, ss. 13, 244 and 312—Powers of a Hindu son to question the alienation of an impartible estate by his father.*] Where a suit is brought to set aside a sale of immovable family property unlawfully alienated during the plaintiff's

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minority, it must be instituted within one year of the plaintiff's attaining his majority under schedule 11, article 12 of the Limitation Act. Section 7 of that Act must be read together with each article in schedule II, and when the period prescribed by the latter extends to three years or more and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full three years. But when the period of limitation prescribed is less than three years, as in article 12, and the minor has that period from the date of his majority, the prescribed period is not to be enlarged to three years. In determining the right of succession to an impartible estate, the class of kindred from whom a single heir is to be selected should be first ascertained. Next, it should be seen whether family custom or kulachar discloses a special rule of selection, and, in default of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to general Hindu law. Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to co-parcenary property which is partible, and it is likewise no ground of preference when such property is impartible. Where, therefore, the family property belongs to a co-parcenary family consisting of all the brothers of the deceased *propositus*, whether of the whole or half-blood, in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years. Representation by a Collector of all minor sons of a deceased Zemindar as their guardian *ad litem*, under the order of the Court, the Collector being added as a defendant in the suit, is an adequate representation of all the sons, even if the Collector could only treat, under Regulation V of 1804, the particular minor on whose behalf the Court of Wards was then managing the zemindari as their proper ward. Consequently, a suit brought by one of such minors, on his attaining majority, to set aside the sale of a portion of the zemindari property attached in execution of the decree given in the former suit, is barred by sections 136, 244 and 312 of the Code of Civil Procedure.

Subramanya Pandya Chokka Talavar v. *Siva Subramanya Pillai* 316

REGULATION VI OF 1831 (MADRAS) : *See* HEREDITARY OFFICE.

RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865, s. 76—*Civil Procedure Code, ss.* 4, 622.] Orders passed by a Collector under the Rent Recovery Act are not open to revision under section 622 of the Civil Procedure Code. *Velli Periya Mira* v. *Moidin Padsha* (I.L.R., 9 Mad., 332) followed.

Venkatanarasimha Naidu v. *Suranna* 298

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 108, CL. (*j*)—*Lessor's right to sue both lessee and his transferee.*] The provision in section 108 of the Transfer of Property Act that a lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and that the lessee shall not, by reason of such transfer, cease to be subject to any of the liabilities attaching to the lease, does not prevent the transferee being also liable to the lessor, who may at the same time sue the lessee upon his express covenant and the transferee upon the privity of estate, though he can have execution against one only.

Kunhamujan v. *Anjelu* 296

"apparently under article 5 (*c*) of schedule I. The question at "issue is whether the stamp was sufficient, and if not, under what "article of schedule I the instrument ought to have been stamped?

"The main grounds on which it is contended that the agree- "ment was properly stamped are that as the zamindari was under "attachment, the document was not and could never have been in- "tended to operate as a lease, and that the subsequent conduct of "the parties resulting eventually in the execution of a formal and "duly stamped deed of lease makes it clear that the agreement of "the 11th January 1886 was intended as a mere agreement and "nothing else.

"The Board, while conceding that the agreement was not in- "tended to operate as a lease, is unable to accept the conclusion "that it is, therefore, not liable to duty under article 4, schedule I "of the Stamp Act. In that article it is clearly stated that an "agreement to lease is chargeable with the same duty as a lease, "and there is no saving clause to indicate that the intention (which "in the present case may be admitted) subsequently to execute a "regular lease makes any difference. The charge of the full duty "both on an agreement to lease and on a lease executed in pur- "suance thereof is guarded against by the proviso to article 39. "The Board considers that the law may be read as meaning that "an agreement to lease is chargeable as a lease, whether an actual "lease is subsequently executed or not and notwithstanding any "*bonâ fide* intention on the part of the executants of the former "subsequently to execute the latter; otherwise the proviso to "article 39 would be superfluous."

The *Government Pleader* (Mr. *E. B. Powell*) for the Crown.

Mr. *W. Grant* for plaintiff.

JUDGMENT.—We are of opinion that the document is an agreement for a lease, and that it must be stamped as such under article 4 notwithstanding that another instrument was intended to be executed.

APPELLATE CIVIL.

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

1893.
March 17.
October 11.

SANKUNNI NAYAR (DEFENDANT No. 2), APPELLANT IN SPECIAL APPEAL No. 779 of 1892,

v.

NARAYANAN NAMBUDRI AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

RAMAN NAMBIAR (DEFENDANT No. 1), APPELLANT IN SPECIAL APPEAL No. 943 OF 1892,

v.

NARAYANAN NAMBUDRI AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 317—*Effect of benami purchase, and purchase as execution-debtor's agent.*

Where the purchaser at an execution sale is the agent of the execution-debtor and buys the property as such, though he advances the purchase money on the understanding that he is to be repaid, a suit for possession of the property is maintainable by the latter against the former. Such a transaction is not a mere *benami* purchase, and is not a bar to such a suit under section 317 of the Civil Procedure Code.

SECOND APPEAL against the decrees of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suits Nos. 1064 and 1065 of 1890, confirming the decree of U. Achutan Nayar, District Munsif of Nedunganad, in original suit No. 339 of 1889.

The facts of the case appear sufficiently for the purpose of this report from the judgments delivered by the High Court.

Sundara Ayyar for appellant in No. 779.

Govinda Menon for respondents in No. 779.

Sankaran Nayar for appellant in No. 943.

Bhashyam Ayyangar for respondents in No. 943.

BEST, J.—These two appeals are against the same decree, the appellant in No. 779 being the second defendant, and appellant in No. 943 the first defendant.

* Special Appeals Nos. 779 and 943 of 1892.

The suit was brought by plaintiff for possession of two items of land alleged to be the jenm property of plaintiff's house and demised by plaintiff's ancestor on kanom for Rs. 412-9-2 to a former karnavan of defendants 2 to 15 in Kollam 1040 (1864–65). Plaintiff's case is that on the land being sold (in 1874) in execution of decree in original suit No. 232 of 1868, obtained against plaintiff's father, it was purchased by first defendant's late karnavan Raman Nambiar *benami* for plaintiff's mana (house), the said Raman Nambiar having been appointed by plaintiff's mother manager of plaintiff's mana, plaintiff being an infant aged two years in 1048 (1872–73) when his father died; that Raman Nambiar continued as such manager till 1054 (1878–79), when first defendant was appointed as his successor and is still the kariastan; that in 1064 (1888–89) when the kanom was renewed to second defendant at the advice of the first defendant, the plaint items were fraudulently excluded. Hence this suit.

The first defendant denied that either his karnavan or himself ever managed on behalf of plaintiff's mana, and pleaded that the purchase in 1874 was made by his karnavan with his own money and on account of his own tarwad and not *benami* for plaintiff; that the suit was opposed to sections 30 and 317 of the Code of Civil Procedure, and also bad for misjoinder of causes of action; further, that it was time-barred, and that plaintiff attained his majority more than three years before the institution of the suit.

Defendants 2 to 5 supported first defendant, and the other defendants allowed the suit to proceed *ex parte* as far as they were concerned.

The two lower Courts have concurred in finding that at the date of the purchase of the plaint property, first defendant's karnavan was managing on behalf of plaintiff's mana; that he did in fact purchase the property for the plaintiff's illom, though the money paid was first defendant's karnavan's own; that there was no adverse possession till January 1889 when plaintiff granted the renewal kanom and first defendant executed the kanom deed XXIII shortly after for the plaint lands; also, that the suit is brought within three years of plaintiff's attainment of majority, and that the cause of action did not arise till January 1889. It has further been found that the suit is not bad either for misjoinder of causes of action or under section 30 of the Code of Civil Procedure.

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The principal contention before this Court is that the suit is bad as being opposed to section 317 of the Code of Civil Procedure, which declares that "no suit shall be maintained against the certi-"fied purchaser (at a Court sale) on the ground that the purchase "was made on behalf of any other person, or on behalf of some "one through whom such other person claims."

The District Munsif held the above section to be no bar to the suit, because "the auction was held and the sale certificate "granted before the new Act (X of 1877) came into force and the "provisions of section 317 apply to a certified purchaser under the "Act." But, as well observed by MAHMOOD, J., in *Aldwell* v. *Ilahi Bakhsh*(1), section 317 of the present Civil Procedure Code has not altered in principle the rule of law contained in section 260 of the old code (VIII of 1859). The Subordinate Judge's reason for holding this suit not to fall within the prohibition contained in section 317 is because it was held in *Sohun Lall* v. *Lala Gya Pershad*(2) that section 260 of Act VIII of 1859 did not preclude a suit by a decree-holder against the certified purchaser for the purpose of establishing his right to bring the property to sale in execution as the property of the judgment-debtor, and "if so," says the Subordinate Judge "I do not see why the judgment-"debtor himself cannot bring a suit for a declaration that the "property was purchased by his agent *benami* for himself." I imagine, however, that it is this latter case that the legislature had expressly in view in enacting section 317. As observed by the Chief Justice and HANDLEY, J., in *Rama Kurup* v. *Sridevi*(3) "the object of the section is to put a stop to *benami* purchases at "execution sales, and this object can only be carried out by en-"forcing it in all cases without regard to consequences." As further observed in the same judgment, "It is not a sufficient rea-"son for declining to carry out the express terms of the section; "that to do so would be to allow a fraud to be perpetrated. The "person in whose name a purchase has been made for the benefit "and with the money of another, of course, commits a fraud in "claiming the property as his own. Nevertheless, the law says "that a suit shall not be maintained against him on the ground "that the purchase was *benami* and thus provides that his fraud

(1) I.L.R., 5 All., 478. (2) 6 N.W.P., 265.
(3) I.L.R., 16 Mad., 390.

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"shall prevail." As was also remarked in *Ramakrishnappa* v. *Adinarayana*(1) "the effect of section 317 can only be taken to "be to enable certified purchasers and those claiming under them "to avoid any arrangement made with them in regard to the "purchase in the nature of a trust."

The present, however, is not a case of benamidar pure and simple. It is found that Raman Nambiar was, at the time of the purchase, manager on behalf of plaintiff, who was an infant, and that other would-be purchasers of the property abstained from bidding, because they were given to understand that the purchase by Raman Nambiar was being made by him as such manager and on behalf of the minor. Consequently, property worth Rs. 2,000 was allowed to be knocked down for Rs. 230. Moreover, Raman Nambiar never set up any claim to the property as his own Such being the case, I do not think the first defendant can be allowed to succeed in his attempt to secure the property for himself under colour of section 317 of the Civil Procedure Code.

But first defendant is entitled to interest on the Rs. 230 decreed to him from 25th July 1874, the date of sale. The lower Courts' decrees will, therefore, be modified by directing plaintiff to pay to first defendant interest at 6 per cent. per annum from 25th July 1874 to date of payment on the Rs. 230 decreed to first defendant. Plaintiff and first defendant will pay each other costs of the appeal proportionate to the amount allowed and disallowed.

Second defendant's appeal No. 779 is dismissed with costs.

MUTTUSAMI AYYAR, J.—I come to the same conclusion. The question for determination in these second appeals is whether upon the facts found the decision of the Courts below is correct. The substantial parties to this suit are the son of the execution-debtor in original suit No. 232 of 1868 and the representative of the certified purchaser at the Court sale held in execution of the decree passed therein. It is provided by section 317 of the Civil Procedure Code that no suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or of some one through whom such other person claims. Although Act VIII of 1859 was in force when the sale took place in the present case, section 317 has not,

(1) I.L.R., 8 Mad., 511.

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as observed in *Aldweil* v. *Ilahi Bakhsh*(1) altered in principle the rule of law contained in section 260 of Act VIII of 1859. That rule is, *not* that a *benami* purchase is void altogether, but that it shall not be available as a ground of action against a certified purchaser. The Privy Council held in *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya and Shamapuddo Bandopadhya*(2) that when the certified purchaser is the plaintiff, the real owner, if in possession, and if he honestly obtained that possession, may rely on the *benami* purchase as a ground of defence. It was also pointed out by this Court in *Ramakrishnappa* v. *Adinarayana*(3) that a *benami* purchase is not invalid even as a ground of claim as against defendants who are neither certified purchasers nor claim under them. Another limitation of the rule is that indicated by the second paragraph of section 317, viz., that the protection vouchsafed to a certified purchaser does not extend to cases of fraud. The suit from which these second appeals arise was brought against the anandravan of the certified purchaser, and the ground on which the Courts below rest their decision is that the plaintiff is the beneficial owner, and that the certified purchaser under whom the first defendant claims is *benami* purchaser or his trustee. This ground of decision is inconsistent with the effect of section 317 which is described in *Ramakrishnappa* v. *Adinarayana*(3) as enabling the person claiming under the certified purchaser to avoid any arrangement made regarding the *benami* purchase. If the facts found disclosed a *benami* purchase and nothing more, the appeals must prevail. But it is also found that Raman Nambiar was, at the time of the Court sale, managing the affairs of respondent's illom as its agent, and that he bought the land as such, though he advanced the purchase money on the understanding that he was to be repaid. It is also found, as a fact, that the market value of the land in dispute was Rs. 2,000, whilst it was bought at the Court sale for Rs. 230. The District Munsif observes that there is strong evidence to show that numerous persons who went to bid at the Court sale were dissuaded from doing so by Raman Nambiar, who represented to them that he was buying the land for the use of respondent's illom. It is also found that Raman Nambiar continued to be the

(1) I.L.R., 5 All., 478. (2) L.R., 2 I.A., 154.
(3) I.L.R., 8 Mad., 511.

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agent of the illom till his death, and that after him, the first defendant was agent until the date of the controversy which resulted in this litigation. Until 1889, the kanom originally granted by the illom was outstanding, and it does not appear that Raman Nambiar ever asserted his title to the land in dispute, or that the first defendant asserted the right of his tarwad to it prior to 1889. Under these circumstances, I consider that the decision of the Courts below can be supported on the ground that Raman Nambiar bought the land as agent of plaintiff's illom subject to a charge in his favour for the amount advanced by him, and that until 1889 the land was treated as the property of the illom; otherwise an agent would be enabled to make a profit out of his principal's property, which he intended to deal with as agent, and continued to do so till 1889, and thereby to turn the understanding on which his name was inserted in the certificate and the land was since held into a means of perpetrating fraud on his principal. I also think that interest should be awarded on Rs. 230 in the decree proposed.

I concur with my learned colleague on the other questions raised on second appeal and in the decree proposed by him.

APPELLATE CIVIL.

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

1893. Nov. 1, 2, 8. Dec. 12.

NARASIMHA RAZU (PLAINTIFF No. 1), APPELLANT,

v.

VEERABHADRA RAZU AND OTHERS (DEFENDANTS Nos. 2 and 3 and PLAINTIFF No. 2), RESPONDENTS.*

Hindu law—Inheritance—Illatom adoption—Sapratibandha property.

There is no evidence that the custom of *illatom* adoption exists among the Kondarazu caste of the Vizagapatam district. *Sapratibandha* (liable to obstruction) property vests in the heirs in existence at the time the inheritance opens, and is not subject to variation by the subsequent birth of any co-heir.

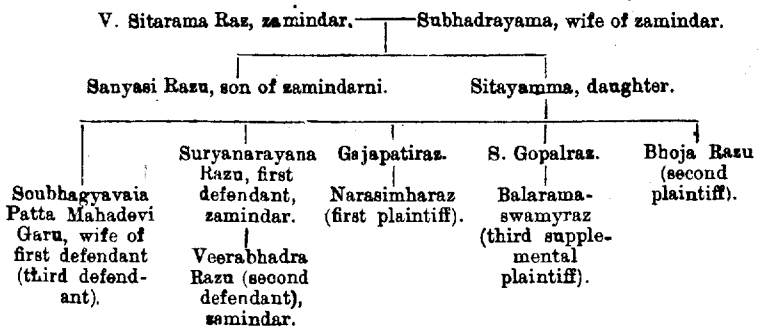
APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in original suit No. 3 of 1890.

* Appeal No. 85 of 1892.

The facts of the case appear sufficiently for the purpose of this report in the following judgment of the District Judge :—

"The facts of the case as set forth in the plaint are as follows.

"The parties to the suit are related as shown in the pedigree "given below :



"Sri Rajah Vyricherla Sitaramarazu Garu possessed the zamin- "dari estate of Kurupam and some movable property and died in "1830. At the time of his death there were living his widow "Sitayama, his son Sanyasi Razu, and two daughters Sitayama "and Gangayama. This Sanyasi Razu lived only for fifteen days "after the death of his father. The whole of the Kurupam "zamindari, therefore, vested in his mother, who died in 1841, "being in possession of the estate until the date of her death. "In 1835, Subhadrayama Garu married her daughter Sitayama "Garu to one Silavamsam Sanyasi Razu Garu, an inhabitant of "Pachipenta. She constituted him her *illatam* son-in-law, and as "such his sons would be heirs to the family property.

"At the time of the death of Subhadrayama Garu, the first "defendant had been born to Sitayama Garu, subsequently Gaja- "pati Raz, father of first plaintiff, the second plaintiff, and one "Gopal Razu were born. This Gopal Razu died without issue. "As the first defendant was, at the time of the death of Sub- "hadrayama Garu (1841) a minor, the estate was taken under "the Court of Wards, and was managed by them until 1856, "when the estate was handed over to the first defendant, he having "then attained majority, and as he was the senior member of the "family.

"Since 1856, first defendant, as the head of the family, has "managed the estate. Plaintiffs were living jointly with the "defendants. About seven or eight months ago first defendant

"purchased the Chemudu zamindari, and got the sale-deed executed "in the name of his son, the second defendant. This property "having been purchased with joint funds, all the members of the "family are entitled to a share in it. Accordingly first plaintiff "demanded a share in this, as well as in the other properties, but "the first defendant refused to give any share. The second plaintiff "brought a pauper suit in respect of the share due to him in "original suit No. 19 of 1879 on the file of this Court; but his "suit failed, as second plaintiff was found not to be a pauper. "Hence the suit for partition of the properties mentioned in the "schedules annexed to the plaint.

"First defendant's answer is: —The zamindari of Kurupam is "an impartible zamindari, governed by the rule of primogeniture. "The late Subhadrayama took the first defendant in adoption in "1839, with the permission of her late husband, and plaintiffs are "not entitled to any share.

"As at the time of the death of Subhadrayama, there were no "*sapindas* or *samanodakas* belonging to the *legitimate* branch of the "Vyricherla family; first defendant as the only sister's son of "the last full owner then in existence had the exclusive right to "inherit the zamindari, irrespective of his right as the adopted son.

"Subhadrayama never married her daughter to Sanyasi Razu "Garu with the object that he should be her *illatam* son-in-law, "and that his issue should inherit the zamindari. Even if she had "such an intention, it cannot have any effect, being opposed to "custom and Hindu law.

"Plaintiffs and first defendant never constituted an undivided "family. The purchase referred to in paragraph 10 of the plaint "was from second defendant's own funds. Even if that is not "proved, plaintiffs cannot claim anything in this, though they may "be found entitled to the other estate, inasmuch as the purchase "was made from the savings of the zamindari, and so formed "the exclusive property of the first defendant. The suit is barred "by limitation. This Court has no jurisdiction to try the suit in "respect of Gumma Mutta and Konda Mutta. The schedules are "incorrect. The plaint is not properly stamped. The suit so far "as second plaintiff is concerned is *res judicata*. The suit is barred "by limitation. The second defendant contended that there is no "cause of action against him, and the third defendant disclaimed

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"all interest, and stated that she merely acted as guardian of the "second defendant, her son.

"The following issues were framed :—

"(1) Is the suit barred by limitation ?

"(2) Is the claim of second plaintiff *res judicata* ?

"(3) Was first defendant adopted by Subhadrayama Garu as "alleged in paragraph 3 of first defendant's written "statement, and, if so, is such adoption invalid for "the reasons stated by the plaintiff ?

"(4) In case the *factum* of adoption is proved, are plaintiffs "entitled to question the validity of this adoption, or "are they precluded from doing so, either by estop-"pel, by conduct or by lapse of time ?

"(5) In the event of its being found that the first defendant "was not duly adopted, whether the right under "which first defendant succeeded to the Kurupam "zamindari, which vested in first defendant in 1841 "was partially divested by the subsequent birth "of brothers: in other words, did the brothers "become, on their birth, coparceners with him (first "defendant) ?

"(6) Is there a valid custom among the Kondarazu caste of "the Vizagapatam district to take an *illatam* son-in-"law as alleged by plaintiff ?

"(7) Did Subhadrayama take Silavamsam Sanyasi Razu in "1835 as an *illatam* son-in-law in accordance with "such custom ?

"(8) Is the zamindari partible and governed by the ordinary "Hindu law, or is it impartible and governed by the "rule of primogeniture ?

"(9) Has the Court jurisdiction with regard to the plaint "Muttahs—Gumma Mutta and Conda Mutta—"situated in the jurisdiction of the Agent to the "Governor at Vizagapatam ? "

On the fifth issue the District Judge found that the right under which the first defendant succeeded to the zamindari was not partially divested by the subsequent birth of brothers, and that under Hindu law an estate cannot be thus divested when the estate is taken by obstructed inheritance. On the sixth and seventh issues the Judge found in the absence of evidence that no such

custom as that alleged by the plaintiff existed, and dismissed the suit.

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The first plaintiff preferred this appeal.

Mr. *Micheli* and *Rama Rau* for appellant.

Subramanya Ayyar for respondents Nos. 1 and 2.

JUDGMENT.—We are of opinion that the findings of the District Judge on the fifth, sixth and seventh issues recorded by him are correct and sufficient for the dismissal of the plaintiff's suit.

These issues are as follows :—

"(5) In the event of its being found that the first defendant "was not duly adopted, whether the right under "which first defendant succeeded to the Kurupam "zamindari, which vested in first defendant in 1841 "was partially divested by the subsequent birth of "brothers : in other words did the brothers become on "their birth coparceners with first defendant ?

"(6) Is there a valid custom among the Kondarazu caste of "the Vizagapatam district to take an *illatam* son-in-"law as alleged by plaintiff ?

"(7) Did Subhadrayama take Silavamsam Sanyasi Razu in "1835 as an *illatam* son-in-law in accordance with "such custom ? "

As to the sixth issue there is no evidence whatever and no attempt has been made by the plaintiffs to prove that the custom of *illatam* exists among the Kondarazu caste of the Vizagapatam district. Plaintiff's first witness says, however, that before the marriage of Sanyasi Razu with Sitayama, the daughter of Subhadrayama (the widow of the former zamindar) Subhadrayama told Sanyasi Razu that "if his wife had male child she would hand "over the zamindari to that child." Our attention is called to a statement recorded as made by second defendant's third witness Gattupalli Jagamma in the following words :— "Sitayama's hus-"band alone was taken as *illatam*. Gangayama's husband was not "taken as *illatam*." Ganyama was, it must here be observed, the younger sister of Sitayama. This statement in record is made in answer to the Court's question "was Gangayama's husband also "taken as *illatam*." This is in a deposition taken by the District Munsif of Parvatipur. The witness was a woman and uneducated. She had not stated that Sitayama's husband was taken as *illatam*. It is therefore difficult to understand how the witness came to be

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asked if Gangayama's husband was *also* taken as *illatam* and this after her examination had been closed. As is contended on behalf of first and second respondents, the conduct of the parties has been quite inconsistent with the custom of *illatam*: for if Sanyasi Razu had been in fact adopted under that custom, he himself should have succeeded to the zamindari which he admittedly never claimed to have done even as against Subhadrayama. There can be little doubt, we think, that the alleged taking of Sanyasi Razu as an *illatam* son-in-law is not true.

Failing this contention, it is clear that, if plaintiff's are entitled at all, it is as the last zamindar's sister's sons, *i.e.*, as *bandhus*, who take by inheritance and not by survivorship. The property was, therefore, *Sapratibandha* (liable to obstruction) which vests in the heirs *in existence at the time when the inheritance opened* and is not subject to variation by the subsequent birth of any co-heir. The case in *Krishna* v. *Sami*(1) referred to by the appellant's counsel was one relating to *Apratibandha* or unobstructed property.

It is clear from the plaint that when the suit was instituted the plaintiffs had overlooked this obstacle in their way: for in paragraph 7 they speak of first defendant alone having been born before Subhadrayama's death, and of first plaintiff's father and his other two brothers and sisters as born subsequently. That such was the fact is also seen from exhibit LXVI, a petition presented by Sitayama to the Governor's Agent on 21st September 1841, in which she speaks of herself as the mother of *one son alone* (*eka putra*). This is evidence entitled to more weight than the statements of plaintiffs' first and second witnesses. The worthlessness of the evidence of plaintiffs' first witness is moreover apparent from the answers given by him in cross-examination.

As to the adoption of first defendant by Subhadrayama, the evidence as to her being authorized by her husband to make the adoption is very far from satisfactory. Moreover, her husband was not the last male owner as his son (a child of four years) survived him for a month (more or less). There can be no doubt, however, that Subhadrayama did herself take the first defendant and treat him as the heir to the zamindari. Though it may be doubted whether this adoption was made under legal authority, there can be no doubt that it was recognized, and that the late first

(1) I.L.R., 9 Mad., 64.

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defendant was in possession on the strength of it from the date of Subhadrayama's death in 1841 till the institution of the present suit in 1890. According to first plaintiff's own evidence the property which stood in his father's name came to himself *exclusively* and first defendant was given no share in it. First plaintiff admits further that till the institution of this suit he described himself by his father's house name Silavamsam, and not as Vyricherla which is the description applicable to the zamindar's family. Plaintiff's third witness, who speaks to the maintenance of the late first defendant's brothers and sisters by that defendant, says that each of the brothers got half a measure of rice daily which first defendant "stopped when he was displeased," and that "some "servants got rations like the brothers." There is no evidence on behalf of plaintiffs that this maintenance was claimed as a right and that the grant of it was not an act of brotherly kindness on the part of first defendant. The Judge is right, therefore, in holding the suit to be time-barred.

A consideration of the issue whether the zamindari is partible is unnecessary under these circumstances, as on the finding that first plaintiff (the only appellant) was not born when the property vested in the late first defendant, plaintiffs' suit must fail. First defendant thus became the exclusive owner and on his death the property belongs to his son, now the sole respondent, as the nearer heir than appellant.

The appeal must be dismissed with costs.

APPELLATE CIVIL.

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

VELU PILLAI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

GHOSE MAHOMED AND OTHERS (DEFENDANTS), RESPONDENTS.*

1893. September 2 October 5

Limitation—Limitation Act—Act XV of 1877, sched. II, art. 85—Mutual account.

To constitute a mutual account there must be transactions on each side creating independent obligations on the other, and not merely transactions which create

* Appeal No. 89 of 1892.

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obligations on the one side, those on the other being merely complete or partial discharges of such obligations. Thus an account consisting of entries of payments made by one party in reduction of his debt to the other, and of payments made by the latter on behalf of the former party for the same purpose is not a mutual account within the meaning of art. 85 of sched. II of the Limitation Act.

Hirada Basappa v. *Gadigi Muddappa*(1) cited and followed.

A shifting balance is a test of mutuality, but its absence is not conclusive proof against mutuality.

APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in original suit No. 33 of 1890.

The plaintiffs sued as heirs to their father, a broker, who had had continuous dealings with the defendants, to recover from them the sum of Rs. 3,016-1-6. The plaintiffs' accounts (with which the defendants' accounts agreed) ran from the 23rd September 1885, on which date a balance was struck and a settlement made in favour of the plaintiffs, to the 7th October 1890, on which date they showed a balance of Rs. 3,016-1-6 in the plaintiffs' favour, the sum now sued for. Payments had been made from time to time and balances struck on both the plaintiffs' and defendants' accounts, but with one small exception in 1885 the account was invariably in favour of the plaintiffs. The District Judge held that the plaintiffs' account did not fall under article 85, schedule II of the Limitation Act, since to bring a case within that article there must be a fluctuating balance, at times in favour of one party and at times in favour of the other, and in the present case the solitary item referred to above being beyond the period of limitation, and therefore not availing the plaintiffs' case, the amounts prior to the 3rd November 1887 were barred, and passed a decree in favour of the plaintiffs for the amounts due between the 3rd November 1887 and the close of the accounts.

The plaintiffs preferred this appeal.

Rama Rau for appellants.

T. Rangachariar for respondents.

JUDGMENT.—The only point argued in this appeal is as to the correctness of the Judge in holding that the account on which plaintiffs rely is not a mutual account within the meaning of article 85 of schedule II of the Limitation Act.

The reason assigned by the District Judge is that, with one trifling exception, and that beyond the period of limitation, the

(1) 6 M.H.C.R., 142.

VELU PILLAI v. GHOSE MAHOMED.

account has been invariably in favour of plaintiffs. He says: "although it may not be necessary in order to bring the case "within article 85 of Act XV of 1877 that there should be actual "demands, it is necessary that the balance should fluctuate, being "at times in favour of one party and at times in favour of the "other," and in support of this proposition he refers to *Harrandas Hemraj* v. *Vissandas Hemraj*(1) and *Hajee Syud Mahomed* v. *Mussamut Ashrufoonnissa*(2).

In the former case it was said by Sir Charles Sargent, C.J., that the corresponding clause of Act IX of 1871 appeared to have been intended to apply to "cases where the course of business "has been of such a nature as to give rise to reciprocal demands "between the parties; in other words, where the dealings between "the parties are such that sometimes the balance may be in favour "of one party and sometimes of the other." The meaning of which is not that there must have been such a shifting balance, but such was a possible and likely incident of the mutual transactions with regard to which the account was kept.

The decision in *Hajee Syud Mahomed* v. *Mussamut Ashrufoonnissa*(2) is authority for the proposition that the mere fact of the balance having been in favour of the defendant on some occasions is not sufficient to constitute the account a "mutual, open and current account."

A shifting balance may, no doubt, be a test of mutuality, but its absence cannot be taken to be conclusive proof against mutuality.

The reason assigned by the Judge for his finding is therefore not valid; but, nevertheless, his decision is correct. The rule to be applied is to be found in the judgment delivered by the late Mr. Justice Holloway in *Hirada Basappa* v. *Gadigi Muddappa* (3). "To be mutual there must be transactions on each side creating "independent obligations on the other, and not merely transac-"tions which create obligations on the one side, those on the other "being merely complete or partial discharges of such obligations." The amounts credited to defendant in the account kept by plaintiffs in the present case are merely payments made in reduction of the debt due from defendants to plaintiffs, and the two entries of amounts due to defendants from plaintiffs for oil, &c., pur-

(1) I.L.R., 6 Bom., 134. (2) I.L.R., 5 Calc., 759. (3) 6 M.H.C.R., 142.

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chased from defendants are also credited merely as items received in partial discharge of defendants' debt to the plaintiffs. We cannot accede to the contention that they are evidences of reciprocal demands. They are casual merely and not such as would imply a regular course of reciprocal dealings.

The lower Court's decision is, therefore, correct, and this appeal must be dismissed with costs.

Objection has been filed by respondent against that part of the lower Court's decree which awards to plaintiffs costs on the whole amount sued for, instead of limiting the same to the amount decreed. The general rule is that if a plaintiff recovers a less amount than he claimed in the plaint, his costs should be apportioned according to the amount recovered and not to the sum claimed. *Mudhan Mohun Doss* v. *Gopal Doss*(1). The Judge has given no reason for departing from this rule. The decree will be modified by awarding costs to plaintiffs only on the amount decreed. The circumstances of the case are such as to justify disallowance of costs to the second defendant (respondent).

In allowance of this objection the lower Court's decree will be modified as above.

There will be no order as to costs of this memorandum of objections.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

1889. September 22, 25.

KUNHANUJAN (DEFENDANT No. 8), PETITIONER,

v.

ANJELU (PLAINTIFF), RESPONDENT.*

Transfer of Property Act (Act IV of 1882), s. 108, cl. (j)—Lessor's right to sue both lessee and his transferee.

The provision in section 108 of the Transfer of Property Act that a lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and that the lessee shall not, by reason of such transfer, cease to be subject to any of the liabilities attaching to the lease, does not prevent the transferee being also liable to the lessor, who may at the same time sue the lessee upon his express covenant and the transferee upon the privity of estate, though he can have execution against one only.

(1) 10 M.I.A., 563.

* Civil Revision Petition No. 414 of 1892.

KUNHANUJAN v. ANJELU.

PETITION under section 25 of Act IX of 1887 praying the High Court to revise the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in Small Cause suit No. 65 of 1892.

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

The Subordinate Judge gave a decree in favour of the plaintiff, and the eighth defendant preferred this appeal.

Sundara Ayyar for petitioner.

Sivasami Ayyar for respondent.

JUDGMENT.—This was a suit for house-rent. The house was let to the first defendant under a kulichit, which he executed on the 23rd September 1888. The first defendant assigned the lease to one Ali Koya, and defendants 2 to 7 are his heirs. The eighth defendant purchased Ali Koya's interest at a Court sale. The plaintiff claimed Rs. 210 as the balance of rent due by all the defendants. The eighth defendant did not enter into possession, and stated that he did not desire to take possession under his sale certificate, though it was his intention to insist on his claim as purchaser so far as the improvements made by Ali Koya are concerned. The Subordinate Judge held, on the Small Cause side, that, as the principal lessee, the first defendant, was liable for rent, that defendants 2 to 7 were also liable, as Ali Koya's heirs, from date of Ali Koya's purchase, and that the eighth defendant was liable for rent from the date on which he purchased Ali Koya's interest. The eighth defendant is the petitioner in revision before me, and it is contended for him that unless he enters into possession as purchaser, he is not liable for rent under section 108, clause (*j*) of Act IV of 1882. It is not denied that under the English law the assignee of a lease may be sued on covenants which run with the land, although he has not taken actual possession of it, and that a covenant to pay rent is a covenant running with the land (Woodfall's Landlord and Tenant, page 239). The reason for the assignee's liability is the privity of estate created by the assignment as between heir and the original lessor, and the privity arises from the vesting of the assignor's interest in the assignee. The question, therefore, is whether, as argued on petitioner's behalf, section 108, clause (*j*) of Act IV of 1882 renders this view inapplicable in this country. That clause provides

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that the lessee may transfer absolutely or by way of mort gage or sub-lease the whole or any part of his interest in the property, and the lessee shall not, by reason of such transfer, cease to be subject to any of the liabilities attaching to the lease. But from this it does not follow that the transferee is not also liable. The lessor may at the same time sue the lessee upon his express covenant, and the assignee upon the privity of estate, though he can have execution against one only. (Woodfall's Landlord and Tenant, 11th Edition, 238). I do not, therefore, consider that this petition can be supported, and I dismiss it with costs.

APPELLATE CIVIL.

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

1893. October 12.

VENKATANARASIMHA NAIDU (PETITIONER),

v.

SURANNA (RESPONDENT).*

Rent Recovery Act—Madras Act VIII of 1865, *s.* 76—*Civil Procedure Code, ss.* 4, 622.

Orders passed by a Collector under the Rent Recovery Act are not open to revision under s. 622 of the Civil Procedure Code. *Velli Periya Mira* v. *Moidin Padsha*(1) followed.

PETITIONS under section 622 of the Civil Procedure Code praying the High Court to revise the order of C. Venkatajugga Row, Assistant Collector of Kistna, dated 9th March 1892, passed in summary suits Nos. 100 and in others.

The petitioner, a zamindar, applied under section 10 of the Rent Recovery Act to eject a tenant on the ground that he had not, in accordance with a decree of the Assistant Collector given in a suit to enforce the acceptance of patta brought by the petitioner against the tenant, accepted patta and presented a muchilika as directed. The Assistant Collector rejected the application, and the zamindar presented this petition under section 622 of the Civil Procedure Code.

Pattabhirama Ayyar for appellant.

Seshagiri Ayyar for respondent.

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* Civil Revision Petitions Nos. 489 of 1892, &c. (1) I.L.R., 9 Mad., 332.

VENKATA-NARASIMHA NAIDU v. SURANNA.

JUDGMENT.—The preliminary point in this case is whether orders passed under Madras Act VIII of 1865 by a Collector are open to revision under section 622 of the Code of Civil Procedure.

The question was answered in the negative in *Velli Periya Mira* v. *Moidin Padsha*(1), which was followed in *Appandai* v. *Srihari Joishi*(2).

It has now been contended that the revision mentioned in section 76 of Act VIII of 1865 (Madras) means revision by the Court which made the order and not revision by a superior Court. We are unable thus to limit the scope of the word by introducing words which are not to be found in the section.

As to the contention that Act VIII of 1865 is a local Act and cannot override the provisions of section 622 of the Code of Civil Procedure by the powers conferred on this Court under the Letters Patent, we need only refer to section 4 of the Code of Civil Procedure.

We do not see sufficient ground for dissenting from the decision in *Velli Periya Mira* v. *Moidin Padsha*(1).

This petition is dismissed with costs.

APPELLATE CIVIL.

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

1893. October 30.

TIRTHA SAMI (PLAINTIFF), APPELLANT,

v.

SESHAGIRI PAI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation—Limitation Act (Act XV of 1877), *s.* 14—*Deduction of time during prosecution of suit with due diligence—Defect of jurisdiction—Other cause of a like nature.*

Where a previous suit by the same plaintiff against the same defendant has failed by reason of misjoinder of causes of action and parties, the plaintiff in a second suit is not entitled to the extra period of limitation allowed by section 14

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(1) I.L.R., 9 Mad., 332. (2) I.L.R., 16 Mad., 451.

* Second Appeal No. 639 of 1892.

TIRTHA SAMI v. SESHAGIRI PAI.

of the Limitation Act, since the cause of failure of the previous suit is not due to 'defect of jurisdiction' in the Court which entertained the suit, nor is it a cause 'of a like nature' thereto. *Deo Prosad Singh* v. *Pertab Kairee*(1) dissented from.

SECOND APPEAL against the decree of W. C. Holmes, Acting District Judge of South Canara, in appeal suit No. 440 of 1889, confirming the decree of U. Babu Rao, District Munsif of Udipi, in original suit No. 320 of 1888.

The facts of the case appear sufficiently for the purpose of this report from the following judgment of the District Judge :—

"The plaintiff, the present sami of the Puttige matt, sued to "set aside a number of decrees passed against the Puttige matt "property during the incumbency of Vijayendra Tirtha Sami, "who was the *de facto* sami of the matt between the death of "Samuthendra Tirtha Sami, who had nominated Vijayendra Tirtha "Sami as his successor, and his (the plaintiff's) getting possession "of the office of sami and of the lands attached to the matt under "the High Court decree in appeal suit No. 66 of 1881, dated "26th October 1883. The plaintiff contended that the suits were "fraudulent and collusive, and denied that the money was bor- "rowed or the goods purchased for the purposes of the matt, and "asserted that Samuthendra Tirtha Sami and Vijayendra Tirtha "Sami had no power to do anything connected with the matt "after the samis of the seven other matts deposed Samuthendra "and appointed the plaintiff as his successor.

"The lower Court has held that all the suits are barred. The "lower Court held that article 95 of schedule II of the Limitation "Act governs the cases. That article, it is argued in this appeal, "does not apply. The article relates to a suit 'to set aside a "decree obtained by fraud,' and, assuming that the only ground "for setting the decrees against the matt property aside would be "fraud and collusion, the article would clearly apply, and I do "not think that the decrees can be questioned on any other ground. "I think article 95 governs the cases.

"It is contended in this appeal that the suits would not be "barred even if the article applies; because to the three years "allowed by article 95 there must be added under section 14 of "the Limitation Act the period (two years, five months and

(1) I.L.R., 10 Calc., 86.

TIRTHA SAMI v. SESHAGIRI PAI.

"twenty-six days) during which the plaintiff was prosecuting a "suit against all the defendants jointly. That suit (original suit "No. 11 of 1886) was filed in the Subordinate Court on the 13th "February 1886 and was dismissed, as it was held the defendants "were wrongly joined in the same suit, and in appeal to the High "Court (No. 139 of 1887) the Subordinate Judge's decree was "confirmed on the 9th August 1888.

"Section 14 of the Limitation Act directs that the Court should "exclude the time during which the plaintiff has been prosecuting "against the defendant another civil proceeding which the 'Court "from defect of jurisdiction or other cause of a like nature' is "unable to entertain. In the present case the plaintiff sued a "number of defendants together. It was held that there was a "separate cause of action against each defendant, and no joint cause "of action, and the suit was therefore dismissed. The question is, "should the time he was prosecuting that suit be excluded in com- "puting the period of limitation for the suits brought against each "defendant separately. In *Ram Subhag Das* v. *Gobind Prasad*(1) "it was held that the plaintiff could not count in his favour the "period during which the plaintiff was prosecuting a suit which "could not be entertained owing to misjoinder of parties (plaintiffs). "In *Deo Prosad Singh* v. *Pertab Kairee*(2), where there had been "a misjoinder of causes of action in a suit, it was held that in a sub- "sequent suit the period during which the former suit was being "prosecuted was to be excluded, misjoinder of causes of action "being held to be of 'like nature' with 'defect of jurisdiction.' "In *Jema* v. *Ahmad Ali Khan*(3) this Calcutta decision was not "followed. A plaintiff sued without joining his partner as party "in the suit and the suit was dismissed. It was held that in a "subsequent suit the period during which the former suit was "prosecuted could not be excluded, because there was no defect of "jurisdiction or 'other cause of a like nature,' which was held to "mean something analogous to defect of jurisdiction. The "Madras High Court has not as yet given a decision on the point, "and it is, if not incumbent, at least advisable, that this Court "should follow the latest ruling of the other High Courts. Besides, "to interpret inability to entertain a suit for defect of jurisdic- "tion or other like cause, to include inability to decide a suit in

(1) I.L.R., 2 All., 622. (2) I.L.R., 10 Calc., 86. (3) I.L.R., 12 All., 207.

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"consequence of misjoinder of causes of action or of parties or in "consequence of some other reason that prevents the suit being "decided on its merits, would be, I think, to put a wider meaning "on the words used in the statute than would be in accordance "with the principles of interpretation usually applied to the inter- "pretation of modern statutes. I think, though with considerable "hesitation, that the suits should be held to be barred."

The plaintiff preferred this second appeal.

Subramanya Ayyar and *Ramachandra Rau Saheb* for appellant.

Pattabhirama Ayyar for respondents.

JUDGMENT.—Assuming that the suit is one to which the six years' rule applies, we do not think that the plaintiff can take advantage of section 14 of the Limitation Act, inasmuch as his previous suit against the same defendant failed, not by reason of any want of jurisdiction on the part of the Court, but by reason of misjoinder of causes of action and parties. In our opinion that is not a cause of a like nature within the meaning of the section. We are unable to agree with the decision in *Deo Prosad Singh* v. *Pertab Kairee*(1). The Courts of Allahabad and Bombay seem to take the same view as we do.

The appeal is dismissed with costs.

APPELLATE CIVIL—FULL BENCH.

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

1892. October 10. 1893. November 23. 1894. February 6.

PALAMALAI PADAYACHI AND ANOTHER (DEFENDANTS, 1 AND 4), APPELLANTS,

v.

SHANMUGA AUSARI (PLAINTIFF), RESPONDENT.*

Hereditary office—(Madras) Regulation VI of 1831, *s.* 3—*Jurisdiction of Revenue Courts.*

A suit for 'Maniam' lands attached to the hereditary office of village carpenter is barred by the operation of section 3 of Regulation VI of 1831.

APPEAL against the decree of R. S. Benson, District Judge of South Arcot, in appeal suit No. 254 of 1890, reversing the decree

(1) I.L.R., 10 Calc., 86.

* Appeal against Order No. 94 of 1891.

of P. Subramaniya Pillay, District Munsif of Vridhachalam, in original suit No. 694 of 1889.

PALAMALAI PADAYACHI v. SHANMUGA AUSARI.

The plaintiff brought a summary suit against the defendants in the Court of the Head Assistant Collector under Regulation VI of 1831 for the possession of the plaint lands on the ground that he was the carpenter of the village of Kandiyankuppam, and that the lands were 'Maniam' lands attached to his office as carpenter. The Head Assistant Collector found that the defendants' occupation was unlawful, and that the plaintiff, who was the village carpenter, was the proper person to be in possession of them, *i.e.*, of the 'Maniam' lands.

An appeal was made to the Collector, and he confirmed the Head Assistant Collector's decree, but remarked that there was no means of carrying out a decree under Regulation VI of 1831.

On the 23rd August 1889 the plaintiff applied to the Head Assistant Collector to be put in possession in accordance with the decree in the above suit, but the Head Assistant Collector referred the plaintiff to the Civil Court.

The plaintiff then brought his suit in the lower Court to recover possession of the lands and Rs. 30 as mesne profits, but the District Munsif dismissed it on the ground that the land was unenfranchised service inam land and that, under Regulation VI of 1831, claims regarding such lands are not cognizable by Civil Courts.

Plaintiff appealed on the ground that the Revenue authorities having decided the right in plaintiff's favour, the defendants were liable to be ejected, and that the suit, being virtually one to enforce the order of the Head Assistant Collector under the Regulation, was maintainable.

The District Judge decreed in favour of the plaintiff, and the defendants preferred this appeal.

R. Subramanya Ayyar for appellants.

Pattabhirama Ayyar for respondent.

This appeal came on for hearing before Muttusami Ayyar, J., and Wilkinson, J., on the 10th October 1892, when the Court made the following order of reference to Full Bench:—

We are unable to reconcile the decision in *Ravutha Koundan* v. *Muttu Koundan*(1) with the provisions of section 3 of

(1) I.L.R., 13 Mad., 41.

PALAMALAI PADAYACHI v. SHANMUGA AUSARI.

Regulation VI of 1831 and with the decision in the *Collector of Kistna District* v. *Chinnamrazu*(1). The present suit is one for the possession of the emoluments of a certain hereditary office, and such a suit is apparently barred by the operation of section 3, Regulation VI of 1831. We therefore refer the question whether the suit is so barred to the Full Bench.

This appeal having come on for hearing before the Full Bench on 23rd November 1893, the Court delivered the following

JUDGMENT:—This is clearly a suit within section 3 of the Regulation, and we must, therefore, answer the question in the affirmative. There is no necessary conflict between the two cases cited in the order of reference.

This appeal coming on for hearing before a Division Bench consisting of Muttusami Ayyar and Best, JJ., the Court delivered the following

JUDGMENT:—In accordance with the opinion of the Full Bench we set aside the decree of the District Judge and restore that of the District Munsif.

Respondent must pay appellants' costs in this Court and also in the lower Appellate Court.

APPELLATE CIVIL.

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

1893. October 17.

RAMAN (PETITIONER), APPELLANT,

v.

KUNHAYAN AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

Execution—Fraud in conducting a sale in contravention of agreement between creditor and debtor—Estoppel of judgment-debtor by previous petition.

The fact that a judgment-debtor, who petitions to have the sale in execution of the decree against him set aside on the ground of fraud and irregularity, has, in a petition made previous to the sale asking for its adjournment, made no mention of the irregularities now relied on does not create an estoppel.

Thakoor Mahatab Deo v. *Leelanund Singh*(2) followed.

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(1) 5 M.H.C.R., 360.

(2) I.L.R., 7 Calc., 613.

* Appeal against Order No. 78 of 1892.

RAMAN v. KUNHAYAN.

APPEAL against the order of the Subordinate Judge of North Malabar passed on civil miscellaneous petition No. 8 of 1892.

The petitioner, a judgment-debtor, prayed that the sale in execution of the decree passed against him might be set aside on the ground that the decree-holder, having entered into an agreement with him arranging for a settlement of the debt in lieu of the sale of the property, had nevertheless caused the property to be sold, had purchased it at a low price and had generally acted fraudulently and in contravention of the agreement. It appeared that after the execution of the aforesaid agreement, the petitioner had filed a petition for the purpose of obtaining an adjournment of the sale with a view to making arrangements for carrying out his agreement. The Court, however, had refused the petition on the ground that the date of the sale was very near.

The Subordinate Judge rejected the petition on the ground that the first petition (No. 545 of 1891) estopped the petitioner from alleging any irregularity in the sale, since no mention had been made in the said petition of the alleged arrangement between the creditor and judgment-debtor.

Ryru Nambiar for appellant.

Govinda Menon for respondents.

JUDGMENT.—The Subordinate Judge is in error in thinking that the petitioner is estopped by his previous petition No. 545 of 1891. There was no occasion for mentioning in that petition the irregularities now relied on as vitiating the sale, as that petition was filed for the purpose of obtaining an adjournment with a view to raising the money by private arrangement. In a similar case the Calcutta High Court also held that omissions in such a petition did not create an estoppel(1). We set aside the order and direct the Subordinate Judge to allow the parties to adduce evidence with reference to the alleged irregularities and to dispose of the case in accordance with law. The costs of this appeal will abide and follow the result.

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(1) I.L.R., 7 Calc., 613.

APPELLATE CIVIL.

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

1894. January, 16.

SUNDARARAJA AYYANGAR (PLAINTIFF), APPELLANT,

v.

PATTANATHUSAMI TEVAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Legal Practitioners' Act—(*Act XVIII of* 1879), *ss.* 28, 29—*Remuneration by promissory note for past professional services rendered under oral agreements—Guardian and ward—Services necessary or manifestly beneficial.*

A guardian executed a promissory note in favour of a vakil (the plaintiff) as remuneration for his past professional services rendered under oral agreements with him :

Held, that a suit upon the note was barred by ss. 28 and 29 of Act XVIII of 1879, and that, as there was no such necessity for the proceedings in question as to render the contract binding on the minors, no suit would lie against them.

SECOND APPEAL against the decree of J. W. F. Dumergue, Acting District Judge of Madura, in appeal suit No. 270 of 1892, reversing the decree of H. Krishna Row, District Munsif of Madura, in original suit No. 272 of 1891.

This was a suit upon a promissory note executed by the fourth defendant as the guardian of his sister's sons, defendants 1 to 3, for Rs. 600 alleged to be due to the plaintiff as remuneration for past professional services rendered by the plaintiff as vakil under oral agreements with the fourth defendant in certain criminal cases and proceedings which arose as follows :—

The present zamindar of Sivagunga and the late zamindar granted the villages of Tiruvelloor, Vembatore and Thavasagudy to the father of the first, second and third defendants on a perpetual cowle in August 1882. After the death of the said defendants' father in September 1887, the present zamindar granted a cowle of the village of Tiruvelloor to his own wife. Disputes arose since then between zamindar's wife backed by the zamindar and first, second and third defendants' mother, who was supported by her brother, the fourth defendant. The zamindar's wife

* Second Appeal No. 700 of 1893.

through her husband commenced to issue puttas to the tenants and collect melwaram, which the first, second and third defendants' mother through her brother, the fourth defendant, resisted. The first, second and third defendants' mother leased the village of Tiruvelloor to one Gopalsamy Naidu, who brought suit against zamindar's wife for possession in original suit No. 7 of 1890 on the file of the East Subordinate Court and obtained decree. While matters were thus progressing, two criminal cases arose out of them. The zamindar's wife's agent charged the fourth defendant's agents with carrying off the fruits of Karuvela trees in Tiruvelloor village before the Sub-Magistrate of Sivagunga. The fourth defendant engaged the plaintiff's service to defend the accused and the accused were acquitted. In the other case, while first, second and third defendants' men were taking the melwaram of Vembatoor village to the said defendants' house, the zamindar's men waylaid them near Othapoovarasu and beating them, carried off the said melwaram produce. The fourth defendant charged the zamindar's men with dacoity and the preliminary enquiry was conducted by the Head Assistant Magistrate, who committed the men to the Session Court where, however, they were acquitted. The plaintiff was engaged to prosecute the men before the Head Assistant Magistrate during the preliminary enquiry. It was mainly in connection with the plaintiff's services in these two criminal cases that fourth defendant executed the plaint promissory note. The promissory note further stated that plaintiff's services were engaged in a breach of trust case and putta transfer case against the zamindar.

The District Munsif passed a decree in favour of the plaintiff, which the District Judge reversed, on the grounds that the suit on the promissory note was barred by sections 28 and 29 of the Legal Practitioners' Act, which require all agreements for remuneration between a pleader and his client to be in writing and filed in Court, and that there was no such necessity in the case as to render the agreement of the guardian binding on defendants 1 to 3.

The plaintiff preferred this appeal.

Bhashyam Ayyangar and *Gopalasami Ayyangar* for appellant.

Sundara Ayyar for respondents.

JUDGMENT.—This was a suit upon a promissory note executed by fourth defendant as the guardian of his sister's sons, defendants

SUNDARARAJA AYYANGAR v. PATTANATHU-SAMI TEVAR.

1 to 3, for Rs. 600, alleged to be due to plaintiff as remuneration for professional services rendered by plaintiff as vakil in criminal cases and proceedings. We agree with the judge that the claim cannot be supported on the special contract evidenced by the promissory note. Sections 28 and 29 of the Legal Practitioners' Act require that such agreements should be in writing and filed in Court. It appears from the promissory note that it was executed for past services rendered under oral agreements with the fourth defendant.

It has been held that this is no bar to a decree being passed for such reasonable remuneration as may be found due on the principle of *quantum meruit*. If, therefore, the fourth defendant should be held to have had authority to bind the minor defendants 1, 2, 3 by this contract, we should have considered it necessary to call for a distinct finding as to the amount that plaintiff would be entitled to as reasonable compensation for services rendered. But no contract made by fourth defendant whether as guardian of the minors, or as their next friend can be held to be binding on them unless the services to be rendered were either necessary or manifestly beneficial to the minors. The finding of the judge is that there was no such necessity as to render the contract binding on the minors. Having regard to the objects for which the plaintiff was employed, we do not think they were necessary or manifestly beneficial to the minors. In this view of the case it is not necessary for us to express an opinion as to the competency of the minors' mother to appoint a guardian for her sons. We also observe that a decree has been passed against fourth defendant for the amount claimed by plaintiff and he has preferred no appeal.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

SHANMUGA PILLAI (DEFENDANT No. 1), APPELLANT,

v.

RAMANATHAN CHETTI (PLAINTIFF No. 2), RESPONDENT.*

1893. December 22. 1894. January 25.

Civil Procedure Code—Act XIV of 1882, *ss.* 25, 223—*Madras Civil Courts Act, s.* 12 —*Jurisdiction of Munsif's Court—Execution of decree of superior Court.*

As in suits so in execution proceedings the competent *forum* is ordinarily that indicated by s. 12 of the Civil Courts Act, but in the five cases mentioned in s. 223 of the Civil Procedure Code special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction, the object whereof is to secure to judgment-creditors in certain cases a special facility or convenience. The condition as to the jurisdiction of the Subordinate Court to which a suit can be transferred under s. 25 of the Code of Civil Procedure is not laid down in s. 223 of the Code, which relates to transfers of applications for execution of decrees, and was omitted therefrom for the special reasons mentioned therein. *Narasayya* v. *Venkatakrishnayya*(1) followed. *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee*(2) and *Durga Charan Mojumdar* v. *Umatara Gupta*(3) dissented from.

APPEAL against the order of W. F. Grahame, District Judge of South Arcot, dated 30th August 1891, passed on civil miscellaneous appeal No. 20 of 1891, confirming the order of the District Munsif of Chidambaram passed on execution petition No. 354 of 1891 and miscellaneous petitions Nos. 503 and 598 of 1891 (original suit No. 19 of 1888 on the file of the District Court of South Arcot).

The facts of this case were as follows:—

The defendant had mortgaged to the plaintiff certain property, only half of which belonged to him, the other half belonging to his brother, one Theagaraja Pillai, who instituted a suit for partition and had his share delivered to him. The plaintiff instituted a suit and attached and sold the defendant's share of the property, the decree in the said suit having been, on the plaintiff's petition, sent by the District Court to the District Munsif's Court for execution. When the plaintiff applied for attachment of the defendant's other property, the defendant presented a petition demanding that the remainder of the property

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* Appeal against Appellate Order No. 70 of 1892.

(1) I.L.R., 7 Mad., 397. (2) I.L.R., 16 Calc., 457. (3) I.L.R., 16 Calc., 465.

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which he had mortgaged should be first sold before his other property was proceeded against. On both the Lower Courts rejecting this petition, the defendant preferred this appeal alleging, *inter alia*, that the District Munsif had no jurisdiction to execute the decree of the District Court for more than Rs. 2,500, the limit of his jurisdiction.

Sundara Ayyar for appellant.

Rangaramanujachariar for respondent.

JUDGMENT.—Two questions arise for determination in this appeal and the first is whether the District Munsif had jurisdiction to execute the decree in original suit No. 19 of 1888. Though the objection was not taken in either of the Courts below, it relates to the inherent jurisdiction of the District Munsif and is patent on the face of the proceedings, and I am of opinion that such objection may be taken at any stage of the case. The decree which is being executed by the District Munsif was passed upon a hypothecation bond for more than Rs. 5,000 which is considerably in excess of his pecuniary jurisdiction, and it is contended on appellant's behalf that the Judge had no power to transfer such decree for execution to a District Munsif. As to the question whether this contention ought to prevail, there is a conflict of opinion among the different High Courts. It was decided in the negative in *Narasayya* v. *Venkatakrishnayya*(1) and in civil miscellaneous appeal No. 47 of 1888, but in the affirmative in *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee*(2) and *Durga Charan Mojumdar* v. *Umatara Gupta*(3) and in *Shri Sidheshwara Pandit* v. *Shri Harihar Pandit*(4). The last case was decided in 1887, the case was decided in 1884 and the Calcutta case in 1889. The learned Judges at Calcutta who decided *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee*(2) considered the Madras case and expressed themselves as being unable to concur in the decision therein.

That decision depends on the construction put on section 223 of the Code of Civil Procedure. Section 25 which relates to transfer of suits authorises the transfer to a Subordinate Court "competent to try the same in respect of its nature and the "amount or value of its subject matter." These words of limitation are not found in section 223 which relates to transfer of applications for execution of decrees. That section not only omits the condition that the Court to which it is sent for execution must be competent to determine the suit in which the decree was passed, but also substitutes for it five other conditions. The first condition clause (*a*) premises that the judgment-debtor resides or carries on business or works for gain within the local limits of the jurisdiction of the Court to which the decree is sent for execution. The second condition clause (*b*) presupposes that the judgment-debtor has not sufficient property within the jurisdiction of the Court which passed the decree, but has property within the jurisdiction of the Court to which the decree is sent for execution. The third condition clause (*c*) premises a case in which immovable property is ordered to be sold, and such property is situated outside the jurisdiction of the Court which passed the decree. The fourth condition clause (*d*) postulates the existence of some special reason for the transfer which the Court that orders the transfer is required to state in writing. The fifth condition premises that the Court to which the decree is sent for execution is subordinate to the Court which passed the decree. Looking at the nature of the several conditions, they suggest the inference that the legislature contemplated a special convenience, or a special facility or some special reason or a special relation as subordinate and Appellate Courts, as grounds for the transfer. There is thus reason to conclude that the condition as to jurisdiction, inserted in section 25, was omitted from section 223 for the special reasons mentioned therein. It follows that if the condition as to jurisdiction mentioned in section 25 and intentionally omitted from section 223 were imported into it, the special facility or convenience which it was the intention of the legislature to secure to judgment-creditors in certain cases might be taken away from them, and the object which the legislature had in view, might be defeated. Suppose for instance the case of a decree passed by a District Court or Subordinate Court for Rs. 2,600 and of the judgment-debtor residing within the jurisdiction of a District Munsif or possessing property only within that jurisdiction; why should the special convenience or facility which might exist if the decree were executed by the District Munsif be denied to the judgment-creditor? Again, the specification of five special cases in section 223 implies that in

(1) I.L.R., 7 Mad., 397. (2) I.L.R., 16 Calc., 457.
(3) I.L.R., 16 Calc., 465. (4) I.L.R., 12 Bom., 155.

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other cases the Court executing the decree must be competent to decide the suit in which the decree was passed. Hence it was inferred in *Narasayya* v. *Venkatakrishnayya*(1) that in framing the five conditions, the legislature intended to denote the statutory exceptions founded on special considerations to the rule which regulates the ordinary jurisdiction. Further, the penultimate clause of the section states expressly that when a decree transferred for execution is that of a Provincial Court of Small Causes, the Presidency Small Cause Court to which it is transferred must also have jurisdiction over the suit in which the decree was passed as regards its subject-matter. The express mention of the ordinary rule in this paragraph emphasizes its omission in the five cases mentioned in the first paragraph of the section. There is also reason for holding that the Code of Civil Procedure contemplates certain exceptions to the ordinary rule, that a Court can only exercise jurisdiction, over proceedings of civil nature when the subject-matter therein does not exceed in value the pecuniary limit of its jurisdiction as defined by section 12 of the Civil Courts Act. Take for instance a claim preferred in regard to a house of Rs. 3,000 value in the Court of a District Munsif during the execution of a money decree passed by him for Rs. 2,400. Which is the Court competent to investigate the claim? Is it the District Munsif who passed the decree or the Subordinate or District Court, as the case may be, that has jurisdiction to try a suit relating to a house of Rs. 3,000 value. The language of section 278 shows that it is the District Munsif who was executing the decree that is authorized to investigate the claim.

The reason mentioned for holding that no exceptions were intended to be created is that intricate questions of importance are likely to arise as often in execution of decrees as in the trial of suits; but it must also be remembered that there are cases in which execution of decrees may be a simple matter giving rise to no questions of special difficulty. In order that the cases may be differentiated, the legislature has given a discretion to the District Court in whom the power of transfer is vested, and also enacted section 239 in addition to section 228. Furthermore, the special relation of the Court to which the decree is sent for execution, under paragraph 6 as a Subordinate Court will enable

(1) I.L.R., 7 Mad., 397.

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the District Court to call up the application for execution for disposal by itself when questions of exceptional difficulty arise therein for consideration.

The grounds on which the decision in the Madras case rests may be thus formulated. As in suits so in execution proceedings, the competent *forum* is ordinarily that indicated by section 12 of the Civil Courts Act, but in the five cases mentioned in section 223 special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction. In view to show that this view is not tenable, the High Court at Calcutta refers to sections 3, 6, 9, 228 and 649 in addition to section 25 of the Civil Procedure Code and section 12 of the Civil Courts Act. The learned Judges think that this Court overlooked the rule that the word 'suit' may include as well proceedings after decree as proceedings before decree.

First as to section 12 of the Madras Civil Courts Act it is referred to in the Madras decision and its applicability to cases other than those specified in the second and third paragraphs of section 223 is recognised. But what is stated there is that an extraordinary or a special jurisdiction was conferred by the Code of Civil Procedure in cases to which paragraphs 2 and 3 relate. The absence of this special jurisdiction would render ineffectual the considerations of special convenience and facility implied by the five conditions in section 223 to which reference has already been made. As regards section 25, the word 'suit' may no doubt include in its extensive sense proceedings after as well as before decree; but it may also possibly be used in its popular and restricted sense to connote proceedings before decree, as contradistinguished from execution proceedings. The presence of additional words in section 12 of the Civil Courts Act and in section 3 of the Code of Civil Procedure lends weight to the view that in section 25 it was used by the legislature in its restricted sense. Even assuming that it includes execution proceedings, the limitation as to jurisdiction can only be imported into section 223 so far as it is consistent with that section. To import it into that section so far as it relates to the special cases founded on special considerations would be incongruous and not only do violence to the plain grammatical interpretation, but also deny to judgment-creditors the special convenience and facilities contemplated in these cases.

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As to section 3 it exempts pending proceedings from the operation of the code, and refers in terms to proceedings prior to decree in any suit instituted or appeal presented before the 1st June 1882, or to proceedings after decree that may have been commenced and were still pending at that date. This section furnishes an argument in support of the view that when proceedings after decree are intended to be denoted the legislature said so expressly. As to sections 6 and 9 they are relied on as indicating that the term 'suit' may be taken to include execution proceedings, but I have already stated that on that view the limitation as to jurisdiction in section 25 can only be imported into section 223 so far as it can be done without incongruity.

With reference to section 649 it recognises the principle which ordinarily regulates the jurisdiction in execution proceedings, but it does not negative an intention to create a special jurisdiction in the five cases specified in section 223. After carefully considering the Bombay and Calcutta decisions, I do not see where the fallacy lies in the reasoning adopted in *Narasayya* v. *Venkatakrishnayya*(1), and I must, therefore, adhere to the principle of that decision therein until the Full Bench overrules it.

The second question for decision is whether appellant's omission to bring to sale Tiyagaraja Pillai's share is a bar to the execution of his decree against other than mortgaged property until he cures the omission. In the present case there is no doubt a direction in the decree that respondent shall first execute the decree against the mortgaged property, but the direction presupposes that the property belongs solely to appellant, or that the decree is binding on Tiyagaraja Pillai. It must be observed here that Tiyagaraja Pillai was not a party to that decree, and that the partition suit brought by Tiyagaraja Pillai was pending at the date of decree under execution. It is not even alleged that in the decree since passed in the partition suit the mortgage debt was either mentioned as a family debt or that Tiyagaraja Pillai had his share decreed to him, subject to payment of a moiety of that debt. The respondent was therefore justified in not proceeding against Tiyagaraja Pillai's share, lest by so doing he may run the risk of involving himself in litigation which may entail

(1) I.L.R., 7 Mad., 397.

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on him expense. The direction is binding only so far as it does not compel him to invade the rights of third parties who were not parties to the decree. This view is in accordance with that taken by the High Court at Allahabad in *Zalim Gir* v. *Ram Charan Singh*(1). In that case a zamindar executed two mortgages of his zamindary property in favour of one Panna Lal—one on the 10th October 1871 and the other on the 10th October 1872. On the 27th January 1874 he mortgaged about 117 bighas out of his zamindary for Rs. 700 to the defendant in that case. On the 10th September 1877 he made a conditional sale of the zamindary property in favour of the plaintiff for Rs. 4,500 to pay off the two charges created in favour of Panna Lal. On the 10th August 1878 the zamindar made another mortgage to the defendant for Rs. 300 of the same 117 bighas. On the 8th November 1881 the defendant obtained a decree on his two mortgages of the 27th January 1874 and of the 10th August 1878, and on his application for execution of the decree, the mortgaged property was advertised for sale on the 20th November 1883. Meanwhile the plaintiff took the necessary proceedings to foreclose his conditional sale, and upon the 18th March 1883 the sale was foreclosed. On the 19th November 1883 the plaintiff brought a suit to have it declared that defendant was not entitled to bring the property to sale, and it was held that he was not entitled to do so before first recouping the plaintiff the amount due on the prior encumbrances. It is therefore competent to respondent in the case before us to apply for execution against other than the mortgaged property if he can show that the portion of the mortgaged property not brought to sale belongs to appellant's divided brother. It is urged on behalf of appellant that the decree under execution was passed against appellant as the managing member of a joint Hindu family during the subsistence of co-parcenary, for a debt contracted for purposes binding on all the co-parceners; but the decree is not produced before me; nor am I referred to any document showing that the decree was passed against appellant as the representative of the joint family whilst the absence of all allusion to the debt and to Tiyagaraja Pillai's liability for his moiety thereof negatives the contention.

The appeal fails, and I dismiss it with costs.

(1) I.L.R., 10 All., 629.

APPELLATE CIVIL.

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

1894. January 9, 10, 11, 15. February 13.

SUBRAMANYA PANDYA CHOKKA TALAVAR (PLAINTIFF), APPELLANT,

v.

SIVA SUBRAMANYA PILLAI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation—Suit to recover immovable family property unlawfully alienated during plaintiff's minority—Limitation Act, s. 7, illustration (b), and schd. II, Arts. 12, 44, 45, 120 and 144—*Hindu Law—Succession: whether under the Mitakshara law, nearness of blood is a ground of preference as between brothers of the half and full blood respectively in case of disputed succession to impartible co-parcenary property—Representation of minor heirs as defendants by including a Collector as a defendant, as their guardian* ad litem—*Code of Civil Procedure—Act XIV of* 1882, *ss.* 13, 244 *and* 312—*Powers of a Hindu son to question the alienation of an impartible estate by his father.*

Where a suit is brought to set aside a sale of immovable family property unlawfully alienated during the plaintiff's minority, it must be instituted within one year of the plaintiff's attaining his majority under schedule II, article 12 of the Limitation Act. Section 7, of that Act must be read together with each article in schedule II, and when the period prescribed by the latter extends to three years or more and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full three years. But when the period of limitation prescribed is less than three years, as in article 12, and the minor has that period from the date of his majority, the prescribed period is not to be enlarged to three years.

In determining the right of succession to an impartible estate, the class of kindred from whom a single heir is to be selected should be first ascertained. Next, it should be seen whether family custom or kulachar discloses a special rule of selection, and, in default of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to general Hindu law.

Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to co-parcenary property which is partible, and it is likewise no ground of preference when such property is impartible. Where, therefore, the family property belongs to a co-parcenary family consisting of all the brothers of the deceased *propositus*, whether of the whole or half-blood, in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years

Representation by a Collector of all minor sons of a deceased Zamindar as their guardian *ad litem*, under the order of the Court, the Collector being added as a

* Appeal No. 22 of 1891.

defendant in the suit, is an adequate representation of all the sons, even if the Collector could only treat, under Regulation V of 1804, the particular minor on whose behalf the Court of Wards was then managing the zamindari as their proper ward. Consequently, a suit brought by one of such minors, on his attaining majority, to set aside the sale of a portion of the zamindari property attached in execution of the decree given in the former suit, is barred by sections 136, 244 and 312 of the Code of Civil Procedure.

APPEAL against the decree of Venkata Rangayyar, Subordinate Judge of Tinnevelly, in original suit No. 46 of 1885. The facts of this case appear sufficiently for the purpose of this report from the judgment of the High Court.

The Subordinate Judge decreed in favour of the defendants.

The plaintiff preferred this appeal.

Rama Rau and *Ramachandra Rau Saheb* for appellant.

Bhashyam Ayyangar for respondents Nos. 11 to 14 and 146.

Ranga Ramanuja Chariar for respondent No. 1.

Gopalasami Ayyangar for respondents Nos. 137 and 152.

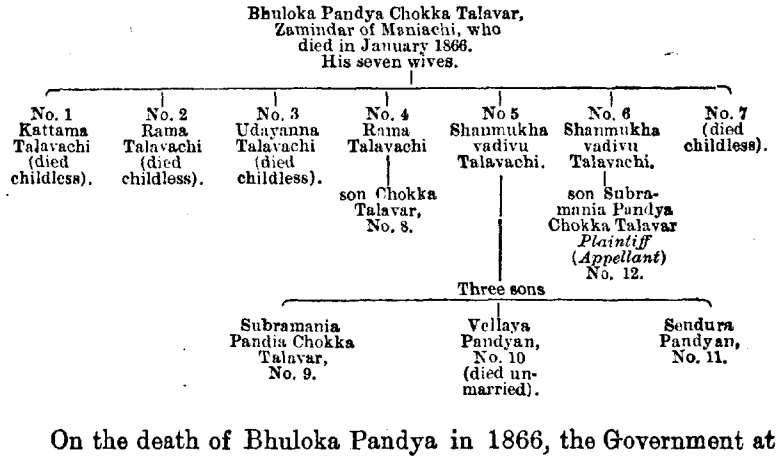
Ranga Rau for respondent No. 7.

JUDGMENT.—This was a suit to recover the mittas or estates called Perunani and Karaikurichi and the pannai or home-farm lands therein, which had formed part of the zamindari of Maniachi, situated in the district of Tinnevelly. The Subordinate Judge of Tinnevelly, who tried the suit, dismissed it with costs. Appellant (plaintiff) is the present zamindar of Maniachi, which is admittedly an impartible estate belonging to a joint Hindu family, but capable of being enjoyed by but one member of the family at a time, and respondents are alienees who are in possession of the property in dispute.

The transactions, which have given rise to this litigation are fully set forth by the Court of first instance in paragraphs 25 to 57 of its judgment. The Subordinate Judge has also sufficiently stated the substance of the pleadings, the contentions of the several respondents, and the questions arising thereupon for determination, and we do not think it is necessary for us to recapitulate in this judgment.

Of the fourteen issues recorded for decision, the thirteenth and fourteenth relate merely to improvements and mesne profits. To the decision on the first three issues, no exception is taken at the hearing before us. The fourth, sixth and seventh issues relate to preliminary grounds of objection urged against the suit, whilst the other issues refer to the merits.

The first question for determination is that raised by the fourth issue, viz., whether the suit is barred by the Act of Limitations. The facts, from which it arises, are shortly these. At the commencement of the year 1866, and for some years before it, one Bhuloka Pandya Chokka Talavar was the zamindar of Maniachi, and the properties now in dispute were then comprised in the zamindari. He died on the 14th January 1866, leaving him surviving seven widows and five minor sons as shown in the subjoined pedigree :



On the death of Bhuloka Pandya in 1866, the Government at first recognized as his lawful successor, his son by the fourth wife, Chokka Talavar, No. 8 in the pedigree. He was, however, junior in years to the eldest son by the fifth wife, Subramanya Pandya Chokka Talavar, No. 9 in the pedigree. But the Government considered that his mother's prior marriage was a legitimate ground of preference. As he (No. 8) was a minor, the Court of Wards assumed management of the zamindari under Regulation V of 1894. The late zamindar's fifth wife then instituted original suit No. 25 of 1866 on the file of the Civil Court of Tinnevelly, disputing the action of the Government and asserting her eldest son's preferable claim by right of primogeniture. In May 1868 the Civil Court decreed in his favour. Meanwhile, the Government recalled their recognition of the junior son by the fourth wife and recognized in his stead the eldest son by the fifth wife, No. 9 in the pedigree, Subramanya Pandya Chokka Talavar, and the Court of Wards since continued in management on his behalf.

Of the three sons by the fifth wife, the second son, Vellaya Pandyan, died unmarried during his minority, and the eldest

Subramanya Pandya Chokka Talavar, the last recognized zamindar and lawful holder, died during his minority in 1873, leaving him surviving one uterine brother named Sendura Pandyan, No. 11 in the pedigree, and two half-brothers, Chokka Talavar, No. 8, and the plaintiff (appellant) No. 12 in the pedigree. It is an undisputed fact that of the three surviving brothers, the plaintiff is the eldest. It is also admitted that the Zamindar of Maniachi is an impartible estate belonging to a joint Hindu family constituted by its male co-parceners, and that the last lawful zamindar was appellant's and Chokka Talavar's half-brother, and the uterine brother of Sendura Pandya, No. 11 in the pedigree.

Appellant rests his title to the zamindari in this Court, as in the Court below, on his position as the eldest of the surviving brothers of the last zamindar, while the respondents' case is that the uterine brother, Sendura Pandyan, excludes him from succession. With reference to this contention, it was alleged for the appellant that Sendura relinquished his interest in the zamindari, if any, in favour of the appellant by document C, which bears date the 15th August 1885. The plaint, which is dated the 9th June 1885, prayed for a decree (1) establishing appellant's right to the properties in dispute, cancelling the decree in original suit No. 14 of 1866 and the auction sale in its execution, and (2) awarding him possession of the properties mentioned in the plaint. It stated that the decree and the execution sale were vitiated by fraud, and that the circumstances constituting fraud came to appellant's knowledge only in March 1885. The decree in original suit No. 14 of 1886 was passed on the 4th May 1867, and the sales in execution of it took place on the 11th and 13th August 1870, and were confirmed by the Civil Judge on the 14th September 1870. The purchasers were placed in possession on 27th and 29th September 1870.

These are the facts which have to be borne in mind whilst dealing with the question of limitation with reference to the arguments addressed to us at the hearing. Treating this suit as one brought to recover immovable family property unlawfully alienated during appellant's minority, the Subordinate Judge has found that it is barred by limitation. He rests his opinion on the ground that appellant was born on the 5th May 1861 and completed his twenty-first year on the 4th May 1882 and not as

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alleged by him on 11th June 1882. It is urged on appellant's behalf that this finding is contrary to the weight of evidence.

The date of appellant's birth formed the subject of the sixth issue, and the evidence cited with reference to it is partly oral and partly documentary. It must be observed that in the case of the appellant, no horoscope has been kept so as to throw light on the precise date of his birth. Both parties admit that appellant was in existence from the 12th June 1861, the contest being as to whether he was born on that date or, as found by the Subordinate Judge, on the 5th May 1861.

As regards the oral evidence, it is that of plaintiff's witnesses Nos. 4 and 25, and defendants' witnesses Nos. 11 and 12. The two former state that plaintiff was born in the month of Vaiyasi, Andu 1036 corresponding to May—June 1861, and the two latter depose that the plaintiff's birthday star or lunar mansion was 'Satayam' or the 24th lunar day or star in the month of Chittirai. Both the witnesses for appellant are related to him, the fourth being a distant relative, and the twenty-fifth witness being his maternal uncle. The evidence of the maternal uncle is open to the observation that he is unable to remember the month and year in which his own eldest and other sons were born, though he professes to recollect the month and year in which appellant was born. The evidence of the fourth witness is also open to the remark that the date of the temple festival at Tiruchendúr in the district of Tinnevelly in the year 1861 with which he connects appellant's birth shows (as explained by the Subordinate Judge) when it is computed from the calendar, that appellant was born on the 5th May and not on the 12th June.

On the other hand, respondents' twelfth witness does not name the month in which special worship or Archani is performed in the Tiruchendúr temple on appellant's Janma Nakshatram day or the day of his birth fixed with reference to the lunar asterism or mansion. According to respondents' eleventh witness it is clear that the appellant's Janma Nakshatram or the star, under which he was born, was the 'Satayam' or the 24th lunar mansion day in the month of Chittirai which corresponds to the 5th May 1861 according to the calendar. Respondents' witnesses are not connected with them. The Subordinate Judge describes the evidence at length in paragraph 21 of his judgment and comes to the conclusion that appellant was born on the 5th May 1861; and after

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carefully considering it, we see no reason to disturb his finding. In the first place, respondents' eleventh witness is a disinterested witness. The fact deposed to by him is in the nature of circumstantial evidence. It is a fact which he was in a position to remember from the Archanai or special service being performed every year on the same lunar day of the same solar month. It is corroborated by the date of the Tiruchendúr festival in the year 1861 with which event the fourth witness connects appellant's birth. Respondent's twelfth witness corroborates the eleventh so far as the performance of a special service in the Tiruchendúr temple on the zamindar's birthday and the name of his Janma Nakshatram or the star under which he was born are concerned.

On the other hand, the *onus* of showing that the suit was brought in time is on the appellant. Both his witnesses are related to him, and their evidence is open to the observations mentioned above. The appellant's pleader suggests that his fourth witness may have made a mistake, but it is not likely. The allusion to the Tiruchendúr festival as the event which enabled him to fix the month and star of appellant's birth appears to be natural.

The documentary evidence bearing on the sixth issue consists of two exhibits H and XV. The former is a takid sent on the 31st May 1882 by the Sub-Collector of Tinnevelly to the Tahsildar of Ottapidaram taluk. It states that the Maniachi Zamindar attains his majority on the 12th June and directs the Tahsildar to close the accounts of the estate and be ready to deliver the zamindari on the 13th June. Exhibit XV is the letter written by the Sub-Collector to the Collector on the same date and is to the following effect: "It appears the eldest minor of the Maniachi estate has "no horoscope and the exact date of his birth is not known. The "Tahsildar on examining the previous records and on due inquiry, "approximately fixes the date on which the minor attains his age "as the 12th June 1882. I propose to issue orders to the Tahsil-"dar to make over the estate to the minor on the 13th proximo." The report of the Tahsildar to which reference is made in exhibit XV is not before us. We cannot say that the exhibits which name the 12th June 1882 approximately as the date on which the appellant attained his majority are inconsistent with the finding that the actual date of birth was the 5th May 1861. It is then said that the zamindari was actually made over to the appellant on the 13th June 1882, but this fact does not carry the case

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further. No correspondence is produced, from which we can infer that the real date of birth was ascertained by the Court of Wards, and it was enough for that Court that on the 13th June 1882, when they transferred the estate, the appellant had ceased to be a minor. The Subordinate Judge appears to us to have come to a correct finding as to the date of appellant's birth.

With reference to the latter part of the sixth issue, it is argued by respondents' pleader that under the Indian Majority Act IX of 1875, s. 3, the appellant should be treated as having attained his majority on the completion of 21 years, only in case he had lawfully been under the jurisdiction of the Court of Wards, and that he must otherwise be treated as having attained his majority on the completion of 18 years. We shall presently consider the question whether Sendura Pandyan excludes the appellant from succession and whether an uterine brother succeeds to an impartible estate in preference to a half-brother, though the latter is senior in years to the former. Assuming, for the purpose of dealing with the question of limitation and for that purpose only, that the appellant was not only the *de facto* but also the *de jure* Zamindar, we see no reason to doubt the correctness of the Subordinate Judge's decision that appellant attained his majority on the completion of 21 years on the 4th May 1882.

There are three more matters in connection with which the question of limitation has been considered by the Subordinate Judge. Adverting to the prayer in the plaint that the decree in original suit No. 14 of 1866 and the sales, in execution of it, of the properties in dispute be cancelled, the Subordinate Judge observes that there is no doubt that as a suit to set aside Court sales in execution of a decree to which appellant was a party, it must be governed by the one-year's limitation prescribed by article 12, schedule II of the Act of Limitations. He adds, however, that, as the plaintiff was a minor, a period of two years must, under illustration (*b*) attached to section 7 of the Act, be added to the one year. It is argued on appellant's behalf that this is a misapprehension of the scope of the illustration, and that the period of limitation prescribed by article 12 is applicable to minors as well as to adults.

That article premises a suit to set aside a sale in execution of a decree and prescribes as the period of limitation one year from the date on which the sale is confirmed. The case premised by

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illustration (*b*) of section 7 is one in which the right to sue for a legacy accrues to A during his minority, and A attains his majority eleven years after such accrual; he would have under the ordinary law one year remaining within which to sue, but under this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority within which he may bring his suit. The Subordinate Judge considers that by reason of the illustration (*b*) a minor, who is a party to a suit has three years to set aside a sale therein from the date on which he attains his majority. He relies in support of his opinion on *Mahommed Hossein* v. *Purundur Mahto*(1), and on *Suryanna* v. *Durgi*(2), but neither of them is in point. The question whether illustration (*b*) of section 7 is an authority for giving a minor the right to sue to set aside a sale falling under article 12 within three years from the date on which he attains his majority, though article 12 prescribes only one year in the case of adults, was not raised or considered in those cases.

The illustration, no doubt, recognises the principle that when the period of limitation prescribed by the ordinary law exceeds three years but expires within three years from the date on which he attains his majority, the minor will have the whole period of three years from the date of his majority. But it does not warrant the inference that it gives three years in cases which are governed by article 12. If the minor were an adult at the date of the sale which he seeks to set aside he would have to sue within one year from the date of the confirmation of the sale; and on attaining his majority, he stands in the position of an adult, and there is no reason why he should have three years instead of one year from the date of majority. Section 7 ought to be read together with each article in the second schedule, and when the period prescribed by the latter extends to three years or more and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full three years. But when the period of limitation prescribed by the schedule, as for instance by article 12, is less than three years, and the minor has that period from the date of his majority, we see no warrant for holding that the intention was to enlarge the period of limitation prescribed by the schedule to three years.

(1) I.L.R., 11 Calc., 287. (2) I.L.R., 7 Mad., 258.

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We are unable to adopt the view of the Subordinate Judge that the appellant had more than one year to set aside the Court-sales if he were a party to original suit No. 14 of 1866.

In paragraph 147 of his judgment, the Subordinate Judge observes that as a suit to set aside the decree in suit No. 14 of 1886 for fraud, the suit is governed by article 95 which allows the appellant a period of three years from the date on which the fraud came to his knowledge. As he finds, however, that no fraud has been proved, the question does not arise in this case, and we shall consider in connection with the merits whether this finding is correct.

The Subordinate Judge also refers to article 44, though he considers it to apply only to voluntary sales ; but, for the appellant, it is contended that, by analogy to that article, he is entitled to sue to set aside, within three years from date of his majority, an improper Court-sale which took place during his minority with the privity of his guardian. We cannot accede to this contention, as article 12 must be read together with article 44, and there can be no true analogy when there is an express provision to the contrary. With articles 12 and 144 before us, we do not think that article 120, which presupposes the absence of a special provision applicable to the case under consideration, can apply. The conclusion we come to on the fourth issue is that the present suit is time-barred as a suit falling under article 144 or article 12 and that neither article 120 or 44 or 45 has any application.

In dealing with the question of limitation it was assumed that appellant was a party to original suit No. 14 of 1866 by his guardian, and that as the eldest surviving brother, though of the half blood, he is lawfully entitled to the zamindari. We now proceed to consider these questions.

The question raised by the fifth issue is whether appellant is entitled to the zamindari of Maniachi in preference to Sendura Pandya Talavar who is still alive. The facts upon which it arises for determination are (1) that the zamindari is an impartible estate; (2) that it belongs to the co-parcenary family consisting of the appellant and his brothers; (3) that the *propositus* was Subramanya Chokka Talavar, No. 9 in the pedigree, who died without male issue; (4) that Sendura Pandyan is his uterine brother, whereas appellant is only his half-brother, and (5) that the latter is older than the former and is the eldest of the surviving sons of

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Bhulcka Pandya Chokka Talavar. It is admitted that Subramanya Chokka Talavar was the eldest son of the previous Zamindar, and that he succeeded his father by right of primogeniture, no special custom being alleged by either party as controlling the right of primogeniture in case of disputed succession to the zamindari. The point for consideration is whether, under the Mitakshara law nearness of blood is a ground of preference as between brothers of the half and full blood in case of disputed succession to impartible co-parcenary property.

The Subordinate Judge decides it in the affirmative, but in that opinion we are unable to concur. Apart from authority, we are of opinion that on general principles the question should be answered in the negative. The first of them is that a rule of decision in regard to succession to impartible property is to be found in the Mitakshara law applicable to partible property, subject to such modifications as naturally flow from the character of the property as an impartible estate. The second principle is that the only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu Law. The third principle is that, in the absence of a special custom, the rule of primogeniture furnishes a ground of preference. In determining who the single heir is according to these principles, we have first to ascertain the class of heirs who would be entitled to succeed to the property if it were partible, regard being had to its nature as co-parcenary or separate property, and we have next to select the single heir by applying the special rule indicated above.

Applying the principles mentioned above to the case before us, there can be no doubt that if the property in dispute had been the separate property of the last lawful Zamindar, from whom succession has to be traced, the uterine brother would be preferred to the half-brother. In enumerating the classes of heirs to separate property with reference to the Smriti of Yagnavalkya cited in Mitakshara, chapter II, section I, sloka 2, the Commentator observes in chapter II, section IV, sloka 5, that "'among "'brothers, such as are of the whole blood take the inheritance in "'the first instance', under the text already cited, 'to the "'nearest sapinda the inheritance next belongs,' since those of the

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"'half-blood are remote through the difference of the mothers.'" Vignanesvara Yogi proceeds then to state in section 6 that "if "there be no uterine brothers, those by different mothers inherit "the estate," and adds in section 8 that "in case of competition "between brothers and nephews, nephews of the whole blood have "no title to the succession in preference to brothers of the half-"blood," for their right of inheritance is declared to be on failure of brothers. If the zamindari of Maniachi, from which the property now in litigation was severed by Court-sales, had been the separate or self-acquired property of Subramania Talavar, Sendura Pandya, his uterine brother, would certainly have succeeded to it in preference to the appellant who is his brother by a different mother. The principle which determines the class of kindred entitled to succeed is that, in case of disputed succession to such property, remoteness of blood furnishes a rule of exclusion. This being so, the further question arises whether the same principle applies when the property is the co-parcenary property, though impartible, belonging to a joint Hindu family consisting of the deceased Zamindar and his brothers. Looking again to the Mitakshara law of succession as applied to partible co-parcenary property, the right of survivorship is mentioned as a dominant right which controls the rule of succession applicable to separate property. In chapter II, section I, sloka 20, of the Mitakshara, the Commentator premises a case of competition between the co-parceners and widows of a deceased person, and refers to the text of Narada 'let them allow a maintenance to his women for life,' and concludes that the widows are entitled only to maintenance, the co-parceners being entitled to the property. It follows that in case of co-parcenary property, the doctrine of survivorship furnishes an additional rule whereby the class of heirs has to be found. It is also a controlling or dominant right for the reason that, according to Hindu theory, co-parcenary property belongs to the co-parcenary family, that though co-parceners are tenants in common, they have no specific property but only an interest which may ripen into specific property on partition, and that, if the existing co-parceners die without male issue, they are to be treated as if they had never been born, and, as if the partible property actually belonged to the body of co-parceners who are alive at the time of partition. When therefore partible property belongs to a co-parcenary family, and when a co-parcener dies without male

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issue, leaving one uterine brother and one half-brother surviving him, the half-brother is entitled to share the property equally with the uterine brother at the time of partition, the deceased brother being considered as if he never had been born, and the property being treated as always vested in the family as a unit, and as never absolutely vested for purposes of inheritance in any one co-parcener in preference to another, how much soever the family may change as to the number of co-parceners from time to time during co-parcenary. To say, therefore, that nearness of blood is a ground of preference in such cases would be tantamount to ignoring the pre-existing co-parcenary interest of half-brothers. Nearness of blood being thus no ground of preference under the Mitakshara law in case of disputed succession to co-parcenary property when it is partible, it is likewise no ground of preference when such property is impartible. It is conceded that the zamindari belongs to the co-parcenary family consisting of all the brothers of the *propositus*, and the nearest class of kindred in which the single heir ought to be found is that of brothers, whether of the whole or half-blood; and applying the rule of primogeniture as a subsidiary rule of selection, since there is no specific custom, the brother, that is entitled to the zamindari, is the eldest in years, viz., the plaintiff or appellant.

This view is in accordance with the course of decisions to which our attention has been called at the hearing.

The first is the case of *Katama Natchiar* v. *The Rajah of Shivagunga*(1). The point decided in that case was that the zamindari of Sivagunga was the self-acquired property of Gouri Vallabha Tevar, the prior lawful Zamindar, that the competition being between his daughter and brother's son, there was no right of survivorship as in the case of co-parcenary property, and that, according to the ordinary rule of succession, the class of kindred among whom the single heir was to be found was represented by the daughter and not by co-parceners. The question, now in dispute, did not arise in that case, but there are observations made by the Privy Council which indicate the principles that should guide our decision in this case. Their Lordships say there are two principles on which the rule of succession, according to the Hindu

(1) 9 M.I.A., 539.

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law, appears to depend. The first is that which determines the right to offer the funeral oblation and the degree in which the persons making the offering are supposed to minister to the spiritual benefit of the deceased; the second is the right of survivorship. It is generally intelligible that upon the principle of survivorship the right of the co-parceners in an undivided estate should prevail. Their Lordships say further that in co-parcenary property according to the principles of Hindu law, there is co-parcenership between the different members of a united family and survivorship following upon it; for there is community of interest and unity of possession between all the members of the family, and upon the death of any one of them, the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that as to the separately-acquired property of one member, the other members of that family have neither unity of interest nor unity of possession and the foundation, therefore, of a right to take such property by survivorship fails. It is said that these observations are in the nature of *obiter dicta*, but if so, they are the *dicta* of the highest judicial tribunal for India, followed in several later cases. Moreover, the two main principles of succession mentioned above are those embodied in the text of Manu, 'that the inheritance belongs to the nearest sapinda', and in the text of Narada to the effect that in an undivided family, the brother takes the co-parcenary property in preference to the widow.

The second case is *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*(1). That was a suit in the nature of ejectment brought by a brother of the half-blood against the uterine brother on the ground that, as he was the eldest of the class of heirs from whom a jobraj should be selected according to family custom, the appointment by the deceased Zamindar of his younger brother, the then defendant, as jobraj, was invalid. The Privy Council held that the appointment was valid by family custom or kulachar which imposed no restriction on the power of the reigning raja to appoint a jobraj from among his kindred. On this point, the Lords of the Judicial Committee remarked that "where there is "evidence of a power of selection, the actual observance of seniority

(1) 12 M.I.A., 523.

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"even in a considerable series of successions cannot of itself defeat "a custom which establishes a right of free choice; and had the "instances been uniform and without exception, that alone would "have been sufficient to support the appellant's case. Such "uniformity of practice was however not proved, for, several "instances appear of infants appointed to the office of jobraj, "whilst relatives within the custom and older in years were "living." It is this finding of fact that was the *ratio decidendi*, but the decision is an authority for the proposition that in determining the right of succession to an impartible estate, we should first ascertain the class of kindred from whom a single heir is to be selected, next see whether family custom or kulachar discloses a special rule of selection, and that in default of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to general Hindu law. The Judicial Committee say further that by general Hindu law, the uterine brother would be the heir in preference to the half-brother, were it a disputed succession to divided property.

This limitation is also in accordance with the text of the Mitakshara in chapter II, section IV, slokas 5 and 6, and is an authority for the proposition that in case of disputed succession to impartible property, which was acquired by, or belonged exclusively to, the deceased zamindar, nearness of blood is a factor to be considered in determining the class of kindred from whom the single heir has to be selected. Respondents' pleader lays considerable stress on the passage in the judgment of the Privy Council which deals with the contention on behalf of the appellant in the Tipperah case, to the effect that the preference of the whole to the half-blood does not extend to a raj, and that, when the estate is ancestral and undivided, brothers of the whole and half-blood are on the same footing. Their Lordships observe as follows: "When a raj is enjoyed and inherited by one sole "member of a family, it would be to introduce into the law, by "judicial construction, a fiction, involving also a contradiction to "call this *separate* ownership, though coming by inheritance, at once "sole and joint ownership, and so to constitute a joint ownership "without the common incidents of co-parcenership. The truth "is, the title to the throne and to the royal lands is, in this case, "one and the same title. Survivorship cannot obtain in such a "possession from its very nature, and there can be no community

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"of interest; for, claims to an estate in lands and to rights "in others over it, such as to maintenance, are distinct and in- "consistent claims. As there can be no survivorship, title by "survivorship, where it varies from the ordinary title by heirship, "cannot, in the absence of custom, furnish the rule to ascertain "the heir to a property which is solely owned and enjoyed and "which passes by inheritance to a sole heir." It is further argued on behalf of the respondents that the doctrine of survivorship, as a dominant right, has no operation as well in the case of impartible co-parcenary as in the case of impartible separate property, and that we are not at liberty to introduce a distinction so as to vary the ordinary rule of succession which, it is contended, applies alike to both. We are unable to accede to this suggestion for several reasons. In the first place, later decisions of the Privy Council recognized survivorship as a material factor when the impartible estate is co-parcenary property. In the next place, the Tipperah estate is situated in a part of India governed by the Dayabhaga School of Hindu Law, which explains away the Smriti of Narada as inapplicable to married women and denies a place to the doctrine of survivorship in its scheme of succession. It may be, as suggested by Mr. Bashyam Aiyangar on respondents' behalf, that when the Tipperah case was decided by the Privy Council, there was an impression at Calcutta that, even under the Dayabhaga law, there was survivorship as an exception to the general scheme of inheritance in the case contemplated by Jimutavahana in verse 34, section 5, chapter XI of the Dayabhaga. But such a notion was held to be erroneous by the Full Bench of the High Court at Calcutta in *Rajkishore Lahoory* v. *Gobind Chunder Lahoory*(1) and see *Sheo Scondary* v. *Pirthee Singh*(2) wherein it was decided that by the Hindu law current in Bengal, a brother of the whole blood succeeds in the case of an undivided immovable estate, in preference to a brother of the half-blood. The *ratio decidendi* is that the doctrine of survivorship has no operation under the Dayabhaga law either as part of the general scheme of inheritance or as an exception to it.

Again, the recognized foundation of the right of survivorship is the Smriti of Narada cited in Mitakshara, chapter II, section 1, verse 7; but Jimutavahana notices this Smriti in chapter XI, section 1, verse 48, of the Dayabhaga, and concludes after a consideration of the other Smritis, especially the Smriti of Vrihaspati, that Narada contemplated the case of wives of an inferior rank, who do not possess the status of a Patni or the lawful wife of approved rank. On the construction suggested by him in verse 54, there is no foundation in the Smriti law, on which the doctrine of survivorship can rest. As the Mitakshara, however, differs from the Dayabhaga, the decision in the Tipperah case, although it is in perfect accordance with the Dayabhaga law, has no application in the Mitakshara country.

(1) I.L.R., 1 Calc., 27. (2) L.R., 4 I.A., 147.

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It is further urged by the learned pleader for respondents that assuming that the Tipperah hills and estate are governed by the Dayabhaga law, the reason assigned by the Privy Council for their decision suggests that the character of impartible property as one capable of sole enjoyment by the incumbent for the time being is so much in the nature of separate property that it is inconsistent with the theory of co-parcenary of which unity of ownership and unity of possession *quoad* the property in litigation are essential incidents.

This contention is sound only in the Dayabhaga country, for, as explained by this Court in *Naraganti Achamma Garu* v. *Venkatachalapati Nayanivaru*(1) the modifications of co-parcenary which flow from impartibility consist in this: "where from the "nature of the property, possession is left with one co-parcener, "the others are not divested of co-ownership. Their necessary ex- "clusion from possession imposes on the co-owner in possession two "obligations to his co-parceners, in virtue of their co-ownership—the "obligation to provide them with maintenance and the obligation "to preserve the *corpus* of the estate. The rights of possession and "maintenance are to this extent distinct and inconsistent—that "they cannot co-exist and be enjoyed by the same persons, that the "one is a right to the immediate perception of the fruits of the "property, the other a right to an indirect benefit, but both rights "have a common origin, unity of ownership. . . . Separate "possession but not separate ownership is the characteristic of "property, which, although impartible, is *ex hypothesi* joint. Co- "ownership, which is the cause of survivorship, was held not to "exist in the case of the Tipperah raj. We should have hesitated

(1) I.L.R., 4 Mad., 250, 266.

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"to express an opinion at variance with that ruling if we could "find no support for our views in a ruling which is equally "imperative upon us, and from which, in the Tipperah case, "their Lordships expressed no intention to dissent. In *Katama* "*Natchiar* v. *The Rajah of Sivagunga*(1) their Lordships declared "that, in the absence of proof of a special custom of descent, the "succession to a zamindari impartible and capable of enjoyment "by one member only of the family at a time, is governed by the "general Hindu law prevalent in that part of India with such "qualifications only as flow from the impartible character of the "subject. The impartibility of the subject does not necessitate "the denial of the right of survivorship, and there are not wanting "in the admitted rules which govern the enjoyment of such property "and the succession to it *indici* of co-ownership and consequent "survivorship." This case is an authority in the Presidency for the proposition that the very custom by which co-parcenary property is rendered impartible suggests survivorship as a necessary incident of impartibility, and that it is not correct to say that there is no co-parcenership in regard to such property, the difference being only in the form in which co-parcenary exists in respect of partible and impartible property.

In this connection our attention is drawn to the decision of the Privy Council in *Rani Sartaj Kuari Rani* v. *Deoraj Kuari*(2). This case modifies the opinion expressed in the last preceding case to this extent and no further, "when the estate is governed by the "Mitakshara law, and it is impartible by the usage and custom of "family and descends according to the law of primogeniture on the "male heirs of the original grantee, the estate is not inalienable "except on proof of special custom." The case is, therefore, an authority for the proposition that inalienability is not one of the modifications which flow necessarily from the impartibility of the subject. As regards survivorship as a cause of succession, their Lordships expressly save it and say, "by the custom or usage, the "eldest son succeeds to the whole estate on the death of the father "as he would, if the estate were held in severalty. It is difficult "to reconcile this mode of succession with the rights of a joint "family and to hold that there is joint ownership which is a "restraint on alienation. It is not so difficult where the holder of

(1) 9 M.I.A., 593. (2) L.R., 15 I.A., 51.

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"the estate has no son, and it is necessary to decide who is to succeed." Referring to the Sivagunga case, their Lordships add "the saying in the Sivagunga case that the zamindari, though "impartible, was part of the family property, must be understood "with reference to the question which was then before their Lordships." That question was one of succession and not of alienation, *inter vivos*.

Another case referred to is what is called the Totapalli case, *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora*(1). In that case an impartible estate belonging to a joint Hindu family was usurped by one of the members of the family. The zamindar, by the aid of another member of the family, ousted him and afterwards entered into an agreement with him to pay the revenue. There was no division in the family. It was argued in that case by appellant's counsel that the estate being impartible must, from its very nature be taken to be separate estate, and consequently that, according to the decision in the Sivagunga case, the succession was determinable by the law which regulates the succession to a separate estate, whether the family be divided or undivided. With reference to the first contention, their Lordships' answer was: "It is clear that the mere impartibility of the estate is *not* sufficient to make the succession follow "the course of succession to separate estate. Their Lordships apprehend that if they were to hold that it did so, they would affect "the titles to many estates held and enjoyed as impartible in different parts of India. Has it then been shown that, though the "family was undivided, the estate was in fact the separate property "of the appellant's husband?" After answering the above question in the negative their Lordships answered the second question in these terms: "In the Sivagunga case, the zamindari had "escheated to Government, which was free to deal with it as it "chose. By a new Sannad the Government granted it to Gouri "Vallabha, conferring a legal title which none could dispute. But "what was done in this case?" After referring to the facts of that case their Lordships state: "this account shows no legal forfeiture, "no fresh grant by any person competent to grant a legal title. "It only shows that on a dispute between Mallappa Dhora and his "superior, another member of the family came in, and, with the

(1) 13 M.I.A., 333.

"strong hand and in concert with the superior, succeeded in ousting Mallappa Dhora and in assuming the position and right of "the zamindar." This case is an authority for the position that forcible dispossession produces no change in the nature and tenure of the impartible property.

Another case is that of *Maharani Hiranath Koer* v. *Baboo Ram Narayan Sing*(1), in which the Tipperah case was dissented from.

Two other cases were also referred to at the hearing,—*Ranganayakamma* v. *Ramaya*(2), and the *Padamathur case*(3). They follow the Sivagunga case.

The latest case is that of *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh*(4). In that case the contest was as to the right of succession to an impartible raj and a zamindari, the rival claimants being the last male holder Nandikishore's three widows and daughter on the one side, and his illegitimate brother on the other. The joint family belonged to the Sudra caste. Their Lordships of the Privy Council held that the illegitimate brother was entitled under the Mitakshara law to succeed by survivorship and observed as follows: "according to the decision "in the Sivagunga case which, as their Lordships understand is "not now disputed, the fact of the raj being impartible does not "affect the rule of succession. In considering who is to succeed on "the death of the raja, the rules which govern the succession to a "partible estate are to be looked at, and, therefore, the question "in this case is what would be the right of succession, supposing "instead of being an impartible estate, it were a partible one." After discussing the point and concluding that the right of survivorship existed as between the deceased zamindar and his illegitimate brother, their Lordships held that the latter was entitled to succeed to the raj by virtue of survivorship. This case is the latest authority for the position that when the impartible estate belongs to a co-parcenary family, the right of survivorship determines the heir entitled to succeed.

The next question is whether the suit is barred by sections 13, 244 and 212 of the Code of Civil Procedure. It is conceded that if the eighth issue is determined against the appellant, this question must likewise be decided against him.

(1) 9 B.L.R., 274, 324.
(2) Mayne, § 499.
(3) I.L.R., 1 Mad., 312.
(4) L.R., 17 I.A., 128.

The eighth issue is whether the plaintiff and his predecessor in title were properly represented in original suit No. 14 of 1866. The Subordinate Judge states the facts of the case so far as they bear on this question in paragraphs 36 to 57 of his judgment, and comes to the conclusion that the appellant and the zamindar whom he succeeded were represented for the reasons mentioned in paragraphs 58 to 103. To this finding several objections are taken on behalf of the appellant.

The first objection is that though the appellant and his predecessor in title were made defendants in original suit No. 14 of 1866, yet they were then minors, and they were not described either as defendants by their mothers and guardians, nor were their mothers, who were also defendants, described as the guardians of their minor sons. It appears from the decree in that suit that the first eleven defendants consisted of six widows and the five minor sons of the former zamindar, Buloka Pandya, including the plaintiff and his predecessor in title, the mother's name being entered first as that of a defendant and the minor's name being entered next as that of her minor son. It is not stated in terms that the mother of each minor was appointed or made a party as his guardian, *ad litem;* but it is clear that, in each case, the mother was her minors' sons' natural guardian and that the object in including both as defendants was presumably to make both parties to the suit, the mother as Buloka Pandya's widow and the minor son by his mother and natural guardian. It was Act VIII of 1859 that was in force when the suit was brought, and it contained no provisions as to appointment by the Court of guardians, *ad litem*, for minor defendants. According to the then practice of the Court, it was sufficient if the mother was made a party as guardian and permitted to act as such on his behalf. It is also in evidence that the mother of Subramania Pandya Chokka Talavar, plaintiff's predecessor in title, applied for a postponement of the sale and preferred an appeal to the High Court from the order of the Civil Judge refusing her application. The conclusion we come to is that in the suit of 1866, as originally framed, appellant and his predecessors' mothers were included to act as their guardians; that the Court allowed them to act as such; that one of them endeavoured in execution proceedings to obtain a postponement of the sale, and that, though the description is

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defective, the defect is merely one of form and the minors were in no way prejudiced thereby.

Even assuming that the description is insufficient, we must still hold that the minors were adequately represented and their interests carefully protected by the Collector of the District, as the Agent of the Court of Wards, and as their guardian *ad litem*. Original suit No. 14 of 1866 was instituted subsequent to the death of Buloka Pandya Chokka Talavar, but prior to he recognition of his son, Chokka Talavar, by the Government as his successor, and to the assumption of management of the zamindari by the Court of Wards. After the Court entered on the management of the estate, the Civil Judge included the Collector of the District as the twelfth defendant, and he was made a party as the *ex-officio* guardian of the minor *heirs*. It is clear, therefore, that the minors were sufficiently represented by the Collector as their guardian *ad litem*, if not also by their mothers previously; but it is urged on behalf of the appellant that the Collector, as Agent of the Court of Wards, was the lawful guardian only of the then recognized zamindar, on whose behalf the Court of Wards held the zamindari, but not of his brothers including the plaintiff and his predecessors in title, the then fifth and ninth defendants. We do not, however, attach weight to this contention, as it is open to the Judge to appoint any competent person as guardian, *ad litem*, provided that there is no antagonism between his interest and that of the minors in the subject-matter of the suit. The Collector accepted the appointment and acted as guardian of all the minor sons. Representation by him of all minor sons as their guardian under the order of the Court is sufficient, even if it were held that the Collector could only treat under Regulation V of 1804 the particular minor on whose behalf the Court of Wards then managed the zamindari as their proper ward.

The second objection is that the mothers of the minors allowed the trial to proceed *ex parte*, and that summonses were not served upon them. As regards non-service of summonses the allegation was attempted to be supported by oral evidence which the Subordinate Judge has discredited. As to the weight due to the oral evidence on this point, we concur in his opinion. It is true that the copy of the judgment in original suit No. 14 of 1866 shows that the Collector alone defended the suit, but the circumstances

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of the case suggest the inference that the minors' mothers left the defence to be conducted by that officer acting under the direction of the Court of Wards, as he was more competent than themselves adequately to protect the minors' interests. We may here observe that the interests of the then *de facto* minor zamindar, who was the ward of the Court of Wards under Regulation V of 1804, were identical with those of his brothers so far as they related to the subject-matter of that suit.

The third objection is that the admission by the Collector of the claim was an act not compatible with his position as guardian, *ad litem*, and prejudicial to the minors. Exhibit XXI proves that the Collector acknowledged the correctness of the plaint in original suit No. 14 of 1866, but requested that the debt sued for and other debts might be permitted to be paid rateably from the income of the estate as it was realised. If the claim was true and valid (it will appear later on from this judgment that such was really the case), it is preposterous to say that the guardian should not have acknowledged the claim but put the plaintiff to the proof of it. Such conduct on his part would add to the costs of the suit, which would be a needless burden on the estate. We are of opinion that the Collector's action was *bona fide* and abundantly warranted by the actual facts of the case.

It is here argued that of the six instalments for which a decree was asked for in the plaint, only three were overdue at date of suit, that the fourth, fifth and sixth instalments had not then accrued due, and that the Collector ought to have resisted the claim for a declaratory decree in respect of the last-mentioned instalments. It is true that the plaint prayed for an order of the Court directing defendants to pay into Court the fourth, fifth and sixth instalments as agreed on in the razinamas on which the suit was based. It is also true that the Civil Court decided that there must be a decree for the then plaintiff for the amount sued for, and for an order that the fourth, fifth and sixth instalments be paid as they fell due. Assuming that no such order should have been made, the then plaintiff might have obtained separate decrees for those instalments with costs prior to the date of the Court-sale. The omission, therefore, of the Collector to take the technical objection now argued saved the minor the costs of other suits which the creditor was at liberty to institute as each instalment fell due. Considering that he put in the written statement in communica-

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tion with the Court of Wards and with its sanction, and seeing also that the Collector then asked the Civil Court for indulgence as to payment of the decree amount from the income of the zamindari, his action was perfectly *bonâ fide*. It was not then unusual for the Civil Courts in order to avoid multiplicity of suits (though the practice is now considered loose) to include a direction in the decree passed on instalment bonds to pay future instalments due on those bonds as they fell due.

Another objection taken to the finding on the eighth issue is that the decree was merely declaratory in so far as it related to the fourth, fifth and sixth instalments, and that the decree was nevertheless executed against the minors' estate.

It must be observed, however, that the decree was not declaratory but contained an order for payment as those instalments fell due, and, in fact, the sale now impugned by the appellant took place long after they had become overdue. In our opinion this objection is entitled to no weight.

Another objection is that the Collector ought to have objected to the execution of the decree on the ground mentioned in the last paragraph, when he represented the plaintiff's predecessor in title in execution proceedings. In fact the Collector did not then take the objection ; but, if it had been taken, it would have been disallowed for the simple reason that on its true construction, the decree was not declaratory after the future instalments became due any more than a decree for payment of future maintenance at a fixed rate would be, and that in execution Courts do not go behind the decree sought to be executed, but take it as they find it, unless it is impugned for fraud or want of jurisdiction patent on the face of the record.

It is also an admitted fact that neither the plaintiff's predecessor in title nor any one else on his behalf objected to the execution of the decree at any time before his death, and we do not think that the plaintiff is now at liberty to rip open the decree and to undo proceedings held in its execution, and completed during his predecessor's lifetime, except on the ground of fraud or collusion.

The next objection is that the Collector should have obtained an adjournment of the sale and not allowed the property in dispute to be sold. The Subordinate Judge refers to the several applications made for adjournments of the sale, to the several adjournments actually granted, to the order of the Civil Judge refusing the last

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application and to the several attempts made to prevent the sale, and to its being at last found unavoidable as shown by the Collector Mr. Longley's letter. We agree in the opinion that the sale was not due to any laches on the Collector's part as guardian of the plaintiff's predecessor in title, but to its being found otherwise impracticable to clear off the heavy debts left by Buloka Pandya Chokka Talavar.

The next objection is that there was no attachment prior to the sale. This is not well-founded in fact, and it is inconsistent with the appellant's admission in the plaint. There are also several exhibits which prove that an attachment preceded the sale. On this point we agree with the Subordinate Judge that the objection has no foundation in fact.

Passing on to the ninth issue, we observe that there is not a particle of evidence in support of the alleged fraud. The learned pleader for the appellant states that he relies on the objections taken by him to the decision of the Subordinate Judge on the eighth issue as constituting together a case of fraud. We are of opinion that they do not amount to fraud.

The last question which remains to be considered in this appeal is that raised by the tenth issue. The plaintiff's case was that the decree-debt was vicious and immoral, and that, although it had originally been contracted by his father, yet it was not one binding upon him. The contention for the defendants was that the debt was incurred for purposes binding on the former Zamindar, Buloka Pandya's family, and therefore on the plaintiff. The Subordinate Judge has stated the evidence on each side, and, after carefully considering it at length, has come to the finding that the debt was neither vicious nor immoral as alleged by the appellant, but was a debt contracted by a Hindu father for purposes binding on his family. In this opinion we entirely concur. The evidence for defendants clearly traces the nucleus of the decree-debt to debts contracted by appellant's father in 1845 and 1849 whilst the plaintiff was born only in 1861. Original suit No. 1 of 1845 was brought by an illegitimate son of appellant's grandfather, and, to that suit, the grandfather and Buloka Pandya, appellant's father, were made parties. The object of that suit was to recover possession of a pannai land or home-farm on the ground that it had been sold to the then plaintiff by appellant's grandfather. Appellant's father resisted the claim, but the suit ended in a compromise, whereby

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it was agreed that appellant's grandfather should pay the then plaintiff Rs. 7,000, that the sale in favour of the latter should be cancelled, and that appellant's father should succeed to the pannai land given up by the then plaintiff. After the compromise, appellant's grandfather died, and appellant's father succeeded to the zamindari and the pannai land in November 1845.

In order to pay the sum of Rs. 7,000 due under the razinamah to pay peishcush, and the then Zamindar's installation expenses and palace expenses, appellant's father borrowed Rs. 22,000 from one Vellayan Chetty. That this debt was contracted for the above-mentioned purposes is, as observed by the Subordinate Judge, proved by defendants' witnesses Nos. 1, 3, 4, 7 and 8, by plaintiff's witnesses Nos. 4 and 22, and by the compromise V.

Vellayan Chetty instituted original suit No. 1 of 1849 against appellant's father and another, and the suit terminated also in a compromise, whereby appellant's father undertook to pay the debt in certain instalments.

In order to pay Vellayan Chetty, appellant's father borrowed from one Venkatachellam Chetty, who subsequently brought original suit No. 3 of 1854, which suit terminated in a compromise, which secured the debt on the zamindari and movable property of appellant's father. In execution of the decree several razinamahs were filed, the last of which was for Rs. 36,000. Venkatachellam assigned his right under the razinamah to Chidambaram Chetty, the plaintiff in original suit No. 14 of 1866, in execution of the decree in which the Court-sales now in dispute took place.

Thus the nucleus of the decree-debt is traced by a series of public documents to the money borrowed from Vellayan Chetty prior to original suit No. 1 of 1849, of which Rs. 7,000 was the amount undertaken to be paid to secure to appellant's father the succession to certain pannai land yielding an annual income of Rs. 10,000, and Rs. 15,000 were borrowed for payment of (i) peishcush, (ii) installation expenses, and (iii) palace expenses. It is argued by the appellant's pleader that the razinamah entered into by appellant's father with Venkatachellam Chetty does not operate to create a charge but only evidences a money-debt. We should be inclined to hold that it did create a charge, for the language of the instrument suggests an intention to secure the debt on specific property. The insertion of general words movable property in addition to the zamindari cannot defeat that intention which

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is the key to right construction. However, it is not necessary to determine this question for the purposes of the present appeal, as we concur in the opinion of the Subordinate Judge that, before the property in dispute was sold, it had been attached in execution of the decree. On the other hand, the appellant's contention that the decree-debt was immoral rests on mere oral evidence. The Subordinate Judge sets out the evidence and considers it not trustworthy, and the reasons assigned by him support his conclusion. On reading the evidence, we do not see our way to coming to a different finding. Thus, on the one side there is unimpeachable documentary evidence, whilst on the other side there is only questionable oral evidence in regard to transactions which took place more than forty years ago, the evidence being produced at a late stage of the final hearing and several of the witnesses being in a position to be influenced by a person in the appellant's position. We have, therefore, no hesitation in adopting the finding of the Subordinate Judge on the tenth issue. Apart from the weight due to the evidence, there are also several reasons why the appellant should not now be permitted to question the nature of the debt. (i) It was held by the Privy Council in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*(1), that a Hindu son has no power, unless he has it by special custom, to question the alienation of an impartible estate by his father, and in the present case there is no proof of such custom; (ii) there is also the fact that the debt sued for in original suit No. 14 of 1866 had been contracted more than ten years previous to the birth of the appellant; (iii) again the original debt merged into a decree-debt during the lifetime of appellant's predecessor in title and in a suit to which both appellant and his predecessor in title were substantially parties, and there is no proof of fraud nor any other material fact upon which appellant can repudiate the decree in original suit No. 14 of 1866 or the Court-sales in its execution.

We shall here briefly notice another question which respondents argued at the hearing of this appeal with reference to the relinquishment by the two surviving brothers of the whole blood in favour of the appellant of any interest which they possess in the zamindari. Exhibit C evidences such relinquishment, and it is admitted by both the brothers of the full blood, Sendura

(1) L.R., 15 I.A., 51.

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Pandya Talavar and Chokka Talavar. Also in their evidence, as the third witness for the plaintiff and as the Court first witness, they acknowledge the appellant's right to the zamindari. The Subordinate Judge held that on the true construction of the document, their rights of survivorship to the zamindari were not the interest relinquished, but we are unable to support this construction, having regard to the language of paragraph 6 of document C. It is in these terms: "Further, as we have given up in consideration for "this, all our right, interest and title, &c., in the movable and "immovable properties, such as the zamindari, &c., capable of "improvement by you, as far as our share of maintenance is "concerned, and as what we have received is sufficient for our share "of maintenance suitable to our dignity as per zamindari custom "and our shares, you and we are not undivided but divided gnathis "(bandhus), and we shall live in separate families." The words 'such as the zamindari' and 'we are divided' disclose an intention to regard the zamindari as appellant's exclusive property from the date of the document.

The respondents' contention is that appellant's claim, as based on exhibit C, would be time-barred, and that the relinquishment is not available to appellant as an additional ground in support of his claim. It is argued that, though Sendura Pandyan, the next junior brother of the appellant and the eldest of the surviving brothers of the whole blood, might not be time-barred by reason of his having attained his majority within three years before he executed document C, yet the privilege conferred upon minors by section 7 of the Limitation Act is personal to them, and does not extend to their adult transferees, and that the transfer of their right after a period of twelve years from the date on which the sale was confirmed and before the expiry of three years, a period which is allowed to them as a personal privilege, is not actionable if the transferee had attained his majority more than three years before suit. In support of this contention reliance is placed on *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas*(1) and *Mohommed Arsud Chowdhry* v. *Yakoob Ally*(2). Those decisions involve, however, the apparent anomaly that a minor cannot transfer his title to property though at the date of transfer it is a subsisting interest so far as he is concerned. In the view which we take

(1) I.L.R., 9 Calc., 663. (2) 15 B.L.R., 357.

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1877—XV : *See* LIMITATION ACT.

1882—XIV : *See* CIVIL PROCEDURE CODE.

CHRISTIAN MARRIAGE ACT—ACT XV OF 1872, s. 68—*Solemnization of marriage under Hindu rites between a Native Christian and a Hindu by a person not authorized to perform marriages under section 5 of the Act.*] A person who performs a ceremony of marriage according to Hindu form between a Native Christian and a Hindu commits an offence under section 68 of Act XV of 1872, unless he is authorized to solemnize marriages under section 5 of the Act.

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CIVIL PROCEDURE CODE, s. 13—*Sivaganga sanad of* 1803—*Failure of suit alleging fraud—Possession known and acquiesced in prior to adjudication.*] The High Court of Madras dismissed on the facts a suit brought in 1886, grounded on fraud attributed to the lineal ancestor of the principal defendant, in obtaining, in 1803, the grant of the sanad of the Sivaganga Zamindari, to which the plaintiff claimed title. The plaintiff's case was that the defendant's ancestor, the younger of two brothers, had fraudulently caused the sanad to be made out in his own name, whereas it was intended to be, and ought to have been, a grant to the elder brother, who was the plaintiff's lineal ancestor. Those through whom the plaintiff claimed had not made any such charge, although they had knowledge of all the facts connected with the grant of the sanad of 1803 to the younger brother, and with the long possession by him and his descendants, among whom there had been litigation, resulting in a decision as to the ownership :—*Held*, that this suit could not be maintained to re-open the question.

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2. ———————, s. 244, SUB-SECTION (c)—*Questions arising in execution of decree—Construction of a decree as to the appointment of a manager of the property of a religious institution.*] A decree of the High Court declared its holder entitled as the Pandara Sannadhi, or religious chief, of an adhinam, to see that a competent person, from among the Tambirans who had received initiation at that institution, was appointed to fill the then vacant office of Tambiran, managing certain mutts. The decree directed that the Pandara should name a Tambiran of his adhinam for the office, whom, after inquiry as to his fitness, the Subordinate Court should appoint. If that Court found him unfit, it was to appoint a Tambiran of that adhinam upon its own selection. In execution the Pandara named a Tambiran for the office, but died before the inquiry as to his fitness. His successor, as head of the adhinam, petitioned to withdraw the nomination, naming another Tambiran. The Subordinate Court made an order disallowing the withdrawal, and, after inquiry as to the fitness of the first-named Tambiran, appointed him to the office. The High Court, on the Pandara's appeal, decided that the first nomination had been

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competently withdrawn, and directed an inquiry as to the fitness of the person secondly named, finding on the evidence that the first-named was not fit:—*Held*, on the appeal of the Tambiran first-named, that the question as to his right was one that had arisen between the parties to the suit, and related to the execution of the decree, within the meaning of section 244, sub-section (*c*), Civil Procedure Code, and that he could appeal from the order made. Also, that, on the construction of the decree, the first nomination could not be withdrawn and a second one substituted before the inquiry, and that the person first named was entitled to the Court's decision as to his fitness. On the facts, the finding of the High Court that the first-named Tambiran was unfit, was not affirmed; and the order of the Subordinate Judge was maintained.

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3. ——————————, s. 257A—*Adjustment of decree out of Court—Instalment bond—Consideration.*] An instalment bond, executed by a judgment-debtor in favour of the decree-holder and in consideration of the benefit of the decree being given up, is not void as an agreement falling under section 257A of the Civil Procedure Code. Such an agreement is void only as far as it affects the right to execute the decree, and may be the foundation of a fresh suit. *Sellamayyan* v. *Muthan*(1), *Jhabar Mahomed* v. *Modan Sonahar*(2), and *Hukum Chand Oswal* v. *Taharunnessa Bibi*(3), followed.

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4. ——————————, s. 283—*Whether defendant may plead that the decree in question was collusively obtained.*] A defendant in a suit brought under section 283 of the Civil Procedure Code, who is connected with the judgment-debtor as being reversionary heir of the judgment-debtor's husband, or as being his co-parcener, may show that the decree, in execution of which the property in dispute was attached, was collusively obtained. *Gulibai* v. *Jagannath Galeankar*(1) dissented from.

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5. ——————————, ss. 588 (17), 589—*Appeal from insolvency order—Act VII of* 1888, *s.* 56—*Act X of* 1888, *s.* 3, *cl.* (*a*)] Bearing in mind that section 589 of the Code of Civil Procedure was passed to regulate the appellate jurisdiction in appeals from orders, the words 'Court subordinate to that Court' in section 3 of Act X of 1888 must be construed with reference to its appellate jurisdiction. Consequently a District Court has no jurisdiction to hear an appeal from an order in insolvency matters, in a case where it has no jurisdiction to hear an appeal in the suit itself, as when the subject-matter of the suit is more than Rs. 5,000 in value.

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6. ——————————, s. 622—*Land Acquisition Act—Act X of* 1870, *ss.* 3, 24, 25, 29 *and* 34—'*Material irregularity*'—*Mistake in regard to the principle of calculation of the value of the land acquired.*] If a Judge and assessors, sitting to determine the amount of compensation to be awarded for land acquired under the Land Acquisition Act of 1870, have refused to take into consideration any of the matters prescribed by section 24 of that Act, or have improperly taken into consideration any of the matters prohibited by section 25 thereof, such procedure

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would amount to material irregularity in the exercise of their jurisdiction, and would justify the intervention of the High Court under section 622 of the Code of Civil Procedure. Having regard to the definition of 'land' contained in section 3 of Act X of 1870, there is nothing illegal in a Judge taking into account the value of works on the land which make it suitable for a salt factory; and even if, in making his estimate of the market value of the land, he took into consideration the price paid for neighbouring pans, and was in error in so doing, his mistake would be only one concerning the principles of valuation and not an irregularity in the exercise of jurisdiction.

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HINDU LAW—*Partition—Maintenance—Arrears of maintenance—Wrongful withholding.*] Where, in consequence of a suit for partition of the entire family property, a portion of the property is divided, but the remaining portion is declared impartible, the family remains undivided in respect to the latter portion. In a suit for arrears of maintenance it is incumbent on the plaintiff to prove that there has been a *wrongful* withholding of the maintenance to which he is entitled. *Jivi* v. *Ramji*(1), *Muthulakshmamma* v. *Venkataratnamma*(2), and *Sri Raja Satrucharla Jagannatha Razu* v. *Sri Raja Satrucharla Ramakrishna Razu*(3) followed.

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LAND ACQUISITION ACT—ACT X OF 1870, ss. 3, 24, 25, 29 AND 34—*'Material irregularity'—Mistake in regard to the principle of calculation of the value of the land acquired—Code of Civil Procedure—Act XIV of* 1882, *s.* 622.] If a Judge and assessors, sitting to determine the amount of compensation to be awarded for land acquired under the Land Acquisition Act of 1870, have refused to take into consideration any of the matters prescribed by section 24 of that Act, or have improperly taken into consideration any of the matters prohibited by section 25 thereof, such procedure would amount to material irregularity in the exercise of their jurisdiction, and would justify the intervention of the High Court under section 622 of the Code of Civil Procedure. Having regard to the definition of 'land' contained in section 3 of Act X of 1870, there is nothing illegal in a Judge taking into account the value of works on the land which make it suitable for a salt factory; and even if, in making his estimate of the market value of the land, he took into consideration the price paid for neighbouring pans, and was in error in so doing, his mistake would be only one concerning the principles of valuation and not an irregularity in the exercise of jurisdiction.

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LIMITATION—LIMITATION ACT—ACT XV OF 1877, SCHED. II, ART. 178—*Applications for probate.*] The Limitation Act does not apply to applications for probate, and the applications referred to in article 178 of schedule II of that Act are applications under the Code of Civil Procedure. *Janaki* v. *Kesavalu*(1), *Bai Manekbai* v. *Manekji Kavasji*(2), and *Ishan Chunder Roy, in re*(3), followed.

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TORT—*Injury to property—Contributary act—Test thereof.*] As in the case of contributary negligence, so an act of one party can only be contributary to the

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injury he complains of, if by the exercise of ordinary care the other party could not have avoided causing the injury.

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WILL—*Probate—Interest of defendant in testator's estate.*] In a suit brought to obtain probate of a will the defendant, before he can contest the will, must show that he has some interest in the testator's estate. The fact of being a legatee under the will, or a creditor of the testator, does not amount to such an interest. But proof of a former will of the testator in which the defendant is interested is a sufficient interest to contest the will set up.

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of the question whether a brother of the whole blood is entitled to succeed to an impartible zamindari in preference to his elder brother of half-blood, it is not necessary for us to determine this question for the purposes of this appeal. Thus, the appellant's claim is barred first by limitation, and next by sections 13, 244 and 312 of the Code of Civil Procedure, and lastly, it also fails on the merits.

As this is a case which may be taken to the Privy Council, and as the original suit was instituted in 1885 and the appeal preferred in 1891, we have deemed it fit to consider at length all the questions argued before us on appeal in order that no occasion may rise for further investigation. The result is that the appeal cannot be supported and must be dismissed with costs.

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PONNAMBALA TAMBIRAN, APPELLANT,

AND

SIVAGNANA DESIKA GNANA SAMBANDHA PANDARA SANNADHI, VISVALINGA TAMBIRAN, AND SAMINADHA TAMBIRAN.

P.C.* 1894. March 2, 3. April 28.

[On appeal from the High Court at Madras.]

Code of Civil Procedure (Act XIV of 1882), section 244, sub-section (c)—Questions arising in execution of decree—Construction of a decree as to the appointment of a manager of the property of a religious institution.

A decree of the High Court declared its holder entitled as the Pandara Sannadhi, or religious chief, of an adhinam, to see that a competent person, from among the Tambirans who had received initiation at that institution, was appointed to fill the then vacant office of Tambiran, managing certain mutts. The decree directed that the Pandara should name a Tambiran of his adhinam for the office, whom, after inquiry as to his fitness, the Subordinate Court should appoint. If that Court found him unfit, it was to appoint a Tambiran of that adhinam upon its own selection.

In execution the Pandara named a Tambiran for the office, but died before the inquiry as to his fitness. His successor, as head of the adhinam, petitioned to withdraw the nomination, naming another Tambiran. The Subordinate Court made an order disallowing the withdrawal, and, after inquiry as to the fitness of the first-

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* *Present:* Lord MACNAGHTEN, Sir RICHARD COUCH and the Honorable GEORGE DENMAN.

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named Tambiran, appointed him to the office. The High Court, on the Pandara's appeal, decided that the first nomination had been competently withdrawn, and directed an inquiry as to the fitness of the person secondly named, finding on the evidence that the first-named was not fit:

Held, on the appeal of the Tambiran first named, that the question as to his right was one that had arisen between the parties to the suit, and related to the execution of the decree, within the meaning of section 244, sub-section (*c*), Civil Procedure Code and that he could appeal from the order made. Also, that, on the construction of the decree, the first nomination could not be withdrawn and a second one substituted before the inquiry, and that the person first named was entitled to the Court's decision as to his fitness. On the facts, the finding of the High Court that the first-named Tambiran was unfit, was not affirmed; and the order of the Subordinate Judge was maintained.

APPEAL from an order (24th February 1890) of the High Court, reversing an order (7th October 1889) of the Subordinate Judge of Kumbakonam, made in execution of a decree (23rd October 1888) of the High Court.

The orders now in question related to the appellant's appointment to be managing Tambiran of endowments belonging to two mutts—one called the Benares (Kasi) mutt at Tiruppanandal in Kumbakonam, and the other at Benares connected with it. Both were in relation to the adhinam at Dharmapuram in the Tanjore district, of which the first respondent was the head or Pandara Sannadhi. The orders were made in execution of a decree of the High Court of the 23rd October 1888, following a judgment in *Gnana Sambandha Pandara Sannadhi* v. *Kundasami Tambiran*(1). In that suit the plaintiff, Gnana, then the head of the adhinam, obtained a decree against Kundasami Tambiran, declaring his appointment as manager of the property of the mutts to be invalid. The latter, though appointed by the will of the last holder of the office, Ramalinga, deceased in 1880, had not been a disciple who received initiation from the adhinam at Dharmapuram. The judgment described the connection of the religious establishments affected by the suit, giving their histories and stating their customs. The decree is to be found in the report of the appeal in the execution proceedings in *Gnana Sambandha* v. *Visvalinga*(2). The judgment of 1888 decided that the managing Tambiran at Tiruppanandal was entitled to select his junior and successor, but his selection was subject to the condition that it should be made of a

(1) I.L.R., 10 Mad., 397. (2) I.L.R., 13 Mad., 339.

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Tambiran from among the disciples of the adhinam at Dharmapuram. Also that, when this had been fulfilled, the Pandara Sannadhi at that adhinam was alone entitled to conduct the ceremony of investiture. The relation of the adhinam to the mutt was to be maintained according to ancient usage. Reference was made also to a previous decision of this committee relating to these institutions in *Kashi Bashi Ramling Swamee* v. *Chitumber Nath Koomar Swamee*(1). The right of the plaintiff consisted in seeing that a Tambiran of the association at Dharmapuram was appointed to manage the property of the mutts; and the remedy applicable was that the Subordinate Court should, on the nomination by him of a qualified Tambiran belonging to Dharmapuram, appoint the latter to the office. The decree ordered that the Subordinate Judge should direct the head of that adhinam to name a Tambiran, from among those of his adhinam, competent to the duties of the managing Tambiran of the mutt at Tiruppanandal; and that, if the Judge saw no objection to the fitness of the person so named for the office, he was to appoint him; but that, in case the Judge should object to the person named, he was to select as well as to appoint, and to direct the head of the adhinam to make the investiture, and certify it; whereupon, the Judge should put the person so appointed and invested in possession of the mutts and their endowments.

The proceedings in execution are stated in the report above mentioned. On the 25th January 1889 the Subordinate Judge ordered the Pandaram to name. On the 11th February he named Ponnambala, and the Court issued a notification of the nomination. On the 18th February 1889 Gnana Sambandha died, and was succeeded by the first respondent, Sivagnana Desika, whose succession was recognized on the 15th March following. On the same day the new Pandaram filed a petition stating the unfitness of Ponnambala for the office, and asking leave to withdraw his name, and to nominate Saminadha instead. The latter became the third respondent in this appeal. The second respondent was Visvalinga, who represented Kundasami, the original defendant, deceased, pending the proceedings. Visvalinga did not appear on this appeal.

The principal questions now raised were, firstly, whether, with reference to section 244, Civil Procedure Code, the present appellant, in order to prefer his claim as the Tambiran first named for the

(1) 20 W.R. (P.C.), 217.

appointment, ought to have brought his separate suit, or could maintain his right in execution proceedings and appeal, as he had done as a petitioner in them, without having been one of the original parties to the suit; secondly, whether, on the true construction of the decree of 1888, the succeeding Pandara of Dharmapuram had power to withdraw his predecessor's nomination; thirdly, whether, upon the inquiry as to his ordination in religion, his character and qualifications, the appellant satisfied requirements.

On the 16th March 1889 the Subordinate Judge made his order. He decided that the power of nomination had been exhausted, and did not continue to the representative of the deceased decree-holder. He referred to the absence of any direction from the Subordinate Judge to the succeeding Pandara to nominate. He added: "I am unable to construe the decree of the High Court "as giving to the appellant the power of nomination more than "once. As the person that had made the nomination, and as one "that saw reasons subsequently for not quite approving the nomin-"ation, the deceased appellant might, before the Court passed final "orders in respect to his nomination, make representations calcu-"lated to show how he had been mistaken in his nomination, and "the Court might permit him to make a fresh nomination. The "same line of procedure is open to the present Pandara Sannadhi "also. Beyond this he cannot go, I think. Of course, it is the "duty of the Pandara Sannadhi to see that a nominee of his adhi-"nam is in every way worthy of the office he is called upon to "fill. Consequently, if the present nominee is not worthy of the "office, the present Pandara Sannadhi, as I said before, should "assist the Court in finding out whether the nominee is a worthy "person or not. Therefore I am of opinion that the power of "nomination could be exercised only once."

The Subordinate Judge then vacated his office. His successor made inquiry as to the fitness of Ponnambala, and on the 7th October 1889 gave judgment that there was no objection to his nomination, which he confirmed. The Pandara Sivagnana Desika was directed to invest Ponnambala with the signs of his office, but filed an appeal to the High Court from the order.

A Divisional Bench (Collins, C.J., and Muttusami Ayyar, J.) reversed the order of the Subordinate Judge. They held that Ponnambala, who, before them, was respondent with Visvalinga, the Pandara, was a necessary party to the appeal, in order that his

interests might not be prejudiced. Their view was that, until the Subordinate Judge had acted upon the nomination, it might be re-called, and that, if there should be any valid cause, it was open to the nominator or his representative to withdraw it and name another person. It might be that there was hardly enough to justify the removal of the first-named Tambiran, if he had been put into possession; but there was enough to show his disqualification upon the inquiry which had yet to be held when his name was withdrawn. They directed an inquiry as to the fitness of the Tambiran secondly nominated, and upon his being found unfit, if that should result, the Subordinate Court was itself to appoint. The judgment is given at length in I.L.R., 13 Mad., 339.

On the 16th January 1891, on Ponnambala's petition under section 598, Civil Procedure Code, for a certificate to enable him to appeal to Her Majesty in Council, the High Court refused leave, giving the following reasons: "The order of this Court of the 24th "February 1890, from which Ponnambala desires to appeal, was "not a final order made against a person who was already a party "in execution proceedings, the petitioner's status being merely that "of a candidate for selection as a trustee, whose nomination by the "former Pandara Sannadhi had been withdrawn by the present "Pandara Sannadhi, and whom the latter had declined to invest "with the insignia of the office as provided by the decree of 1888. "Further, the order proceeded, not only on the ground that under "the terms of the decree the present Pandara Sannadhi was per-"fectly competent to revoke the nomination made by his predeces-"sor for sufficient cause, but also on the further ground that there "was enough in the evidence as regarded the petitioner's antece-"dent conduct for disallowing his claim as a candidate for the re-"sponsible and important position of trustee of the mutt at Tirup-"panandal.

"We do not consider that the refusal to accept a candidate for "the office of a trustee, when there is no prior vested right in him, "is a matter in respect of which the petitioner is entitled to leave "to appeal to the Privy Council.

"It is contended that the former order treated the petitioner as "a necessary party to it. The petitioner was made a party by the "Pandara Sannadhi (who was entitled to appeal) to his appeal "from the order of 1889, and it was considered that he was a neces-"sary party in his own interest, for the limited purpose of deter-

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"mining whether the objections taken by the Pandara Sannadhi "were well founded, and whether the petitioner was an eligible "candidate for the office of trustee. We do not consider that this "is a case in which we should grant leave to appeal to the Privy "Council."

On the 9th May 1891 Ponnambala, on the motion of Mr. *J. D. Mayne*, obtained special leave to appeal, liberty being reserved to the respondents to raise any question as to the competency of the appeal at the hearing.

On this appeal, Mr. *J. D. Mayne* appeared for the appellant, Sir *John Rigby*, Q.C., Solicitor-General, and Mr. *Walter Lindley* appeared for the first and third respondents.

The second respondent did not appear.

Sir *John Rigby*, Q.C., raised the objection, as one preliminary to the hearing, that the appellant was not in a position to bring forward his claim to be appointed managing Tambiran by appealing from the order of the 24th February 1890. He had not been a party to the suit. The order of the High Court of the 16th January 1891 was referred to. As regarded his right to secure, if he could, the result of his nomination, the order of the 24th February 1889 was not a final decree or order in his favour within section 595, Civil Procedure. A right under that decree had vested in the nominator, but none was vested in the person who might be named by the latter, so as to enable him to appear in the suit which was between rival claimants of the power to appoint. His only mode of insisting on his right, if he had one, was by bringing his separate suit. Reference was made to *Ragava* v. *Rajaratnam*(1).

Their Lordships disallowed the objection, reserving their reasons till they should give judgment on the appeal.

Mr. *J. D. Mayne* for the appellant argued that the High Court had been wrong in deciding that the first respondent had power to withdraw, as he had petitioned to withdraw, the nomination made by his predecessor. The first question was—had not the power to name been exhausted when the first nomination was made? It was true that the Pandara of the adhinam had not, by exercising the power to name in favour of the appellant, invested him thereby with the office. But the nomination was sufficient to

(1) I.L.R., 14 Mad., 57.

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vest in him the right to be subsequently appointed to the office, subject to one exception, viz., that his right would be defeated if the judicial inquiry provided should terminate in a finding of his unfitness. The inquiry had not taken place when the first respondent applied to be allowed to withdraw the nomination made by his predecessor, without alleging that it had been made in error, or without care, or on any undue ground. No such reason was assigned why the nomination should be withdrawn. The first respondent had asked leave to withdraw the name already submitted, and with it to withdraw what the appellant had previously obtained as a right, viz., the opportunity of submitting himself for the Court to inquire whether he was fit for the office or not. The appellant, when named, had a right defeasible in a special manner, but not in the manner attempted. Reference was made to *Neelkisto Deb Burmono* v. *Beerchunder Thakur*(1). The appellant was entitled to rely on a strict adherence to the terms of the decree of 1888, which did not authorize a series of nominations, but required an inquiry to be held by the Judge as soon as a nomination had reached him from the Pandara. If nothing had vested in the Tambiran first named, the Judge's proceedings, after the attempted withdrawal, which would in that supposed case have been effectual, would have been void. There would have been no person in whose favour the Subordinate Judge's approval of the nomination would have operated. But that was not the state of things. The first nomination was valid for all the way that it went; the choice had been exercised; and the rest was in the hands of the Subordinate Judge. Moreover, the High Court was wrong upon the evidence in reference to the character and conduct of the appellant. As to this the order was made on an incorrect view of the facts. The sanctioning authority had no right of selection, but must proceed on judicial grounds, and could not withhold the appointment, unless there were valid reasons for holding the first nominated Tambiran to be unfit. There was error in the High Court's finding that such reasons existed.

Sir *John Rigby*, Q.C., and Mr. *W. Lindley* for the first and third respondents argued that, upon the true construction of the decree of 1888, the right of nomination had not been exhausted, but the right and duty of seeing that due nomination was made

(1) 12 Moore I.A., 523; 3 B.L.R. (P.C.), 13; 12 W.R. (P.C.), 21.

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by the causing a suitable person's name to be before the Subordinate Judge, had passed to the successor of the original decree-holder as head of the adhinam. The former having died before the approval of the nomination, without that approval it could have no effect. To this must be added that the High Court found valid reasons to exist why the Subordinate Court should not have sanctioned the nomination. There had been a *locus penitentiæ* as the High Court had decided. If the nominator had changed his opinion as the fitness of the person whom he had named, and in this respect the successor had the same power, he could have withdrawn that name. It was contended that, upon the evidence, the High Court was right in finding that there were grounds for refusing to confirm the appellant's nomination; and that the order that inquiry should be made as to the qualifications and fitness of the third respondent was a proper one.

Mr. *J. D. Mayne* replied.

Afterwards, on the 28th April 1894, their Lordships' judgment was delivered by Sir RICHARD COUCH.

JUDGMENT.—This appeal arises out of proceedings in the execution of a decree of the High Court at Madras, made on the 23rd of October 1888 in an appeal in which Gnana Sambandha, the plaintiff in the suit, was appellant, and the second respondent Visvalinga Tambiran, the representative of Kumarasami Tambiran, the original defendant in the suit, was respondent. The suit related to two mutts (temples)—one situated at Tiruppanandal and the other at Benares—and was brought by the plaintiff as the representative for the time being of a religious institution called the adhinam at Dharmapuram in the district of Tanjore. The plaintiff's case was that the properties in suit were the endowments founded in support of the mutts and various charities at Benares and other places, in the charge and under the management of the Tambirans or representatives of the mutt called the Benares mutt at Tiruppanandal in the same district; that the last lawful manager of this mutt was one Ramalingam Tambiran, and upon his death a dispute arose in regard to the right of succession to the management. The plaint prayed for a declaration that the mutts at Tiruppanandal and Benares were subject to the control of the plaintiff and his successors at Dharmapuram; that they were entitled to appoint and send Tambirans to manage them; that the defendant's succession was unlawful, as he was not a Tambiran

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attached to the adhinam at Dharmapuram, and was not appointed by the plaintiff; and that the will executed by Ramalingam Tambiran in his favour had no legal force. The High Court decreed that the appellant's claim that the properties at Tiruppanandal and Benares belonged to the adhinam at Dharmapuram and to the possession of those properties should be dismissed; and that his claim to a declaration of his right to appoint Tambirans to management at Tiruppanandal and Benares, and to a direction that possession of the said properties should be transferred to a Tambiran whom he might appoint, should also be dismissed. In other respects the decree of the Lower Court was reversed, and it was declared that the appointment of Kumarasami, the original defendant, by Ramalingam as his junior and successor, and the will in favour of Kumarasami, were illegal, and they were set aside so far as they related to the mutts at Tiruppanandal and Benares and other subordinate mutts and their endowments. It was also declared that the appellant was entitled, as the head of the Dharmapuram mutt, to see that a competent Dharmapuram Tambiran was appointed as the head of the mutt at Tiruppanandal; that the Subordinate Judge of Kumbakonam, in order to fill up the then vacant office of Tambiran of the Tiruppanandal mutt, should direct the appellant, who was the plaintiff in the suit, to name a Tambiran from among the Tambirans of his adhinam competent to discharge the duties of the managing Tambiran of the Benares (Kasi) mutt at Tiruppanandal; that if the Subordinate Judge saw no objection to the fitness of the person so named for the office aforesaid, he should appoint him as such managing Tambiran; but in case the Subordinate Judge should object to the person so named, he should appoint a competent person of the Dharmapuram adhinam as such managing Tambiran, and should thereupon direct the appellant to invest him as usual and certify it; and that upon the investiture being certified, the Subordinate Judge was to place the person so appointed and invested in possession of the mutt, &c.

On the 21st of January 1889 the plaintiff in the suit and appellant in the High Court applied to the Subordinate Judge for execution of the decree by a warrant for realization of the costs awarded by it, and that further proceedings might be taken regarding the appointment of a Tambiran to the then vacant place in the Kasi (Benares) mutt at Tiruppanandal in accordance with the decree. Thereupon, on the 25th of January, the Subordinate

Judge made an order directing the petitioner to name a Tambiran from among the Tambirans of his adhinam competent to discharge the duties, ten days being given for that purpose.

On the 11th of February 1889 the plaintiff presented a petition to the Subordinate Judge praying that, inasmuch as Ponnambala Tambiran, one of the Tambirans of his adhinam, was a fit man for the vacant place, was competent to discharge the affairs thereof with efficiency, and was one of good character from among the Tambirans of his adhinam, the Court would be pleased to appoint him to the vacant office. Upon this an order was made in these terms:—"The Court has no means of testing the fitness of the "Tambiran named except by inviting the opinion of the public "about it. Therefore a notice will be put up at the court-house "calling upon the public interested in the well-being of the mutt "at Tiruppanandal to give its opinion about the Tambiran named "on Saturday the 2nd of March 1889." Accordingly a notice to that effect was, on the 15th of February, affixed in a conspicuous part of the court-house. It may be doubted whether this was either a necessary or a wise proceeding on the part of the Subordinate Judge leading, as it was sure to do, to agitation among the supporters of a rival candidate, and subjecting the appointment to something resembling popular election, which does not appear to be intended by the decree.

In the case for the appellant it is stated that in reply to this notice a great number of petitions were forwarded to the Court, many of them expressing approval of the nomination of Ponnambala, others suggesting the names of other Tambirans as being, in the opinion of the writers, more suitable for the post. Of the latter class the majority were in favour of Karbar Saminadha Tambiran, at that time manager of the Dharmapuram Adhinam. Of the petitions opposed to the nomination 74 stated the preference of the petitioners for some other nominee, but contained no allegation to the prejudice of Ponnambala; 61 contained a general statement of unfitness, but with no reason for it, and 11 charged him with misconduct. The accuracy of this statement in the appellant's case was not disputed by the respondents' counsel.

On the 18th of February 1889 the plaintiff in the suit and appellant in the High Court died, and was succeeded as the head of the Dharmapuram adhinam by the first respondent in the present appeal who, on the 28th of February, petitioned the Court

to admit him in the place of the deceased and to take further proceedings. On the 15th of March he was ordered to be made the representative of the deceased plaintiff. On the same day he presented a petition to the Court stating that Ponnambala was unfit to manage the properties of the Benares mutt at Tiruppanandal, and that contrary to the decision he was a Tambiran who received kashayam (a ceremony of initiation) from the Madura adhinam, and praying that the Court would permit him to withdraw the petition submitted to the Court by the former Pandara Sannadhi nominating Ponnambala Tambiran, and to appoint Karbar Saminadha Tambiran to the office. On the 16th of March the petition, and also one for the realization of the costs, came on for hearing, the representative of the defendant in the suit and Ponnambala being described as counter-petitioners in the title of the judgment. The former did not appear. Ponnambala appeared by two vakils, and in the judgment it is said that on his behalf it was contended, *inter alia*, that the power of nomination could be exercised only once, that it was exercised by the late Pandara Sannadhi, and that under the decree of the High Court the representative of the appellant had no power to make a fresh nomination unless directed byt he Court. The petitioner's pleader contended that there was power to withdraw the nomination and to make a fresh nomination. The Subordinate Judge in his judgment, after saying it was suggested that matters would be greatly facilitated by his deciding first of all the question about the power of nomination, gave his reasons for holding that the power of nomination could be exercised only once.

Evidence was then gone into, the new head of the Dharmapuram adhinam examining witnesses, including himself, to prove the charges against Ponnambala, and Ponnambala examining witnesses in answer, also including himself. The opponents of Ponnambala objected to his appointment on the grounds (i) that he was not ordained by the Dharmapuram adhinam, and was not a Tambiran of the Dharmapuram mutt, but that he came from and belonged to the adhinam at Madura. (ii) That he proved himself unequal to discharge the less onerous and comparatively trifling duties of the Dharmapuram mutt to which he had been appointed within the last seven or eight years. Upon the latter charge evidence was allowed to be given that he misconducted himself while so employed, and committed acts of

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malversation and breach of trust, and misappropriated money and things belonging to the mutt and its charities. The Subordinate Judge (the successor of the one who held that the nomination could not be withdrawn, and who had taken the depositions of all the plaintiff's witnesses upon the second question, except one who was examined before a commissioner) having taken the evidence of Ponnambala and his witnesses, held that there was no objection to his nomination, and confirmed it, and directed him to be invested and the investiture to be certified within two months from the date of his decree, and ordered that, upon such investiture being certified, Ponnambala Tambiran should be put in possession of the Benares mutt at Tiruppanandal and the properties forming its endowments, and the endowments of the charities attached to it.

The new head of the Dharmapuram adhinam, who was allowed to be the plaintiff, appealed to the High Court, which ordered that the order of the Lower Court appointing Ponnambala Tambiran as the head of the mutt should be set aside and the petitions be remanded, and that the Judge should proceed to inquire if there was any objection to the appointment of the person nominated by the then plaintiff, and appoint him if there was no objection, and if his appointment was found on inquiry to be open to objection, to proceed to appoint a competent Tambiran to Tiruppanandal. The present appeal is brought by Ponnambala from that order.

The Solicitor-General, who appeared for the first and third respondents, objected to the appeal being heard, on the ground that section 244 of the Civil Procedure Code (Act XIV of 1882) was applicable, and that Ponnambala ought to have brought a separate suit. By an order of Her Majesty in Council, dated the 9th of May 1891, special leave to appeal against the order of the High Court was given, but the respondents were to be as liberty to raise any questions regarding the competency of the appeal at the hearing thereof. Section 244 enacts that questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution discharge or satisfaction of the decree, shall be determined by order of the Court executing the decree and not by separate suit. It would be a sufficient answer to this objection that it was not taken before the Subordinate Judge when he allowed Ponnambala

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to become a party to the proceedings and appear by a vakil at the hearing, at which it was decided that the nomination could not be withdrawn. Nor was the objection taken in the grounds of appeal to the High Court. It is too late now to take it. But their Lordships cannot see what suit could be brought by Ponnambala. The nomination could not give a right to bring a suit, and whilst the decree of the High Court stood he had no title upon which to bring one to set aside that decree if such a kind of suit were maintainable. If he is not allowed to appeal against the order of the High Court, he will be without any mode of relief. And the High Court say in their judgment that they considered he was a necessary party to the proceeding as the person to whose appointment the appellant before them objected. Section 244 appears to be intended to prohibit a separate suit in cases where one might be brought, and to enable the question to be determined in the execution proceeding. It is not applicable to such a case as this.

The first question for consideration is —Could the new head of the Dharmapuram adhinam withdraw the nomination of his predecessor and make a new nomination? The answer to that depends upon the meaning of the decree. The declaration in it that the head of the Dharmapuram adhinam was entitled to see that a competent Dharmapuram Tambiran was appointed as the head of the mutt at Tiruppanandal was relied on. What follows this declaration shows that it does not give him power to appoint. He is to nominate, and it is his duty to nominate, a competent person. If he afterwards discovers any ground of unfitness in the person nominated, he should inform the Subordinate Judge, who is to decide whether there is any objection to the fitness of the person. The appointment is to be made only by the Subordinate Judge. He is to direct the head of the adhinam to name a Tambiran, and when that is done, is to decide upon his fitness. The person nominated has a right to have the decision of the Subordinate Judge, and would be deprived of it by the nomination being withdrawn and a new nomination being made. The petition before referred to asked that the petitioner might be permitted to withdraw the nomination of Ponnambala and to nominate Saminadha Tambiran. This was not granted by the Subordinate Judge, but the High Court, if their Lordships rightly understand its judgment, appears to have held that until the Subordinate Judge acted upon the nomination there was a *locus*

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penitentiæ, and he was entitled to withdraw it if in his opinion there was any valid objection to it, and therefore the petitioner might withdraw it if there was any valid objection to it. Their Lordships do not concur in this construction of the decree.

There remain then two questions for determination: (i) Was Ponnambala a Tambiran of the Dharmapuram mutt? (ii) Was he unfit to be appointed Tambiran of the mutt at Tiruppanandal? The first witness was the then head of the Dharmapuram adhinam, who petitioned to be allowed to withdraw the nomination of Ponnambala. He said that Ponnambala was removed from the Odakkam (an office) in the Dharmapuram mutt for some wrongful acts committed by him in respect to cash and paddy. He used to visit Dharmapuram occasionally from Trichinopoly, where he held an office, and finding Ponnambala unemployed, he asked him the reason. Ponnambala said he had committed some faults in respect of cash and paddy, and that the Pandara Sannadhi had removed him. The witness spoke to the Pandara Sannadhi himself, who said he had removed Ponnambala for wrongful acts committed by him in respect to cash and paddy. In answer to the Court the witness said that the late Pandara Sannadhi did not think Ponnambala fit for the office of Tambiran of Tiruppanandal, and that he nominated him in consequence of the persuasion of persons whose names he gave, because it was thought he would act up to their wishes. In cross-examination he said that he had been to the Madura adhinam and saw Ponnambala there, and therefore he stated in his petition that Ponnambala had received his kashayam (the visible symbol of initiation) in the Madura adhinam. He said there was some difference in the mode of dress adopted by the Tambirans of the Madura adhinam and the Tambirans of the Dharmapuram adhinam, and that Ponnambala had adopted the Dharmapuram style for 10 or 11 years, ever since he came to the Dharmapuram adhinam, and that the Dharmapuram adhinam had a mutt at Madura. As to the faults committed in the Odakkam he said there was a general talk that he had not up to that time inquired about particulars, and did not know what faults Ponnambala had committed in respect to cash and paddy, and there was no record to show that Ponnambala had committed faults in the Odakkam, and that he had been removed. The witness said he and three other Tambirans protested against the nomination; they told the Pandara Sannadhi that Ponnambala belonged to the Madura adhinam; that it was not proper to

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appoint him to a big mutt like Tiruppanandal; and that the Karbar Tambiran should be appointed. This is the Tambiran who was nominated by the witness in his petition for withdrawal of the nomination of Ponnambala. Further on he said there were complaints about the management of Rajan Katlai some months before the Pandara Sannadhi's death; that Ponnambala had made large remissions of rent, and that he did not take any notice of the accounts showing less cultivation: there were no records about them. Why, it may be asked, did not the witness bring these complaints before the deceased Pandara Sannadhi when he made the protest? He appears to have made in his petition to the Court a grave charge of unfitness against Ponnambala upon vague and general statements, of which he had not at that time any evidence, and to have been influenced by a desire to have the other candidate appointed. The next witness, Venkatarama Aiyer, had been an agent in the Dharmapuram mutt for 47 or 48 years, and had known Ponnambala for 10 or 11 years. He said he was a Tambiran of the Madura adhinam. He said, "I asked him, and he said he had "come from the Madura adhinam. I have moved with him closely "these 10 or 11 years. He is not fit to manage the estate of the "Tiruppanandal mutt as the Tambiran thereof." He went on to say that Ponnambala was dismissed from the Odakkam for acts of malversation as regards paddy, rice and cloths, and was unemployed for two or two and a half years; that he was afterwards sent for five or six months by the Pandara Sannadhi to assist the Katlai Tambiran at Tirubhuvanam who was ill, and was afterwards sent to Tiruvarur where he had been for the last two years, and there had been frequent complaints that he did not manage the lands properly. He said, "The complaints existed from the time of "the late Pandara Sannadhi." Their Lordships think that if there had been any malversation in the Odakkam which rendered Ponnambala unfit for employment, he would not have been appointed to Tiruvarur or allowed to remain there for two years. In cross-examination the witness said, "From what Ponnambala "Tambiran and other Tambirans told me, I said he belonged "to the Madura adhinam." As to the faults, as the witness called them, in the Odakkam, he said the Pandara Sannadhi held an inquiry, and called on Ponnambala for an explanation, and asked the witness and other agents to look into the accounts. They did so, and reported the matter to the Pandara Sannadhi, who did not press it. The next witness is Dharmalinga Pillai, who

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said he had been in the service of the mutt for 22 years. In considering the value of the evidence of agents or servants of the mutt it is to be observed that they were deposing in support of the case of the present head of it. This witness said Ponnambala was a Tambiran of the Madura adhinam; it did not appear that he received mantra kashayam in the Dharmapuram mutt. In cross-examination he said that when Ponnambala first arrived at Dharmapuram he was not dressed in the Dharmapuram style, and he asked him to what adhinam he belonged, and he said to the Madura adhinam. But the witness said, "When he changed his "style of dress I did not ask him about it. . . . I do "not know the reason for his changing his style of dress. It "is not usual for one to remain at the giving of mantra kasha-"yam or upadesam. Tambirans who received mantra kashayam "used to tell me about it. As Ponnambala did not tell me about "it, I thought he did not receive it at Dharmapuram." He said he was present when the Pandara Sannadhi inquired about the cash, cloths and paddy missing, and from faults discovered against him in the Odakkam, and from complaints against him from Tiruvarur, he stated he was not fit to be appointed to Tiruppanandal.

The next witness was Tirumalai Pillai, also an agent in the Dharmapuram mutt. He said Ponnambala committed some faults in the Odakkam, and the Pandara Sannadhi dismissed him; that he knew both the facts personally. This is all he said as to that charge. As to the Rajan Katlai he said two Brahmin agents attached to it represented to the Pandara Sannadhi "that Pon-"nambala had sold paddy without orders, and that he had made "remissions in lease. They said that paddy was sold, and the "proceeds were not brought to account, and that the yield was "good, and there was no ground for remission at all. Pandara "Sannadhi sent for Ponnambala. The agents said that the sale "proceeds were carried towards the payment of debts due to one "Somasundara. This was what the accounts stated. They said "Ponnambala said he had not committed any faults and that the "accounts would support him." The accounts were not produced as they should have been. Without them this evidence is of no value. The next witness is Ramaswamy Aiyan, who was employed in the Rajan Katlai at Triuvarur as the Attavanai accountant. His charges against Ponnambala were that he expended money without uthara chits (which are orders on the shroff for disbursements of monies, prepared by the witness and signed by the

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Tambiran); that when there were not uthara chits, Tambiran himself spent the money and the shroff had no knowledge of it. He said Ponnambala wrote in the accounts some fictitious debts and appropriated the sums to his own use; that the debts were written in the names of Somasundara Chetti and Tyagu Chetti. The witness also said that a sum of Rs. 100 and odd, the produce of a sale, was not brought into account, and there was a remission to a lessee; that the Pandara Sannadhi directed the amount remitted to be collected, and as regards the matters not brought into account he said he would send final orders, but no such orders were received. Without the accounts the truthfulness of this witness could not be tested. He said he got Rs. 6 a month in the Rajan Katlai and "did not mention to any one else the "said matters up to now," which is improbable if they were of any importance. The next witness is Ramasawmy Aiyar, one of the Brahmins who were said by a former witness to have made a complaint. He does not give any material evidence, and appears to have had a dispute with Ponnambala about his pay.

The evidence of the remaining witnesses for the plaintiff, with one exception, Vidilinga Tambiran, whose evidence need not be noticed, relates to the question whether Ponnambala was a Tambiran of Dharmapuram, and it will be better now to notice his witnesses in answer to the charges against him. He was first examined. He said that he was a native of Kallianpuram and received mantra kashayam in Sivasilam. He denied that while he was doing duty as Odakkam Tambiran he was removed for any fault, or that the Pandara Sannadhi held an inquiry as to his having appropriated to his own use paddy, cloth and cash; or that he was tried at Dharmapuram for any fault committed at Tiruvarur. He said in cross-examination that "orders were received "that it was wrong to have granted a lease to the maniagar of "the village of Sakkramangalam . . . that it was wrong not "to have collected 150 kalams of paddy out of the lease amount. "The order to the effect that it was wrong to have granted remis-"sion of 50 kalams of paddy was received subsequent to the "explanation sent by me to the Pandara Sannadhi." He also admitted that uthara chits were not properly kept by him, and that they should be properly kept up. In the course of a long cross-examination he repeated that he was not dismissed from the Odakkam, and was not found fault with for stealing money and

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paddy, or punished for it. This examination was taken on the 11th of April 1888, and it appears from the Judge's diary that, owing to his illness, and the Court being closed for recess, the further hearing was postponed till the 13th of September. On the 18th of September the witness was re-called and examined by the plaintiff's pleader, when he said that he never made expense without issuing uthara chits. He was then examined as to sums amounting to Rs. 200 credited in the accounts of Rajan Katlai under the name of Somasundari Chetti. He admitted that there was a man of that name at Dharmapuram, a cook in the mutt there, who was serving under him for a month or two, but he said he did not know who the Somasundari Chetti in the accounts was and did not inquire "until now." He said he knew the man; he was living at Tiruvarur; he kept no profession of any kind as far as he knew; he said he had a house; he must look to the accounts to see if there were any dealings with that man before he went to Rajan Katlai. He then spoke about credit in the name of Tiyagu Chetti which he had been charged with. He said that one Tyagaraja Pillai and a Mudaliar kept a common shop at Tiruvarur; that the kanukkupillai used to borrow from him for their Katlai purposes and wanted to give credit in the name of Tiyagu Chetti, and he gave him leave to do so; that he knew Tyagaraja Pillai who came to him to demand money due to him; that there was no man of the name of Tyagaraja Mudali at Tiruvarur, and he had made a mistake when he said before that the creditor was Tyagaraja Mudali; that the Judge was not well at the time, and he was told to answer readily and to the point, and so the mistake happened. The Judge's diary in the record shows that he was ill at this time. This part of Ponnambala's evidence appears to be what is referred to in the judgment of the High Court as "matters against him in evidence which he ought "to have explained, but has not explained satisfactorily." It is to be observed that the plaintiff's witnesses had been examined before the predecessor of the Subordinate Judge, who gave the judgment, but Ponnambala was examined before that Judge, who did not express any dissatisfaction with his evidence. The other witnesses spoke about his being a Tambiran of Dharmapuram, except the last, V. Krishna Aiyar, a vakil of the High Court. His evidence was that the nomination was made by the late Pandara Sannadhi after consideration of the merits and demerits

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of the Tambirans from whom the selection might be made, and with a desire to select one who might not be disapproved by the Court. From his evidence the nomination appears to have been honestly made, and not from any undue influence or pressure.

Some of the evidence for the plaintiff on the latter question has been already noticed. Two remain to be mentioned. Subramania Mudaliar, who lived in the Tinnevelly district, and was one of the chief disciples of the Dharmapuram adhinam, said that when Ponnambala was in the Odakkam, he told him he belonged to the Madura matam (apparently meant for adhinam) in reply to his questions where he came from, where he received his kashayam, and what he was doing. He was then dressed in the Dharmapuram style. "From what Ponnambala told me I say he "belongs to the Madura adhinam. I have no other reason for "saying that he is a Tambiran of the Madura adhinam." He also said he told him he belonged to Panangudi. Theetharappa Mudali, who also lived at Tinnevelly and is one of the disciples of the Dharmapuram mutt and one of the petitioners for the appointment of Saminadha Tambiran, said that the Dharmpauram adhinam had a mutt at Sivasilam in the Tinnevelly district; that Ponnambala was a Tambiran of the Madura adhinam and belonged to Panangudi in the Nanguneri taluk; that Kallianpuram is near Sivasilam; there was a Kallianpuram Ponnambala, a Tambiran of Dharmapuram, who was dead. In cross-examination the witness said the nominee, Ponnambala, told him about his native place; that he had belonged to Panangudi and had received his kashayam in the Madura mutt. He is the only witness who speaks about another Ponnambala.

The case of the nominee, Ponnambala, was that he received his kashayam at the mutt in Sivasilam and did not belong to Panangudi, but to Kallianpuram. Three witnesses, members of his family residing in Kallianpuram, deposed that he got his kashayam at the Dharmapuram mutt at Sivasilam; he was then 20 or 22 years of age. Another witness, Chitambaranadha, a Tambiran of Dharmapuram, said that Ponnambala got his mantra kashayam at Sivasilam; the witness was then present at Sivasilam outside the pujamatam; that Ponnambala came to Dharmapuram and was employed at the Odakkam. Ponnambala was not asked in cross-examination or by his own pleader about the statements it had been said he had made that he came from the Madura adhinam. This is a frequent omission in trials in India, and

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no inference can fairly be drawn from it. Their Lordships cannot attach much weight to the evidence that Ponnambala said he came from the Madura adhinam. Assuming that the witnesses intended to speak the truth, it is possible they may not have exactly recollected what was said. He may have said he came from Madura, which appears to be true, and it may have been supposed by the witnesses that he meant he came from the Madura adhinam. Their Lordships do not give credit to the evidence that he belonged to Panangudi, and that there was a Kallianpuram Ponnambala who is dead. Upon the question whether the nominee, Ponnambala, was a Tambiran of Dharmapuram the High Court was silent, but as they may have thought it was unnecessary to decide it, no inference can be drawn from their silence. Upon the questions of fact in the case their Lordships have come to the same conclusion as the Subordinate Judge, and they will humbly advise Her Majesty to reverse the order of the High Court, and to order that the appeal to it be dismissed with costs, and to affirm the order of the Subordinate Judge. The respondent, Sivagnana Desika Gnana, will pay the costs of this appeal.

Appeal allowed.

Solicitor for the appellant—*Mr. R. T. Tasker.*

Solicitors for the first and third respondents—*Messrs. Keen, Rogers and Co.*

APPELLATE CIVIL.

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

1893. Nov. 30. Dec. 1, 6, 7. 1894. March 9.

MALLIKARJUNA PRASADA NAIDU (DEFENDANT), APPELLANT,

v.

DURGA PRASADA NAIDU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu law—Partition—Maintenance—Arrears of maintenance—Wrongful withholding.

Where, in consequence of a suit for partition of the entire family property, a portion of the property is divided, but the remaining portion is declared impartible, the family remains undivided in respect to the latter portion.

* Appeals Nos. 47 and 48 of 1892.

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In a suit for arrears of maintenance it is incumbent on the plaintiff to prove that there has been a *wrongful* withholding of the maintenance to which he is entitled. *Jivi* v. *Ramji*(1), *Mahalakshmamma* v. *Venkataratnamma*(2), and *Sri Raja Satrucharla Jagannadha Razu* v. *Sri Raja Satrucharla Ramabhadra Razu*(3) followed.

APPEALS against the decrees of G. T. Mackenzie, District Judge of Kistna, in original suits Nos. 10 and 13 of 1891.

These two suits were filed by the younger brothers of the Zamindar of Challapalli or Devarakota, who was the defendant in both suits. The plaints were similar, and set forth that plaintiffs and defendant were members of an undivided Hindu family; that their father died on 6th April 1875, leaving these three sons; that disputes arose and plaintiffs lived apart from defendant from 1st May 1875; that their father left a valuable zamindari estate, regarding the partition of which the parties engaged in litigation, which terminated with the decision of the Privy Council, dated 1st May 1890, that the zamindari was impartible; that the plaintiffs, while engaged in the partition litigation, did not ask for or receive maintenance from defendant; that defendant in a written statement and in an affidavit admitted his liability to give plaintiffs maintenance; that each plaintiff received Rs. 19,500 as maintenance during the pendency of the partition suit by order of Court; that each plaintiff claimed Rs. 2,000 per mensem as maintenance from defendant, with arrears bearing interest, and sums for marriage of children, furniture and residence; that this was demanded by a letter, dated 30th March 1891, and had not been given; and the plaintiffs prayed for a decree for these sums as a charge upon the zamindari with costs and subsequent interest.

The defendant filed similar written statements in the two suits. He pleaded that plaintiffs had been divided from defendant since 30th September 1882, the date of the decree of the District Court in the partition suit, and that they have no claim upon defendant for maintenance. Defendant denied that he had ever made any admission that he was liable to maintain plaintiffs after a decree for partition. Defendant pleaded that the amount of maintenance claimed was excessive, and that the other sums claimed were contrary to law and custom. Defendant also submitted that the Court must take into account the amount of property which has

(1) I.L.R., 8 Bom., 207. (2) I.L.R., 6 Mad., 83.
(3) 4 M.I.A., 168, and I.L.R., 14 Mad., 240.

come into the hands of plaintiffs from other sources, and suggested that Rs. 3,000 per annum to each plaintiff would be a sufficient grant. Defendant also stated that the plaintiffs were maintained until February 1879 out of the estate funds, and that defendant was ready and willing to maintain the plaintiffs in the family house in the accustomed manner. The defendant contended that plaintiffs by their acts and omissions had deprived themselves of the right to claim arrears of maintenance, and that the claim for arrears was for the most part barred. If arrears were granted, they ought not to be at the rate of Rs. 2,000 per mensem, and they ought not to bear interest, and that the maintenance ought not to be a charge upon the zamindari.

The District Judge decreed in favour of the plaintiffs and the defendant preferred this appeal.

Pattabhirama Ayyar for appellant.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and *Venkatarama Sarma* for respondent.

JUDGMENT.—The plaintiffs and defendant are sons of the late Raja Ankinidu, Zamindar of Challapalli, who died in the month of April 1875. The zamindari, as it has now been finally decided by the Privy Council, is an impartible one, and consequently the eldest son of the late zamindar, that is the defendant, is in enjoyment. The present suits are brought against him for maintenance.

The main question raised by the defendant is whether the family has, in consequence of proceedings in the suit ultimately determined by the Privy Council, become a divided one.

A larger question was raised by the defendant's vakil with regard to the right of a younger brother of the holder of an impartible zamindari to any maintenance at the hands of the zamindar for the time being. Having regard to the pleadings and issues, this general contention, we think, cannot properly be allowed on this appeal. If it could have been successfully maintained, it ought to have been raised in the Court of First Instance. The plaintiff would then have had an opportunity of meeting it by showing that at any rate in this family it has been usual for the reigning zamindar to make provision for the other members of his family, and there are some indications that such was in fact the case. Moreover, in his written statement in the partition suit, the zamindar admitted his liability in this respect.

The real defence is based on the admitted fact that in 1880 the plaintiffs brought a suit against the defendant for partition of the entire family property, and, so far as the partible property was concerned, obtained a decree. It is said that the effect of a partition of any part of the property of a Hindu family is to sever the joint ownership in respect of the whole property, and that it is not legally possible for a family to divide a portion of their family estate and yet to remain undivided in respect of the remainder. It is true that, when a partition is effected in a family either by agreement or by decree, the result generally is to bring about a complete severance of the coparcenary, and that this consequence may follow, although in fact a portion of the property remains undivided. In the case however of division by consent of parties, it is clear that they may, if they choose, reserve and keep undivided part of the property. With regard to such part they must necessarily retain the status of an undivided family. (See *Sri Raja Satrucharla Jagannadha Razu* v. *Sri Raja Satrucharla Ramabhadra Razu*(1). No authority for the contrary proposition was cited by the zamindar's vakil. In the present case, with regard to the property which remains undivided, there was on the plaintiff's side a demand that it should be divided, but that demand was ineffectual, because in point of law the property was not partible. No partition has taken place either by decree or by consent, and therefore, in our judgment, the rights of the junior members of the family remain as they were before any demand was made. That is to say, they retain "such right and "interest in respect of maintenance and possible rights of succes-"sion as belong to the junior members of a raj or other impartible "estate descendible to a single heir." (See *Sartaj Kuari* v. *Deoraj Kuari*)(2). If the plaintiff is entitled to maintenance he is, we think, entitled to have it charged on the zamindari property or part of it. (See *Coomara Yettapa Naikar* v. *Venkateswara Yettia*)(3). In view of the liberty of disposition enjoyed by the zamindar there is no other way in which the rights of junior members can be secured. No reason was suggested why in this respect any distinction should be made between the male and female members of a family, and in the case of women there is no

(1) 4 M.I.A., 168, and I.L.R., 14 Mad., 240. (2) I.L.R., 10 All., 285.
(3) 5 M.H.C.R., 405.

doubt that a decree for maintenance in their favour is generally accompanied with a direction making it chargeable on certain specified property. We think, however, that the zamindar is justified in objecting to the decree as framed by the District Judge, inasmuch as it fetters him unnecessarily in the disposition of his property. It is sufficient that the decree should make the maintenance chargeable on certain villages, and if the parties cannot agree, we must ask the Judge to find what particular property will form sufficient security.

The next question is as to the rate at which maintenance should properly be allowed. It was contended on behalf of the zamindar that in estimating the rate the Court should take into account the property alleged to be in the hands of the plaintiff, and the finding of the Judge with regard to that property was impugned.

The zamindar's vakil relied particularly on certain letters put in by the plaintiff himself and admitted in some unaccountable way, although the writer of them was not called and was admittedly alive. The case made for the zamindar was that lanka lands of considerable value had been acquired by the plaintiff in his own name, and in June 1890, when the unfavourable judgment of the Privy Council had been heard of, transferred *benami* to Janakiramayya, the District Munsif. We do not think this is proved, and agree with the conclusion stated by the Judge in the 41st paragraph of his judgment. Janakiramayya's letters, some written to the zamindar's brother Ramalinga and some to the plaintiff's servant Suryaprakasa (11th witness), cannot fairly be construed as implying that the lands belonged to the plaintiff or his brother. The District Judge has found that a monthly allowance of Rs. 500, with an additional Rs. 250 in lieu of any provision for a house, furniture, cattle or occasional expenses, *e.g.*, on account of marriages, is an adequate and fair allowance. The plaintiff had asked for a much larger sum, viz., Rs. 2,000, and the defendant had named a smaller one, viz., Rs. 250. It appears from the notes that the quantum of the allowance was in a great measure left to the Judge, and considering his experience in the district, we should be slow to disturb his judgment in the matter. On the part of the plaintiff it is urged that the allowance ought to be raised at least to Rs. 1,000 per mensem, and that some provision ought to be made from the allotment to the plaintiff of a house and garden. On the other hand, it is contended for the

zamindar that the allowance of Rs. 750 is excessive. We think that the District Judge has given good reasons for refusing to grant the use of a house to the plaintiff, and we are not satisfied that the money allowance he has made is either excessive or inadequate.

The District Judge has granted arrears at the rate of Rs. 500 per mensem for twelve years prior to the institution of the suit. In this we think he was wrong. The right to maintenance is primarily a right to be maintained out of the current income of the property in the enjoyment of the party chargeable. The circumstance, however, that a person entitled to maintenance has not in fact been maintained by the person chargeable does not necessarily give him a right of action for arrears. On proof of failure to maintain without more, he cannot be said to become a creditor of the person in default. It is incumbent on him to prove that there has been a wrongful withholding of the maintenance to which he is entitled. *Jivi* v. *Ramji*(1) and *Mahalakshmamma* v. *Venkataratnama*(2). If it were not so, it would mean that the manager of the family could, at the choice of any member preferring to reserve his claim for maintenance out of current income, be compelled to pay him from time to time sums of accumulated arrears which could only be paid out of capital. In this case it is admitted that the plaintiff has, since the 1st May 1875, been living apart from the defendant, and as neither asked for nor received maintenance except what he received under the order of the High Court pending the appeal to the Privy Council, that is, between December 1887 and July 1890.

In our opinion it is clearly the plaintiff's own fault that he has not received maintenance for the whole period of twelve years for which he claims it. In his suit brought in 1880 he made another and inconsistent claim, and therefore he has no right now, that he has failed in that litigation, to complain that a claim not made by him, though conceded by the defendant, was not satisfied. There has been no wrongful withholding on the part of the defendant. We must, therefore, reverse the decision of the District Judge with regard to the arrears, except as regards the period above mentioned, during which payment was actually made. The allowance for that period was demanded and given on the footing of maintenance, and as the sum will have to be refunded by the

(1) I.L.R., 3 Bom., 207. (2) I.L.R., 6 Mad., 88.

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plaintiff in execution of the decree of the Privy Council, we think that plaintiff is entitled to a decree for the same sum, *viz.*, Rs. 19,500 in the present case, to which must be added Rs. 3,500 for the seven months between the date of the institution of the suit and the making of the decree, for the Judge has decreed payment of the higher rate of Rs. 750 per mensem only from the latter date, and in that respect we do not alter the decree.

Subject to the alterations required by this judgment, the decrees are confirmed, and plaintiffs must pay proportionate costs of these appeals.

Their memoranda of objections are dismissed with costs. We see no reason to interfere with the decrees of the Judge on the point raised.

If the parties do not agree within one week from date of receipt of this order, the Judge must proceed to inquire as to the property which should be charged with the maintenance.

APPELLATE CIVIL.

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

1893. December 20. 1894. March 29.

MADHAVA RAU (PLAINTIFF), APPELLANT,

v.

P. M. FERNANDES (DEFENDANT), RESPONDENT.*

Tort—Injury to property—Contributary act—Test thereof.

As in the case of contributary negligence, so an act of one party can only be contributary to the injury he complains of, if by the exercise of ordinary care the other party could not have avoided causing the injury.

SECOND APPEAL against the decree of S. Subbarayar, Subordinate Judge of South Canara, in appeal suit No. 321 of 1891, confirming the decree of A. Babu Rau, District Munsif of Udipi, in original suit No. 25 of 1890.

The plaintiff was the owner of a garden. The defendant was his neighbouring proprietor on the north and east. The plaintiff's case was that his garden was surrounded on three sides—north,

* Second Appeal No. 651 of 1893.

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east and west—by three channels; that, at a certain point, the defendant blocked up the communication of the third channel with the first by recently putting up a wall; that, by pushing forward a bank to the south of his fields and adding to them, and by additions to the west of his gardens, defendant had encroached upon the beds of the first and second channels and narrowed their water-way considerably; that, by deepening the channel below the foundation of a stone embankment of the plaintiff's he had endangered it, and that these wrongful acts of the defendant had caused the water on three sides of his garden to increase so in depth and force as to overflow his garden, wash off the surface soil and otherwise damage his trees. Plaintiff accordingly prayed that the channels might be restored to their former condition, or Rs. 50 paid to him in the alternative, and that Rs. 21 for damages already sustained might be awarded.

The defendant denied the alleged encroachment and acts complained of, and charged plaintiff with having trespassed upon and included the village road and channel to the area of his garden and otherwise encroached from his side of the garden.

The District Munsif found that the narrowing of the first and second channels and their water-way was caused by the wrongful encroachments into and usurpation of unassessed Government waste land set apart for 'Karugulanadedari' (cattle path) by plaintiff and defendant.

That defendant had blocked up the channel and cut off the communication of the first channel with the third; that defendant had deepened the first channel; that these wrongful acts, though they caused damage to plaintiff's property, were not the sole causes of the damage complained of, the plaintiff having also contributed to bring about the result. In this view he dismissed the plaintiff's suit.

The plaintiff appealed on the ground, *inter alia*, that the encroachment on his part on Government land had taken place more than twelve years before and did not contribute to the injury complained of. The District Judge confirmed the decree of the District Munsif.

The plaintiff preferred this appeal.

Ramachandra Rau Saheb for appellant.

Sundara Ayyar for respondent.

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ORDER.—On the facts found the decrees of the Courts below cannot be supported. It is conceded that the encroachment in the channel by plaintiff was long before the defendant's enroachments. The Courts below are in error in supposing that plaintiff's suit must fail on the ground that he also contributed to the injury. As in the case of contributary negligence, so also in the present case, plaintiff's encroachment could only be held to be contributary if by the exercise of the ordinary care defendant could not have avoided causing the injury. Government, on whose property both parties are found to have encroached, may be entitled to require both parties to restore the channel to its original width; but as between plaintiff and defendant it was the latter's recent encroachment that was the cause of plaintiff's land being submerged. This is a wrong against which plaintiff is entitled to relief against the defendant.

We, therefore, set aside the decrees of the Courts below and call upon the Subordinate Judge to submit findings on the eighth issue, *viz.*, to what relief (if any) is the plaintiff entitled under the circumstance of the case, within one month from date of receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court.

(In compliance with the above order, the Subordinate Judge submitted a finding which was accepted by the High Court in the following judgment:—)

JUDGMENT.—Accepting the finding, we reverse the decrees of the Courts below and direct that the channel and cattle lane be repaired by the defendant, or else that he do pay plaintiff a sum of Rs. 30 (thirty) as costs of doing the work, and that defendant do pay plaintiff a further sum of Rs. 15 as damages, and that he do also pay plaintiff proportionate costs on the above in all three Courts.

APPELLATE CIVIL

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

JOSEPH (ON BEHALF OF THE SECRETARY OF STATE FOR INDIA IN COUNCIL), PETITIONER,

v.

THE SALT COMPANY (SUBBIAH PANDARAM AND COMPANY), RESPONDENTS.*

1892. August 5, 11.

Code of Civil Procedure—Act XIV of 1882, *s.* 622—*Land Acquisition Act—Act X of* 1870, *ss.* 3, 24, 25, 29 *and* 34—*'Material irregularity'—Mistake in regard to the principle of calculation of the value of the land acquired.*

If a Judge and assessors, sitting to determine the amount of compensation to be awarded for land acquired under the Land Acquisition Act of 1870, have refused to take into consideration any of the matters prescribed by s. 24 of that Act, or have improperly taken into consideration any of the matters prohibited by s. 25 thereof, such procedure would amount to material irregularity in the exercise of their jurisdiction, and would justify the intervention of the High Court under s. 622 of the Code of Civil Procedure. Having regard to the definition of 'land' contained in s. 3 of Act X of 1870, there is nothing illegal in a Judge taking into account the value of works on the land which make it suitable for a salt factory; and even if, in making his estimate of the market value of the land, he took into consideration the price paid for neighbouring pans, and was in error in so doing, his mistake would be only one concerning the principles of valuation and not an irregularity in the exercise of jurisdiction.

PETITION under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of J. A. Davies, District Judge of Tanjore, in compensation case No. 4 of 1890. The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgment of the High Court.

The *Acting Government Pleader* (*Subramania Ayyar*) for petitioner.

Mr. *Wedderburn*, *Sankaran Nayar* and *Madhava Row* for respondents.

JUDGMENT.—This is a civil revision petition put in on behalf of the Secretary of State in Council under section 622 of the Civil Procedure Code against the decision of the District Judge of Tanjore and the assessors in compensation case No. 4 of 1890.

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* Civil Revision Petition No. 212 of 1891.

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The first question which arises is whether the High Court has power to entertain the petition under section 622, Civil Procedure Code. The Judge and assessors agreed as to the amount of compensation to be awarded, and, under section 29, Act X of 1870, their decision is final. But under section 34, the Judge and assessors are bound to state the grounds of their award under clauses 1–4 of section 24, and if it can be shown that they have refused to take into consideration any of the matters prescribed by that section or have improperly taken into consideration any of the matters prohibited under section 25, we think such procedure would amount to material irregularity in the exercise of jurisdiction which would justify interference under section 622, Civil Procedure Code. We find, moreover, that, in a case in which a question rose under section 55 of the Land Acquisition Act, the High Court of Calcutta held that though there was no appeal from what the Judge had decided, it could be set aside as being in excess of his jurisdiction. (*Taylor* v. *The Collector of Purnea*)(1).

Passing to the grounds for the award stated under section 34, we find that the Judge and assessors state that they award under section 24, clause 1, the sum of Rs. 42,500 "on the ground of that "being its market value judging (i) by the amount actually "expended upon the property, (ii) by the amount fetched at sales "in neighbouring pans, and (iii) at the average value per pan "arrived at with reference to the estimate of the several witnesses."

Prima facie there is no illegality or irregularity in the exercise of jurisdiction in this award, the 'market value of the land' being the first matter which the Judge and assessors were bound to consider under section 24, clause 1.

It is contended, however, for the Government that the Judge and assessors were wrong in estimating the market value of the land as a salt factory, because the Salt Commissioner could, at any time withdraw the license to make salt under Madras Act IV of 1889, that the land could not, therefore, have any market value as a salt factory, and that the selling price of the land itself was the proper criterion for value.

It is true that section 16, Madras Act IV of 1889, directs that, when on cancelment of a license the Commissioner resolves to retain the salt works, and to acquire the proprietary rights of the

(1) I.L.R., 14 Calc., 423, 429.

JOSEPH v. THE SALT COMPANY.

late licensee, the value of the land as a site for salt manufacture shall not be taken into account in acquiring the proprietary right, but that compensation shall be paid to the late licensee at the rate fixed in section 18. But this Act did not receive the assent of the Governor-General till 30th December 1889, subsequent to this land being taken up under Act X of 1870, and, in the former Salt Act I of 1882, we find no corresponding provision. We observe that the lands were purchased by the company in 1885 and 1886 for about Rs. 3,000, and that in making his offer of Rs. 18,002–11–6 for acquiring them under the Act the Collector has taken into consideration the cost of converting them into salt pans. At the time, therefore, the land was acquired, there was no direction that the Government should only be called upon to pay the value of the land alone and that compensation for its special value should only be paid for at fixed rates. Looking to the definition of 'land' in section 3, Act X of 1870, we are not able to say there was any illegality in the Judge taking into account the value of the works which made the place suitable for a salt factory, and even if, in making his estimate of market value, the Judge was in error in taking into consideration the price paid for neighbouring pans, the mistake would at most be only one concerning the principles of valuation and not an irregularity in the exercise of jurisdiction. We must dismiss the petition with costs.

APPELLATE CIVIL.

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

RAHAMTULLAH SAHIB (DEFENDANT), APPELLANT,

v.

RAMA RAU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1894. Feb. 15, 16. May 4.

Will—Probate—Interest of defendant in testator's estate.

In a suit brought to obtain probate of a will the defendant, before he can contest the will, must show that he has some interest in the testator's estate. The fact of being a legatee under the will, or a creditor of the testator, does not amount to such an interest. But proof of a former will of the testator in which the defendant is interested is a sufficient interest to contest the will set up.

* Appeal No. 29 of 1893.

RAHAM-TULLAH SAHIB v. RAMA RAU.

APPEAL from the decree of Shephard, J., sitting on the original side of the High Court in testamentary original suit No. 10 of 1892.

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

Mr. *Michell*, *Subramania Ayyar*, and Mr. *Laing* for appellant.

The *Advocate-General* (Hon. Mr. *Spring Branson*), Mr. *Wedderburn*, Mr. *W. Grant* and Mr. *D. Grant* for respondents.

JUDGMENT.—This was a testamentary suit brought to obtain probate of the last will and testament of the late Raja of Venkatagiri in the district of Nellore. Plaintiffs alleged that the late raja made his last will on the 3rd June 1892 and died on the 6th idem, and, as executors appointed by testator, they claimed probate. Exhibit A is the will propounded by them, and among the legacies mentioned therein, a sum of Rs. 1,000 is given to defendant Haji Muhammad Rahamtullah Saheb. He, however, filed a caveat objecting to the grant of probate on the ground that the will is not genuine; that its execution was procured by fraud, coercion or undue influence; that the testator did not know what he was doing, nor understand the nature and effect of its provisions, if in fact he signed or affixed his mark to the alleged will. Defendant set up another will, dated the 31st May 1892, whereby it is alleged the late raja appointed Dewan Bahadur Raghunadha Row, the Honorable Mir Humayun Jah Bahadur, C.I.E., Kummati Krishnamachari and Dewan Bahadur T. Venkasami Rao as executors. Defendant stated that that will purports to remit, *inter alia*, a debt of Rs. 55,000 due from him to the testator, and further, to give defendant a legacy of Rs. 5,500. He further alleged that the will relied on by him was in the possession or power of the testator's sons and others, including the plaintiffs, Raja T. Rama Row and Ramakrishniah.

Plaintiff's application for probate of the will propounded by him was made on the 12th August 1892 and the defendant's caveat was filed on the 19th idem. On the 24th January 1893 the following four issues were fixed for decision:—

(i) Whether the will dated 3rd June 1892 was genuine?

(ii) Was the deceased raja at the time of executing the same of sound and disposing mind?

(iii) Is the will invalid as having been procured by fraud, coercion, undue influence or such importunity as took away his free agency in the matter?

(iv) Was it duly attested?

RAHAM-TULLAH SAHIB v. RAMA RAU.

On the 7th February 1893 two more issues were framed with reference to plaintiff's averment that defendant had no interest in the estate of the late raja entitling him to intervene in the matter of their application for probate, and to call upon them to prove the will in solemn form. The additional issues are—"whether defendant has any interest in the estate of the deceased raja," and "whether it is competent to the defendant to prove such interest, if any, in this suit." The final hearing was fixed on the 3rd March for the 12th April, and it was also directed that the additional, or the fifth and sixth, issues be tried first. The suit came on for trial before Mr. Justice Shephard on the 19th April 1893, and on that day defendant applied for an adjournment in order that he might bring in the prior will set up by him, and was not ready with his evidence. The learned Judge declined to grant the application on the ground that it was made at the very last stage of the argument. Thereupon, he recorded a judgment, finding the first of the additional and preliminary issues in plaintiff's favour, and decreed that the will dated 3rd June 1892 was the last will and testament of the deceased raja, and that the probate thereof be granted to plaintiffs. Hence this appeal.

Two questions arise for determination in this appeal, viz., whether, apart from the prior will set up by the defendant, there is proof of defendant's interest in the testator's estate, and whether the learned Judge ought to have granted an adjournment to enable defendant to bring in the alleged prior will. As regards the first question, we agree with the learned Judge that, apart from that will, defendant has no interest. It is true that under the will propounded by plaintiffs, defendant is entitled to a legacy of Rs. 1,000, but this circumstance can give him no right to denounce that will and to call for proof of it in solemn form. Another contention on appellant's behalf is that he claims to be also a creditor of the late raja. Adverting to this contention, the learned Judge has observed that in reality there is no evidence that appellant is a creditor of the testator, and even if he is, this will not help him.

The law is clear on this point. In *Hingeston* v. *Tucker*(1) it was held by Sir C. Cresswell that before a person can be permitted

(1) 2 Swaby & Tristrain's Rep., 596.

to contest a will, the party propounding it has a right to call upon him to show that he has some interest. Section 250 of the Indian Succession Act is framed on the same principles. As for the nature of the interest which ought to be proved, it was held in *Kipping* v. *Ash*(1) that the bare possibility of an interest is sufficient. But this possibility should rest on existing facts and not on mere conjecture. In *Crispin* v. *Doglione*(2) it was held by Sir C. Cresswell that the possibility of filling a character which would give the party concerned an interest was not sufficient, but that there must be a possibility of having an interest in the result of setting aside the will. There are also several Indian cases in which an interest was considered necessary and made the subject of inquiry, and we may refer to *In the matter of the petition of Desputty Singh*(3), *Komallochun Dutt* v. *Nilruttun Mundle*(4), *In the matter of the petition of Hurro Lall Shaha*(5), *Nilmoni Singh Deo* v. *Umanath Mookerjee*(6). In *in the matter of the petition of Desputty Singh*(3), and in *Menzies* v. *Pulbrook and Ker*(7) it was decided that a creditor of the testator has no right to contest the will, for the reason that it is indifferent to him whether he shall receive his debt from an executor or an administrator.

There is, however, no doubt that if the defendant proved the prior will, he would have a sufficient interest to contest the will set up by the plaintiffs. The material question, therefore, is whether the defendant was justified in not producing, at the date of the final hearing, evidence to prove the prior will on which he relies. He ought to have been prepared to proceed at once with the case if the sixth issue had been decided in his favour. It is quite possible, however, that he expected that the second preliminary issue would be determined first and hoped to frame his procedure with reference to such determination. Moreover, defendant will be hereafter precluded from proving the will set up by him, as it has been held that when once probate of a will has been granted in solemn form, no one who has been cited or taken part in the proceedings or who was cognizant of those proceedings and stood by, can afterwards seek to have it cancelled. *In re Pitamber Girdhar*(8). We are of opinion therefore that if defendant pays

(1) 1 Robertson's Rep., 270.
(2) 2 Swaby & Tristrain's Rep., 17.
(3) I.L.R., 2 Calc., 208.
(4) I.L.R., 4 Calc., 360.
(5) I.L.R., 8 Calc., 570.
(6) I.L.R., 10 Calc., 28.
(7) 2 Curteis Rep., 845.
(8) I.L.R., 5 Bom., 638.

into Court within one week from the date of re-opening of this Court after the recess all the costs incurred hitherto by plaintiffs both in the Court below and on appeal, the decree of the learned Judge should be setaside and the case remanded for disposal afresh, after giving appellant an opportunity to prove the will set up by him, and that if the appellant fails to make such payment within the time thus allowed, the appeal shall stand dismissed with costs throughout.

APPELLATE CIVIL.

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

VENKATRAYER (PETITIONER),

1892. Nov. 25.

v.

JAMBOO AYYAN (RESPONDENT).*

Appeal from insolvency order—Code of Civil Procedure—Act XIV of 1882, *ss.* 588 (17), 589—*Act VII of* 1888, *s.* 56—*Act X of* 1888, *s.* 3, *cl.* (*a*).

Bearing in mind that section 589 of the Code of Civil Procedure was passed to regulate the appellate jurisdiction in appeals from orders, the words 'Court subordinate to that Court' in section 3 of Act X of 1888 must be construed with reference to its appellate jurisdiction. Consequently a District Court has no jurisdiction to hear an appeal from an order in insolvency matters, in a case where it has no jurisdiction to hear an appeal in the suit itself, as when the subject-matter of the suit is more than Rs. 5,000 in value.

PETITION under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of J. A. Davies, District Judge of Tanjore, passed on appeal against order No. 94 of 1891, presented against the order of P. Doraisami Iyer, Acting Subordinate Judge of Tanjore, in insolvency petition No. 2 of 1890 (in connection with original suit No. 36 of 1886).

The defendant in original suit No. 36 of 1886 applied under section 344 of the Code of Civil Procedure to the Subordinate Judge of Tanjore, praying that he might be declared an insolvent, being unable to satisfy his debts, which amounted to over Rs. 9,000. The Subordinate Judge granted the petition. The

* Civil Revision Petition No. 17 of 1892.

VENKATRAYER v. JAMBOO AYYAN.

plaintiff in the above suit, a scheduled-creditor of the petitioner, appealed to the District Judge against the order of the Subordinate Judge, who allowed the appeal on the ground that the Subordinate Judge had no jurisdiction in the matter, and that the application for insolvency should have been made to the District Court. The original petitioner preferred this appeal to the High Court against the order of the District Judge on the ground that the appeal should have been made to the High Court.

Srirangachariar and *Parthasaradhi Ayyangar* for petitioner.

Ramachandra Ayyar and *Sivaswami Ayyar* for respondent.

JUDGMENT.—The question before us is whether the appeal lies to the District Court or to the High Court. The suit in which the order was passed was one in which the subject-matter was over Rs. 5,000 in value and the appeal in the suit therefore lay to the High Court.

As section 589 of the Code of Civil Procedure was first enacted, appeals from orders specified under section 588, clause 17, lay in all cases to the High Court. This was modified by Act VII of 1888, in which the Court to hear the appeal in the suit was made the Court to hear the appeal against the orders in insolvency matters. The section thus modified failed, however, to provide for cases in which orders in insolvency matters were passed by Courts of Small Causes, and by section 3, Act X of 1888, it was provided that an appeal from an order specified in section 588, clause 17, should lie (*a*) to the District Court, when the order was passed by a Court subordinate to that Court; and (*b*) to the High Court in any other case.

The question, therefore, is whether clause (*a*) operates to transfer the jurisdiction from the High Court to the District Court, in cases in which the subject-matter of the suit is over Rs. 5,000 in value. Section 2 of the Code of Civil Procedure makes a subordinate Court subordinate both to the High Court and the District Court, but the Civil Court's Act gives the appellate jurisdiction exclusively to the High Court in suits in which the subject-matter is over Rs. 5,000 in value. Bearing in mind that section 589 of the Code of Civil Procedure was passed to regulate the appellate jurisdiction in appeals from orders, we are of opinion that the words 'Court subordinate to that Court' must be construed with reference to its appellate jurisdiction. It would be anomalous that a District Court should have jurisdiction to hear appeals from such

orders when it had no jurisdiction to hear an appeal in the suit itself and the first clause in the section points to an intention to give jurisdiction in insolvency matters to the ordinary appellate *forum*.

VENKATRAYER v. JAMBOO AYYAN.

We must set aside the order of the District Court and direct that the appeal be returned to the party for presentation in the High Court. Appellant is entitled to his costs in this appeal, but we make no order as to costs in the Court below, since the point was not taken there.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

GNANAMUTHU UPADESI (PETITIONER), APPELLANT IN CIVIL MISCELLANEOUS APPEAL No. 130,

1893. December 22.

v.

VANA KOILPILLAI NADAN (COUNTER-PETITIONER), RESPONDENT IN THE ABOVE.*

ASEERVADHAM (PETITIONER), APPELLANT IN CIVIL MISCELLANEOUS APPEAL No. 139,

1894. January 23.

v.

VANA KOILPILLAI NADAN (COUNTER-PETITIONER), RESPONDENT IN THE ABOVE.*

Limitation—Limitation Act, sched. II, art. 178—Applications for probate.

The Limitation Act does not apply to applications for probate, and the applications referred to in art. 178 of sched. II of that Act are applications under the Code of Civil Procedure. *Janaki* v. *Kesavalu* (1), *Bai Manekbai* v. *Manekji Kavasji*(2), and *Ishan Chunder Roy in re*(3) followed.

APPEALS against the orders of T. M. Horsfall, District Judge of Tinnevelly, passed on civil miscellaneous petition No. 165 of 1892 and succession certificate petition No. 40 of 1892 respectively.

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

The petitioner preferred these appeals.

Ranga Chariar for petitioner.

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* Appeal against Orders Nos. 130 and 139 of 1892.

(1) I.L.R., 8 Mad., 207. (2) I.L.R., 7 Bom., 213. (3) I.L.R., 6 Calc., 707.

GNANAMUTHU UPADESI v. VANA KOILPILLAI NADAN.

JUDGMENT.—These appeals have been preferred from two orders passed in connection with a previous order made on an application for probate, which was registered as certificate case No. 9 of 1892 on the file of the District Court of Tinnevelly. The facts of the case, in so far as they relate to that application, are shortly these. A lady at Tuticorin called Ponniya Muthu Nadathi died on the 12th June 1891. Appellant is her father and respondent is her husband. The former applied for probate alleging that she had left a will and appointed him executor, but the latter contended that the alleged will was a forgery and repudiated appellant's claim to probate. He urged further that she died intestate leaving a son surviving her, though he survived her but for three months, and that respondent was entitled to letters of administration in regard to her estate. But when the application for probate came on for disposal on the 16th February 1892, as the appellant's vakil stated that he had no instructions, the application was dismissed with costs. No appeal was preferred from the order of dismissal.

But on the 10th March 1892 appellant made another application for probate to the District Court. The Judge held that there must first be a petition asking, for reasons stated, that the order on petition No. 9 of 1892 should be set aside or reviewed, and on the ground that no such petition had been presented; he dismissed the second application for probate with costs on the 7th April 1892. From this order appellant has preferred civil miscellaneous appeal No. 139 of 1892.

On the 29th April 1892 appellant made an application to the District Court praying that the order of the 16th February 1892 be set aside and the original application for probate be restored to the file. On the 29th July 1892 the Judge dismissed this application as barred. He observed that the rulings in *Janaki* v. *Kesavalu*(1), *Ishan Chunder Roy in re*(2), and *Bai Manekbai* v. *Manekji Kavasji*(3) did not apply, as in all these cases the limitation was merely held not to apply to the institution of proceedings, and that in the case before him the proceedings had begun and must, therefore, be governed by the Code of Civil Procedure and the Limitation Act. From this order civil miscellaneous appeal No. 130 of 1892 has been preferred.

(1) I.L.R., 8 Mad., 207. (2) I.L.R., 6 Calc., 707. (3) I.L.R., 7 Bom., 213.

GNANAMUTHU UPADESI v. VANA KOILPILLAI NADAN.

Civil Miscellaneous Appeal No. 139 *of* 1892.—The Judge's order in dismissing the second application for probate on the application of 10th March 1892 is clearly bad in law. It was a fresh application for probate, and the Judge was in error in not treating it as such. It was pointed out in *Janaki* v. *Kesavalu*(1), so early as November 1884, that the Limitation Act was not intended to apply to an application for probate, an application under the Religious Endowments Act, an application for a certificate to collect the debts, an application for the appointment of new trustees, and similar applications. It was also explained in the case of *Bai Manek Bai* v. *Manekji Kavasji*(2) and *in re Ishan Chunder Roy*(3) that article 178 of schedule II of Act XV of 1877 is limited to applications made under the Code of Civil Procedure, that an examination of all the other articles in the second schedule relating to applications, that is to say of the third division of that schedule, shows that the applications therein contemplated are such as are made under the Code of Civil Procedure, and that though acticle 178, when read alone, seems capable of the widest extension to every application that can possibly be made to a Court, the applications referred to in that article are applications *ejusdem generis*, *i.e.*, applications under the Code of Civil Procedure, and that any other construction would lead to the most inconvenient results. It is no doubt usual to demand an explanation when there is unreasonable delay in applying for probate, because the time when after the testator's death the will is to be proved is not fixed, and the explanation is necessary to assist the Judge in coming to a finding as to the genuineness of the will propounded. The reason for the exemption of applications for probate from the operation of the Limitation Act probably is that the application for probate is in the nature of an application for permission to perform a duty created by a will or for recognition as a testamentary trustee, and the right to apply continues so long as the object of the trust exists or any part of the trust if really created remains to be executed. The order of the Judge on the application of the 10th March 1892 is set aside, and he is directed to restore the application for probate to his file and to dispose of it on the merits in accordance with law. Respondents will pay appellant's costs in this Court.

(1) I.L.R., 8 Mad., 207. (2) I.L.R., 7 Bom., 213. (3) I.L.R., 6 Calc., 707.

GNANAMUTHU UPADESI v. VANA KOILPILLAI NADAN.

Civil Miscellaneous Appeal No. 130 *of* 1892.—The order of the Judge cannot be supported. It is wrong, because when the appellant was legally entitled to make a second application on the 10th March 1892, it was not competent to the Judge to impose a restriction upon appellant's right and to direct that he should make an application under the Code of Civil Procedure, so as to let in the law of limitation and indirectly to defeat the object of the legislature in exempting applications for probate from the Act of Limitations. The Judge is also in error in construing section 261, which only renders the provisions of the Code of Civil Procedure as nearly as may be so as to let in the limitation bar, from which applications for probate are saved.

This order must be, and is hereby, set aside, as both appeals were heard at the same time, and as the same vakils appeared in both, there would be no order for costs in this appeal.

APPELLATE CIVIL.

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

1893. Nov. 27, 29.

JUJI KAMTI AND OTHERS (DEFENDANTS), PETITIONERS,

v.

ANNAI BHATTA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 257*A—Adjustment of decree out of Court—Instalment bond—Consideration.*

An instalment bond, executed by a judgment-debtor in favour of the decree-holder and in consideration of the benefit of the decree being given up, is not void as an agreement falling under s. 257A of the Civil Procedure Code. Such an agreement is void only as far as it affects the right to execute the decree, and may be the foundation of a fresh suit. *Sellamayyan* v. *Muthan*(1), *Jhabar Mahomed* v. *Modan Sonahar*(2), and *Hukum Chand Oswal* v. *Taharunnessa Bibi*(3) followed.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the revised decree of S. Subbaiyar, Subordinate Judge of South Canara, in Small Cause Suit No. 22 of 1890.

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

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* Civil Revision Petition No. 547 of 1892.

(1) I.L.R., 12 Mad., 61. (2) I.L.R., 11 Calc., 671. (3) I.L.R., 16 Calc., 504.

Sankaran Nayar and *Sankara Menon* for petitioner.

Narayana Rau for respondent.

JUJI KAMTI v. ANNAI BHATTA.

JUDGMENT.—Two questions are argued in support of this petition for revision. The first is that the bond sued on is void as an agreement falling under section 257A of the Code of Civil Procedure. That section is inserted in the code in the chapter relating to the execution of decrees and in the section headed 'mode of executing decrees.' This suggests that the intention was to render such agreement void only so far as it affects the right to execute the decree. As observed in *Sellamayyan* v. *Muthan*(1) where the benefit of a decree is given up, and in consideration of it a bond is executed, it cannot be intended that the bond should not be the foundation of a fresh suit. This is also the view taken by the High Court of Calcutta. *Hukum Chand Oswal* v. *Taharunnessa Bibi*(3), *Jhabar Mahomed* v. *Modan Sonahar*(2). We are aware that the High Court at Bombay has held otherwise, but the scheme of the code does not appear to have been allowed due effect in arriving at those decisions.

The second question is whether the suit is time-barred. If, as alleged in the plaint, the first instalment of Rs. 50 was paid in February 1886, as the next instalment was not payable till February 1887, the suit brought in January 1890 was in time. In the revision petition defendants claim credit for the sum of Rs. 50. We cannot, therefore, say the suit is time-barred.

A further question raised is as to the liability of the third defendant for the debt. Third defendant was not a party to the bond on which the suit is brought, and the karar referred to in the bond to which third defendant is alleged to have been a party appears to have been superseded by the plaint bond. We therefore exonerate third defendant from all liability for the debt and direct plaintiff to pay her costs; and we modify the decree as against defendants 1 and 2 by reducing the amount decreed from Rs. 420 to Rs. 370.

Plaintiff and defendants 1 and 2 will pay each others costs throughout proportionate to the amounts now allowed and disallowed.

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(1) I.L.R., 12 Mad., 61. (2) I.L.R., 11 Calc., 671.
(3) I.L.R., 16 Calc., 504.

PRIVY COUNCIL.

P.C. *
1894.
April 20.

BALA GAURI VALLABA TEVAR (PLAINTIFF),

AND

PERIASAMI UDAYAR TEVAR AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Madras.]

Sivaganga sanad of 1803—*Failure of suit alleging fraud—Possession known and acquiesced in prior to adjudication—Civil Procedure Code, s.* 13.

The High Court of Madras dismissed on the facts a suit brought in 1886, grounded on fraud attributed to the lineal ancestor of the principal defendant, in obtaining, in 1803, the grant of the sanad of the Sivaganga Zamindari, to which the plaintiff claimed title. The plaintiff's case was that the defendant's ancestor, the younger of two brothers, had fraudulently caused the sanad to be made out in his own name, whereas it was intended to be, and ought to have been, a grant to the elder brother, who was the plaintiff's lineal ancestor. Those through whom the plaintiff claimed had not made any such charge, although they had knowledge of all the facts connected with the grant of the sanad of 1803 to the younger brother, and with the long possession by him and his descendants, among whom there had been litigation, resulting in a decision as to the ownership':

Held, that this suit could not be maintained to re-open the question.

APPEAL from a decree (20th March 1889) of the High Court, affirming, after a remand, a decree (20th November 1886) of the District Court of Madura, dismissing the appellant's suit.

In this suit for the proprietary right and possession of the Sivaganga Zamindari, the question which the plaintiff sought to raise related to the selection by the Government of Madras of a successor to the former zamindar of Sivaganga, named Sasivarna, whose lineal heirs became extinct in the last century. In 1801 his surviving collateral relations were the Tevar family, then consisting of two brothers, and of these the younger was appointed by proclamation to be zamindar, and in 1803 received a sanad from the Government. It was claimed that the elder brother, Padamattur Woyar Tevar, from whom the plaintiff was fifth in descent, was intended to be appointed zamindar, but the name of the younger brother, Gauri Vallaba Woyar Tevar, was by fraud inserted in the sanad, and that his line of descendants had thus come into possession.

* *Present:* Lords HOBHOUSE, ASHBOURNE and MACNAGHTEN, and Sir RICHARD COUCH.

The principal point on this appeal was whether, after judicial decision and the open and known succession of the younger brother and his branch of the family, considered along with the grant made to him, the right of the elder brother could now be held to be an open question. Two Courts had found no proof of fraud.

The appointment of the zamindar in 1801 was made by proclamation on the 6th July. The sanad was dated the 22nd April 1803, and was forwarded to the Collector for delivery to the zamindar, whom it styled Muttu Ragunadha Gauri Vallaba Wulla Worria Tevar. This the younger brother received and continued in possession till he died in 1829. The elder brother lived till 1814 and left sons, but neither he nor they set up any claim to the zamindari.

Gauri Vallaba left no son, but a posthumous daughter, Katama Natchiar, was born to him. Between her and others of his immediate family on the one hand, and his collateral relations on the other, the succession was disputed. Suits followed in which the elder branch, claiming through Padamattur Goyar Tevar, was represented. The report of Srimut Mootoo Vijaya (*Ragunadha Gauri Vallaba Peria Woodia Tevar* v. *Rani Anga-muthu Natchiar*(1)) shows the earlier litigation, but the principal cases bearing on the present one were *Katama Natchiar* v. *The Raja of Sivaganga*(2), decided in 1863 (which decided that the zamindari was to be taken as 'self-acquired' property in the hands of the 'Istemrar zamindar,' in other words in the possession of Gauri Vallaba Tevar), and *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar*(3). In this last case, Dora Singha Tevar, the eldest surviving grandson of the 'Istemrar zamindar,' was held solely entitled to the impartible estate of Sivaganga; and in the judgment all the anterior facts material to a report of the present one are to be found at p. 298 of I.L.R., 3 Mad. From 1866, when the judgment in 11 Moore, I.A., 50, was given, the younger branch of the Tevar family remained in possession.

This suit was brought on the 4th January 1886 against Periasami, the son of Dora Singha Tevar. As defendants with him

(1) 3 Moore, I.A.Ca., 278.
(2) 9 Moore, I.A.Ca., 539; see also 11 Moore I.A., 50.
(3) I.L.R., 3 Mad., 290

were joined his brothers, and also purchasers who had become, from time to time, interested in the estate, bringing the number up to 124. The plaintiff claimed a declaration that the judgment of 30th November 1863 in *Katama Natchiar* (the daughter of Gauri Vallaba Tevar) v. *Bodha Gaurasami Peria Odaya* (the plaintiff's father)(1) was not binding upon him, having been obtained by fraud. He complained that in consequence of that decision, Katama ousted his father in 1864 and continued in possession till her death in 1877, after which Dora Singha Tevar, the father of the defendant Periasami, obtained possession from Katama's son by the decree of the Madras Courts, dated the 14th May 1881, affirmed in appeal in *Muttuvadhana Tevar* v. *Dora Singha Tevar*(2) and held possession till his death on the 19th July 1883, when Periasami, his eldest son, succeeded to the impartible zamindari. He alleged that when his father, Bodha Gurusami, died in 1872, he was left an infant of eight years of age; that he came of age in 1882, 27th December, and acquired the knowledge of the fraudulent acts in 1885. The details of these acts he did not specify.

The defendant by his written statement, in which his younger brothers joined, contended that the fact of the zamindari having been acquired by his maternal great grandfather Gauri Vallaba Tevar had been conclusively settled as a matter adjudicated within section 13, Civil Procedure, by the judgment above mentioned(3), which could not be set aside. He denied that there had been fraud in the obtaining the sanad of 1803, and urged the insufficiency of the allegations on account of their vagueness. He also set up limitation.

Issues raising the above points having been fixed, the plaintiff filed a more definite statement, that, in 1802, when the permanent settlement was submitted to the Collector of Madura, Gauri Vallaba fraudulently inserted his name and title between those of his brother Padamattur Woya Tevar, so as to enable him to assert that he was the grantee of the zamindari; and that "in 1803 the "Government forwarded to the elder Woya Tevar, through the "Collector, an istemrar sanad for the zamindari, but Gauri Val-"laba kept possession of it, and pretended that he was the person "named therein as grantee."

(1) 9 Moore, I.A.Ca., 539. (2) I.L.R., 3 Mad., 290. (3) 9 Moore, I.A.Ca., 543.

The plaintiff also alleged that "Gauri Vallaba caused the "permanent settlement accounts and other documents which were "in the Collector's office, and which stood in the name of Woya "Tevar, to be concealed or destroyed."

Other charges were made, but the main fraud alleged was that Gauri Vallaba had caused his own name to be inserted in the sanad. The suit was dismissed on the 20th November 1886 by the District Judge, who held it barred by the decision in 1863, and also by limitation. He recorded no express finding as to whether fraud had taken place or not. On appeal the High Court (KERNAN and WILKINSON, JJ.) remanded the record for a finding on this latter question, which had been raised by an issue, pointing out that, at the time of the decision of 1863, the question of fraud had not arisen, and was now alleged not to have been known. They added that it was now alleged that Gauri Vallaba Tevar had fraudulently caused the preparation of the sanad, having arranged that accounts should be given by the Collector's office, containing the insertion of his own name as zamindar, and making it appear that his was the name of the person to whom the sanad should issue.

On this remand, the District Judge finally found, on all the evidence, that the allegations of fraud were not proved. He concluded that there was no evidence of the fraud alleged as to Gauri Vallaba Tevar having got his own name inserted in the sanad in the place of that of his elder brother, or that the Government had intended to make the grant to the latter.

Objections were filed by the plaintiff. The same Division Bench of the High Court then dismissed the appeal, giving the following judgment:—

"The plaintiff's case is based on allegation of fraud having "been committed by Gauri Vallaba Tevar on his elder brother in "1802 and 1803 by preparing false accounts showing that he, "Gauri Vallaba Tevar, was the person who was proclaimed zamin-"dar in 1801, and by inducing thereby the Government to grant "the zamindari in his name. All those acts of alleged fraud have "been fully investigated by the District Judge, and he has, after "careful examination, negatived them. It is not necessary to "repeat his observations in which, however, we agree. The con-"duct of the elder brother of Gauri Vallaba Tevar and of his "grandson after his death contain the clearest evidence that the

"sanad granted in the name of Gauri Vallaba Tevar was known "to them and, although there were various suits between the "parties, this fraud was not set up until this suit was filed.

"In the suit in 1836 the grandson of the elder brother ad- "mitted that the younger brother was installed as zamindar, but "he says it was with the elder brother's consent. The installation "of the younger brother took place in 1801 in Colonel Agnew's "camp, and the evidence of Mr. Hughes, referred to by the Dis- "trict Judge, shows that, amongst the people who then held up "their hands in homage to the newly-installed zamindar, the "younger brother, was his elder brother.

"The parties have had the sanad in the name of Gauri Vallaba "Tevar before them for eighty years and had ample opportunity "of inquiry, and the plaintiff had entirely failed to prove his alle- "gation, and we dismiss the appeal with separate costs to the "zamindar and to the lessees."

On this appeal Mr. *T. H. Cowie*, Q.C., and Mr. *J. D. Mayne* appeared for the appellant.

Mr. *R. V. Doyne* for the respondent.

For the appellant, the argument was, in outline, as follows:—The decision of 1863 in favour of Katama Natchiar was based on the assumption that Gauri Vallaba was the person in whom the Government intended that the zamindari should vest in 1801 and 1803. This was no bar to the present suit, which was brought upon the contention that the elder brother was intended to be the zamindar, and that the insertion of Gauri Vallaba's name in the sanad of 1803 was effected by his fraud. There were errors in dealing with the evidence in the Courts below, which should be held to affect the findings upon this question, and to leave it open to reconsideration. Counsel for the respondents was not called upon.

Their Lordship's judgment was delivered by Lord HOBHOUSE.

JUDGMENT.—This case appears to their Lordships to be a very simple one. The appellant contends that by a fraud alleged to have been committed in the years 1802 and 1803 by Gauri Vallaba Tevar, a sanad appointing him zamindar of Sivaganga was granted to him by the Government in 1803, whereas it should have been granted to his elder brother Woya Tevar. But Gauri Vallaba Tevar entered upon the zamindari at that time, and he and his descendants have enjoyed it ever since.

It is quite clear that there could have been no secrecy about his appointment to be zamindar. The matter was the subject of public proclamation, and Woya Tevar must have known, and all his descendants must have known, that the sanad granting the zamindari was in the name of Gauri Vallaba Tevar, and that the zamindari was actually occupied and enjoyed by Gauri Vallaba Tevar and his descendants.

No suit can be brought forward at the present time to re-open the question, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Roweliffes, Rawle, Johnstone and Gregory.*

Solicitors for the respondent: Messrs. *Lawford, Waterhouse and Lawford.*

APPELLATE CIVIL.

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

NARANAYYAN (DEFENDANT), APPELLANT,

v.

NAGESWARAYYAN (PLAINTIFF), RESPONDENT. *

1893. October 3.

Code of Civil Procedure—Act XIV of 1882, s. 283—Whether defendant may plead that the decree in question was collusively obtained.

A defendant in a suit brought under section 283 of the Civil Procedure Code, who is connected with the judgment-debtor as being reversionary heir of the judgment-debtor's husband, or as being his coparcener, may show that the decree, in execution of which the property in dispute was attached, was collusively obtained. *Gulibai* v. *Jagannath Galvankar*(1) dissented from.

APPEAL against the order of J. A. Davies, District Judge of Tanjore, in appeal suit No. 577 of 1891, reversing the decree of T. Venkatramaiyar, District Munsif of Valangiman, in original suit No. 247 of 1890.

This was a suit under section 283 of the Code of Civil Procedure to establish the plaintiff's right to proceed against certain

* Appeal against Order No. 64 of 1892.

(1) I.L.R., 10 Bom., 659.

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property of Sitaramayyan, against whose widow the plaintiff held a decree. The District Munsif, having determined that decree to be fraudulent, dismissed this suit.

On appeal by the plaintiff, the District Judge, relying on *Gulibai* v. *Jagannath Galvankar*(1), reversed the decree of the District Munsif and passed a decree in favour of the plaintiff. The defendant preferred this appeal.

Subramanya Ayyar for appellant.

Mr. *Norton* and *Sankaran Nayar* for respondent.

JUDGMENT.—We are of opinion that the decision of the Judge cannot be supported.

It is not necessary, for the purposes of this suit, to determine whether it is open to the plaintiff in a suit brought under section 283 of the Code of Civil Procedure to ask for consequential relief in addition to a declaration establishing his right to the property. If it were necessary to decide the question, we should certainly hold that even a plaintiff could do so, and thus avoid a multiplicity of suits. Such is also the opinion of Jardine and Telang, JJ., in *Sadu Bin Raghu* v. *Ram Bin Govind*(2).

The question before us is whether a defendant in such a suit is precluded from showing that the decree, in execution of which the property in dispute was attached, was collusively obtained. Such a defence would not be ordinarily available or necessary when the defendant is an utter stranger, in no way connected with the judgment-debtor, unless, it may be, the decree makes the debt a charge on the property claimed. In the present case, however, the Munsif considered the defendant interested in setting up the defence either as reversionary heir of the judgment-debtor's husband Seetharamiah or as a coparcener of his. We are unable to hold that such a defence is not open to a party interested in making it in a suit brought under section 283. We do not see our way to following the decision in *Gulibai* v. *Jagannath Galvankar*(1), as in our opinion section 283 does not introduce an exception to the rule that the defendant is bound to set up every defence available to him. Moreover, we think it unreasonable that he should be compelled to submit to a decree that may result in his eviction and thus have to bring a fresh suit for restoration.

(1) I L.R., 10 Bom., 659. (2) I.L.R., 16 Bom., 608.

NARANAYYAN v. NAGESWARAYYAN.

We must observe, however, that the defence is only available to the defendant if he is interested as mentioned above.

We set aside the order of remand and send back the appeal to the District Judge for disposal with reference to the foregoing observations.

The costs of this appeal will abide and follow the result.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

YOHAN AND OTHERS.*

1892. January 17.

Christian Marriage Act—Act XV of 1872, s. 68—Solemnization of marriage under Hindu rites between a Native Christian and a Hindu by a person not authorized to perform marriages under s. 5 of the Act.

A person who performs a ceremony of marriage according to Hindu form between a Native Christian and a Hindu commits an offence under section 68 of Act XV of 1872, unless he is authorized to solemnize marriages under section 5 of the Act.

PETITION under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of H. T. Ross, Sessions Judge of Gódávari, acquitting the prisoners in calendar case No. 39 of 1891.

The third accused, a Hindu, performed the ceremony of marriage according to Hindu form between the first accused, who was a Native Christian at the time, and a Hindu girl, who was given in marriage by the second accused, her uncle. The Sessions Judge acquitted the accused persons on the ground that section 68 of the Christian Marriage Act (XV of 1872) does not apply to marriages in Hindu form, solemnized by a Hindu, though one of the parties is found in fact to be a Christian, and that the whole Act appears to contemplate marriages in the Christian form alone, differing in that particular from Act V of 1865.

* Criminal Revision Case No. 488 of 1892.

QUEEN-EMPRESS v. YOHAN.

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

Mr. *Michell* for the accused.

JUDGMENT.—We cannot agree with the view taken by the Sessions Judge. The preamble and sections 4, 5 and 68 of the present Act XV of 1872 are almost identical with the preamble and sections 4, 5 and 56 of Act V of 1865.

Section 68, as amended by section 6, Act II of 1891, makes punishable the solemnization of a marriage between persons of whom one is a Christian, unless the person solemnizing such marriage has been authorized for that purpose under section 5. It is conceded that the third accused was not authorized under section 5, and hence the case is exactly similar to that in Proceedings of the Madras High Court dated 21st March 1871 (1) and the accused are, *primâ facie*, liable to punishment.

We are told that this application has been made by Government merely to obtain an authoritative declaration of the law and a re-trial is not pressed for, having regard to the length of time which has elapsed.

We, therefore, do not think it necessary to pass any further order.

(1) 6 M.H.C.R., App. 20.

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1872—XV : *See* CHRISTIAN MARRIAGE ACT.

1877—XV : *See* LIMITATION ACT.

1882—X : *See* CRIMINAL PROCEDURE CODE.

„ —XIV : *See* CIVIL PROCEDURE CODE.

1889—X : *See* PORTS ACT.

CIVIL PROCEDURE CODE—ACT XIV OF 1882, ss. 231, 244—*Order of a Court on application for execution by one or more joint decree-holders—Appeal therefrom.*] An appeal lies from an order under section 231 of the Code of Civil Procedure, such an order being one relating to the execution of a decree within the meaning of section 244. *Gooroo Dass Roy* v. *Ram Ruginee Dossia* (17 W.R., 136) and *Odhoya Pershad* v. *Mahadeo Dutt Bhandaree* (17 W.R., 415) distinguished.

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2. ——————————————————, ss. 244, 278 *to* 283—*Questions to be determined by the Court executing a decree—Grounds of objection.*] Where the question is whether the property in dispute belongs to the judgment-debtor or to his estate or not, and the question is raised in a proceeding in execution between parties to the suit or their representatives, it matters not on what grounds the objection is taken to the property being made the subject of execution, and the question is one to be determined in execution, and section 244 of the Code of Civil Procedure bars a separate suit. *Abeedoonissa Khatoon* v. *Ameeroonissa Khatoon* (L.R., 4 I.A., 66) followed.

Upendra Bhatta v. *Ranganatha Bhatta* 399

3. ——————————————————, s. 622—*Power to call for record of cases not appealable to High Court—When a Court can be said "to have acted in the exercise of its jurisdiction illegally or with material irregularity."*] A District Judge disposed of some suits on a point taken by himself on appeal, without affording the parties an opportunity of proving what was necessary to meet the point, and admitted other appeals after they had become time-barred :—*Held*, that where a Subordinate Court, having applied its mind to a question of law or procedure, arrives at an erroneous decision, such decision is not by itself any ground for the exercise by a High Court of the powers given by section 622 of the Code of Civil Procedure. *Amir Hassan Khan* v. *Sheo Baksh Singh* (I.L.R., 11 Calc., 6) followed :—*Held*, further (Best and Davies, JJ., *dissentiente*), that the case contemplated by the words "act . . . illegally or with material irregularity" in section 622 of the Code of Civil Procedure is that of a perverse decision on a question of law or procedure, a decision being perverse where it is a conscious departure from some rule of law or procedure. *Per* BEST, J.—The words in question of section 622 of the Code are applicable

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to illegalities or irregularities which are the result merely of ignorance of law or carelessness, and the disposal of a suit on a point taken by the Court itself on appeal, without affording the parties an opportunity of proving what is necessary to meet the point, is an irregularity in procedure within the meaning of section 622, and that the inadvertent admission of an appeal that is time-barred is an illegality in procedure within the meaning of that section. *Per* DAVIES, J.—The clause of section 622 in question is applicable only to errors of procedure, and it is not in every case that the High Court would, in the exercise of the discretionary power granted it by the section, interfere in revision. The interference would be confined to cases where the illegality or irregularity was such as had occasioned or might occasion a substantial failure of justice, as in the present case.

Kristamma Naidu v. *Chapa Naidu* 410

CHRISTIAN MARRIAGE ACT—ACT XV OF 1872, s. 68—*Solemnization of marriage under Hindu rites between a Native Christian and a Hindu by a person not authorized to perform marriages under section 5 of the Act.*] A person who performs a ceremony of marriage according to Hindu form between a Native Christian and a Hindu commits an offence under section 68 of Act XV of 1872, unless he is authorized to solemnize marriages under section 5 of the Act.

Queen-Empress v. *Yohan* 391

CRIMINAL PROCEDURE CODE—ACT X OF 1862, ss. 531, 532 AND 537—*Commitment to Sessions Court by Magistrate having no jurisdiction over place where alleged offence was committed—Exercise of powers duly conferred.*] A Magistrate who commits a case for trial by a Sessions Court, does so in the exercise of powers duly conferred upon him, and the fact that he had no territorial jurisdiction over the place where the alleged offence was committed, and that an objection to the committal on this ground was taken before the commitment, is no ground for the Court to which the commitment is made quashing it under section 532 of the Criminal Procedure Code. *The Queen-Empress* v. *James Ingle* (I.L.R., 16 Bom., 200) followed.

Queen-Empress v. *Abbi Reddi* 402

HINDU LAW—*Maintenance—Forfeiture of widow's right to maintenance by reason of unchastity.*] The unchastity of a widow deprives her wholly of her right to maintenance, and the fact that there has been an agreement as to maintenance makes no difference. *Valu* v. *Ganga* (I.L.R., 7 Bom., 84) *and Vishnu Shamlog* v. *Manjamma* (I.L.R., 9 Bom., 108) followed.

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2. ———, *Succession—Manu, Chapter IX, slokas* 122 *and* 125—*Rule of selection as between an elder son by a wife of an inferior class of caste and a junior son by a wife equal in caste—Dagger wife—Meaning of the term* bhoga strées—*Custom showing preference in succession for the sons by a senior wife to those by a junior wife—Nearness of blood as a ground of preference between brothers of the half and full blood, respectively.*] In case of disputed succession to indivisible property between sons who are born of mothers of the same caste but of different classes therein, the right of a junior son by a first married wife, if she be of higher class, is superior to that of an elder son of a wife of lower class. Thus, when a Sudra marries a woman of his caste but of an inferior class, as a dagger wife, in addition to his wife equal in caste to him, the rule of selection is in favour of

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his son by the latter by reason of the mother being of a higher class. A valid custom prevails among the Kumbla zamindars whereby the son by a senior wife has a prior right of succession to a son by a junior wife, although the latter may be the elder son, seniority referring to the date of the marriage and not the age of the wife. Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to coparcenary property which is partible, and it is likewise no ground of preference when such property is impartible. When, therefore, family property belongs to a coparcenary family consisting of two brothers of a deceased *propositus*—one of the whole blood and one of the half-blood—in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years.

Ramasami Kamaya Naik v. *Sundaralingasami Kamaya Naik* 422

LIMITATION ACT—ACT XV OF 1877, SCH. II, ART. 124—*Suit for having the appointment of a karnam declared void.*] A suit by existing karnams for having the appointment of another person as a karnam jointly with themselves declared void does not fall within the provision of article 124 of the Limitation Act.

Lakshminarayanappa v. *Venkataratnam* 395

PENAL CODE—ACT XLV OF 1860, S. 378, ILLUSTRATION (o)—*Theft—Whether a dishonest removal by a wife of her husband's property left in her custody amounts to theft.*] There is no presumption of law that a wife and husband constitute one person in India for the purpose of criminal law. If the wife, removing her husband's property from his house, does so with dishonest intention, she is guilty of theft.

Queen-Empress v. *Butchi* 401

PORTS ACT—ACT X OF 1889, S. 6, CL. (K)—*Local Government's rules thereunder—Boats plying and not plying for hire*—Ultra vires.] It is only with regard to boats plying for hire that section 6 of Act X of 1889 gives the Local Government authority to make rules. Rules purporting to make it obligatory on boat owners to ply for hire are *ultra vires*.

Queen-Empress v. *Thommayya Chetti* 397

RELIGIOUS ENDOWMENT—*Powers of a Christian congregation to elect under which Bishopric the endowment should be placed in spiritual matters—Effect of a concordat placing the endowment within the territorial jurisdiction of a certain Bishop—Suit for partition of the endowment.*] In the year 1806, a fund was started by a caste of Roman Catholic boatmen in Royapuram for the purpose of supplying the religious wants of the caste, and in 1829 the Church of St. Peter at Royapuram was erected. The fund was under the control of the Government Marine Board which, in 1830, in consequence of disputes between the headman of the caste, suspended all payments. In 1863, a member of the caste, claiming to be sole surviving headman, brought a suit against Government for a declaration that he was sole surviving headman, and as such entitled to the sole management of the funds then in the hands of Government, which funds the Government paid into Court to the credit of the said suit. By the decree in this suit it was declared that the fund, in question, belonged to the whole body of Roman Catholic boatmen in Royapuram, that it must be devoted to the religious observances of the body, and that it rested with that body to

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determine whether in spiritual matters the Church should continue under the Vicar Apostolic or the Goanese Bishop of Mylapore. In 1886 a concordat was executed between the Pope of Rome and the King of Portugal, the effect of which was to place St. Peter's Church within the territorial jurisdiction of the Vicar Apostolic. Plaintiffs, who were members of the Goanese party, complained that, having regard to the effect of the concordat of 1886, it would be impossible for their party—even if in a majority—to elect a priest of their own party, and prayed for a division of the fund :—*Held*, that even if this were so, this fact would not justify the Court in taking away from St. Peter's Church part of its endowment.

Chinnasami Mudali v. *Advocate-General* 406

REVENUE RECOVERY ACT—MADRAS ACT II OF 1864, s. 11—*Whether gathered products belonging to a tenant can be distrained by Government on account of the landlord's arrears of revenue.*] Government can attach for arrears of revenue under section 11 of Madras Act II of 1864 the gathered products belonging to a tenant, provided that the products are of the land on account of which the arrears of revenue have accrued.

Krishna Chadaga v. *Govinda Adiga* 404

We must observe, however, that the defence is only available to the defendant if he is interested as mentioned above.

We set aside the order of remand and send back the appeal to the District Judge for disposal with reference to the foregoing observations.

The costs of this appeal will abide and follow the result.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

YOHAN AND OTHERS. *

1892. January 17.

Christian Marriage Act—Act XV of 1872, s. 68—Solemnization of marriage under Hindu rites between a Native Christian and a Hindu by a person not authorized to perform marriages under s. 5 of the Act.

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PETITION under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of H. T. Ross, Sessions Judge of Gódávari, acquitting the prisoners in calendar case No. 39 of 1891.

The third accused, a Hindu, performed the ceremony of marriage according to Hindu form between the first accused, who was a Native Christian at the time, and a Hindu girl, who was given in marriage by the second accused, her uncle. The Sessions Judge acquitted the accused persons on the ground that section 68 of the Christian Marriage Act (XV of 1872) does not apply to marriages in Hindu form, solemnized by a Hindu, though one of the parties is found in fact to be a Christian, and that the whole Act appears to contemplate marriages in the Christian form alone, differing in that particular from Act V of 1865.

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Mr. *Michell* for the accused.

JUDGMENT.—We cannot agree with the view taken by the Sessions Judge. The preamble and sections 4, 5 and 68 of the present Act XV of 1872 are almost identical with the preamble and sections 4, 5 and 56 of Act V of 1865.

Section 68, as amended by section 6, Act II of 1891, makes punishable the solemnization of a marriage between persons of whom one is a Christian, unless the person solemnizing such marriage has been authorized for that purpose under section 5. It is conceded that the third accused was not authorized under section 5, and hence the case is exactly similar to that in Proceedings of the Madras High Court dated 21st March 1871(1) and the accused are, *primâ facie*, liable to punishment.

We are told that this application has been made by Government merely to obtain an authoritative declaration of the law and a re-trial is not pressed for, having regard to the length of time which has elapsed.

We, therefore, do not think it necessary to pass any further order.

APPELLATE CIVIL.

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

1894. January 9.

NAGAMMA (PLAINTIFF), APPELLANT,

v.

VIRABHADRA (DEFENDANT), RESPONDENT.*

Hindu law—Maintenance—Forfeiture of widow's right to maintenance by reason of unchastity.

The unchastity of a widow deprives her wholly of her right to maintenance, and the fact that there has been an agreement as to maintenance makes no difference. *Valu* v. *Ganga*(2) and *Vishnu Shambhog* v. *Manjamma*(3) followed.

SECOND APPEAL against the decree of P. Subbayar, Subordinate Judge of South Canara, in appeal suit No. 246 of 1892, reversing

(1) 6 M.H.C.R., App. 20.
(2) I.L.R., 7 Bom., 84.
* Second Appeal No. 634 of 1893.
(3) I.L.R., 9 Bom., 108.

NAGAMMA v. VIRABHADRA.

the decree of I. P. Fernandez, District Munsif of Kundapur, in original suit No. 108 of 1891.

Plaintiff in this case, the widow of defendant's deceased son, Subraya Hebbara, sued for recovery of Rs. 20-2-6, being the value of rice and money with interest, due for her maintenance from October 1890 to April 1891 under a deed of agreement executed by the defendant on 6th March 1887.

The defendant admitted the agreement, but averred that the plaintiff had been living in adultery for a year and a half, that she had been degraded from caste for her pregnancy, and that thereby she forfeited her right to maintenance.

The plaintiff in her statement in answer to defendant's statement admitted having been put out of caste in consequence of pregnancy, but denied having lived in adultery, her pregnancy being the result of a forcible connection, and contended that the agreement was not invalidated by such pregnancy.

The Subordinate Judge reversed the decree of the District Munsif in favour of the plaintiff, who preferred this appeal.

Pattabhirama Ayyar for appellant.

Ramachandra Rau Saheb for respondent.

JUDGMENT.—We must follow the decision in *Valu* v. *Ganga*(1) and *Vishnu Shambhog* v. *Manjamma*(2), and hold that unchastity of a widow deprives her wholly of her right to maintenance. No text has been cited in favour of the theory that a bare maintenance can be allowed. The fact that there has been an agreement in our opinion makes no difference. It merely fixes the amount and the security. We must dismiss the appeal with costs.

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(1) I.L.R., 7 Bom., 84.
(2) I.L.R., 9 Bom., 108.

APPELLATE CIVIL.

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

1893. April 19.

LAKSHMI AMMAH (PLAINTIFF No. 3), APPELLANT,

v.

PONNASSA MENON AND OTHERS (DEFENDANTS NOS. 1 TO 15), RESPONDENTS.*

Code of Civil Procedure—Act XIV of 1882, *ss.* 231, 244—*Order of a Court on application for execution by one or more joint decree-holders—Appeal therefrom.*

An appeal lies from an order under section 231 of the Code of Civil Procedure, such an order being one relating to the execution of a decree within the meaning of section 244. *Gooroo Doss Roy* v. *Ram Ruginee Dossia*(1) and *Odhoya Pershad* v. *Mahadeo Dutt Bhandaree*(2) distinguished

APPEAL under section 15 of the Letters Patent from the order of Subramania Ayyar, J., dated 4th January 1892, passed on appeal against appellate order No. 10 of 1891, confirming the order of A. Thompson, District Judge of South Malabar, dated 2nd August 1890, passed in civil miscellaneous appeal No. 214 of 1890.

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

Sankaran Nayar for appellant.

Respondents were not represented.

JUDGMENT.—We are of opinion that from an order under section 231 of the Code of Civil Procedure, being an order relating to the execution of a decree between the parties to the decree within the meaning of section 244 of the same Code, an appeal lies. If all the joint decree-holders apply for execution, there can be no doubt that the order passed on such application, whether refusing or granting it, will be appealable. Section 231 provides for the case in which all the decree-holders are unable or are unwilling to join in the application, and in such case enables one or more of such decree-holders to apply for execution of the whole decree, and then the Court is authorized to impose such terms as are necessary for the protection of the interests of the other decree-holders. This appears to us to disclose an intention to provide

* Letters Patent Appeal No. 32 of 1892. (1) 17 W.R., 136. (2) 17 W.R., 415.

facility for executing decrees even when all the decree-holders are unable or unwilling to join in applying for execution. It is no doubt true that the Court has discretion to refuse execution for sufficient cause; but that is no reason for holding such order to be other than an order relating to the execution of the decree within the meaning of section 244. In *Gooroo Doss Roy* v. *Ram Ruginee Dossia*(1), which was followed in *Odhoya Pershad* v. *Mahadeo Dutt Bhandaree*(2), the question was not between the decree-holder on one side and the judgment-debtor on the other, but merely between two of the joint decree-holders. With reference to the learned Judge's observation, we find that there has been no contest as between the decree-holders, but only an allegation that some of them had come to terms with the judgment-debtor.

We set aside the order of the learned Judge and of the lower appellate Court, and remand the case to the District Judge for replacement on the file and disposal on the merits, so far as the order of the District Munsif cancels the previous order in favour of third plaintiff.

The costs in this Court and the District Court will abide and follow the result.

APPELLATE CIVIL.

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

1893. March 2. April 18.

LAKSHMINARAYANAPPA (DEFENDANT No. 3), APPELLANT,

v.

VENKATARATNAM AND OTHERS (PLAINTIFFS and DEFENDANTS NOS. 1, 4 AND 5), RESPONDENTS.*

Limitation Act—Act XV of 1877, *sch. II, art.* 124—*Suit for having the appointment of a karnam declared void.*

A suit by existing karnams for having the appointment of another person as a kurnam jointly with themselves declared void does not fall within the provision of article 124 of the Limitation Act.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 545 of 1891, confirming the

(1) 17 W.R., 136. (2) 17 W.R., 415. * Second Appeal No. 757 of 1892.

LAKSHMINARAYANAPPA v. VENKATARATNAM.

decree of O. V. Nunjundeh Ayyar, District Munsif of Masulipatam, in original suit No. 130 of 1890.

The third defendant was appointed a village kurnam by the first and second defendants, who were the receiver and manager, respectively, of the estate in which the village was situated. The plaintiffs, who were already kurnams of that village, filed this suit to set aside the appointment. It appeared that the third defendant was appointed a kurnam on the ground that the existing kurnams did not discharge the duties of their office efficiently, and that his father, who had died ten years before the suit, had been a kurnam, but had for ten years previously performed no duties as such. The District Judge, in affirming the decree of the District Munsif, held that the third defendant having been out of possession of this hereditary office for twenty years, had lost all right to it, and was barred by article 124 of the Limitation Act.

The third defendant preferred this appeal.

Pattabhirama Ayyar for appellant.

Srirangachariar for respondents Nos. 1 and 2.

JUDGMENT.—Article 124 of the Limitation Act is not applicable, as this is not a suit for possession of the hereditary office, but a suit by the existing kurnams for having declared void the appointment of third defendant as kurnam jointly with themselves. We observe that the appointment was made under the orders of the Collector administering the estate on behalf of the zamindar, on the ground that the existing kurnams did not discharge the duties of their office with efficiency.

As regards respondents' contention that the third defendant was appointed as an additional kurnam, we find that the third defendant's father had been kurnam of the village, and it was quite open to the landholder, in fact it was his duty, to fill up the vacancy caused by the third defendant's father's death under section 7 of the Regulation XXIX of 1802. The faisal number of kurnams cannot be reduced without the sanction of the Board of Revenue, and the omission to appoint a successor to the third defendant's father was contrary to the policy of that section. The appointment of the third defendant, instead of being open to objection, was therefore merely in accordance with the requirements of the regulation.

It is contended that the third defendant's right to the office was barred, as his father had died ten years previously, and he has also during the last ten years of his life ceased to do the duties of kurnam, though his name was retained in the list of kurnams. The question is not whether the third defendant's right to claim the office is barred, but whether the Collector had no power to make the appointment.

LAKSHMINARAYANAPPA v. VENKATARATNAM.

The appointment of a stranger even by a zamindar when a vacancy exists would be open to no objection on the ground of its not being made within twelve years of the vacancy occurring, and we fail to understand why the appointment of an heir should be open to objection on this ground.

We set aside the decrees of both the lower Courts and direct that the suit be dismissed with costs throughout to be paid by plaintiffs (first and second respondents).

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

THOMMAYYA CHETTI.*

1893. August 30. November 1.

Indian Ports Act—Act X of 1889, s. 6, cl. k—Local Government's rules thereunder—Boats plying and not plying for hire—'Ultra vires'.

It is only with regard to boats plying for hire that section 6 of Act X of 1889 gives the Local Government authority to make rules. Rules purporting to make it obligatory on boat owners to ply for hire are *ultra vires*.

PETITIONS under sections 435 and 436 of the Criminal Procedure Code, praying the High Court to revise the finding and sentence of the First-class Sub-divisional Magistrate of Negapatam, passed in summary trials Nos. 1, 5 to 7 and 9 to 11 of 1893.

In these cases the owners of boats in the Port of Negapatam were fined various sums for refusing to take out their boats to a certain steamer, when called upon by the Port Officer to do so. The convictions were under rules 1 and 23 of the boat rules sanctioned

* Criminal Revision Cases Nos. 290 to 297 of 1893.

QUEEN-EMPRESS v. THOMMAYYA CHETTI.

in Madras G.O., No. 503, dated 16th November 1891, passed under section 6, clause *k* of Act X of 1889. The rules in question were as follows :—

"Owners of boats shall be subject to the control of the register-"ing officer appointed by Government, and shall carry out at all "times all orders issued by him in connection with the plying of "their boats and which are not inconsistent with any of these "rules, and shall supply the tindal of each registered boat with "a printed copy of these rules and of any orders issued by the "registering officer, which copy shal be shown by such tindal to "any passenger by such boat demanding to see the same.

"No owner of a registered boat licensed to ply for hire, not "being a steam launch, and no person in charge of such boat, "shall refuse to let on hire such boat without having and assigning "reasonable cause for such refusal to the satisfaction of the regis-"tering officer."

Mr. *Grant* for petitioners.

The *Acting Government Pleader* and *Public Prosecutor* (*Subramanya Ayyar*) in support of the conviction.

COLLINS, C.J.—The accused were convicted for refusing to take out their licensed boats to certain steamers when called on by the Port Officer to do so. The Acting Sessions Judge, who refers this case, admits that the accused were rightly convicted under certain boat rules made by the Local Government under the powers given by section 6 of Act X of 1889, but suggests that those rules are *ultra vires*. Clause k is the clause in the Act under which the Local Government acted, and boat rules 20 to 23 are the rules under which the convictions took place. It is contended on the part of the accused that at the time the Port Officer issued his orders they were not plying, and that therefore the order of the Port Officer was not a lawful one. I do not think that there is any power in the Local Government to make rules compelling owners of licensed boats to ply their boats at all times, and if they have a discretion to ply or not, the Port Officer's orders to ply are not lawful orders. These boat rules 20 to 23 appear to be *ultra vires*, and the convictions must be set aside and the fines, if paid refunded. In summary trial No. 4 of 1893 if the boat was, unseaworthy as it is stated, I agree with the Acting Sessions Judge that the complaint was vexatious and frivolous and ought not to have been made.

QUEEN-EMPRESS v. THOMMAYY CHETTI.

SHEPHARD, J.—I am of the same opinion. I think that the rules 1 and 23, so far as they purport to make it obligatory on boat owners to ply for hire, are *ultra vires*, and therefore void and of no effect. It is only with regard to boats plying for hire that section 6 of the Act gives the Government authority to make rules.

APPELLATE CIVIL.

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

1893. February 8 March 8.

UPENDRA BHATTA (COUNTER-PETITIONER), PETITIONER,

v.

RANGANATHA BHATTA (PETITIONER), RESPONDENT.*

Code of Civil Procedure—Act XIV of 1882, *ss.* 244, 278 *to* 283—*Questions to be determined by the Court executing a decree—Grounds of objection.*

Where the question is whether the property in dispute belongs to the judgment-debtor or to his estate or not, and the question is raised in a proceeding in execution between parties to the suit or their representatives, it matters not on what grounds the objection is taken to the property being made the subject of execution, and the question is one to be determined in execution, and section 244 of the Code of Civil Procedure bars a separate suit. *Abeedoonissa Khatoon* v. *Ameeroonissa Khatoon*(1) followed.

PETITION under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of the District Judge of South Canara in civil miscellaneous appeal No. 38 of 1890.

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

Pattabhirama Ayyar for petitioner.

Narayana Rau for respondent.

JUDGMENT.—The petitioner, Upendra Bhatta, obtained a money decree in original suit No. 206 of 1883 on the file of the District Munsif of Karakal against one Shridhara Bhatta. Shridhara Bhatta having died, execution was applied for against his sons, widow and undivided brothers as his heirs. In course of execution a certain piece of land called Mudanga bettu was attached and advertised for sale. Counter-petitioner, Runganatha Bhatta,

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* Civil Revision Petition No. 38 of 1892. (1) L.R., 4 I.A., 66.

UPENDRA BHATTA v. RANGANATHA BHATTA.

one of the brothers of the deceased Shridhara Bhatta, objected to the sale on the ground that this land under the will of Sridhara Bhatta's father belonged to a certain temple. The District Munsif found that the land in question did not form portion of the land devised to the temple by the will, and ordered execution to proceed. Present counter-petitioner appealed to the District Court, which, after calling for a further finding from the District Munsif, reversed his order and dismissed the execution petition so far as it related to the Mudangá bettu land. The judgment-creditor, Upendra Bhatta, objects by this revision petition to the proceedings of the District Court on the ground that that Court had no jurisdiction to entertain the appeal against the District Munsif's order, inasmuch as that order was passed under the claim sections of the Civil Procedure Code, ss. 278 to 283, and therefore by section 283 no appeal lies against such order, but counter-petitioner's remedy was by regular suit. The objection was not raised in the District Court, but being one relating to jurisdiction, we cannot but entertain it.

The argument on the other side is that the question which the District Munsif had to decide was one between the parties to the suit or their representatives, and relating to the execution of the decree, within the meaning of section 244 of the Civil Procedure Code, and therefore was one to be decided by the Court executing the decree, and not by separate suit. This view is in accordance with the later decisions of all the High Courts. In some earlier decisions of the Allahabad High Court distinctions were drawn between cases where the judgment-debtor or his representatives set up a title in themselves, and those when they set up a title as trustees on behalf of third parties or of charities. But the later decisions adopting the principle laid down by the Privy Council in *Abeedoonissa Khatoon* v. *Ameeroonissa Khatoon*(1) have established that when the question is whether the property in dispute belongs to the judgment-debtor or to his estate or not, and that question is raised in a proceeding in execution between parties to the suit or their representatives, it matters not on what grounds the objection is taken to the property being made the subject of execution, and the question is one to be determined in execution, and section 244 bars a separate suit *Kuriyali* v. *Mayan*(1), *Ravunni Menon* v. *Kunju Nayar*(2), *Punchanun Bundopadhya* v. *Rubia Bibi*(3), *Nimba Harishet* v. *Sitaram Paraji*(4), *Mulmantri* v. *Ashfak Ahmad*(5), and *Seth Chand Mal* v. *Durga Dei*(6).

(1) L.R., 6 I.A., 66.

UPENDRA BHATTA v. RANGANATHA BHATTA.

We must hold that the District Judge had jurisdiction to entertain the appeal and dismiss this revision petition with costs.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

BUTCHI.*

1893. May 5.

Penal Code—Act XLV of 1860, *s.* 378, *illustration* (*o*)—*Theft—Whether a dishonest removal by a wife of her husband's property left in her custody amounts to theft.*

There is no presumption of law that a wife and husband constitute one person in India for the purpose of criminal law. If the wife, removing her husband's property from his house, does so with dishonest intention, she is guilty of theft.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code by A. W. B. Higgens, District Magistrate of Gódávari, in his letter dated 23rd February 1893, No. 89.

In this case a married woman, during the absence of her husband in Burmah, removed his movable property left in her charge from his house to the house of her paramour with whom she was residing. The husband on his return charged the wife and her paramour with theft. The Second-class Magistrate convicted both of theft, but the Deputy Magistrate, on appeal, acquitted the wife on the strength of illustration (o) to section 378 of the Indian Penal Code, which he interpreted as meaning that the paramour, and not the wife, should be treated as the thief in such cases.

On this the District Magistrate referred the case for the orders of the High Court.

(1) I L.R., 7 Mad., 255. (2) I.L.R., 10 Mad., 117. (3) I.L.R., 17 Calc., 711.
(4) I.L.R., 9 Bom., 458. (5) I.L.R., 9 All., 605. (6) I.L.R., 12 All., 313.

* Criminal Revision Case No. 88 of 1893.

QUEEN-EMPRESS v. BUTCHI.

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

JUDGMENT.—There is no presumption of law that the wife and husband constitute one person in India for the purposes of criminal law. Theft is an offence against property, and where there is no community of property, each may commit theft in regard to the property of the other. The question is one of intention. If the wife, removing the husband's property from his house, does so with dishonest intention, she is guilty of theft. Her joint possession may in many cases give rise to a presumption that she had authority from her husband to give the property, but this is a presumption of fact, and it may be rebutted. The intent with which the husband's property is removed is a question of fact, and where a dishonest conversion is intended, it clearly amounts to theft.

We set aside the Deputy Magistrate's order acquitting the first accused and direct that the appeal so far as she is concerned be restored to the file and disposed of with reference to the above observations.

APPELLATE CRIMINAL.

Before Mr. Justice Parker and Mr. Justice Best.

1894.
June 6.
July 10.

QUEEN-EMPRESS

v.

ABBI REDDI (AND ANOTHER).*

Criminal Procedure Code—Act X of 1882, *ss.* 531, 532 *and* 537—*Commitment to Sessions Court by Magistrate having no jurisdiction over place where alleged offence was committed—Exercise of powers duly conferred.*

A Magistrate who commits a case for trial by a Sessions Court does so in the exercise of powers duly conferred upon him, and the fact that he had no territorial jurisdiction over the place where the alleged offence was committed, and that an objection to the committal on this ground was taken before the commitment, is no ground for the Court to which the commitment is made quashing it under section 532 of the Criminal Procedure Code.

The Queen-Empress v. *James Ingle*(1), followed.

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* Criminal Appeals Nos. 36 and 37 of 1894. (1) I.L.R., 16 Bom., 200.

QUEEN-EMPRESS v. ABBI REDDI.

THE facts of the case appear sufficiently for the purpose of this report from the following jndgments of the High Court.

Pattabhirama Ayyar for appellants.

The *Government Pleader* and *Public Prosecutor* (Mr. *Powell*) in support of the conviction.

PARKER, J.—I do not think we are bound to set aside the conviction and sentence of the Sessions Court merely on the ground that the committing Magistrate had no territorial jurisdiction over the place in which the offence is alleged to have been committed. The order of commitment was an order under section 531, Criminal Procedure Code, and is not liable to be set aside because the proceedings were taken in a wrong place, unless the error occasioned a failure of justice. The Magistrate was himself empowered to commit to the Sessions, and did not in so doing usurp an authority to which he was not entitled. I do not think section 532, Code of Criminal Procedure, applies. See *The Queen-Empress* v. *James Ingle*(1). Nor am I of opinion that the institution of proceedings in the wrong sub-division has occasioned a failure of justice. The Sessions Court which tried the case had territorial jurisdiction, even though the committing Magistrate had not. Under section 537, Code of Criminal Procedure, we should not be justified in reversing the sentence on account of the irregularity previous to the trial.

BEST, J.—Before proceeding to the merits of this appeal, a legal objection to the validity of the trial has to be considered.

It is urged on behalf of appellants that the Joint Magistrate, by whom the case was referred to the Second-class Magistrate for inquiry with a view to the committal of the case for trial by the Sessions Court was without jurisdiction in the case, and that, as the objection was taken before the commitment, the commitment ought to have been quashed under section 532 of the Code of Criminal Procedure.

The section is as follows: "If any Magistrate or other authority "purporting to exercise powers duly conferred, which were *not so* "conferred, commits an accused person for trial before a Court "of Session or High Court, the Court to which the commitment is "made may, after perusal of the proceedings, accept the commitment "if it considers that the accused has not been injured thereby, *unless*

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(1) I.L.R., 16 Bom., 200.

QUEEN-EMPRESS v. ABBI REDDI.

"*during the inquiry and before the order of commitment objection was* "*made* on behalf either of the accused or of the prosecution to the "jurisdiction of such Magistrate or other authority.

"If such Court considers that the accused was injured, *or if* such "objection was so made, it shall quash the commitment and direct "a fresh inquiry by a competent Magistrate."

The words 'purporting to exercise powers duly conferred' at the beginning of this section appears to me to have reference to section 206 of the Code, and to signify 'power to commit for trial,' and, as all Magistrates in this presidency are empowered to commit to the Court of Session, I am of opinion that this objection must be disallowed. There can be no doubt that the Sessions Court of the North Arcot District is the proper Court to which the case should have been committed, and, as the commitment, even if irregular, cannot have prejudiced the accused, the objection must be further disallowed with reference to the provisions of section 537 of the Code.

Seeing no reason to differ from the finding arrived at by the Judge and assessors we dismiss these appeals.

Ordered accordingly.

APPELLATE CIVIL.

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

1894. April 2.

KRISHNA CHADAGA (PLAINTIFF), APPELLANT,

v.

GOVINDA ADIGA (DEFENDANT), RESPONDENT.*

Revenue Recovery Act—Madras Act II of 1864, s. 11—Whether gathered products belonging to a tenant can be distrained by Government on account of the landlord's arrears of revenue.

Government can attach for arrears of revenue under section 11 of Madras Act II of 1864 the gathered products belonging to a tenant, provided that the products are of the land on account of which the arrears of revenue have accrued.

CASE stated under section 617 of the Civil Procedure Code by W. C. Holmes, District Judge of South Canara, in appeal suit No. 339 of 1892.

* Referred Case No. 186 of 1893.

KRISHNA CHADAGA v. GOVINDA ADIGA.

This reference arose from a suit in which a landlord sued his tenant, *inter alia*, for 10 mudies of rice-rent, in respect of which the tenant denied his liability on the ground that the said rice was distrained by the Revenue authorities in satisfaction of arrears of revenue due by the landlord. The District Judge decided that section 11 of Madras Act II of 1864 does not empower the Revenue authorities to distrain *gathered* products in possession of a tenant for arrears of revenue accruing on the land, but referred the point to the High Court as being one not free from doubt.

Narayana Rau for appellant.

Respondent was not represented.

JUDGMENT.—Our answer to the question is that the Government can attach, under section 11 of Madras Act II of 1864, for arrears of revenue, gathered products belonging to a tenant, provided that they are the products of the land on account of which the arrears of revenue have accrued.

The products belonging to a tenant are made liable by the section, and clause 3 gives a right to the tenant to deduct the value of the same from rent then due or thereafter to become due to the landlord on account of the land on which the products were grown.

It follows that the products liable to distraint are the products of the defaulter's land, though such products may belong to the tenant.

APPELLATE CIVIL.

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

1894. July 9, 10, 18.

CHINNASAMI MUDALI AND OTHERS, PLAINTIFF, No. 2 AND HIS REPRESENTATIVES, APPELLANTS,

v.

ADVOCATE-GENERAL OF MADRAS AND OTHERS (DEFENDANTS), RESPONDENTS. *

Religious endowment—Powers of a Christian congregation to elect under which Bishopric the endowment should be placed in spiritual matters—Effect of a concordat placing the endowment within the territorial jurisdiction of a certain Bishop—Suit for partition of the endowment.

In the year 1806, a fund was started by a caste of Roman Catholic boatmen in Royapuram for the purpose of supplying the religious wants of the caste, and in 1829 the Church of St. Peter at Royapuram was erected. The fund was under the control of the Government Marine Board which, in 1830, in consequence of disputes between the headmen of the caste, suspended all payments. In 1863, a member of the caste, claiming to be sole surviving headman, brought a suit against Government for a declaration that he was sole surviving headman and as such entitled to the sole management of the funds then in the hands of Government, which funds the Government paid into Court to the credit of the said suit. By the decree in this suit it was declared that the fund, in question, belonged to the whole body of Roman Catholic boatmen in Royapuram, that it must be devoted to the religious observances of the body, and that it rested with that body to determine whether in spiritual matters the Church should continue under the Vicar Apostolic or the Goanese Bishop of Mylapore.

In 1886 a concordat was executed between the Pope of Rome and the King of Portugal, the effect of which was to place St. Peter's Church within the territorial jurisdiction of the Vicar Apostolic. Plaintiffs, who were members of the Goanese party, complained that, having regard to the effect of the concordat of 1886, it would be impossible for their party—even if in a majority—to elect a priest of their own party, and prayed for a division of the fund:

Held, that even if this were so, this fact would not justify the Court in taking away from St. Peter's Church part of its endowment.

APPEAL from the decree of Shephard, J., sitting on the original side of the High Court in suit No. 124 of 1889.

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

* Appeal No. 11 of 1892.

CHINNASAMI MUDALI v. ADVOCATE-GENERAL.

Mr. *Kernan* and Mr. *Grant* for appellants.

The *Advocate-General* (*Hon.* Mr. *Spring-Branson*) for respondents Nos. 1 and 3.

JUDGMENT.—We agree with the learned Judge that the plaintiffs have not been able to show that the position of themselves or their party has, in a canonical point of view, been materially affected by the concordat of 1886. The plaintiffs, no doubt, belong to the caste of Christian boatmen, for whose religious benefit the fund was originally intended. But by the decree in original suit No. 105 of 1863, it was decided that it was for the majority of the caste to determine whether in spiritual matters, the Church of St. Peter at Royapuram should be placed under the Vicar Apostolic or under the Goanese Bishop of Mylapore. Although the result of the first caste meeting held in pursuance of that decree was to place the Church under the Bishop of Mylapore, the order of 30th January 1867 recognized the election of the Rev. T. Gnanaprakasa Nadar as the successor of the Rev. Vincent de Silva. The Rev. T. Gnanaprakasa Nadar was subordinate to the Vicar Apostolic, and ever since 1867 the Church of St. Peter has remained under the spiritual jurisdiction of the Bishop of Madras.

The concordat of 1886 and the decree of 1887 have not, therefore, affected the position of the plaintiffs with regard to the sacraments called 'paracholia.' If plaintiffs are unable now to obtain these sacraments in St. Peter's Church, they have been under the same disability since 1867, and the concordat between the Pope and the King of Portugal has not altered their position in respect to these sacraments.

All that can be alleged by plaintiffs as a grievance against the concordat is that at any future election of a priest by the members of the boatmen caste, it may be practically impossible for the adherents of the Goanese party—even if in a majority—to elect a priest of their own party, since by the concordat, St. Peter's Church has been definitely placed within the territorial jurisdiction of the Vicar Apostolic. We are by no means clear that this result would necessarily follow. Seeing that the differences settled by the concordat related only to questions of patronage and jurisdiction, and did not touch the validity of the orders of either party or the faith of the Church, it may be that a Goanese priest, if elected, would be granted the necessary faculties by the Supreme Pontiff or the Vicar Apostolic. It appears from the evidence of Father

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Mayer, the Vicar-General under the Archbishop of Madras, that such canonical faculties can be given, though no doubt they very rarely are given. But even if supreme ecclesiastical authority has imposed upon the priests of the Goanese party a prohibition to accept this particular office, it appears to us that such prohibition is a matter of ecclesiastical jurisdiction with which the Courts have nothing to do. It could hardly be contended that it would not be open to the Supreme Pontiff to impose such a prohibition upon any individual priest in obedience to the See of Rome. And the possibility that the right of the caste to have one of the Goanese clergy as their officiating priest might be terminated by the permanent surrender of the church to the jurisdiction of the Vicar Apostolic was clearly contemplated by Scotland, C.J., and Bittleston, J., in civil suit No. 136 of 1866, and by Turner, C.J., in his judgment in civil suit No. 102 of 1880.

It is not, however, necessary for us to speculate upon a contingency which may never arise, for even if the practical effect of the concordat is to prevent the election of a Goanese priest, it is clear that that fact will not justify the Court in taking away from St. Peter's Church part of its endowment and bestowing that part upon the Church of St. Anthony. It was held in civil suit No. 105 of 1863, and re-affirmed in civil suit No. 102 of 1880, that the purpose of the fund was the erection of a church for the use of the caste of Christian boatmen at Royapuram, the performance of divine worship therein and other religious observances connected with the church, and to that purpose the whole property must be devoted. The question of the division of the fund so as to endow two churches for the use of the two parties has been previously considered, and it has been twice held that on principle and authority no such division can be made, and that the fund and the church cannot be separated.

Finally, it was urged for the appellants that they were entitled to their costs out of the fund, since they had a *bonâ fide* grievance, and that the Advocate-General had accorded his sanction for the bringing of the suit. We have already shown that the concordat has not altered the existing position of the plaintiffs with regard to the rites of the church, which remain the same as it has been since 1867, while the possible future grievance, if it exist at all, is one with which the ecclesiastical authorities alone can deal. As regards the sanction of the Advocate-General, it is rightly pointed

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out that it is no part of the duty of that officer to decide the case as a Judge, and that if an apparently good and *bonâ fide* grievance is shown, he may properly leave the applicants to bring the suit at their own risk. When, however, we find that an opportunity has been taken of a *friendly* settlement of differences between the highest authorities in Church and State to re-agitate in a *hostile* spirit questions long ago decided against the party of the appellants, we can see no reason why they should not be left to bear their own expenses. It would be an evil precedent if litigants were advised or encouraged to think that they could renew litigation with impunity, drawing the expenses of so doing from trust funds and not from their own pockets. We cannot but see how the very existence of such a fund as this may offer temptation to fomenters of litigation and encouragement for speculative actions. The last suit, which was decided by Sir Charles Turner on December 5th, 1883, cost the fund no less than Rs. 20,366. The present suit, which is framed to re-open the same questions, was filed within 5½ years of that decision, and here too we find that separate costs for third defendant, as well as those of the Advocate-General (first defendant), amounting in all to Rs. 4,775, have been allowed out of the fund. Apparently none of this has yet been recovered from the plaintiffs. It is lamentable to find that monies which have been devoted to the performance of divine worship and the religious instruction of the poor should be dissipated in fruitless litigation, and we cannot but express our regret that the Court was not moved to call for security for costs before the hearing of this appeal.

We dismiss the appeal with costs, but we do not feel ourselves justified in ordering that any further sum be paid out of the fund.

Branson & Branson—Attorneys for appellants.

Barclay, Morgan & Orr—Attorneys for respondents Nos. 1 and 3.

APPELLATE CIVIL—FULL BENCH.

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

1893. July 17. 1894. February 28. March 1, 2. August 6.

KRISTAMMA NAIDU AND OTHERS (PLAINTIFFS NOS. 2 TO 6), PETITIONERS,

v.

CHAPA NAIDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure—Act XIV of 1882, *s.* 622—*Power to call for record of cases not appealable to High Court—When a Court can be said "to have acted in the exercise of its jurisdiction illegally or with material irregularity."*

A District Judge disposed of some suits on a point taken by himself on appeal, without affording the parties an opportunity of proving what was necessary to meet the point, and admitted other appeals after they had become time-barred :

Held, that where a Subordinate Court, having applied its mind to a question of law or procedure, arrives at an erroneous decision, such decision is not by itself any ground for the exercise by a High Court of the powers given by s. 622 of the Code of Civil Procedure. *Amir Hassan Khan* v. *Sheo Baksh Singh*(1) followed :

Held, further (Best and Davies, JJ., *dissentiente*), that the case contemplated by the words "act . . . illegally or with material irregularity" in s. 622 of the Code of Civil Procedure is that of a perverse decision on a question of law or procedure, a decision being perverse where it is a conscious departure from some rule of law or procedure.

Per Best, J.—The words in question of s. 622 of the Code are applicable to illegalities or irregularities which are the result merely of ignorance of law or carelessness, and the disposal of a suit on a point taken by the Court itself on appeal, without affording the parties an opportunity of proving what is necessary to meet the point, is an irregularity in procedure within the meaning of s. 622, and that the inadvertent admission of an appeal that is time-barred is an illegality in procedure within the meaning of that section.

Per Davies, J.—The clause of s. 622 in question is applicable only to errors of procedure, and it is not in every case that the High Court would, in the exercise of the discretionary power granted it by the section, interfere in revision. The interference would be confined to cases where the illegality or irregularity was such as had occasioned or might occasion a substantial failure of justice, as in the present case.

PETITIONS under section 622 of Act XIV of 1882, praying the High Court to revise the decrees of the District Court of Ganjam in appeal suits Nos. 80, 82, 83, 84, 85, 86, 117, 119, 121 and 122

* Civil Revision Petitions Nos. 378 to 387 of 1892. (1) I.L.R., 11 Calc., 6.

of 1891, presented against the decrees of the Court of the District Munsif of Chicacole in original suits Nos. 84, 102, 108, 91, 99 104, 110, 89, 98 and 107 of 1890 respectively.

These petitions came on for hearing on the 17th day of July 1893. The Court (Muttusami Ayyar and Best, JJ.) made the following order of reference to the Full Bench.

ORDER ; BEST, J.—"These cases being not appealable by reason "of the amount of the suit in each of them not exceeding five "hundred rupees (see section 586 of the Code of Civil Procedure), "these applications are made for revision under section 622 of the "same code.

"The first question for decision is, whether the cases are open "to revision under the section last mentioned.

"Such revision is allowable if the Court by which the case "was decided (i) exercised a jurisdiction not vested in it by law, or "(ii) failed to exercise a jurisdiction so vested, or (iii) 'acted in the "exercise of its jurisdiction illegally or with material irregularity.'

"The contention on behalf of petitioners in all the cases is that, "in the exercise of its jurisdiction, the Court acted 'with material "irregularity,' in that its decision proceeds on a point taken by the "Court itself in appeal as to which no issue was recorded and "consequently the petitioners (plaintiffs) were afforded no oppor-"tunity of proving their case. While in petitions Nos. 384 to 387 "there is a further contention that the Judge 'acted illegally' in "admitting the appeals after they had become barred under the "law of limitations.

"It has been found in second appeals Nos. 604 and 605 of "1892, in which the amount of the suit being more than Rs. 500 "appeals lay, that the first of the above two objections is well "founded. We have therefore ordered the District Judge to try "the necessary issues and submit findings thereon ; and in second "appeals Nos. 606 to 608 we have found the second of the above "objections to be also well-founded and have consequently set "aside the Lower Appellate Court's decrees and restored those of "the District Munsif. There can be no doubt, therefore, that, if "these applications for revision can be entertained under section "622 of the Code of Civil Procedure, we should, in the case of "petitions Nos. 378 to 383, adopt the course taken by us in second "appeals Nos. 604 and 605, and in the case of petitions Nos. 384 "to 387, set aside the Lower Appellate Court's decrees and restore

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"those of the District Munsif as was done in second appeals Nos "606 to 608.

"The question is, have we power to entertain these petitions ?

"I should have had no hesitation in answering this question "in the affirmative had it not been for the *dictum* of my learned "colleague in the Full Bench case *Manisha Eradi* v. *Siyali Koya*(1) "that the words 'act illegally or with material irregularity' apply "to those cases only in which there is an error of law or material "irregularity *on the procedure, by reason of which the Subordinate* "*Court concludes that it has or has not jurisdiction.*'

"With all deference, I am unable to see either in the wording "of section 622 of the Code of Civil Procedure or in the decision "of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh*(2) "anything to warrant the placing of any such limited construction "on the words. Nor can I see that the decision of a Divisional "Bench of this Court in *Erajabi* v. *Mayan*(3) is in conflict with "the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo* "*Baksh Singh*(2). In the latter case, not only had the Lower "Courts jurisdiction to decide the question which was before them, "but they also decided it—whereas the irregularity of the Lower "Court in Erajabi's case was *failure to consider the question* whether "the suit was barred. Nor am I able to think that the cases in "*Seshadri* v. *Krishnan*(4), *Sanjivi* v. *Ramasami*(5) and *Rama* v. "*Kunji*(6) were not rightly entertained under section 622.

"All that was decided in *Amir Hassan Khan* v. *Sheo Baksh* "*Singh*(2) was that the mere fact of a Court having come to a "wrong decision even on a point of law is not sufficient to consti- "tute an illegality or material irregularity in procedure so as to "bring the case within the scope of section 622.

"I cannot help thinking that the disposal of a suit on a point "taken by the Court itself on appeal, without affording the parties "an opportunity of proving what is necessary to meet that point, "is an irregularity in procedure within the meaning of section "622, and that the inadvertent admission of an appeal that is "time-barred is an illegality in procedure within the meaning of "the same section. Of course, if the Court had considered this "latter question and decided that the appeals were not time-barred,

(1) I.L.R., 11 Mad., 220. (2) I.L.R., 11 Calc., 6. (3) I.L.R., 9 Mad., 118.
(4) I.L.R., 8 Mad., 192. (5) I.L.R., 8 Mad., 494. (6) I.L.R., 9 Mad., 375.

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"the case would have been different, for that would have been "a case of erroneous decision within the ruling in *Amir Hassan* "*Khan* v. *Sheo Baksh Singh*(1). But where (as in these cases) "there is no such finding, but without any inquiry, the appeals "are treated as within time, there is, I think, illegality in procedure "within the meaning of section 622.

"I would therefore hold that this Court has power to enter- "tain all these petitions under section 622, and I would set aside "the Lower Appellate Court's decrees in the cases to which civil "revision petitions Nos. 384 to 387 relate with costs in this and "the Lower Appellate Court; and in the cases, the subject of peti- "tions Nos. 378 to 383, I would direct the trial of issues similar to "those sent for trial in second appeals Nos. 604 and 605 of 1892."

Muttusami Ayyar, J.—"I am unable to concur in the "opinion of my learned colleague. I still adhere to the opinion "expressed in the Full Bench case that the illegality or irregu- "larity mentioned in section 622 ought to be taken to refer to such "error of law or irregularity as has led the Court below either to "exercise a jurisdiction which it did not possess or to decline to "exercise a jurisdiction which it possessed.

"The question must be referred to the Full Bench."

Pattabhirama Ayyar for petitioners.

Ramachandra Rau Saheb for respondents.

COLLINS, C.J.—"The questions referred to the Full Bench are "whether the cases mentioned are open to revision under section "622, Civil Procedure Code.

"The High Court may exercise its powers of revision if the "Court by which the case was decided appears to have exercised a "jurisdiction not vested in it by law, or to have failed to exercise a "jurisdiction so vested, or to have acted in the exercise of its juris- "diction illegally or with material irregularity. The reference "states that the District Judge decided the case on a point taken "by the Court itself as to which no issue was recorded, and it is "further contended that the Judge acted illegally in admitting the "appeals after they had become barred under the Law of Limi- "tations. It is not stated that the attention of the Judge was "called to these points, or that any review petition was presented. "That the Judge had jurisdiction to try the cases appears to be

(1) I.L.R., 11 Calc., 6.

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"certain, and I am of opinion that, although the Judge undoubt-"edly was wrong in law, that is no ground for revision under sec-"tion 622. See *Amir Hassan Khan* v. *Sheo Baksh Singh*(1). I "am inclined to adopt the words in the judgment of West, J., in "*Shiva Nathaji* v. *Joma Kashinath*(2), and hold that the section "applies to an obviously perverse use of jurisdiction or authority "which could not be justified even on the premises assumed or "found by the Judge.

"The degree of ignorance or bad law which would amount to "perverseness must be determined by the facts of each particular "case. I would hold that section 622 does not apply to the cases "in the reference."

MUTTUSAMI AYYAR, J.—"This is a reference made as to the "interpretation to be placed on the words in section 622 of the "Code of Civil Procedure, 'If the Court appears to have acted in "the exercise of its jurisdiction illegally or acted with material "irregularity.' The question submitted for the decision of the "Full Bench is what effect is to be given to those words.

"They were introduced into the Code by the amending Act of "1879, and they are not to be found in Act X of 1877. Accord-"ing to the last-mentioned Act, as originally framed, the High "Court was authorized to interfere only in two classes of cases, "viz., (i) when the Subordinate Court by which a case was decided "exercised a jurisdiction not vested in it by law, or (ii) when it "failed to exercise a jurisdiction vested in it by law. The class of "cases in which the Subordinate Court had admittedly jurisdiction, "but acted in the exercise of such jurisdiction in contravention "of a rule of law or of procedure, was not then contemplated and "provided for. The inference is clear that it was to supply this "omission that the words 'act illegally or with material irregu-"larity in the exercise of its jurisdiction' were introduced in 1879.

"The intention to extend the section to a third class of cases "being thus clear, some effect must be given, according to recog-"nized rules of interpretation, to the words 'act illegally or with "material irregularity' in order to carry out that intention. On "this ground I am not prepared, on further consideration, to adhere "to the opinion which I expressed in my judgment in *Manisha* "*Eradi* v. *Siyali Koya*(3), viz., that the words 'act illegally or

(1) I.L.R., 11 Calc., 6. (2) I.L.R., 7 Bom., 359. (3) I.L.R., 11 Mad., 220.

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"with material irregularity' are referable to those cases only in "which by reason of some error of law or of procedure the Sub-"ordinate Court either exercised a jurisdiction not vested in it by "law or failed to exercise a jurisdiction vested in it by law. That "opinion is not tenable, since it practically treats the additional "words as superfluous or unnecessarily introduced.

"Comparing section 622 as altered by Act XII of 1879, with "section 584 of the code which states the grounds upon which a "second appeal is to be admitted, it is apparent in what cases a "decision is considered by the legislature either to be illegal or to "be vitiated by material irregularity. The real question is what "is the distinction, if any, indicated by the words 'act illegally or "with material irregularity' as contradistinguished from the words "in section 584 'decide contrary to law or to a rule of procedure.'

"In Amir Hassan Khan's case, the question raised for deci-"sion was whether an erroneous conclusion as to whether a suit is "barred either by section 13 or section 43 of the Code of Civil "Procedure was included in the words 'act illegally or with mate-"rial irregularity.' The Privy Council decided the question in "the negative and observed that though the Subordinate Courts "might have decided it wrongly, yet they had jurisdiction.

"Thus, it is clear that where the Subordinate Court applies its "mind to a question of law or procedure and arrives at an erro-"neous conclusion in the exercise of its jurisdiction it is not a "ground for interference under section 622.

"This being so, the further question arises, what is the nature "of the error contemplated by the words 'act illegally or with "material irregularity,' if not an error of judgment in applying a "rule of law or of procedure to the facts of a particular case. "Looking to the several causes of erroneous decision in applying a "rule of law or of procedure, they may consist either in misappre-"hension of a rule of law or of procedure present to the mind of "the Judge or in omission to bear in mind some principle which "qualifies or limits the operation of such rule.

"I am therefore of opinion that the case contemplated by the "words 'act illegally or with material irregularity' is that of per-"verse decision on a question of law or procedure. A decision can "be said to be perverse only when the matter is pleaded and wil-"fully disregarded, or when there is some conscious violation of a "rule of law or of procedure on the part of a Subordinate Court.

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"In this view, neither the inadvertent omission in the cases "referred to to consider whether the appeal presented was barred "by the Act of Limitations, nor the refusal to hear evidence, on "the ground that the stipulation the patta contains as to the rate "of interest is such as clearly vitiates it, appears to me to disclose "any ground for interference under section 622 of the Code of "Civil Procedure. I would answer the question accordingly."

SHEPHERD, J.—"The questions referred relate to two sets of "petitions. In the one set the complaint is that the District "Judge omitted to observe that the appeals were time-barred. In "the other set it is said that he decided the appeals on points not "taken by the parties and without giving them an opportunity to "adduce evidence. Arguments were addressed to us at consider- "able length on the operation of section 622 of the Civil Proce- "dure Code, and the question raised is one of general importance. "By section 622 power is given to the High Court in certain cases "in which no appeal lies to call for the record and pass such orders "as the Court may think fit. The cases are three in number. "First, the case in which the Court below appears to have exer- "cised a jurisdiction not vested in it by law; secondly, the case in "which such Court appears to have failed to exercise a jurisdiction "so vested; and, thirdly, the case in which such Court appears to "have acted in the exercise of its jurisdiction illegally or with "material irregularity. Treating the section as if it consisted of "three clauses, one may say that, as regards the present petitions, "the first and second clauses clearly have no application. The "question is whether the District Court has acted illegally or with "material irregularity within the meaning of the third clause. "Numerous cases have been decided with reference to this clause "which, it should be observed, did not appear in the section of the "original code of 1877.

"The most important case decided by the Judicial Committee "in 1884 is the case of *Amir Hassan Khan* v. *Sheo Baksh Singh*(1).

"The appeal to the Judicial Committee was against an order "passed by the Judicial Commissioner of Oudh, reversing the "judgment of the Court of first instance and dismissing the "Plaintiff's suit as being barred under sections 13 and 43 of the "code.

(1) I.L.R., 11 Calc., 6.

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"The Judicial Committee after quoting the third clause of "section 622 observed 'The question then is, did the Judges of "the Lower Courts in this case, in the exercise of their jurisdic- "tion, act illegally or with material irregularity. It appears that "they had perfect jurisdiction to decide the question which was "before them and they did decide it. Whether they decided it "rightly or wrongly, they had jurisdiction to decide the case; and "even if they decided wrongly, they did not exercise their juris- "diction illegally or with material irregularity.' This decision, "as I read it, simply amounts to this, that the erroneous decision "of the Court of first instance in that particular case did not "constitute an illegality or irregularity within the meaning of "section 622.

"There are two other decisions of the Judicial Committee to "which no special reference is required. *Muhammad Yusuf Khan* "v. *Abdul Rahman Khan* (1) and *Birj Mohun Thakur* v. *Rai Uma* "*Nath Chowdhry*(2).

"The question has been frequently discussed in the High "Courts before and since the publication of the decision in 1884 in "Amir Hassan Khan's case. I do not think it is necessary to "deal with the cases in detail. It is enough to say that the "greatest possible diversity of opinions has been expressed. What "may be called an intermediate view was propounded by West, "J., in an elaborate judgment in *Shiva Nathaji* v. *Joma Kashi* "*Nath*(3), (see also Mahmood, J., in *Magni Ram* v. *Jiwa Lal*(4)). "In Allahabad, Straight, J., took the extreme view that any error "affording a good ground of second appeal within the meaning of "section 584 would equally form a good ground for revision under "section 622. *Badmi Kuar* v. *Dinu Rai*(5). On the other "hand, in this Court a construction has been put upon the section "which goes to the other extreme in limiting the powers of the "High Court under section 622. In the judgment reported in "*Manisha Eradi* v. *Siyali Koya*(6) Sir. T. Muttusami Ayyar, J., "reviewed the cases prior to 1887 and held with reference to Amir "Hassan Khan's case 'that the last clause of the section must be "taken to apply only to those cases in which there is an error of "law or a material irregularity in the procedure by reason of

(1) I.L.R., 16 Calc., 749. (2) I.L.R., 20 Calc., 8. (3) I.L.R., 7 Bom., 369.
(4) I.L.R., 7 All., 336. (5) I.L.R., 8 All., 114. (6) I.L.R., 11 Mad., 226.

"which the Subordinate Court concludes that it has or has not "jurisdiction.' (Compare *Magni Ram* v. *Jiwa Lal*(1), *and Badmi* "*Kuar* v. *Dinu Rai*(2)).

"In the same year the question was raised again, and the "ruling of the Court, in which Kernan, J., took part, can hardly "be reconciled with the opinion expressed in the earlier judgment "of Sir T. Muttusami Ayyar, J., *Bhashyam* v. *Jayaram*(3).

"In this state of things, there being no uniform course of "decisions on the point, I am bound to form my own opinion, and "I must say that I am unable to concur in the narrow interpreta- "tion which has been put upon the section. According to the "ordinary rules of construction some effect has to be given to the "third clause of the section. That would be so if this clause "had been part of the original section, but the intention of the "legislature is still more marked when it is seen that the third "clause was added by way of amendment. In construing the "section, we have for our guide the opinion of the Judicial "Committee in Amir Hassan Khan's case which may be said to "amount to this—that the erroneous decision of a Lower Court is "not by itself any ground for the exercise by a High Court of the "powers given by the section. That decision excludes one class of "cases, but, as it appears to me, leaves it open for us to consider in "what other cases the clause may be applicable.

"As I read the decision, it does not compel us to hold that the "Court has no power except in cases where jurisdiction has been "wrongly assumed or declined—cases which are sufficiently covered "by the first two clauses.

"The possible cases to which it might be thought that the "general language used by the Legislature was applicable, may "perhaps be stated as follows. In failing to apply the rule of law "which ought, under given circumstances, to be applied, or in "applying a rule which ought not to be applied, or generally in "disposing of a matter otherwise than in accordance with law, it "may be that the Judge has, owing to misapprehension, wrongly "concluded that the law was applicable or inapplicable, or that he "has proceeded erroneously owing to inadvertence, or again that "he was ignorant of the correct rule applicable, or that knowing "the correct rule he refused to apply it. In the first two cases,

(1) I.L.R., 7 All., 336. (2) I.L.R., 8 All., 114. (3) I.L.R., 11 Mad., 303.

"that is where the Judge has exercised his judgment and decided "wrongly or where his mistake is due to inadvertence or careless- "ness, I think that, with the decision of the Judicial Committee "before us, we are bound to hold that the High Court has no "power to interfere. In the last case, that is where a Judge "consciously transgresses the law, the matter stands on a different "footing. There is a material distinction between an erroneous "judgment and a perverse judgment, as there is between a wrong "verdict and a perverse verdict. If a perverse judgment or a "conscious departure from the rules of procedure does not give "occasion for the exercise of the powers given by the third clause, "I am at a loss to understand in what class of cases it can be said "that a Judge has acted illegally or with material irregularity.

"Under the circumstances of the cases referred to us, it is not "necessary to say whether the High Court is also at liberty to "interfere when it is shown that the Judge has acted in ignorance "of the correct rule of law, for it is not suggested that the "District Judge did not know the law in any of the cases before "us. Perhaps the distinction between ignorance and perversity "is not very important, for, while ignorance of a plain rule of law "is not likely to be admitted, it would probably in such a case be "right to impute knowledge and therefore perversity. On the "other hand, it may be noted that the case of a perverse judgment "is distinguishable from all the other cases in this respect—that "the remedy by way of review is practically unavailable. It may "well be supposed that the Legislature did not intend that the "High Court should give relief under section 622 in those cases in "which the ordinary relief by way of review was open to the party "aggrieved. In the cases before us in which the question of "limitation arises, it appears to me that there was nothing more "than inadvertence—in the other cases the Judge's procedure was "certainly not regular and may possibly have led to injustice. It "is by no means clear, however, that the petitioners have been "prejudiced and I do not think it can be said that the Judge acted "perversely.

"For these reasons I think that in both classes of cases the "question should be answered in the negative."

BEST, J.—"This reference to the Full Bench was made in "consequence of a difference of opinion between Sir T. Muttusami "Ayyar, J., and myself as to the correctness of the *dictum* in

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"*Manisha Eradi* v. *Siyali Koya*(1), which limited the meaning of "words 'acts illegally or with material irregularity,' in section 622 "of the Code of Civil Procedure, to errors or irregularities 'by "reason of which the Subordinate Court concludes that it has or has "not jurisdiction.' It is now admitted that the opinion expressed "in the *dictum* is not tenable, consequently *cadit quæstio*.

"New ground has, however, now been taken. The first of the "points now newly urged is that the words in question are only "intended to apply to cases in which the illegality or irregularity "is due to 'perversity' on the part of the Judge—the result of "wilful disregard or conscious violation by him of a rule of law or "procedure, and that they are inapplicable to illegalities or irregu-"larities which are the result merely of ignorance of law or "carelessness. This seems to me to be a distinction that is in no "way warranted by the language of section 622. The word "'perverse' is certainly not used in that section, and I am "altogether at a loss to understand why this distinction should be "made.

"The other ground now newly taken is that section 622 is "inapplicable to a case in which it is open to the party aggrieved "to apply to the Court which has erred for a review of its "judgment. This also seems to me to be limiting the scope of "section 622 within narrower bounds than what is justified by the "language used, according to which revision is allowed in all cases "'in which no appeal lies.' The privilege of applying for review "of judgment under section 623 of the Code, is not intended to be "*compulsory*, as is apparent on a perusal of that section. It may "be that the Court to which application for revision is made under "section 622 may, in the exercise of its discretion, decline to inter-"fere until application for review has been made under section "623; but I am not prepared to hold that such application for "review is an essential condition precedent to an application under "section 622. I am unable to accept as valid either of the objec-"tions now taken, and I adhere to the opinion recorded by me "before this reference was made to the Full Bench."

DAVIES, J.—"In order to answer the question referred, it is "necessary to consider the scope of the last provision in section "622 of the Code of Civil Procedure. When is the Court to be

(1) I.L.R., 11 Mad., 229.

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"deemed to have acted in the exercise of its jurisdiction illegally "or with material irregularity?"

"I am clearly of opinion that this clause contemplates cases "other than those referred to previously in the same section, "namely, where the Court has either exercised a jurisdiction not "vested in it or refused to exercise a jurisdiction vested in it, and "that it is intended to refer to the class of cases where the Court "having jurisdiction and exercising it violates a rule of law or of "practice relating to procedure, that is, in the mode in which it "exercises its jurisdiction. The use of the word 'acted' seems to "indicate this to be the true position, and the current of authority "in the numerous cases that have been cited at the bar also, "I think, bears out this construction. The Privy Council has "decided that the clause does not apply to erroneous opinions of "law, *Amir Hassan Khan* v. *Sheo Baksh Singh*(1) and that is "intelligible upon the principle that, in forming an opinion on a "question of law the Court merely goes through a mental opera-"tion and cannot be said to be 'acting.'

"Taking it, then, that the clause is applicable only to errors of "procedure, it is not in every case that the High Court would, in "the exercise of the discretionary power granted it by the section, "interfere in revision. Their interference would be confined to "cases where the illegality or one irregularity was such as had occa-"sioned or might occasion a substantial failure of justice.

"Now, in the first case under reference, that of an Appellate "Court disposing of a suit on a point taken by itself in appeal with-"out affording the parties an opportunity of proving what was "necessary to meet that point, there is, in my opinion, an irregula-"rity in procedure as grave as it would be to decide a suit without "hearing the parties at all, and in that view I would hold it to be "a 'material irregularity' in procedure within the meaning of "section 622. In the second case, the admission and hearing of "an appeal that was time-barred was, in the absence of a special "order for its admission, passed after the Court was satisfied that "there was sufficient cause for the delay, a patent illegality in "procedure, for under section 4 of the Limitation Act 'every . . "appeal presented . . after the period of limitation prescribed "therefor . . shall be dismissed' subject, of course, to the

(1) I.L.R., 11 Calc., 6.

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"exception just stated, which did not exist in this case. One of "the principles of justice is that there should be finality to "litigation in certain events and the law of limitation, among "others, supplies instances. So the illegality here was one affecting "the interests of justice. In both cases, moreover, apart from "theory, there has been, in fact, a failure of justice, because in the "allied suits in which a second appeal happened to lie, the Division "Bench has set aside the proceedings of the Judge in both the "matters now under reference.

"I would, therefore, answer the reference in the affirmative to "the effect that the errors in procedure were such as to be liable to "revision by this Court under section 622 of the Code of Civil "Procedure."

These petitions came on for final disposal after the expression of the opinion of the Full Bench, and the Court delivered the following

JUDGMENT.—According to the view of the majority of the Full Bench, these petitions must be dismissed.

They are dismissed accordingly with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Davies.

1893. July 31. August 1, 2, 3, 7, 8, 9, 10. 1894. March 2.

RAMASAMI KAMAYA NAIK (DEFENDANT), APPELLANT,

v.

SUNDARALINGASAMI KAMAYA NAIK (PLAINTIFF), RESPONDENT.*

Hindu law—Succession—Manu, Chapter IX, slokas 122 and 125—Rule of selection as between an elder son by a wife of an inferior class of caste and a junior son by a wife equal in caste—Dagger wife—Meaning of the term bhoga strees—*Custom showing preference in succession for the sons by a senior wife to those by a junior wife—Nearness of blood as a ground of preference between brothers of the half and full blood, respectively.*

In case of disputed succession to indivisible property between sons who are born of mothers of the same caste but of different classes therein, the right of a junior son by a first married wife, if she be of higher class, is superior to that of an elder

* Appeals Nos. 78 and 95 of 1891.

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son of a wife of lower class. Thus, when a Sudra marries a woman of his caste but of an inferior class, as a dagger wife, in addition to his wife equal in caste to him, the rule of selection is in favour of his son by the latter by reason of the mother being of a higher class.

A valid custom prevails among the Kumbla zamindars whereby the son by a senior wife has a prior right of succession to a son by a junior wife, although the latter may be the elder son, seniority referring to the date of the marriage and not the age of the wife.

Nearness of blood is no ground of preference under the Mitakshara law in case of disputed succession to co-parcenary property which is partible, and it is likewise no ground of preference when such property is impartible. When, therefore, family property belongs to a co-parcenary family consisting of two brothers of a deceased *propositus*—one of the whole blood and one of the half-blood—in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years.

APPEALS against the decree of C. Venkobah, Subordinate Judge of Madura (West), in original suit No. 21 of 1889.

The facts of the case appear sufficiently for the purpose of this report in the Judgment of the High Court.

The Subordinate Judge passed the following decree:

"I disallow the claim of plaintiff to the exclusive possession "of the zamindari and its appurtenances as described in schedule "A, and to the trusteeship of the devastanams and choultry "specified in schedule B, and also to the mesne profits claimed in "respect to these properties. I declare the equal right of plaintiff "and defendant to such of the pannai lands and gardens as were "acquired by their father since he became zamindar in 1861 until "his death, and to the lands items 1 to 8 in schedule D, and "direct that an account be taken of the former, and that the areas "of the latter be fixed, and that the lands, after taking account "and fixing the precise areas, be divided into two equal shares, one "of which I direct should be put into plaintiff's possession. I "declare plaintiff's right to live in the புதுவீடு or new house, the "description of which should be supplied by the Commissioner "who takes an account of the lands. I declare plaintiff's right "to receive his half share of mesne profits on the lands above "specified from 14th October 1885 till he is put in possession "or for three years from this date whichever event first occurs. "I declare plaintiff's right to a half share in the jewels, movables "and Government securities, &c., mentioned in schedule E or to "such of them as exist; their discovery, values and partition are "left to a Commissioner, who should be appointed for the purpose,

"and who should make over to plaintiff his share in them or their "value. I think plaintiff is entitled to proportionate costs on the "claim allowed. Defendant should pay the same, while plaintiff "should pay the costs of defendant on the claim disallowed."

The defendant and plaintiff preferred these appeals to the High Court, respectively.

The *Advocate-General* (Hon. Mr. *Spring Branson*), *Rama Rau* and *Subramanya Ayyar* for appellant.

Bhashyam Ayyangar, *Desikachariar* and *Ranga Ramanuja Chariar* for respondent.

JUDGMENT.—This is a suit to establish the plaintiff's title to the zamindari of Saptur in the Madura district together with its appurtenances, and for the plaintiff's half share of such properties belonging to the late zamindar as are partible. The suit is valued at some five (5) lakhs of rupees, and the following facts are admitted, namely, that the zamindari and its appurtenances are impartible; that the plaintiff is the son of Nagayasami Kamaya Naik, who was the last zamindar but one of Saptur; that the defendant is another son of the same person; that, after the death of their father in October 1885, his eldest son, also called Nagayasami, succeeded to the zamindari, that this Nagayasami died, while a minor under the Court of Wards, unmarried, on the 31st of December 1887, the succession to whom is now the subject in dispute, and that the plaintiff is the eldest surviving son of the previous Nagayasami, being aged 9 years at the time of suit, while the defendant was aged only 7 years at that time. The plaintiff claims the succession by his mother, Nagammal, as his next friend, as the senior in age of the surviving brothers of Nagayasami Kamaya Naik, the last male holder, according to the law and custom of primogeniture. The defendant pleads his right to the succession in preference to plaintiff on four (4) main grounds, namely, first, that plaintiff's mother, Nagammal, was not legally married to their father, and that plaintiff was, therefore, an illegitimate son; while he, the defendant, is admittedly the legitimate son by his mother, Muthuveerammal; secondly, that even if the plaintiff's mother was legally married to the late zamindar, she was a lady of a different and inferior caste and rank *to that of the defendant's mother*; thirdly, that by family custom, the defendant is entitled to succeed by reason of his mother having been married prior to the plaintiff's mother, and fourthly, that he is a full

brother of the last holder of the zamindari, while plaintiff is only the half-brother.

The first question then for decision is whether the plaintiff's mother was the lawful wife of his, the plaintiff's father; and this question has branched into two issues. One is whether the plaintiff's mother was married, in fact, to the plaintiff's father, or kept as his mistress, and the other is whether she was of a different and inferior caste to that of the father of the plaintiff, and therefore no valid marriage could be contracted between them. The Subordinate Judge has found that the plaintiff's mother was married to the plaintiff's father in 1875 in the dagger form; that a dagger is used by the Saptur zamindars, who are surnamed Kattari Kamaya in the case of inequality in the caste or social position of the bride; that though the customary rites of the Kumbla caste were also performed, yet the use of the dagger was an essential addition; and that, though according to his finding she was of a different and inferior caste to that of the plaintiff's father, yet that did not invalidate the marriage.

In appeal No. 78 of 1891, the defendant, as appellant, contends that there was no marriage, in fact, between the plaintiff's mother and his father, and that the plaintiff's mother being of a different and inferior caste, could not, according to the custom of the plaintiff's father's caste, have been legally married to him.

The plaintiff, as appellant, in appeal No. 95, contests the finding of the Subordinate Judge that his mother was of a different and inferior caste to that of his father. As to the *factum* of marriage, there is voluminous evidence, both oral and documentary, to prove beyond a doubt that, on the 9th of July 1875, the plaintiff's mother was united to the plaintiff's father by a number of ceremonial rites. It is needless for us in appeal to repeat in detail what has been fully set forth on this subject in the judgment of the Subordinate Judge, because the defendant himself does not, and cannot, dispute that on the date named some ceremonial took place for the union between the plaintiff's mother and his father. That evidence establishes that on the 9th of July 1875, the marriages of three men were celebrated, two of whom were persons of the name of Thumbayasami and Thathaya Naik. On that same day the plaintiff's mother, Nagammal, and her sister, Kumarammal, admittedly went through a form of marriage with the zamindar, the plaintiff's father, in which form a dagger played

a very prominent part. The defendant's case is that the zamindar did not appear in person at the ceremonial but was represented by this dagger, and that the third bridegroom who was present was not the zamindar but a bandy driver of his named Ramasami, and that, owing to the non-presence of the zamindar there could not have been a valid marriage between him and the two ladies with whom he was undoubtedly united on that occasion (though as the defendant says only in concubinage) because the mere tying of the bottu in the presence of the dagger was not sufficient to constitute a valid marriage ceremonial. Exhibits XXXII and XXXII-A show that, in the year 1800, it was reported by the Collector that the mere tying of the bottu did not of itself constitute a marriage, but simply signified a promise of constancy. The plaintiff, on the other hand, asserts that the driver Ramasami was not married on this occasion, but six months before, and that the third bridegroom who was present was the zamindar himself, and that the dagger was used only as an addition or an ornament to the ceremony. It is the presence of this dagger which has given rise to all the uncertainty as to whether it was a form of marriage or of concubinage that was adopted on the occasion. The defendant's argument is that the dagger was there to represent the zamindar as he did not attend in person, and that, by his non-attendance, there could have been no joining of hands or other essential for constituting a valid marriage, for, to constitute a valid marriage, there must be, if the marriage is a sacrament, the due performance of nuptial rites (*Brindavana* v. *Radhamani*(1) and, if it is a contract, there must be an intention to marry. It is argued that the very absence of the zamindar showed there was no intention on his part to marry, if the marriage was a contract, and that, if it was a sacrament, the essentials for the due performance of nuptial rites could not have been performed. The plaintiff's argument is that the nuptial rites were duly performed, the zamindar being present; that the dagger was there merely as an ornament, and that it was customary for people of the zamindar's caste to have a dagger paraded on the occasion of marriages. The Subordinate Judge has found that the dagger was there for the purpose of indicating that the two ladies, Nagammal and her sister, Kumarammal, whom the zamindar married, were of an

(1) I.L.R., 12 Mad., 72.

inferior caste and rank. We consider that the evidence on behalf of the plaintiff as to the actual presence of the zamindar at the ceremonial is overwhelming. Not only is there the direct evidence of many of the plaintiff's witnesses, who were present on the occasion to the effect that the driver Ramasami was not married at that time, and that the zamindar himself was the third bridegroom, but there is also documentary evidence showing clearly that the zamindar and no one but the zamindar, was one of the three bridegrooms present on the occasion. Thus exhibit C series, which are the zamindar's own palace accounts showing the money received and disbursed for the marriage festival, is unequivocally headed as for the marriage of the zamindar,' and in those accounts there are items of expenditure which could apply only to the zamindar, such as the receipts of moyi or wedding presents which, from the persons who made them, could only have been made to the zamindar. There is an entry for the cost of horses, for the procession called the 'yekalichi' for the *outside* bridegrooms, with another entry for a similar procession, which, by inference, must be taken as referring to the inside bridegroom, the zamindar. There is an entry for the cost of a toe-ring put upon the zamindar. These accounts read with exhibit D further show the purchase of two rich silk marriage cloths called kandangi, which could have been intended only for the ladies united to the zamindar; for the other two women, who were married on that day, were poor dependents of the zamindar who would not have had such valuable cloths bestowed upon them. These marriage accounts further show very liberal expenditure in other matters, such as the distribution of rice which was made on far too large a scale, if only persons of ordinary rank had been married. Another account (exhibit E-I) is proof that drummers were paid for four marriages. This shows that the two ladies must also have been married; for, if the defendant's account were true, there could only have been three marriages.

Against this, defendant has adduced no evidence of any value to prove that the zamindar was not present in person, and he has carefully avoided bringing forward any evidence as to what really did take place on the occasion in question. There is, therefore, no ground whatever for the assertion that the zamindar was not present at the time; and those witnesses who speak to his presence speak also to his going through the necessary acts which were necessary to constitute a valid marriage between people of the

Kumbla caste. The defendant's contention, therefore, that there could have been no valid marriage in consequence of the absence of the zamindar falls to the ground. Extraneous evidence, however, has been produced on the defendant's behalf for the purpose of showing that ladies united to the zamindar by marriage ceremonials in which the dagger was used were not deemed to be his lawful wives. For instance, it is shown that Kumarammal, the plaintiff's mother's sister, who was united to the zamindar at the same time as herself, and another lady Muttukamatchi Ammal, who was also on another occasion united to the zamindar according to the dagger form, were called bhoga strees—a word indicating concubine. In common parlance it may be applied to a concubine, as it is the ordinary dictionary meaning of the term. But it is also used in a secondary sense. In Linga Bhattiya, kanda 2, verse 264, the term 'bhogini' is used to denote the wives of kings other than the royal wife, who is called 'mahishi,' because she is anointed. The royal wife is called mahishi, because she is adored, the other wives being called bhogini for, with them, there is bhoga or enjoyment. Again in Sabdha Ratnacara, page 817, the term, bhogini, is said to signify (1) a female servant, (2) a dancing girl, and (3) wives other than the one consecrated. Further, in Monier-Williams' Dictionary, page 723, the term 'bhogini' is explained to mean either the concubine of a king or a wife *not* regularly consecrated with him; we find also that there is other evidence counteracting the effect of the use of the word bhoga stree as applied to these ladies. In the very papers (exhibits II to IV), in which Muttukamatchi Ammal is referred to as a bhoga stree of the late zamindar, she is spoken of both by herself and by the zamindar as his wife; and with reference to Kumarammal who, at the heading of the account (exhibit VI*a*) showing her funeral expenses, is referred to as a bhoga stree, we find that her funeral ceremonies were conducted as only those of a wife would have been. This appears in the account VI*a* itself, as well as in the accounts JJJ and LLL series, for it is in evidence that ceremonies therein mentioned, such as fixing a grinding stone, with the due performance of the Shastras would only have been performed for a wife. Further, we find that one Mangaleswari, who was an admitted concubine of the zamindar, not married to him in dagger or other form, is referred to by him as a *moha* stree not a bhoga stree. The defendant has exhibited a document (exhibit XXV)

which purports to be a genealogical tree of the Saptur zamindars, and which, it was said, was approved by the late zamindar himself. In this document his wives are named; but we do not find the names of any of the dagger wives there appearing. This document is, however, one of doubtful authenticity, and there is nothing certain to show that the zamindar ever saw it or approved of it. Besides, at the time that it is said to have been prepared, namely, in 1874, the plaintiff's mother and her sister had not been united to the zamindar. Reference has further been made to two birth registers, the one being exhibit XXVII*a*, in which the plaintiff's birth on the 25th June 1880 is entered with only his mother Nagammal's name, no reference being made to the zamindar, and the other being exhibit XXVII*b*, wherein the defendant's birth on the 23rd of September 1881 is entered with the zamindar as his father, but as we have nothing to show upon whose or upon what information the officers concerned made those registers, and no explanation has been taken from them for the difference in the one case for entering the mother's name and in the other for entering the father's name, the entries are conclusive of nothing. We cannot infer that the reason for the difference was the illegitimacy in the one case and the legitimacy in the other. On the other hand, it has been shown on behalf of the plaintiff that his mother has always been treated as a wife of the zamindar. One of the admitted wives of the zamindar has stated in exhibit XXXIII*c* that for about a year the dagger wives of the zamindar were living together with herself and the other admitted wives. Though it appears that they afterwards lived in separate apartments in the palace, it was in the palace they lived and not outside it as the concubines did. It also appears that when the late zamindar was committed to jail in 1884, and his wives were sent to Bodinayakkanur to be taken care of by the zamindar of that place, the plaintiff's mother, as well as another dagger wife, accompanied them (exhibit XXXVIII*d*). In exhibit VVV the defendant's mother herself treated Muttukamatchi Ammal, a dagger wife already alluded to, as a married wife of the zamindar, her husband. In exhibit WWW the same Muttukamatchi Ammal and the plaintiff's mother joined two of the admitted wives in a petition to the Board of Revenue against the defendant's mother, claiming equality between themselves and the defendant's mother. Plaintiff himself performed the first annual ceremonies of his father jointly

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with the defendant, as shown in exhibit JJ, and there is nothing to show that the defendant's mother objected to the plaintiff's doing so; and after the death of the husband, the late zamindar, she, the plaintiff's mother, was treated as a wife by the Government officials concerned with the Court of Wards (*see* exhibit S among others.) It is unnecessary to refer to all the evidence proving that the plaintiff's mother was lawfully married to the zamindar, and her recognition as his lawful wife, because, except for the circumstances which have been mentioned above, as urged on behalf of the defendant and which have been explained, all the rest of the evidence is in her favour. We have, therefore, no hesitation in agreeing with the Subordinate Judge that the plaintiff's mother was the lawful, though a dagger wife of his father, provided there was no impediment to their marriage. The impediment pleaded by the defendant is that the lady being of a different and inferior caste to that of the zamindar, could not be lawfully wedded to him. It is not contended that in the absence of a particular custom such a marriage would be invalid in the face of the rulings of the Privy Council in *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver*(1) and *Ramamani Ammal* v. *Kulanthai Natchear*(2). In the former case it was held that, by Hindu law, marriage between Sudras where the husband is of a superior caste to that of his wife, is valid, and in the latter case that a marriage between a man of one sub-division of the Sudra caste with a woman of another sub-division of the Sudra caste is valid by Hindu law. But, what the defendant sets up is a local or caste custom among the Kumbla Naiks prohibiting such unions. The learned Advocate-General has referred to Mr. Mandlik's work on the Mayukha and Yagnavalkya (pages 400 *et seq.*) to prove that usage will override the ordinary Hindu law, and contends that he has in this case proved the custom set up. On this point, we find with the Subordinate Judge that there is no reliable evidence whatever of any such custom prevailing among the zamindars of the Kumbla caste. The evidence in respect thereto is only oral and is of a meagre description. It is true that the plaintiff's mother has endeavoured to show by recitals in documents relating to herself or to her relatives (exhibits B, GG, GGG, and DDD) that she was of exactly the same caste as the

(1) 13 M.I.A., 141. (2) 14 M.I.A., 346.

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zamindar's, and it is true that the defendant has also endeavoured by evidence (exhibits XA, XB and XIII) equally suspicious because the documents on both sides are all of recent date and after the death of the late zamindar, to prove that she was not so. The Subordinate Judge has, however, found that her caste was not Kumbla Totiya as the zamindar's was, but Parivara which he treats as an inferior caste. But one thing is certain, and that is that they were both of the Sudra caste and that legal marriage was possible between them. The zamindar would never have attempted to marry a woman whom he knew he could not marry, and the legal presumption is that when there is a marriage in fact there is a marriage in law (*Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (1)). There is no proof of a special custom in this case prohibiting such marriage.

The second main point for determination in the case is whether, having found that the marriage of plaintiff's mother with his father was a valid marriage, the plaintiff's mother was of a caste and rank inferior to the defendant's mother's, and, if so, whether that would entitle the defendant to succeed in preference to the plaintiff. Although they both were of the Sudra caste, we have no difficulty in deciding that the status and rank of the plaintiff's mother was inferior to that of the defendant's mother. The defendant's mother was the daughter of a zamindar, while the plaintiff's mother was the daughter of an ordinary ryot. The defendant's mother had no strain of mixed blood, while the plaintiff's mother was of the Parivara caste or the descendant of parents of illegitimate origin—*vide* paragraphs 35 and 36 of the Subordinate Judge's judgment—the correctness of the conclusion in which there is no ground for disputing. The inferiority of the plaintiff's mother's status as wife is the only reasonable explanation for the presence of the dagger at her marriage. In the case of the admitted wives of the zamindar, there was no dagger used when they were married, so that the only way to account for its use at the marriage of the plaintiff's mother is that it was intended to indicate her status as an inferior description of wife or as a dagger wife. If it was not intended to denote the inferiority of status of the plaintiff's mother, no other satisfactory explanation is afforded by the evidence for the use of the dagger. The theory

(1) 13 M.I.A., 158.

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for the defendant that it represented the zamindar who was absent has been already exploded. There is no proof that the dagger was invariably used in the case of all marriages between people of this caste. In fact, it is admitted that the use of the dagger is extremely rare, and only two or three instances of it are given in the plaintiff's evidence. There are also other circumstances indicating that the marriage of the plaintiff's mother was not conducted in the same way in which the marriages of the zamindar's regular wives were celebrated. Considerably less money was spent upon it than in the case of the admitted wives, and it was combined with the marriages of two other people of inferior rank—of persons who were poor dependents of the zamindar—one indeed of whom, Thumbayasami, was a brother of the plaintiff's mother. Then the plaintiff's mother and the other dagger wives, as a rule, lodged separately and messed separately from the other wives. It is therefore clear to us that the plaintiff's mother was in status and rank inferior to her husband and the defendant's mother. The question then arises whether, having found the plaintiff's mother and the defendant's mother to be of the same main caste, namely, Sudras, though not of the same division, the difference in their rank or status would make them of a different class within the meaning of sloka 125, chapter IX, Manu. That sloka is to this effect: "as between sons born of wives equal in their class and "without any other distinction, there can be no seniority in right "of the mother; but the seniority ordained by law is according to "the birth." The learned vakil for the plaintiff maintains that Manu alluded only to caste, as he was there dealing with caste, and that any other construction would be meaningless. But the ancient author seems to have been dealing with the equality of wives generally, and it is quite possible, as in this case, that two ladies may be of the same main caste and yet belong to different subdivisions of that caste, and therefore be unequal in class or rank. The strict literal translation of the phrase rendered as 'wives equal in their class' is 'like wives' which would allow of the wider interpretation that if there were any substantial inequality in the rank or status of the wives they would not be 'like wives.' Within each of the four main divisions of Hindu caste it is notorious that there are many classes or ranks, and these are perhaps most numerous in the Sudra caste, and it appears to us that their Lordships of the Privy Council, in making use of the words 'caste

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and class' in their judgment in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (1), contemplated inequalities besides those in the main caste only, for otherwise the word 'class' would be superfluous if it was taken to be synonymous with the main caste.

We are therefore prepared to hold with the Subordinate Judge that what is indicated in the text of Manu is inferiority of the class of the wife more than that of the main caste. In this view, and finding for reasons already stated that plaintiff's mother was of an inferior class to that of defendant's mother, it remains to be decided whether that fact would be ground for preferring the defendant to the plaintiff. Sloka 122 of the same chapter in Manu is to this effect: "A younger son being born of a first "married wife after an elder son had been born of a wife last "married, but of a lower class, it may be a doubt in that case "how the division shall be made."

That is just the case we have here, but unfortunately Manu has not directly decided the doubt that he raises, and, as the Subordinate Judge points out, there appears to be no precedent. The point was noticed but not decided in the Privy Council case, *Pedda Ramappa Nayanivaru* v. *Bangari Sheshamma Nayanivaru*(2). The two slokas 123 and 124 following the sloka 122 indicate that in the case therein contemplated the younger son of the first married wife being of a higher class would take a larger share of the property, and we are of opinion that this factaken with the implication in sloka 125 that there would be a difference between the sons in cases where their mothers were of different classes is sufficient to show that the right of the junior son by a first married wife if she be of higher class is a superior right to that of the elder son of a wife of lower class. It follows that when the competition between them is, as in this case, to an indivisible property, the right of him who has the superior right, if the property were partible, must prevail. We, therefore, agree with the Subordinate Judge in finding on this point in favour of the defendant.

We consider that this view is in accordance with the analogies of general Hindu law as applied to partible property. The decisions of the Privy Council both in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*(1) and in *Pedda Ramappa Nayanivaru* v. *Bangari Seshamma Nayanivaru*(2) are authorities only for

(1) 14 M.I A., 592, 594.

(2) L.R., 8 I.A., 1.

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the proposition that as between sons born of *wives equals in class* and *without any other distinction*, there is no seniority in right of their mothers, but that the seniority recognized by law is according to birth. In the present case, however, the plaintff's mother and the defendant's mother are not equal in caste or class. There is the further distinction between them, viz., that the former si a dagger wife, whilst the latter was married by the pure Kumbla caste rites without the intervention of a dagger. In the Bangari Palayam case, their Lordships of the Privy Council expressly stated that they did not decide what would be the proper rule of succession when the wives were of a different caste or class. The text of Manu, chapter IX, 125, as interpreted by Kallukka Bhatta, on which their Lordships rest their decision, premises the case of sons born of wives of equal caste and without any other distinction. This case falls therefore to be decided on the principle laid down by their Lordships in the Urkad case in the following terms : "Now, no work of authority or decision directly relating "to the descent of property, which, at the present day, is governed "by the rule of primogeniture, was cited at the Bar, nor have we "found any materially bearing on the question. We must, there-"fore, decide it upon principle, and by analogy to the existing "general law of inheritance and upon what we find laid down in "early times when primogeniture by general law conferred some "special rights and privileges which no longer exist." The question then is what is the rule suggested by analogy, first, to the existing Hindu law of inheritance and, next, to the Hindu law as it existed in early times when primogeniture conferred by the general law certain special rights and privileges? Under the former we may take, by way of analogy, the cases in which the rival claimants of an impartible estate are a legitimate junior son and an illegitimate senior son or an after-born son and an adopted son. In the first case, among Sudras, both sons take shares in partible property, but the illegitimate son takes only half a share (Mitakshara, chap. I, s. XII, sloka 3).

This is the first exception to the general rule that, though sons may share in partible property, the son born of a concubine only a secondary son and son born of a wife is the primary son and preferable heir to impartible property.

Turning to the case of a disputed succession to an impartible estate in which the rival claimants are an adopted son and the

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after-born legitimate son, it is stated in Dattaka Chandrika, s. V, 32, that among Sudras, they take equal shares in partible property. But the succession to impartible property, nevertheless, devolves on the after-born son in preference to the adopted son, the reason being that the adopted son is a substitute for the *aurasa* son, and that, when the latter comes into existence, he excludes the substitute.

This is the second exception to the general rule under which of two sons who may be entitled to share alike in partible property, one is the principal or primary and the other as a mere substitute is a secondary son, and as such, excluded by the other, though his junior in years, from succession to impartible property. The succession of a legitimate son to an impartible estate in preference to an illegitimate son, and of an after-born son in preference to an adopted son does not rest on mere inference. In Dattaka Chandrika, s. V, 26, a vedic text is referred to as ordaining that kings shall not appoint to the empire any of the twelve descriptions of sons, which included also the adopted son and the son of a female slave, when a legitimate son existed. It is hardly necessary for us to add that the Palayapats of Madura and Tinnevelly were, prior to the commencement of the British, rule in the nature of petty principalities or tributary chieftainships.

Looking again to the ancient Hindu law, we find an analogy in '*anuloma*' marriages. A Brahmin was in former times at liberty to marry a Brahmin wife, a Kshatriya wife, a Vaisya wife and a Sudra wife; so a Kshatriya was entitled to have a Kshatriya wife, a Vaisya wife and a Sudra wife; so it was permitted to a Vaisya to have a Vaisya wife and a Sudra wife. Hence it is stated in the Mitakshara, chap. I, s. VIII, v. 2, that instances do occur of a Brahmin having four wives, a Kshatriya three, and a Vaisya two, the wives being of different varnas or castes or tribes. This form of marriage with women of inferior castes was called anuloma union, and it was a permitted connection, while *pratiloma* union, that is to say, of a man of an inferior class or varna with a woman of a superior class, was a prohibited connection. The author of the Mitakshara explains in chap. I, s. VIII, v. 4, how rights of sons of wives of different classes, when partition was made between them, were regulated, and states that the sons of a Brahmin by a Brahmini woman took four shares *apiece*, his sons by a Kshatriya wife, three shares each, by a Vaisya

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woman two, and by a Sudra one. In the same manner the sons of a Kshatriya born to him by women of the several tribes had three shares, two or one in the order of the tribes (castes). Likewise the sons of Vaisya by women of the several tribes have two shares and one in the order of the classes. Again, in chap. XI, s. I, v. 47, the author of the Dayabhaga adverting to the texts of Manu, chap. IX, 85, 86 and 87, states that the rank of wife belongs, in the first place, to a woman of the highest tribe, and seniority is reckoned in the order of tribes. Thus, Manu says, when regenerate men take wives both of their own class and others, the precedence, honour and habitation of those wives must be settled according to the order of their classes. Therefore (since seniority is by the tribe) a woman of equal class, though youngest in respect of the date of marriage is deemed eldest. The rank of wife (patni) belongs to her, for she alone is competent to assist in the performance of sacrifices and other sacred rites. This is the third exception to the general rule in which the son by the dagger wife is by analogy to *anuloma* marriage only a secondary son who, though senior in age, is excluded by a son of a wife equal in caste and rank.

Thus the rule deducible by analogy from this branch of ancient Hindu law is one of preference in favour of the son by a wife of the same caste or rank. It follows that when a Sudra marries a woman of an inferior division of his caste, as a dagger wife or as a wife of an inferior class in addition to his wife equal in caste to him, the rule of selection is in favour of his son by the latter by reason of his mother being of a higher class, or having the rank of patni.

It is argued by the plaintiff's pleader that the Sudras are all of one caste, though they belong to different sub-divisions. It is so for the purpose of permitting a marriage between a man of one sub-division and a woman of an inferior sub-division, but it does not follow that there are no gradations in respect of caste, status or rank. Surely, it cannot be said that there is no distinction between a man of the purest Vellala or Mudali caste, and a woman of the Palli or Shanar or toddy-drawer's caste, though their main caste is that of Sudras. The ancient conception of Sudras as one of the four leading classes has attained a considerable extension after the Dekkan and Southern India came within the pale of ancient Hindu law. The ancient Brahminical theory was that

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all the Sudras were intended to do service for or to be the servants of the regenerate classes. But this soon vanished when the class of Sudras came to embrace in it kings, rajas, provincial chieftains, aristocratic classes and numerous non-Aryan tribes, independent and influential, with peculiar marriage customs and with peculiar notions of the incidents of a legal marriage. It is notorious that Sudra rajas and zamindars often imitated Kshatriya kings in many respects, especially as regards the number and rank of wives they married and the concubines they maintained.

It is not improbable that the notion of a secondary wife or a secondary son came to prevail among some Sudra zamindars by analogy to anuloma marriages among Kshatriyas. The real question is whether there are traces of such consciousness in the present case. The offspring of the anuloma form of marriage; where the mother was of a caste inferior to that of his father, was not equal in caste to his father. If his father was a Kshatriya and his mother was a Vaisya, though they might legally marry, the wife did not acquire the status of a Kshatriya lady, and the son born of her, though legitimate, had not the caste, status or rank of a Kshatriya, but had an intermediate caste and status. He was called 'mahisya,' and as compared with the son by a Kshatriya wife, he was only a secondary son. (See *Brindavana* v. *Radhamani*(1)). In the same way, it may be that the plaintiff's mother, Nagammal, was, by reason of her descent from a man of the Kumbla caste and a woman of the Vellala caste, of inferior caste. In this view the Parivara caste is inferior to the Kumbla Tottiya caste, as found by the Sub-Judge, though their main caste is that of Sudras. It is noteworthy that when a special form of marriage is adopted to denote the wife's inferior caste or class, and she is since treated in the husband's family differently from a wife of equal class married by the pure caste ritual without the use of a dagger, the reasonable explanation is that she was taken and treated as a secondary wife not having the rank of patni within the meaning of the text of Manu. (Chap. IX, 85 to 87.)

The next or third point for determination (fourth issue in the Lower Court) is whether there is a custom prevailing among the Kumbla zamindars, to which admittedly the parties belong, that the son by a senior wife has a prior right of succession to a son by

(1) I.L.R., 12 Mad., 72.

a junior wife, although the latter may be the elder son, seniority referring to the date of marriage and not to the age of the wife. It is admitted in this case that the defendant's mother was married before the plaintiff's mother, but the alleged custom is not in accordance with the ordinary law of succession among Hindus where primogeniture is the rule irrespective of the seniority of marriage of the mothers. The law has so been clearly declared by the Privy Council in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*(1) and *Pedda Ramappa Nayanivaru* v. *Bangari Seshamma Nayanivaru*(2). It, therefore, lies on the defendant to prove the special family custom. It must be borne in mind that the contest here is between two wives, neither of which was the first married wife or 'pattama stree' as the first or royal wife is called. Several instances have been given in evidence where a younger son by the 'pattama stree' has taken precedence of an elder son by a subsequent wife, but those cases are not to the point in this case, and all the evidence in regard to them must be rejected as irrelevant. The first married wife, as Mr. Mayne points out (Hindu Law, para. 87), has precedence over the others and her first-born son over his half-brothers, because a peculiar sanctity seems to have been attributed to the first marriage as being that which was contracted from a sense of duty and not merely for personal gratification, and it may be that among certain classes of people, the preference shown to her first-born son was extended to other sons born of her; so that it would not be fair to treat the case of her sons as on a par with the sons of subsequent wives. It is as between such wives that the question of custom must be considered here. This will eliminate from the record all the evidence which was confined to the competition between a son of a 'pattama stree' and of a junior wife which forms the major portion of the evidence. The evidence adduced in support of the custom falls under three classes.

First, statements giving the opinions of deceased persons who are likely to know of its existence; second, similar opinions by living persons, and third, particular instances in which the custom was recognized and acted on. Under the first class, the evidence was naturally documentary, and much of it was either irrelevant for the reasons above stated, or inadmissible for reasons now to be

(1) 14 M.I.A., 570. (2) L.R., 8 I.A., 1.

stated. Section 32 (clause 4) of the Indian Evidence Act, which allows of the admission of such evidence requires that it should have been given before any controversy as to such custom had arisen; and the statement must refer to a custom or matter of public or general interest, and not to a particular case or instance. Now, to take the documents exhibited under this head in their order of date, we find exhibits XXVI *a* and *b*, the opinions of the zamindars of Valayapatti and Erasakkanayakanur taken in 1826 inadmissible, as they refer only to the line of descentin their own particular estates, and they are irrelevant as they contemplate the case only of the first and a second wife. The next exhibits are the XIX series (*a* to *r*), opinions taken in 1849, with reference to the succession in the Perayur zamindari. These are objected to on the score that they were taken after controversy arose, but we find this not to be the case. The correspondence on the subject is to be found in exhibits XXXIII series, and it shows that there was only a doubt whether the younger son by a senior wife should succeed before an older son by a junior wife. The Collector held the opinion that by custom the younger son should succeed and the Court of Wards being doubtful directed an enquiry to be made as to the custom, and it was found that it prevailed, and it was accepted and acted on. There had been a difference of opinion by the pundits who were at first consulted, but there was no dispute such as to render the evidence inadmissible. In order to effect this "there must be not merely facts which may lead to a dispute "but a *is mota*, or suit, or controversy preparatory to a suit actu- "ally commenced or dispute arisen and that upon the very same "pedigree or subject-matter which constitutes the question in liti- "gation." (*Taylor on Evidence*, page 556). The competition in this Perayur case was between the second wife's son aged 2 and the eighth wife's son aged 8, and the opinions then taken are, therefore, relevant in the present case, so far as they refer to the general custom and to a contest between sons of wives other than the first married wife. All the persons, who gave them, are proved to be dead, and their original statements have been produced and proved in order to avoid the objection taken in the Urkad case that the originals had not been produced and proved. But some of these opinions must be rejected on other grounds. Thus the opinion of the Thevaram zamindar in exhibits XIX and XIX*a* is inadmissible, as the opinion of a deceased person because it refers to the

rule of succession in his own particular zamindari only. The opinion of the Bodinayakanur zamindar in exhibits XIX*b* and *c* is inadmissible for the same reason ; so also is the opinion of the zamindarni of Thottapanaickanur in exhibit XIX*f* and those of the zamindar of Kannavadi in exhibits XIX *j* and *k*, and of the zamindar of Mambarai in exhibits XIX *q* and *r*. The opinion of the zamindar of Erasakkanayakanur in exhibit XIX*l* is irrelevant, as it refers only to the case of the senior wife, as well as only to the particular estate. Excluding these we have left the opinions of five zamindars, namely, those of Pulyankulam (exhibits XIX *d* and *e*) of Uttapanaickanur (exhibits XIX *g* and *h*) of Gandamanaickanur (exhibit XIX*m*) of Kadavur (exhibit XIX*n*) and of Edayakottai (exhibits XIX *o* and *p*) all speaking to the general custom among Kumbla zamindars of the son by a senior wife taking the succession in preference to an older son by a junior wife.

The next documents in time are in connection with the Virupakshi case in 1853 (exhibits XXXIV series). The opinions therein given are irrelevant, as the son by the second wife who succeeded to the allowance was the eldest of the surviving sons.

The last batch of opinions forming the second main-stay in proof of the custom were in 1875, and are to be found in exhibits XII *a* to *k* series, but we find one and all of them inadmissible, as the statements were undoubtedly made after controversy had begun. There was a dispute as to the succession in the Bodinayakanur estate like the dispute in the present case as to whether the younger son by the fifth wife was to be preferred to the elder son by the sixth wife. The Court of Wards recognized the right of the younger son, whereupon a suit was brought on behalf of the elder son in original suit No. 5 of 1875 on the file of the Subordinate Court of Madura. The Collector, as Agent of the Court of Wards, was made a defendant in the suit, and, in forwarding a copy of the plaint in the suit to the Court of Wards, applied for instructions to defend the suit. This was on the 13th July 1875 (*vide* exhibit XXXVII*a*), and it was after this the opinions were called for as appears from the Collector's letters (exhibits XII *b*, *d*, *h*, and XVII) which are dated in August 1875, and the opinions given are, of course, all of subsequent dates. There are other grounds on which these statements that have been used in evidence are inadmissible, such as that some of them are copies, their correctness as such also not being proved, but it is sufficient to reject them all

on the broad ground that they were not given *ante litum motam*. This closes the first class of evidence adduced. The second class consists of the opinions of living persons as to the general custom, and they are admissible under section 48 of the Indian Evidence Act. There are three such opinions as are relevant in this case, those of the defendant's nineteenth, twenty-fourth and sixty-second witnesses. The nineteenth defence witness says "In case "the first wife had no sons but the second and third wives had "sons, the son of the second wife, even though younger in age, "would have the right to the succession, and so on according to the "order of wives . . . . The rule of succession stated by me "is applicable to all divisions of Kumblas," and this follows the opinion he gave in 1875 as a Kumbla zamindar (*vide* exhibit XVII*a*). The twenty-fourth defence witness is a Kumbla of the Thevaram zamindari, and he says that "the succession in the "case of Kumbla zamindars is regulated by the seniority of the "mother irrespective of the ages of the sons." The sixty-second defence witness is the father of the first wife of the late zamindar of Saptur, the father of the parties to this suit, and he states as follows : "Among our Kumbla-zamins the right of succession "is according to the order of wives. What is meant by the order "of wives is that should there be a son to the first wife, the right "of succession goes to that son ; but, if there be no son to the first "wife, and the second wife has a son, it goes to that son. It is "this what I mean by order. Even if the son of the second wife "is older than the son of the first wife, the right of succession is "only to the first wife's son. Similarly in the case of the sons of "the other wives." The evidence of the defendant's eighteenth witness is to the effect that the sons of the eldest wife succeed one after another, of which there was an instance in his own zamindari, but this does not apply to the matter in question as it relates only to the rights of the sons by the first married wife.

The third class of evidence offered in proof of the custom consists of particular instances, in which it was observed evidence which is admissible under section 13 of the Indian Evidence Act. The Perayur and Bodinayakanur cases referred to above are instances distinctly in point. In the former case the son of the second wife being only 2 years of age succeeded in preference to the son of the eighth wife who was 8 years old, and in the latter case, the younger son of the fifth wife took the succession in

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preference to the elder son by the sixth wife. But there is this to be said with regard to the latter case that the elder son was an idiot and might have been disqualified on that ground alone, although the correspondence (exhibit XXXVII) shows that the right of the younger son was recognized on the strength of the custom. Beside these clear instances, evidence has been adduced to prove similar instances in other zamindaris of the same caste, but as all of them appear to relate only to the case of the first married wife or 'pattama stree,' they must be rejected as irrelevant for reasons already stated. Thus the case in 1861 in the Andipatti Poliem (exhibit XXXV series) was between the son of the senior wife, and the son of the second wife, there being only two wives, and it was the same in the Uttapanaickanur case in 1866 (exhibit XXXVI) to which defence witnesses Nos. 20 and 21 speak. The instances given by the oral evidence of the witnesses Nos. 18, 19, 26 and 41 for the defendant also all refer to the sons of the first married wife, so that under this head of particular instances we have only the two instances of Perayur and Bodinayakanur as applicable to this case. But it must be remarked that cases of competition between the sons of junior wives in so small a community as the Kumbla zamindars are, must of necessity be, of rare occurrence when the son or sons of the first married wife always take precedence as much of the evidence shows they do.

The general result of the evidence as to the custom set up is that we have the opinion of five deceased persons and of three living persons *plus* two well-authenticated instances of its observance in proof of it, while there is nothing whatever on the other side to disprove it. It was contended for plaintiff that there was an instance in this Saptur zamindari itself where the son of a fourth wife succeeded in preference to the son of a third wife in the fact that in 1803 Vada Kamaya Naik, son of a fourth wife of his father became zamindar after his elder brother by the first wife was hanged, in preference to Sangaralinga Kamaya Naik, a son of the third wife.

Assuming these facts to be proved by the genealogical table (exhibit XXV) and by the evidence of the plaintiff's first and forty-first witnesses, and that Sangaralinga Kamaya Naik, the son by the third wife, afterwards succeeded Vada Kamaya Naik, son by the fourth wife, as shown by exhibit TTT, they do not prove the circumstance they are used for. In the first place Vada

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Kamaya Naik was treated by the Government as the Istimrar zamindar by its sannad SSS after his brother had been executed, and it may have been an act of State and not a case of succession but one of selection; and in the second place, there is nothing to show that Sangaralinga Naik was then born. He might have been born long after his brother had been recognized as the zamindar by the Government. The evidence then being all one way, and extending back as far as living memory and existing records go, can the custom be found to be sufficiently established according to the standard laid down by the Privy Council in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*(1). "It is of the essence of "special usages modifying the ordinary law of succession that they "should be ancient and invariable; and it is further essential that "they should be established to be so by clear and unambiguous "evidence. It is only by means of such evidence that the Courts "can be assured of their existence, and that they possess the condi-"tions of antiquity and certainty on which alone their legal title "to recognition depends." Now, out of the mass of evidence adduced, that which we have alone admitted as strictly applicable in this case is undoubtedly clear and unambiguous in favour of the alleged custom, and its antiquity and certainty seem to be proved as well as they can be among a set of people so absolutely lawless as these poligars were in former days. In respect to its certainty the opinions are unanimous, and are supported by two actual instances, while no opinion has been adduced against it, nor any instance given of a departure from it. And in respect to its antiquity it is spoken to as an old established rule, 'whereof the memory of man runneth not to the contrary' so far as is shown to us.

In these circumstances we consider that the custom has been clearly proved to be ancient and invariable, and therefore one that our Courts must recognize. We accordingly confirm the finding of the Subordinate Jugde in this matter.

The next question in the case is the fifth issue, namely, whether, on the death of the last zamindar, his full-brother, the defendant, is entitled to succeed to the zamindari, which is admittedly an ancestral, impartible estate held by only one member of the family

(1) 14 M.I.A., 585.

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at a time, in preference to the plaintiff, his half-brother. The Subordinate Judge decides it in the negative, and, in that opinion, we concur. [Their Lordships here repeated *verbatim* that portion of the judgment in *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai*(1), which commences with the word 'apart' in the second line of the second paragraph on page 325 of this volume and ends with the word 'succeed' in the last line of the fourth paragraph on page 334.]

The last points for our determination are matters of detail in regard to what properties in schedules C, D and E of the plaint are to be considered as partible between the plaintiff and the defendant.

Schedule C refers to the 'pannai' lands, and the Sub-Judge has given excellent reasons for holding that such of them as were acquired by the grandfather of the parties are not partible, but must be considered as appurtenant to the zamindari; but he has held that those acquired by the father are partible. It would appear that the Sub-Judge has here erred in treating the father as the last holder of the estate, because exactly the same reasons which he gives for holding the acquisitions of the grandfather to have been incorporated in the estates apply with equal force to the acquisitions of the father. They all alike descended to the last holder, the brother of the parties to the suit. The principle is laid down in the judgment of this Court in *Lakshmipati* v. *Kandasami*(2), that it is a question of intention whether the zamindar, for the time being, who acquires fresh lands, means to incorporate them with the zamindari or to treat them as separate private property. His object in acquiring them as private property could only be for the purposes of alienation, and the presumption is that if he does not alienate them in his lifetime or by testamentary disposition his intention was to add them to the estate.

For this and the other reasons discussed by the Sub-Judge upon the evidence in the matter, we are of opinion that all the lands comprised in schedule C were merged in the estate proper and are, therefore, not partible. The properties in schedule D are ryotwari lands and house properties, and we see no reason to differ from the Sub-Judge's finding in respect to these, namely, that items Nos. 1 to 8 being lands not situate within the zamindari, were

(1) I.L.R., 17 Mad., 316. (2) I.L.R., 16 Mad., 54.

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Subbayya *v.* Krishna. I.L.R., 14 Mad., 186	463, 464, 466, 468
Syed Ameer Ali *v.* Syed Ali. 5 W.R. (C.R.), 289	474
Syed Nurul Hossein *v.* Theosahai. L.R., 19 I.A., 221	475
Tarini Charan Ganguli *v.* John Watson. 3 B.L.R., 437	475
Thacker *v.* Hardy. L.R., 4 L.B.D., 685	484, 493, 497
Uji *v.* Kathi Lalu. 7 B.H.C.R., 133	480

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Procedure. *Narasimha* v. *Ayyan Chetti* (I.L.R., 12 Mad., 157), followed. *Per* SHEPHARD, J.—The language of section 539 is in part borrowed from 52 George III, cap. 101 (Sir Samuel Romilly's Act) and the decisions upon that statute are in a measure reproduced in the section. Section 539 should, accordingly, be construed in the light of the decisions on that statute, so far as they are applicable to the language of the section, and the statute having from the first been held to be inapplicable to cases in which the hostile removal of a trustee is required, section 539 is likewise inapplicable to such cases.

Rangasami Naickan v. *Varadappa Naickan* 462

CONTRACT ACT—ACT IX OF 1872, s. 30—*Contracts to buy and sell Government promissory notes—Whether wagering contracts or not—Admissibility of oral evidence to contradict the nature of a contract in writing—Evidence Act—Act I of* 1872, *s.* 92.] A, on various occasions, agreed to sell to B (a sowcar) certain amounts of Government of India promissory notes, amounting in all to 4½ lakhs, for delivery on the following 30th of November. On the 28th of November B agreed to sell and A to buy 4½ lakhs worth of the notes for delivery on the 30th of November. A did not perform his contract to sell, and B sued him for damages, amounting to Rs. 7,109-6-0, being the difference between the price at which he (B) had agreed to buy, and the price at which he had agreed to sell. A denied that the transactions were *bonâ fide* contracts made in the ordinary way of business, and pleaded that the real contract was only to pay differences as ascertained by the price of the Government paper on the 30th of November, and that such a contract being, by way of wager, was void under section 30 of the Indian Contract Act :—*Held*, on the evidence that neither party intended *bonâ fide* purchases and sales for delivery, and that, therefore, the contract was void as a wagering contract :—*Held on appeal* (1), that the burden of proof that the agreements were wagers, *i.e.*, that they were not in substance what they were in form, lay on A, as the party so alleging ; (2) that oral evidence is admissible to show that an agreement in writing to sell is really only an agreement by way of wager. (*See* Indian Evidence Act, s. 92). *Anupchand Hemchand* v. *Champsi Ugerchand* (I.L.R., 12 Bom., 685) followed, *Juggernauth Sew Bux* v. *Ram Dyal* (I.L.R., 9 Calc., 791) dissented from ; (3) *per* MUTTUSAMI AYYAR, J., that, it being proved on the evidence that it was the defendant's intention at the time he contracted to sell to pay differences only, the plaintiff either knew of this intention or he did not. In the former case the contract was a wager and therefore void, and in the latter there was no *consensus* as to a matter which was of the essence of the contract, and therefore no valid contract ; (4) *per* BEST, J., that a contract is not a wagering contract unless it is the intention of *both* parties at the time of entering into the contracts to call for or give delivery from or to each other (see *J. H. Tod* v. *Lakshmidas Purshotamdas*, I.L.R., 16 Bom., 441) and *Grizewood* v. *Blane* (L.R., 11 C.B., 526), and that no such common intention having been proved the contract was a valid one.

Eshoor Doss v. *Venkatasubba Rao* 460

2. ——————————, s. 30—*Contracts to buy and sell Government promissory notes—Whether wagering contracts or not—Contracts for payment of differences only.*] A having on various occasions sold certain amounts of

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Government promissory notes to B, aggregating on the whole to 2½ lakhs, for delivery on 30th November 1891, B on the 28th of November sold the same amount to A for delivery on the 30th November. On that day B, through his attorneys, called upon A to retain the 'paper' contracted to be sold by A to B in respect of that contracted to be sold by B to A, and to pay the differences in the prices of the two contracts to B, and subsequently sued him for the amount:—*Held*, that on the evidence B having admitted that the original contract sued on was for payment of differences only, that it was a wagering contract, and therefore void:—*Held*, on appeal *per* MUTTUSAMI AYYAR, J., that the above judgment should be confirmed; *per* BEST, J., that on the evidence it was not proved that at the time of entering into the original contract the intention of both parties was merely for payment of differences, and that consequently the contract was not a wagering contract, but a valid one.

Venkatachella Chetti v. *Venkata Subba Rau* 496

3. ——————————, ss. 151, 152, 161—*Liability of Railway Companies as bailees—Railways Act—Act IX of* 1890, *ss.* 72, 76—*Carrier's Act—Act III of* 1865.] A having on various occasions sold certain amounts of Government promissory notes to B, aggregating on the whole to 2½ lakhs, for delivery on 30th November 1891, B on the 28th of November sold the same amount to A for delivery on the 30th November. On that day B, through his attorneys, called upon A to retain the 'paper' contracted to be sold by A to B in respect of that contracted to be sold by B to A, and to pay the differences in the prices of the two contracts to B, and subsequently sued him for the amount:—*Held*, that on the evidence B having admitted that the original contract sued on was for payment of differences only, that it was a wagering contract, and therefore void:—*Held*, on appeal *per* MUTTUSAMI AYYAR, J., that the above judgment should be confirmed; *per* BEST, J., that on the evidence it was not proved that at the time of entering into the original contract the intention of both parties was merely for payment of differences, and that, consequently, the contract was not a wagering contract but a valid one.

Venkatachella Chetti v. *Venkata Subba Rau* 496

DHARMAKARTAS OR HEADMEN OF A ROMAN CATHOLIC CHURCH—*Legal powers thereof.*] The appointment of a committee of headmen or dharmakartas in a Roman Catholic Church by the Bishop to assist the vicar in the secular affairs of the church gives the members of such committee no right to close the church or oust the vicar, and still less to appoint a priest not under the discipline and obedience to the Church of Rome.

Matian Pillai v. *Bishop of Mylapore* 447

DISTRICT MUNICIPALITIES ACT (MADRAS)—ACT IV OF 1894, s. 55—*Profession tax—What amounts to an exercise of profession or the holding of office under the section.*] An officer, whose head-quarters are within a Municipality, does not *ipso facto* exercise his profession or hold such office or appointment within the Municipality so as to render himself liable for the payment of profession tax under Madras Act IV of 1884. Accordingly an officer who is not personally present at his head-quarters in the course of duty for a period of sixty days in the half-year is not liable for the tax under section 55 of the Act.

Chairman, Ongole Municipality v. *Mounsey* 453

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DIVORCE—*Caste custom—Whether immoral and therefore invalid or not.*] There is nothing immoral in a caste custom by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expenses of the latter's original marriage (*parisam*).

Sankaralingam Chetti v. *Subban Chetti* 479

EVIDENCE—*Estoppel—Limitation of the doctrine in respect to a party suing as the representative of another—Stamp Act—Act I of* 1879, *s.* 39—*Whether secondary evidence of a lost document can be admitted on payment of penalty.*] Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by any one except that other person. In the case of a lost document no penalty can be levied and secondary evidence admitted, for section 39 of the Stamp Act presupposes that the document on which a penalty can be paid is forthcoming. *Kopasan* v. *Shamu* (I.L.R., 7 Mad., 440) followed.

Ranga Rau v. *Bhavayammi* 473

EVIDENCE ACT—ACT I OF 1872, s. 92—*Contract Act—Act IX of* 1872, *s.* 30—*Contracts to buy and sell Government promissory notes—Whether wagering contracts or not—Admissibility of oral evidence to contradict the nature of a contract in writing.*] A, on various occasions, agreed to sell to B (a sowcar) certain amounts of Government of India promissory notes, amounting in all to 4½ lakhs, for delivery on the following 30th of November. On the 28th of November B agreed to sell and A to buy 4½ lakhs worth of the notes for delivery on the 30th of November. A did not perform his contract to sell, and B sued him for damages, amounting to Rs. 7,109-6-0, being the difference between the price at which he (B) had agreed to buy, and the price at which he had agreed to sell. B denied that the transactions were *bonâ fide* contracts made in the ordinary way of business, and pleaded that the real contract was only to pay differences as ascertained by the price of the Government paper on the 30th of November, and that such a contract being, by way of wager, was void under section 30 of the Indian Contract Act:—*Held*, on the evidence that neither party intended *bonâ fide* purchases and sales for delivery, and that, therefore, the contract was void as a wagering contract:—*Held on appeal* (1), that the burden of proof that the agreements were wagers, *i.e.*, that they were not in substance what they were in form, lay on A, as the party so alleging; (2) that oral evidence is admissible to show that an agreement in writing to sell is really only an agreement by way of wager. (*See* Indian Evidence Act, s. 92). *Anupchand Hemchand* v. *Champsi Ugerchand*, (I.L.R., 12 Bom., 585) followed, *Juggernauth Sew Bux* v. *Ram Dyal* (I.L.R., 9 Calc., 791) dissented from; (3) *per* MUTTUSAMI AYYAR, J., that, it being proved on the evidence that it was the defendant's intention at the time he contracted to sell to pay differences only, the plaintiff either knew of this intention or he did not. In the former case the contract was a wager and therefore void, and in the latter there was no *consensus* as to a matter which was of the essence of the contract, and therefore no valid contract; (4) *per* BEST, J., that a contract is not a wagering contract unless it is the intention of *both* parties at the time of entering into the contracts to call for or give delivery from or to each other (see *J. H. Tod* v. *Lakshmidas Purshotamdas*,

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I.L.R., 16 Bom., 441) and *Grizewood* v. *Blane* (L.R., 11 C.B., 526), and that no such common intention having been proved, the contract was a valid one.

Eshoor Dose v. *Venkatasubba Rau* 480

PROMISSORY NOTE—*Negotiation—Whether an assignment by the payee of all his property including the note amounts to negotiation in the absence of endorsement.*] A promissory note payable to payee or order cannot be negotiated by the mere assignment by the payee of all his property including the note. *Pattat Ambadi Marar* v. *Krishnan* (I.L.R., 11 Mad., 290) followed.

Abboy Chetti v. *Ramachandra Rau* 461

RAILWAYS ACT—ACT IX OF 1890, ss. 72 AND 76—*Carrier's Act—Act III of* 1865—*Contract Act—Act IX of* 1872, *ss.* 151, 152 *and* 161—*Liability of Railway Companies as bailees.*] Subject to the provisions of Act IX of 1890, the responsibility of Railway Companies for loss of goods delivered to them for carriage is that of a bailee under sections 151, 152 and 161 of the Indian Contract Act. In a suit for damages occasioned by such a loss the plaintiff need not prove how the loss occurred, but on proof of the loss, the Company will, in absence of proof of any ground upon which it can be exonerated, be liable as a bailee.

Sesham Patter v. *L. S. Moss* 445

RECEIVER—*Appointment of a receiver by a Court under section* 503 *of the Code of Civil Procedure—Misappropriation by the receiver—Whether, subject to the receiver's liability, the creditor or judgment debtor must bear the loss.*] In cases in which a receiver, appointed at the instance of the judgment-creditor under section 503 of the Code of Civil Procedure, misappropriates moneys collected by him, the decree is not satisfied *pro tanto*, but the loss falls on the estate or its owner, subject to the receiver's liability.

Orr v. *Muthia Chetti* 501

REGISTRATION ACT—ACT III OF 1877, s. 49—*Suit for damages for breach of contract to execute a lease—Production in evidence of an unregistered kabuliat to prove contract.*] Defendant entered into an agreement with the plaintiff to lease a certain property to him. The plaintiff delivered the kabuliat to the defendant and was put into possession of the property. The defendant did not execute the cowle and did not register the kabuliat, and subsequently improperly deprived the plaintiff of his possession. Plaintiff brought a suit for damages for breach of contract:—*Held*, on a question as to whether the kabuliat was admissible in evidence having regard to section 49 of Act III of 1877, since it had not been registered, that, since the plaintiff's action was not founded on an alleged title under a lease granted by the defendant, but was an action for damages for breach of the contract to execute the lease, the kabuliat was admissible in evidence to prove the contract. *Hurjivan Virji* v. *Jamsetji Nowroji* (I.L.R., 9 Bom., 63) distinguished.

Rajah of Venkatagiri v. *Narayana Reddi* 456

STAMP ACT—ACT I OF 1879, s. 39—*Evidence—Estoppel—Limitation of the doctrine in respect to a party suing as the representative of another—Whether secondary evidence of a lost document can be admitted on payment of penalty.*] Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by any one except that other person. In

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the case of a lost document no penalty can be levied and secondary evidence admitted, for section 39 of the Stamp Act presupposes that the document on which a penalty can be paid is forthcoming. *Kopasan* v. *Shamu* (I.L.R., 7 Mad., 440) followed.

Ranga Rau v. *Bhavayammi* 473

SUCCESSION CERTIFICATE ACT—ACT VII OF 1889, s. 7 (3)—*Power to grant certificate to applicant if he has the best* primâ facie *title thereto—Necessity for some inquiry prior to such a grant.*] The intention of sub-clause (3) to section 7 of the Succession Certificate Act is *not* to save the Court the trouble of making any inquiry at all where the applicant is not heir to the deceased, but it is to allow the *primâ facie* title to the certificate to prevail when a question of law or fact arises on inquiry too difficult to be determined in a summary proceeding.

Sivamma v. *Subbamma* 477

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 68 (*e*)—*Mortgagee's right to sue for the mortgage money where he is kept out of possession by mortgagor's indirect conduct.*] Where a usufructuary mortgagee is unable to obtain possession of the mortgaged property owing to his mortgagor having executed a subsequent mortgage and placed the second mortgagee in possession, the first mortgagee may elect to sue at once for the money under section 68 of the Transfer of Property Act, instead of for possession of the land.

Linga Reddi v. *Sama Rau* 469

distinctly the private properties of the zamindari, and therefore partible, while the other items Nos. 9 to 15 were appurtenant to the zamindari as palaces and places of residence, &c., and therefore impartible. Schedule E relates to movables which we agree with the Sub-Judge in finding to be partible, as the rule of impartibility applicable to zamindaris does not extend to the personal property left by a zamindar (*Maharajulun Garu* v. *Rajah Row Puntulu*(1)).

The result of our decision is that the appeal of the plaintiff is dismissed and the Sub-Judge's decree is confirmed in all respects excepting as regards some of the 'pannai' lands comprised in schedule C of the plaint which are now all declared to be appurtenant to the zamindari, and plaintiff has therefore no right to share therein. The Lower Court's decree will be modified accordingly, and the proportionate costs there decreed payable by the defendant to the plaintiff will be reduced by that extent and added to the proportionate costs payable by the plaintiff to the defendant.

The appeal of the defendant is otherwise dismissed. In regard to costs in this Court, we shall leave each party to bear his own, each having failed on the main grounds of his appeal.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

SESHAM PATTER AND ANOTHER (PLAINTIFFS), PETITIONERS,

v.

L. S. MOSS (DEFENDANT), RESPONDENT.*

1893 Dec. 8, 12. 1894. April 6.

Indian Railways Act—Act IX of 1890, *ss.* 72 *and* 76—*The Carrier's Act—Act III of* 1865—*Indian Contract Act IX of* 1872, *ss.* 151, 152 *and* 161—*Liability of Railway Companies as bailees.*

Subject to the provisions of Act IX of 1890, the responsibility of Railway Companies for loss of goods delivered to them for carriage is that of a bailee under ss. 151, 152 and 161 of the Indian Contract Act. In a suit for damages occasioned by such a loss the plaintiff need not prove how the loss occurred, but on proof of the loss, the Company will, in absence of proof of any ground upon which it can be exonerated, be liable as a bailee.

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(1) 5 M.H.C.R., 18.

* Civil Revision Petition No. 655 of 1892.

SESHAM PATTER v. L. S. MOSS.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of V. Kelu Eradi, District Munsif of Palghat, in small cause suit No. 839 of 1892.

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

Mahadeva Ayyar for petitioners.

Barclay, Morgan & Orr for respondent.

JUDGMENT.—Under section 72 of the Indian Railways Act, the responsibility of the Railway Company for loss of goods delivered to be carried by the Railway is, subject to the provisions of that Act, that of a bailee under sections 151, 152 and 161 of the Indian Contract Act. Under section 76 of the former enactment, it is not necessary for the plaintiffs to prove how the loss was caused. Act III of 1865, sections 8 and 9 are declared by section 72 not to affect the responsibility of the Railway Company as defined by the latter section. The plaintiffs must show in the first instance the alleged loss or deficiency, and then the Railway Company will be bound to show that the loss occurred under circumstances which would exempt a bailee from responsibility for it.

The District Munsif finds that the plaintiffs' allegation that the bags of pepper were cut open and their contents were extracted whilst they remained in the custody of the Railway Company is not proved. Adverting to the several possible causes of the loss on which the defendant relied, he finds that they are not made out, but as regards the carelessness of the weighing clerks, he does not record a distinct finding. He eventually dismisses the suit on the ground that the plaintiffs did not prove their allegation that the bags of pepper were cut open and their contents extracted. The District Munsif has not tried this suit with reference to the requirements of the Railway Act and recorded distinct findings as to whether the quantity delivered was proved to be what is alleged in the plaint, or whether the quantity entered in the forwarding note in excess of the quantity delivered is due to a mistake on the part of weighing clerks, and as to whether the Railway Company has proved any ground upon which they can be exonerated from liability as bailees. He will submit distinct findings on the questions mentioned above upon the evidence on record within three weeks of the re-opening of the Court after the Christmas vacation, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

APPELLATE CIVIL.

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

MARIAN PILLAI AND OTHERS (DEFENDANTS NOS. 1, 5 AND 6), APPELLANTS,

v.

BISHOP OF MYLAPORE AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1894. July 23, 24. August 3.

Dharmakartas or headmen of a Roman Catholic Church—Legal powers thereof.

The appointment of a committee of headmen or dharmakartas in a Roman Catholic Church by the Bishop to assist the vicar in the secular affairs of the church gives the members of such committee no right to close the church or oust the vicar, and still less to appoint a priest not under the discipline and obedience to the Church of Rome.

APPEAL from the decree of Shephard, J., sitting on the original side of the High Court in civil suit No. 48 of 1891.

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

Shephard, J., gave judgment for the plaintiffs, and the defendants preferred this appeal.

Mr. *W. Grant* for appellants.

Mr. *Kernan* and *R. F. Grant* for respondents.

JUDGMENT.—The church which is the subject of dispute is called the Church of the Blessed Virgin Mary of Assumption, and is situated in Big Parcherry in Black Town. It appears to have been built about 1640, and in the list of Roman Catholic Churches (exhibit C) it is described as supported by the See of Saint Thomé and by private contributions. There is no endowment, and as far as can be gathered it was built by Native Christians with the assistance of a Mr. D'Souza, a rich Portuguese merchant. There appear to have been quarrels from time to time about its management, but for a long time—at any rate more than a century—it has been within the jurisdiction of the Bishop of Mylapore. At the time of the concordat between the Pope and the King of Portugal in 1886, it was placed within the territorial jurisdiction of the

* Original Side Appeal No. 33 of 1893.

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Archbishop of Madras. But, subsequently by a decree of 1887 it was transferred back again to the jurisdiction of the Bishop of Mylapore.

The present suit is by the Bishop of Mylapore and the vicar of the church. It appears that the defendants who style themselves church-wardens or dharmakartas—they claim to be hereditary dharmakartas—have taken forcible possession of the church and its property. They claim a right to dismiss the vicar, to appoint a schismatic priest, to exclude the Bishop of Mylapore and the present vicar from the church at their pleasure, and in fact they maintain that the proprietary right of the church is vested in them, and that the building is their own property.

It is not denied that for 250 years the church has been used for the purpose of divine worship according to the doctrine and discipline of the Church of Rome. Not a scrap of evidence exists to show that defendants are proprietors of the building in the sense that they might devote it to any other use than that for which it has been dedicated since it was built. Nor is there any evidence to show that defendants or any of them have succeeded by hereditary right to the office of church-wardens or dharmakartas. There is no evidence of endowment or of the constitution of a trust, and if the defendants are wardens and trustees of the church, it is manifestly absurd to allege that they in such capacity are at liberty to use the property entrusted to their care for purposes not only inconsistent with, but antagonistic to the objects of the trust. If, therefore, the defendants are church-wardens, the Court would be justified in removing them for such acts as seizing the church by force, expelling the vicar, repudiating the ecclesiastical authority of the bishop, and claiming the right to appoint a schismatic priest. But in order satisfactorily to determine the rights of the parties, it is necessary to consider whether the defendants are dharmakartas at all, and, if so, what are the limits of their powers. It is evident that for more than a century—at any rate from 1792—some of the Native Christians, under the designation of headmen, dharmakartas or directors, have been associated with the priest in charge in matters relating to the upkeep of the fabric and the keeping of the accounts of the church. It is not denied by the plaintiffs that there has been such a committee of directors; but it is contended that these headmen or directors have been appointed by the bishop to assist the vicar,

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and that they are in no sense proprietors of the church, and no trust property is vested in them.

Exhibit B is an edict issued by the then Bishop of Mylapore on the 10th August 1792. It shows that in earlier times, when the church was under the authority of the Capuchins, the superior of that order was at liberty to nominate directors subject to the approval of the Bishop of St. Thomé. The edict goes on to recite that various misappropriations and peculations have been committed by different headmen, amounting in all to 1,974 pagodas, which sum is ordered to be recovered from them. Seventeen directors are appointed for the functions of the said chapel, and it is provided that in the event of a vacancy by death or other cause, the superior shall nominate any director for the approval of the bishop. The care of the money received by subscriptions, &c., is vested in the superior, the president of the committee, and two of the headmen, and it is provided that disputes shall be settled by the body of the directors, whose decision, however, shall not be effectual if not in conformity with the opinion of the reverend superior.

The position of the directors as shown in this document is consistent with that shown in exhibit O. This is a petition presented to the Episcopal Governor of Mylapore by the Pariahs of Big Parcherry, dated the 27th May 1817, and the order thereon. In the petition the Pariahs state that by a special miracle they have obtained possession of the church from the Reverend Jaao Fidelis, and in order that the Christians may not be deprived of divine worship, the petitioners, as dharmakartas of the church and describing themselves as "regularly appointed by the Bishop of "St. Thomé and by your Lordship," pray that the church may be re-opened for mass and divine service. In the order dated the 29th May 1817 the Episcopal Governor gives a certificate authorising the opening of the church and appointing a vicar for the same.

Exhibit V is a letter from the Vicar-General of St. Thomé, dated the 9th October 1871, cancelling a rule that had been issued by the directors of the church and ordering that the rule which had been previously in force shall be observed. This letter is addressed to Marian Pillai and other dharmakartas of the church and shows that the discipline which was existent in 1792 and 1817 was still observed. This pastoral letter refers to an arrangement

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for the conduct of church affairs dated the 30th June 1838 which had been made by Bishop Texeira, but this document was not produced. A document which was alleged to be a true copy of that arrangement was produced by the defendants, but we will consider this later on in dealing with the defendants' documents. Exhibit L is another pastoral letter from the same Vicar-General, dated the 4th July 1872, giving directions to the headmen regarding the monthly meeting and the income of the church. Exhibit Q is a letter, dated the 25th January 1873, addressed by Marian Pillai as church-warden to the Vicar-General complaining of the conduct of the vicar and his ecclesiastical superiors and claiming that beyond performing the services of the church the vicar has no further power, but that the administration of it is vested in the church-wardens. Upon this letter the Vicar-General has endorsed the following order: "I do not acknowledge any authorized "church-warden in the Church of the Blessed Virgin Mary of "Assumption, Big Parcherry, which was by mutual consent of the "headmen and dharmakartas put in 1840 under the control of the "prelates of the Bishopric of St. Thomé for onerous title besides the "present headmen, president confirmed by me and dharmakartas "who obey my orders." Two of the documents produced by the defence, exhibit XXI, dated the 5th January 1831, and exhibit XIX, dated the 14th November 1847, go to confirm the contention of the bishop as to the position and duties of the headmen, president and directors of Mathuranaiyagiammal's church.

Passing now to the documentary evidence adduced by the defendants, we find that it is of two kinds, first, documents adduced in order to prove that the ecclesiastical authorities have admitted the claims made by the defendants, and, secondly, documents from which it may be shown that defendants have asserted their rights.

In the first class are exhibits VI, IV and VIII. Exhibit VI purports to be a Tamil translation of the agreement of the 30th June 1838 authenticated in 1871 by Father Amarante, Vicar-General of Saint Thomé, which it is said was furnished to the headmen, together with letter IV, in which they were told that the original had been sent to the Archbishop of Goa. The genuineness of both these documents is denied by the plaintiffs, and the learned Judge has found that they are not proved to be genuine. We may observe, in the first place, that exhibit VI purports to be a copy only; no reason is assigned why the original should not have

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been procured either from the archives of the Bishop of Mylapore or from those of the Archbishop of Goa. Nor is it clear why defendants themselves should not have made and kept a copy of the original document before transmitting it to the Vicar-General. The learned Judge has set out his reasons for discrediting the document. It is ungrammatical and almost untranslateable, and its alleged contents are such as to raise a very strong presumption against its genuineness. Bearing in mind the high state of discipline always maintained in the Roman Catholic Church, it is inconceivable to us that a bishop of that church should really bind himself, in the event of his failing to follow the regulations of headmen appointed by himself, not only to forfeit his interest in the church, but to recall the vicar appointed by him. We have no hesitation in saying that the internal evidence of the letter is to us conclusive against its genuineness. Exhibit VIII is a letter addressed to Marian Pillai by the vicar acknowledging receipt of the key of the harmonium and informing him that on his transfer from the church, he, the vicar, will return it. The letter concludes with the words "and will subject the rules of your church." The contention of the plaintiffs is that these words are an interpolation, and the learned Judge has so found. We agree with him for the words added are neither grammar nor sense.

Finding then that exhibit VI is unproved, we find no trace of assumption of proprietary right in the church by the dharmakarthas until the letter (exhibit Q) in 1873, and that claim was then repudiated by the Vicar-General. The next occasion on which we find it brought forward is in 1886, and on that occasion it was rather hinted at than distinctly stated. The year 1886 was, as we have before mentioned, the year in which the concordat was concluded between the Pope and the King of Portugal. Exhibit XVI is a petition addressed by the church-wardens and congregation of this church to His Most Faithful Majesty the King of Portugal, in which the petitioners set forth their objections to the territorial boundaries fixed by the concordat and their strong attachment to the See of St. Thomé, whose jurisdiction over them, they pray, may be maintained. But the last paragraph contains a hint that if the prayer be not granted, the petitioners may not submit themselves to the orders of the Pope and the King. It is stated that should the five churches be possibly made over to the Irish missionaries, the members of the said churches will be under

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the painful necessity of seeking other redress. As we understand these words it is hinted that petitioners may have recourse to the Courts in British India to avoid submission to the authority of the Pope and of His Majesty. This was followed on the 17th January 1887 by a letter (exhibit XXVIII) from Marian Pillai to the Vicar-General in which the same threat is repeated. Marian Pillai there states he cannot resist the removal of the priest, but he adds "you must know that any interference with the church and "its property will be legally proceeded with. For this I must "inform you that as soon as the orders for the removal of the "priest are known here the church will be closed." Whether any action would have been taken upon these threats it is impossible to say, but the claims of the dharmakarthas were not at that time repudiated by the Mylapore Mission, possibly because, if the transfer was carried out, their control and authority exercised by them would have passed to the Archbishop of Madras. We find, however, from exhibit XXIX, that the petition was successful and the church was re-transferred to the jurisdiction of the Bishop of Mylapore. The conclusion we have come to, therefore, is that the documents put forward to show the admission of the defendants' claim of right by the Mylapore Mission are not proved to be genuine, and that the evidence only proves there has existed for a long time a committee of directors appointed by the bishop and permitted to choose a president from among themselves, but whose orders were subject to the control of the bishop and the vicar.

It appears to have been the duty of these headmen to assist the priest in the secular affairs of the church, in return for which they were allowed certain advantages in the payment of half-fees for marriages, funerals and other ceremonials. We agree with the learned Judge that the appointment of such a committee could give the members thereof no right to close the church or to oust the vicar, and still less to appoint a schismatic priest not under discipline and obedience to the Church of Rome.

We dismiss the appeal with costs.

Branson & Branson, attorneys for plaintiffs.

Pedroza, attorney for defendants.

APPELLATE CIVIL.

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

CHAIRMAN, ONGOLE MUNICIPALITY (DEFENDANT), PETITIONER,

v.

MOUNSEY (PLAINTIFF), RESPONDENT. *

1894. March 13, 14.

District Municipalities Act (Madras)—Act IV of 1884, s. 55—Profession tax—What amounts to an exercise of profession or the holding of office under the section.

An officer, whose head-quarters are within a Municipality, does not *ipso facto* exercise his profession or hold such office or appointment within the Municipality so as to render himself liable for the payment of profession tax under Madras Act IV of 1884. Accordingly an officer who is not personally present at his head-quarters in the course of duty for a period of sixty days in the half-year is not liable for the tax under section 55 of the Act.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of V. Subrahmanyam Garoo, District Munsif of Ongole, in small cause suit No. 202 of 1892.

The facts of this case appear sufficiently for the purpose of this report from the judgments of Muttusami Ayyar and Best, JJ. The District Munsif decreed in favour of the plaintiff, and the defendant preferred this appeal.

Krishnaswami Chetti for petitioner.

Mr. *Brown* for respondent.

MUTTUSAMI AYYAR, J.—This was a suit to recover back the sum of Rs. 25 which was illegally collected by defendant from plaintiff as profession tax due by him to the Municipality for the year 1891–92. During that year, plaintiff held the office of Sub-Collector of Nellore. Defendant is the Chairman of the Municipality in the town of Ongole which is the head-quarters of the Sub-Collector. His office buildings are at Ongole, but it has been found by the District Munsif, that during the year 1891–92, he resided at Ongole and did his work there, except for 22 days in the first half, and for 20 days in the second half of the year. It is in evidence that he was appointed as the Acting District Judge of

* Civil Revision Petition No. 747 of 1892.

Salem on the 15th June, and reverted to his appointment as Sub-Collector on the 19th September. It is also in evidence that he obtained permission to hold his office at Nellore for two months from October. It is clear then that save for the forty-two days mentioned above, he was in circuit and did his work outside Ongole. It appears, however, that some clerk was left at the head-quarters when the Sub-Collector wa sin circuit, and that the whole office establishment did not accompany him. The question is, whether upon these facts, plaintiff is liable to pay profession tax under section 55, Act IV of 1884. The material words "hold office or "appointment within the Municipality" mean carrying on business there as the holder of the particular office. The intention was to place public servants like the plaintiff in the same position in which others are, who exercise their profession within the municipal limits. It is the nature of plaintiff's duty often to go out on circuit, and if urgent work outside the Municipality requires his presence there for about six months, it cannot be said that he still works within the municipal limits. The cause of his liability is his participation in the benefit and convenience conferred by the Municipality upon those residing within the municipal limits. By section 59 plaintiff is exempted from liability if he does not hold his office for sixty days or more in any half-year. The contention that wherever he may do business as Sub-Collector, he must be presumed to carry on such business at his head-quarters is one to which I cannot accede as sound within the meaning of the Municipal Act, for, under that exactment, it is an essential condition of liability that the profession should be exercised within the municipal limits. The decision of the District Munsif is right and this petition must be dismissed with costs.

BEST, J.—The only question for decision in this case is as to the meaning of the words "exercised such calling or held any such "office or appointment within the Municipality" as used in section 55 of the District Municipalities Act No. IV of 1884 (Madras).

It is conceded on behalf of the petitioner, the Chairman of the Municipality of Ongole (in the Nellore District), that it is only in case of the calling having been exercised or office or appointment held within the Municipality for a period of not less than sixty days within a half-year that the tax is payable; and it is not denied that during each of the half-years in question Mr. Mounsey, the counter-petitioner, did not personally exercise his calling or

hold office within the Municipality for the minimum period of sixty days. It is contended, however, that as Ongole is the head-quarters station of the Sub-Collector of Nellore, and as Mr. Mounsey held the appointment of Sub-Collector for more than the minimum period in each of the half-years, he is liable to pay the tax. The question, therefore, is whether an officer, whose head-quarters are within a Municipality, is to be considered *ipso facto* as exercising his profession or calling, or holding his office or appointment, within such Municipality, although as a matter of fact he was absent from the Municipality and discharging the duties of his office elsewhere. If the subordinates left in charge of the office at Ongole could be held to be doing the Sub-Collector's work, there would be ground for holding the contention on behalf of the Municipality to be valid, on the principle of *qui facit per alium facit per se*. But the Sub-Collector's duties cannot be delegated by him to be done by his clerks. His duties must be discharged by himself alone, and that at the place where he happens to hold his office from time to time. This may be anywhere within his division, or even out of it, if sanctioned by the proper authorities. As appears from the evidence in the present case, Mr. Mounsey was absent for some time of the period in question in the Salem district as Acting Judge of that district; for a portion of the period he held office at Nellore, with permission obtained from the Collector, and during other portions he was out on famine duty. He consequently held his office in Ongole for not more than twenty-two days during the first of the two half-years in question and for even a shorter period during the second of the two half-years.

I think that the District Munsif is right in holding that, under these circumstances, Mr. Mounsey was not liable to pay profession tax to the Ongole Municipality for either of the two half-years in question.

I would therefore dismiss this petition with costs.

APPELLATE CIVIL—FULL BENCH.

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

1893. September 25. December 1. 1894. February 28. March 1, 6.

RAJAH OF VENKATAGIRI (DEFENDANT), APPELLANT,

v.

NARAYANA REDDI (PLAINTIFF), RESPONDENT.*

Registration Act—Act III of 1877, *s.* 49—*Suit for damages for breach of contract to execute a lease—Production in evidence of an unregistered kabuliat to prove contract.*

Defendant entered into an agreement with the plaintiff to lease a certain property to him. The plaintiff delivered the kabuliat to the defendant and was put into possession of the property. The defendant did not execute the cowle and did not register the kabuliat, and subsequently improperly deprived the plaintiff of his possession. Plaintiff brought a suit for damages for breach of contract:

Held, on a question as to whether the kabuliat was admissible in evidence having regard to section 49 of Act III of 1877, since it had not been registered, that, since the plaintiff's action was not founded on an alleged title under a lease granted by the defendant, but was an action for damages for breach of the contract to execute the lease, the kabuliat was admissible in evidence to prove the contract. *Hurjivan Virji* v. *Jamsetji Nowroji* (I.L.R., 9 Bom., 63) distinguished.

APPEAL against the decree of C. Ramachendrier, District Judge of Nellore, in original suit No. 30 of 1890.

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

The District Judge found in favour of the plaintiff, and the defendant preferred this appeal.

Mr. *Wedderburn*, Mr. *Brown*, and *Krishnasami Chetti* for appellant.

Pattabhirama Ayyar for respondent.

This appeal coming on for hearing before the Chief Justice and Mr. Justice Davies, the Court made the following order of reference to the Full Bench.

ORDER OF REFERENCE TO THE FULL BENCH.—This was a suit for damages sustained by plaintiff in consequence of the defendant having cancelled a kararnama. The facts of the case are as follow: The plaintiff put in a darkast in April 1889, offering to take in izara two villages in defendant's zamindari for a term of five years from the 1st July 1889 to 30th June 1893 at a yearly rental of Rs. 1,400. This offer was accepted by the Dewan on 24th October 1889 (exhibit IV, and see also exhibit J). On the 30th November 1889 the plaintiff executed and delivered to the defendant's agents the kabuliat (exhibit VI), and an hypothecation bond for securing the first year's rent (exhibit VII), and was, on the same day, put in possession of the villages. On the 28th April 1890 the plaintiff gave notice to the defendant (exhibit O) to register the plaintiff's kabuliat (exhibit VI), and its counterpart, the cowle (exhibit V). This latter document has not been executed by defendant. The defendant took no notice of this request, but a few days afterwards cancelled the lease. This cancellation, the District Judge has found, was made without sufficient cause, and we agree with him.

* Appeal No. 103 of 1892.

It will be observed that exhibits IV, V, VI and VII were produced and filed on behalf of the defendant. At the hearing of the appeal the defendant's counsel objected that these documents could not be considered for any purpose by the Court, as they were unregistered (section 49 of the Registration Act). No issue was raised on this point in the Lower Court. The point referred to the Full Bench is,—can the exhibits J, IV, V, VI and VII be considered to ascertain the nature and terms of the contract made between the plaintiff and defendant for the purpose of assessing the damages caused to the plaintiff by the wrongful act of the defendant or for any other and what purpose.

This appeal coming on for hearing before the Full Bench, the Court delivered the following judgment.

JUDGMENT:—In the course of the argument it was agreed that the only document as to which any question of registration arises is exhibit VI, the kabuliat signed by the plaintiff and given to the defendant.

The question is whether that document, although not registered, can be admitted in evidence in support of the plaintiff's claim. If the plaintiff's action was founded on an alleged title in virtue of a lease granted by the defendant, and his case were that as lessee he had been unlawfully ejected from the demised land, there can be no doubt that the document VI could not be admitted in

evidence. The plaintiff would then be seeking to use it as evidence of a transaction affecting immovable property. But it is clear that that is not the case made in the plaint. The plaint sets out the agreement for a lease of the village which was to run from fasli 1299 and last for five years. It is stated that certain things were done in pursuance of the agreement, among other things, that the plaintiff was put in possession. Then it is charged that the defendant did not register the kabuliat and improperly deprived the plaintiff of possession. The cause of action alleged is the failure on the part of the defendant to act up to the karar (*i.e.*, the agreement for a lease), and the improper resumption of the village.

It is clear that the plaintiff does not assert his title under the incomplete lease, and that he does complain of the breach of contract on the part of the defendant in refusing to register the kabuliat and give him a cowle, and also in disturbing his possession. The act of the defendant in thus disturbing the plaintiff's possession is merely a part of the defendant's conduct which the plaintiff complains of as a breach of the contract made with him. It is not an essential part, for, if the plaintiff had never been in possession, he would have had his right of action.

Having regard to the language of section 49 of the Registration Act, we think there is no doubt that the kabuliat, although not registered, is admissible in evidence to prove the contract. We do not think it is necessary to refer to the cases cited except the case of *Hurjivan Virji* v. *Jamsetji Nowroji*(1), as to which it has to be observed that although the plaint included a prayer for damages, the judgment makes no reference to it. The decision cannot, therefore, be cited as an authority against the admissibility of a document in this case.

In our opinion the answer to the question referred should be that the document may be admitted to prove the contract and the damages occasioned by the breach of it.

This appeal coming on for final disposal after the expression of the opinion of the Full Bench, the Court delivered the following judgment.

JUDGMENT:—The undisputed facts in this case are that an offer made by the plaintiff to the Dewan of the defendant to take on

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

lease the village of Valamaid attached to the defendant's zamindari for a term of five years from the 1st July 1889 to the 30th June 1893 (fasli years 1299 to 1303) at a yearly rental of Rs. 1,400 was accepted by the Dewan (exhibit I) on the 24th October 1889. On the 30th of November following the plaintiff, as directed, (exhibit IV) executed and delivered to the defendant's agents the kabuliat (exhibit VI), and an hypothecation bond for securing the first year's rent (exhibit VII), and was, on the same day, under previous orders of the Dewan (exhibits J and R) put in possession of the village (exhibits G and L). Disputes subsequently arose between the plaintiff and the ryots of the village, the plaintiff complaining that the ryots were, at the instigation of the village karnam, refractory (exhibit XXI), and the ryots complaining that the plaintiff was oppressing them (exhibits I and II), the result of which was that the plaintiff's lease was cancelled by beat of tom-tom in the village. A few days previously, that is, on the 28th April 1890, the plaintiff had given notice to the defendant (exhibit O) calling on the defendant to have the plaintiff's kabuliat IV and its counterpart the cowle (exhibit V), which had been prepared on the 30th November, registered, to which demand, however, no attention was paid. Those documents with exhibit VII accordingly remain unregistered to this day—the cowle indeed never having been executed. The plaintiff now sues, by way of damages, for the loss he had sustained and would sustain by the defendant's failure to carry on the contract of lease.

The defendant contended, in the Lower Court, that the contract was not completed and was inoperative, as the lease had not been registered, and that the plaintiff had forfeited the benefit of the lease by his misconduct. The District Judge found the contract was complete and that plaintiff had not by any conduct on his part worked a forfeiture of the lease, and awarded plaintiff as damages for the breach of contract Rs. 3,470 as against Rs. 4,000 claimed by him.

The defendant's appeal is really urged on but two grounds. It could not be contended on the facts as already set forth that the contract had not been concluded, especially when plaintiff had actually been put into possession under it, and on the merits it could not be shown that plaintiff had committed any act coming within the forfeiture clause of the lease. He had acted within his rights in letting out fresh land for cultivation, which was in sub-

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stance the ryot's grievance against him. There was no proof that he unnecessarily harassed them.

The chief ground of appeal then is that it was by plaintiff's own default that the lease was not registered, and not being registered, evidence of its terms was inadmissible, and the other ground is that the damage decreed were excessive and too remote.

The first of these points was not made an issue in the Lower Court, and consequently was not argued there. The argument put forward here is that the plaintiff could have registered the document G as embodying the terms of the lease, or he could have compelled the registration of the kabuliat K by taking out process under sections 36 to 39 of the Registration Act, and, by thus failing to get the lease registered, evidence to prove its terms cannot be received according to section 49 of the Act. The prohibition in section 49 is that no document required to be registered (and, in this case, the lease being for five years, undoubtedly required to be registered) shall be received as evidence of any transaction affecting immovable property. The real nature of this suit is for compensation for disturbing the plaintiff in his possession, and doing the necessary acts to entitle him to possession, such, for example, as not executing the counterpart of the lease and duly registering it; so that the non-registration is itself part of the plaintiff's cause of action. It may be that to save himself he could have adopted one of the courses suggested to effect registration, but that would not absolve the defendant from his liability, because the defendant's was the primary liability. The plaintiff has done all that it lay on him to do. He had executed his muchilika and handed it to the defendant's agent. It was then left for the defendant to execute the counterpart and hand it to the plaintiff. The proper answer, however, to the argument advanced is that this is not a suit brought upon the kabuliat and cowle (exhibits VI and V), which, it should be noticed, were not filed for plaintiff as part of his case but by defendant, but a suit upon a breach of an implied contract by the defendant to do that which it was necessary for him to do in order to give effect to the agreement he had entered into with the plaintiff. The other unregistered documents that have been put in showing the terms of the lease, have not been put in to enforce the lease, in which case they would not have been admissible as evidence as they would have been evidence of a transaction affecting immovable

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property, but they must be deemed to have been put in simply as evidence of the character of the breach of agreement by the defendant, and as a basis for calculating the measure of damages, neither of which things can, in the least, affect the land lying in the village of Valamaid. The first objection must, therefore, be disallowed. We, however, thought it right to refer this point to a Full Bench, as it has never been directly raised and decided by this High Court. In regard to the other objection as to the damages decreed, there is no ground for holding that the District Judge is wrong either in his findings of fact or the principles he has adopted in assessing damages. He finds, on sufficient materials, that the plaintiff could have made on an average an annual net profit of Rs. 694 on his lease, and it is five times that amount for the five years' term of the lease that he has rightly decreed to plaintiff. The plaintiff was as clearly entitled to prospective as to past profits in a suit for damages.

The appeal accordingly fails, and it is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

1894. Feb. 2, 7.

ABBOY CHETTI (DEFENDANT), PETITIONER,

v.

RAMACHANDRA RAU AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Promissory note—Negotiation—Whether an assignment by the payee of all his property including the note amounts to negotiation in the absence of endorsement.

A promissory note payable to payee or order cannot be negotiated by the mere assignment by the payee of all his property including the note. *Pattat Ambadi Marar* v. *Krishnan* (I.L.R., 11 Mad., 290) followed.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of S. Krishnasami Iyer, District Munsif of Erode, in small cause suit No. 975 of 1891.

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

* Civil Revision Petition No. 666 of 1892.

ABBOY CHETTI v. RAMA-CHANDRA RAU.

The District Munsif decreed in favour of the plaintiffs, and the defendant preferred this appeal.

Mahadeva Ayyar for petitioner.

Pattabhirama Ayyar and *Venkatarama Sarma* for respondents.

JUDGMENT.—This case is governed by the decision in *Pattat Ambadi Marar* v. *Krishnan*(1), wherein it was held that an assignment by an agreement in writing of all the assignor's property, including a promissory note, was held not to be sufficient to sustain a suit by the assignee on the note in the absence of an endorsement. The ground of decision is that a promissory note cannot be negotiated by the mere execution of a deed of assignment. The right of suit did not pass to the plaintiffs by operation of law, for the company of which defendant was a member was wound up, and it is admitted that the plaintiffs' firm derived its right from assignment by exhibits B and C. The promissory note purports to be payable to the payee or order, and it is not denied that it is a negotiable instrument. I set aside the decree of the District Munsif, and direct that the suit be dismissed with costs.

APPELLATE CIVIL—FULL BENCH.

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

1891. December 11. 1893. November 24. 1894. January 26. March 7.

RANGASAMI NAICKAN (PLAINTIFF No. 1), APPELLANT,

v.

VARADAPPA NAICKAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure—Act XIV of 1882, *s.* 539—*Whether a suit to remove a trustee to a charitable trust lies under the section.*

A suit to remove a trustee to a charitable trust does not lie under s. 539 of the Code of Civil Procedure. *Narasimha* v. *Ayyan Chetti*(2), followed.

Per Shephard, J.—The language of s. 539 is in part borrowed from 52 George III., cap. 101 (Sir Samuel Romilly's Act) and the decisions upon that statute are in a measure reproduced in the section. Section 539 should, accordingly, be construed in the light of the decisions on that statute, so far as they are applicable

(1) I.L.R., 11 Mad., 290. (2) I.L.R., 12 Mad., 157. * Appeal No. 66 of 1891.

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to the language of the section, and the statute having from the first been held to be inapplicable to cases in which the hostile removal of a trustee is required, s. 539 is likewise inapplicable to such cases.

APPEAL against the decree of H. H. O'Farrell, Acting District Judge of Trichinopoly, in original suit No. 49 of 1889.

The facts of the case appear sufficiently for the purpose of this report from the judgments of the Full Bench of the High Court.

Mr. *D'Rozario* for appellant.

Ramachendra Rau Sahib for respondents, Nos. 1 to 5, 7, 8, 10, and 11.

This appeal coming on for hearing before the Chief Justice and Mr. Justice Wilkinson, the Court made the following order of reference to the Full Bench.

ORDER OF REFERENCE TO THE FULL BENCH.—*Narasimha* v. *Ayyan Chetti*(1) was dissented from by two of the Judges who took part in *Subbayya* v. *Krishna*(2). Two other Judges have followed the opinion of the majority of the Judges in *Subbayya* v. *Krishna*(2) in two unreported cases, original suit appeal No. 4 of 1891 and regular appeal No. 199 of 1887. Considering the difference of opinion that exists on the point, we resolve to submit to a Full Bench the question "whether under section 539 of the Civil Procedure Code a suit to remove a trustee will lie."

This appeal coming on for hearing before the Full Bench, the Court delivered the following judgments.

COLLINS, C.J.—The question referred to the Full Bench for decision is "whether under section 539 of the Civil Procedure Code a suit to remove a trustee will lie."

There has been a great diversity of opinion amongst the Judges of the Madras High Court on this point. In *Narasimha* v. *Ayyan Chetti*(1), Mr. Justice Kernan and Mr. Justice Wilkinson expressed doubts whether section 539 empowered a Court to remove a trustee, whilst in *Subbayya* v. *Krishna*(2), Mr. Justice Muttusami Ayyar in a most exhaustive judgment reviewed the statutes and cases both English and Indian relating to the subject in question and came to the conclusion that section 539 did not authorize the removal of a trustee. Best and Weir, JJ., took the opposite view and held that a trustee could be removed in a suit brought under this section. It appears to me that section 539 of the Civil Procedure

(1) I.L.R., 12 Mad., 157. (2) I.L.R., 14 Mad., 166.

Code was drafted on the lines of 52 George III., cap. 101, commonly called Romilly's Act, and the draftsman must have been well aware that it had been held that the Act did not apply when the question arose as to whether a trustee should be adversely dismissed for misconduct. Is it probable, therefore, that if the Legislature intended the section to apply to a case where the removal of a trustee was in question that specific relief would not have been mentioned. The section enumerates the specific reliefs that are given and the first is appointment of new trustees under the trust. We are, however, asked to add words to the section and to say that the Legislature intended to give the power to remove adversely a trustee, although the Legislature refrained from saying so. The words "granting such further or other relief as the nature of the case may require" cannot, under the recognized rules of construction, be said to give a Court the power to remove a trustee..

The words of a statute cannot be construed contrary to their meaning as embracing or excluding cases merely, because no good reason appears why they should be excluded or embraced: see *Pike* v. *Hoare*(1), *per* Lord Northington, *per curiam* in *Dean* v. *Reid*(2). The duty of the Court is not to make the law reasonable, but to expound it as it stands according to the real sense of the words:—see *per Cresswell*, J., in *Biffin* v. *Yorke*(3). It is far better, says Lord Campbell in *Coe* v. *Lawrence*(4), that we should abide by the words of a statute than seek to reform it according to the supposed intention.

I agree with the dictum expressed by the Judges in *Narasimha* v. *Ayyan Chetti*(5), and in the judgment of Mr. Justice Muttusami Ayyar in *Subbayya* v. *Krishna*(6) and answer the question referred to the Full Bench in the negative.

MUTTUSAMI AYYAR, J.—I adhere to the opinion expressed by me in the previous decision.

SHEPHARD, J.—The question is whether under the provision of section 539 of the Civil Procedure Code two or more persons can, with the consent of the Advocate-General, institute a suit for the removal of a trustee on the ground of fraudulent and improper conduct.

(1) Eden, 184.
(2) Peters, 524.
(3) 6 Scott's N.R., 234. s.c., 5 M. & Gr., 428.
(4) 1 E. & B., 516.
(5) I.L.R., 12 Mad., 157.
(6) I.L.R., 14 Mad., 186.

The terms of the section with reference to the relief which may be obtained are not merely general. The section particularizes the points to which the decree may be directed:—

(*a*) appointing new trustees under the trust;
(*b*) vesting any property in the trustees under the trust;
(*c*) declaring the proportions in which its objects are entitled;
(*d*) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged;
(*e*) settling a scheme for its management, or granting such further or other relief as the nature of the case may require.

The section is significantly silent with regard to that most important head of relief in connection with trusts, viz., the removal of fraudulent trustees. The contention, therefore, that the section was intended to comprehend suits having that end in view can only be rested on the ground that by necessary implication jurisdiction to entertain such suits was conferred by the section. Apart from this section there is no doubt that in the Presidency Town it was competent to the Advocate-General to initiate proceedings either for the purpose of removing a trustee or for the purposes mentioned in the section, including that of having a scheme of management settled by the Court, as was done in the Patchiappa case. The powers of the Advocate-General in this respect to take action for the protection of charitable trusts are the same as those which the Attorney-General in England possesses: *Attorney-General* v. *Brodie*(1). In the mufussil it was different. There was no public official who could take action in the Courts with reference to trusts and it was probably doubtful whether the Mufussil Courts had jurisdiction with regard to trusts such as is undoubtedly given by the present section. At any rate no case can be found in which a Mufussil Court has exercised such jurisdiction.

This being the state of things, while no alteration of the law was required for the Presidency Town, for the provincial Courts with regard to charities in the mufussil, there was need that jurisdiction should be given to enable those Courts to deal more effectually with trust property. Whether the Legislature had any further purpose in view and intended that District Courts

(1) 4 M.I.A., 194.

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should grant relief generally with regard to such trusts in suits instituted by a public official or by interested persons with his consent is the question we have to determine. In favour of the construction of the section giving the Court this larger jurisdiction it may fairly be said that the case such as the present, in which the removal of the trustee is alleged to be required in the interests of the trust, is eminently one in which it might be thought that a power to invoke the aid of the Court should be given either to a public official or to persons interested in the trust. Legislation to that effect with reference to charities not of a religious character would be in harmony with the enactment already in force with regard to trusts of a religious character; for under the Act of 1863 it is competent to persons interested in a religious establishment, on leave of the District Court being first obtained but without joining as plaintiff any of the other persons interested, to bring a suit against the trustee who has been guilty of breach of trust and to obtain his removal from office or other relief.

It is incorrect to say that charitable trusts which are not within the Act of 1863 are left wholly unprovided for unless a general jurisdiction with regard to them is given by the section: see *Mohiuddin* v. *Sayiduddin*(1). As has been pointed out by two of the learned Judges in *Subbayya* v. *Krishna*(2), a jurisdiction to remove trustees has always been exercised by the Mufussil Courts. The remedy is not wanting altogether; but except in this section of the Code there is no provision of law empowering any public official to take action.

In the course of the argument stress was laid on the difficulties which would arise if the jurisdiction claimed is taken to be conferred by the section. It appears to me that no construction of the section is altogether free from difficulties. On the one hand if the section is to be restricted to proceedings not involving the removal of a trustee, it may be said that although the suit is launched upon an allegation of breach of trust and a breach of trust of a serious nature requiring the removal of the trustee may be proved, the District Court or the High Court, as the case may be, will have to stay its hand and remit the parties to an inferior Court to obtain the proper relief. Again, it would seem strange

(1) I.L.R., 20 Calc., 816. (2) I.L.R., 14 Mad., 199, 220.

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that the Legislature should think it necessary to restrict to the High Court and District Court the jurisdiction in such simple matters as appointing new trustees, for although there may be a prayer for the settlement of a scheme the jurisdiction is complete notwithstanding that there is no such prayer. Again, seeing that for the Presidency Towns no amendment of the law was required, it is difficult to understand why the Advocate-General was mentioned and why an alternative jurisdiction was given to the High Court. On the other hand it may be objected that there being already a jurisdiction in the Mufussil Court to remove trustees an enactment giving jurisdiction to certain Courts only in the same matter would be anamolous. It might lead to the most inconvenient results if a suit could be instituted under the section in the High Court and at the same time another suit under the old procedure in a District Munsif's Court. Passing from these consideration, from which in my opinion no conclusion can safely be drawn, I come to consider the other enactments with regard to the same subject matter which the Legislature had before them in 1877. In this country there was the Act of 1863 relating to religious endowments and containing the section already mentioned which gives a general jurisdiction to the Civil Court in the case of any breach of trust. In specifying the relief which may be granted, section 14 expressly mentions the removal of the trustee or other person incriminated. If in 1877 it was intended to give the District Court a similar jurisdiction in suits launched by persons interested in non-religious trusts, and in the section as originally framed the words 'or religious' do not appear, it is difficult to understand why all mention of this important head of relief, the removal of trustees, was not mentioned.

It is clear, however, that the language of the section was not borrowed from the Act of 1863 and that it was in part borrowed from the statute of George III known as Sir Samuel Romilly's Act. That being so, we are bound to have regard to the interpretation which has been put upon the latter Act—and the more so inasmuch as it appears that the decisions upon the statute are in a measure reproduced in the section of the Code. It is true that the circumstances under which legislation was required in England and in India were widely different. In England the ordinary mode of obtaining redress with regard to charities being by way

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of information exhibited by the Attorney-General, what was required was not a *forum* or a new jurisdiction but a new mode of invoking the aid of the Court. The statute is intituled "An "Act to provide a summary remedy in cases of abuses of trusts "created for charitable purposes" and it enables two or more persons to proceed by petition praying such relief as the nature of the case might require.

In this country what was required at least for the mufussil was the creation of a new jurisdiction. The chapter does not state that the jurisdiction is to be summary (compare title of chapter XXXIX) and I cannot agree that it was intended that the proceeding being by suit should have that character. (*See* per Weir, J., in *Subbayya* v. *Krishna*(1)). Notwithstanding these distinctions which may be drawn between the two enactments, I think we are bound to construe the language of chapter XL in the light of the decisions on the statute, so far as they are applicable to that language. The statute was from the outset held not to be applicable to cases in which the hostile removal of a trustee is required (*see* cases collected in Lewin on Trusts and Daniell, Ch. P., cap. XXXVIII) and a further Act had to be passed in 1853 (16 and 17 Vic., cap. 137), empowering the Court under certain circumstances on application made to order the removal or appointment of any trustee. When it is found that the Legislature with those statutes and the decisions on them and also with the Act of 1863 before them omitted all reference to removal of trustees, the inference seems to me irresistable that that matter was not intended to be brought within the scope of the chapter. General words, it is true, are used similar to those used in the statute, but those words must be read with the words that go before and cannot be taken to include a distinct and substantive head of relief. In my opinion a jurisdiction to remove trustees as it is not given expressly by the chapter is not given by necessary implication, and therefore the question referred to us must be answered in the negative.

This case coming on for final hearing, after the delivery of the opinions of the Full Bench, the Court delivered the following judgment

JUDGMENT.—In accordance with the opinion of the Full Bench, we must hold that the suit is not maintainable in the District Court. The plaint ought to have been returned. We must modify the decree accordingly. The appellant must pay the costs of appeal.

(1) I.L.R., 14 Mad., 216.

RANGASAMI NAICKAN v. VARADAPPA NAICKAN.

APPELLATE CIVIL.

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

LINGA REDDI (DEFENDANT NO. 4), APPELLANT,

v.

SAMA RAU AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

1893. December 13, 14. 1894. January 18.

Transfer of Property Act—Act IV of 1882, *s.* 68 (*c*)—*Mortgagee's right to sue for the mortgage money where he is kept out of possession by mortgagor's indirect conduct.*

Where a usufructuary mortgagee is unable to obtain possession of the mortgaged property owing to his mortgagor having executed a subsequent mortgage and placed the second mortgagee in possession, the first mortgagee may elect to sue at once for the money under section 68 of the Transfer of Property Act, instead of for possession of the land.

APPEAL against the decree of R. S. Benson, District Judge of South Arcot, in original suit No. 19 of 1890.

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

The District Judge passed a decree in favour of the plaintiff, and the fourth defendant preferred this appeal.

Bhashyam Ayyangar and *Krishnasami Ayyar* for appellant.

Pattabhirama Ayyar for respondents.

BEST, J.—The suit, out of which this appeal has arisen, was instituted by one P. Sama Rau (now first respondent) against Ranga Rao, his son Janakirama (a minor) and brother Ragava Rao (defendants 1, 2 and 3 respectively) as executants of the mortgage bond A (dated 10th July 1890), the other defendants in the suit being Linga Reddi (the present appellant) and three others holding prior mortgages over portions of the property mortgaged to plaintiff under the mortgage bond A.

Plaintiff's case was that of the Rs. 4,500 for which the mortgage bond A was executed, Rs. 3,000 were left with him

* Appeal No. 115 of 1891.

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for redemption of the prior mortgages, and for payment to other creditors of defendants 1 to 3, but that his attempts to discharge the prior mortgage debts were frustrated by the machinations of the fourth defendant (now appellant), who induced defendants 1 to 3 to execute to himself on the 16th September 1890 a usufructuary mortgage of the property for Rs. 2,750, and to put him in possession of the property. Hence plaintiff's suit to recover from defendants 1 to 3, and on the responsibility of the property mortgaged to plaintiff under A, a sum of Rs. 2,256 paid by him to those defendants and certain creditors of theirs, up to 10th October 1890, with Rs. 450 as damages. Defendants 4 to 7 were included as defendants in consequence of their being in possession of portions of the properties.

First defendant's plea was that it was owing to plaintiff's failure to pay off the other mortgages that he was obliged to make other arrangements. Second and third defendants also pleaded adversely to the plaintiff, but it is unnecessary to consider their pleas for the purpose of this appeal.

Fourth defendant pleaded that plaintiff had no right to recover the money from the plaint property, as exhibit A contained no pledge of the property. He also denied tender to him as alleged by the plaintiff. He further denied all knowledge of the payments alleged to have been made by plaintiff to, and on behalf of, defendants 1 to 3. He also denied the alleged collusion between himself and those defendants, and insisted on his right as prior mortgagee for a sum of Rs. 1,250 and also under the usufructuary mortgage bond of September 1890 for the further sum of Rs. 2,750.

It is unnecessary to state the pleas to the other defendants as the present appeal is by fourth defendant alone.

The District Judge has found that a sum of Rs. 2,181 was advanced by plaintiff to defendants 1 to 3 and is a valid mortgage debt, but that of the property mortgaged under A a portion had previously been sold to sixth defendant under exhibit XI, and that the land so sold must be excluded from liability for the debt due to plaintiff. As for the damages claimed, the District Judge held interest at 10 per cent. per annum on the amount found to have been paid by plaintiff to be a sufficient award. He, therefore, passed a decree against first and third defendants personally and against their shares of the mortgaged property for Rs. 2,181

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with interest thereon as above, second defendant's share being held liable only for a portion of the debt, and that only in case it is not satisfied out of the first and third defendants' shares; fourth defendant has been held jointly liable with first and third defendants for plaintiff's costs on the amount decreed to plaintiff, because the Judge found the litigation to be due to the intervention of fourth defendant who "induced first and third defendants to "abandon their mortgage to plaintiff and give him one instead."

The present appeal is, as already observed, by fourth defendant, the respondents being plaintiff and defendants 1 to 3.

The points urged at the hearing are—

(1) That as a usufructuary mortgagee, plaintiff is not entitled to sue for sale of the property.

(2) That the suit is premature, as under the mortgage bond A the money is not repayable till after the expiration of three years.

(3) That plaintiff is entitled to sue only for possession of the property and redemption of prior mortgages.

(4) That section 68 of the Transfer of Property Act is not applicable.

(5) That the amount claimed is excessive.

(6) That the damages cannot be made a charge on the property.

It is true that exhibit A allows three years for payment of the money, but the finding is that owing to appellant's machinations the plaintiff was unable to get possession of the property. Section 68 of the Transfer of Property Act provides that the mortgagee has a right to sue for the money (*inter alia*) where the mortgagee being entitled to possession of the property, the mortgagor fails to deliver possession to him or to secure the possession of it to him. No doubt in the present case the money for redemptions was left with the plaintiff, and the mortgagor had to take no active part in placing him in possession of the property, and consequently the case is not one coming within the letter of the section, but there can be no doubt it is within the spirit of the rule contained therein; and as it was owing to the combined action of the mortgagors and appellant, that the respondent (plaintiff) was unable to get possession of the property, the latter must be allowed to elect to sue at once for the money instead of for possession of

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the land, though no doubt a suit for possession was also open to him. I would, therefore, disallow the objections Nos. 1 to 4.

As to the fifth objection the Judge's finding is supported by exhibit L and the receipts referred to in paragraph 13 of the judgment.

As to the last objection, under the mortgage A, plaintiff was entitled to the usufruct of the land in lieu of interest at 10 per cent. per annum. It is this same interest that is awarded as damages. I think it has been rightly made a charge upon the property. As remarked by Romer, J., in the recent case of *Cradock* v. *The Scottish Provident Institution*(1), to constitute a charge in equity by deed or writing, it is not necessary that any general words of charge should be used. It is sufficient if the Court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security.

I would dismiss this appeal with costs.

Objection has been taken on behalf of first respondent (plaintiff), under section 561 of the Code of Civil Procedure, to the part of the decree which directs the property to be sold subject to the mortgages evidenced by exhibits IV, V, and VI. As these mortgages are of date prior to that under which this suit has been brought, the Judge's decree is correct. The mere fact of the amounts due under these mortgages being included in the mortgage bond VII executed to fourth defendant by defendants 1 and 3 subsequently to the execution of A is no reason for holding that A is unaffected by them.

I would, therefore, dismiss first respondent's objections also with costs.

MUTTUSAMI AYYAR, J.—I agree.

(1) 69 L.T.J. (N.S.), 380, 382.

APPELLATE CIVIL.

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

1894. April 3, 4.

RANGA RAU (PLAINTIFF), APPELLANT,

v.

BHAVAYAMMI (DEFENDANT), RESPONDENT.*

Evidence—Estoppel—Limitation of the doctrine in respect to a party suing as the representative of another—Stamp Act—Act I of 1879, s. 39—Whether secondary evidence of a lost document can be admitted on payment of penalty.

Where a person claims property as the representative of another, the doctrine of estoppel cannot apply to representations made by any one except that other person.

In the case of a lost document no penalty can be levied and secondary evidence admitted, for s. 39 of the Stamp Act presupposes that the document on which a penalty can be paid is forthcoming.

Kopasan v. *Shamu*(1) followed.

APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in original suit No. 39 of 1890.

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

The plaintiff preferred this appeal.

Rama Rau and *Bhashyam Ayyangar* for appellant.

Subramanya Ayyar for respondent.

JUDGMENT.—Appellant is the zamindar of Bobbili, and respondent's late husband, Sitaramaswami, was the sister's son of appellant's paternal grandfather. The property in litigation is the proprietary estate called Chilikala Jagannathapuram, and it has admittedly been in the possession first of Sitaramaswami and after his death in that of his widow, the respondent, from February 1862. In that year, appellant's paternal grandfather transferred the estate for valuable consideration to respondent's husband under the patta VI. Appellant brought the present suit to eject the respondent from that estate and to recover possession of it with *mesne* profits for three years, 1887 to 1889. Appellant's mother, Chellayammi, was the daughter of Gopayammi,

* Appeal No. 58 of 1893.

(1) I.L.R., 7 Mad., 440.

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who was the sister of appellant's paternal grandfather and wife of one Rajagopala Rao. The estate in dispute was first granted to Rajagopala Rao in 1848, and, on his death in 1856, his widow and the grantor applied to the Collector for its being registered in the name of the latter. The Collector accordingly registered the estate in the name of the grantor who, after continuing in possession for six years, transferred it for value under the patta VI to Sitaramaswami as stated above. The ground on which the appellant rests his claim is that the first grant to his maternal grandfather Rajagopala Rao was absolute and unconditional, that it is not true as stated by his paternal grandfather and maternal grandmother in 1856 (exhibits XVI and XVII), that the grant was subject to the condition that the estate was to revert to the grantor in the event of the grantee dying without male issue, and that the allegation made to that effect in 1856 was collusive and made in view to defraud the reversioner. He alleged that his maternal grandmother Gopayammi died in March 1872, that his mother died in May 1887, that he was adopted in February 1871 and attained his majority in 1881. It will thus be seen that appellant claims the estate as the daughter's son by adoption of Rajagopala Rao the grantee of 1848. The respondent resisted the claim on the ground that the grant to Rajagopala Rao was not absolute but conditional, that the estate reverted to the grantor on Rajagopal's death without male issue, that the transfer of 1862 to her husband was valid, and that the appellant's claim was barred by limitation. The Judge held that the grant of 1848 was conditional, and that, although the claim was not barred by limitation, the appellant was estopped from asserting that his paternal grandfather was not competent to transfer the estate under patta VI, and that the transfer was valid. The Judge accordingly dismissed the suit with costs. Hence this appeal.

We are unable to agree with the Judge that the doctrine of estoppel applies to this case. It cannot apply when the person making the representation was not the person as whose representative the plaintiff claims the property, and in the case before us the appellant claims the estate in the right of his maternal grandfather, and not of his paternal grandfather, who was the person that declared that he was competent to transfer it under the patta VI. This limitation of the doctrine of estoppel is mentioned not only in the case referred to by the Judge (*Syed Ameer Ali* v. *Syed Ali*(1)), but also by the Privy Council in *Syed Nurul Hossein* v. *Theosahai*(2). As to the question of limitation, the decision must depend on the further question whether the retransfer to the appellant's paternal grandfather was the result of collusion between him and his sister Gopayammi. Act XIV of 1859 was the law of limitation in force until April 1873, and if the appellant's right were barred by that enactment, it could not be revived either by Act IX of 1871 or by Act XV of 1877, under which the death of the female on which the reversion becomes an estate vested in possession is the event from which time begins to run against the right of the reversioner to sue. Assuming that there was no collusion between Appellant's paternal grandfather and maternal grandmother, and that the retransfer to the grantor was *bonâ fide*, the resumption by the grantor in 1856 would be an act done in enforcement of an adverse title against both the widow and the reversioner, and not merely an act done under an alienation by the widow. The suit would then clearly be barred by Act XIV of 1859. It was also so held in *Tarini Charan Ganguli* v. *John Watson*(3) and *Aumirtolall Bose* v. *Rajoneekant Mitter*(4).

The real question then for determination is whether the collusion alleged between Gopayammi and appellant's grandfather is proved. The *onus* of proving the fraud is clearly upon the appellant, and we are of opinion that his oral evidence is not reliable. It is true that his first three witnesses depose to a conversation between appellant's grandfather and maternal grandmother in which it was contrived that they should falsely represent to the Collector that the grant of 1848 was conditional. But we are unable to attach weight to their evidence. In the first place they are all *Ghosha* ladies in a position of dependance on the appellant, and in receipt of maintenance from him. They say they never mentioned what they then heard to any one before this suit, and it is improbable that they should be able to remember, at this distance of time, the particulars to which they depose.

We are further of opinion that the Judge is right in refusing to admit in evidence an alleged copy of the grant of 1848, on the ground that the original was not sufficiently stamped under Regulation 13 of 1816 which was in force in 1848. The copy

(1) 5 W.R. (C.R.) 289.
(2) L.R., 19 I.A., 221.
(3) 3 B.L.R., 437.
(4) L.R., 2 I.A., 113.

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shows that the stamp used was of Rs. 8 value, whilst it ought to have been of Rs. 50 value. The value of the property is not mentioned in the copy. The Judge was, however, in our opinion, justified in ascertaining the value by reference to exhibits I and II, and the value of the stamp which should have been used must be calculated with reference to that value. We also agree with him that the copy should not be admitted on payment of penalty, for the provision of the Stamp Act regarding payment of penalty (section 39 of Act I of 1879) prescribes that such payment shall be endorsed on the document, and presupposes that the document is forthcoming. It was also held in *Kopasan* v. *Shamu*(1) that in the case of a lost document no penalty can be levied and secondary evidence admitted. As regards the contention that the *onus* of proving that the grant was conditional rests on the defendant, we are of opinion that the contention cannot be supported. In the written statement it was denied that any *patta* in writing was granted in 1848, and that there was any grant in April of that year at all, but it was alleged that there was a conditional grant in August 1848. Under these circumstances, we think it is incumbent on the plaintiffs to show that there was an unconditional grant in writing, this being part of his case. As was observed in *Poslin Beharee* v. *Watson and Company*(2) the averment in the written statement is not in the nature of a plea of confession and avoidance so as to shift the burden on to the defendant. Even assuming the *onus* of proof to have been on the defendant, the Judge's finding that the grant of 1848 was conditional is supported by several of defendant's documents XIV, XVI and XVII, the first of which contains an admission by the appellant's mother in 1874 that the original grant was conditional. The appeal therefore fails and we dismiss it with costs.

(1) I.L.R., 7 Mad., 440.

(2) 9 W.R., 190.

APPELLATE CIVIL.

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

1894. February 20. March 29.

SIVAMMA (PETITIONER), APPELLANT,

v.

SUBBAMMA (COUNTER-PETITIONER), RESPONDENT.*

Succession Certificate Act—Act VII of 1889, *s.* 7 (3)—*Power to grant certificate to applicant if he has the best* primâ facie *title thereto—Necessity for some inquiry prior to such a grant.*

The intention of sub-clause (3) to section 7 of the Succession Certificate Act is *not* to save the Court the trouble of making any inquiry at all where the applicant is not heir to the deceased, but it is to allow the *primâ facie* title to the certificate to prevail when a question of law or fact arises on inquiry too difficult to be determined in a summary proceeding.

APPEAL against the order of W. M. Thorburn, District Judge of Cuddapah, dated 16th September 1892, passed on civil miscellaneous petition No. 169 of 1892.

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

Parthasaradhi Ayyangar for appellant.

Krishnamachariar for respondent.

JUDGMENT.—This was a petition for a certificate under Act VII of 1889 to collect the debts due to one Sesha Reddi, deceased. Sesha Reddi had a son named Venkatanaraina Reddi, and the latter died in November 1886, leaving behind him a widow named Subbamma. The father died on 22nd of March 1889, leaving him surviving, besides Subbamma, a widow named Chalamma and a daughter named Sivamma. The daughter applied for the succession certificate and rested her claim on a will left by Sesha Reddi, dated 4th March 1889, and on a maintenance agreement executed by Subbamma on the 4th August 1889. Petitioner's case was that by the will she was constituted her father's heir, and that his daughter-in-law, Subbamma, acknowledged her preferential right. It is alleged that no application was made by Subbamma, and the order made by the District Judge is "give certificate to Subbamma

* Appeal against order No. 145 of 1892.

SIVAMMA v. SUBBAMMA.

"on security." No reasons are assigned for the order, and it is urged for petitioner (and there is nothing to the contrary on the record) that no inquiry was held at all in regard to the will and the release set up by petitioner. The petitioner's pleader contends that the procedure followed by the Judge is at variance with Act VII of 1889, and we are of opinion that the contention is well founded. The procedure to be followed is prescribed by section 7 of the Act. It contemplates that in every case there should be a summary inquiry, and the Court should make an order for the grant of a certificate according to the result of such inquiry. In any case in which it becomes necessary, in order to decide the right to the certificate, to determine any question of law or fact which is too intricate and difficult for determination in a summary proceeding, the Court is empowered to grant the certificate to the applicant if he appears to be the person having *primâ facie* the best title thereto. The intention is *not* to save the Court the trouble of making any inquiry at all where the applicant is not the heir to the deceased, but it is to allow the *primâ facie* title to the certificate to prevail when a question of law or fact arises on inquiry too difficult to be determined in a summary proceeding. In cases in which no complicated issues are involved, and the issues are capable of being decided without difficulty in a summary proceeding, the Court is bound to determine the right to the certificate by summary inquiry. The difficulty felt must be the result of summary inquiry, and *not the a priori* theory that every inquiry into a special ground of claim urged to the certificate necessarily involves an inquiry too intricate for determination in a summary proceeding.

We set aside the order of the Judge and remand the case for disposal in accordance with law. Costs will abide and follow the result.

APPELLATE CIVIL.

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

SANKARALINGAM CHETTI (PLAINTIFF), APPELLANT,

v.

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

1894. March 12, 29.

Divorce—Caste custom—Whether immoral and therefore invalid or not.

There is nothing immoral in a caste custom by which divorce and re-marriage are permissible on mutual agreement, on one party paying to the other the expenses of the latter's original marriage (*parisam*).

SECOND APPEAL against the decree of T. M. Horsfall, District Judge of Tinnevelly, in appeal suit No. 346 of 1892, reversing the decree of V. Malhari Rao, District Munsif, Srivilliputtur, in original suit No. 100 of 1891.

The plaintiff and defendants were members of the potters caste in Tinnevelly. Plaintiff sued for the recovery of his wife, the second defendant, who, having left her husband, was living with the first defendant as his wife. The defence raised by the second defendant was that the plaintiff had ill-treated her and that according to caste custom she had repaid the plaintiff the *parisam*, or expenses of her marriage, thereby dissolving the marriage, and had married the first defendant.

The District Judge, reversing the decree of the District Munsif, dismissed the plaintiff's suit, and the latter preferred this appeal.

Narayana Rau for appellant.

Venkatasubba Ayyar for respondent No. 1.

JUDGMENT.—The question in issue is whether there has been a valid and legal divorce between plaintiff and second defendant, the District Judge finds in the affirmative.

The only point argued before us is whether the caste custom is valid, appellant's pleader contending that it is immoral, and, therefore, that the Courts will not recognize it. Exhibits A and B go

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* Second Appeal No. 696 of 1893.

SANKARA-LINGAM CHETTI v. SUBBAN CHETTI.

to show that it has been recognized by the caste as an ancient and reasonable custom.

We do not think that the case of *Uji* v. *Hathi Lalu*(1) is in point, since the question there was whether the caste could sanction a woman's re-marriage without *a divorce*, *i.e.*, without a proceeding to which both husband and wife were parties. Here the finding is that there has been a divorce according to the custom of the potters in Tinnevelly.

The finding further is that divorce in this form is consistent with the 'original' customs of the potters, and, if this be so, the custom is sufficiently ancient. We do not see that it is immoral, since it does not ignore marriage as a legal institution, but provides a special mode by which it may be dissolved. The fact that there is a money-payment does not make the custom immoral, and among the inferior castes similar customs are known to prevail.

The second appeal fails and we dismiss it with costs.

APPELLATE CIVIL.

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

1894.
April 16.
September 11.

ESHOOR DOSS (PLAINTIFF), APPELLANT,

v.

VENKATASUBBA RAU (DEFENDANT), RESPONDENT.*

Indian Contract Act—Act IX of 1872, s. 30—Contracts to buy and sell Government promissory notes—Whether wagering contracts or not—Admissibility of oral evidence to contradict the nature of a contract in writing—Indian Evidence Act, s. 92.

A, on various occasions, agreed to sell to B (a sowcar) certain amounts of Government of India promissory notes, amounting in all to 4½ lakhs, for delivery on the following 30th of November. On the 28th of November B agreed to sell and A to buy 4½ lakhs worth of the notes for delivery on the 30th of November. A did not perform his contract to sell, and B sued him for damages, amounting to Rs. 7,109-6-0, being the difference between the price at which he (B) had agreed to buy, and the price at which he had agreed to sell. A denied that the transactions were *bonâ fide* contracts made in the ordinary way of business, and pleaded that the real contract was only to pay differences as ascertained by the price of the Government paper on the 30th of November, and that such a contract being, by way of wager, was void under s 30 of the Indian Contract Act:

(1) 7 B.H.C.R., 133.

* Original Side Appeal No. 26 of 1893.

ESHOOR DOSS v. VENKATA-SUBBA RAU.

Held, on the evidence that neither party intended *bonâ fide* purchases and sales for delivery, and that, therefore, the contract was void as a wagering contract:

Held on Appeal (1), that the burden of proof that the agreements were wagers, *i.e.*, that they were not in substance what they were in *form*, lay on A, as the party so alleging;

(2) that oral evidence is admissible to show that an agreement in writing to sell is really only an agreement by way of wager. (*See* Indian Evidence Act, s. 92). *Anupchand Hemchand* v. *Champsi Ugerchand* (I.L.R., 12 Bom., 585) followed: *Juggernauth Seo Bux* v. *Ram Dyal* (I.L.R., 9 Calc., 791), dissented from;

(3) per *Muttusami Ayyar*, J., that, it being proved on the evidence that it was the defendant's intention at the time he contracted to sell to pay differences only, the plaintiff either knew of this intention or he did not. In the former case the contract was a wager and therefore void, and in the latter there was no *consensus* as to a matter which was of the essence of the contract, and therefore no valid contract;

(4) per *Best*, J., that a contract is not a wagering contract unless it is the intention of *both* parties at the time of entering into the contracts to call for or give delivery from or to each other; *see J. H. Tod* v. *Lakshmidas Purshotamdas*, (I.L.R., 16 Bom., 441) and *Grizewood* v. *Blane* (L.R., 11 C.B., 526) and that no such common intention having been proved, the contract was a valid one.

APPEAL from the decree of Davies, J., sitting on the original side of the High Court in civil suit No. 74 of 1892.

The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgments of the High Court.

DAVIES, J., dismissed the plaintiff's suit, and the plaintiff preferred this appeal.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and Mr. *R. F. Grant* for appellant.

Mr. *Wedderburn* for respondent.

MUTTUSAMI AYYAR, J.—This is a regular appeal from the decree of Mr. Justice Davies. Plaintiff (appellant) is a sowcar and defendant (respondent) is a Pleader of the High Court, both residing at Madras. On divers dates between the 24th October and the 4th November 1891, the former agreed to buy and the latter to sell promissory notes of the Government of India, 4 per cent. loan, to the extent of 4½ lakhs of rupees at premia varying from Rs. 5—4 to Rs. 5—11 per cent., the promissory notes themselves being deliverable on the 30th November 1891. On the 28th November 1891, two days prior to the date fixed for delivery, defendant agreed to buy and plaintiff to purchase a similar amount of securities of the same kind to be delivered on the same date but at a premium of 7 per cent. The plaint

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stated that defendant broke his contract to sell and thereby became liable to pay plaintiff a compensation of Rs. 7,109-6-0, which represents the difference between the price at which he was bound to buy and the price at which he was bound to sell. Defendant denied the claim *in toto* though he admitted the execution of the agreements. He contended that they were only nominal transactions, that neither he nor plaintiff ever intended that there should be an actual sale or transfer of Government paper, that the real contract was only to pay the differences, and that such contract, being by way of wager on the varying prices of Government promissory notes in the market, was not actionable. Another ground of defence was that plaintiff had agreed not to claim the difference until the expiration of six months from the date on which it became due, and consequently that the suit was premature. It was further urged by defendant that plaintiff neither tendered the price of the securities which he had agreed to buy nor the promissory notes which he had agreed to sell, and that he was not ready or willing to do either. The first four issues raised the question whether the agreements sued on were contracts of sale made *bonâ fide* in the ordinary course of business or by way of wager, and the fifth and sixth issues related to two other questions, viz., whether the suit was premature and whether the plaintiff was ready and willing to perform his part of the agreement on the 30th November 1891. The learned Judge decided the fifth issue against the defendent, and all the other issues in his favour and in the result he dismissed the suit but without costs. Hence this appeal.

Three questions of law arise for consideration in this appeal and on each of them the decision of the learned Judge is correct. The first is as to the burden of proof. The contracts sued upon are in form agreements to sell promissory notes of the Government of India, and there can be no doubt that it is the party who alleges that those agreements are not in substance what they purport to be, that ought to prove his case. In the absence of proof to the contrary, the presumption is that a transaction is in substance what it is in form. The second question is whether oral evidence is admissible for the purpose of showing that an agreement in writing to sell Government paper is really an agreement made by way of wager on its market price on a future day. On this point, there is a conflict of opinion, the High Court at

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Calcutta holding that it is not admissible whilst the High Court at Bombay holds that it is. I agree in the opinion of the learned Judge that the Calcutta decision does not give, whilst the Bombay decision gives, due effect to the provisions of section 92 of the Indian Evidence Act; compare *Juggernauth Sew Bux* v. *Ram Dyal*(1) with *Anupchand Hemchand* v. *Champsi Ugerchand*(2). The first proviso of that section enacts that any fact may be proved by oral evidence which would invalidate any document or which would entitle any person to a decree or order relating thereto, and assuming that in the case before us, defendant is entitled to a decree in case he shows that the agreements which form the subject of this litigation are gaming contracts, he is clearly entitled to adduce oral evidence in proof of its averment, but not precluded from doing so by that fact not being stated in the documents themselves. The third question is as to the specific incident which distinguishes agreements by way of wager from agreements to buy or sell made in the ordinary course of business. The general rule is that when two parties agree that the one is to sell and that the other is to buy Government promissory notes at a certain premium, and that the promissory notes are to be delivered by the one and accepted by the other on a future day, whatever may be the rate of premium at which those securities may sell in the market on that date, the agreement is perfectly valid, the reciprocal promises to buy and sell being the consideration for each other. An agreement to sell or buy Government paper is a contract which the law permits in common with any other contract to sell or buy goods. To this general rule, however, section 30 of the Indian Contract Act introduces an exception and provides that agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which the wager is made. If two parties bet, therefore, on the premium at which Government securities may sell in the market on a future date, and the one promises to pay certain sum of money to the other according as the actual market price on that date is one way or the other, the transaction is not a real sale as recognized in the ordinary course of business, but a gambling on the premium at which Government

(1) I.L.R., 9 Calc., 791. (2) .L. „ 12 Bom., 585.

securities sell in the market from time to time. Such gambling is forbidden on considerations of public policy by section 30 of the Contract Act which enacts that no suit will lie to recover anything won on the wager. It is true that both in contracts of sale and in gaming contracts the market rate of premium on the future date is uncertain and that both may be highly speculative and risky, resulting in considerable profit to one party and loss to the other. But in the one, the actual sale or transfer of Government paper is the basis of the speculation, and in the other, it is a naked speculation, having no connection with any business which is intended to be carried on. The essential difference, then, between the two classes of transactions consists in this—that in agreements by way of wager, there is no intention at the time when they are made to sell or buy Government paper or to do more than to speculate and pay the difference. In *Thacker* v. *Hardy*(1) Lord Justice Cotton says that the essence of gaming and wagering consists in the agreement that one party is to win and the other party is to lose upon a future event, which at the time of the agreement is of an uncertain nature, that is to say, that if the future event turns out one way, the plaintiff is to win and if it turns out the other way, he is to lose. In *Grizewood* v. *Blane*(2) the Lord Chief Justice observes "we ought to see what was the "plaintiff's intention and what was the defendant's intention at "the time of making the agreement, whether either party really "meant to sell or buy and if they did not, it was a gambling "transaction." Thus, in coming to a decision as to whether the agreements which the plaintiff seeks to enforce are agreements by way of wager, we have to consider whether the real intention at the time when those agreements were made was to buy and sell Government paper.

The Privy Council ruled in *Ram Loll Thackoorseydass* v. *Soojumnul Dhondmull*(3) that a wager upon the average price which opium should fetch at the next Government sale at Calcutta was not illegal or contrary to public policy, but that decision proceeded on the ground that the Statute VIII and IX Vict., c. 109, did not extend to India. But the Contract Act which came into force in this country in September 1872, altered the law as it stood in 1848 when the Judicial Committee decided that case.

(1) L.R., 4 Q.B.D., 685. (2) L.R., 11 C.B., p. 526. (3) 4 M.I.A., 346.

I now proceed to consider the evidence so far as it bears on the intention of the parties when the agreements which form the subject of this litigation were made.

As his first witness, defendant states that he entered into the agreements on the understanding that he was to pay only the difference in the premia, that he never considered himself to be under an obligation to deliver Government paper, and that though the sale notes E1 to E7 referred to such delivery, he knew that resale notes would be executed so as to cancel them at the end. He goes on to observe that he had no sufficient means to undertake to deliver Government paper to the extent of 4½ lakhs and that he would not have made the contracts in question if he had to deliver Government paper. He has not been cross-examined as to his means and there is no other evidence to contradict him. It appears further from exhibit A which is a letter of demand addressed to defendant by plaintiff's solicitors on the 30th November which is the day fixed in the sale notes for delivery, that defendant was called upon to pay the difference but *not* to deliver Government paper. If defendant's evidence is reliable, as I think it is, there can be no doubt that at all events he had no intention to deliver Government paper and that the agreements were at their very inception mere contracts to pay the difference in the premia.

The only other witness, who was present when three of the seven agreements E1 to E3 were made, is the broker, Syed Meah, defendant's third witness. He deposes that though he negotiated three sales as broker, he does not know whether the agreements evidenced by E1 to E3 were intended to be only contracts to pay the difference or *boná fide* contracts of sale. He admits in his evidence that the majority of dealings in Government paper, as carried on in the bazaar, and without the intervention of a bank, are contracts to pay the difference only. Seeing that the plaintiff, on whose behalf the broker acted, was not present when the agreements were made and that the latter was aware that most of similar dealings in the bazaar were contracts to pay the difference, it is anything but natural or likely that Syed Meah should not have distinctly ascertained whether Government paper was really intended to be transferred. The evidence of this witness appears to me, therefore, to be evasive, and it discloses also traces of bias in favour of Raja Eshoor Doss. This is all the direct evidence

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bearing upon the specific agreements which form the subject of this suit.

But these agreements were made in the bazaar, otherwise than through a bank. There is strong evidence to show that the majority of dealings in the bazaar in Government paper are only contracts to pay the difference. Defendant and his second witness, a broker, swear that all the dealings in the bazaar are of that description, whilst defendant's third witness, another broker, and plaintiff's second witness, who is a stock broker, and his third witness who often assists him in his business, depose that the majority of them are contracts to pay the difference. This circumstance raises a presumption in favour of the defendant's case.

The extent to which such dealings were carried on in the bazaar both by defendant and plaintiff as contrasted with their means of life renders it probable that they were mere contracts to pay the difference. Defendant states that his transactions in the bazaar amounted to 7 lakhs of rupees in September 1891, to 20 lakhs in October and to 21 lakhs in November. His position in life is that of a Vakil of the High Court who, finding his practice not sufficiently remunerative, has resorted to this form of speculation though on his own showing he has no means to deliver Government paper to the extent of 4¼ lakhs. As for the plaintiff, he states that he is worth 6 or 7 lakhs, and I am of opinion that the learned Judge is warranted in saying, after discussing his evidence and exhibit I, that it is not probable that in one month he would venture the whole of his wealth in speculation.

It is a peculiar fact in the case before us that there is a resale note (exhibit III), or cancelling contract as the defendant calls it, the amount and description of Government securities resold to defendant being the same as those originally sold by him. This is generally the case with dealings in the bazaar. Defendant says in his evidence in connection with those dealings, "we exchange, "bought and sold notes at first and cancel them at the end with "the same parties or other parties whom they nominate, paying "the difference. There are 30 or 40 people so speculating and "the plaintiff is one of them." On this point defendant's second witness, Muni Subbarayulu, states that the entry about delivery of Government paper in the original sale notes is only nominal. It is a sale in the sense that the difference in the premia is to be

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adjusted. If the transactions take place in the bazaar, it is the difference only that is adjusted. If there is to be a real delivery of Government promissory notes, it is done through the bank, if the amount is at all considerable.

Considering again what took place on the 28th November, which is called the settling day, there is strong reason to think that the agreements sued on were merely contracts to pay differences. As to what took place on that day, defendant, his second and third witnesses, plaintiff and his third witness, Venkatachella Chetty, give evidence of which the following is the effect:—

About the 28th November the price of Government promissory notes was rising in the market and plaintiff and others, who had agreements from defendant to sell, attended to call on him to settle with them. Plaintiff's third witness, Venkatachalà Chetty, called on defendant to close his transaction by giving counter-contracts of purchase, and defendant, saying he was in difficulties, offered to pay 8 annas over and above his selling price. Two persons named, Krishnasami Chetty and Nambooperumal Chetty, agreed to those terms but Goverdana Doss, plaintiff, and Venkatachalla Chetty insisted on full terms and went away. However, they returned again, according to the evidence, at 6 o'clock in the evening and renewed the discussion and on defendant's repeating his old terms plaintiff went away asking Venkatachalla to settle for him on the same terms on which Goverdana Doss and Venkatachalla should settle for themselves. Some one present then suggested that full differences should be paid and that six months' time should be given for the payment. Defendant agreed to this suggestion and Goverdana Doss accepted those terms. Venkatachala Chetty also did so on his own account and on behalf of the plaintiff. Then Goverdana Doss gave a resale note to defendant for 6¼ lakhs and took from the latter a promissory note for the difference in the premia. Then Venkatachala resold 4¼ lakhs on plaintiff's behalf and 2½ lakhs on his own account. On the 2nd or 3rd December next Venkatachala brought to him from the plaintiff his resale note III and delivered it to defendant.

Thus, what took place on the 28th November furnishes strong ground for the opinion that no Government paper was originally intended to be sold. Otherwise it is not possible to account for not a word being said about the delivery of Government paper or about the tender of its price or for plaintiff meeting defendant two

days before the date fixed for delivery. The explanation given by defendant is probably true. As it was thought that the price of Government securities might rise or fall by the 30th, each party desired to take advantage of this element of uncertainty and adjust the difference in the best way he could to his best advantage. Nor do I see why, if a real sale was originally contemplated, a resale note for the amount of the original sale note should be executed in every case. Looking again to the number of persons that settled with defendant on the 28th November, and the aggregate value of Government paper on which he agreed to pay the difference, it is impossible to believe that with his limited means he could have intended a *bonâ fide* sale of Government paper or that his original intention could have remained unknown to plaintiff who systematically speculated on the difference in the premia. Passing on to plaintiff's witnesses, the first witness is plaintiff himself. He was not present when the agreements were made and his statement that they were *bonâ fide* sales of Government paper is not entitled to much weight. He does not explain why a resale note was executed. He admits a number of transactions of very considerable value in which he received only the difference.

His second witness is one Mr. Berry, a stock-broker at Madras. His evidence is that sales of Government paper in the bazaar are generally met by native dealers by payment of the differences. He appears to me to overlook the class of cases in which the original intention was only to pay differences and to assume that there is in the first instance a *bonâ fide* sale in every case. I do not desire to be understood as holding that *bonâ fide* sales of Government paper may not be adjusted by payments of the difference between the contract price and the market price on the day fixed for delivery so as to supersede the necessity for delivery of Government paper. But what I do hold is that when there is no original intention to deliver Government paper and when the contract is at its inception a contract to pay only the difference, such contract is in law a gaming contract.

Plaintiff's third witness is one Venkatachala Chetty, who had also a similar agreement whereby defendant engaged to sell Government paper for 2½ lakhs to him.

Adverting to the transactions in Government paper in the bazaar the witness states as follows: "I did not expect that "Government promissory notes would pass from hand to hand.

"The profits and loss of each transaction between the selling price "and the market price on the day of settlement would be "compared, a balance struck and the difference paid. The practice "was to buy and sell the same quantity of paper, but it did not "matter from whom it was bought and sold. There was no inten-"tion at the time of purchase that Government promissory notes "should be actually delivered or money paid." He gave a resale note to defendant on account of his own transaction, and he states that plaintiff also gave a similar note to defendant.

Thus, in favour of the view that when the agreements in suit were made there was no intention to deliver Government paper, there is first defendant's evidence; there is next the fact that the broker, with whom three such agreements were made does not contradict him and swear to the contrary; and there is, again, the presumption arising from defendant's and plaintiff's means in life and from the general character of dealings in Government paper in the bazaar. There is further the cancelling contract or a resale of the same quantity of paper by plaintiff to defendant. There is also the statement of plaintiff's third witness that at the time of purchase there is usually no intention to deliver Government paper or to pay its price. There is further the fact that plaintiff had a large number of transactions in which differences were alone paid as shown by exhibit I. There is again the conduct of plaintiff and other dealers with defendant on the 28th November which raises a presumption in favour of his contention.

In favour of the view that the agreements were *bonâ fide* sales, there is the form of the agreements and there is Raja Eshoor Doss' statement. Weakened as it is by the circumstances mentioned in the last paragraph, upon the whole evidence there is no reason to doubt that it was the defendant's intention only to pay the differences. That being so, the plaintiff was aware or not aware of such intention. If the former was the case, it was a gaming contract; if the latter, there was no *consensus* as to a matter which is of the essence of the contract, and therefore no valid contract. However, the broker's evasive evidence and his omission to contradict the defendant, the position of Raja Eshoor Doss as a sowcar, who is in frequent communication with brokers and dealers in the bazaar, and presumably familiar with the general character of dealings in Government paper in the bazaar, the defendant's statement that plaintiff is one of the thirty or forty in the bazaar that

speculate in the manner described by him and the accession of strength which that story receives from the execution of a resale note, and from the difference being demanded before the due date and from conduct of the parties on the 28th November, and from the extent of dealings carried on by them as compared with their means—these circumstances lead me to the conclusion that the learned Judge was right in upholding the defendant's contention.

I would accordingly dismiss this appeal with costs.

I would also disallow the memorandum of objections.

BEST, J.—The suit was brought for the recovery from defendant of a sum of Rs. 7,109-6-0 (with interest thereon) as the amount due to plaintiff from defendant on account of dealings in promissory notes of the Government of India 4 per cent. loan.

Plaintiff's case is that he purchased from the defendant on various dates in October 1891 and on the 4th of the following month at rates varying from Rs. 105-4-0 to Rs. 105-11-0 Government promissory notes of the aggregate value of 4½ lakhs deliverable on the 30th November 1891—and resold the whole lot to defendant on the 28th November at the rate of Rs. 107 per cent., the date of delivery being the same 30th November, and that the amount due to him (plaintiff) on account of these dealings is Rs. 7,109-6-4, which he now seeks to recover with interest at 12 per cent. per annum from 30th November 1891.

The defendant admitted the facts of sale and purchase of Government notes as stated in the plaint, but pleaded (1) that the transactions were of the nature of gambling, and therefore, void under section 30 of the Contract Act; (2) that plaintiff had failed to perform his part of the contract; (3) that the suit is premature, plaintiff having agreed to allow defendant six months' time for making the payments in question.

The learned Judge in the Court below found the two latter pleas to be invalid; but on the first plea he found in favour of the defendant and dismissed the suit.

The question for consideration is, therefore, whether the learned Judge is right in holding the agreements between plaintiff and defendant for purchase and sale of Government securities to be void as gaming transactions.

The law on the subject is clearly stated by FARRAN, J., in

J. H. Tod v. *Lakshmidas Purshotamdas*(1) in the following words:— "Contracts are not wagering contracts unless it be the intention "of *both* contracting parties *at the time of entering into the contracts* "*under no circumstances to call for, or give delivery*, from or to each "other." See also *Grizewood* v. *Blane*(2). The question is, therefore, was it the intention of both plaintiff and defendant in this case at the time of making the agreements for sale by defendant to plaintiff of the Government securities that there should be no actual sale and purchase of Government promissory notes, but only payment of differences in the price of the securities on the 30th November. In this latter case the suit has been rightly dismissed, but in the former, defendant's plea under section 30 of the Contract Act must be disallowed. This question is one of fact and no doubt the burden of proof is on the defendant.

Before the evidence is considered, it is necessary to dispose of the objection taken on behalf of the appellant (plaintiff) that oral evidence is inadmissible to vary or contradict the terms of the contracts which are evidenced by the bought and sold notes. Such was no doubt the ruling of the Calcutta High Court in *Juggernauth Sew Bux* v. *Ram Dyal*(3), but as observed in *Anupchand Hemchand* v. *Champsi Ugerchand*(4), the effect of proviso 1 to section 92 of the Evidence Act does not appear to have been considered by the learned Judges who decided the Calcutta case, relied on by the appellant. Under that proviso oral evidence is clearly admissible to prove any fact which would invalidate a document, and it is for such a purpose that the oral evidence has been tendered and admitted in the present suit.

I now proceed to consider the evidence. The first witness is the defendant himself. He no doubt says that the understanding with which he sold was that differences (in price) should be paid on the day of settlement, and that he himself "would not have "entered into a contract for the actual delivery of 4½ lakhs of "Government paper," as he "could not have done it" not having sufficient means. There is every reason to believe that this latter statement is quite true, but his intention alone is not sufficient to make the transactions one of gaming and therefore void. As already observed it is only if both parties intended at the time of

(1) I.L.R., 16 Bom., 441, 445.
(2) L.R., 11 C.B., 526.
(3) I.L.R., 9 Calc., 791.
(4) I.L.R., 12 Bom., 585.

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entering into the agreement that there should be nothing more than payment of differences that defendant's plea will be of avail to him. Defendant admits that he "never saw the plaintiff "personally till 28th November," *i.e.*, the date on which took place the resale to defendant of all the 4¼ lakhs of Government securities that had been previously purchased by plaintiff from defendant. He says "I don't know that plaintiff said anything to me" even then, and he admits that plaintiff "went away without settling "anything, and that it was Venkatachella Chetty (plaintiff's third "witness) who resold to him the 4¼ lakhs on plaintiff's behalf."

Venkatachella Chetty's evidence is to the effect that when he made the contract for plaintiff on the 28th November he was "not instructed to make it specially with the defendant," but was free to make it with any one, plaintiff having simply directed him to sell the 4¼ lakhs of paper in the market, without giving any special directions whatever. This witness further states that the broker, through whom the sale to defendant of the 4¼ lakhs, was effected on the 28th November, was Muni Subbarayalu.

This Muni Subbarayalu has been examined as defendant's second witness. He merely saw plaintiff on that day, as he was coming downstairs from defendant's office, when plaintiff told him that he objected to defendant's offer to pay 4 or 8 annas per 100 rupees. All the above witnesses speak merely to the transaction of 28th November, and not to the understanding between the parties at the time when the original purchases were made by the plaintiff.

The broker by whom the first three of those purchases were made is Syed Meah Sahib, who has been examined as defendant's third witness. He no doubt states that the "majority of "dealings in Government paper in the bazaar are contracts merely "for the payment of differences," but he also expressly states that he "cannot say whether this was one of those or not," and in cross-examination he further states that he is "quite sure when "these contracts were entered into, nothing was said about adjusting "differences by counter-sales," and that he himself "did not know "at the time whether paper was really to pass or only differences "to be paid." He has no doubt stated that a few days after the contracts, plaintiff asked him if defendant would be able to fulfil his contract. "Whether he would pay differences, for he seemed "to be dealing recklessly." But in cross-examination he gives a

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more particular account of the conversation as follows:—What he said was "I hear Venkatasubba Rao (the defendant) is selling "papers recklessly and I fear very much about it." Then I said "He is a straightforward gentleman; there will be no fear." Then Raja (*i.e.*, plaintiff) said "Will he pay the differences? If "so I shall buy paper from others and give delivery to others to "whom I have sold paper." "His meaning was," says the witness, "to close the contracts with the defendant on the delivery day or "it may be earlier to save trouble, and *buy elsewhere to supply* "*people to whom he had sold.*"

This is all the evidence for the defence and I am of opinion that it is far from sufficient to prove that at the time of entering into the contracts with defendant for the purchase of the Government securities, the understanding on both sides was, that there was only to be payment of differences.

The fact of plaintiff having resold the whole of the 4¼ lakhs to defendant on the 28th November is not evidence of intention on the several dates of purchase by plaintiff. Nor is the intention on the part of defendant to pay differences sufficient to render the contract void. As appears from defendant's own evidence in the connected case (original suit appeal No. 37) such was also his intention in contract for Government paper entered into by him with the Madras and Agra Banks in which contracts, he says "my "intention was only to pay differences." He further admits that he has also entered into what he calls "cancelling contracts" with the banks.

There being a mutual understanding for sale of a certain quantity of Government securities on a fixed date at a fixed price, the mere fact of an undisclosed intention on the part of defendant to pay differences only cannot invalidate the contract. As observed by Sir F. Pollock in his principles of contracts, fifth edition, page 5—"the law does not allow a party to show that his inten-"tion was not in truth such as he made or suffered it to appear."

Plaintiff declares that he had the intention of buying and was both in a position to pay and willing to do so. He admits that he bought with the intention of selling again and making a profit. This amounts to speculation, it is true; but there is no law against speculation. As pointed out by Lindley, J., in *Thacker* v. *Hardy*(1),

(1) L.R., 4 Q.B.D., 685, 688.

it required in England a statute, VII Geo. II., ch. 8, to prevent gambling in the public funds; and further, "notwithstanding "the strong condemnation of such gambling in the preamble, the "Act itself was repealed in 1860; and even when the Act was in "force, gambling in shares and foreign stocks was held not to be "illegal either under the Act or at common law."

I am unable to attach weight to the argument founded on the circumstances of plaintiff's dealings being equal in amount to the value of his whole estate. He is admittedly a wealthy man and there is no reason for supposing he could not have met his liabilities. Nor do I think the fact of his having resold the whole amount to defendant on the 28th November is a circumstance entitled to weight against the plaintiff. Defendant was thus afforded an opportunity of reducing his losses if the price of Government notes should rise during the next two days, and defendant himself has admitted (as observed above) that such "cancelling contracts," as he calls them, are allowed by respectable banks. It is true that plaintiff has admitted that if defendant had paid him the difference between selling price and the market price on the date of delivery he would have been satisfied, that this was the profit he intended to make, and that if the price of Government paper had gone down he himself should have paid the defendant the difference between the contract price and the market price but he adds "that was not the understanding at the time of making "the contract," and explains this last sentence of his by saying that it was only if the defendant had asked him for the difference he should have paid the difference, and that the intention was that the notes should be delivered.

Plaintiff's second witness, Mr. Berry, is a stock-broker, who has been concerned in the purchase and sale of Government paper for the past twelve years. He says "there are many transactions "in Government paper, in which Government paper does not "change hands. On settling days *either the difference is paid or* "*the notes delivered.* Native dealers in the bazaar make contracts "for the actual delivery of paper, but they generally meet them "by asking the purchaser to take delivery from somebody else and "paying or receiving the difference or by selling back." He further states "there are fixed settling days once a month, gene-"rally at the end of the month, for completing transactions that "have been entered into. This is done on the principal of a bank

"clearing house. The reason is to avoid the risk of large quanti-"ties for paper being handed about over the market. Unless there "were a settling day, there would have to be a delivery on every "purchase. The paper would soon get dirty and want renewal; "and numerous endorsements are saved."

Having carefully considered the evidence on both sides, I am unable to concur in the finding arrived at by the learned Judge in the Court below, that the understanding between both the parties was from the beginning that there should only be payment of differences.

As to the memorandum of objections filed on behalf of the respondent, I agree with the learned Judge in finding that defendant failed to prove the alleged agreement to allow six months' time for payment; and I also concur in the finding that there is nothing in the objection as to want of tender by the plaintiff, as there was in fact nothing that plaintiff had to tender.

As to the defendant's costs in the Court below, I am of opinion that, considering the nature of the defence set up, defendant was rightly disallowed his costs.

I would, therefore, disallow all the respondent's objections, and give plaintiff a decree for the amount claimed by him. But as my learned colleague has come to a different conclusion, the decree of the learned Judge in the Court below must be affirmed, and this appeal dismissed under section 575 of the Code of Civil Procedure.

Branson & Branson, attorneys for appellant.

Wilson & King, attorneys for respondent.

APPELLATE CIVIL.

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

1894.
April 16.
Sept. 11.

VENKATACHELLA CHETTI (PLAINTIFF), APPELLANT,

v.

VENKATA SUBBA RAU (DEFENDANT), RESPONDENT.*

Indian Contract Act—Act IX of 1872, s. 30—Contracts to buy and sell Government promissory notes—Whether wagering contracts or not—Contracts for payment of differences only.

A having on various occasions sold certain amounts of Government promissory notes to B, aggregating on the whole to 2½ lakhs, for delivery on 30th November 1891, B on the 28th of November sold the same amount to A for delivery on the 30th November. On that day B, through his attorneys, called upon A to retain the 'paper' contracted to be sold by A to B in respect of that contracted to be sold by B to A, and to pay the differences in the prices of the two contracts to B, and subsequently sued him for the amount:

Held, that on the evidence B having admitted that the original contract sued on was for payment of differences only, that it was a wagering contract, and therefore void;

Held, on appeal *per Muttusami Ayyar*, J., that the above judgment should be confirmed;

Per Best, J., that on the evidence it was not proved that at the time of entering into the original contract the intention of both parties was merely for payment of differences, and that consequently the contract was not a wagering contract, but a valid one.

APPEAL from the decree of Davies, J., sitting on the original side of the High Court in original suit No. 75 of 1892.

The facts of the case appear sufficiently for the purpose of this report from the foregoing and from the judgment of Mr. Justice Davies, which was as follows:

"The judgment in this case follows the judgment in the con-"nected case No. 74 of 1892, the facts and the pleadings being "similar and the evidence in that case having been treated as evi-"dence in this. The differences here are (1) that the amount "involved is in connection with transactions for 2½ lakhs of rupees, "the amount of difference claimed being Rs. 3,312-8-0; (2) that "the plaintiff is not a man of wealth like the plaintiff in the other

* Original Side Appeal No. 37 of 1893.

"suit; and (3) that he has put himself out of court by practically "admitting that the contract was for payment of differences only "and therefore was a wagering contract in the eye of the law.

"For the like reasons as are given in my judgment in the "other suit, this suit is dismissed but without costs."

The plaintiff thereupon preferred this appeal.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and Mr. *R. F. Grant* for appellant.

Mr. *Wedderburn* for respondent.

MUTTUSAMI AYYAR, J.—The learned Judge rests his decision in this case against the plaintiff on his practically admitting that the contract sued on was for payment of differences only, and on the reasons assigned by him for his decision in original suit No. 74 of 1892. I concur in that opinion for the reasons mentioned in my judgment in regular appeal No. 36 of 1893. I would dismiss this appeal also with costs, and disallow the memorandum of objections.

BEST, J.—This suit was tried with original suit No. 74 of 1892, which forms the subject of appeal in original suit appeal No. 36 of 1893.

The learned Judge has dismissed the suit for the reasons given in his judgment in the connected suit with the remark added that the plaintiff in this suit has "put himself out of court by practi-"cally admitting that the contract was for payment of differences "only." But on referring to the evidence in the case I am unable to find any such admission on the part of the plaintiff. Plaintiff's statement (as his own first witness in the case) is that the "inten-"tion was to get actual delivery of paper, but *if he sold again to the "same party then differences only were to be paid*"; and as a matter of fact a sale to defendant was made on the 28th November, *i.e.*, two days before the date on which defendant was to deliver under the original contract. I have no doubt whatever the plaintiff was, in a sense, gambling in Government paper, but such gambling, however demoralizing and reprehensible, is not illegal, as observed in *Thacker* v. *Hardy*(1). In the absence of proof that at the time of entering into the original agreement the understanding of both parties was that it was merely for payment of differences, I am of opinion—for reasons stated in my judgment in

(1) L.R., 4 Q.B.D., 685.

VENKATA-CHELLA CHETTI v. VENKATA SUBBA RAU.

original suit appeal No. 36 of 1893—that the contract between the parties cannot be held to be void within the meaning of section 30 of the Contract Act.

If the same objections have been filed in this case, I would disallow them for the reasons stated in my judgment in that case, and, also for reasons stated in that judgment, I would allow this appeal; but as my learned colleague's finding is in favour of the respondent, the decree of the learned Judge in the court below must be affirmed, and this appeal dismissed with costs under section 575 of the Code of Civil Procedure.

Branson & Branson, attorneys for appellant.

Wilson & King, attorneys for respondent.

APPELLATE CIVIL.

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

1894. March 29, 30.

BALA PATTABHIRAMA CHETTI (DEFENDANT No. 1), APPELLANT,

v.

SEETHARAMA CHETTI AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS.*

Code of Civil Procedure—Act XIV of 1882, ss. 510, 524—Reference to arbitration—Refusal of person appointed arbitrator to act—Appointment of arbitrator by Judge under s. 510—Effect of s, 524 on such appointment.

The words 'so far as they are consistent with any agreement so filed' in s. 524 of the Code of Civil Procedure do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that a Judge may act in conformity to it, and that s. 510 has otherwise no application. The reasonable construction is that the action of the Judge under s. 510 should not be inconsistent with the agreement, if it contains any special provision on the subject.

APPEAL against the decree of D. Irvine, District Judge of Coimbatore, in original suit No. 19 of 1890.

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

Ramachandra Rau Saheb for appellant.

Mr. *Grant* and *Lakshmana Chetti* for respondent No. 2.

Bhashyam Ayyangar for respondent No. 1.

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* Appeal No. 107 of 1893.

BALA PATTABHIRAMA CHETTI v. SEETHARAMA CHETTI.

MUTTUSAMI AYYAR, J.—There was a controversy among three brothers governed by Hindu law as to the partition of their family property. They entered into an agreement on the 3rd October 1890, referring the matters in difference between them to two arbitrators and one umpire for decision. The arbitrators named in the agreement, were one Kasturi Chettiar, nominated by one of the three coparceners called Bala Pattabhirama Chetti, and one Padmanabha Chettiar named by the other two coparceners Seetharam Chetti and Subbaratnam Chetti. The agreement was filed in the District Court of Coimbatore under section 523 of the Code of Civil Procedure, and the Judge made an order of reference in accordance therewith. But Kasturi Chettiar refused to act as arbitrator, and the late Judge, Mr. Irvine, appointed Adinarayana Chettiar in his place under section 510 of the Code of Civil Procedure. The arbitrators, thus constituted made an award on the 3rd August 1891, and the Judge, modifying it in certain matters under section 518, adopted it, and passed a decree in its terms as altered by him. Hence this appeal. For the appellant it is contended that there is no legal basis for the award. It is urged (i) that the words in section 524, "so far as they are consistent "with any agreement so filed," signify that the award should be made by the arbitrators named in the agreement, and that if any of them is unwilling to act, the agreement, which is the basis of the award, becomes inoperative, and (ii) that the Judge's finding that Kasturi Chettiar consented to arbitrate previous to the order of reference is not warranted by the evidence in the case.

As regards the first contention, I am unable to accede to it. The words in section 524, "so far as they are consistent with "any agreement so filed," do not mean, as argued by appellant's pleader, that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that the Judge may act in conformity to it, and that section 510 has otherwise no application. The reasonable construction is that the action of the Judge under section 510 should not be inconsistent with the agreement, if it contains any special provision on the subject. Section 524 should be read as if it contained the words "In the absence of any thing "in the agreement to the contrary, section 510 is applicable." This view appears to me to be in accordance with the scheme of arbitration contained in Chapter XXXVII of the Code. That

chapter provides for arbitration in three modes (i) by an order of reference in a suit already pending; (ii) by an order of reference based on an agreement filed for that purpose; and (iii) by enforcement of an award already made by arbitrators without the intervention of the Court. It enacts distinct provisions as to various matters in order that the order of reference made in a suit pending may not prove abortive, but result in an award according to the original intention of the parties. In dealing with orders of reference made upon an agreement, the code gives effect to the intention of the parties embodied in the agreement, in cases to which section 510 would apply, if the order of reference were made in a pending suit, by providing that the foregoing provisions, viz., sections 509 to 522, shall apply, that is to say, be taken to be intended by the parties to the agreement to apply, provided that there is nothing inconsistent in that agreement with such intention. When a number of incidents are considered to be the ordinary incidents of a contract, such as of a lease or mortgage, &c., and the intention of the legislature is to preserve the contractual freedom of the parties, *quod* those incidents, it is usual for the legislature to indicate that intention by saying that in the absence of a special provision to the contrary the incidents specified shall be taken to be the incidents intended to be included in the particular contract in dispute. It is a rule of convenience designed to avoid repetition. The first contention must be disallowed.

As regards, however, the finding that Kasturi Chetti consented to arbitrate previous to his nomination, I do not think that the evidence supports it. Kasturi Chetti denies that he was ever consulted or agreed to act as arbitrator. The other arbitrator, Padmanabha Chetti deposes that Kasturi Chetti was unwilling to act when he was communicated with after the reference had been made. He was not asked whether previous to the reference Kasturi had consented or not. These are disinterested witnesses, and their evidence does not show that it was ascertained that Kasturi Chetti had consented to act prior to the order of reference. Though the second defendant says that Kasturi consented to act, yet his evidence is that of an interested party, and it is not safe to rely upon it unless it is corroborated. The reason assigned by Kasturi for his reluctance to arbitrate is that both parties are his relatives, and it is not unnatural that he should be unwilling to occupy a position in which his decision may be obnoxious to one or other of his relatives. It has already been held in the cases of *Pugardin* v. *Moidin*(1) and *Bepin Behari Choudhry* v. *Annoda Prosad Mullick*(2) that section 510 is not applicable unless, as its language implies, the arbitrator who is superseded for being unwilling to act, previously consented to arbitrate. On the ground that Kasturi Chetti never consented to his appointment as arbitrator and that section 510 is not applicable. I would set aside the decree appealed against, and direct that this suit be dismissed with costs.

BEST, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

ORR (PLAINTIFF No. 1), APPELLANT,

v.

MUTHIA CHETTI (DEFENDANT No. 1), RESPONDENT.*

1893. December 2 1894. January 24

Receiver—Appointment of a receiver by a Court under s. 503 of the Code of Civil Procedure—Misappropriation by the receiver—Whether, subject to the receiver's liability, the creditor or judgment-debtor must bear the loss.

In cases in which a receiver, appointed at the instance of the judgment-creditor under s. 503 of the Code of Civil Procedure, misappropriates moneys collected by him, the decree is not satisfied *pro tanto*, but the loss falls on the estate or its owner, subject to the receiver's liability.

APPEAL against the order of T. Weir, District Judge of Madura, dated 26th August 1892, passed on C.M.A. No. 8 of 1892, confirming the order of S. Dorasawmy Ayengar, District Munsif of Sivaganga, passed on execution petition No. 274 of 1891.

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

The Lower Courts decreed in favour of the defendant and the paintiff prepared this appeal.

Bhashyam Ayyangar for appellant.

Sundara Ayyar for respondent.

(1) I.L.R., 6 Mad., 414. (2) I.L.R., 18 Calc., 324.

* Appeal against Appellate Order No. 63 of 1892.

ORR v. MUTHIA CHETTI.

JUDGMENT.—In original suit No. 415 of 1884 on the file of the District Munsif of Sivaganga, appellant obtained a money decree against respondent. In execution of the same, the produce of the village of Kumbanur in fasli 1299 was attached by appellant, and on his application, a receiver was appointed under section 503 of the Code of Civil Procedure to superintend the harvest and to recover the melvaram. The receiver collected a sum of Rs. 845-2-7 on account of the melvaram, but instead of remitting the amount to the Court, misappropriated it to his own use. Thereupon, respondent instituted criminal proceedings against him, and the receiver absconded and is still absconding. Appellant then applied for execution against respondent in respect of the balance due under the decree, and the latter contended that the decree must be taken as satisfied to the extent of the sum of money misappropriated by the receiver, from whom, it would appear, no security was taken, for the due performance of his office. Both the Courts below disallowed the contention, hence this appeal. The question which arises for determination is, whether in cases in which a receiver appointed at the instance of the judgment-creditor under section 503, misappropriates his collections, the decree ought to be treated as satisfied *protanto*, on the ground that he is the agent of the judgment-creditor on whose application he was appointed.

The only case cited at the hearing is, that of *John Tiel and Co.* v. *Abdool Hye*(1). That was decided under section 243, Act VIII of 1859. There the manager exceeded the powers conferred upon him by the Court, and mortgaged the attached property with the consent of all the parties concerned, so as to leave some proprietary interest in the judgment-debtor. The question for determination was whether any judgment-creditor coming after the appointment of the manager and the making of the said mortgage, had a right to attach and sell what remained of the judgment-debtor's interest in the property. The Court held that he was entitled to attach, and stated the ground of decision in these terms: "A manager appointed under Act VIII of 1859, "s. 263, so far as he is an officer of the Court, is, at the most, the "*hand* of the Court for the purpose of gathering in on behalf of "the judgment-debtor the moneys due to him, in order that they "may immediately be applied to the satisfaction of the decree. If

(1) 19 W.R. (C.R.), 73.

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"he does more than this and deals with the subject of the property "itself, he must do so as the agent of the judgment-debtor, and not "properly as the officer of the Court." In the case before us, the receiver collected the melvaram in the exercise of the power conferred upon him by the Court, but instead of paying the collections into Court, as he was bound to do, in order that they might be applied in satisfaction of the decree, misappropriated them to his own use in breach of his duty as receiver. I am of opinion that the Judge is right in holding that the present case is not on all fours with the other case. I do not think, however, that the decision of the Judge can be supported. He considers that the receiver in the present case was the judgment-creditor's agent, because it was on his application that the appointment was made. The appointment is the act of the Court and once made in the interests of justice or *ex debito justitiæ*. He is an officer or representative of the Court, and subject to its orders. His possession is the possession of the Court by its receiver, and the tenants in possession, when he is appointed to receive rents and profits of immovable property, become virtually tenants *pro hâc vice* of the Court, their landlord. His possession is the possession of all the parties to the proceeding according to their titles. The moneys in his hands are in *custodia legis* for the person who can make a title to them. The Judge observes that very wide powers are conferred upon receivers by section 503 including a power to remove the property in possession, but it does not follow from it that his relation either to the Court or to all the parties interested in the proceeding undergoes any change in proportion to the extent of his powers. For, it has been held in England in similar cases that a receiver appointed by the Court is appointed on behalf and for the benefit of all persons interested, parties to the suit or proceeding. This being so, it is clear that if a loss arises from the default of the receiver, the estate must bear the loss as between the parties to the suit or proceeding. It is true that when the party entitled to an estate is ascertained, the receiver will be considered his receiver and their principle is applicable in the case of a suit in which title to property is decreed, and not to the case before me, for the decree under execution is a money decree, the title in the property under attachment continuing to vest in the judgment-debtor. The first-mentioned rule is only the result of the general principle that the loss must fall on the estate or its owner, subject

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to the receiver's liability. The terms "receiver" and "manager" are synonymous, and though the appointment of a receiver may, in certain cases, operate to change possession, yet it has no effect whatever on the title of either party to the property which is placed in the possession of the receiver. For any loss arising from his default, the receiver is certainly responsible, but when he cannot be proceeded against the question as between innocent parties is who ought to bear the loss which is imputable to neither, and the only answer is that it must devolve on the estate to which the appointment relates. There is also another reason in support of this view. Moneys in the hands of the receiver belong to the Court which appointed him, and are in *custodia legis*, and he cannot spend them except under the orders of the Court. If they are lost, whilst in custody of the receiver notwithstanding the exercise by him of due care, it cannot be denied that the loss must devolve on the estate, for the loss is not imputable to his default or that of any other. The Courts below are in error in introducing a theory of agency without reference to the title to the property, for the collection of the rents of which the receiver has been appointed. I set aside the orders of both the Courts below and direct that appellant be allowed to execute his decree without being compelled to deduct from the amount thereof the amount misappropriated by the receiver. Respondent will pay appellant's costs throughout.