



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, <i>Middle Temple.</i>
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Puisne Judges.

Hon'ble G. A. PARKER (*to 3rd February 1896*).

„ H. H. SHEPHARD.

„ S. SUBRAMANIA AYYAR, C.I.E.

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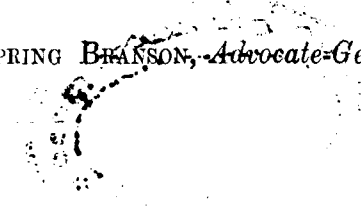
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THE
INDIAN LAW REPORTS,
Madras Series.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Subramania Ayyar.

IMBIOHI KANDAN AND OTHERS (PLAINTIFFS), APPELLANTS,

1895.
August 19,
21.

v.

IMBIOHI PENNU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Malabar law—Makkatayam rule of inheritance—Tiyans of South Malabar.

On the death of a Tiyar of South Malabar following the Makkatayam rule of inheritance, his mother, widow and daughter are entitled to succeed to his property (acquired by himself and his father) in preference to his father's divided brothers.

SECOND APPEAL against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in appeal suit No. 434 of 1893, reversing the decree of U. Achutan Nayar, District Munsif of Calicut, in original suit No. 578 of 1890.

The plaintiffs sued to establish their right to certain property left by one Changaran, deceased, as against the defendants, who were his mother, widow and daughter. Changaran was the son of Kelukutti, a deceased brother of the plaintiffs, with whom, it was found, they had no common property and had not lived as members of a joint family. The parties were Tiyans of South Malabar following the Makkatayam rule and the property in question had been acquired by Changaran and his deceased father.

The District Munsif passed a decree for the plaintiff. On appeal, the Subordinate Judge reversed this decree.

The plaintiffs preferred this second appeal.

* Second Appeal No. 1800 of 1894.

IMBICHI
KANDAN
v.
IMBICHI
PENNUN.

Sundara Ayyar for appellants.

Ryru Nambiar for respondents.

JUDGMENT.—The District Munsif clearly found that plaintiffs were divided from the late Changaran and had no community of interest with him. This finding was not questioned in the grounds of appeal to the Lower Appellate Court, and the Subordinate Judge was, therefore, right in laying down that the question was whether, according to the law and custom followed by Makkatayam Tiyans of Calicut, the property of a deceased person goes to his father's brothers who are not joint in interest with him rather than to his mother, widow and daughter.

The decision of the Subordinate Judge is entirely in accordance with the principles laid down in *Rarichan v. Perachi*(1) and *Raman Menon v. Chathunni*(2). It has been decided that the rule of impartibility applies to Makkatayam Tiyans of Calicut, and in *Rarichan v. Perachi*(1) following the principle that self-acquired property lapses to the tarwad, it was held that the undivided brother succeeded in preference to the widow. But the case is quite different when the brothers are divided and have no community of interest as in this case. Here it is found that the only property in which plaintiffs and Kelukutti ever had a common interest is in the family burying place, which will certainly not constitute them an undivided tarwad. That being so, the mother, wife, and daughter of Changaran who certainly belong to his tarwad are preferential heirs to his uncles who did not belong to his tarwad at all and had no community of interest with him.

We think the decision of the Subordinate Judge is correct and dismiss the second appeal with costs.

(1) I.L.R., 15 Mad., 281.

(2) I.L.R., 17 Mad., 184.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Best.

QUEEN-EMPRESS

v.

SUBBARAYAR.*

1895.
August 15,
21.

Criminal Procedure Code—Act X of 1882, ss. 87, 88, 89, 439, 537—Proclamation for person absconding—Attachment of his property—Irregularity in publication of proclamation—Revisional powers of High Court.

An accused person for whose arrest a warrant had been issued having absconded, a proclamation was issued and affixed to the Court house on the 6th of November requiring him to appear on the 11th of December 1893, and his property was attached. The proclamation was not published at the village where the accused resided until the 15th of November. The accused surrendered on the 25th of June 1894 and applied for restoration of the property under Criminal Procedure Code, section 89, and an order was made by which the restoration of his property was refused. The accused preferred a petition to the High Court for the revision of that order:

Held, that there was no legal proclamation under Criminal Procedure Code, section 87, and that the order should be set aside and the attachment declared void.

PETITION under Criminal Procedure Code, section 439, praying the High Court to revise an order of E. J. Sewell, Acting Sessions Judge of Tanjore, in criminal appeal No. 93 of 1894, modifying the order of R. B. Clegg, Joint Magistrate of Kumbakonam, in magisterial case No. 6 of 1893.

On the 14th October 1893 a warrant was issued by the Joint Magistrate for the arrest on a criminal charge of one Kuthur Subbarayar. The warrant was not executed and it was reported that the accused had absconded. A proclamation under Criminal Procedure Code, section 87, was issued on the 6th of November, the date fixed for the appearance of the accused being the 11th of December 1893. The proclamation was published by the affixing of a copy on the Court house on the 6th of November, but it was not published in the place where the accused resided until the 15th of November. The property of the accused was attached under Criminal Procedure Code, section 88, after the issue of the

* Criminal Revision Case No. 135 of 1895

QUEEN-
EMPRESS
v.
SUBBARAYAR.

proclamation. The accused surrendered on the 25th of June 1894 and he was then heard to show cause under Criminal Procedure Code, section 89, why his property should be restored to him. The Magistrate held that the accused had been absconding, that the want of completeness in the publication of the proclamation was a mere irregularity which he regarded as immaterial with reference to Criminal Procedure Code, section 537, and he made an order that the property should be sold and the sale-proceeds credited to Government. The Sessions Judge on appeal concurred in the finding that the accused had been absconding, but altered the order appealed against into one refusing to restore the property to the accused.

The accused preferred this petition.

Mr. K. Brown and Sivaswami Ayyar for petitioner.

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

JUDGMENT.—The only point argued on behalf of the petitioner was that any proceeding under the 88th section of the Criminal Procedure Code was vitiated by the fact that the proclamation had not been published in due accordance with the provisions of the previous section. The 87th section authorizes the issuing of a proclamation requiring the absconding person “to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.” The section then proceeds:—

“The proclamation shall be published as follows:—

- (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;
- (b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides, or to some conspicuous place of such town or village; and
- (c) a copy thereof shall be affixed to some conspicuous part of the Court house.”

The proclamation requiring the petitioner to appear on the 11th December was issued on the 6th November and on that day affixed to the Court house. It was not published in the village in which the petitioner resides till the 15th November.

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Clearly therefore there was a failure to comply with the provisions of the section. The minimum allowance of thirty days was not allowed to the petitioner as from the date of the proclamation in the village.

Apart from the provisions of the 537th section of the Code which were invoked by the Magistrate, there can be no question that the proclamation was vitiated by the defect.

Section 87 prescribes certain rules with regard to time and with regard to place. In respect of these matters the section is imperative and the neglect of the rule with regard to time is no more excusable than would be the neglect of the rule requiring publication in two places. Suppose that the petitioner had, in consequence of his failure to attend in obedience to the proclamation, been charged under the 174th section of the Indian Penal Code, could it be said that he was legally bound to attend in obedience to the proclamation, when it appeared that the proclamation had not been duly made and published under the 87th section of the Procedure Code? Clearly not.

In the ordinary case of a summons it is necessary in order to establish a charge under the 174th section of the Penal Code to prove that the summons was duly served on the person charged. In the case of a proclamation personal service being impracticable, other modes of bringing the order to the notice of the person addressed are prescribed. It appears to us that whether personal service or substituted service has to be proved, equally strict proof should be demanded in order to establish a charge under the 174th section of the Penal Code. If a charge under that section had been brought against the petitioner, it could never have been suggested that the provisions of the 537th section of the Criminal Procedure Code should be used to supplement the deficiency of proof, nor can we understand how the Magistrate could imagine that he had any right to utilize that section in the actual proceedings. He was not sitting as a Court of appeal or revision, but as a Magistrate enforcing the penal consequences of alleged disobedience to a proclamation.

It may be suggested that, although the Magistrate was not at liberty to refer to the 537th section, it was competent to the Sessions Judge on the appeal or is competent to this Court to consider whether the provisions of that section should be applied. It was contended that the defect in the proclamation was an error,

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omission or irregularity within the meaning of the section. If it were necessary to decide the point we should hesitate to accede to this contention. But the present case is peculiar. The Magistrate had to consider whether a legal proclamation had been legally published. It was his duty in considering this to have regard to the actual facts as they appeared before him. Instead of confining himself to the facts he exercises a dispensing power which he does not possess, and by the aid of it holds that the proclamation was a legal one. In our opinion the proceedings of the Magistrate was wholly illegal.

There was no legal proclamation. The petitioner could not have been convicted on a charge of disobedience to the proclamation and for the same reason the other penal consequences of disobedience cannot be visited on the petitioner.

The order of the Sessions Judge who adopts the reasoning of the Magistrate is wrong and must be set aside, as also that of the Joint Magistrate and the attachment declared void.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

KANDASAMI PILLAI (PLAINTIFF),

v.

MURUGAMMAL (DEFENDANT).*

Hindu law—Wife's right of maintenance among Sudras—Continued unchastity and misconduct.

In 1887 a suit was instituted against a Sudra by his wife and a decree was passed for her maintenance. The judgment-debtor now sued to have that decree set aside, alleging that his wife had since committed adultery and given birth to an illegitimate child. The wife denied the adultery and stated that her husband had become reconciled to her and that her child was legitimate. It was found that the plaintiff's case was established and that the defendant's misconduct had been recent, open and continuous:

Held, that the decree in the previous suit should be set aside, and that the defendant was not entitled to a bare maintenance.

* Civil Suit No. 143 of 1895.

Quere: Whether apart from the other circumstances in the case, the fact of having given birth to an illegitimate child would have constituted a bar to the wife's claim to bare maintenance. KANDASAMI PILLAI v. MURUGAMMAL.

The facts of the case are stated above sufficiently for the purpose of this report.

Mr. J. Adam for plaintiff.

Gurusami Chetti for defendant.

JUDGMENT.—The plaintiff in this case seeks to set aside the decree passed in original suit No. 129 of 1887 in favour of the defendant, his wife, awarding to her a maintenance of ten rupees per mensem. The suit is founded on the allegation that in 1893 the defendant committed adultery with one Velayuda Asari. The defence is a simple denial of the case set up in the plaint.

The only issues to be determined are—has the plaintiff made out the case set up by him, and, if so, to what relief is he entitled?

[His Lordship recorded an admission that the parties had separated in 1886 and had never since resided together, and, after discussing the evidence, stated, as his finding thereon, that the defendant had in 1893 become pregnant by Velayuda Asari and had given birth to a child by him. The judgment continued as follows:—]

I have no hesitation in finding that the plaintiff has made out his case.

As to the relief prayed, it has been contended on behalf of the defendant, that she is entitled under any circumstances to at least bare maintenance. *Honamma v. Timannabhat*(1) relied upon in support of this contention has been dissented from in *Valu v. Ganga*(2). In *Roma Nath v. Rajonimoni Dasi*(3), Petheram, C.J., and Banerjee, J., however, seem inclined to hold that the view taken in the earlier Bombay case is warranted by the texts of Hindu law, and further that it has the support of reason, inasmuch as the allowance of mere food and raiment to an unchaste woman is prescribed in order that she may have a *locus poenitentiae*, and that she may not be compelled by sheer necessity to continue to lead a life of shame and misery. However, in *Nagamma v. Virabhadra*(4) recently decided by this Court, the learned Chief Justice and Shephard, J. observe:—"We must follow the decision in *Valu v.*

(1) I.L.R., 1 Bom., 559.

(3) I.L.R., 17 Cal., 674, 679.

(2) I.L.R., 7 Bom., 64.

(4) I.L.R., 17 Mad., 392.

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"*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." In the above cases it will be seen that the question related to the provision to be made for widows, whilst here it is as to the maintenance of a wife. Referring to the existence of a distinction between the two classes of cases, Sargent, C.J., in *Valu v. Ganga*(1) already cited observes thus:—"The only analogous cases in which such a distinction is to be found, are those of an adulterous wife and mother for which special texts are provided. The close and tender relations which exist between husband and wife and mother and son may well account for the ancient law-givers laying down, as a rule of conduct, for a husband and son, that even the wife or mother who has been guilty of unchastity should not be left in a state of perfect destitution; but it has still to be determined how far these texts will be regarded as mandatory and not merely preceptive; and if the former, in what cases and to what extent the Court will enforce them." It must be admitted that the point is one of some difficulty. For although the doctrine of the ancient law-givers enunciated in the texts in question is grounded on the sound considerations adverted to by Petheram, C.J., and Banerjee, J., yet it is not easy to formulate precisely the cases in and the extent to which that doctrine is to be applied. But assuming that the texts are not mere moral precepts but mandatory, I think—following the view adopted by the Calcutta Court in *Roma Nath v. Rajonimoni Dasi*(3) in the case of the widow—it be safely laid down that maintenance, however small, ought not to be awarded by Courts, even to a wife when it appears that she, about the time of the litigation, persists in a vicious course of life. To hold otherwise would be contrary to all morality and principle; and I have little doubt that before a decree for maintenance is given to a wife who has once been guilty of infidelity, she must show, not only that at the time of the plaint and the trial she was leading a chaste life, but also that she had done so for a sufficient period previously so as clearly to lead to the conclusion that she has completely renounced her immoral course, and that, in fact, she is a reformed woman. In the present case, however, there is not a

(1) I.L.R., 7 Bom., 84.

(2) I.L.R., 9 Bom., 108.

(3) I.L.R., 17 Calo., 674, 679.

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particle of evidence to prove such is the case with the defendant. On the contrary the defendant appears to be so strongly addicted to vice, and her misconduct has been so recent, open and continuous, that I am unable to say that I am satisfied that even the idea of definitely changing her present mode of life has occurred to her. Her case seems moreover to be complicated by the fact that she is the mother of an illegitimate child; since a text of *Yajñavalkya* treats conception by unlawful commerce to be such an aggravation of a disloyal wife's offence as to justify complete desertion by the husband, though it should be added that *Vijñaneswara* appears to restrict the text to the case of the three regenerate classes—*Colebrooke's Digest*, Book IV, Chapter I, Verse LXXXVII; and therefore, by implication, to hold it to be inapplicable to Sudras, to which caste the parties in the present case belong. But whether even among Sudras the existence of an illegitimate issue born to the wife before she changed her life would not, under certain circumstances, be an obstacle in the way of her claiming even bare maintenance is rather a delicate question. However this may be, and although no doubt a mere false defence by itself would not deprive the party setting it up of her legal right, the attempt which the defendant has made in this case to fasten upon the plaintiff as his legitimate issue the fruit of adultery is clear proof that she is far from a penitent wife who may be allowed to seek the benefit of the humane provision mentioned in the texts referred to in *Valu v. Ganga*(1) and *Roma Nath v. Rajonimoni Dasi*(2).

The plaintiff is, therefore, entitled to the relief claimed. I set aside the decree in original suit No. 129 of 1889 and the execution proceedings taken therein subsequent to this suit. The defendant must pay the costs of the plaintiff.

Ramanujachariar attorney for plaintiff.

(1) I.L.R., 7 Bom., 84.

(2) I.L.R., 17 Calo., 674, 679.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

1895.
August 7, 18.

MUNICIPAL COUNCIL, NELLORE (DEFENDANT), PETITIONER,

v.

RANGAYYA (PLAINTIFF), RESPONDENT.*

District Municipalities Act (Madras)—Act IV of 1884, ss. 72, 97, 262.

The plaintiff built a house at Nellore, the construction of which was completed on the 15th of August 1893. The municipal authorities of that place, being governed by Madras District Municipalities Act, gave notice of assessment on the 11th of September, levied the tax as assessed, and credited it as the tax due for the half-year ending on the 30th of September 1893. The plaintiff now sued to recover the amount paid by him as having been illegally levied:

Held, that under the provisions of District Municipalities Act, section 262, the suit was not maintainable.

PETITION under Provincial Small Cause Courts Act IX of 1887, section 25, praying the High Court to revise the decree of W. Gopalachari, District Munsif of Nellore, in small cause suit No. 552 of 1894.

Suit to recover Rs. 3-6-0, being the amount of the tax alleged to have been illegally levied from the plaintiff by the defendant on account of house-tax. The defendant, which was a municipal council constituted under the Madras District Municipalities Act, (Act IV of 1884), admitted that the tax had been levied from the plaintiff and credited as the tax due for the half-year ending the 30th of September 1893 in respect of a house, the building of which was completed on the 15th of August 1893. It was pleaded that the tax was levied in accordance with law, and also that the suit was not maintainable with reference to section 262 of the Act above referred to. This section is as follows:—

“262. (1) No assessment, charge or demand of a tax made
Assessment, &c., not
to be impeached if Act
substantially complied
with.
“under the authority of this Act shall be
“impeached or affected by reason of any mis-
“take in the name, residence, place of busi-
“ness or occupation of any person liable to
“pay the tax, or in the description of any property or thing
“liable to the tax, or of any mistake in the amount of assessment

* Civil Revision Petition No. 518 of 1894.

“or tax, or by reason of any clerical error, provided the direc-
“tions of this Act shall have been in substance and effect com-
“plied with; and no proceedings under this Act shall, for want of
“form, be quashed or set aside in any Court of Justice.

“(2) No action shall be maintained in any Court to recover
“money paid in respect of any tax, toll or fee assessed or levied,
“or any payment collected, under this Act, or to recover money
“or damages by reason of any assessment made, tax, or toll or fee
“levied, or any payment under this Act, provided that the pro-
“visions of this Act relating to the assessment and levy of taxes,
“tolls and fees, and to the collection of payments have been in
“substance and effect complied with.

“(3) No distress or sale under this Act shall be deemed unlaw-
“ful, nor shall any person making the same
Distress not unlaw- “be deemed a trespasser on account of any
ful for want of form. “error, defect or want of form in the bill,
“notice, schedule, form, summons, notice of demand, warrant of
“distress, inventory, or other proceeding relating thereto; nor
“shall such person be deemed a trespasser *ab initio* on account of
“any irregularity afterwards committed by him.

“Provided that every person aggrieved
Special damage “by such irregularity may recover satisfac-
actionable. “tion for any special damage sustained by
“him.”

The District Munsif overruled both of the pleas above referred to and passed a decree as prayed.

The defendant preferred this petition.

Pattabhirama Ayyar for petitioner.

Subramania Ayyar for respondent.

SHEPHARD, J.—This action is brought to recover the sum paid by the plaintiff in respect of the first instalment of the tax on a house for the year ending with March 1894. The construction of the house not having been completed till August 1893, it is contended for the plaintiff that the tax was not leviable for the first half of the year and must, therefore, be recoverable by action. On the other hand it is argued on the defendant's behalf that any such action is barred by the 262nd section of the Act of 1884. Unless it can be shown that the plaintiff is, under the circumstances, saved by the proviso to that section, this defence must clearly prevail.

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It is said that the provisions of the Act relating to the assessment and levy of taxes have not been in substance and effect complied with, because according to the right construction of the Act a house not completed at the beginning of the year cannot be made the subject of taxation. It is not said that in any other respect there has been a departure from, or neglect of, the provisions of the Act relating to the assessment of the property.

For the purpose of any argument regarding the construction of the 262nd section, it must be assumed that money paid and sought to be recovered is money which was not legally payable by the plaintiff.

The second clause of the section is one of a group of provisions designed to give special protection to the municipal council.

The 261st section provides for notice of action; the first clause of the 262nd section provides for certain specified cases of mistake.

The second clause provides that no action shall be maintained to recover money paid in respect of any tax assessed or levied under it. Then follows the proviso. It is clear that this clause is not intended to be restricted to those cases in which there has been a mistake such as is provided for in the first clause.

The second clause presupposes a case in which a tax has been illegally levied and only requires that the provisions of the Act relating to assessment and levy shall have been complied with.

Assuming that the commissioners have made a mistake, and ought not to have levied a tax on the plaintiff's house for the first half-year, I think they are entitled to the protection which they claim under the 262nd section. It cannot be said that the house-tax was not in legal existence in Nellore; the *modus operandi* presented by the Act was adopted, and all that can be charged against the defendants is that they made a mistake of law, or, of fact, in assessing this particular house of the plaintiff. Such a mistake does not, I think, bring the case within the proviso which, as I read it, is aimed at illegal exactions made by a council or its officers arbitrarily and without any regard to the provisions of the Act.

The case is not in my opinion distinguishable from that cited on the defendant's behalf (*Kamayya v. Leman*(1)). The plaintiff's remedy is by appeal under the 97th section of the Act. In this

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

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view of the case it is unnecessary to consider whether in the sections relating to the tax on buildings the existence of the building at the beginning of the period for which the tax may be charged is presupposed.

I would reverse the decree of the District Munsif and dismiss the suit with costs throughout.

BEST, J.—The question is whether this suit for recovery of a sum of Rs. 3-6-0 collected by the Municipal Commissioners of Nellore as house-tax for the half-year (March to September 1894) is maintainable.

The District Munsif has held that it is on the authority of *Tuticorin Municipality v. South Indian Railway*(1). In that case the money sued for was money that had been collected by the Tuticorin Municipality in direct violation of section 60 of the Act, which exempts a person who has paid profession tax in one municipality from liability to pay for the same half-year in another municipality. It was therefore clearly a case in which the provisions of the Act relating to the assessment and levy of the tax had not been in substance and effect complied with, and therefore within the proviso of section 262.

The present case is different, as no express provisions of the Act can be held to have been contravened. That it never could have been intended that a newly-built house that only became habitable six weeks before the expiry of the half-year should be taxed for the whole half-year may be inferred from section 72, which provides for remission of the tax on vacant buildings; but clearly there is no ground on which it can be held in the present case that the tax has been imposed or levied in contravention of any express provision of the Act; and such being the case *Kamayya v. Leman*(2) is authority for holding that the suit is not maintainable.

It must, therefore, be dismissed and the Lower Court's decree set aside.

(1) I.L.R., 18 Mad., 78.

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

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

VENKATARATNAM PANTULU.*

Criminal Procedure Code—Act X of 1882, ss. 161, 172.

At the beginning of a trial in the Court of a Presidency Magistrate, an application was made, on behalf of the accused, for a copy of the Police charge sheet which contained the whole of the prosecution evidence as set forth by the Police, and extracts from, if not copies, of the Police diary. The application was rejected by the Magistrate:

Held, that the High Court should not on revision interfere with the order of the Magistrate.

PETITION under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise the order of O. R. Jones, Chief Presidency Magistrate, Madras, dated 30th September 1895, in calendar case No. 25884 of 1895.

The facts of the case and the reasons for the order sought to be revised was stated by the Chief Presidency Magistrate as follows:—

“On calendar No. 25884 of 1895, wherein Venkataratnam Pantulu is charged by the Police with theft in a building, being called on for hearing, Mr. L. Gordon applied, on behalf of the accused, for a copy of the Police charge sheet. This was refused for the following reasons:—

I do not know of any provisions of law in the Criminal Procedure Code or elsewhere which entitles the defence to call for a copy of the charge sheet. I am willing to give a copy of the charge preferred by the Police, though the defence is not legally entitled to that until the charge has been framed by the Court under section 210 or 255, Criminal Procedure Code.

Police charge sheets put in by the Madras City Police contain a good deal of information for the use of the Magistrate, and are certainly extracts from if not copies of the Police diary which,

under section 172, Criminal Procedure Code, the defence is not allowed to call for or to see.

To allow the defence to see the whole of the prosecution evidence before the enquiry or trial would simply amount to placing the whole case for the prosecution at their disposal. The witnesses would be liable to bribery and intimidation, and with ignorant witnesses who might be induced to omit or include one single statement while otherwise telling all the truth, this would very often cause a true case to break down.

I am unable to see how a prior knowledge of what the prosecution witnesses are going to say can benefit the accused, unless he makes an unfair and illegal use of that knowledge. As the evidence of each witness is given and recorded, the accused is given ample opportunity to cross-examine, or if he desires it, he may reserve his cross-examination until the prosecution is closed. Again, when called upon for his defence, he can re-call and cross-examine any witnesses he likes.

For these reasons I consider that to give the accused a copy of the charge sheet before the trial would give him a most unfair advantage, if inclined to use the knowledge thus gained improperly, and would be of no benefit to him if not so inclined and therefore, in the absence of any provision of the Criminal Procedure Code entitling him to it, I refuse to grant the copy applied for.”

The accused preferred the petition.

The grounds on which the above order was sought to be revised were stated in the petition as follows:—

“(1) Because the Police cannot extend the privilege given by section 172, Criminal Procedure Code, to documents other than diaries by incorporating the contents of a diary into such documents.

“(2) Because an accused person is entitled to inspection of the charge sheet in Court, and if a copy is not granted beforehand, delay may be occasioned by necessary adjournments.

“(3) Because the ruling of the Magistrate is contrary to the principle laid down in *Sheru Sha v. The Queen-Empress*(1) and *Bikao Khan v. The Queen-Empress*(2).”

Mr. H. G. Wedderburn for petitioner.

The Crown was not represented.

(1) I.L.R., 20 Calc., 642.

(2) I.L.R., 16 Calc., 610.

* Criminal Revision Case No. 510 of 1895.

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JUDGMENT.—We are not prepared to hold that the Chief Presidency Magistrate was wrong in refusing a copy of the charge sheet to the prisoner's attorney at the present stage of the proceedings. The petition is dismissed.
Gordon attorney for petitioner.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

EACHARAN PATTAR AND ANOTHER, APPELLANTS,

v.

APPU PATTAR AND OTHERS, RESPONDENTS.*

Court Fees Act—Act VII of 1870, ss. 6, 7 (ix), 17—Redemption suit against mortgagee in possession—Arrears of rent covenanted for, to be deducted from the mortgage amount.

In a redemption suit against a mortgagee in possession, when the mortgagee has not paid rent which has been stipulated for, and the plaintiff asks for an account in taking which the arrears of rent should be deducted from the mortgage amount:

Held, that the Court fee should be computed according to the principal sum expressed to be secured by the mortgage.

CASE stated for the opinion of the High Court under Civil Procedure Code, section 617, by R. S. Benson, District Judge of South Malabar, in appeal suit No. 512 of 1894.

The case was stated by the District Judge as follows:—

“Under section 617, Civil Procedure Code, and following the precedent of the reference in *Venkappa v. Narasimha*(1) and *Rama Varma Rajah v. Kadar* (2), I have the honour to refer the following question as to Court fees for orders of the High Court:—

“In a suit for redemption of land demised on kanom, the plaintiff also claims arrears of rent due under the demise and prays for the recovery of the land on payment of the amount of the kanom minus the arrears of rent. What is the Court fee payable on the plaint? Is it to be calculated on the kanom amount, or on that sum plus the arrears of rent claimed?

* Referred Case No. 34 of 1894.

(1) I.L.R., 10 Mad., 187.

(2) I.L.R., 16 Mad., 415.

“The question is of much importance in this district both from a fiscal point of view and also as affecting the distribution of work in the Courts, as it is believed that the valuation of the suit for purposes of jurisdiction would follow the valuation arrived at for the purpose of the Court Fees Act.

“Unfortunately neither the practice nor the rulings of the Courts on the point appear to be altogether clear and consistent.

“The question came before me recently in civil miscellaneous appeal No. 42 of 1894, and the conclusion I arrived at was that the claim for redemption and the claim for rent were distinct causes of action, and that a suit like that under consideration embraced two distinct subjects, in regard to either or both of which relief might be given or refused; and that therefore under section 17 of the Court Fees Act, the institution fee on the plaint should be calculated on the aggregate of the value of each subject.

“This ruling of mine, however, which is mainly based on the recent ruling in *Konna Panikar v. Karunakara*(1) is opposed to what has been the practice of all the Courts of this district (except Shernad) since the case of *Subramanya Bharatengal v. Kunnan*(2) in 1889.

“The same question is now pending before me in appeal suit No. 512 of 1894, in which the plaintiff sued to redeem a kanom demised of Rs. 970 and to recover arrears of rent amounting to Rs. 675 on payment of the balance due after deducting the arrears of rent from the kanom. The Lower Court disallowed the prayer for redemption, but gave a decree for a portion of the rent. The appeal is against (1) the disallowance of the alleged right to redeem, and (2) the disallowance of part of the rent claimed. Court fee has been paid in each Court only on the kanom amount, but I am of opinion that it should also be paid on the rent claimed. Many similar cases are pending, and it is highly desirable that the question should be authoritatively settled at an early date.”

Counsel were not instructed.

SHEPHARD, J.—As I understand the reference, the suit is an ordinary suit for redemption in which, owing to the fact that the mortgagee in possession has not paid the stipulated rent, the plaintiff asks for an account, in taking which the arrears of rent will be deducted from the mortgage amount.

(1) I.L.R., 16 Mad., 323. (2) Civil Revision Petition No. 337 of 1889 (unreported).

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In my opinion the Court fee ought in such a case to be computed according to the principal money expressed to be secured by the mortgage. In *Konna Panikar v. Karunakara*(1), it is distinctly said that the suit was to redeem the land and to recover arrears of rent. On that basis the judgment proceeds. *Subramanya Bharatengal v. Kunnan*(2) seems exactly in point.

I would answer the reference by holding that the fee must be computed on the amount of the mortgage.

BEST, J.—The suit is not for redemption and rent, but for redemption on payment of the kanom amount, the arrears of rent due from the kanomdar being deducted.

I am of opinion that the Court fee payable must be calculated on the kanom amount.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

TIRUNARASIMHA CHARI.*

*Criminal Procedure Code—Act X of 1882, ss. 144, 435, 476—Enquiry before
issue of an order under s. 144—Judicial proceeding—False evidence.*

A Magistrate, making an enquiry before issue of an order under Criminal Procedure Code, section 144, is acting in a stage of a judicial proceeding and has, therefore, jurisdiction to take action under section 476, if he is of opinion that false evidence has been given before him.

PETITION under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise an order of the Taluq Magistrate of Madurantakam, dated the 15th May 1895.

By the order in question the Taluq Magistrate directed the prosecution of the petitioner for offences under Indian Penal Code, sections 181, 193. The offences in question were charged to have been committed in the course of an enquiry held under Criminal Procedure Code, section 144.

(1) I.L.R., 16 Mad., 328. (2) Civil Revision Petition No. 387 of 1889 (unreported).
* Criminal Revision Case No. 321 of 1895.

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

Mr. H. G. Wedderburn for petitioner.

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

JUDGMENT:—On April 27th, 1895, an order was issued by the Taluq Magistrate of Madurantakam under section 144 of the Criminal Procedure Code, forbidding the erection of a stone-cut Vadagalai namam over the entrance of an Odayavar shrine in a certain temple, on the ground that such erection would lead to a riot. The Magistrate took proceedings in the first place on the report of the Village Munsif, which was followed by a police report and a petition from various persons. Before passing the order, he took a deposition from the dharmakarthas, Tirunarasimha Chari, and several others.

There is no question as to the jurisdiction of the Magistrate to pass the order, and under section 435, Criminal Procedure Code, his proceedings are not subject to revision by the High Court. But after the issue of the order, viz., on May 15th, 1895, the Magistrate under section 476, Criminal Procedure Code, directed the prosecution of the trustee Tirunarasimha Chari for giving false evidence (sections 181 and 193 of the Indian Penal Code), the alleged false evidence being that the trustee had sworn the namam was an old one, whereas in truth it was an entirely new one. The District Magistrate refused to interfere with this order, and the first question for determination is whether the deposition was taken by the Taluq Magistrate "in the course of a judicial proceeding," as, if not, the Magistrate had no jurisdiction to act under section 476, Criminal Procedure Code.

Under the old Procedure Code X of 1872, similar orders for the prevention of local nuisances were expressly declared to be not judicial proceedings, (sections 518, 520), and were therefore not revisable under section 297. See *Ramanuja Jeeyarsvami v. Ramanuja Jeeyar*(1). Section 144 of the present Code corresponds to section 518, Act X of 1872, and though section 520 was not re-enacted as a separate section in the corresponding chapter, its purport is repeated in the third clause of section 435 of the present Code. In making this provision the Legislature had no

(1) I.L.R., 3 Mad., 354.

QUEEN-
EMPRESS
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SIMHA CHARI.

1895.
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11.

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doubt in view the fact that there might be emergencies in which it was essential for the prompt preservation of the public peace to debar the interference of the High Court, but orders passed under section 144, have only a temporary duration.

The difficulty arises from the variation in language between section 297 of the old Code and section 435 of the present Code. Under the old Code powers of revision were granted to the High Court in judicial proceedings only, and the enacting of section 520 would seem to imply that, but for that section orders under section 518 would be "judicial proceedings," section 435 of the present Code enables the High Court to call for the record of "any proceeding before any inferior Criminal Court," and, therefore, orders under section 144 would certainly be subject to revision, were it not for the proviso in the third clause of the section. Under section 4 of the present Code "judicial proceeding" is defined to be "any proceeding in the course of which evidence is or may be legally taken." It seems to us impossible to deny that a Magistrate acting under section 144 may legally take evidence before issuing an order. He may, it is true, act on information received or on his own knowledge, without taking evidence, but the proviso in the third clause which in certain cases authorizes the Magistrate to pass an order *ex-parte* seems to contemplate that ordinarily an order under the section should not be made, without an opportunity being afforded to the person against whom it is proposed to make it, to show cause why it should not be passed. (See *In the matter of Harimohan Malo*(1) and *Queen v. Ram Chandra Mockeryjee*(2). This necessarily implies the power to take evidence before coming to a decision, though a Magistrate is empowered to act upon what is not legal evidence in cases of special urgency.

From this it would appear that both under the old Code and under the present Code these urgent orders were regarded as in their nature "judicial proceedings," the only difference being that, whereas under the old Code, section 520, somewhat inaccurately declared them to be not judicial proceedings for the purpose of ousting the High Court's powers of revision under section 297, the present Code equally bars the High Court's jurisdiction without making an illogical declaration.

(1) 1 B.L.R. (A. Cr.), 20.

(2) 5 B.L.R., 131.

QUEEN-
EMPRESS
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SINHA CHARI.

For these reasons we come to the conclusion that a Magistrate, making an enquiry before issue of an order under section 144, is acting in a stage of a judicial proceeding, and has therefore jurisdiction to take action under section 476, if he is of opinion that false evidence has been given before him.

We are not prepared to hold that the Taluq Magistrate was bound to make any further preliminary enquiry, and as he had jurisdiction, we cannot set aside his complaint, nor will we now express any opinion as to the defence that may be raised at the trial.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Best.

SRIRAMULU AND OTHERS (RESPONDENTS), APPELLANTS,

v.

SOBHANADRI APPA RAU (PETITIONER), RESPONDENTS.*

1894.
August 17,
28.

Limitation Act—Act XV of 1877, sched. II, art. 110—Rent Recovery Act (Madras)—Act VIII of 1865, ss. 7, 9, 10—Suit to recover arrears of rent—Proceedings in Revenue Court to enforce acceptance of patta tendered—Time from which period of limitation is computed.

In a suit for rent for a period which had expired more than three years before the date of the plaint, it appeared that proceedings had taken place in a Revenue Court under Rent Recovery Act (Madras), 1865, to enforce acceptance by the defendant of the patta tendered by the landlord. These proceedings had terminated on appeal in favour of the landlord less than three years before the institution of this suit:

Held, that the period of limitation applicable to the suit was not computable from the date of the termination of the proceedings under the Rent Recovery Act and that the suit was barred by limitation. *Sobhanadri Appa Rau v. Chalamannu* (I.L.R., 17 Mad., 225) overruled.

APPEAL under Letters Patent, section 15, against the judgment of Muttusami Ayyar, J., pronounced on civil revision petition No. 51 of 1892, which was presented under Provincial Small Cause Courts Act, section 25, praying the High Court to revise the decree of M. B. Sundara Rau, Subordinate Judge of Ellore, in small cause suit No. 323 of 1891.

Suit to recover rent due on land of which the defendant was a tenant of the plaintiff. The rent was claimed in respect of

* Letters Patent Appeals Nos. 10 to 14 of 1894.

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v.
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APPA RAU.

the faslis 1295 and 1296, i.e., for a period which had expired more than three years before the institution of this suit. The plaintiff's father had tendered pattas for those faslis. Proceedings were instituted under Rent Recovery Act (Madras), 1865, before the Head Assistant Collector of Kistna to enforce acceptance by the defendant of the patta tendered by the landlord. An appeal was preferred against the decision of the Head Assistant Collector to the District Judge, who disposed of the appeal in favour of the landlord less than three years from the institution of the present suit. On these facts it was argued for the plaintiff that the suit was not barred and that the period of limitation applicable to it should be computed from the date of the decree of the District Court, whereby the question was determined whether the form of patta adopted was correct.

The Subordinate Judge overruled this argument and dismissed the suit as barred by limitation. The petition for the revision of his decree came on for hearing before Muttusami Ayyar, J., who held that the suit was not barred by limitation on the authority of his decision in *Sobhanadri Appa Rau v. Chalamanna*(1).

The defendant preferred this appeal.

Mr. Parthasaradhi Ayyangar for appellant.

Mr. E. B. Powell for respondent.

PARKER, J.—I find myself unable to reconcile the decision of the learned Judge with the decision in *Periyannayagam Pillai v. Virappa Naikan*(2) and that in *Easwara Doss v. Subbaraya Naicken*(3), to which Mr. Justice Muttusami Ayyar was a party. These decisions do not appear to have been brought to his notice. It is stated that plaintiff's father had tendered pattas for the fasli years for which the rent is now claimed. Having done so he was in a position, under section 7 of the Rent Recovery Act, to sue for the rent notwithstanding that a suit to determine the terms of the tenancy was pending. The pendency of that suit did not prevent the accrual of the cause of action, though the determination of the suit for rent might have to await the decision in the suit brought to determine the terms of the patta. The period of limitation began to run on the dates on which the rent fell due and the obligation arose on the tender of the patta. The

pendency of the other suit could not either postpone the obligation (the patta tendered being correct), or prevent the accrual of the cause of action. The landlord was in a position to sue, though the decision of the suit might possibly have to be postponed. I would set aside the order of the learned Judge and dismiss civil revision petition No. 51 of 1892 with all costs in this Court.

Letters Patent appeals Nos. 11 to 14 follow.

BEST, J.—The question for decision in all these appeals is the same, namely, whether the suits are barred under article 110 of schedule II of the Limitation Act? The rent sued for in each case is due for faslis which admittedly ended more than three years prior to the institution of these suits and the Court of first instance held in each case that the suit was time-barred. But the learned Judge of this Court, before whom the cases came for revision under section 25 of Act IX of 1887, has held that the period of limitation must be calculated from the date on which were finally decided the suits brought by the landlord under section 9 of Act VIII of 1865 (Madras) for enforcement of acceptance by the tenants of pattas tendered, which they had refused to accept.

No doubt section 7 of the Act makes the tender of a patta such as the tenant was bound to accept, a condition precedent to a suit for recovery of the rent except in cases in which there has been mutual exchange of patta and muchalka, or an agreement to dispense with such.

But this condition does not appear to me to warrant the holding that when a suit is brought to enforce acceptance of such patta, institution of a suit for the rent to which it relates must or can be deferred till disposal of that suit. It seems to me that the landlord is in a position to sue for the rent as soon as he has tendered a proper patta, and it is clear from section 14 of the Act that rent becomes an arrear and due "at the time when according to any written agreement or the custom of the country it ought to have been paid" and that is not later than the end of the fasli for which it is due.

I agree, therefore, in setting aside the learned Judge's order and restoring the decrees of the Court of first instance in each of these cases.

Each of these appellants is entitled to his costs in this Court both of the present appeals and of the revision petitions.

SRIRAMULU
v.
SOBHANADRI
APPA RAU.

(1) I.L.B., 17 Mad., 225.

(2) 7 M.H.C.R., 51.

(3) Civil Revision Petition No. 186 of 1891 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Beet.

KRISHNAYYA (PLAINTIFF), APPELLANT,

v.

SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT.*

1895.
January 30.
April 18.
September
28.

Irrigation-cess Act (Madras)—Act VII of 1865—Lands irrigated under Kistna anicut—Water-cess—Optional or compulsory use of water.

A raiyat occupying land in the Kistna delta made no application for the supply of water, but water from the irrigation channels flowed from time to time on to his land from irrigated lands of a higher level, and he had no option as to whether to accept or refuse the supply. No increased benefit was derived from the water by the raiyat. A sum having been levied from him on account of water-cess, he now sued to recover the amount:

Held, that the plaintiff was entitled to recover.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 452 of 1893, reversing the decree of B. Virasami Ayya, District Munsif of Guntur, in original suit No. 232 of 1892.

The plaintiff was a raiyat occupying land in the Kistna delta, and the plaint alleged that in fasli 1300 he raised on his land a crop of *mosadum* paddy and that the crop was damaged by water which flowed on to it from fields on a higher level which were irrigated under the Kistna anicut, and that he was assessed to pay and paid under protest a certain sum on account of water-cess, which sum he now sought to recover. It was pleaded that the suit was barred by Revenue Recovery Act II of 1864 (Madras), section 59, and that the imposition of a water-cess was rightly made, since the crop of *mosadum* paddy was a wet crop and as such benefited by irrigation, although in a favourable season it is possible to cultivate it with rain water alone.

The District Munsif held that *mosadum* paddy was a crop not merely depending on rain, but needing occasional irrigation not inundation, and that the plaintiff was neither a loser nor a gainer by the water flowing on to his land, and that even if he were a gainer thereby he would not for that reason alone have become liable for the water-cess. On these findings he passed a decree for the plaintiff as prayed.

* Second Appeals Nos. 1438 to 1442 of 1894.

The District Judge on appeal stated the circumstances out of which the claim arose as follows:—

"The river Kistna passes through the hills at Bezwada and then becomes a delta river. It flows on a level higher than the surrounding country, which slopes away from each bank of the river and down to the sea with an even slope of about one foot per mile. More than thirty years ago Government threw across the river at Bezwada a great transverse dam, called the anicut, and thus provided a constant head of water to irrigate the delta. This water was conveyed from each end of the anicut into the delta by the old channels of former flood action or by new channels excavated for the purpose. The system of channels to supply the whole delta is not yet completed and it is a mistake to think that there is a separate channel to each raiyat's holding, as there is a water pipe to each house in a city. The system is much more rough and ready. The water is let off from the channels into the fields nearest the sluices and from these fields it flows down to other fields. It flows from terrace to terrace of rice fields, or it is led along by small distributory channels kept up by the raiyats themselves or it flows down any natural slope to a lower village with its fields, until finally it passes to the Koleru lake, the Romperu swamp or the sea. The ideal system would be to have a channel and a sluice at each man's holding, with a hydrometer to measure the amount of water issued to him, but the existing system is simply that the water is put into the delta and left to flow down to the fields that require it.

"In 1865 the Secretary of State desired to have separate returns of the receipts from the Kistna and Godavari anicuts and to enable Government to obtain these returns, Madras Act VII of 1865 was passed. The land in the Kistna delta was classed as dry land and a charge per acre was made for the water from the anicut channel, supplied or used. I imagine that Government in passing this Act looked on it as making nominal change in the land revenue accounts and had no idea that the Act would affect the rights of the cultivators. I believe that in those days no officer in the Madras Presidency thought that a raiyat could refuse to take the water when it was supplied.

"In 1885 a raiyat in Zupudi of Bapatla Taluk was compelled to pay water rate on land upon which he had attempted to raise a crop of paddy when the excess water from the higher villages flowed down upon it. I expressed the view that the raiyat had no legal option to refuse the water and must pay, but this view was emphatically set aside by the High Court. The case is reported as *Venkatappayya v. The Collector of Kistna*(1). This decision caused a sensation in the district.

"In the present suit the plaintiff has lands on a low level and the excess water from the higher villages flowed upon his lands. He had cultivated the land with *mosadum* paddy. The evidence shows that this paddy can be cultivated with an abundant rainfall, but that if the rain be not sufficient to make water stand on the field, the paddy must be irrigated. The evidence also shows that the rainfall that year was deficient and that plaintiff, by the help of this excess water which flowed to his land, did reap a crop. Plaintiff and his witnesses say that the water was a yard deep and damaged the crop, but I suspect that to be an exaggeration. Plaintiff made no application for water. Upon these facts the question before me is whether the Collector can demand water rate."

(1) I.L.R., 12 Mad., 407.

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STATE FOR
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In the result the District Judge reversed the decree of the District Munsif and dismissed the plaintiff's suit.

Pattabhirama Ayyar and *Venkatarama Sarma* for appellant.

The Government Pleader (Mr. *E. B. Powell*) for respondent.

SHEPHARD, J.—It seems to me desirable before we decide this appeal, which raises an important question, that we should have before us more distinct findings on the facts. It appears from the District Munsif's judgment that several questions of fact were raised before him and the District Munsif records his opinion upon them. In the judgment of the District Judge there is only one of the fourteen paragraphs of which it consists, which touches the particular facts of the case.

Without any discussion of the evidence, the District Judge finds that the rainfall was insufficient and that the water which flowed to plaintiff's field did in fact save the crop and produce a harvest, whereas the Munsif finds that the plaintiff was neither a gainer nor a loser by the water. In my opinion, however, the circumstance that the plaintiff was in fact a gainer is not sufficient to justify the dismissal of the suit, or to distinguish the case from *Venkatappayya v. The Collector of Kistna*(1). The facts of that case are not very clearly stated in the report. Apparently, the plaintiff there, was, by reason of the submersion of his lands, driven to growing *tiruvarangam* paddy—a crop requiring irrigation. The crop failed, but it is not said that it failed in consequence of the excess water. The *ratio decidendi* appears to be that the plaintiff was practically compelled to use the water in order to obtain any crop. According to this decision, the question is not whether in the result the plaintiff derives benefit from the water, but under what circumstances he came to use it. If he had no choice in the matter, then, as I understand the decision, he cannot be said to have used the water within the meaning of the Act. I think the District Judge should be asked to return a finding on the question whether the plaintiff used the water for purposes of irrigation within the meaning of the Act.

BEST, J.—The finding of the Judge is that *mosadam* paddy—a crop of which was raised and reaped by the plaintiff—though it can be cultivated with an abundant rainfall, must be irrigated if the rain be not sufficient to make water stand on the field; that in

the year in question the rainfall was deficient and that it was by the help of the water that flowed to his land that plaintiff reaped a crop. The case is, therefore, distinguishable from *Venkatappayya v. The Collector of Kistna*(1), where there was a failure of the paddy crop which the raiyat endeavoured to raise, to avert, if possible, the loss that would otherwise be incurred by reason of the land being rendered unfit for dry cultivation. The learned Judges who decided that case are careful to limit their decision to the "facts found in the case" and upon those facts they held—and rightly so—that to compel the then plaintiff to pay the cess would be to violate the rule that requires the construction to be placed on statutes to be reasonable, for it is clear from the preamble of Act VII of 1865 (Madras) that the cess is only payable on account of the "increased profits" derivable from lands irrigated by the works referred to therein. Stress is laid on behalf of appellant on the following passage in the judgment above referred to. "The appellants did not apply for the water and it was not allowed to flow to their land by reason of such application and we cannot therefore say that water was supplied inasmuch as the expression 'implies in its ordinary sense a previous request, express or implied.' These last words are significant. It is not necessary that there should have been an actual request for the water, the request can be 'implied.' Immediately afterwards, in considering the word 'used,' the learned Judges say 'the term 'ordinarily presupposes freedom either to use or abstain from using the water and the language of the section does not suggest an intention to exclude this freedom,' and further at p. 410 they say 'the reasonable construction is that the use contemplated by the Act is a voluntary use though not pre-ceded by an application.' A previous request can be implied therefore if there has been a voluntary use of the water. I concur in remitting for trial the issue suggested by my learned colleague.

The District Judge is requested to submit his findings within one month from the date of receipt of this order, and seven days will be allowed for filing objections after the findings have been posted up in this Court.

In compliance with the above order, the District Judge F. H. Hamnett submitted the following findings:—

(1) I.L.R., 12 Mad., 407.

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"The appellants had no choice but to use the surplus water or to run the risk of serious damage, if not the total loss of any dry crops they might attempt to raise on the lands. The use of the water was not, therefore, optional, inasmuch as the appellants had no freedom to either take or refuse the water.

"I now consider the question whether the appellants had the intention of deriving an increased profit by the use of the water.

"What should, in my opinion, be the real important question is whether the appellants derived any increased profits by the use of the water as compared with the profits they would ordinarily have got by raising dry crops. There is no clear evidence on this point, but it may be presumed that wet crops, if properly irrigated, yield a much larger return than dry crops, otherwise the raiyats would not pay an extra tax of Rs. 4 an acre over the dry assessment for the use of Government water. This would be a legitimate inference to draw if water was obtained in the way it is usually supplied to wet fields. In the present case the tax imposed was eventually reduced to Rs. 2 an acre and I gather from exhibit III that this tax must have been imposed on the ground that the crops raised were wet crops irrigated by drainage water, of which the Jamabundy officer (or his superior, the Collector) was satisfied, the supply was too precarious to allow of the cultivation of a regular wet crop. We start then with the fact that the supply is a precarious one. It is very doubtful whether wet crops raised with such a precarious supply would be more remunerative than good dry crops raised on the same land. The Revenue Inspector proves that the lands in those particular cases only yielded $2\frac{1}{2}$ tooms an acre as compared with 15 tooms, the average yield of ordinary wet lands. The value of $2\frac{1}{2}$ tooms would not be more than about Rs. 5, and this is not in excess of what the lands might have yielded if cultivated with dry crops, the assessment of the lands (as dry lands) being Rs. 2 an acre and the assessment being supposed to be about half the nett yield of the lands. It is urged that fasli 1300 was a bad year and that the appellants would probably have got no dry crops at all. This might be so, but in June or July when the appellants planted their *mosadam* crops, it was too early for any one to predict whether the rains were going to fall or not. When they planted the crops, therefore, they could have had no intention of deriving an increased profit from the use of Government water, which they could not have realized from dry crops, assuming that dry crops were cultivable in spite of the flow of surplus water over the lands. I find, therefore, that there is no proof that the appellants derived any increased profit or intended to derive any increased profit as compared with the profit which their lands, if capable of cultivation as dry lands, would have yielded in an ordinary season, and that, on this ground, and there was no use of the water for irrigation purposes within the meaning of the Act, which presupposes that the tax is only paid for use of water which is intended to yield increased profits.

"I have also found above that the use of the water was no optional but compulsory."

These appeals coming on for final hearing, the Court delivered the following judgment:—

JUDGMENT.—It is now found that it was practically impossible for the plaintiff to divert the water and prevent it coming

over his land and that no increased benefit was derived from the water.

The inference drawn by the Judge is that the use of the water was not voluntary. On these findings, following the decision in *Venkatappayya v. The Collector of Kistna*(1), we must allow the appeal, reverse the decree of the District Judge and restore that of the District Munsif.

The appellant is entitled to costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Subramania Ayyar.

DAIVANAYAGAM PILLAI, APPELLANT,

v.

RANGASAMI AYYAR, RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 2, 244, 311, 588—Order refusing to set aside a Court sale—Second appeal.

A judgment-debtor, whose property had been sold in execution of a decree and purchased by the decree-holder, applied that the sale be set aside on the ground that the person, at whose instance execution had proceeded, had been improperly brought on to the record. The application was rejected by the Court of first instance and an appeal by the applicant was dismissed:

Held, that no second appeal lay to the High Court.

APPEAL under Letters Patent, section 15, against the judgment of Muttusami Ayyar, J., dismissing a second appeal preferred against the order of T. M. Horsfall, District Judge of Tinnevely, in civil miscellaneous appeal No. 12 of 1892, which affirmed the order of S. Saminatha Sastri, District Munsif of Ambasamudram, in miscellaneous petition No. 1843 of 1892.

The petitioner in the District Munsif's Court was one Daivanyagam Pillai, the second defendant in original suit No. 90 of 1890, and the petition stated that his property had been attached in execution of the decree in that suit, that after the date of the

(1) I.L.R., 12 Mad., 407.

* Letters Patent Appeal No. 20 of 1895

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1894.
October 31.
November 1.
1895.
August 21.

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attachment one Rangasami Ayyar had applied to be brought on to the record as an assignee from the decree-holder, that his application had been granted after the death of the original decree-holder, no one having been brought meanwhile on to the record as a representative of the deceased and no notice having been served on the second defendant, and that the property which had been attached was subsequently sold in execution and purchased by the decree-holder. The prayer of the petition was that the sale should be set aside under Civil Procedure Code, section 311. The District Munsif dismissed the petition for default. The District Judge dismissed the appeal against the order of the District Munsif.

The petitioner preferred a second appeal which came on for hearing before Muttusami Ayyar, J.

Ramachandra Rau Sahib and Ranga Ramanjachariar for appellant.

Srinivasa Ayyangar for respondent.

MUTTUSAMI AYYAR, J.—The preliminary objection is taken that no second appeal lies in this case. I am of opinion that the objection is well founded. I held in *Pechi Chetti v. Venkatachellam Chetti* (1) that no second appeal lay against an order made under section 588. An order refusing to set aside a sale is appealable under section 588, and it is provided by Act VII of 1888 that the orders passed in appeals under section 588 shall be final. By section 2 of the Civil Procedure Code it is expressly declared that an order specified in section 588 is not a decree. No second appeal can, therefore, be taken to lie under the provisions of the Code relating generally to appeal decrees. It is urged that in the case before me the decree-holder, who was a party to the suit, was the purchaser at the Court sale and that the order must therefore be taken to be an order passed under section 244. But it is not enough that the question determined is one mentioned in section 244. In order that the order may be a decree, it is also necessary that the order should not be one specified in section 588. Under section 2 of the Code of Civil Procedure it is immaterial whether a decree-holder or a third party is the purchaser at the Court sale. The same view was taken by the Full Bench at Calcutta in *Nana Kumar Roy v. Golam Chunder Dey* (2). My attention is,

(1) Appeal against Appellate Order No. 18 of 1893 (unreported).

(2) I.L.R., 18 Cal., 429.

however, called to the cases—*Vallabhan v. Panguanni* (1), *Muttia v. Appasami* (2) and *Viraraghava v. Venkata* (3). But none of them is in point and this question did not arise in those cases.

I dismiss this appeal with costs.

The appellant preferred an appeal under Letters Patent, section 15, against the above judgment.

Jivaji for appellant.

Respondent was not represented.

JUDGMENT.—We agree with the learned Judge that there is no second appeal.

The appeal is dismissed with costs.

DAIVA-
NAYAGAM
PILLAI
v.
RAMASAMI
AYYAR.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

RAMASAMI BHAGAVATHAR (DEFENDANT No. 3),
PETITIONER,

1895.
September
4, 17.

v.

NAGENDRAYYAN AND OTHERS (PLAINTIFF AND SUPPLEMENTAL
PLAINTIFFS), RESPONDENTS.*

*Companies Act—Act VI of 1882, s. 4—Illegal association—Business carried on
for the purpose of gain.*

Persons more than twenty in number paid each a certain sum monthly to a stakeholder. The sum total of the subscriptions was then paid over as a loan free of interest to one of the subscribers chosen by casting lots, and he was thereupon required to execute a bond with a surety obliging him to continue his monthly subscriptions to the end of the period for which the arrangement was agreed to hold good—that period being as many months as there were subscribers. The bonds in question were executed in favour of the stakeholder and the subscribers. A suit was brought on one of such bonds to recover the amount payable for subscription on account of the period subsequent to its execution:

Held, that the obligees carried on business which had for its object the acquisition of gain within the meaning of Companies Act, 1882, section 4, and accordingly constituted an illegal association and that the suit was not maintainable.

PETITION under Provincial Small Cause Courts Act, IX of 1887, section 25, praying the High Court to revise the decree of

(1) I.L.R., 12 Mad., 454. (2) I.L.R., 13 Mad., 504. (3) I.L.R., 16 Mad., 287.

* Civil Revision Petition No. 597 of 1894.

RAMASAMI
BHAGAVATHAR

v.
NAGEN-
DRAYYAN.

K. Krishnamachariar, District Munsif of Madura, in small cause suit No. 809 of 1894.

The facts were stated by the District Munsif as follows:—

"Sut to recover Rs. 40-12-0, being the balance of subscription and interest thereon, due in respect of a chit subscribed for by the deceased father of the first defendant with the first plaintiff as stakeholder. The said subscriber got his prize and was paid the money, on himself and the third defendant executing the plaint bond as security for the due payment of the subscriptions.

"The first and second defendants, who are the legal representatives of the deceased subscriber, Rappa Subbayan, have allowed the suit *ex parte*."

The bond above referred to was executed by the deceased subscriber and defendant No. 3 in favour of plaintiff No. 1 and the other subscribers to an association, the nature of which did not appear from the printed records in the case, but was made apparent by the facts admitted at the hearing, the effect of which is stated in the judgments on the petition. A question was raised before the District Munsif as to whether the suit was maintainable "the suit transaction relating to a company consisting of more than twenty subscribers and not registered under the Indian Companies Act." The District Munsif determined this and the other questions raised in the suit in favour of the plaintiff and passed a decree as prayed.

Defendant No. 3 preferred this petition.

Balaji Rau for petitioner.

Bhashyam Ayyangar and *Gopalasami Ayyangar* for respondents.

SHEPARD, J.—The question is whether the association formed by the plaintiffs and the deceased Subbayan, not having been registered under the Companies Act, was an illegal one. If they were associated together for the purpose of carrying on a business and had in view the acquisition of gain, the action, being brought to enforce a contract made for an illegal purpose, clearly cannot be maintained. The facts are not fully stated in the judgment, but it was admitted before us that the chit-fund, or *kuri* as it is called, in which the deceased Subbayan and the plaintiffs took part, was managed in the following way. Periodically the subscribers pay each a certain sum to a stakeholder. The sum total of their subscriptions is then assigned by casting of lots to one of the subscribers who is thereupon required to execute a bond with

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a surety obliging him to continue his subscriptions to the end of the period for which the arrangement is agreed to hold good. The subscriber who at any one drawing happens to take the prize enjoys the benefit of the money without paying interest—and accordingly an advantage is gained by those who gain the prize in the early part of the period as compared with those who, having to keep up their subscriptions all the time, do not receive anything until towards the end of the period. (See *Kamakshi Achari v. Appavu Pillai*(1)—also Logan's Malabar District Manual, page 172, and as to analogous institutions in China, Simcox's Primitive Civilization, Vol. II, page 332.)

It can hardly be doubted that persons associated together in this way must be said to carry on a business. It is true that they have no business relations with persons outside their circle as in cases when a trade is carried on; there is no subsisting fund with which such business could be carried on. But money-lending is a business, and here upon each drawing of lots there is a loan of the common fund made by ninety-nine members of the association to the hundredth. The point taken by Mr. Bhashyam Ayyangar was that business was not carried on for the purpose of gain either to the association or to the individual members of it. It was suggested that the real object which subscribers to a chit-fund have in view is, not the chance of an early drawing of the lot, but the securing of a safe deposit for savings and the consequent inducement to save money. It is possible that the idea of enforced economy may weigh with those who contribute to a fund, but I am unable to believe that the chance of gain by the securing of a loan on easy terms is not also an object which contributors have in view. Mr. Bhashyam Ayyangar's argument was the same as that used in *Shaw v. Benson*(2). The object of the society in that case was first to advance money to shareholders to enable them to build or purchase houses, and secondly to lend money to shareholders on approved personal security. Interest was charged on the moneys so advanced and the business was so conducted that at the end of the period for which it was intended to go on, the members who had not borrowed would pay £84 on each £100 share, whereas the member who had borrowed from the beginning would pay £119. In that case, therefore, it was rather the lenders

(1) 1 M.H.C.R., 448.

(2) 11 Q.B.D., 563, 570.

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than the borrowers who acquired gain. It was argued that the object of the society being the encouragement of saving, all members received equal advantage, there was therefore no acquisition of gain. But it was held that at any rate for the lending members there was a gain and therefore the society was an illegal one. In that case, as it seems to me, the contention that the encouragement of saving was the object of the association was more entitled to weight than it is in the present case in which all the subscribers must at the outset have had in contemplation the borrowing of the fund.

The case of *Kraal v. Whympere*(1) was cited on the plaintiffs' behalf. The decision, which turns on the particular conditions of the society in question, a society established on the mutual principle for the maintenance of widows and children, appears to me to have no bearing on the present case. The cases in which the object is to make some of the members to acquire gain by their dealings with the rest are expressly distinguished in the judgment. The present case, in my opinion, belongs to that class and, acting on the principle enunciated in the English cases that the Act should be carried out without a too minute or hypercritical consideration of its terms, (*In re Padstow Total Loss and Collision Assurance Association*(2)), I think we are bound to hold that the association was an illegal one and that therefore the decree should be reversed and the suit dismissed. I would make no order as to costs.

BEST, J.—I concur. The object of the association was the business of money-lending—the member to whom the loan was to be given being decided by drawing lots. These lots were drawn once a month, when also were due the monthly subscriptions of each of the members—and the whole amount of the month's subscriptions was paid over to the drawer of the loan for that month, on his executing a bond (with a surety) for his continuing to subscribe during the remaining months for which the kuri was established: the whole number of months of its existence being equal to the number of subscribers, so that each subscriber should have a month in which he must be the drawer of the loan. Those who drew the loan in the earlier months were decidedly gainers, as they at once got the money on condition of repaying the por-

(1) I.L.R., 17 Calc., 786, 808.

(2) 20 Ch. D., 137, 145.

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tion of it merely in excess of their theretofore paid subscriptions by punctual payment of future subscriptions—no interest being charged except on such subscriptions as should not be paid as they fell due. The hope of gain by drawing an early prize is no doubt the motive which induces persons to become subscribers to these kuris—and such gain is sufficient to bring the associations within the scope of the Companies Act, *Cf. Shaw v. Benson*(1) and *In re Padstow Total Loss and Collision Assurance Association*(2). *Kraal v. Whympere*(3) is distinguishable, as pointed out in that case itself, from a case in which the object of the business is “to enable some” of the members to acquire gain by their dealings with the rest,” which is a not inapt description of the object of the association now in question.

The bond A on which the suit was brought is executed not only to the first plaintiff as stakeholder, but to him and the subscribers to the kuri.

It is, therefore, a contract to pay money according to the rules of an association illegal for want of registration under section 4 of the Companies Act (VI of 1882).

I concur in dismissing the suit without any order as to costs.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

THAYAMMAL (PLAINTIFF),

v.

ANNAMALAI MUDALI AND ANOTHER (DEFENDANTS).*

Hindu law—Inheritance—Stridhanam—Sister-in-law.

A childless Hindu widow, who had been predeceased by her parents, died, leaving stridhanam property. Her brother's widow claimed to be entitled to inherit that property and sued to enforce her claim:

Held, that, whether the marriages of the deceased and her mother respectively had taken place in a superior or an inferior form, the plaintiff was not entitled to inherit the stridhanam property in question.

(1) 11 Q.B.D., 568, 570.

(2) I.L.R., 17 Calc., 786, 808.

(3) 20 Ch. D., 137, 145.

* Civil Suit No. 108 of 1895.

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SUIT for possession of certain property the stridhanam of one Seshammal, deceased, to which the plaintiff claimed to be entitled under the law of inheritance. Seshammal had died, leaving no children or parents and the plaintiff was her brother's widow. It was pleaded, *inter alia*, that the plaintiff was not entitled to inherit under the Hindu law. The first issue related to this plea and that alone was tried.

Mr. R. F. Grant for plaintiff.

Balaji Rau and Desikachariar for defendant No. 1.

Sundara Ayyar for defendant No. 2.

JUDGMENT.—On the application of the defendants the first issue, which is one of law, was argued under section 146 of the Code of Civil Procedure. It raises the question whether the plaintiff is, as alleged in the plaint, heir to the stridhanam of the late Seshammal, a married woman.

According to the rules of law applicable to the devolution of the stridhanam of a married woman, the property passes in the first place to the lineal descendants, if she left any, in an order to which it is unnecessary here to refer. The course of descent in default of descendants varies according to the form in which the deceased was married. If the marriage was in one of the four approved or superior forms, the husband, if he survives, takes the inheritance and in default those who would be his heirs. But if the marriage was in one of the four unapproved or inferior forms, the deceased's mother succeeds, and if there is no mother, the father. Failing the parents the heirs of the father and in default those of the mother inherit (Mitakshara, chapter II, section XI; Stokes' Hindu Law Book, page 461).

Now the allegation in the plaint relevant to the present question are that Seshammal died, leaving no lineal descendants nor husband nor mother nor father, and that the plaintiff is the widow of Seshammal's brother, who predeceased his sister. As to the form, however, in which Seshammal was married the plaint is silent. The law presumes under the circumstances that the marriage was in one of the approved forms (Mayne's Hindu Law, 5th edition, paragraph 80) and in this view of the matter the plaintiff has to show that she is heir to Seshammal's husband. The learned counsel for the plaintiff scarcely ventured to assert that a person in the position of the plaintiff can be heir to her sister-in-law's husband. No authority was cited in favour of that proposition

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and none, I believe, can be found to support it. A man's wife's brother's widow belongs to none of the three well-known classes of relations who are heirs to him. She is neither a sapinda nor a samanodaka nor a bandhu of that man, and so far as the law of inheritance goes there seems to be no difference between her and a complete stranger. It is thus perfectly clear that, on the hypothesis that Seshammal's marriage was in one of the superior forms, the plaintiff's claim must fail.

The case, however, has to be considered with reference to the other hypothesis also, viz., the marriage was in an inferior form. It is true, as observed before, that the presumption is against that hypothesis. But that is a rebuttable presumption, and, as no evidence has been taken, I think the plaintiff is entitled to ask for a determination of the question on the supposition that she will be able to adduce evidence to rebut that presumption. In this view the question is, is the plaintiff heir to Seshammal's mother or father? It is convenient to take first the latter part of the question. On behalf of the plaintiff certain passages in *Kutti Ammal v. Radakristna Aiyar*(1) and *Lakshmanammal v. Tiruvengada*(2) were relied upon. Assuming those cases to be among the authorities for the proposition that bandhus need not necessarily be male relations, I fail to see how they afford any support to the claim of the plaintiff, since to enable her to come in as a bandhu of Seshammal's father, his gotra and that of the plaintiff must be different, whereas the contrary is the case here. By her marriage she passed into his gotra; and if she is entitled at all, it can only be as one of his sagotra sapindas. But, unlike under the Mayukha, a female sagotra sapinda of Seshammal's father in the position of the plaintiff is not an heir to him in this Presidency. (*Balamma v. Pullayya*(3); see as to daughter-in-law, specially, Mayne's Hindu Law, 5th edition, paragraph 488, and Dr. Jolly's Lectures on Hindu law at page 199). The next question is, is the plaintiff heir to Seshammal's mother? The answer to this also must be in the negative. For if Seshammal's mother's marriage was in an approved form, on the hypothesis that she died an issueless widow, (on which hypothesis alone the plaintiff can claim), the mother's heir would be her husband's, i.e., Seshammal's father's heir. And

(1) 8 M.H.C.R., 88.

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

(3) I.L.R., 18 Mad., 168.

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I have already shown that the plaintiff is not his heir. But even supposing Seshammal's mother was married in an inferior form—*Bandam Settah v. Bandam Maha Lakshmy*(1), wherein it was broadly laid down that under the Hindu law a daughter-in-law is not an heir to her mother-in-law, is a direct authority against the plaintiff.

I must, therefore, hold that in no point of view the plaintiff's claim, that she is entitled to Seshammal's stridhanam, is sustainable. And finding the first issue against her I dismiss the suit with costs.

Branson & Branson attorneys for plaintiff.

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Subramania Ayyar.

KANAKAYYA (PLAINTIFF No. 2), APPELLANT,

v.

NARASIMHULU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Party-wall—Erection on the wall by one tenant in common—Injunction at suit of other co-tenant.

One of two tenants in common of a party-wall raised the height of the wall with a view to building a superstructure on his own tenement. The other tenant in common, who had not consented to the alteration in the wall, but had suffered no inconvenience therefrom, now sued to enforce the removal of the newly-erected portion:

Held, that the plaintiff was entitled to the relief sought.

SECOND APPEAL against the decree of N. Saminadha Ayyar, Subordinate Judge of Vizagapatam, in appeal suit No. 40 of 1893, affirming the decree of A. L. Narasimham, District Munsif of Vizianagaram, in original suit No. 86 of 1892.

The plaintiffs and defendants were tenants in common of a party-wall. The defendants, without the consent of the plaintiffs, intending to build a superstructure on their tenement, raised the

height of the party-wall. This suit was brought to compel the removal of the newly-erected part of the wall.

The District Munsif dismissed the suit, and his decree was affirmed on appeal by the Subordinate Judge who held that the defendants had "every right to use the wall for lawful purposes "without inconvenience or injury to the co-owner, and this is "exactly what they have done."

Plaintiff No. 2 preferred this second appeal.

Ramachandra Rau Saheb for appellant.

Mr. M. O. Parthasaradhi Ayyangar and *Parthasaradhi Ayyangar* for respondents.

PARKER, J.—The finding is that the wall in dispute is a party-wall, belonging to plaintiffs and defendants as tenants in common. It is also found that the agreement A has no reference to the plaintiff wall.

The plaint asks that the part of the wall newly raised by the defendants shall be removed, and on the authority of *Watson v. Gray*(1), I am of opinion that plaintiffs are entitled to the relief asked for. It is true that the refusal of plaintiffs to give the required permission may be ill-natured and that the raising of the wall will not really harm them; but, at the same time, the altered wall is no longer the same wall and the newly-erected portion will not be a common or party-wall. The erection of it might give rise to inconvenience and quarrels.

I would give second plaintiff a decree for removing the portion of the wall newly raised, but as both parties have set up false pleas, I would direct that each pay his own costs throughout.

SUBRAMANIA AYYAR, J.—I was at first inclined to hold that the sound view to take with reference to the point at issue was that adopted in *Brookes v. Curtis*(2). There the Court of Appeal of New York observe:—"The fairer view and the one generally adopted in legislative provisions on the subject in this and other countries is to treat a party-wall as a structure for the common benefit and convenience of both of the tenements which it separates, and to permit either party to make any use of it which he may require either by deepening the foundation or increasing the height, so far as it can be done without injury to the other. The

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(1) 4 M.H.C.R., 180.

* Second Appeal No. 865 of 1894.

(1) L.R., 14 Ch. D., 192.

(2) Gray's Cases on Property, Vol. II, pp. 225, 226.

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"party making the change, when not required for purposes of repair, is absolutely responsible for any damage which it occasions; but in so far as he can use the wall in the improvement of his own property without injury to the wall or the adjoining property, there is no good reason why he should not be permitted to do so." On further consideration, however, I have arrived at the conclusion that the better rule to lay down is the simpler one enunciated in *Watson v. Gray*(1) since it will compel such of the owners of party-walls as are desirous of adding to, or otherwise materially interfering with, the common property to obtain beforehand the consent of the others interested in it to the change being effected, and consequently is the one less likely to lead to disputes among joint holders of party-walls. I agree, therefore, with my learned colleague in giving a decree to the appellant as proposed.

APPELLATE CIVIL—FULL BENCH.

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

1895. -
August 6, 7.
September 6.
October 24.
November 1.

VALLABHA VALIYA RAJAH (COUNTER-PETITIONER), APPELLANT,
v.
VEDAPURATTI (PETITIONER), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, ss. 87, 89, 92, 93.

A mortgagor who has made default in payment of the mortgage money within the time limited by the decree in a suit for redemption is not entitled to apply for execution of the decree after the time limited.

SECOND APPEAL against the order of R. S. Benson, District Judge of South Malabar, on civil miscellaneous appeal No. 122 of 1893, reversing the order of E. K. Krishnan, Subordinate Judge of Palghat, made on miscellaneous petition No. 706 of 1893 in the matter of original suit No. 3 of 1889.

The plaintiff sued to redeem a kanom, and a decree was passed directing that the mortgage premises be delivered to him on his payment of the mortgage money to defendant No. 31 within six

months of the final decree, and providing that in default of payment the property be sold. The money was not paid within the prescribed period, but 25 days after it had expired the plaintiff paid the amount into Court and got possession of the property. Defendant No. 31 refused to receive the money, and now prayed that the property should be restored to her on the ground that the plaintiff was not entitled to execute the decree after the expiry of the period limited thereby.

The Subordinate Judge rejected the petition with reference to the ruling in *Kanara Kurup v. Govinda Kurup*(1), and he directed that the property should remain with the plaintiff. On appeal the District Judge reversed the order of the Subordinate Judge with reference to the ruling in *Elayadath v. Krishnan*(2).

The plaintiff preferred this second appeal.

Sankaran Nayar for appellant.

Sundara Ayyar for respondent.

The second appeal came on for hearing before SHEPHARD and BEST, JJ., who made the following order of reference to the Full Bench:—

ORDER OF REFERENCE TO THE FULL BENCH:—The decree in this case directs that, upon the plaintiff paying a certain sum into Court on or before a certain day, the defendants shall deliver up the mortgaged property to the plaintiff, and "that, if such payment is not made on or before the said date, the said property be sold." The money was not paid within the time limited, but it was paid into Court a few days afterwards and the property was put in to the possession of the plaintiff. The defendant thereupon, refusing to receive the money, applied for restoration of the property on the ground that it was no longer open to the plaintiff, after the expiration of the time limited, to apply for execution of the decree. The District Judge on appeal ruled in favour of the defendant on the authority of the decision in *Elayadath v. Krishna*(2), by which he held that the case was governed. In the case cited the point decided was that a plaintiff, having a decree similar to that now before us, but not containing any direction for sale, could not be allowed to execute it after the expiration of the time limited. This decision is, in our opinion, open to grave doubt, and, as there are other decisions in conflict with it and the question is of some

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(1) L.R., 14 Ch. D., 192. * Appeal against Appellate Order No. 32 of 1894.

(1) I.L.R., 16 Mad., 214.

(2) I.L.R., 13 Mad., 267.

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importance, we think it right to refer it to a Full Bench. The other decisions to which we refer are to be found in *Ramunni v. Brahma Dattan*(1), *Kanara Kurup v. Govinda Kurup*(2) and an unreported case. In Calcutta also the High Court has taken the view favourable to the decree-holder—see cases cited in *Ajudhia Pershad v. Baldeo Singh*(3).

On principle, as it appears to us, these decisions are right. In the terms of the decree itself there are no words indicating a forfeiture of the mortgagor's right on default being made by him in payment within the fixed period. It is for his benefit that the term for payment is introduced. On default the mortgagee is at liberty to apply for an order for sale. To allow him, by remaining passive after default made, to retain possession notwithstanding an offer of the mortgagor to redeem, is practically to hold that upon default made he becomes absolute proprietor. The mortgagee is thus placed in a higher position than he would be if there were in the decree a direction for foreclosure on default, for in that case clearly the direction would need to be carried into effect by an order under section 93 of the Transfer of Property Act, and until that was done the right of the mortgagee would not become absolute. On the other hand, according to the construction placed upon the decree and upon the Act in the judgment in *Kanara Kurup v. Govinda Kurup*(2) the mortgagee is placed in such a position that, while he can always recover his money by insisting on a sale, he cannot gain more than the money due to him by remaining passive and not applying for a sale. We desire to adopt the reasoning used by MUTTUSAMI AYYAR J. in *Kanara Kurup v. Govinda Kurup*(2). As it must be admitted that the mortgagor may, on the mortgagee applying for an order for sale, come in and ask for time or offer to redeem even at the last moment before the sale is concluded, may he not anticipate the action of the mortgagee and offer to redeem before a sale is threatened?

The question we have to refer is, whether, after the expiration of the time mentioned in the decree and before any order for sale, the mortgagor is precluded from redeeming the property?

The case then came on for hearing before the Full Bench.

Mr. K. Brown and Sankaran Nayar for appellant.

(1) I.L.R., 15 Mad., 366, 370.

(2) I.L.R., 16 Mad., 214.

(3) I.L.R., 21 Cal., 818, 824.

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

COLLINS, C. J.—The question referred to a Full Bench by SHEPHERD and BEST, JJ., is “whether, after the time mentioned in the decree and before any order for sale, the mortgagor is precluded from redeeming the property?” The decree in question directs that, upon the plaintiff (the mortgagor) paying a certain sum into Court on or before a day certain, the defendants (the mortgagees) shall deliver up the mortgaged property to the plaintiff and “that, if such payment be not made on or before the said date, the said property be sold.” The money was not paid within the time limited, but it was paid into Court after that date and the property was put in possession of the plaintiff under the decree. The mortgagee refused to receive the money, and applied for restoration of the property on the ground that it was no longer open to the plaintiff, after the expiration of the time limited, to apply for execution of the decree. The District Judge ruled in favour of the mortgagee on the authority of *Elayadath v. Krishna*(1).

I am of opinion that the District Judge was right and that the decision in *Elayadath v. Krishna*(1) is good law. The Judges in that case (MUTTUSAMI AYYAR and PARKER, JJ.,) held that the application by the mortgagor for permission to pay after the expiration of the period fixed in the decree does not fall under the proviso of section 93 of the Transfer of Property Act. There was no application by the mortgagee for foreclosing the right of redemption. Sections 92 and 93, Transfer of Property Act, must be read together, and the proviso of the latter section has no application when the mortgagee does not apply for foreclosure or when the original decree does not contain the last clause mentioned in section 92. The case of *Ramunni v. Brahma Dattan*(2) is not in conflict with *Elayadath v. Krishna*(1). In *Ramunni v. Brahma Dattan*(2) the jenmi of land in Malabar sued in 1886 to redeem a kanom of 1849 and obtained a decree which merely directed the surrender of the land to the plaintiff on payment of a certain sum within three months from date of decree. The decree remained unexecuted, the money not having been paid. The jenmi brought another suit to redeem the same kanom, and the Court held the suit was not barred by the former decree. The question was referred owing to the observations

(1) I.L.R., 13 Mad., 267.

(2) I.L.R., 15 Mad., 366, 370.

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of MUTTUSAMI AYYAR J. in *Kanara Kurup v. Govinda Kurup*(1), but it is to be observed that, although both Judges (MUTTUSAMI AYYAR and BEST, JJ.) were of opinion that the order appealed against could not be supported, they differed in their reasons—BEST, J. holding that, as the defendants (the mortgagees) had accepted the amount tendered by the plaintiff, the defendants must be held to have waived their right to object to the same as paid out of time. MUTTUSAMI AYYAR J. apparently overlooked the decision in *Elayadath v. Krishna*(2), and in his judgment observed that, the mortgagee never having obtained an order for sale under section 93 of the Transfer of Property Act, the mortgagor's right of redemption never became extinct and the necessity for the sale was obviated by payment before any order was made under section 93. I do not think that was the question the learned Judge had to decide. The point in dispute was, whether the plaintiff, who had made default in payment of the money within the time fixed by the decree, had a right to apply for execution of that decree after the time limited, and I am clearly of opinion that he had no such right in execution. The cases cited in the Calcutta reports do not appear to me to have a material bearing on the point in question, and the Bombay decisions appear to support the decision in *Elayadah v. Krishna*(2).

I answer the question referred in the affirmative so far as it relates to the execution of the decree. It appears to me that the terms of the reference are somewhat too wide, as the defendant's only contention in the case was that it was not open to the plaintiff after the time limited to apply for execution of the decree, and that question I have decided in favour of the defendant.

PARKER, J.—The question referred to the Full Bench is whether, after the expiration of the time mentioned in the decree and before any order for sale, the mortgagor is precluded from redeeming the property.

In the case which gave rise to the reference the decree directed that, upon the mortgagor (plaintiff) paying a certain sum into Court on or before a certain day, defendants should deliver up the mortgaged property to plaintiff, and that if such payment were not made on or before the said date, the property be sold. The money was not paid within the time limited, but it was paid

(1) I.L.R., 16 Mad., 214.

(2) I.L.R., 13 Mad., 267.

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on a later date and the Court put plaintiff into possession. The mortgagee refused to receive the money and applied for restoration on the ground that it was no longer open to plaintiff after the expiration of the time limited to apply for execution of the decree. The District Judge decided in defendant's favour on the strength of the ruling in *Elayadath v. Krishna*(1). The learned Judges who made this reference to the Full Bench consider that this ruling is in conflict with the cases in *Ramunni v. Brahma Dattan*(2) and *Kanara Kurup v. Govinda Kurup*(3), and also refer to *Ajudhia Pershad v. Baldeo Singh*(4) which later decisions, they state, they would prefer to follow.

Elayadath v. Krishna(1), *Manavikraman v. Unniappan*(5), *Ramunni v. Brahma Dattan*(2), *Kanara Kurup v. Govind Kurup*(3), *Ramasami v. Sami*(6), *Poresh Nath Mojumdar v. Ramjodu Mojumdar*(7), *Ajudhia Pershad v. Baldeo Singh*(4), *Mahant Ishwargar v. Chudasama Manabhai*(8), and *Patloji v. Ganu*(9) were referred to in the argument. It will be observed that both the Calcutta cases were suits by the mortgagee, whereas all the Madras and Bombay cases were, like the present, suits by the mortgagor. It does not appear to me that the Calcutta cases have any application. The first *Poresh Nath Mojumdar v. Ramjodu Mojumdar*(7) was a foreclosure action in which plaintiff got possession without taking the proceedings prescribed by section 87 of the Transfer of Property Act. It was held that as he had not done so it was still open to the mortgagor (defendant) to redeem. In the second case *Ajudhia Pershad v. Baldeo Singh*(4) it was held that an application by plaintiff (mortgagee) for sale under section 89 did not require to be in the form prescribed in section 235, Code of Civil Procedure, and was of the nature of an application for a decree absolute.

The Bombay cases are in accord with *Elayadath v. Krishna*(1) and *Manavikraman v. Unniappan*(5). In the former (*Mahant Ishwargar v. Chudasama Manabhai*(8)) it was held that the Court in execution could not extend the time fixed by the decree, and in the latter *Patloji v. Ganu*(9) that the time ran from the date of the original decree. In the latter case the decree directed that, if

(1) I.L.R., 13 Mad., 267.

(3) I.L.R., 16 Mad., 214.

(5) I.L.R., 15 Mad., 170.

(7) I.L.R., 16 Calc., 246.

(9) I.L.R., 15 Bom., 370.

(2) I.L.R., 15 Mad., 366.

(4) I.L.R., 21 Calc., 818, 824.

(6) I.L.R., 17 Mad., 96.

(8) I.L.R., 13 Bom., 106.

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the money be not paid within the time limited, the plaintiff (mortgagor) should be for ever foreclosed.

Passing to the Madras cases, it does not appear to me that the decision in *Ramunni v. Brahma Dattan*(1) is in conflict with *Elayadath v. Krishna*(2). The former case *Ramunni v. Brahma Dattan*(1) was one of a second suit for redemption by the plaintiff (mortgagor). The first suit had remained unexecuted since plaintiff had not paid the money within the time limited. The decree contained no declaration as to foreclosure or sale. It was held that, though the first decree could not be executed, the relation of mortgagor and mortgagee still continued to subsist until it was terminated either by foreclosure or sale, and hence that a second suit for redemption would lie. This decision is not inconsistent with *Elayadath v. Krishna*(2), which simply held that a decree could not be executed after expiration of the time limited, or with *Ramasami v. Sami*(3), where it was held that no second suit would lie since that first decree directed that, if the money be not paid within the time limited, redemption should be barred.

It is however difficult to reconcile the decision in *Kanara Kurup v. Govinda Kurup*(4) with the earlier decisions. In that case the mortgagor (plaintiff) obtained a decree for redemption on 16th March 1889 by which six months' time was given for the payment of the sum fixed. The Appellate Court simply confirmed the original decree in June 1890, but the appellate decree gave no extension of time for the payment of the money notwithstanding that an application for further time had been made by the plaintiff in an execution petition put in in February 1890. This petition had, however, been presented after the time fixed by the original decree had expired. The Subordinate Judge executed the decree on the ground that plaintiff's right to relief could only be extinguished by an order under section 93 of the Transfer of Property Act. It seems to me that the order of the Subordinate Judge to execute the decree after it was at an end was wrong. See *Elayadath v. Krishna*(2), *Mahant Ishwargar v. Chudasama Manabhai*(5), and *Patloji v. Ganu*(6). On a Letters Patent Appeal being preferred, the learned Judges upheld the action of the Subordinate Judge in executing the decree, but on different grounds.

(1) I.L.R., 15 Mad., 366.

(3) I.L.R., 17 Mad., 96.

(5) I.L.R., 13 Bom., 106.

(2) I.L.R., 13 Mad., 267.

(4) I.L.R., 16 Mad., 214.

(6) I.L.R., 15 Bom., 370.

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Best J. was of opinion that as defendants had accepted the money they must be held to have waived their right to object to the sum as paid out of time, while MUTTUSAMI AYYAR, J. held that, as the mortgagee never obtained any order for sale and as the money was paid before the equity of redemption was extinct, the order of the Subordinate Judge was right.

In the case which gave rise to the present reference the mortgagee has refused to accept the money and therefore cannot be said to have waived his right. The special ground on which BEST, J. based his decision does not apply here. With regard to the judgment of MUTTUSAMI AYYAR, J. I can only say with great deference that I think the learned Judge overlooked the decisions in *Elayadath v. Krishna*(1) and *Manavikraman v. Unniappan*(2) and mistook the real question that was before him. In all the remarks that he makes as to the scheme of the Transfer of Property Act I entirely agree. I also agree that the mortgagor can redeem at any time before the right of redemption becomes extinct either under the Transfer of Property Act or by the Law of Limitation. But the question under consideration was one of procedure, not of substantive law, and though the plaintiff could bring a second suit for redemption (provided such a suit be not barred), or might pay the money into Court if defendant applied for sale, I do not see how this right to do either of these things can affect the Law of Limitation and enable him to execute a redemption decree after the expiration of the time limited.

The right of applying for sale after the time limited is the right of the defendant-mortgagee, and if he does not choose to exercise that right he cannot be compelled to do so. He may prefer to remain in possession, and may consider that he could not find a better investment for his capital if he were paid off. He may (it is true) be compelled to accept payment if the mortgagor pays the money into Court within the time limited or succeeds, after the expiration of that time, in a second redemption suit. But if he prefers to retain the property, he need not apply for sale, and he may possibly hope that the right of redemption will become barred before the mortgagor is in a position to sue again.

I find it impossible to reply to the question referred to the Full Bench by a simple affirmative or negative. • If by the question is

(1) I.L.R., 13 Mad., 267.

(2) I.L.R., 15 Mad., 170.

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intended "Is the mortgagor precluded from executing the decree?" I would answer in the affirmative; but if the question be "Is he precluded from redeeming the property?" the answer seems to be that it all depends upon the circumstances of the case. Provided the mortgagor's right of redemption be not extinct he can bring a fresh suit, or he can redeem if the mortgagee applies for sale; but he cannot himself apply for execution of the decree after the expiration of the time limited.

I would reply to the referring Bench accordingly. In the case under reference it seems to me that the decision of the District Judge was right.

SHEPARD, J.—The question raised by this reference is stated in terms larger than the actual case requires. The precise question should have been whether, under the circumstances mentioned, the mortgagor is precluded from redeeming the property under the decree. This question, however, almost necessarily involves the larger question, what remedy is open to the mortgagor after the expiration of the time limited by the decree for the payment of the mortgage money. That the right of the mortgagor still remains, notwithstanding the expiration of the period so fixed, there can be no doubt. Whether the decree be made in a suit by the mortgagee or in the mortgagor's suit for redemption, whether the decree contains a direction for sale or a direction for foreclosure, it is equally open to the mortgagor to come in, on an application being made by the mortgagee either under the 87th or under the 93rd section, and pay the mortgage money into Court. The 93rd section contains an express provision indicating that the right of redemption is extinguished only upon the passing of an order absolute for foreclosure or a similar order for sale under the provisions of the same section. And even after such latter order has been passed, there still remains to the mortgagor the right, which, under the provisions of the Civil Procedure Code, every judgment-debtor has, to prevent the sale by paying money into Court. While it is thus clear that the mortgagor, when put on the defensive by a hostile application made on the mortgagee's behalf, has the means of making good his right of redemption at any time before the actual sale takes place, it has to be seen in what manner he can assert his right against a mortgagee who remains quiescent and makes no application for an order absolute. The 93rd section of the Act, which is supplementary to the preceding section and has

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to be read with it, says: "if payment is made of such amount and of such subsequent costs as are mentioned in section 94, the plaintiff shall, if necessary, be put into possession of the mortgaged property." A like provision is contained in the 87th and in the 89th sections, except that in the latter a payment "on the day fixed as aforesaid" is pre-supposed. Although the language of the other two sections is not so precise, I think it is evidently intended that in all three cases alike the payment is to be made on the day fixed. That being so, the mortgagor having lost the opportunity of recovering possession under the first paragraph of the 93rd section, must, unless the proviso can be called in aid, assert his right of redemption otherwise than under the decree. The proviso in the 93rd section authorizing the Court upon good cause shown to postpone the day fixed for payment is similar to that in the 87th section, but curiously in the 89th section, which is the section declaring the course to be taken in the case of a decree for sale, there is no such proviso. It is quite clear, as was pointed out in *Elayadath v. Krishna*(1) that the proviso cannot be intended to operate except in cases where the decree for redemption contains a clause similar to that prescribed by the last paragraph of the 92nd section. Reading the 87th section and the 93rd section together, I also think that the proviso was only intended to come into play when an application has been made by the mortgagee for the final order to which he may be entitled. That seems to have been the opinion of the learned Judges who heard the appeal in *Elayadath v. Krishna*(1); (see also *Mahant Ishwargar v. Chudasama Manabhai*(2)). The point did not arise for decision, because the decree under consideration stopped short with the order for payment of the mortgage money within three months and contained no order for sale on default. In the two cases where it was held that the mortgagor could proceed under the decree even after the lapse of the six months, the judgments are not founded on the proviso enabling the Court to give time. In the Madras case *Kanara Kurup v. Govinda Kurup*(3) MUTTUSAMI AYYAR, J., dwells on the circumstance that the mortgagor's right of redemption is not lost until the actual sale takes place. The learned Judge says the real question is "whether on the expiration of six months the

(1) I.L.R., 13 Mad., 267, 268.

(2) I.L.R., 13 Bom., 109.

(3) I.L.R., 16 Mad., 214, 218.

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right of redemption becomes extinct under Act IV of 1882." With great deference I must say that I do not think that was the real question which he had to decide. What he had to determine was whether the mortgagor, not having applied within the six months, was entitled to an order for the delivery of the mortgaged property on payment of the mortgage money. Undoubtedly the mortgagor had not lost his right of redemption, but it did not follow that he was entitled to make it good by an application for execution of the decree. The possibility of a second suit for redemption being brought does not seem to have been noticed. In the Caloutta case *Poresh Nath Mojumdar v. Ramjodu Mojumdar*(1) the decree had been made in a foreclosure suit, and, although after the expiration of the six months no order absolute was made under the 87th section, the mortgagee obtained an order and under it got possession. The mortgagor subsequently brought the money into Court and applied for redemption of the property. In this case again, as it appears to me, the right of redemption was clearly not lost to the mortgagor. The Court, proceeding partly on the English cases, held that the mortgagor's application ought to be allowed. A lucid statement of the English practice in foreclosure suits is given by the late Master of the Rolls in *Campbell v. Holyland*(2). According to that practice the Court has a discretion to enlarge the time for payment. This may be done either on the independent motion of the mortgagor, or on the hearing of an application to make the foreclosure absolute; *Alden v. Foster*(3) *Jones v. Creswicke* (4). Even after the foreclosure is made absolute, it is only in point of form that the order is final, for the Court still has a discretion to treat the parties as mortgagor and mortgagee. The practice prescribed by the Act so far follows the English practice that in a foreclosure or redemption suit there is first an interim order fixing a time for payment, and, secondly, a final order for foreclosure absolute. Until this latter is passed under the 87th or 93rd section, as the case may be, I do not think the mortgagor's right of redemption is lost; but, except in the provision already mentioned, I do not find anything in the Act to justify the notion that the English practice as to enlarging the time for payment was intended to be followed. In that practice a wide distinction is

(1) I.L.R., 16 Calc., 246.
(3) 5 Beav., 592.

(2) L.R., 7 Ch. D., 168.
(4) 9 Sim., 307, 317.

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made between foreclosure suits and redemption suits, applications for enlargement being rarely granted in the latter case. See *Faulkner v. Bolton*(1), where, on default of payment, the Vice-Chancellor refused to allow the plaintiff to redeem and dismissed the bill. No sign of such a distinction is to be found in the Act. It appears to me that, if the Legislature had intended that the mortgagor should be allowed to come in after the day fixed and apply on his own motion for enlargement of the time, they would have recognized this distinction and framed some rules for the guidance of the Court. It is only reasonable to hold that the mortgagor, if seeking to take advantage of the decree, should be kept strictly to its terms, and that on the other hand, the mortgagee should not, perhaps many months after the passing of the fixed day, be called upon without notice to find a fresh investment for his money.

This view of the law is supported by the series of cases in which it has been held in this Court that a mortgagor, not having prosecuted the decree obtained by him in a redemption suit, is at liberty to bring a second suit for redemption, for, if these cases are good law, the mortgagor cannot complain that he is without a remedy. According to those cases *Sami v. Somasundram*(2), *Periandi v. Angappa*(3), *Kuruthasami v. Jaganatha*(4), *Ramunni v. Brahma Dattan*(5) and *Ramasami v. Sami*(6) the mortgagor who has let pass the time for executing his decree is in much the same position as a mortgagor in England whose suit has been dismissed for want of prosecution. The principle involved in them derives a qualified support from the observation of the Judicial Committee in *Hari Ravji Chiplun Kar v. Shapurji Hormasji Shet*(7) where the case in *Periandi v. Angappa*(3) was cited in argument. It seems to me that it is too late for us to question those cases. It was pointed out that in them the decrees under consideration contained no direction for sale or foreclosure, but in my opinion the addition of such a direction, inasmuch as it does not by itself extinguish the right of redemption, makes no difference. Apart from these cases, I should, for the reasons already stated, arrive at the same conclusion as to the rights of a mortgagor under his decree. If the mortgagor is

(1) 7 Sim., 319.
(3) I.L.R., 7 Mad., 423.
(5) I.L.R., 15 Mad., 306.
(7) I.L.R., 10 Bom., 461, 465.

(2) I.L.R., 6 Mad., 119.
(4) I.L.R., 8 Mad., 478.
(6) I.L.R., 17 Mad., 96, 97.

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left in this position that he can neither proceed upon the decree nor institute another suit, he is after all in no worse position than a mortgagor in England whose suit for redemption has been dismissed for other reasons than want of prosecution. If he is in possession, his rights are fully protected under the provisions of the Act. If the possession is with the mortgagee, the mortgagor has only himself to blame if he has not been careful to conform to the terms of the decree for which he himself asked. Where the decree has been made in a foreclosure suit as in *Poresh Nath Mojumdar v. Ramjodu Mojumdar*(1) it must be admitted that there may be more hardship. On that case, however, it is not necessary to give an opinion. For the reasons stated I think that the question whether the mortgagor is, after the day fixed in the decree for redemption, precluded from taking action under his decree, must be answered in the affirmative.

[This second appeal having come on for final disposal, the Court delivered judgment dismissing it with costs.]

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

AMBALAVANA PANDARAM (PLAINTIFF), APPELLANT.

VAGURAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Limitation Act—Act XV of 1877, sched. II, art. 116—Suit for rent
Registered contract signed by lessee only.*

In a suit for rent accrued due more than three years before the date of the plaint, it appeared that the contract between the landlord and tenant was comprised in a registered document which was signed only by the latter.

Held, that the suit was not barred by limitation.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in appeal suit No. 339 of 1893, reversing the decree of H. Krishna Rau, District Munsif of Madura, in original suit No. 164 of 1892.

(1) I.L.R., 16 Calc., 246.

* Second Appeal No. 1337 of 1894.

Suit by a landlord against his tenant for rent. The contract between the landlord and tenant was contained in a registered document signed by the latter only. The rent had accrued due more than three years before the institution of the suit.

The District Munsif passed a decree for the plaintiff. The Subordinate Judge on appeal reversed this decree, holding that the suit was barred by limitation.

The plaintiff preferred this second appeal.

Krishnasami Ayyar for appellant.

Mr. Gantz for respondent.

JUDGMENT.—The only question is whether the claim for rent more than three years prior to suit is time-barred. Plaintiff's contention is that it is not, as the document is registered and therefore article 116 is applicable, the rent being for a period within six years prior to the suit. The Subordinate Judge has held article 116 to be inapplicable on the authority of the decision of *KERNAN and BRANDT, JJ.*, in *Ramasami Chetti v. Sokkanada Chetti*(1). This decision is, however, not reported in the authorized Law Reports, and is consequently not a binding authority. See Act XVIII of 1875, section 3. Were it otherwise, we should have felt it our duty to have referred the question for decision by the Full Bench, as we are very clearly of opinion that the decision referred to is erroneous. In our opinion a contract which has, in fact, been registered is no less a "contract in writing registered" within the meaning of article 116, because it bears the signature of only one of the parties in the absence of any statutory provision requiring the signatures of both parties.

We are of opinion that the registration in the present case is sufficient to bring the present suit within the provisions of article 116, and consequently the claim for rent for faslis 1295 and 1296 is not barred.

We must set aside the decree of the Subordinate Judge, and restore that of the District Munsif.

Appellant will have his costs in this Court and in the Lower Appellate Court.

(1) 1. Mad., L.J., 737.

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*Before Mr. Justice Shephard and Mr. Justice Best.*1895.
September 17.VENKATANARASIMHA NAIDU (PLAINTIFF AND PETITIONER),
APPELLANT,PAPAMMAH (DEFENDANT AND COUNTER-PETITIONER),
RESPONDENT. **Decree, construction of—Application for execution by defendant. Previous orders as applied for by defendant—Present objection by plaintiff to continued execution on behalf of defendant. 'Res judicata.'*

Although a decree does not in terms give a certain relief yet if it is construed in orders passed upon it as having given that relief, it is not competent to the Court on subsequent applications to treat those orders as erroneous and put another construction on the decree.

APPEAL under Letters Patent, section 15, against the judgment of DAVIES, J., dismissing an appeal against the order of G. T. Mackenzie, District Judge of Kistna, in miscellaneous appeal No. 661 of 1891, by which an order of C. Rangayya Pantulu on miscellaneous petitions Nos. 1239 and 1550 of 1891 was affirmed.

The last mentioned petitions were preferred respectively by the plaintiff and defendant in original suit No. 333 of 1877. In that suit the plaintiff sued to establish his right to open and keep open the mouth of a channel leading to a village in his estate and a decree was passed by which it was declared "that the plaintiff is entitled to take through the channel in question the flood water of the Tammileru, but to take none of the clear water; that for this purpose he is entitled to extend the channel 343 yards from the spot locally known as 'one' parallel to the bank of the river on which the channel is, and to take such measures as may be necessary for diverting the flood water, but none of the clear water; that the channel shall not be more than 5 yards 2 feet and 2 inches wide at the mouth with a 'floor' sufficiently to prevent clear water passing and that the taking of clear water to the injury of the interests of the village of Vengur shall be at his risk."

* Letters Patent Appeal No. 31 of 1894.

In 1883 and 1886 the plaintiff presented applications for execution of the decree by the erection of the 'floor' therein referred to, but they were not proceeded with. In 1885 the defendant made an application with the same object; the plaintiff thereupon objected that it was not competent to the defendant to make the application, but the Court made an order that the 'floor' should be constructed and the plaintiff did not appeal. In 1887 on the application of the defendant, which was opposed by the plaintiff, the Court applied a commissioner for the execution of the decree, and under similar circumstances the Court in 1890 appointed another commissioner to construct the 'floor' in accordance with the decree. The plaintiff now applied to stop the work which had been begun alleging that the decree was declaratory only and did not determine the height of the 'floor' to be erected.

The District Munsif was of opinion that, although the decree was declaratory and not capable of execution, the orders above referred to were binding on him and that the work should proceed. With regard to the height of the erection, he pointed out that the suit went on second appeal before the High Court by which an order was made for the trial of an issue relating to that matter, and that the second appeal was abandoned by the plaintiff before this issue was determined; and he put off making an order about that matter pending the receipt of a report from the commissioner.

The District Judge on appeal concurred in the opinion that though the decree was declaratory merely the plaintiff was not now entitled to raise the objection which had been overruled by the orders of 1885, 1887 and 1889 against which he had not appealed.

The plaintiff preferred an appeal against the appellate order of the District Judge which came on for hearing before DAVIES, J., who dismissed it.

The present appeal was preferred as above against the judgment of DAVIES, J.

Pattabhirama Ayyar for appellant.

Krishnasami Ayyar for respondent.

JUDGMENT.—It appears that, since the passing of the decree in 1879, no less than four applications have been made for execution, and orders have been passed accordingly for the construction of a dam or 'floor' as it is termed in the decree. These orders were passed notwithstanding the opposition of the plaintiff and he never appealed.

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There can be no doubt that, although some of the terms of the decree are inserted for the protection of the defendant, it was never intended that the defendant should execute it against the plaintiff. It is argued that the District Munsif had no jurisdiction to order execution of the decree and that the previous orders in execution should be disregarded, and we are referred to *Kalka Singh v. Parasram* (1). That was not a case in which the execution of a decree was immediately in question and is therefore distinguishable from the other decisions of the judicial committee which were cited.

Those decisions go to show that although a decree does not in terms give a certain relief, yet if it is construed in orders passed upon it as having given that relief, it is not competent to the Court on a subsequent application to treat those orders as erroneous and put another construction on the decree *Mungul Pershad Ditchit v. Griga Kant Lahiri Chowdhry* (2) *Ram Kirpal Shukul v. Musu-mat Rūp Kuari* (3) and *Bani Ram v. Nanhu Mal* (4).

We think those decisions are applicable to this case. We must dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

CHAKRAPANI ASARI (PLAINTIFF), APPELLANT,

v.

NARASINGA RAU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Courts Act (Madras)—Act III of 1873, s. 12—Suits Valuation Act—Act VII of 1887, s. 8—Suit for share of undivided property.

Persons entitled to a share in certain lands of a village only part of which was held in severalty, executed a mortgage of part of the lands due to their share. The mortgage contained a description of the land comprised therein by paimash numbers and admeasurement. The mortgaged property was brought to sale in execution of a mortgage decree and was purchased by the present plaintiff.

(1) L.R., 22 I.A., 68.

(8) L.R., 11 I.A., 37.

* Referred Case No. 12 of 1894.

(2) L.R., 8 I.A., 123.

(4) L.R., 11 I.A., 181

The plaintiff now sued for the apportionment and possession of the share to which he was entitled, and stated the value of the suit to be the value of the share claimed by him, viz., Rs. 1,870, and not that of the entire property. The defendants were the mortgagors and the other persons interested in the land, their respective shares not having been ascertained and demarcated:

Held, that the suit was within the jurisdiction of a District Munsif.

CASE stated for the opinion of the High Court under Civil Procedure Code, section 617, by V. Srinivasachari, Subordinate Judge of Kumbakonam.

The case was stated as follows:—

"This is an appeal against an order of the District Munsif of Trivalore returning the plaint presented in original suit No. 352 of 1892 to be presented to the proper Court.

"The plaintiff is a purchaser of a share in a small village called Kongayanagaram in the Nannilam taluk from the defendants Nos. 15 and 16 under a conveyance executed to him on the 28th March 1887.

"The village in question comprises 13 velies and odd of land divided into four shares and was long held in two parts, one moiety of two shares (termed periapathi) by the defendants Nos. 6 to 9, and the other (termed chinnapathi) by the defendants Nos. 1 to 5. There are also some lands termed samudayam appertaining to all the four pangus or shares, some being assessed to revenue and some unassessed. The plaintiff states that these remain common and undivided amongst the holders of the four shares. The plaintiff finds that, though the lands appertaining to the entire chinnapathi and comprising 6 velies 12 mahs 40 gulies and 25 cents of nanja, punja and garden land are being enjoyed by the shareholders in common, that the patta for some of them runs in the name of the second defendant and for others in the names of the defendants Nos. 4 and 5; and he thinks that those falling under the second defendant's patta appertain to his own and first defendant's half shares, and those entered under the patta of the defendants Nos. 4 and 5 belong to their half share, and that, for the sake of convenience, all the lands were mixed up together and held and enjoyed by all of them in common.

"The fifteenth and sixteenth defendants were the decree-holders in original suit No. 27 of 1884 on the file of the Subordinate Court of Negapatam, they having there sued upon a simple mortgage bond, dated the 15th May 1882, executed to them by the first defendant and his father and secured on a part of the lands due to

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their share, more particularly specified by their paimash numbers and extent as entered in the patta of the second defendant.---. The fifteenth and sixteenth defendants having attached the entire lands specified in column 4 of the schedule attached to the plaint as the property of their judgment-debtor, the second defendant intervened and claimed some of them as those which had fallen to his share under an execution had under a partition decree obtained by him. They were released and the remainder of the lands were sold and bought by the aforesaid decree-holders themselves. The plaintiff states that the second defendant not having sued for his share of the undivided samudayam lands, and not being decreed the same, his share of this property remained to the defendant No. 1 and his father and passed by the Court sale to the defendants Nos. 15 and 16: and the plaintiff having now purchased all the properties bought by the defendants Nos. 15 and 16 in the Court auction, he has lodged this suit for the recovery of the same. He sued for the division of the four shares of samudayam lands also and for allotment to him of $1\frac{1}{2}$ shares of the same.

"For purposes of Court fee, he stated the value of the lands sued for at five times the ordinary revenue payable to Government.

RS. A. P.

"(1) On the nunja, punja and garden lands under section 7, paragraph 5, clause (a) of the Court Fees Act, which amounted to ... 306 4 0

"(2) On the jari manaikats due to three-fourths share of the first defendant out of two shares appertaining to the chinnapathi portion of the village on its market value under clause (d) of the same paragraph 5, and this amounted to ... 325 0 0

"(3) On the chinnapathi samudayam lands due to the said share on the market value of the same under the same provision of law, this amounted to ... 110 0 0

"(4) on the one and a half out of four shares of the unassessed samudayam lands, which remain undivided on their market value, and this amounted to. 150 0 0

Total ... 891 4 0

"He sued also for past meene profits and estimated their amount at Rs. 978-12-0, and stating that the total of these figures, viz., Rs. 1,870, is the value for jurisdiction purposes, he instituted the suit in the Court of the District Munsif of Trivalore.

"According to the plaintiff all the samudayam and jari manaikats mentioned in Nos. 2 to 4 above remain undivided, those mentioned under Nos. 2 and 3 among the share-holders of chinnapathi and those of No. 4 among the holders of the four shares of the entire village.

"Although the nunja, punja and garden lands sued for have been described by their paimash numbers and the extent due to the three-fourths share claimed by the plaintiff, it was distinctly stated in paragraph 16 of the plaint that they formed undivided portions of such numbers; and the plaintiff's share of the same, having regard to good and bad soil, has yet to be ascertained."

The Subordinate Judge referred to *Vydinatha v. Subramanya*(1), *Khansa Bibi v. Syed Abba*(2), *Nagamma v. Subba*(3), and *Ramayya v. Subbarayudu*(4), and he stated as the question on which he was doubtful whether the case was governed by the ruling in *Nagamma v. Subba*(3), or by that in *Ramayya v. Subbarayudu*(4): he stated his own conclusion as follows:—

"In my opinion, when the suit relates to coparcenary property, unless it is one for general partition among all the shareholders, the specific and definite share claimed must be held to be the subject-matter of the suit as stated in the Suits Valuation Act and the Act III of 1873 (The Madras Civil Courts Act) and the value of the same should determine the Court's jurisdiction, and not that set on the whole property which will, of course, be the value of a suit in which a general partition of all the shares may be prayed for."

Rangachariar for appellant.

Sundara Ayyar for respondents.

JUDGEMENT.—In our opinion the Subordinate Judge is right in his conclusion (see also *Krishnasami v. Kanakasabai* (5)). Furthermore under the 8th section of the Suits Valuation Act of 1887 it is clear that the suit is within the jurisdiction of the District Munsif. Costs to be costs in the suit.

(1) I.L.R., 8 Mad., 235.
(3) I.L.R., 11 Mad., 197.
(5) I.L.R., 14 Mad., 183.

(2) I.L.R., 11 Mad., 140.
(4) I.L.R., 13 Mad., 25.

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APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

SOMASUNDARAM AYYAR AND OTHERS (PLAINTIFFS),
APPELLANTS,

1895.
March 6.

FISCHER (DEFENDANT No. 1); RESPONDENT.*

Vendor and purchaser—Covenant by a benamidar—Covenant for quiet enjoyment.

Land forming part of a samindari was brought to sale in execution of a decree and was purchased by A benami for the zamindari. After the samindari's death B, her son and supposed heir, together with A, sold the land under a conveyance, which contained a joint covenant to remove any hindrance in the vendee's enjoyment of the land. Persons claiming under the lawful successor of the deceased zamindari obtained an ejectment decree against the representatives of the vendee, then deceased, and they were permitted to retain possession only on a payment made to the decree-holders. They now sued A and B for the amount of the purchase money paid on the conveyance and the costs incurred in the ejectment suit.

Held, that the plaintiffs were entitled to the decree sought by them against A, notwithstanding that he was a benamidar merely.

SECOND APPEAL against the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 151 of 1893, affirming the decree of Venkataranga Ayyar, Subordinate Judge of Madura (East), in original suit No. 62 of 1891.

In 1874 the father of the plaintiffs obtained a lease for ten years of one-fourth of the village of Sattukudi from the zamindari of Sivaganga. Before the expiry of the lease the property was brought to sale in execution of a decree against the lessor, on whose behalf it was bought in by the present defendant No. 1 for Rs. 2,500. Subsequently in 1877 the lessee purchased the land for Rs. 2,000 from defendant No. 1 and the son and supposed heir of the lessor then deceased. The conveyance contained a covenant by the vendors in the following terms:—"Should there be any hindrance in your enjoying the said premises, we shall settle and remove such hindrance." In 1889 persons claiming under the lawful successor of the lessor obtained an ejectment decree against the present plaintiffs, their father having meanwhile died. The matter was compromised by a payment of Rs. 3,500 to the decree-

holders, who thereupon entered up satisfaction of the decree. The plaintiffs now sued defendant No. 1 and the other vendor to recover with interest the purchase money and the amount of costs incurred in the ejectment suit. The lower Courts held that the first defendant, as being a benamidar merely, was not liable to satisfy the plaintiffs' claim, and a decree was passed against the other defendant alone.

The plaintiffs preferred this second appeal.

Krishnasami Ayyar for appellants.

Mr. H. G. Wedderburn, Mr. Parthasaradhi Ayyangar, and Rangachariar for respondent.

JUDGMENT.—The only question is as to the liability of the first defendant jointly with the second defendant, against whom a decree has been given. The judgment of the lower Courts exonerating the first defendant proceeds on the ground that he was merely a benamidar as far as the property sold to plaintiffs' father was concerned.

The real question is whether, even assuming the first defendant to have been merely a benamidar as to the property, he is not liable on the covenant mentioned in C, which is in the following words:—"Should there be any hindrance in your enjoying the same, we shall settle and remove such hindrance." This is an express covenant by both the defendants, which cannot be affected by the benami character of the first defendant who is equally liable thereunder with the second.

It is contended on behalf of respondent that, being a benamidar, there was no consideration for the promise made by him. The consideration was clearly the purchase of the property by the plaintiffs' father.

In this view we do not consider it necessary to dwell upon the letter A and the proceedings taken by respondent on the promissory note which was given in first defendant's name by plaintiffs' father for the consideration amount.

It is next contended that there was no breach of covenant, in that appellant was not actually evicted, and our attention is called to *Howard v. Maitland*(1). The observations of the Master of the Rolls in that case tend in the opposite direction, for he says:—"If anybody had brought an action against the plaintiff and recovered

SOMASUND-
RAM AYYAR
v.
FISCHER.

* Second Appeal No. 1512 of 1894.

SOMASUND-
RAM AYYAR
v.
FISCHER.

judgment, I am not prepared to say that that alone might not have been a disturbance within the covenant."

In the present case a decree was obtained and proceedings taken in execution, and it was only on paying a sum of Rs. 3,500 to the decree-holder that plaintiffs were allowed to retain possession of the property. There was therefore such hindrance as was contemplated in the covenant.

In allowance of this appeal we modify the decree of the lower Courts by making first defendant jointly liable with the second for the amount decreed.

Appellants are entitled to their costs in this Court and in the lower Appellate Court.

APPELLATE CIVIL.

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

THOLAPPALA CHARLU (PLAINTIFF), APPELLANT,

v.

VENKATA CHARLU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 11—Right to hereditary office of guru.

The plaintiff as Anagundi Raja guru claimed to be entitled, and now sued for a declaration of his title, to the hereditary office of priest of Samayacharam. The defendants claimed the office and had collected voluntary contributions in the character of the holders of such office. The office was not connected with any particular temple; no specific pecuniary benefit was attached to it, and the alleged duties of the office were to exercise spiritual and moral supervision over persons wearing a certain caste mark in a certain tract of country:

Held, that the suit was not cognizable by a Civil Court.

SECOND APPEAL against the decree of L. Moore, District Judge of Bellary, in appeal suit No. 170 of 1891 reversing the decree of C. Ranga Rau, District Munsif of Naraindevarakerry, in original suit No. 33 of 1889.

Suit to establish plaintiff's claim to a hereditary office, the nature of which is stated sufficiently for the purpose of this report in the judgment of the High Court. The District Munsif passed a decree for plaintiff, which was reversed on appeal by the District

* Second Appeal No. 321 of 1894.

Judge on the ground that the plaintiff's claim was not cognizable by a Civil Court.

The plaintiff preferred this second appeal.

V. Bhashyam Ayyengar, Pattabhirama Ayyar and Desikachariar for appellant.

Ramachandra Rau Sahib and Kuppusami Ayyar for respondent No. 2.

JUDGMENT.—The District Judge dismissed the plaintiff's suit on the ground that it was not maintainable. He based his decision on the ground that the suit was analogous to that decided in *Subbaraya Chetti v. Venkatanarasu Chetti*(1), in which it was held that a suit for a declaration that a person was entitled to the exclusive right to the office of a desayi would not lie, the right of desayi being alleged to be a right to settle caste disputes in certain villages. It is urged upon us in appeal that the right claimed by plaintiff is a right to an hereditary office, to which titles have been attached by the former ruling power; that the right of the Anagundi Raja guru carried with it a monopoly, and that it had been found by the District Munsif that defendants had been guilty of personation and deceit, assuming the hereditary titles of the plaintiff, and under such false pretences receiving fees, which would otherwise have been paid to plaintiff and not to defendants. On this state of facts, as found by the District Munsif in paragraph 99 of his judgment, it is urged that plaintiff is entitled to relief.

It is, however, necessary to refer to the plaint to see the grounds on which relief is asked for by the plaintiff himself. It is therein stated that plaintiff and his ancestors, "in consequence of their being the priests of the Anagundi royal family," have been enjoying hereditarily the Samayacharam guru office in respect of the people wearing namam mark in a certain tract of country; that defendants 2 and 3 have been claiming the right to this office, using plaintiff's titles and collecting the fees. The plaint goes on to pray for a decree to establish plaintiff's right to the priestship of Samayacharam in respect of the namam-wearing people living in the places mentioned, and for an injunction to restrain defendants from interfering in the said right and collecting the fees, &c.

It will be observed that the plaint does not ask for any injunction to restrain defendants from assuming plaintiff's hereditary

(1) Second Appeal No. 200 of 1891 (unreported).

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titles, or for damages caused by personation or assumption of such titles. It is a suit to establish a claim to an hereditary office, and the plaintiff alleges that the person entitled to hold the office is hereditary guru for the time being of the Anagundi royal family.

The question then is whether the priestship of Samayacharam is an office for which a suit will lie in a Civil Court. It is distinguishable from most of the cases quoted in that it is not attached to any particular temple or place; no specific pecuniary benefit is attached to the office, the only emoluments being voluntary contributions, while the duties of the office are to exercise spiritual and moral supervision over people who wear a certain caste mark in a certain tract of country. No such supervision over the members of the caste can be enforced by law, it being entirely within the option of each individual member of the caste whether he will submit to it or not. Such being the case, the office seems exactly analogous to that of a desayi, as to which it was decided in *Subbaraya Chetti v. Venkatanarasu Chetti* (1) that a suit would not lie. No doubt the office of hereditary guru to the Anagundi royal family may be an endowed office, and the holder thereof entitled to certain titles and distinctions, but the relief sought in the plaint is not on the ground that defendants have represented themselves to be the raja's gurus. The District Munsif has, it is true, treated it as if such was the claim, but the plaint does not ask for any declaration that plaintiff is the raja's guru, or to restrain defendants from using his titles, but merely for a declaration that plaintiff is entitled to the Samayacharam office. It is possible the plaintiff might have succeeded had the plaint been framed differently, or had it been amended, but there was no issue as to any personation by defendants, or as to any fraud in assuming the plaintiff's titles.

Under these circumstances we think the District Judge was right in holding that the suit is not maintainable, and we must dismiss the second appeal, but we make no order as to costs.

(1) Second Appeal No. 200 of 1891 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Parker and Mr. Justice Subramania Ayyar.

JAMBUVAYYAN (PLAINTIFF) APPELLANT,

v.

VENKATARAYAR (DEFENDANT) RESPONDENT.*

1895.
August 19.
September 3.

Civil Procedure Code—Act XIV of 1882, s. 344—Insolvent judgment-debtor—Decree passed on appeal—Jurisdiction of original Court to make declaration of insolvency.

A suit for money was dismissed, but on appeal the High Court passed a decree for the plaintiff. The judgment-debtor made an application to the Court of first instance under Civil Procedure Code, section 344, to be declared an insolvent:

Held, that the Court had jurisdiction to make the declaration sought for.

APPEAL under Letters Patent, section 15, against the judgment of MUTTUSAMI AYYAR, J., dismissing appeal against order No. 42 of 1893, which was preferred against an order of C. Venkobachariar, Subordinate Judge of Tanjore, on insolvent petition No. 2 of 1890.

The application in the Subordinate Court was made under Civil Procedure Code, section 344, by the defendant in original suit No. 36 of 1886 on the file of that Court. This suit had been dismissed by the Subordinate Judge, but his decree had been reversed in appeal No. 60 of 1888 in the High Court, in which a decree was passed for the plaintiff. Objections to the application were overruled by the Subordinate Judge, who passed an order as prayed. The decree-holder preferred to the High Court the appeal, which came on for hearing before MUTTUSAMI AYYAR, J., who delivered judgment as follows:—

MUTTUSAMI AYYAR, J.—It is urged in support of this appeal that the jurisdiction of the Subordinate Judge in insolvency matters is limited to decrees actually passed by himself and does not extend to decrees passed on appeal from his decrees by the Appellate Court, although the suits in which they are passed are cognizable by him. In support of this contention, reliance is placed on the wording of section 360 of the Code of Civil Procedure. That section is in these terms:—"The local Government may, by notification in the official Gazette, invest any Court other than a District Court with the powers conferred on District Courts by sections 344 to 359 of the

* Letters Patent, Appeal No. 49 of 1894.

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"Code of Civil Procedure, and the District Judge may transfer to any Court situated in his district and so invested, any case instituted under section 344. A Court so invested may entertain an application under section 344 by any person who has been arrested or imprisoned, or against whose property any order of attachment has been made, in execution of a decree for money passed by that Court." The argument is that the words "passed by that Court" are words of limitation, and do not include decrees under execution if they are passed by the Appellate Court in appeal.

By section 344 plenary jurisdiction is conferred on District Courts subject to the condition precedent that the judgment-debtor is arrested or imprisoned in execution of a decree for money, or that an order of attachment is made in execution of such decree. By the first clause of section 360, power is reserved to the local Government to confer on any Court other than a District Court the powers conferred on District Courts by sections 344 to 359. These two sections, if nothing more appeared, would disclose an intention to enable the local Government to confer co-ordinate jurisdiction. As Courts other than District Courts may have limited pecuniary jurisdiction over suits, the words "in any decree passed by that Court" are inserted. The occasion when the jurisdiction arises is arrest or imprisonment or attachment in execution of a money decree. The reasonable construction is that the words "decree for money passed by that Court" mean decrees passed by that Court in suits which are cognizable by it or decrees passed in appeal in confirmation, reversal or modification of those decrees. For purposes of execution, the decree passed by an Appellate Court is on the same footing with the decrees passed by the original Court itself. Whenever there is an appeal, the final decree capable of execution is the decree passed by the Appellate Court, whether it confirms, modifies or reverses the original decree, and if the appellant's contention were to prevail, all decrees from which appeals are preferred would cease to be decrees passed by the original Court for purposes of execution. There would also be this anomaly. A Subordinate Judge would have insolvency jurisdiction over one defendant who did not prefer an appeal, and have no insolvency jurisdiction over another defendant in the same suit who preferred an appeal from his decree. At the last hearing when this Court directed the District Court to return the appeal preferred to it for presentation to the High Court, this objection was not taken. 1

dismiss this appeal with costs on the ground that the construction which ought to be placed on a statute should be such as fairly and reasonably executes the intention of the legislature where that intention is plain.

The appellant preferred the present appeal under Letters Patent, section 15.

Sivasami Ayyar for appellant.

Mr. Parthasaradhi Ayyangar for respondent.

JUDGMENT.—It is conceded that if the Subordinate Court had, in the first instance, decreed in plaintiff's favour, it would have had jurisdiction to entertain an application under section 344, but it is contended that it is otherwise, since the Subordinate Court dismissed the plaintiff's claim and the decree in his favour was passed by the Appellate Court.

If this argument be valid, the jurisdiction of the Subordinate Court would also be ousted, if the plaintiff had obtained a decree in his favour in the first instance, and that decree had subsequently been confirmed on appeal, since the decree to be executed would be that of the Appellate Court.

There can be no doubt that the Subordinate Court must execute the decree of an Appellate Court, reversing its own, and that in that respect it is regarded for all intents and purposes as the Court which passed the decree.

We think the order of the learned Judge was right and dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

BARROW (RESPONDENT No. 1), APPELLANT,

v.

JAVERCHUND SETT (APPELLANT), RESPONDENT.*

Limitation Act—Act XV of 1877, s. 14, sched. II, art. 179—Exclusion of time of proceeding bonâ fide in Court without jurisdiction—Step in aid of execution—Application for sanction to an agreement to give time to a judgment-debtor.

On an application made in June 1892 for execution of a decree for the payment of a sum of money, by instalments passed in 1883 by a Subordinate Court,

* Letters Patent Appeal No. 52 of 1894.

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YAN.
v.
VENKATA-
RAYAR.

1895.
September 17.

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SETT.

it appeared that the Subordinate Court, after executing it in part, had transferred it to the Presidency Court of Small Causes, which proceeded to execute it up to 23rd February 1887, and that on a further application made on 5th March 1888, it was discovered that the transfer of the decree was a mistake, as the amount exceeded Rs. 2,000, and the decree was returned to the Subordinate Court on 5th July 1888. On 26th February 1889 an application was made to the Subordinate Court to sanction an agreement to give time for the satisfaction of the judgment-debt under Civil Procedure Code, section 257 (A), but sanction was never given, and on 28th July 1891 the decree-holder applied to have the decree transferred to another Court, and in September applied for execution and realised Rs. 250 towards the debt.

Held by Parker, J., that the time during which the decree was in the Presidency Court of Small Causes should be deducted in the computation of the period of limitation for the present application under Limitation Act, section 14, clause 3.

Held by Shephard and Best, JJ., that whether or not such deduction should be made, the present application was barred by limitation for the reason that the application on 26th February 1889 was not a step in aid of execution.

APPEAL under Letters Patent, section 15, against the judgment of PARKER, J., delivered in appeal against order No. 161 of 1892 reversing the order of V. P. DeRozario, Subordinate Judge of South Malabar, in miscellaneous petition No. 86 of 1892.

Application by the assignee of the plaintiff for the execution of the decree in original suit No. 39 of 1882 on the file of Subordinate Court, Calicut.

The application was dismissed by the Subordinate Judge as being barred by limitation under the circumstances set out in the following judgment of PARKER, J. :—

PARKER, J.—The decree of which execution is sought was passed on 3rd April 1883 by the Calicut Subordinate Court for a sum of Rs. 7,220 with costs and interest from date of decree till payment, and was made payable by monthly instalments of Rs. 60 each. After some execution had been had at Calicut, the decree was, on 23rd July 1884, transferred for execution to the Madras Small Cause Court. Execution was had by instalments in Madras and payments, amounting to Rs. 1,050, were made up to 23rd February 1887. On 5th March 1888, a further application for execution was made in the Small Cause Court, and it was then discovered that under the penultimate clause of section 223, Code of Civil Procedure, the decree ought never to have been sent for execution to the Small Cause Court at all, since the amount exceeded Rs. 2,000. It was accordingly returned for execution to the Calicut Subordinate Court on 5th July 1888.

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On 5th February 1889 an arrangement was made by the parties at Madras for the discharge of the balance of the decree by monthly instalments at a different rate from that prescribed by the decree, and a petition to enforce this agreement was put in in the Calicut Subordinate Court on 26th February 1889. A notice went on petitioner's application, but the Court never formally sanctioned the arrangement. On 28th July 1891, petitioner applied to have the decree transferred to the Palghat Subordinate Court for execution, and it was transferred on 30th July. An application for execution was made at Palghat on 25th September 1891 and Rs. 250 was realized. This last application was made on 20th June 1892 and the Subordinate Judge has now held that execution is barred.

The Subordinate Judge bases his order on two grounds—(i) that (the present application being to enforce the decree and not the unrecognized arrangement of 5th February 1889) no certain time for the payment of the instalments has been fixed by the decree, and (ii) that as all proceedings in the Madras Small Cause Court were invalid, they cannot avail to keep the decree alive, and the application of 23rd July 1884 to transfer the decree to Madras cannot be regarded as a step in aid of execution. The Subordinate Judge held that the decree had become barred on 3rd April 1887 (1886).

There can be no doubt that the application of 23rd July 1884 was made in good faith and was intended as a step in aid of execution. The mistake was not discovered by the Madras Small Cause Court for nearly three years, and the Madras Court received and executed the decree. I think the case falls within the purview of section 14, clause 3, of the Limitation Act, and that the time occupied in executing the decree in Madras ought to be deducted. See *Rajbullabh Sahai v. Joy Kishen Pershad*(1) and *Krishnayyar v. Venkayyar*(2).

Against this view the decision in *Chattar v. Newal Singh*(3) was quoted, but that case referred to an application for a kind of relief which obviously could not be granted, and does not touch the question of a *bond fide* mistake in seeking relief in the wrong Court.

Taking this view, the application of 26th February 1889 was in time, since the decree was only returned to the Calicut Subordinate Court on 5th July 1888, and no limitation has arrived since 1889.

(1) I.L.R., 20 Cal., 29.

(2) I.L.R., 6 Mad., 81.

(3) I.L.R., 12 All., 64.

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Though by some informality the arrangement of February 1889 was not sanctioned, I think the application can still be viewed as a step in aid of execution of the decree.

Further, I do not agree with the Subordinate Judge that it is impossible to ascertain from the decree the dates on which the instalments are to be paid. It seems to me clear they are intended to be paid monthly from 3rd April 1883, and this is all that is necessary. See *Kaveri v. Venkamma*(1) and *Lakshmi Bai Bapuji Oka v. Madhav Rao Bapuji Oka*(2).

The order of the Subordinate Judge must be reversed and execution allowed. The appellant is entitled to his costs in this appeal.

The judgment-debtor preferred this appeal under Letters Patent, section 15.

Sankaran Nayar for appellant.

Respondent was not represented.

JUDGMENT.—Even if the period during which the application was pending in the Madras Court of Small Causes should be excluded under section 14 of the Limitation Act, the application of 26th February 1889, being one for sanctioning the agreement to give time for payment, and not for execution of the decree, was clearly not a step in aid of execution; the subsequent application is, therefore, barred.

We must, therefore, allow this appeal and restore the order of the Subordinate Judge. Under the circumstances, we make no order as to costs of this appeal.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

SAMINADHA PILLAI AND OTHERS (DEFENDANTS NOS. 1
TO 4, 7, 8, 11 AND 15), APPELLANTS,

v.

THANGATHANNI (PLAINTIFF), RESPONDENT.*

*Hindu law—Inheritance—Obstructed heritage—Succession per capita—
Succession on extinction of a divided branch of a family.*

On the death, without issue, of a Hindu who was divided from the rest of his family, his property passed in succession to his widow and mother. On the

(1) I.L.R., 14 Mad., 396.

(2) I.L.R., 12 Bom., 65.

* Appeals Nos. 121 and 124 of 1894.

death of the latter, the nearest surviving reversioners were the plaintiff's husband and the first defendant's father, both since deceased, and their first cousin. The plaintiff now claimed a one-third share of the property above mentioned as the heiress of her husband who left no issue. It appeared that the plaintiff's husband and his co-reversioners were divided:

Held, that the plaintiff was entitled to recover.

Semle: that she would have been entitled to recover even if her husband had not been divided from his co-reversioners.

APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in original suit No. 12 of 1893.

The plaintiff, a Hindu widow, sued to recover a one-third share of properties left by Kolandavelayuda Pillai, who died without issue in 1876. The widow and afterwards the mother of the deceased had held the properties until the death of the latter, which took place in June 1885. The plaintiff's case was that, at the time of the mother's death, the nearest surviving reversioners to the estate were her husband, since deceased, and his brother, the father of defendants Nos. 1 and 2, and their first cousin Ramasami Pillai. It was admitted that the three persons were the grandsons of Velayuda Pillai's paternal uncle, and that there was no coparcenary between Velayuda Pillai and them, that the plaintiff's husband had died without issue in October 1886 not having secured possession of his share of the properties. The defendants Nos. 1 and 2 contended that their father deceased and his brother and cousin were undivided, and that they were all members of a joint family and that, even if it were not so, the property did not devolve as separate property, but jointly, and that the plaintiff was not entitled to the relief sought.

The Subordinate Judge held that the plaintiff's husband was divided from his brother and cousin, and (on the second issue) that whether or not they were divided, the property devolved on them as separate property and (on the third issue) that the plaintiff was entitled to the share of her husband which vested in him before his death and accordingly passed a decree for the plaintiff.

The defendants preferred this appeal.

Mr. Parthasaradhi Ayyangar for appellants.

Pattabhirama Ayyar for respondent.

JUDGMENT.—We agree with the conclusions of the Subordinate Judge on the second and third issues. The question whether the rule of survivorship holds good among a group of heirs who succeed on the extinction of a divided branch of the family has

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not been actually decided in this Court. In *Gopalasami v. Chinnasami*(1) the inclination of the Court was evidently in favour of the contention that the rule did not apply in the case of daughter's sons succeeding. In principle there is no distinction between that case and the present. In both it is an instance of obstructed heritage, the heirs being ascertained at the time of the death and taking *per capita*. Since the date of the Madras case the question has been considered in Calcutta, and the conclusion arrived at was that the rule of survivorship does not apply to property taken in the ordinary course of inheritance as distinguished from property in which persons have an interest on birth (*Jasoda Koer v. Sheo Pershad Singh*(2)—see also *Nallatambi Chetti v. Mukunda Chetti*(3). We think this view is correct. To hold otherwise would be to recognize as coparceners with rights of survivorship a group of persons who might be descended from different parents and might at the same time belong to a larger group, having another and distinct family property of their own.

Apart from this there is the finding, which is amply supported by the evidence that the three heirs—Ramasami, Choekalingam and the plaintiff's husband—were divided when the property devolved upon them.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

1895.
October 9.

SRINIVASA AYYANGAR (PETITIONER), APPELLANT,

v.

SEETHARAMAYYAR AND OTHERS (RESPONDENTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 295—Rateable distribution—Assets realized in execution.

A, B and C held money decrees against the same judgment-debtor. A attached by a prohibitory order dated in December funds of the judgment-debtor in the hands of D. In January, B attached in execution the same funds. In February they were paid into Court, and subsequently on the same day C attached them as money due in the custody of the Court :

(1) I.L.R., 7 Mad., 458.

(3) 3 M.H.C.R., 455.

(2) I.L.R., 17 Calc., 36.

* Letters Patent Appeal No. 17 of 1895.

Held, that the funds should be rateably distributed between A and B, and that C was not entitled to participate therein.

APPEAL under Letters Patent, section 15, against the judgment of MUTTUSAMI AYYAR, J., dismissing a petition under Civil Procedure Code, which prayed the High Court to revise the proceeding of A. F. Elliot, District Munsif of Vellore, in small cause suit No. 1480 of 1892.

The facts of the case appear sufficiently for the purpose of this report from the following judgment :—

MUTTUSAMI AYYAR, J. :—Three persons hold money decrees against one Soetharamayya, and one Venkatasami had with him certain stamps and other things of Rs. 95-2-0 value belonging to the judgment-debtor.

Petitioner had the property attached by prohibitory order on the 22nd December 1892. Another judgment-creditor, Muni-ammal, attached the same on 16th January 1893 in execution of her own decree. Venkatasami paid Rs. 95-2-0 due by him to the judgment-debtor into Court on the 3rd February 1893. On the same day, but after payment into Court, one Manikkam Chetty attached it as money due in the custody of the Court. On the 30th March 1893 the District Munsif paid out of the deposit petitioner's costs and divided the balance rateably among the three creditors. To this order petitioner objects in revision, and urges that Manikkam Chetty attached after the money was realized, and that this was not a case for rateable distribution under section 295, Code of Civil Procedure. Neither of these contentions seems tenable. Section 295 applies to every case whereby the process of the Court in execution property becomes available for distribution amongst judgment-creditors. Money paid into Court by reason of a prohibitory order does not become the property of the creditor at whose instance the prohibitory order was issued without a further order directing payment to him. Until then his position is that of an attaching creditor, and under the Code of Civil Procedure several decree-holders may successively attach the same property and claim rateable distribution. The mere payment into Court does not constitute realization. There must be a further order directing its payment to a particular creditor or creditors. I see no reason to disturb the order in revision.

I dismiss this petition with costs.

The petitioner preferred this appeal under the Letters Patent, section 15.

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Subramania Ayyar for appellant.

Ethiraja Mudaliar and *Siragnana Mudaliar* for respondents.

JUDGMENT.—It seems to us clear that the debt due by the third party to the judgment-debtor, when paid into Court, was realized within the meaning of the 295th section, *Pallonji Shapurji Mistry v. Jordan*(1) and was therefore liable to rateable distribution among those who applied before the payment into Court.

In *Manikkam's* case the application was not made till after the payment into Court, and he therefore is not entitled to distribution. The order must be altered accordingly.
 No costs.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

RANGAYYA CHETTI (PLAINTIFF).

v.

THANIKACHALLA MUDALI AND OTHERS (DEFENDANTS) *

Hindu Law—Insolvency of managing member of a family—Insolvent Act, s. 7—Vesting order—Official Assignee's power to convey land.

The managing member of a Hindu family was adjudicated an insolvent and a vesting order was made. The Official Assignee conveyed a house forming part of the family property of the insolvent to the plaintiff who now sued for possession. The second defendant, who was a leper, was the younger brother of the insolvent, the other defendants were the insolvent's sons. The plaintiff did not prove that the debts which led to the adjudication were incurred for the necessary purposes of the family, and the insolvent's sons did not prove that they were incurred for immoral purposes:

Held, (1) that the second defendant's disease, which was not of a virulent type, did not affect his coparcenary rights;

(2) that the Official Assignee could only convey the shares of those persons upon whom the debts of the insolvent were binding, and accordingly that the plaintiff was entitled to a moiety of the house only and that the house should be sold and half the sale-proceeds paid to him.

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

(1) I.L.R., 12 Bom., 400.

* Civil Suit No. 62 of 1894.

Venkataramayya Chetti for plaintiff.

Nadamuni Chetti and *Varadarajulu Chetti* for defendants.

JUDGMENT.—The plaintiff, as purchaser under a sale-deed dated 24th February-1894, executed by the Official Assignee, claims possession of the house in dispute, which admittedly was the family property of the defendants; of whom the second defendant is the younger brother and the other defendants sons of the first. He rests his claim on the grounds that the second defendant being a leper is not entitled to any share in the property and that even if he was entitled, the debts with reference to which the first defendant was declared insolvent were incurred by him for purposes binding upon all the defendants. As to the relief the plaintiff prays in the alternative, that should it be held that the plaintiff is not entitled by his purchase to the possession of the entire property, but that he became entitled to an interest less than the whole, the same be ascertained and that on due partition being made, such share be ordered to be delivered to him, or if that be found impracticable the whole house be sold and such portion of the sale-proceeds as represents his interest be ordered to be paid to him.

The first and the third defendants are dead. The second defendant denies that the disease which it is now admitted he has been suffering from is of such a character as to entail forfeiture of his rights and that the debts referred to in the plaint are binding upon him. The fourth and fifth defendants also raise a similar contention as to the debts.

Three issues were raised. The first relates to the extent of the interest which passed under the sale and the second and the third to the second defendant's disease and its effect if any upon his right to the property in dispute.

It will be convenient to deal first with the last two. That the second defendant's disease is leprosy is not now disputed. But that disease is regarded by the Hindu Law as a disqualification entailing forfeiture of rights only when it appears in a virulent and aggravated form. (*Muttirelayuda Pillai v. Parasakti*(1), *Janardhan Pandurang v. Gopal Pandurang*(2), *Ananta v. Ramabai*(3), *Mohunt Bhagaban Ramanuj Das v. Mohunt Roghunundun Ramanuj Das*(4)). Consequently the plaintiff has to make out

(1) *Sudder Reports* of 1860, p. 239.
 (3) I.L.R., 1 Bom., 554.

(2) 5 B.H.C.R., 145.
 (4) L.R., 22 I.A., 94.

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that the disease is of that particular description which leads to loss of rights. With reference to this matter the plaintiff called as a witness Mr. Haller, a medical practitioner, who had been in subordinate charge of Lepor hospitals for many years and who appears to have made the disease a subject of special study; the witness states that the form from which the second defendant suffers is of the slowest type, that it expends itself in the extremities of the hands and the feet, and that it is of the least disfiguring kind. I am of opinion, therefore, that the second defendant's disease is not virulent and it hence does not affect his coparcenary rights.

Now as to the first which is the remaining issue and which relates to the extent of the interest acquired by the plaintiff under the sale to him, two questions have to be considered.

The first is whether the Official Assignee was in law entitled to convey not only the interest of the first defendant the insolvent, but also that of his coparceners the other defendants. On behalf of the plaintiff it was contended that he was and *Fakirchand Motichand v. Motichand Hurruckchand*(1) was referred to as a distinct authority in favour of that contention. There it was held by Latham, J., that the right which entitles a father governed by the Mitakshara law to dispose of his son's interest in ancestral immovable estate for the payment of his own debts not incurred for immoral purposes, is, on a vesting order being made on the father's insolvency, vested, under section 7 of the Indian Insolvent Act, in the Official Assignee who can consequently give a good and complete title to such ancestral immovable estate to a purchaser. The learned Judge considers that the father's right of disposal is not a 'power' within the meaning of section 30 of the said Act, which in his opinion applies to powers in the ordinary legal sense of the term created by will or instrument *inter vivos*, but that it falls more appropriately within the words in section 7 under which all the real and personal estate and effects of the insolvent and all his future estate, right, title, interest and trust in or to any real or personal estate or effects (with certain specified exceptions immaterial for the present) vest in the Official Assignee. To put it shortly the learned Judge's view amounts to saying that the son's share in the ancestral estate is property available for the realization

(1) I.L.R., 7 Bom., 438.

of the father's debts not shown to be immoral. A substantially similar conclusion was arrived at in *Jagabhai Lalubhai v. Bhukandas Jagjirandas*(1), where West and Birdwood, JJ., held that the father's right referred to above was covered by the words of section 266 of the Code of Civil Procedure laying down what property is liable to attachment in execution of a decree. West, J., who delivered the judgment of the Court referring to this point observes:—"The District Judge has relied on section 266 of the Code of Civil Procedure which says that the property subject to attachment must be such as the judgment-debtor could dispose of for his own benefit. This is the direction, no doubt, but it does no more than state a general principle which, though the section is not referred to, must have been present to the minds of the Judicial Committee. Their Lordships thought probably that the father could dispose of the family estate for his own benefit at least *prima facie* and subject only to the rights on which the sons could rely in particular cases" (*Jagabhai Lalubhai v. Bhukandas Jagjirandas*(1)). If this conclusion were erroneous, the innumerable cases including the leading decisions of the Judicial Committee on the point, wherein the interest of sons was held to have passed by a sale in execution of decrees obtained against the father alone, must be considered to have been wrongly decided, a contention which is impossible at all events at this time of the day. *Fakirchand Motichand v. Motichand Hurruckchand*(2) relied upon on behalf of the plaintiff is therefore a direct authority in favour of his contention, so far as the third and fifth defendants, the surviving sons of the late first defendant, are concerned. Nor as to the second defendant am I able to see any sound distinction in principle between his case and that of the other defendants just referred to. For if the son's share is property which the father has power to dispose of for his own benefit in the restricted sense explained by West, J., in the passage quoted above, how can the share of any other undivided coparcener, which the managing member can convey for debts incurred by him for legal necessity, be treated differently? No doubt there is difference in the proof to be adduced as to the character of the debt in the two instances. But the essential element that the shares other than that of the transferee are liable to be proceeded against for the transferor's debt is common

(1) I.L.R., 11 Bom., 37, 41.

(2) I.L.R., 7 Bom., 438.

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to both the cases. I must therefore hold that the Official Assignee has in law power to transfer not only the share of the insolvent, but also those of his coparceners, whether they be his sons or brothers or other collaterals, provided of course the debts for which the property is disposed of, are shown to have been incurred for purposes binding upon them.

The second question, therefore, to be considered with reference to the issue under discussion is, were the debts incurred for such purposes? The case of the third and the fifth defendants is easily disposed of, as they have failed to prove that any of the debts which led to their father being adjudicated an insolvent was incurred for immoral purposes. It is quite true that the evidence of Baggyam called by the defendants satisfactorily establishes that the late first defendant kept her for nearly ten years from 1885 up to his death, and spent upon her considerable sums of money. By such proof above, however, the said defendants cannot be said to have discharged the onus thrown on them by law as they should connect the particular debt, about which the dispute exists, with the immorality of the father. In this case not only has that not been shown, but there is positive evidence on behalf of the plaintiff which proves that the debts in question had nothing to do with the immoral life of the late first defendant. The second defendant's case, of course, rests on a different ground. As to him, unlike the case of the sons, the burden of proof as already suggested is on the plaintiff who must affirmatively make out that the debts were incurred for the necessary purposes of the family. Has this been shown? Before considering this question, I ought to notice the contention urged by the plaintiff's vakil in his reply to the effect that the second defendant, not having expressly traversed the averments in the plaint as to the character of the debts, is not now entitled to say they are not binding upon him. This contention is clearly untenable. In the first place there is nothing to show that the defendant admitted that the debts were incurred for family purposes. Secondly, the first issue is wide enough to raise the point, and in fact the whole trial proceeded upon the distinct footing that this question was one of the points to be established by the plaintiff who accordingly adduced evidence on it. Now in the evidence thus adduced only three debts are referred to. The first is a sum of money lent by the plaintiff to the first defendant. Theruvengada, plaintiff's second witness, states that the first defendant became a

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surety for one Shanmuga Mudali with reference to certain moneys borrowed by the latter from the Bank of Madras and as Shanmugam failed to pay the Bank, the first defendant incurred the debt in question to enable him to discharge his obligation to the Bank. Whether in the interests of the family it was necessary for the first defendant to become Shanmugam's surety has not been shown, and the debt in question cannot therefore be held to be binding on the second defendant. The two remaining debts are similar in character and the circumstances connected with them are these. The first defendant Theruvengada referred to above and Virasami, plaintiff's first witness, jointly executed about 1888 certain works under the Public Works Department and made profits. But as the first defendant received the whole of the profits and withheld from Theruvengada and Virasami their shares thereof, they sued and obtained against him decrees for the sums so due to them. Beyond the oral testimony of these two persons, there is no evidence on the point. No portion of the record in the suits in which the said decrees were passed has been exhibited in this case. Nor does it appear why Virasami and Theruvengada allowed the first defendant to take away moneys due to them. The evidence shows that from 1886, i.e., a considerable time before the three became partners in connection with the said works, the first defendant ceased to live with the other members of the family including the second defendant and had been residing elsewhere with his concubine Baggyam already referred to. That the first defendant lived not only an immoral, but an extravagant life from the time he took the said woman into his keeping in 1885 seems tolerably clear from her evidence. And even though I am not prepared to say that no share of his earnings as a contractor under the Public Works Department went to the support of his children and the second defendant, who remained in the family house, I am unable to hold that the debts due to the two individuals in question arose from family necessity. Baggyam says that during all this time Theruvengada lived with the first defendant in the same place in which he and she resided. I cannot treat one in such a position as a *bonâ fide* creditor in respect of a sum of money which he ought never to have allowed the first defendant to appropriate to his own use especially as against the second defendant from whom the first defendant was living separately without any fault on the part of the former (second defendant). The case of Virasami is not the

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same as that of Theruvengada in this respect, but at the same time as against him also, I fail to see why the second defendant should be held responsible for moneys which are not shown to have been appropriated for the purposes of his family and towards the misapplication of which by his elder brother, he in no way contributed. I must therefore hold that the plaintiff has failed to establish that any of the debts relied on by the plaintiff is binding upon the second defendant, whose interest in the house in dispute, therefore, remains unaffected by the sale to the plaintiff.

The result is there must be a decree in favour of the plaintiff for a moiety of the house which will be sold and the plaintiff's moiety of the sale-proceeds paid to him. Both parties are permitted to bid for the property at the sale. The rest of the claim is disallowed. The plaintiff must pay the second defendant's costs, and the third and fifth defendants will pay those of the plaintiff.

APPELLATE CIVIL.

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

MANAVIKRAMAN (DEFENDANT), APPELLANT,

v.

AVISILAN KOYA (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, arts. 36, 49. Suit for compensation for attachment before judgment.

In a suit by A against B property of B was attached before judgment in November 1888. The suit was dismissed in October 1889, and an appeal by the plaintiff was dismissed in July 1890. B now sued A in September 1892 for damages occasioned by the attachment before judgment:

Held, that the suit was barred by limitation.

SECOND APPEAL against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in appeal suit No. 447 of 1893.

* Second Appeal No. 43 of 1895.

affirming the decree of A. Chathu Nambiar, District Munsif of Ernad, in original suit No. 550 of 1892.

Suit instituted on 28th September 1892 for compensation for an attachment before judgment on 1st November 1888. Both the Lower Courts held that the period of limitation applicable to the case was six years under Limitation Act, sched. II, art. 120, and they passed decrees for the plaintiff.

The defendant preferred this second appeal.

Subramania Sastri for appellant.

Sundara Ayyar for respondent.

JUDGMENT.—The timber in respect of which plaintiff seeks for compensation was attached before judgment in original suit No. 490 of 1888 on the file of District Munsif of Ernad. It had been cut in a forest by the plaintiff on the strength of a karar obtained from Manjery Karanamalpad, but the defendant sued in original suit No. 490 of 1888 alleging his own title to the *mala* and therefore to the timber which had been cut therein. It was on the allegation that the timber was his that the defendant obtained the attachment before judgment. Eventually the Court found that the defendant had no title to the *mala* and the judgment was confirmed on appeal (exhibit G).

Under section 491 of the Civil Procedure Code it is open to a Court on the application of a defendant to award compensation for attachment before judgment in two cases (1) when the attachment was applied for on insufficient grounds, and (2) if the suit fails and it appears to the Court there was no probable ground for instituting the suit. Both these cases are thus recognised as giving rise to a cause of action, and it is evident that the wrong (if any) done to the plaintiff falls within the second class since there could be no question of the sufficiency of the grounds for attachment had the defendant possessed any title at all.

The first question is as to whether the suit is or is not barred. The Courts below have held that article 120 of the Limitation Act applies to the case since they have not been able to see that the suit falls under any other article. We agree with them that article 29 does not apply since this is not a case of wrongful seizure, but it is argued for the appellant that the case falls under article 36 and that the suit should be regarded as one for misfeasance independent of contract, and that it falls under the description of a

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tort for which a limitation of two years is generally provided. See the judgment of Farran, J., in *Essoo Bhayaji v. The S. S. Saritri* (1).

It appears to us, however, from the observations of the learned Judge in that case that he would have classed a suit of this description under article 49 and not under article 36. His view was that for actions for tort a two years limitation was provided as a general rule subject to certain special exceptions. Article 49 prescribes a limitation of three years for a suit for compensation for wrongfully taking or injuring or wrongfully detaining specific movable property, and the time runs from the date of the wrong. If this article applies the suit will be barred since defendant had no title whatever to the timber and the wrong was done at the date of the attachment (1st November 1888). In favour of this view it may be noted that the same period of limitation is prescribed for a suit for compensation for injury caused by an injunction wrongfully obtained (article 42) for which a similar compensation can be granted by the Court under section 497, Civil Procedure Code. The two classes of cases are exactly parallel, and we can hardly suppose that the Legislature intended to prescribe a limitation of three years in the one case and six years in the other. It is true that the unlawful taking was through a process of the Court, but the timber was attached as belonging to defendant, and had he succeeded in his suit it would have been handed over to him. It does not appear material that the actual seizure was made by the Court amin. If article 49 does not apply, the suit would appear to fall under section 36 and in either view the suit is barred. It is not necessary to consider the other points raised. The appeal must be allowed and the decrees of the Courts below reversed, the suit being dismissed with all costs throughout.

(1) I.L.R., 11 Bom., 133.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

WILSON (APPELLANT),

1895.
October 8.

THE MADRAS MUNICIPALITY (RESPONDENTS).*

City of Madras Municipal Act—Act I of 1884, sched. B—Vehicle Tax—Bicycle.

A bicycle with pneumatic tires, having two metal springs under the saddle, is liable to taxation as a vehicle with springs under the City of Madras Municipal Act, 1884.

CASE stated for the decision of the High Court under the City of Madras Municipal Act, section 193.

The case was stated as follows :—

Dr. W. H. Wilson appealed to the Magistrates at the Egmore Court against a tax imposed by the Municipality on his bicycle under the head of "other vehicles with springs" in schedule B of the above Act. The appellant now requires us to state a case for the decision of the High Court on the point of law involved. He contends that his bicycle is not a vehicle or that it conveys nothing, that the rider conveys the bicycle and not the bicycle the rider; and he states that the proper definition of vehicle is that which conveys a burden distinct from the motor or motive power. Even adopting this extended definition, a bicycle can and often does convey the rider's luggage, and is often used by postmen to convey Her Majesty's mails. We, therefore, decided that a bicycle is a vehicle.

Then Dr. Wilson contends that even if a vehicle, a bicycle is not a vehicle with springs; as a fact there are two metal springs under the saddle of Dr. Wilson's bicycle, but the Act does not say metal springs. The object of the words "with springs" in the Act is to divide fast-running vehicles provided with apparatus to lessen jolting from slow-moving carts in which no attempt is made to counteract jolting. The pneumatic tires of a bicycle are to prevent jolting and perform the same office as metal springs in other vehicles. The appellant cited one or two English cases, but in these the question was whether a bicycle is a "carriage." In the Madras Act the word is "vehicle" which is a very different thing.

* Referred case 13 of 1895.

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"The question, we submit for the decision of the High Court, is whether a bicycle is a vehicle with springs within the meaning of section 123 and schedule B of Act I of 1884."

The provisions of schedule B of the City of Madras Municipal Act referred to above prescribe rates of taxation (i) "for every four-wheeled vehicle with springs drawn by two or more horses"; (ii) "for every four-wheeled vehicle with springs drawn by a horse, mule, bull, or bullock, or by two or more horses under thirteen hands or by two or more mules, bulls, or bullocks"; (iii) "for every two-wheeled vehicle with springs drawn by one or more horses, mules, bulls or bullocks"; (iv) "for every other vehicle with springs."

Mr. J. Adam for appellant.

Mr. J. H. M. Ryan for respondents.

JUDGMENT.—We are of opinion that a bicycle is a vehicle with springs within the meaning of the Madras Act I of 1884. The word "vehicle" is not defined in the Act. The term is used by itself and not qualified by reference to any particular kinds of vehicle. Clearly, as appears from the language of schedule B, the term is not confined to carriages drawn by horses or other beasts of burden. A perambulator used for children is within the operation, though it may be exempted under the proviso to section 153.

The case of *Williams v. Ellis*(1) is distinguishable for the reason that, in the statute there under consideration, various special kinds of carriages were mentioned, and therefore the rule of *ejusdem generis* applied. As it cannot be doubted that a bicycle is a vehicle in the general acceptation of the word, so we think there is no doubt that this particular bicycle is a vehicle with springs. We must, therefore, answer the question in the affirmative.

(1) L.R., 5 Q.B.D., 175.

APPELLATE CIVIL.

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

ADIPURNAM PILLAI, APPELLANT,

1896.
July 29.
August 9.

D'SENA AND OTHERS (PETITIONERS), RESPONDENTS.*

Companies Act—Act VI of 1882, s. 182—Notices—Loan Society—Liquidation—Previous withdrawal of member—Construction of rules—Distribution of assets.

One of the articles of association of a registered Loan Society provided that a member who has received no loan may withdraw from the association and receive the amount at his credit in calls minus the arrears, if any, and interest due thereon on giving one month's notice, such withdrawals to be paid from the first available funds. The society went into voluntary liquidation. By an extraordinary resolution it was resolved that the assets be rateably divided among the shareholders who had already withdrawn and those who were still in the fund. The liquidators applied to the Court under Companies Act, section 182, to determine the question how the assets should be distributed with reference to the above article. *Shepherd, J.*, ordered that notice of the application be given by advertisement on the notice board of the Court and in newspapers, and that a copy be posted at the society's office:

Held, affirming the judgment of *Shepherd, J.*, that those members who had given notice of withdrawal under the article quoted above were entitled to be paid out of the assets of the society in priority to the other members.

APPEAL against the judgment of *SHEPHERD, J.*, dated the 17th August 1894, and pronounced on an application made in the matter of the Indian Companies Act VI of 1882, and the Madras Building Association (Limited) in liquidation.

This was an application by the liquidators of the Madras Building Association (Limited) for the directions of the Court as to the mode and order of distribution of the company's assets with reference to the claims and right of two classes of members of the company designated, respectively, withdrawal and non-withdrawal members. The petition, which was dated the 6th of March 1894, was based on an affidavit of the liquidators, which set out that the applicants had been appointed in pursuance of an extraordinary resolution passed on the 17th of November 1893, for winding up the association under Act VI of 1882, section 173, clause (c), and that at the same time a resolution was passed that the assets be

* Original Side Appeal No. 10 of 1896.

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rateably divided among "the shareholders who have already withdrawn and those who are still in the fund." The affidavit further alleged as follows :—

"That the Madras Building Association (Limited) was started in June 1877 and registered under the Indian Companies Act X of 1866 for the purpose, among other things, of granting loans to members on approved securities.

"That the nominal capital of the association, which was a mutual society, was Rs. 6,50,000, divided into 1,300 shares of Rs. 500 per share, subscribed for by monthly calls of Rs. 5 per share, extending over a period of one hundred months or eight years and four months.

"That loans were granted to subscribers by ballot as provided for by section 13 of the articles of association.

"That loans were granted to the members according to the number of shares held by each of them.

"That borrowers were required to repay the loan by monthly calls of Rs. 5 per share and interest at 6 per cent. under rule 23 of the articles.

"That rule 42 of the articles of association provides that a member, who obtains no loans, may 'withdraw from the association and receive the amount at his credit in calls minus the arrears (if any) and interest due thereon on giving one month's notice; such withdrawals to be paid from first available funds.'

"That the practice from the commencement of the association has been to pay such withdrawal non-loan members in rotation according to the dates on which such withdrawal notices were received by the association.

"That, up to the date when the society went into liquidation, there were 44 withdrawal members remaining unpaid whose claims amounted to Rs. 20,144 as per schedule A hereto annexed, and 33 members who had not withdrawn and whose claims amounted to Rs. 16,995 as per schedule B hereto annexed.

"That a dividend to all the members was declared by the association annually except during the last three years in consequence of heavy losses.

"That two of the withdrawal members, T. Manicka Mudaliar and J. L. Pinto, sued the association in the Madras Court of Small Causes, and obtained decrees for the amounts due to them on the 31st October 1893, and on the 16th November 1893 for

Rs. 1,600 and Rs. 195 respectively (Small Cause Suits Nos. 18001 of 1893 and 19275 of 1893).

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"That the entire claims of the shareholders against the company, at the time when it went to liquidation, amounted to Rs. 37,139, and a sum of about Rs. 1,050 was distributed among the shareholders in or about December 1893, in accordance with the resolution set forth in the last preceding paragraph and the shareholders accepted their dividend with the exception of six shareholders, among whom (the latter) were T. Manicka Mudaliar and J. L. Pinto who sued the association in the Court of Small Causes as set forth in paragraph 10 herein and whose (those who refused to accept the dividend above referred to) claims amounted in all to Rs. 3,245 as per schedule C, hereto."

The matter having come on for hearing, SHEPARD, J., made an order as follows :—

"I order that notice of the application for an order as to the mode of distribution of the assets of the above association, &c., be served personally on the members named in the above-said joint affidavit of E. C. D'Sena and W. Fermier who refused to accept the dividend therein mentioned, and by public advertisement in the *Hindu* and *Standard* newspapers twice in each, and by posting notices on the notice board of this Court and at the office of the said association, and I further order that this application do stand and be, and the same is hereby adjourned to 17th day of July 1894."

The notices and advertisements having been made as ordered, further affidavits were filed from which it appeared that some of the members had and others had not given notice under article 42 of the memorandum of association.

Article 42 of the memorandum of association was in the following terms :—

42. "A member who has received no loan, may withdraw from the association and receive the amount at his credit in calls, minus the arrears (if any) and interest due thereon, on giving one month's notice, such withdrawals to be paid from first available funds."

Parthasaradhi Ayyangar for the liquidators.

Nammayya Chetti, Venkataramayya Chetti and Seshagiri Ayyar for various members of the association.

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SHEPARD, J.—This is an application under section 182 of the Companies Act for the determination of a question with reference to the claims of members of the society who have and members who have not given notice of withdrawal under the rules.

The affidavit does not state with such clearness as might be desired, the precise question which the liquidators desire to raise, and more than one question was mentioned in the course of the argument. It was suggested that the notices of withdrawal were given after the society was known to be insolvent. That however is not a matter put forward in the original affidavit of the liquidators and no question is asked upon it. I confine myself to the question above stated which, as I read the affidavit, is the only question requiring an answer. It is not alleged that there are any outside creditors of the society. The question arises simply between members who have given notice under rule 42 and members who have not. Whether the former are to be paid in priority to or *pari passu* with the latter.

On behalf of the liquidators in support of the view expressed in the resolution, 17th November 1893, I was referred to the observation of Jessel, M. R., in *In re Mutual Society*(1).

It was contended that the rules contemplated the society as a going concern and had no application to the affairs of the society in liquidation. There is no authority for this position. On the contrary if authority is needed, *In re Blackburn and District Benefit Building Society*(2) is clear authority for the proposition that the rights of members must be regulated by the contract contained in the rules. The question then is simply one of construction—the construction of rule 42. The rule says that, under certain circumstances, a member may withdraw and receive the amount at his credit in calls *minus* arrears and interest—“such withdrawals to be paid from first available funds.”

I am clearly of opinion that the rule gives members, who have given due notice, the right to have the sums due to them paid in priority to other members who have not given notice, such payments to be made out of the funds in the liquidators' hands so far as they are available.

Adipurnam Pillai, one of the class described as non-withdrawal members, preferred this appeal.

(1) 24 Ch. D., 427.

(2) 24 Ch. D., 421.

The Advocate-General (Hon'ble Mr. Spring Branson) for ADIPURNAM PILLAI v. D'SENA. appellant.

Parthasaradhi Ayyangar for the liquidators, respondents Nos. 1 and 2.

Sundara Ayyar for respondent No. 3, one of the class described as withdrawal members.

JUDGMENT.—This is an appeal from an order of Mr. Justice SHEPARD disposing of an application under section 182 of the Indian Companies Act in the matter of the Madras Building Association (Limited).

The Madras Building Association (Limited) is now in liquidation, but prior to the petition for liquidation certain shareholders gave notice of withdrawal from the company, and the question for decision is, what are the rights of the withdrawing members between themselves and the other members of the association; in other words, have the members who have given notice of withdrawal a right to be paid out of the assets in priority to the other members? The learned Judge decided that they had priority.

Article 42 of the memorandum of the articles of association says that a member who has received no loan may withdraw from the association and receive the amount at his credit in calls *minus* the arrears (if any) and interest due thereon on giving one month's notice, such withdrawals to be paid from first available funds. The learned Advocate-General appears for the appellant and argues that article 42 only applies to the association as a going concern, and that as the association is in liquidation all the shareholders as between themselves are entitled to share and share alike, and the case of *In re Mutual Society*(1) decided by the late Master of the Rolls was relied on. But that case is distinguishable from the present, as the shareholders of the Mutual Society who had given notice of withdrawal were to be paid out of one particular fund which was non-existent at the time the society went into liquidation. Mr. Sundara Ayyar, who appears for the third respondent, relies on the case of *In re Blackburn and District Benefit Building Society*(2) which has been confirmed by the House of Lords in *Walton v. Edge*(3). Rule 3 of that society stated that any member of the society shall be allowed to withdraw (provided

(1) 24 Ch. D., 427. (2) 24 Ch. D., 421. (3) L.R., 10 App. Cas., 33.

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SHEPHARD, J.—This is an application under section 182 of the Companies Act for the determination of a question with reference to the claims of members of the society who have and members who have not given notice of withdrawal under the rules.

The affidavit does not state with such clearness as might be desired, the precise question which the liquidators desire to raise, and more than one question was mentioned in the course of the argument. It was suggested that the notices of withdrawal were given after the society was known to be insolvent. That however is not a matter put forward in the original affidavit of the liquidators and no question is asked upon it. I confine myself to the question above stated which, as I read the affidavit, is the only question requiring an answer. It is not alleged that there are any outside creditors of the society. The question arises simply between members who have given notice under rule 42 and members who have not. Whether the former are to be paid in priority to or *pari passu* with the latter.

On behalf of the liquidators in support of the view expressed in the resolution, 17th November 1893, I was referred to the observation of Jessel, M. R., in *In re Mutual Society*(1).

It was contended that the rules contemplated the society as a going concern and had no application to the affairs of the society in liquidation. There is no authority for this position. On the contrary if authority is needed, *In re Blackburn and District Benefit Building Society*(2) is clear authority for the proposition that the rights of members must be regulated by the contract contained in the rules. The question then is simply one of construction—the construction of rule 42. The rule says that, under certain circumstances, a member may withdraw and receive the amount at his credit in calls *minus* arrears and interest—“such withdrawals to be paid from first available funds.”

I am clearly of opinion that the rule gives members, who have given due notice, the right to have the sums due to them paid in priority to other members who have not given notice, such payments to be made out of the funds in the liquidators' hands so far as they are available.

Adipurnam Pillai, one of the class described as non-withdrawal members, preferred this appeal.

(1) 24 Ch. D., 427.

(2) 24 Ch. D., 421.

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

Parthasaradhi Ayyangar for the liquidators, respondents Nos. 1 and 2.

Sundara Ayyar for respondent No. 3, one of the class described as withdrawal members.

JUDGMENT.—This is an appeal from an order of Mr. Justice SHEPHARD disposing of an application under section 182 of the Indian Companies Act in the matter of the Madras Building Association (Limited).

The Madras Building Association (Limited) is now in liquidation, but prior to the petition for liquidation certain shareholders gave notice of withdrawal from the company, and the question for decision is, what are the rights of the withdrawing members between themselves and the other members of the association; in other words, have the members who have given notice of withdrawal a right to be paid out of the assets in priority to the other members? The learned Judge decided that they had priority.

Article 42 of the memorandum of the articles of association says that a member who has received no loan may withdraw from the association and receive the amount at his credit in calls *minus* the arrears (if any) and interest due thereon on giving one month's notice, such withdrawals to be paid from first available funds. The learned Advocate-General appears for the appellant and argues that article 42 only applies to the association as a going concern, and that as the association is in liquidation all the shareholders as between themselves are entitled to share and share alike, and the case of *In re Mutual Society*(1) decided by the late Master of the Rolls was relied on. But that case is distinguishable from the present, as the shareholders of the Mutual Society who had given notice of withdrawal were to be paid out of one particular fund which was non-existent at the time the society went into liquidation. Mr. Sundara Ayyar, who appears for the third respondent, relies on the case of *In re Blackburn and District Benefit Building Society*(2) which has been confirmed by the House of Lords in *Walton v. Edge*(3). Rule 3 of that society stated that any member of the society shall be allowed to withdraw (provided

(1) 24 Ch. D., 427.

(2) 24 Ch. D., 421.

(3) L.R., 10 App. Cas., 33.

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the funds permit) sums by giving certain notices of withdrawal, and that no further liabilities shall be incurred by the society till such member shall be repaid. It was held on the construction of the above that the rule as to the withdrawal of members must not be confined to the society as a going concern, but was applicable to adjust the rights of the withdrawing and continuing members *inter se* in the winding up, that the members who had given notice to withdraw, and whose notices had expired before the commencement of the winding up, were entitled to be paid out of the assets in priority to the other investing members who had not given notice of withdrawal, notwithstanding that at the date of the winding up there were no funds in hand for their payment.

In the present case rule 42 states that the withdrawals are to be paid from the first available funds.

We hold, therefore, that the learned Judge was right, and this case comes within the principles laid down in *re Blackburn and District Benefit Building Society*(1), and we dismiss the appeal with costs.

Alasingarachariar—attorney for appellant.

APPELLATE CIVIL

Before Mr. Justice Parker and Mr. Justice Davies.

1895.
November 21.
December 3.

SUBBARAU NAYUDU, PLAINTIFF,

v.

YAGANA PANTULU AND ANOTHER, DEFENDANTS.*

Limitation Act—Act XV of 1877, s. 14—Exclusion of time of former proceedings.

In 1892 a suit was instituted in the Presidency Court of Small Causes against defendants not resident within the jurisdiction, the leave of the Registrar of the Court having been first obtained. Subsequently it was ruled that the Registrar was not empowered to give such leave, and the suit was dismissed. A similar suit was then instituted, the leave of the Court having been first obtained:

Held, that the time during which the first suit was pending should be deducted in the computation of the period of limitation applicable to the second suit.

(1) 24 Ch. D., 421.

* Referred case No. 12 of 1895.

CASE stated for the opinion of the High Court under Presidency Small Cause Court Act, section 69 by V. P. deRozario, one of the Judges of the Presidency Small Cause Court.

The case was stated as follows:—

In this suit, presented on the 25th April last, the plaintiff seeks to recover from the defendants residing in Kistna a sum of Rs. 525-3-6 due on balance of account to one Kottaya Naidu who assigned the debt to the plaintiff. The cause of action is alleged to have arisen about five years before the date of the present suit. The plaintiff states that, under section 14 of the Limitation Act, he is entitled to deduct the period of three years during which a former suit No. 6837 of 1892 filed on the 25th March 1892 on the same cause of action was pending in this Court, which suit was dismissed on 26th April 1895 by the Chief Judge for want of jurisdiction, as the leave to sue the defendants residing beyond the jurisdiction was given by the Registrar who had no power to grant it.

This power was vested in the Registrar by a rule framed by the High Court and published in the *Fort St. George Gazette* in 1885, and from that date until 27th March 1895, when the rule was declared by the High Court to be *ultra vires*. See *Rajam Chetti v. Seshayya*(1); the power of granting leave was exercised by the Registrar.

It is not contended that the plaintiff acted otherwise than *bona fide* in applying for the required leave to the officer publicly declared by the High Court to which the Small Cause Court is subordinate to have the power to grant it. The suit was filed on the very day on which the leave was obtained, and it is not contended that the plaintiff failed to exercise due diligence in prosecuting the suit, or that its long pendency in this Court is due to any negligence on his part. But it is urged that the plaintiff's suit was not dismissed for want of jurisdiction on the part of the Court, but, on the contrary, the Court having jurisdiction was precluded from taking cognizance of it by reason of the leave of the Court not having been obtained for its institution as required by law, that the Court was divested of its jurisdiction by the plaintiff's own act or omission, and that this omission was *per se* negligence or want of due diligence on his part. In support of this contention the case of *Ramakristna*

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(1) I.L.R., 18 Mad., 236.

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Castrulu v. Darba Lakshmidheramma(1) is relied upon. There a suit for inam lands was dismissed on the ground that the plaintiff had no certificate as required by Regulation IV of 1831. Eight years afterwards the plaintiff having obtained the requisite certificate commenced a second suit, it was held that the institution of the former suit had not suspended the statute of Limitation Act XIV of 1859—Holloway, J., remarking “the fact that he (plaintiff) failed to obtain the required certificate will no more suspend the statute, than the inability to procure evidence would have done. . . . That the certificate was not procured, may be from the plaintiff’s misfortune or from his negligence, but with that the Court has no concern. This case really proceeds on the very obvious principle that a plaintiff’s failure to procure what is necessary for the institution of his suit, does not keep alive his cause of action.” But the circumstances of that case are different from those of the present; and further the remarks of the learned Judge are *obiter dicta*, as even if the period during which the first suit was pending were deducted, the second suit was barred as more than twelve years had run against the plaintiff’s remedy. In a much later case *Putali Meheti v. Tulja*(2), where the production of the Collector’s certificate was necessary to give jurisdiction to the Court, it was held that its non-production did not necessarily constitute such a want of due diligence as to disentitle the plaintiff to the deduction of time allowed by section 14 of the Limitation Act. West, J., observed “the case appears to have been one of an error committed in good faith and not one of want of due diligence. The plaintiff wanted a decree and took the steps apparently necessary to obtain it. His suit failed, though a defect of jurisdiction of the Court, which had not really judicial cognizance of the cause until the preliminary condition overlooked for so long, had been satisfied.” The circumstances of that case and those of the present case appear to be similar.

Section 14 enacts: “In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of First Instance or in a Court of Appeal, against the defendant shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in

a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.”

The section indicates that the Legislature intended to show indulgence to a party acting *bona fide* under a mistake (*Kristna v. Chathappan*(1)), and that a plaintiff is entitled to the benefit of the terms of section 14, if it is shown “that his suit had been prosecuted *bona fide* and with due diligence, and that the Court was unable to decide upon it from some cause quite unconnected with the default or negligence of the plaintiff The inability of the Court must be either some unavoidable circumstance over which no one has any control, or something incidental to the Court itself, and unconnected with the acts of the parties.” (*Per Jackson, J., in Chunder Madhub Chuckerbutty v. Bissessuree Debea*(2)).

I am of opinion that the plaintiff is entitled to the benefit of the terms of section 14 of the Limitation Act. But at the request of the defendants’ pleader, I beg to submit for the opinion of the High Court the question, whether, in the circumstances stated, the time during which the plaintiff was prosecuting his former suit in this Court should be excluded in computing the period of Limitation for the present suit.

I have reserved judgment contingent upon the opinion of the High Court on the question submitted.

Mr. K. Brown for plaintiff.

Pattabhirama Ayyar for defendants.

JUDGMENT.—This suit No. 6550 of 1895 was instituted in the Presidency Small Cause Court on the 26th April last under section 18 (a) of Act XV of 1882, the leave of the Court having first been given as was necessary, because the defendants do not reside within the local limits of its jurisdiction but in the Kistna District. A precisely similar suit had been filed on the 25th of March 1892 by the leave of the Registrar of the Court, and it was pending until the 26th April last, when it was thrown out on the ground that the Court had no jurisdiction to entertain it, because the leave of the Registrar was not the leave of the Court as had recently been declared by the High Court (*Rajam Chetti v. Seshayya*(3)). Up till then, the Registrar had been exercising the power for many years under a rule passed by the High Court in 1885, which was now found to be *ultra vires*. The plaintiff’s

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(1) 1 M.H.C.R., 320.

(2) I.L.R., 3 Bom., 223.

(1) I.L.R., 13 Mad., 269. (2) 6 W.R., 184. (3) I.L.R., 18 Mad., 236.

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present suit is barred by limitation if he cannot claim the benefit of section 14 of the Limitation Act, and that is the question referred to us, whether the time from the 25th of March 1892 to the 26th of April 1895 during which he was prosecuting his former suit should be excluded in computing the period of limitation for the present suit.

Section 14 of the Limitation Act allows such exclusion if the former suit was prosecuted with due diligence and in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it. It is not contended that the plaintiff was in fact negligent in prosecuting the suit, the long pendency of which was owing to no fault of his, nor that he did not act *bonâ fide* in bringing the suit on the sanction of the Registrar, which was then supposed to be a valid sanction even by the Court itself. What is contended is that he is responsible in law for his omission to obtain the leave of the Court, and it was only by reason of that omission that the Court was divested of its jurisdiction. In support of the first proposition several cases are cited. In *Ramakristna Castrulu v. Darba Lakshmiddevamma*(1) it was held that the statute of limitations was not suspended in consequence of plaintiff's misfortune or negligence in not producing a certificate required by law, for want of which his previous suit had been dismissed. In *Bai Jamna v. Bai Ichha*(2), the plaintiff was held not entitled to deduct the time she was engaged in prosecuting the first suit, because that was dismissed owing to the non-production of a registered certificate due to her own laches. In *Krishnaji Lakshman v. Vithal Ravi Renge*(3) the plaintiff was not allowed the benefit of section 14, because his previous suit was defective for want of parties and was withdrawn by himself. In *Tirtha Sami v. Seshagiri Pai*(4) the first suit had failed by reason of misjoinder of causes of action and parties, and hence plaintiff was held not entitled to exclude the time it was pending. In all these cases it will be observed that the condition was one within the power of the party to fulfil, and it was default or defect in himself and not a "defect of jurisdiction" in the Court which entertained the suit "or other cause of a like nature" that deprived him of the time occupied in carrying it on to a failure. Now in this case, it

(1) 1 M.H.C.R., 320.
(3) I.L.R., 12 Bom., 625.

(2) I.L.R., 10 Bom., 604.
(4) I.L.R., 17 Mad., 299.

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would be impossible to say that the plaintiff committed any fault when he complied with the rule sanctioned by this Court. Being then accepted as good in law, he could hardly have disputed it, especially as the Court to which he applied recognized and acted upon it. It cannot therefore be held that he was guilty of any omission, and it is conceded there was no actual negligence or want of *bonâ fides* on his part. To entitle a plaintiff to the benefit of the terms of section 14 of the Limitation Act, it is sufficient to show "that his suit had been prosecuted *bonâ fide* and with due diligence, and that the Court was unable to decide upon it from some cause quite unconnected with the default or negligence of the plaintiff." (*Per Jackson, J., in Chunder Madhub Chuckerbutty v. Bissessuree Debea*(1)).

Then as to the proposition that the Court had an inherent jurisdiction over the case, which it was prevented from exercising only by reason of the plaintiff's omission to obtain the requisite leave, we are not prepared to accede to it. It is argued that the case is similar to cases such as that under section 30 of the Code of Civil Procedure where with permission of the Court one party may represent others in the suit, or such as those wherein the production of a certificate or other authority is a preliminary condition to a suit, without which the Court will not exercise its jurisdiction, albeit jurisdiction is vested in it. In this class of cases however the inability of the Court is not an inability to entertain the suit, but an inability to decide it until the condition is fulfilled, and it is an everyday occurrence to allow the omission to be supplied after the plaint is filed. But in this case the Presidency Small Cause Court had absolutely no jurisdiction until its leave had been obtained in writing "before the institution of the suit," because the defendants did not reside within its local jurisdiction. The Act conferring the jurisdiction is not only a special but a local Act, and it is an essential qualification that the leave of the Court be first given before it can exercise jurisdiction over defendants not residing within the local limits of its ordinary jurisdiction, and who otherwise are not subject to it. Its jurisdiction is excluded until it is specially conferred by the Court's own act, and that act must be performed prior to the institution of the suit. The Court had therefore no inherent jurisdiction, which makes all the difference

(1) 6 W.R., 184.

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between the case here in question and the class of cases referred to above, where there is no want of jurisdiction to begin with but only a refusal to exercise it for the time being. It is just as if a plaint were presented not in proper form or unverified; the Court would not act upon it—not because it had no jurisdiction, but because a prerequisite was wanting, which is allowed to be supplied afterwards by amendment. In the present case the Court was altogether debarred and precluded from receiving the plaint, as it had not given its prior consent to its entertainment and had no authority to accord it afterwards. It is urged that, that being the case, the Court should have returned the original plaint for presentation in the proper Court and the question of limitation need not then have arisen. But we give no opinion on this point, as it is not embraced in the reference made to this Court. With regard to that, we reply for the reasons given that the plaintiff is entitled to exclude, from the computation of the period of limitation for his present suit, the time his former suit was pending in the Court.

Rencontre—Attorney for plaintiff.

APPELLATE CIVIL.

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

SADASOOK GAMBIR CHUND (PLAINTIFF), PETITIONER,

v.

KANNAYYA AND ANOTHER (DEFENDANTS) RESPONDENTS.*

Presidency Small Cause Courts Act—Act XV of 1882, s. 37—Powers of Full Bench of Presidency Small Cause Court—Question of fact.

One of the Judges of the Presidency Small Cause Court in a suit tried by him delivered judgment for the plaintiff. The defendant made an application to the Full Bench under the Presidency Small Cause Courts Act, section 37, and the Court arrived at the conclusion that the judgment proceeded on a misappreciation of the evidence and reversed the decree:

Held, by COLLINS, C.J., and SHEPHARD, J. (BEST, J., dissenting) that the Full Bench of the Presidency Small Cause Court had transgressed the limits of the

* Civil Revision Petition No. 510 of 1894.

jurisdiction conferred by Act XV of 1882, section 37, as the case was one on which different minds might not unreasonably have come to different conclusions.

PETITION under Civil Procedure Code, section 622, praying the High Court to revise the proceedings of the Full Bench of the Presidency Court of Small Causes in small cause suit No. 4946 of 1894.

One of the Judges of the Presidency Small Cause Court passed a decree for the plaintiff in the above suit. The Full Bench on an application made under Presidency Small Cause Courts Act, section 37, considered that he had come to an erroneous conclusion on the evidence and reversed the decree.

The plaintiff preferred this petition.

Mr. W. Grant for petitioner.

Mr. R. F. Grant for respondents.

SHEPHARD, J.—This petition raises an important question with regard to the practice of the Full Bench of the Small Cause Court in dealing with applications under the 37th section of the Act of 1882. The application in this case was made on behalf of the defendants, against whom a decree had been passed. It is made in the form of an appeal against the decision of the Second Judge, and is based on various grounds, three of which relate merely to questions of the appreciation of evidence. In their judgment on the application the learned Chief Judge and his colleagues discuss the evidence, and deal with the case precisely in the manner in which an Appellate Court might have treated it. They differ from the conclusion of fact at which the Second Judge had arrived and find in favour of the defendants. They hold that the case is one in which, under the rules of the 16th February 1886, they are justified in entertaining the application and dealing with the case accordingly. The result was the reversal of the decree and the dismissal of the suit.

Now, whatever may be the force or effect of the rules above-mentioned, there can be no doubt that under those rules the Full Bench cannot assume a jurisdiction which under the Act itself they do not possess. The question then is, whether under the 37th section of the Act, the Full Bench was justified in entertaining the application and reversing the decree.

The section consists of two parts. First there is a declaration that the determination of a case tried in the Small Cause Court is to be final and conclusive. In other words the right of appeal is

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denied. Then comes the provision empowering the Full Bench, on application duly made, to grant a re-trial or to do certain other things. The forms which the interference of the Full Bench may take are such as a Court of Appeal might be empowered to use; but evidently the Full Bench is not intended to sit as a Court of Appeal. The section which follows, providing for a re-hearing by the High Court in cases of miscarriage or failure of justice, furnishes an alternative course, which would scarcely be given if under the preceding section the Full Bench were meant to be a Court of Appeal. The distinction between the functions of the Full Bench and those of an Appellate Court must lie in the character of the conditions under which the Full Bench has jurisdiction to interfere. Those conditions are not expressed even in such general language as is used in the 38th section, but I think they may be gathered from the language of the previous Act and the rules of English law *in pari materia*. By the 50th section of the Act of 1850, which also contains a declaration that the judgments of the Small Cause Court are to be final and conclusive, there is reserved to the Court the power of granting a new trial. The section does not provide for any other mode of interference with the original decree. When, in 1882, the Legislature altered the law by prescribing several modes of interference, it appears to me that it clearly was not intended to alter the conditions under which the Full Bench might act. Now under the Act of 1882, as formerly under the Act of 1850, it has to be seen whether in any given case the circumstances are such as would justify the granting of a new trial. In the present case, if under the Act of 1850 a new trial would not properly have been granted, then, in my opinion, under the existing law, the application ought not to have been allowed and the decree ought not to have been reversed. The conditions under which a new trial may be granted according to the accepted practice prevailing in English Courts in cases in which that is the form of remedy provided are various. (See Lush's Practice). The only rule which could possibly have any application to the present case is that which justifies a motion for a new trial on the ground that the verdict is against the weight of evidence. This rule, however, does not mean that the Court before which the motion is made is at liberty to set aside the verdict merely on the ground that they take another view of the evidence and do not agree with the conclusion of the jury. The applicant for a new trial must go

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farther than this; he must show that the verdict is one to which no reasonable man ought to have come (see *Solomon v. Bitton*(1)). It does not appear that in the present case there was any pretence for saying that the judgment of the Second Judge was in this sense an erroneous one. The burden of proof was on the defendants, and the question was simply as to the sufficiency of the proof adduced by them. It is clear that the case was one in which different minds might not unreasonably have come to different conclusions. In the case cited above the Judge before whom the case had been tried had expressed dissatisfaction with the verdict. Yet the Court of Appeal reversed the order for a new trial on the ground that the granting of a new trial did not depend on the opinion of the Judge who tried the action, but on the question whether the verdict was such as reasonable men ought to have come to.

In my opinion the Full Bench have transgressed the limit of the jurisdiction conferred on them by the 37th section. They have in fact assumed the functions of a Court of Appeal.

I would therefore set aside their order and restore the decree. The respondents must pay all the costs.

BEST, J.—It is contended on behalf of the petitioner that the Full Bench of the Madras Small Cause Court exceeded its powers in reversing the decision of the Second Judge merely on a consideration of the evidence, there being no question of law.

Section 37 of the Presidency Small Cause Courts Act (XV of 1882), under which the Judges acted, after declaring that every decree and order of the Small Cause Court in a suit shall be final and conclusive, "save as is herein specially provided," adds that the Court may, on application of either party, made within eight days from the date of the decree or order in any suit, order a new trial to be held, "or alter, set aside or reverse the decree or order," upon such terms as it thinks reasonable.

The language used seems to me to mean that, though the party is not entitled to appeal as of right, in any case in which application is made within the time allowed the Court may, if it thinks fit, reconsider any decree or order with all the powers of an ordinary Appellate Court. There is nothing, either in the wording of the section or in the rules for new trials sanctioned on the 16th

(1) 8 Q.B.D., 176.

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February 1886, to debar a re-hearing where the question is one merely of appreciation of the evidence. The rules, in fact, by saying that the powers conferred by the section will ordinarily be exercised only on certain specified grounds, recognize the power of the Court to grant a re-hearing even in other cases, should the same be thought necessary for the ends of justice; and such also appears to have been the intention of the Legislature, judging from the language used in section 37.

Being of opinion that the Full Bench did not act without jurisdiction, and seeing nothing illegal in its proceedings, I would dismiss this petition with costs.

This petition came on for hearing under the provisions of section 575 of the Code of Civil Procedure before COLLINS, C.J., who delivered judgment as follows :—

COLLINS, C.J.—This case was not re-argued before me, the respondents not appearing.

I agree with Mr. Justice Shephard's reasons and conclusion, and I would therefore set the order aside and restore the decree. The respondents must pay all the costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

1895.
August 7, 8,
18.

VIZIANAGARAM MAHARAJAH (PLAINTIFF), APPELLANT,

v.

SITARAMARAZU AND OTHERS (DEFENDANTS NOS. 1 TO 9, 11 TO 13, 15 TO 29 AND 10 TO 14 DEFENDANTS' REPRESENTATIVES), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, art. 132—Suit for kattubadi—Whether kattubadi is rent merely or constitutes a charge—Resumption of service grant.

The plaintiff sued for possession of three villages granted by his predecessor to the ancestors of the defendants on the ground that the villages had been granted on service tenure and that he was entitled to resume them. He prayed in the alternative for a decree for six years' arrears of kattubadi:

Held (1) on the evidence that the plaintiff was not entitled to resume the villages;

* Appeals Nos. 134 and 179 of 1893.

(2) that the plaintiff was entitled to a decree for only three years' arrears of kattubadi.

APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in original suit No. 14 of 1891.

The plaint set out that three villages, "included under the head of jeroyati relating to the plaintiff's samastanam, were given by the plaintiff's grandfather the Maha Rajah to the defendants' ancestors, three in number, that is, Kakarlapudi Appala Razu, Seetarama Razu and Vijiagopala Razu, who were in the subordinate service of the plaintiff's ancestors, with the condition that they should render service by being present as courtiers. Having regard to the treaty entered into between the English Government and this samastanam, and before the English Government took the administration of the Northern Circars, the gifts made by the holders of this samastanam of their own accord can be enjoyed for life only during their time. They cannot bind the interest of the reversionary heirs according to the custom." After setting out that the first named grantees adopted sons of the third, the plaint proceeded as follows :—

"The remaining seven sons and Vijiagopala Razu enjoyed one share separately. As the suit villages were granted as service mokhasa and as the permission of the Maha Raja was required for their division, only the suit villages were enjoyed jointly till 1845. Vijiagopala Razu's son, Seetarama Razu, requested the plaintiff's father, the Maha Raja Garu, very much in 1853, that he should grant him again saying that he would render service as usual and enjoy the same, and that he would be paying the kattubadi fixed by the circar. Thereupon, instead of granting them into three shares according to family rights, they were given again on the 13th September 1853 to the seven sons who were staying with Vijiagopala Razu and the adopted sons Lakshminarasimha Razu and Bungaru Razu with a kattubadi of Rs. 300 newly fixed for enjoyment on the condition that they should according to mamul be in attendance as courtiers, whenever the circar may desire, render service and be subject to their pleasure."

The effect of certain litigation was next stated in the plaint, and it was added that after its close the defendants divided the villages into nine shares "and have been enjoying till 1879 according to their respective shares, paying the usual kattubadi." The further averments were that, as the defendants were not at the

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inam settlement made by the plaintiff according to the custom, and as the conduct of the defendants was not satisfactory to the plaintiff, and as the services of the defendants were not required, the defendants were informed that they should pay a sist of Rs. 5,000 for the villages; and that, as they failed to do so, notices were served on them requiring them to relinquish the villages. The plaintiff's prayers were for possession of the villages and for the payment of kattubadi at Rs. 300 a year for four faslis (1289 to 1292) and mesne profits for three faslis (1297 to 1299) or in the alternative (in case plaintiff was not found to be entitled to possession) for the payment of kattubadi for faslis 1289 to 1292 as above and for faslis 1297 to 1299 at Rs. 5,000 a year.

The District Judge held that the plaintiff was not entitled either to resume the villages or to enhance the kattubadi, and passed a decree for kattubadi from 1289 at Rs. 300 a year.

Plaintiff preferred this appeal and objections were taken by the defendants as to the amount of kattubadi decreed.

Mr. H. G. Wedderburn and Rangachariar for appellant.

Bhashyam Ayyangar and Subramania Ayyar for respondents.

JUDGMENT.—The plaintiff's right to resume the villages held by the defendants is chiefly put upon the ground that the latter and their predecessors have always held and still hold by tenure of service. It is also contended that, by the custom of the zamindari, the Maharajah had the right to resume the villages, and that the grant of 1853 made by the plaintiff's predecessor must be construed with reference to the acts done and views expressed by him at or about that time. Since 1853 the defendants have been holding under an instrument, dated the 13th September 1853, which recites that the villages then under attachment had been granted to their ancestors for family purposes under tenure of service, and that no kattubadi had hitherto been payable. It provides that henceforward kattubadi shall be payable at the rate of Rs. 300 a year, and requires that the grantees "shall behave themselves properly, abiding by the orders of the circar as was done before the attachment (sabak)." The attachment mentioned in this document had been in force since 1845, when the plaintiff's grandfather died. Up to that date the defendant's predecessor had held the villages under an instrument of 1808 (XII). That instrument, styled a mokhasa patta, declares that the grantees shall enjoy the villages hereditarily. Except in the use of the word mokhasa

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there is no reference to any service. The grant is an absolute one, free of rent and evidently intended to be in perpetuity. The plaintiff's counsel was unable to explain what the nature of the supposed service required of the defendants was, and we can find no evidence that any services were ever rendered or required. The probability is that the grant of 1808 was made to the defendants' predecessors simply because they were fellow castemen of the Maharajah whom he wished to maintain. No doubt it was the current opinion in 1853 that such grants were liable to resumption. That circumstance explains the language used by the late Maharajah in the letter on which the plaintiff's counsel relied.

The circumstances under which the new grant was made in 1853 are similar to those in *Vizianagaram Maharajah v. Suryanarayana*(1). In that case the Privy Council approved the judgment of this Court in dismissing the suit. The expressions of subservience used in the grant of 1853 are likewise to be found in the grant in the case. We may also refer to the decision of this Court in *Suryanarayana v. Ramachandra*(2).

We agree with the District Judge in the conclusion at which he has arrived. We think there is no evidence of the alleged custom. The plaintiff's appeal must be dismissed with costs.

The objection on the part of the respondents in appeal suit No. 134 is based on the law of limitation. The Judge has held that the suit for kattubadi is one to which article 132 of the schedule to the Act applies and has awarded relief accordingly. Whatever may be the nature of the claim for kattubadi, the suit is so framed as to enforce the personal remedy only. It has been held by the Judicial Committee that the 132nd article has reference only to cases in which the property charged is sought to be made liable—*Ram Din v. Kalka Prasad*(3), see also *Miller v. Runga Nath Moullick*(4), *Seshayya v. Annamma*(5), *Rathnasami v. Subramanya*(6). In the face of these decisions we are bound to disregard an unreported decision to the contrary effect to which our attention was called.* We must allow the objection and the decree must be

(1) I.L.R., 9 Mad., 307.

(3) I.L.R., 7 All., 502.

(5) I.L.R., 10 Mad., 100.

(2) Appeal No. 77 of 1866, unreported.

(4) I.L.R., 12 Calc., 389.

(6) I.L.R., 11 Mad., 56, 59.

* Second Appeal No. 822 of 1894, 8th November 1894: *Venkatarama Doss v. Maharajah of Vizianagaram*.—This was a suit by the Maharajah of Vizianagaram to recover from the defendant a sum of money being arrears of

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amended accordingly. The respondents are entitled to their costs on this part of their objection. The other objections are not pressed.

In appeal suit No. 179 of 1893, the memorandum of objections is allowed with costs.

kattubadi accrued due for eleven years (falsis 1289 to 1299 both inclusive) on the village of Arjunavalasa held by the defendant in the plaintiff's zamindari. It was held by the lower Courts that the suit was not barred by limitation for the reason that kattubadi was not rent merely but constituted a charge on the land. *Alubi v. Kunhi Bi* (I.L.R., 10 Mad., 115) was referred to by the lower Appellate Court and Limitation Act, sched. II, arts. 131 and 132, were held to be applicable to the case. The judgment of the High Court on second appeal so far as it related to the question of limitation was as follows:—

JUDGMENT.—The next contention is that inasmuch as the last payment of kattubadi was made in April 1879 and the suit was brought on 20th June 1891, the whole claim is barred. It was argued that the irregular levy of kattubadi abandoned more than 12 years before suit was not proof of a legal right, *Ramachandra v. Jaganmohana* (I.L.R., 15 Mad., 161) and that even if the right was not extinguished kattubadi was only rent, and not more than three years rent can be recovered. In proof of this latter position two unreported cases *Papamma Rau v. Sivaramayya* and *Prakasa Rau v. Maharajah of Vizianagaram* (second appeal No. 1061 of 1894 and second appeal No. 692 of 1893) were referred to. Though the last payment of kattubadi was in 1879, the suit is only for 11 years instalments and if kattubadi is a rent charge the case falls under section 132 of the Limitation Act and the suit is in time. That kattubadi is a rent charge and really a portion of the revenue reserved was held in *Ramachandra v. Jaganmohana* (I.L.R., 15 Mad., 161) and in many decided cases. See also *Alubi v. Kunhi Bi* (I.L.R., 10 Mad., 115). It follows that 12 years kattubadi may be recovered. The decision in second appeal No. 1061 of 1894 is not in conflict with this view. The claim was for Rs. 25 as kattubadi and it was not brought in a Small Cause Court, but on the regular side of a District Munsif's Court. An appeal was heard by the Subordinate Judge a second appeal was rejected by the High Court under section 586, Code of Civil Procedure, on the ground that the suit was of small cause nature. The sum claimed was Rs. 25 only and it was not sought to make it a charge upon the land. It was held that the claim was not for a cess, but that though originally payable to the Government as revenue it was now payable to the zamindar as rent. The question of rent charge did not arise.

It must be admitted that the decision in *Prakasa Rau v. Maharajah of Vizianagaram* (second appeal No. 692 of 1893) is inconsistent with the reported cases as to the nature of kattubadi, but the case is not reported and we do not feel bound to follow it.

We must hold, therefore, that the claim is not barred and dismiss the second appeal with costs.

APPELLATE CIVIL.

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

KOOPMIA SAHIB (PLAINTIFF), APPELLANT,

v.

CHIDAMBARAM CHETTI AND OTHERS (DEFENDANTS NOS. 1 TO 5,
7 TO 14, 16 TO 23, 25 TO 35, 37, 38 AND
40 TO 54), RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, s. 74—Redemption of prior mortgage—
Extinguishment of prior mortgage—Title by possession—Limitation.*

The trustees of a religious institution improperly mortgaged land forming part of its endowment, and put the mortgagee into possession on 27th June 1877 as usufructuary mortgagee. The mortgagee assigned his mortgage to defendant No. 1 on 7th December 1882. On 23rd December 1889 the mortgagors executed to the plaintiff a deed of usufructuary mortgage of the same land to secure Rs. 1,400; the deed stated that the money was borrowed with a view to discharge a prior mortgage and proceeded "as you have undertaken to pay Rs. 1,000 to the mortgagee, I credit you with Rs. 1,000 and receive Rs. 402 in cash." The plaintiff paid off the prior mortgage on 18th April 1890, but did not obtain possession, other persons having entered in the interests of the institution. The plaintiff now sued for possession and a declaration of his mortgage right, the persons in possession and the prior mortgagee, but not the mortgagors were joined as defendants:

Held, that Transfer of Property Act, Section 74 was not applicable to the case, and that the plaintiff was not entitled to a decree.

SECOND APPEAL against the decree of T. Weir, District Judge of Coimbatore, in appeal suit No. 165 of 1892, affirming the decree of S. Krishnasami Ayyar, District Munsif of Erode, in original suit No. 285 of 1890.

The plaintiff sued for possession of certain land and for a declaration that he was entitled to hold it as usufructuary mortgagee. The plaintiff alleged that the owners of the land mortgaged it on 27th June 1877 to one Varadaraja Naik, who assigned the mortgage to defendant No. 1 on 7th December 1882; that the mortgagors on the 23rd December 1889 executed in favour of the plaintiff a usufructuary mortgage of the land for Rs. 1,400, part of the transaction being that he should redeem defendant No. 1; and that the plaintiff on 18th April 1890 paid off the mortgage under which defendant No. 1 held the land.

* Second Appeal No. 1732 of 1894.

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Defendant No. 1 admitted that his claim had been discharged by the plaintiff and stated that he was not in possession. Defendant No. 2 alleged the land formed part of the endowments of a Durga. The other defendants were persons who came in and were joined on their own application. They had taken possession shortly before suit after a meeting of the community interested in the Durga, and their case was that the mortgagors held the land as poojaris of the Durga and had no right to mortgage it.

The District Judge found that the land formed part of the endowment of the Durga. He held that the plaintiff did not keep alive what rights the previous mortgagee had, but extinguished the mortgage under his arrangement with the mortgagors. As to this point he referred to the terms of the instrument of 23rd December 1889, which contained the following passage: "I have mortgaged to you for Rs. 1,400, which I have borrowed with a view to discharge a prior mortgage. As you have undertaken to pay Rs. 1,000 to the mortgagee, I credit you with Rs. 1,000 and receive Rs. 402 in cash." On the question whether the plaintiff was entitled to rely on the possessory title of defendant No. 1, the District Judge cited *Madhava v. Narayana*(1), and as to the claim of the persons in actual possession, he quoted *Ismail Ariff v. Mahomed Ghous*(2), and in the result he confirmed the decree of the District Munsif by which the suit was dismissed.

The plaintiff preferred this second appeal on the following grounds among others:—

"(1) The plaintiff being a subsequent mortgagee and having as such paid off the prior usufructuary mortgage in favour of the first defendant, is entitled to all the rights of the said first defendant and to recover possession of the properties sued for.

"(2) The Lower Appellate Court has misconstrued section 74 of the Transfer of Property Act, the provisions of which are clearly applicable to the facts of the present case.

"(3) Possession having been held for more than twelve years under the first mortgage, the first mortgagee has, by the operation of the law of limitation, acquired a right to a limited interest as mortgagee even if the mortgagors had no right to mortgage the property.

"(4) The Lower Appellate Court is wrong in holding that there can be no acquisition of right by limitation unless one and the same trespasser continues in possession for upwards of twelve years.

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

(2) I.L.R., 20 Cal., 834.

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"(5) The Lower Appellate Court ought to have held that the first mortgage became valid by limitation, inasmuch as the possession of each of the persons in occupation was not independent of but derivative from his predecessor."

Bhushyam Ayyangar and *Tiruvengkatachariar* for appellant.

Sircasami Ayyar, *Subramania Ayyar* and *Ayya Ayyar* for respondents.

JUDGMENT.—The plaintiff has never been in possession, nor has he made his mortgagors parties to the suit. It is conceded he must fail unless section 74 of the Transfer of Property Act applies to this case, the argument being that plaintiff stands in the position of first defendant, who has been mortgagee in possession for over twelve years.

We think it is clear that this section does not apply. Section 74 contemplates the existence of two mortgages at one and the same time, and the independent action of the subsequent mortgagee to put an end to the prior mortgage. It is difficult to see how two usufructuary mortgages could subsist at the same time, and the language of the instrument clearly proves that the intention of the parties was to extinguish the first mortgage by the execution of the second. In these cases it is the intention which must be regarded. See *Mohesh Lal v. Mohant Bawan Das*(1).

The second appeal fails and we dismiss it with costs.

APPELLATE CIVIL.

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

VENKATARAMAKRISHNA RAU AND ANOTHER (DEFENDANTS
Nos. 3 AND 4), APPELLANTS,

v.

BHUVANGA RAU (PLAINTIFF), RESPONDENT.*

*Hindu Law—Stridhanam—Estate of married daughter in stridhanam
property of mother.*

Under the Hindu Law in force in Southern India, a married daughter, who succeeds to her mother's immovable stridhanam property, takes a life interest only, and after her death it passes to her mother's heir.

(1) I.L.R., 9 Cal., 261.

* Appeal No. 176 of 1894.

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October 7, 22.

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APPEAL against the decree of H. T. Ross, District Judge of Godavari, in original suit No. 18 of 1892.

Suit for possession of the estate of Bayyanagudem. This estate was given as stridhanam to Chinnamma Rau by her husband. Chinnamma Rau enjoyed it till 1873, when she died leaving a will by which she devised it to her son Prasada Rau. Prasada Rau entered into possession and enjoyed the estate until 1878, when he died leaving Bhujanga Rau, his adoptive son, on whose behalf possession was assumed by the Agent of the Court of Wards. In 1881, Ramayamma, the daughter of Chinnamma Rau, sued Bhujanga Rau for possession of the estate as the stridhanam of her mother and obtained a decree under which she was in possession till her death in 1891. Bhujanga Rau now sued to recover the estate. Defendant No. 1 was the husband of Ramayamma who alleged that she had devised the estate to him by will. Defendant No. 3 had been adopted by defendant No. 1 after the death of his wife. Defendant No. 2 was an executor of the last-mentioned will. The other defendants were brought on to the record on the death of defendant No. 1 as his legal representatives.

The plaintiff denied the genuineness of the will of Ramayamma and also her power to devise the estate which he claimed under the law of inheritance. The defence was that Ramayamma's estate passed to her husband whether as heir or devisee.

The District Judge held that the will was genuine but invalid, and passed a decree as prayed.

The defendants Nos. 3 and 4 preferred the appeal.

Ramachandra Rau Sahib for appellants.

Pattabhirama Aiyar for respondent.

JUDGMENT.—The substantial question in issue is whether Ramayamma took an absolute or a qualified estate. The property was stridhanam in the hands of her mother, but it is settled law that such property, when inherited by a daughter, ceases to be stridhanam in her daughter's hands. The decision in *Sengamalathammal v. Valayuda Mudali*(1) is the leading case upon this subject, and it has been followed in numberless cases in this Presidency as also in Calcutta. See *Prankissen Laha v. Sreemutty Noyanmoney Dassee*(2). No doubt at all would have been felt in this case

(1) 3 M.H.C.R., 312.

(2) I.L.R., 5 Calc., 222.

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had it not been for the decision of this Court in *Narasayya v. Venkayya*(1), which has been represented as being inconsistent with the earlier decisions. The District Judge who decided the case evidently considered it inconsistent, though he followed the earlier decisions, and so also did a Division Bench of this Court in *Virasangappa Chetti v. Rudrappa Chetti*(2) to which we have been referred. We will now proceed to point out that there was no inconsistency, and that the case referred to is in consonance with the whole course of decisions.

In *Narasayya v. Venkayya*(1) the question was who was the heir to the property of a maiden daughter with respect to the estate which she had inherited from her mother and in whose hands it had been stridhanam property. The lady had no sister, and the contest was between her father and her brother as to which of them was the nearer heir. The District Munsif held that the same rule of succession was to be applied as if the last holder was a male instead of a female, and that the brother was no heir as his father was alive. On appeal the Subordinate Judge held that as a female the daughter had taken but a qualified heritage, and that upon her death the last full owner's heir was her heir. On this view he considered that the son was the mother's heir in preference to the husband, and on this ground reversed the District Munsif's decree. The decision in *Sengamalathammal v. Valayuda Mudali*(3) was clearly before him, and in the appeal to the High Court it was expressly referred to. Before the High Court it was contended that the decision of the Subordinate Judge was bad in law, but the Judges refused to accede to the contention, thus admitting that the decision in *Sengamalathammal v. Valayuda Mudali*(3) was a binding authority. It was, however, pointed out that the *Mitakshara* (ch. II, sec. XI, 30) laid down a special rule of succession to the inherited property of a maiden daughter, of which property she, by a special rule, was as much a full owner as her mother was. The special rule of succession gave the property to her uterine brother, and on this ground the decision of the Subordinate Judge was affirmed.

The observation which gave rise to the misconstruction is as follows:—"But when a daughter succeeds to her mother's stridhanam, she is as much full owner as her mother," but the context shows that the daughter spoken of was the maiden daughter to

(1) 2 Mad. L.J., 149.

(2) I.L.R., 19 Mad., 110.

(3) 3 M.H.C.R., 312.

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whom alone the judgment relates. This is also clear from the fact that the general rule enunciated by the Subordinate Judge is expressly approved. The succession to a maiden daughter is the sole exception to the rule, and in all the other cases quoted, the question has been as to the succession to married daughter. It was expressly laid down in *Sengamalathammal v. Valayuda Mudali* (1) that the married daughter only took a life interest without power of alienation, and that, irrespective of the property being joint, the sister would succeed in preference to the husband; in other words, that the succession would go to the heirs of the mother. Taking this view, it is unnecessary to consider the validity of the will left by Ramayamma. The appeal fails and we dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

VIRASANGAPPA SHETTI (PLAINTIFF), APPELLANT,

v.

RUDRAPPA SHETTI (DEFENDANT), RESPONDENT.*

Hindu law—Stridhanam—Inheritance by a grand daughter for a limited estate—
Succession by heir of last full owner.

A Sudra (Lingayat) died in 1826 leaving his property to A, B and C, his daughters, who enjoyed it for some time jointly. In 1860 a settlement was made by (i) A, the sole surviving daughter, (ii) D, who was the daughter of B, and (iii) the present plaintiff, who was the only son of C, and also the stepson of D. Under the settlement two-thirds of the property was given to the present plaintiff and the rest was divided between A on the one hand and D and E on the other. E was the daughter of D. Subsequently D and E acquired A's share under a deed of gift dated 5th June 1863. D died in 1883. E had died previously, leaving the present defendant, her husband, and a daughter F, who died an infant unmarried in 1892. The plaintiff now sued to recover the property which had passed to the line of B:

Held (1) that the settlement of 1860 on its true construction gave to D and E a life interest only in the event of their having no descendants, but an estate of inheritance otherwise, and that that disposition was valid, and accordingly that in the event which happened they took a heritable estate;

(1) 3 M.H.O.R., 312.

* Appeal No. 136 of 1894.

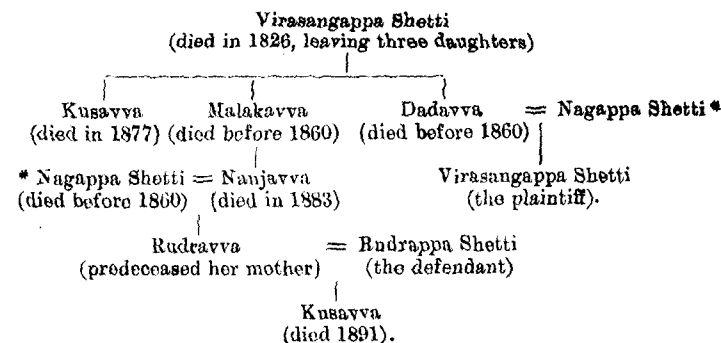
(2) that under the settlement of 1860 and the deed of gift of 1863 D and E took as joint tenants with benefit of survivorship, and not as tenants in common, and accordingly that D became sole full owner of the property on the death of E, whose husband thus acquired no title as her heir;

(3) that F inherited the property, but only for a limited estate, and that the plaintiff was entitled to succeed as heir to D, the last full owner.

APPEAL against the decree of O. Chandu Menon, Subordinate Judge of South Canara, in original suit No. 5 of 1892.

The plaintiff sued to recover property left by one Kusavva, who died an infant without issue in August 1891. The defendant was the father of the deceased.

The parties to this suit were Lingayats and Sudras. The facts of the case were admitted and are stated sufficiently for the purposes of this report in the judgment of the High Court. The relationship of the persons there referred to appears from the following table:—



The operative part of the settlement of 1860 (exhibit B), which was worded as the deed of Kusavva, though it was signed by Nanjavva and Virasangappa also, was as follows:—

“On account of the properties valued at Rs. 24,000 resolved to be given to the said Nanjavva and her daughter Rudravva, besides the movable property with Rs. 19,000 which was given to them on this date in the shape of gold, silver, bellmetal, copper and cash, I have given them out of my immovable property situated at Pejavar of Murned magane in Mangalore taluk, all the lands assessed at Rs. 424-2-4, fixing their value at Rs. 5,000, with the exception of land No. 5 called Kusavva: assessed at Rs. 26-11-7 and situated in Bolaur village—thus making up in all properties worth Rs. 24,000. And I have made over to the said Virasangappa Shetti all the other immovable and movable

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properties, as also the garden with the storied house and out-houses therein, forming a portion of the garden No. 3 of Mangalore Kasba bazaar out of Virasangappa's warg assessed at Rs. 16 and situated to the south and east of the lane, with the exception of the house and garden situated in the north, purchased in auction and formerly occupied by a barber tenant, reserving to myself the garden and house now occupied by me and obtained by me on mulgeni from the Murgi Mutt people. Hereafter both parties should enjoy the respective lands allotted to them and pay the Government assessment thereof and conduct the suits, &c., regarding the respective properties in their possession. Virasangappa should conduct without any omission the panchaparva and other ceremonies of our family god at Kadamatt as they had been conducted hitherto since the time of our ancestors. Either party has no right to object that the allotment of the movable and immovable properties made by me is unequal. They must not through folly waste the properties allotted to their respective shares. Either party has no right whatever to alienate, either by sale or mortgage, the properties in their possession without the co-operation of the other except for the purpose of improvement. Virasangappa Shetti alone should pay the one year's interest on the debt of Rs. 700 due, and also the sum that may be found due to Nanaji Shetti on account of the articles purchased from his shop. Virasangappa Shetti should also pay the wages due, if any, to the Shanbhogue, the servants and the cooks, according to the account. Of the two parties, whichever has not got descendants (issue) should enjoy the property for life time only, and then the property should be enjoyed by the party having descendants. To this effect is the will executed."

The operative part of the deed of gift of 1863 (exhibit C) was as follows:—

"Because I was living with you up to this time and you were looking after my maintenance, and because you should hereafter also maintain me during the rest of my life-time and perform the customary obsequies and ceremonies after my death, I have made over to you by way of gift the aforesaid garden with the storied house therein now occupied by us and which had been obtained on Maulza (for value) mulgeni from the Murgi Mutt people on payment of Rs. 690, together with the five documents relating thereto, to wit

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"You and your descendants, from generation to generation, shall enjoy (the same) and shall pay the annual mulgeni of Rs. 10 to the Murgi Mutt. To this effect is the gift deed executed by me out of my own free will."

The Subordinate Judge dismissed the suit. The plaintiff preferred this appeal.

Bhashyam Ayyangar and Narayana Rau for appellant.

Ramachandra Rau Sahib for respondent.

JUDGMENT.—One Virasangappa, who originally held considerable property, including that in litigation in the present suit, by his will dated 10th January 1826 devised it to his daughters Kusavva, Malakavva and Dadavva on terms and conditions which it is unnecessary to state fully. It is sufficient for our present purpose to say that he directed that the three ladies should live in union and enjoy the property jointly, and that, if they should find it inconvenient to do so, the same should be divided into four shares, of which Kusavva and Malakavva should each take one share and Dadavva and her husband the remaining two shares. Up to 1860 no separation took place, but in September of that year an arrangement was made, which was brought about by Kusavva, and to which all the descendants of Virasangappa that were then alive were parties, they being (i) Kusavva, the eldest daughter; (ii) Nanjavva, daughter of Malakavva, the second daughter, who had died before that time; (iii) Nanjavva's daughter Rudravva; and (iv) the plaintiff (appellant), the only son of Dadavva, the youngest daughter of the testator, she also having died before 1860. The arrangement was not a mere partition in accordance with Virasangappa's will, but a transaction which went beyond it, as the plaintiff thereunder got, as the representative of the third daughter's branch, more than two-thirds of the properties instead of half, which was his proper share under the will. Exhibit B, which evidences this transaction, after referring to the will of Virasangappa, the marriage of Dadavva, as the first wife of Nagappa Shetti, and, after her death, that of Nanjavva, daughter of Malakavva, as his second wife, the birth of children to him, viz., the plaintiff by Dadavva and Rudravva by Nanjavva, states that, for the prevention of disputes among the parties, it was agreed and arranged that, excepting a house and a garden obtained on mulgeni by the first daughter Kusavva and reserved to her, movables worth Rs. 19,000 and immovables valued at Rs. 5,000

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were to be taken by Nanjavva and Rudravva, and that the rest of the properties was to go to the plaintiff. It also provides that whichever of these parties has no descendants should enjoy the properties allotted to him or her for life only, and then the same should go over to and be enjoyed by the party having descendants. Three years after this arrangement, Kusavva made a gift, under exhibit C, of the house and garden which she had reserved to herself, to Nanjavva and Rudravva. These properties, as well as those granted to them under exhibit B, were, on the death of Nanjavva, the survivor of the grantees, held by her granddaughter Kusavva till her death in 1892. The question at issue is, who is entitled to succeed to these properties left by the last-mentioned lady, she having died unmarried.

The plaintiff's case, as put before us, is as follows:—The grant under exhibit B was to Nanjavva alone, Rudravva her daughter being mentioned therein only to indicate that the estate granted was not a life estate, but one of inheritance. On Nanjavva's death, Kusavva, her granddaughter, inherited the property, Rudravva having predeceased Nanjavva. The interest taken by Kusavva in the property thus inherited by her was only a limited interest similar to that taken by a woman in an estate inherited by her from a male. Consequently on Kusavva's death, the succession should be traced from the last full owner Nanjavva, and there being no nearer heir than the plaintiff, he is entitled to the properties in question either as Nanjavva's co-wife's son or as her husband's sole sapinda, the defendant (respondent) Kusavva's father not being, as Nanjavva's son-in-law, entitled under the Hindu law to claim the same. Further, if it should be found that the grant under exhibit B was not to Nanjavva alone, but to her and Rudravva, as is contended on behalf of the defendant, even then the plaintiff is the party entitled. For in this case, as well as under exhibit C, Nanjavva and Rudravva took as joint tenants and consequently, on Rudravva predeceasing Nanjavva, the whole vested by survivorship in the latter to whom he is the heir.

The case for the defendant is that exhibit B conferred on Nanjavva and Rudravva only a life interest in the properties with remainder to their descendants. Kusavva as their descendant took not as Nanjavva's heir, but directly under the instrument as grantee. Consequently the succession is to be traced from her, and the defendant, her father, and not the plaintiff, is her heir. It

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was also urged that, if the above contention be held to be unsustainable, and if it be found that Kusavva took only by inheritance, then the estate which she thus took was a heritable one and consequently the defendant succeeded to the same. Should this contention also fail, it was argued lastly that the plaintiff's claim should be held unsustainable so far at least as a moiety of the property granted under exhibit B as well as that given under exhibit C is concerned, inasmuch as Nanjavva and Rudravva took as tenants in common and the latter's share passed first to her daughter Kusavva and, even assuming this lady took only a limited interest under the law as contended by the plaintiff, it passed after her to the defendant, the last full-owner Rudravva's husband and heir.

In these circumstances the points which arise for determination are—

(i) As to exhibit B—

Was the grant to Nanjavva alone, or to her and Rudravva? Did the grantee or grantees take only an estate for life, or a heritable estate? If the grant was to both, did they take as joint tenants?

(ii) As to exhibit C—

Did the donees take as joint tenants?

(iii) If Kusavva took any property as Nanjavva's heir, what interest did she take as such heir?

Now as to the first point arising with reference to exhibit B, it is quite clear to us that the grant was not to Nanjavva alone, but to her and Rudravva. Exhibit B distinctly says so. And the evidence shows that the plaintiff as well as the other parties were also of that opinion. For, when some of the property set apart under exhibit B had to be mortgaged in 1878, the instrument of mortgage was executed by both Nanjavva and Rudravva as owners, and the plaintiff signed the instrument as a witness. We are unable, therefore, to uphold the plaintiff's contention with reference to this point.

Passing on to the next point, we have, after a careful consideration of the language of exhibit B and the circumstances in which it came to be executed, arrived at the conclusion that it gave a life-estate to Nanjavva and Rudravva only in the event of their having no descendants, but an estate of inheritance otherwise—a disposition perfectly valid in law (see Mayne's *Hindu Law*, 5th edition, paragraph 382, and the cases therein cited). And as they

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had in Kusavva a descendant, their estate must be held to have been a heritable one to which Kusavva succeeded by inheritance. This was also the view taken in suit No. 33 of 1883 instituted by the present plaintiff against Kusavva and the present defendant whereby he sought to eject Kusavva on several grounds, one of them being that Nanjavva and Rudravva took only a life-estate. In dealing with this contention the Subordinate Judge who tried that suit found in unmistakeable terms that "Nanjavva and Rudravva jointly took an absolute estate." On appeal to this Court the learned Chief Justice (Sir Charles Turner) and Muttusami Ayyar, J., agreed with the Subordinate Judge as to the construction of the document in question, though it must be admitted that the passage in their judgment which immediately follows this expression of their concurrence with the Subordinate Judge is somewhat ambiguous. We think, however, that we are justified in holding that the learned Judges did not intend to lay down that Kusavva took directly under exhibit B, even if that document were susceptible of a construction different from that put upon it by us, as it is clear that, not having been in existence at the date of the instrument, she was precluded from so taking by the well-established rule of Hindu law that a grantee or donee must be a person capable of taking when the transaction begins to operate, and must, either in fact or in contemplation of law, be then in existence. We are confirmed in this view by the circumstance that in the concluding portion of the paragraph of the judgment wherein this question is discussed, the learned Judges speak of Kusavva "as entitled to inherit the property set apart for these ladies and their descendants by this instrument."

We must, therefore, hold that the interpretation put by the learned Judges upon exhibit B is in accordance with the view now adopted by us.

Coming now to the third point, we may conveniently consider together that and the question raised with reference to exhibit C. We think that the plaintiff's contention is sound. Considering that the manifest object of the arrangement under exhibit B was to secure the enjoyment of the properties to Nanjavva and Rudravva and their descendants, and in default of any such descendant, to the plaintiff and his descendants, it seems to us more likely that the intention was that, in the event of either of the female grantees dying in the life-time of the other, the share of the deceased should

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pass to the survivor. (Compare *Vydinada v. Nagammal*) (1). We see nothing in the circumstances of the arrangement or the terms of the instrument to show that a tenancy in common was intended. Nor was it otherwise in the case of the gift under exhibit C. For considering that the donor was the very lady who brought about the arrangement evidenced by exhibit B, considering also that the donees were mother and daughter, and further that the donees were, as stated in the document itself, under an obligation to maintain the donor during the rest of her life-time, it appears to us that what was in the contemplation of the parties was a joint tenancy. If, on the other hand, it be supposed that they took as tenants in common, it might well have happened that Rudravva's share would, even in the life-time of the donor, have passed to a comparative stranger had she died leaving only her husband and no issue, she having, as a matter of fact, predeceased the donor. That a tenancy which might possibly result in such a devolution was intended seems to us improbable.

In our opinion, therefore, on Rudravva's death, her share in all these properties passed by survivorship to Nanjavva, who thus became the sole full owner of the whole estate, and it follows that the defendant's claim to a moiety on the ground that he is Rudravva's heir is unsustainable.

We have now to deal with the last point, which relates to the nature of the interest taken by Kusavva in the property in question. If she took a heritable estate, the plaintiff must fail; but if, on the other hand, she took a limited estate, he must succeed. The contention on his behalf is that she took only a limited interest, since in this Presidency property inherited by a woman even from another woman, is not the former's stridhanam, and since in stridhanam property alone a woman takes an estate of inheritance; and the contention on behalf of the defendant is that the property in question was Kusavva's peculiar property. In *Sengamalathammal v. Velayuda Mudali* (2) the question arose as to property which devolved upon a daughter from her mother, and it was held by Bittleston, C.J., and Ellis, J., that the estate did not become the daughter's stridhanam. On behalf of the defendant, however, we have been referred to the decision in C.M.A. No. 130 of 1890 (*Narasayya v. Venkayya*) (3) which no doubt is in the

(1) I.L.R., 11 Mad., 258. (2) 3 M.H.C.R., 312. (3) 2 Mad. L.J., 149.

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defendant's favour. But we find that, though this case was distinctly before the Division Bench which decided *Mullangi Ammanna v. Chinna Kamayya*(1), yet it was there held that property to which a woman succeeds as the heir of another woman does not become the successor's stridhanam.

The learned vakil for the defendant strenuously maintains that the rule laid down in *Narasayya v. Venkayya*(2) referred to above is in accordance with the Mitakshara, the leading authority in this Presidency, and though the passage in section XI (2) of that work, which includes inherited property under the head of stridhanam, has been held not to lay down the law correctly as to property inherited by a woman from a male, yet there is no good ground for overruling its authority in respect of property inherited from a female. There would be some force in this argument if the view that, notwithstanding that the language of Vijnaneswara in the passage in question is broad and general, the author did not really intend to include in his description of stridhanam what passes by inheritance from a male to a female, were well founded. For in that case it might be urged with some show of reason that the authority of the Mitakshara on the point at issue now is not necessarily affected by the decision laying down that property inherited from a male is not stridhanam. But that view has been shown to be clearly erroneous by Messrs. West and Bühler (Digest, 3rd edition, pages 269 and 272), Dr. Gooroodas Banerjee (Marriage and Stridhanam, pages 283-7) and Dr. Jolly (Lectures on Hindu Law, pages 242-251). It is, therefore, difficult to see how Vignaneswara is still to be treated as an authority on the point under consideration, whilst, except in Bombay, the Courts, including the Privy Council, have unanimously declined to follow him as to property inherited from a male. Moreover, so far as this Presidency is concerned, the Courts, in thus rejecting Vijnaneswara's doctrine that the word ' &c.' in the text of Yajñavalkya relating to what constitutes stridhanam includes property inherited, have not proceeded solely on the authorities peculiar to the Dayabhaga school, but have been influenced considerably by the fact that the Smṛiti Chandrika and Daya Vibhaga or Madhavyam have put an entirely different construction on the same word in the said text. Bittleston, C.J., and Ellis, J., in *Sengamalath-*

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ammal v. Velayuda Mudali(1) refer to and rely on the Smṛiti Chandrika as supporting their conclusion, and the Privy Council in *Mutta Vaduganadha Tevar v. Dorasinga Tevar*(2) observes "there are two commentaries which are received as authority in the Carnatic, the Smṛiti Chandrika and the Daya Vibhaga of Madhaviya, neither of which follow the cited passage of the Mitakshara in assigning to a woman as her stridhan property inherited by her." It will thus be seen that the contention that property inherited is not stridhanam, though opposed to the Mitakshara, is supported by two out of the three commentators accepted as high authorities in the southern or the Dravida school, and one of whom wrote several centuries after Vignaneswara.

Our attention was next drawn to the observations of Telang, J., in *Manilal Rewadat v. Bai Rewa*(3) on what has been called the doctrine of reverter. The learned Judge at p. 763 says with truth that "this doctrine of reverting to the heirs of the last male owner is one which is nowhere expressed, as far as we are aware in either the Mitakshara or the Mayukha." No doubt the circumstance thus alluded to by the learned Judge furnishes an excellent ground against the introduction of the doctrine of reverter in the provinces where the doctrine of the Mitakshara that inherited property is stridhanam is accepted to be law as it is in Bombay. But the argument has no force here, that doctrine not having been adopted by the Courts in this Presidency. And when once it is held that a woman inheriting property takes but a limited estate and does not become a fresh stock of descent, the doctrine of reverter is a necessary consequence, since inheritance must be traced from the last full-owner, whether such owner is a male or a female.

Following, therefore, the rule laid down by Bittleston, C.J., and Ellis, J., in *Sengamalathammal v. Velayuda Mudali*(1) so far back as 1867, and affirmed recently by the Chief Justice and Shephard, J., in *Mullangi Ammanna v. Chinna Kamayya*(4), we hold that Kusavva took only a limited interest in the property in question, and that on her death the plaintiff, as the heir of the last full-owner, is entitled to succeed to it.

The result is the plaintiff is entitled to the property left by Kusavva out of what was inherited by her from Nanjavva.

(1) 3 M.H.C.R., 312. (2) L.R., 8 I.A., 99. (3) I.L.R., 17 Bom., 758.

(4) Second Appeal No. 169 of 1893 unreported.

(1) Second Appeal No. 169 of 1893 unreported.

(2) 2 Mad. L.J., 149.

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We must ask the Subordinate Judge to submit findings on the first, second and sixth issues. Further evidence may be taken on either side.

[After the Subordinate Judge had submitted the findings required, the Court passed a decree for the plaintiff.]

PRIVY COUNCIL.

P.C.*
1895.
November
14.

MATHUSRI UMAMBA BOYI SAIBA AND OTHERS (PETITIONERS),
APPELLANTS,

AND

MATHUSRI DIPAMBA BOYI SAIBA AND OTHERS (COUNTER-
PETITIONERS), RESPONDENTS.

[On appeal from the High Court at Madras.]

Duration of receivership—Discretion of Court—Decree in accordance with judgment, section 206, Civil Procedure Code.

It is within the discretion of a Court appointing a receiver in a suit to order that the office should continue permanently after the decree when such continuance is necessary, or for so long as it may be so. A decree of the High Court declared it to be necessary that a permanent appointment should be made of a receiver and manager of the estate allotted by the Government to the family of the deceased Maharaja of Tanjore, and directed that fresh appointments to the receivership should be made from time to time as occasion might require during the life of the senior widow under whose management the estate had been originally placed and the lives of the co-widows surviving her, or for so long as the Court might consider necessary:

Held, that the decree directing the permanent receivership was not in variation of the judgment which it purported to follow, that the Court had a discretion to make such an order when necessary for the preservation of the estate; and that so doing was in accordance with the practice; there being nothing to prevent the Court from giving the management to the senior widow living at the time, if she should be fit to manage the estate on behalf of all interested in it.

APPEAL from an order (28th August 1893) of the High Court rejecting a petition for the amendment of a former decree (8th May 1868) of the same Court.

* Present: Lords HOBHOUSE, MACNAGHTEN and MORRIS and Sir RICHARD COUCH.

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This petition of the 15th August 1893, to bring the decree of 8th May 1868 into conformity with the judgment of the same date, related to the receivership and management of the estate allotted by the Government in 1862, after the decision in *The Secretary of State v. Kamachee Boye Sahaba*(1), to the widows and daughter of the late Maharaja of Tanjore, who died in 1855, leaving fifteen widows, of whom eight survived when six of them made this application, two of them being counter-petitioners.

The question was as to the validity of an order contained in the decree of the High Court of the above date for the continuance of the receivership over the estate in which the widows and daughter were entitled to participate. This order rendered that office permanent during the widows' lives, or for so long as the District Court might consider necessary.

The Government order of 1862 (21st August) was that the estate allotted for the benefit of the family of the late Maharaja "should be made over to the senior widow, who will have the management and control of the property; and it will be her duty to provide in a suitable manner for the participative enjoyment of the estate by the other widows, her co-heirs. On the death of the last surviving widow, the daughter of the late Raja, or failing her, the next heirs of the late Raja, if any, will inherit the property."

The widow (under whose management the estate was originally placed by the Government) H. H. M. Kamakshi Boye Saiba, died in 1892. Her co-widow H. H. M. Jijoyiamba Boye Saiba, with another co-widow, instituted in 1866 the suit *Jijoyiamba Bayi Saiba and another v. Kamakshi Bayi Saiba and others*(2), the first defendant in that suit being then the senior widow managing under the above order. The decree in that suit, dated 8th May 1868, issued upon the judgment of the same date, disallowed the division of the estate, but directed the appointment of a receiver and manager. The circumstances which led to this, and the order for the continuance of the receivership are stated in that judgment, of which the part material to the present question was as follows:—

"We are now satisfied that the first defendant is unfit to be again trusted with the possession and control of any part of the

(1) 7 M.I.A., 476.

(2) 3 Mad. H. C. Rep., 424.

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"existing property; the further evidence now before the Court shows reckless dealing with the property and the lavish expenditure of large sums for purposes of which the accounts afford no satisfactory explanation; not only has the large sums of ready money received from the Government, and the whole proceeds of the immovable property been dissipated, but a considerable portion of the movable property itself has also been got rid of, and debts to a considerable amount left unpaid. We are, at the same time, of opinion that it would be most imprudent to entrust the management of the property to the second defendant as urged by her vakil or to either of the junior widows. Little, if anything we are sure, would be gained as respects the care and preservation of the property, and there would very soon be violent disputes and further litigation. It appears to us to be absolutely necessary that the estate should remain in the custody and under the control and direction of a competent receiver and manager appointed from time to time by the Civil Court, and invested with general powers for the management and regulation of the property and its enjoyment and the application of the rents and profits. The Collector is at present the appointed receiver, and there is no doubt that it is of the greatest advantage to the estate and parties interested that he should continue to act as receiver and manager, as we trust he will be able to do. The continuance of his appointment, therefore, will be decreed; but should it be necessary, the Civil Judge must appoint a fit and proper person in the Collector's place, taking sufficient security for the discharge of his duties, and fixing a fair and reasonable amount of remuneration for his services."

The judgment from which the above is an extract, was followed by a decree which, in reference to the same widow till then managing the estate, declared as follows, appointing a receiver and manager in her place:—

"This Court doth also adjudge and declare that the first defendant is not a fit and proper person to be again entrusted with the possession and management of the said property and that the permanent appointment of a receiver and manager of the property is necessary; and this Court doth decree that, if practicable, the Collector be continued as such manager, but, if not practicable, the Civil Court appoint a fit and proper person in his place, taking good and

"sufficient security for the discharge of his duties, and fixing a fair and reasonable sum as a remuneration for his services, and from time to time make fresh appointments as occasion may require during the lives of the said widows and the survivors or survivor of them or until it shall be considered by the Civil Court that a receiver and manager is no longer necessary."

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In 1888 a petition was filed by some of the widows, including Mathusri Jijoyi Amba, for the discharge of the receiver appointed by the Court, and to have the management of the estate declared to belong to the widows in succession according to their seniority. This was rejected, and the rejection was upheld on appeal to the Queen in Council, *ex-parte Rani Mathusri Jijaiamba and others*(1).

Then followed, after the death of Mathusri Kamakshi, the present petition, dated the 15th August 1893, wherein six of the surviving eight co-widows, among whom were the four present appellants, petitioned that the decree of 1868 might be brought into conformity with the judgment which preceded it, by deleting the word 'permanent' between the words 'the' and 'appointment,' and by substituting the words "the life of the first defendant" for the words "the lives of the said widows and of the survivor of them, or until it shall be considered by the Civil Court that a receiver and manager is no longer necessary."

This application was rejected by the High Court on the 28th August 1893. The judgment of the Court (COLLINS, C.J., and DAVIES, J.) was as follows:—

"It is not stated in the application under what provision of law the application is made, but at the hearing the vakil who presented it made reference to section 206 of the Code of Civil Procedure (Act XIV of 1882) now in force, which directs 'that the decree must agree with the judgment,' and that 'the Court shall of its own motion or on that of any of the parties amend the decree so as to bring it into conformity with the judgment.' But there was no such provision in Act VIII of 1859 (as amended by Act XXIII of 1861) which was the law of procedure in force at the time the decree in question was passed. Section 189 of that Act provides that 'the decree shall bear date the day on which the judgment was passed. It shall contain the

(1) I.L.R., 13 Mad., 390.

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“number of the suit, the names and descriptions of the parties, and particulars of the claim, as stated in the register of the suit and ‘shall specify clearly the relief granted or other determination of the suit.’ This section applies to the decree of the original Court, and the rules laid down in section 360 as to what the decree of the Appellate Court should contain are just the same. No provision is made in either case that the decree should be in agreement with the judgment except in the matter of date. No doubt that even under the old Act the decree would in the usual course follow the judgment, and would be liable to be set aside if it were opposed to the judgment, but there was nothing to prevent the insertion in the decree of directions that might not have found place in the judgment, or to use the words of the section itself, ‘to specify clearly what the determination was.’ Now, in this case we have had before us the decree of this Court in its original state, and we find it signed by the two learned Judges who gave the judgment, and it is not to be supposed that they were not aware of its contents, and if they were aware of its contents, it must be taken that in it they declared clearly and specifically what their final determination was, and unless it can be shown that it is at direct variance with their judgment we have no conflict of authority that we can be called upon to set right. Taking the judgment then and reading it we are unable to see anything in it which is contrary to what is decreed, that is, anything which decides that the appointment of receiver and manager is not to be permanent, and that the appointment is to last only during the life-time of the first defendant. On the other hand, we consider the following portion of the judgment distinctly contemplates what is only more fully expressed in the decree. ‘The remaining point for consideration is the future preservation and management of the whole property with a view to the interests of all the parties. Although we do not consider the case one in which the first defendant should be held responsible to the plaintiffs and the other widows as a defaulting trustee, we are now satisfied that she is unfit to be again trusted with the possession and control of any part of the existing property We are at the same time of opinion that it would be most imprudent to entrust the management of the property to the second defendant as urged by her wakil or to either of the other junior widows. Little, if anything, we are sure, would be

“gained as respects the care and preservation of the property, and there would very soon be violent disputes and further litigation. It appears to us to be absolutely necessary that the estate should remain in the custody and under the control and direction of a competent receiver and manager appointed from time to time by the Civil Court and invested with general powers for the management and regulation of the property and its enjoyment and the application of the rents and profits.’ We have therefore no ground for altering the directions in the decree which was passed by this Court twenty-five years ago, and which has been preserved in its integrity and acted upon in its entirety ever since. If, as it is further stated in the application, the decree gave a relief different from that claimed in the plaint, the matter should have been made the subject of appeal at the time. It is too late to re-open the case on its merits now.

“The fact is this is but another undisguised attempt on the part of the surviving Ranis to get back into their own hands the management of the estate, which for their common benefit was taken away from them by the decree. Their last attempt was in 1887 when they applied to the District Court to remove the receiver and manager appointed by it on the ground that he was no longer necessary, a contingency for which it will already have been noticed the decree itself had provided. But the District Court dismissed the application, and this Court confirmed the order, and on appeal to the Judicial Committee of the Privy Council, their Lordships delivered a judgment on the 24th April 1890, dismissing the appeal and observing that the Court had ‘exercised a very sound discretion’ in not removing its receiver. This Court in its order of the 18th December 1888, when granting the certificate for appeal to Her Majesty in Council, remarked as follows:—‘More than 20 years have passed since that decree and we are of opinion that the same reasons which in 1868 made the appointment of a receiver imperatively necessary still exist in all their force. Old age and 20 years more of that seclusion which is the lot of ladies of exalted rank in this country can hardly have made their Highnesses better fitted for the management of an estate whose annual income is more than 1½ lacs of rupees and which was valued in 1868 as worth about 68 lacs of rupees (the movable property in jewels and cash alone being worth nearly 20 lacs).’ Nothing is urged to show that the Ranis are at this moment in any fitter position to manage their own

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"affairs than they were then, but all that is now done is to raise a technical objection which strikes at the very root of the decree, for, if it were allowed, the decree would become a dead letter owing to the demise of the first defendant, during whose lifetime alone the petitioners require us to find it was to remain in force. Then fresh disputes and litigation would arise to be terminated only by the passing of another decree in terms similar to this one, the estate in the meanwhile having been wasted. This is not a desirable result, and we have no hesitation for the reasons we have stated in rejecting the application and it is rejected accordingly."

On the appeal, of four of the petitioners, Mr. J. D. Mayne appeared for the appellants.

The respondents did not appear.

It was argued in support of the petition that the language of the decree of the 8th May 1868 was in excess of that which the judgment of the same date had authorized. The judgment had not decided the question whether the appointment of the receiver and manager should be permanent. The judgment had proceeded on the personal unfitness of the widow first entrusted with the management. Whether or not the receivership should continue after the rights of other widows according to their seniority, under the terms of the gift by the Government, had accrued, was a question that had not been brought before the Court, and the judgment had not disposed of it. The decree, however, had established the permanence of the receivership. As a matter of jurisdiction, however, the Court could not decide upon the claims of the widows, whose future rights had not been made the subject of any demand or of any issue. Reference was made to section 206 of the Code of Civil Procedure. The rights of the widows had been secured to them by the terms of the Government order at the time when the gift was made in 1862.

At the end of the argument for the appellant, their Lordships' judgment was delivered by Lord MACNAGHTEN :—

Their Lordships are of opinion that there is no ground for this application and that the appeal fails. They think that the decree of the 8th of May 1868 is in accordance with the judgment pronounced and with the practice of the Court. The judgment of the Court declares that the matter for their consideration was "the future preservation and management of the whole property with

"a view to the interests of all parties": the portion of the decree which is objected to was, in the opinion of their Lordships, necessary for the security and preservation of the property. There is nothing in the decree to prevent the appellants, if they think fit, applying for the discharge of the receiver and manager, and there is nothing to prevent the Court putting the senior widow living in the management of the property if the Court is satisfied that she is a fit and proper person to manage it on behalf of all the persons interested.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. Lawford, Waterhouse, & Lawford.

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APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

KAMALAKSHI (PLAINTIFF), APPELLANT,

v.

RAMASAMI CHETTI (DEFENDANT No. 6), RESPONDENT.*

Hindu law—Devadasi—Adoption by temple dancing woman—Right of adoptive daughter—Civil Procedure Code, ss. 440, 568—Suit by infant without a next friend—Evidence taken on remand.

Suit by the adoptive daughter of a temple dancing woman, deceased, to compel the trustees of the temple to permit the performance of a certain ceremony, in view to her entering on the duties and emoluments attached to the office of her adoptive mother. The plaintiff was 17 years old at the time the suit was instituted and she did not sue by a next friend. No objection was taken by the defendants, on the ground that the plaintiff could not sue without a next friend, until the case came before the Court of first appeal at which time the plaintiff had attained majority. On second appeal, the High Court directed the return of a finding on the issue (previously framed but not tried) whether the plaintiff's adoption was valid. Fresh evidence was taken and the finding was that the adoption was made with the intention that the girl should be prostituted while she was still a minor.

* Second appeal No. 1785 of 1894.

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Held, (1) that seeing no objection was taken to the suit on the ground that the plaintiff should have sued by a next friend, until after she had attained her majority, the irregularity was waived ;

(2) that the Lower Court had power to take additional evidence on the issue remanded ;

(3) that the suit was not maintainable on the ground that the adoption of the plaintiff was made with a criminal intention.

SECOND APPEAL against the decree of W. Dumorgue, District Judge of Madura, in appeal suit No. 121 of 1893, reversing the decree of H. Krishna Rau, District Munsif of Madura, in original suit No. 581 of 1891.

This was a suit instituted by the plaintiff at the age of 17 without a next friend against the trustees of the Minakshi Sundaeswarar pagoda. It was alleged in the plaint that one Minammal, who died in 1879, was one of the dancing women attached to the pagoda, and as such entitled to the benefit of one of the temple endowments, that Minammal had taken in adoption the plaintiff who was accordingly entitled to succeed to her office and the emoluments attached to it, that the plaintiff could not enter on to the office until a pottu-thali had been tied on her in the temple, and that the defendants did not permit this to be done. The prayer of the plaint was that the defendants be compelled to allow the thali to be tied in the temple, in view to the plaintiff performing the dancing service and enjoying the honours and endowment attached thereto.

The District Munsif passed a decree as prayed. The District Judge reversed the decree and dismissed the suit on the ground that the claim was inadmissible as being in effect a claim by the plaintiff to be enlisted as a public prostitute.

The plaintiff preferred this second appeal.

Mr. Parthasaradhi Ayyangar for appellant.

Sundara Ayyar and Ranga Ramanujachariar for respondent.

SUBRAMANIA AYYAR, J.—The first question raised in this case is whether the presentation of the plaint and the prosecution of the suit by the plaintiff (appellant) when she was yet a minor and without the aid of a next friend were void or were mere irregularities which the defendants had by their conduct waived.

In the recent case of *Doorga Mohun Dass v. Tahir Ally*(1), Sale, J., said:—"The reason why no proceeding can be taken by

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"an infant without the assistance of a next friend is, as stated in *Daniell's Chancery Practice*, 6th Edition, p. 105, 'on account of an infant's supposed want of discretion, and his inability to bind himself and make himself liable for costs.' And it would seem that the rule was intended for the protection and benefit of defendants, for it has been held that when a defendant waives this benefit and protection, the suit may proceed without a next friend." In *ex-parte Brocklebank*, (1) cited by the learned Judge in support of his opinion, all the Judges proceeded upon the view that an infant to whom a debt was due had a right to enforce the payment of it by means of a debtor's summons and proceedings in bankruptcy based thereon, and that the infant having sued out the writ in the action in his own name without a next friend, was an irregularity which was waived by the conduct of the defendant. There is authority, therefore, for holding that the contention of the defendants (respondents) that the proceedings in the present case were altogether void cannot be supported. It was no doubt open to the defendants to apply under section 442, Civil Procedure Code, to have the plaint taken off the file, as it appeared on the face of the plaint itself that the plaintiff was a minor at the date of its presentation. They not only omitted to do so, but throughout the trial raised no question on the point. And when the District Munsif passed a decree against them, they preferred an appeal against it to the District Court making the plaintiff respondent, without getting a guardian *ad litem* appointed as if she were not a minor, even though at the time the appeal was preferred she was still under the age of 18. It is now too late for the defendants to object to the irregularities they complain of.

The next question for decision is whether the plaintiff is entitled to the relief claimed by her, viz., that the defendants be directed to permit her to undergo the pottu-tying ceremony in the temple in accordance with the usage of the institution. The District Munsif held that she was entitled to the relief. The District Judge, being of opinion, as I understand him, that the grant of such relief would be opposed to public policy as one tending to promote immorality, disagreed with the District Munsif and rejected the claim.

Now as to the ceremony itself, it seems to be quite simple in its nature. As its very name denotes, the material portion of it

(1) I.L.R., 22 Cal., 274.

(1) L. R., 6 Ch. D., 358.

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consists of nothing more than tying within the precincts of the temple a circular piece of gold to the neck of the girl to be admitted as a temple dancer. (See the judgment of the Sessions Judge in *Regina v. Arunachellum*(1), a case connected with this same temple.) So far, therefore, as the performance of the ceremony itself goes, there is nothing immoral in it. The District Judge's view probably rests upon the notorious fact that women who are temple dancers generally lead the life of prostitutes. That, however, in no way proves the existence of any true connexion between the tying of the pottu and the immoral lives of those who undergo the ceremony. And it is scarcely necessary to say that, neither in theory nor in practice, is the dedication to the temple looked upon as essential to a woman of the dancing-girl caste becoming a prostitute. But, on the other hand, there is an immediate and clear connexion between the ceremony in question and the mirasi office of dancer claimed by the plaintiff, inasmuch as the former is a necessary preliminary to her entering upon the duties of that office and to her enjoying the emoluments attached thereto. It is quite true that, in *ex-parte Padmavati*(2) and in *Regina v. Arunachellam*(1) already referred to, tying of pottu was one of the circumstances relied upon by the prosecution against the accused. But that was, of course, not for the purpose of establishing that the ceremony by itself amounted to an offence, but to throw light on the intention of the accused as to the course of life to which the minors were to be trained. The argument was the ceremony made the girls temple dancers; temple dancers usually became prostitutes; hence the object of the accused in obtaining possession of the girls was to train them up to a life of prostitution. It seems to me therefore that the said cases are not in conflict with the proposition that no true relation exists between the ceremony and the immoral life of the dancers. Consequently, if the defendants without lawful excuse refuse to allow the plaintiff to undergo the customary ceremony said to be a pre-requisite to her entering upon the duties of her mirasi office, she is certainly entitled to redress. And I consider that we, sitting here as Judges, are not at liberty to upset any decisions admitting the right of members of the dancing-girl caste to remedy for violation of their civil rights, on the alleged ground that a change has taken place in the

(1) I.L.R., 1 Mad., 165.

(2) 5, M.H.C.R., 415.

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sentiments of the large mass of the Hindu community in regard to the propriety of recognizing the usages of the said caste. As observed by Lord Campbell, L.C., in *Brook v. Brook*(1) "change of opinion on any great question may be a good reason for the Legislature changing the law, but can be no reason for Judges to vary their interpretation of the law."

In connection with the objection that the plaintiff is not entitled to the relief claimed, we were referred to *Johnson v. Shrewsbury and Birmingham Railway Company* (2) where Lord Justice Knight Bruce, when dealing with the question of specific performance of agreements for personal service, said that before the Court can act in the exercise of its peculiar jurisdiction to enforce specific performance of an agreement it must be satisfied that the agreement is one ascribable to a class in which the Court has been accustomed or has certainly jurisdiction to interfere. This observation is no doubt equally applicable to a case like this where specific relief of a somewhat novel description is claimed. But, as pointed out by the Lord Justice himself in the same case later on, the demand may be new specifically without being new in kind or in principle. And in my view the novelty of the relief sought here belongs to the former class and not to the latter. In support of this opinion I may, without in the slightest degree intending to suggest any invidious comparison between the menial office of a temple dancer and the dignified position of a mahant or head of a mutt, refer to *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran*(3), where the learned Chief Justice and Muttusami Ayyar, J., ordered the Subordinate Judge to direct the Pandara Sannadhi of Dharmapuram to invest the Tambiran who may be appointed as the head of the Tirupanandal mutt "with arukattu, sundravedam (certain ear ornaments) and cloth as usual."

For the reasons stated above I come to the conclusion that the objection raised by the defendant to the relief prayed for on the score of immorality or novelty cannot be sustained; and that the plaintiff is entitled to the decree prayed for, if her claim is in other respects good.

This leads me to consider the next and the most important question in the case, viz., whether the adoption of the plaintiff by Minammal, another female, is valid or invalid. The District

(1) 9 H.L.C., 209.

(2) 3 De Gez M. & G., 924.

(3) I.L.R., 10 Mad., 508.

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Munsif dealt with this question very briefly, contenting himself with the single observation, "It is perfectly valid, such adoptions being 'recognized by law.'" The District Judge, being of opinion that the suit failed on another ground, expressed no opinion on this point. The defendant's contention, that the adoption is invalid, appears to be based on the following allegations. At the date of the adoption the plaintiff was a minor under the age of 16, the adoptive mother was a dancing woman attached to the temple and was leading an immoral life like other women of her class. She took the plaintiff in adoption with the intention of dedicating her to the temple in the customary manner and devoting her to prostitution even before the completion of her 16th year. And they argue that the party who gave and the party who received the plaintiff in adoption under such circumstances committed an offence punishable under the Indian Penal Code, which had come into force at the time, and consequently the plaintiff acquired no legal status or rights by such a violation of the public law of the country.

Now, upon these allegations, two legal questions arise for consideration. The first is, assuming the defendant's above allegations to be true, was an offence committed under the said section of the Penal Code? And the second is, if an offence was so committed, could and did such a transaction confer on the plaintiff the status of an adopted daughter and the rights claimed by her as incidents to such status?

As to the first question, in *Queen-Empress v. Ramanna*(1), Parker, J., was of opinion that if a dancing woman, who was herself a prostitute, took a minor girl in adoption with the intention of training up the latter to follow the same course of life as herself, an offence under section 373 would have been complete, even though the age of the adopted child prevented her immediate prostitution and allowed time for repentance, and even though one of the purposes of the adoption was that the child should inherit the property of the person adopting. Muttusami Ayyar, J., said that if, in making the adoption, the intention was that the girl should be employed as a prostitute whilst she continues to be a minor, the accused might be liable. Upon the views thus expressed it follows that the party who gave and Minammal who took the plaintiff in adoption were guilty of an offence under the provisions of the

criminal law relied upon by the defendants, if the act complained of was committed under the circumstances alleged by them, notwithstanding that the act was called an adoption, which is ordinarily not a crime.

Upon the next question whether such an adoption entitles the plaintiff to claim through the said Minammal the office of dancing in the temple, which office is said to vest hereditarily in the family of Minammal, I have not been able to find any direct Indian decision; nor have we been referred to any such authority. In *ex parte Padmavati*(1) Holloway and Innes, J.J., observed "the fact of a transaction being in violation of public law may prevent the arising of rights which would otherwise have the sanction of private law." This, however, was an incidental observation, and the point which I am now considering did not actually arise for decision there, I have therefore to deal with the question on principle. And there can be no doubt that the principle applicable to such cases is that laid down in the following words in a recent decision relating to an illegal agreement concerning property. "The general rule is that no rights can spring from or be rested upon an act in the performance of which a criminal penalty is incurred."—(*Young-husband v. Birmingham T. S. Co.*(2) a rule no doubt subject to certain exceptions, none of which, however, so far as I am aware, is relevant for our present purpose. I have not been able to find any case in which this principle was acted upon in respect of a transaction touching personal status entered into in contravention of law. But I fail to see any valid reason why the rule should not be applicable to such transactions also; when even such violations of private law known as unlawful agreements are rendered unactionable, it is difficult to understand how violations of public law known as crimes are to be treated differently. The object of the legislature in preventing Civil Courts from entertaining suits in the former class of cases can only be to discourage as much as possible such transgressions. And, as it would be absurd to suppose that the Legislature is less anxious to repress crimes, it would be unreasonable to hold that the prohibition against a civil suit exists in the former case only and not in the latter also. It seems to me, therefore, that if a woman who makes an adoption under circumstances which render the adoption an offence under section 373, sues to enforce

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(1) I.L.R., 12 Mad., 273.

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

(2) 36 American State Reports, 248.

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CHETTI. rights alleged to have been created in her favour by that adoption, it would be impossible, consistently with established legal principles, to allow such a suit to be maintained. The reason for disallowing such a suit, borrowing the language of Johnson, J., who delivered the judgment of the Supreme Court of the United States in *Bank of the United States v. Owen*(1), is "no Court of Justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they, then, become auxiliary to the consummation of the violations of law?" On behalf of the plaintiff it was however argued that as she herself did not commit any crime, she must be taken to stand on a different footing from that occupied by the guilty parties and that as she is willing to accept her changed situation, it would be but adding to the injury already sustained by her to refuse to recognize her claim to the office and rights of Minammal who was responsible for the plaintiff's present condition. Whether, if the question arises between the plaintiff and those who did her the injury, the doctrine of estoppel may be invoked in her favour, as it has sometimes been in the case of invalid adoptions under the ordinary Hindu law, is a matter on which it is not necessary to express any opinion now. For, the defendants here are the managers of the temple, who had nothing to do with the transaction which the plaintiff wishes to take advantage of, and as against such persons how can the plaintiff rely upon a plea of estoppel? Her present claim must therefore stand or fall by the validity or invalidity of the adoption set up. And it is not possible to hold, in a suit instituted by her, that to be valid which must be treated as invalid in a suit if instituted by Minammal, as has been already shown. In this connection an observation of Searle, C.J., in *Mill and Lumber Co. v. Hayes*(2), though made in respect of an illegal agreement in restraint of trade, is quite in point. He said, "The illegality vitiates the contract between the immediate parties as well as in respect to third parties." The reason for this is plain. For whilst in cases of fraud and mistake the wrong is usually personal to the injured party and can be waived, it is different in cases of illegality. In these the wrong is far-reaching and is done to society. Consequently, in such cases the interests of individuals must be subservient to public welfare *McNamara v.*

(1) 2 Peters, 539.

(2) 9 American State Reports, 212.

Gargett(1). I cannot, therefore, help arriving at the conclusion that the plaintiff's adoption is a nullity if it took place under the circumstances stated by the defendants and the plaintiff is not entitled to maintain her claim based as it is upon such an illegal transaction.

It thus becomes necessary to ascertain whether the adoption was made as alleged by the defendants. That it took place after the Penal Code came into force, that Minammal who took her in adoption was a temple dancer living by prostitution, and that the plaintiff was at the date of the adoption a minor under the age of 16 are, I understand, not questioned. But whether in making the adoption the intention of Minammal was as asserted by the defendants, is a point on which there is no distinct admission, though the attempt which it is probable was made before the plaintiff completed her sixteenth year to get her registered as a temple dancer is important evidence that the original intention was to prostitute her even when she was a minor. But whether it was so or not is a question of fact upon which it is not open to us to express any opinion on second appeal. The District Judge has not, as already stated, given any finding on the matter, and I would therefore call for a finding from him upon the seventh issue in the light of the observations of Muttusami Ayyar, and Parker, J.J., in *Queen Empress v. Ramanna*(2) already quoted. (See also the observations of Banerjee and Sale, J.J., in *Deputy Legal Remembrancer v. Karuna Baistobi*(3). If the finding on this question is in favour of the plaintiff, the District Judge should also be asked to submit findings on issues 3, 4 and 5.

The finding is to be returned within six weeks after the receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court.

BEST, J.—The suit is by a woman of the dancing-girl caste for a decree directing the trustees of a temple in Madura to cause to be tied to her the pottu or thali without which she cannot be allowed to dance in the temple or to enjoy the emoluments attached to the office of dancer. Plaintiff claims to be entitled to the office and emoluments as adopted daughter of one Minammal who died in 1879.

The District Munsif gave a decree as prayed, but that decree was reversed on appeal by the District Judge on the ground that

(1) 13 American State Reports, 361.

(2) I.L.R., 12 Mad., 273,

(3) I.L.R., 22 Calc., 164.

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CHETTI. the suit is not maintainable, as the private right claimed by the plaintiff cannot arise except by transgression of a precept of public law. Hence this appeal by the plaintiff.

The public law here referred to by the Judge is contained in section 372 of the Indian Penal Code, which makes punishable the disposing of girls for the purposes of prostitution; and the tying of pottu to a girl under 16 years of age and enrolling her as a dancing girl in a temple has been held to be such a disposal of her and therefore an offence punishable under the section above referred to. Plaintiff, however, is not under the age of 16 years. She expressly states in her plaint that the delay hitherto in getting the pottu tied was owing to the fear that it would be criminal, but that having come of age on the 1st August 1891 this suit was instituted (in October 1891).

It is contended before us on behalf of the respondent that the Courts cannot recognize an institution such as that of dancing girls, the object of which is prostitution and the gain to be derived from that source. *Chinna Ummayi v. Tegarai Chetti*(1) no doubt goes to this extent, and to the same effect are also the dicta of West, J., in *Mathura Naikin v. Esu Naikin*(2). But the opinions of West, J., on the subject in the latter case were dissented from by Muttusami Ayyar and Parker, JJ., in *Venku v. Mahalinga*(3) and as remarked by Muttusami Ayyar, J., "they were not necessary for the decision of that case." And it is open to question whether *Chinna Ummayi v. Tegarai Chetti*(1) has not been overruled by a subsequent decision reported in the same volume *Kamalam v. Sadagopa Sami*(4). No doubt the latter case was sought to be distinguished from the former on the ground of its including a claim for honours and income as appurtenant to the hereditary office of dancing girl which plaintiff was seeking to recover; but, as observed by Muttusami Ayyar, J., in *Venku v. Mahalinga*(3), "it is not clear how, if the custom which is the source of the hereditary right to the office is an immoral custom, the existence of an endowment or emolument makes a difference and removes the legal taint in the source of the right."

Both in *Venku v. Mahalinga*(3) and in *Muttukannu v. Paramasami*(5) it was held that adoptions by dancing girls must be

recognized by the Courts, on the ground that the class of dancing women "being recognized by Hindu law as a separate class having a legal status, the usage of that class, in the absence of positive legislation to the contrary, regulates rights of status and of inheritance, adoption and survivorship." But the adoption in question in both those cases took place prior to the coming into force of the Indian Penal Code.

There is also the judgment of Sir Charles Sargent, C.J., and Candy, J., in *Tara Naikin v. Nana Lakshman*(1), in which occurs the following passage:—"The existence of dancing girls in connexion with temples is according to the ancient established usage of the country, and this Court would, in our opinion, be taking far too much upon itself to say that it is so opposed to "the legal consciousness" of the community at the present day as to justify the Court in refusing to recognize existing endowments in connexion with such an institution."

As observed by Muttusami Ayyar, J., in *Queen-Empress v. Ramanna*(2), the giving and accepting of a minor for adoption by a dancing woman is not necessarily a criminal act, and is punishable as an offence under sections 372 and 373 of the Penal Code only if the specific intent which makes the act criminal is established by cogent evidence. "It would be no offence if the intention was that the girl should be brought up as a daughter, and that when she attains her age, she should be allowed to elect either to marry or to follow the profession of her prostitute mother."

There is thus authority for the following positions (i) that the institution of dancing women cannot be ignored by the Courts and (ii) that adoption by such women is not necessarily illegal.

The case last cited is also authority for the position that, if the adoption was made with the intention of training the child to a life of prostitution, the act would be criminal, and I agree with my learned colleague in holding that the Courts cannot recognize as against the temple trustee rights claimed as arising from a criminal act.

I concur, therefore, in the order proposed by my learned colleague.

It has been further contended on behalf of respondent that the suit being brought by plaintiff when a minor without a next

(1) I.L.R., 1 Mad., 168. (2) I.L.R., 4 Bom., 545. (3) I.L.R., 11 Mad., 393.
(4) I.L.R., 1 Mad., 866. (5) I.L.R., 12 Mad., 214.

(1) I.L.R., 14 Bom., 90.

(2) I.L.R., 12 Mad., 279.

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friend was opposed to section 440 of the Code of Civil Procedure and should have been dismissed by the District Munsif on that ground. The objection was not taken in the Court of First Instance—not in fact till appeal was preferred against the decree passed in plaintiff's favour. This was too late, see *ex-parte Brocklebank*(1) and *Beni Ram Bhutt v. Ram Lal Dhukri*(2). Plaintiff is now a major and was so also at the hearing of the appeal by the District Judge, and though she was a minor when defendant's appeal was preferred, he took no steps to have a guardian *ad litem* appointed for her. This objection must therefore be disallowed.

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

"The seventh issue, upon which I am directed by their Lordships of the High Court to submit a finding, is whether the plaintiff is the adopted daughter of Padmasani's daughter, Minammal, and whether the adoption of the plaintiff is valid?"

"As to the fact of adoption there is no longer any dispute and the evidence of Padmasani, examined as the plaintiff's first witness, shows that the plaintiff was two or three years old when she and her elder sister Gnanambal were adopted by Minammal, who was 20 or 25 years of age at the time and died a few years after the adoption was made.

"The validity of the plaintiff's adoption depends on the intention with which it was made, and, if the intention was that the plaintiff should be prostituted while she was still a minor, then under section 373, Indian Penal Code, the adoption was a criminal act out of which no private rights can flow.

"On receipt of the order of remand from the High Court, I gave notice to the parties to produce evidence necessary for determining the question at issue, and my reason for so doing was, that the evidence already on record was insufficient for the purpose. It was objected, on behalf of the plaintiff, that I had no power to take additional evidence, since I had not been authorized to do so by the order of remand. In support of this objection, reference was made to section 562, Code of Civil Procedure, but that section relates only to cases which are remanded by an Appellate Court to Court of First Instance for trial upon the merits

(1) L.R., 6 Ch. D., 358.

(2) I.L.R., 13 Cal., 180.

"and implies that additional evidence is to be taken if necessary. Hence it is in no way applicable to the present case, in which the order of remand did not alter the position of this Court as an Appellate Court deciding an issue which it had not decided before. An Appellate Court is empowered by sections 568 and 569, Code of Civil Procedure, to take additional evidence for the substantial cause that the evidence on record does not enable it to arrive at a decision. Hence four documents have now been filed as exhibits IV to VII, on behalf of the defendant-appellant, who has also recalled and examined as his seventh and eighth witnesses the persons whom he examined as his third and second witnesses before the District Munsif, while the plaintiff has recalled her sixth and fourth witnesses before the District Munsif and examined them as her ninth and tenth witnesses."

* * * *

"I find, therefore, that Minammal's intention in adopting the plaintiff was to prostitute her while she was still a minor, that the adoption was therefore a criminal act, and that it is consequently invalid."

This second appeal having come on for final hearing after return to the order of this Court, the Court (SUBRAMANIA AYYAR and DAVIES, JJ.) delivered the following judgment:—

JUDGMENT.—We agree with the Judge that he had the power to take additional evidence on the issues of fact remanded for trial. These were issues that had been framed but not tried, and we see nothing in section 566, Code of Civil Procedure, that prohibits the Lower Court from taking evidence on such issues under section 568 so long as he complies with the requirements of that section.

The District Judge's finding on the question of fact as to intention is supported by legal evidence. Accepting the finding, we dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

1895.
July 12, 18.
October 21.

NARAYANAN CHETTI AND OTHERS (DEFENDANTS),
APPELLANTS IN APPEAL No. 40 AND RESPONDENTS
IN APPEAL No. 122,

v.

ARUNACHELLAM CHETTI (PLAINTIFF), RESPONDENT IN APPEAL
No. 40 AND APPELLANT IN No. 122.*

Civil Procedure Code, s. 608—Order for security to be furnished by respondent in Privy Council—Order made after decree appealed against—Liability for mesne profits of persons giving security.

The present plaintiff purchased land brought to sale in execution of a decree and was put in possession. The sale was set aside by the High Court and the purchaser was ousted. He preferred an appeal to the Privy Council, and the High Court directed that security be given for the mesne profits and the due delivery of the property without waste in the event of the appeal being successful. The present defendants furnished security and executed a document under which the plaintiff who had succeeded in the Privy Council now sued to enforce his rights. It appeared that after the date of the instrument above mentioned a payment was made from the income of the property in satisfaction of a decree obtained by the Zamindar against the present plaintiff for arrears of poruppu previously accrued due:

Held, (1) that the order of the High Court requiring security to be furnished was not *ultra vires* and that the instrument above mentioned was enforceable;

(2) that the defendants who had given no personal guarantee were not competent to put an end to the security under the provisions of the Contract Act relating to revocation of a surety;

(3) that on the right construction of the instrument the period for the profits of which the defendants were chargeable was that between the date of the instrument and the date of the decision of the Privy Council;

(4) that the defendants should be credited with the amount paid in satisfaction of the decree for poruppu.

CROSS APPEALS against the decree of Venkatarangayyar, Subordinate Judge of Madura East.

Plaintiff sued to enforce his rights under an instrument, dated 16th February 1886, and executed by the defendant under the circumstances which appear below. In execution of the decree in original suit No. 44 of 1879 on the file of the Subordinate Court of Madura East, certain villages were brought to sale and were

* Appeals Nos. 40 and 122 of 1893.

purchased by the present plaintiff, who was put in possession under the orders of the Court on the 15th October 1882. The High Court by an order, dated 16th October 1883, set aside the sale. The present plaintiff, having been dispossessed as the result of that order, preferred an appeal against it to the Privy Council. The appeal having been admitted, the High Court on 13th April 1885 made an order in the following terms:—"We direct that the minors by their guardians (respondents) do furnish security to the satisfaction of the Court of First Instance within three months from this date for the mesne profits and the due delivery of the property without waste if this Court's order is reversed."

The matter having accordingly come on before the Subordinate Judge, he made an order on the 9th May 1885 as follows:—

"This comes on to-day for orders as to the amount for which the original judgment-debtors are to furnish security. Mr. Srinivasengar, the purchaser's vakil, wants security for Rs. 12,000 for mesne profits for two years at Rs. 6,000 per year, and for Rs. 20,000 for due re-delivery of the property without waste. Mr. Narasimachariar, the judgment-debtor's vakil, accepts the valuation given by the other side for mesne profits and agrees to give security for two years' profits, but, as regards the security for the due re-delivery, he says it will be sufficient if his clients undertake to place the purchaser back in possession if required. I, therefore, consider that the judgment-debtors should lodge some security to meet these contingencies. The question, then, is for what amount. I consider that in the circumstances of the case, security for Rs. 3,000 will be sufficient for this purpose.

"The judgment-debtors will, therefore, lodge security on or before 13th July 1885 as already ordered for Rs. 15,000."

The instrument of the 16th February 1886 above referred to, which was executed by the present defendants who furnished the required security, recited the above proceedings and comprised a description of immovable property, which was therein stated to have been given as security in accordance with the above orders.

On the 29th June 1888 the Privy Council reversed the order of the High Court by which the sale had been set aside. The plaintiff now sued as above to enforce his rights against the defendants. It appeared that subsequent to 16th February 1886 a payment was made from the income of the property in question in satisfaction of a decree obtained by the Zamindar against the

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present plaintiff for arrears of poruppu previously accrued due. The Subordinate Judge passed a decree against the defendants personally and against the property comprised in the instrument for Rs. 9,543. Against this decree the plaintiff and defendants Nos. 3 and 4, respectively, preferred the present appeals.

The Advocate-General (Hon. Mr. Spring Branson) and *Krishnasami Ayyar* for appellants in No. 40.

Bhashyam Ayyangar and *Rangaramanuja Chariar* for respondent.

Bhashyam Ayyangar and *Jivaji* for appellant in No. 122.

Krishnasami Ayyar for respondents.

JUDGMENT.—It will be convenient to deal first with the contention on the part of the defendants (appellants in No. 40) that there was no consideration for the undertaking given by them, because the order of this Court, dated the 13th April 1885, was an order which the Court had no power to pass under Section 608 of the Code of Civil Procedure. It is said that such an order could not be made against a respondent in a Privy Council Appeal, who had already been put in possession in execution of the decree appealed against.

On the other hand we are referred to a decision of the Privy Council in *Mussumat Jariut-ool-Butool v. Mussumat Hoseinee Begum*(1), in which this point was considered with reference to the law as it stood under the Bengal Regulation of 1797. In that case it was held that it was competent to the Court to require security for protection of property during an appeal even after the execution of the decree. (See also *Sooruj Monce Dayce v. Sudanund Mohapattur*(2). In the face of these authorities we are unable to hold that the order was an illegal one; and even if it was, it is by no means clear that the undertaking given by the defendants at the request of the judgment-debtor or in consequence of the order was given without consideration.

It is then argued on the appellants' behalf that, although the undertaking given by them might in its inception be valid, it was competent to them to withdraw it at any time and release themselves and their property from all liability in the future. In the view we take of the document the provisions of the Contract Act relating to revocation of a surety are inapplicable, because no per-

(1) 10 M.I.A., 196.

(2) 12 W.R., 296.

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sonal guarantee was given by the appellants. At the request and for the benefit of defendants Nos. 8 and 9 the appellants pledged certain property to secure the claim which Arunachellam might eventually have in respect of the mesne profits of the land which was allowed to remain in the possession of the same defendants. We do not understand on what principle the appellants can claim to withdraw their property from pledge before the event has happened on which the accrual of the claim secured by it depends. No authority was cited for the position that a pledge or mortgage given under such circumstances could be cancelled at the will of the person who has given it. The evidence, moreover, does not go beyond showing that the appellants were desirous of being released from liability. This contention of the appellants must, we think, fail.

The questions which next arise relate to the construction of the bond. It is much to be regretted that a document of this importance should be drawn in such a slovenly way. The order of the Subordinate Judge directing that security be given is also open to the charge of ambiguity. The Judge who tried the case treated the document as one imposing a personal liability on the executants. We can find no words to justify that view and Mr. Bhashyam Ayyangar did not attempt to support it. To that extent, therefore, the appeal must be allowed.

Then it is contended that the intention was that the executants should be liable for the mesne profits of two years only, and reliance is placed on the reference to two years contained in the order of the 9th May 1885. The real order, as it appears to us, is contained in the last two lines of the document in which no limit of time is fixed. But, however that may be, we have to find the terms of the obligation in the document executed by the appellants, and, if they meant to limit their liability in point of time, they ought to have seen that words to that effect were introduced. There is no such limit, but on the contrary it is clear that the mesne profits for which security is given are the mesne profits accruing up to the date of the decision of the pending appeal. The other terminus, that is, the point of time from which the mesne profits are to be calculated is not stated in the document. The parties might have agreed to make the executants responsible for the profits accruing since the date when Arunachellam was dispossessed; and for the respondent it is argued that the document should be

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construed as if an agreement to that effect were expressed in it. In our opinion if it was intended to carry back the liability of the executants to an earlier date than the date of execution, the plaintiff, who was taking the document by way of security, ought to have taken care that express words to that effect were introduced. In the absence of such words we think it must be taken to have been intended that the appellants should be chargeable with the profits which might accrue between the date of the bond and that of the decision by the Privy Council. Subject to the limit of Rs. 15,000 expressed in the document and to certain questions about to be considered, the sum recoverable from the appellants is the amount of the mesne profits which accrued between the two dates above mentioned. The figures are given in our order of the 2nd November 1888, which figures were apparently adopted by both parties at the trial. The above-mentioned two dates cover a period beginning in Fasli 1295 and ending with Fasli 1297. As to the profits of Fasli 1295, it will have to be ascertained how much was received after the 16th February 1886, the date of the bond.

As to the profits of Fasli 1296, which are said to have been Rs. 6,924-6-4, the appellants claim a deduction in their favour on account of a payment made from the collections towards a sum due by Arunachellam under a decree obtained against him by the Sivaganga Zemindar. The payment was made by the receiver who was then in possession, and the decree obtained by the Zemindar related to arrears of 'poruppu' due to him by Arunachellam. It appears to us that, as Arunachellam has had the benefit of this payment, and as the amount was subtracted from the profits which the defendants might otherwise have had, the appellants, being in the position of sureties, are entitled to deduct that amount from the profits of Fasli 1296. In this view it is immaterial that the 'poruppu' on account of which the payment was made was not the 'poruppu' of the current fasli. The exact amount of the payment must be ascertained. Another question is raised with regard to a sum of Rs. 2,456-6-3, which has been allowed against the plaintiff-appellant in No. 122. No intelligible reason is given for the allowance and it is admitted that the amount did not arise from the profits of the land.

We must request the Subordinate Judge to have an account prepared on the lines above indicated, after holding such inquiry

and taking such evidence as may be necessary, and to submit the same within six weeks from the date of the receipt of this order.

In compliance with the above order, the Subordinate Judge submitted findings, and on receipt of which the High Court gave judgment as follows:—

JUDGMENT.—The result of the further finding is that Rs. 11,133-0-1 is due to the plaintiff. That sum will have to be substituted for Rs. 9,543-9-9. To the extent of the difference between these two sums the plaintiff's appeal is allowed, and he will have or pay proportionate costs of that appeal accordingly. In the other appeal No. 40, the defendants have failed, except as to the form of the decree, which must be amended by relieving them from personal liability. Substantially the defendants have failed in their appeal and must pay the cost of it.

There will be a decree for the plaintiff for the first-mentioned sum with interest at 6 per cent. from date of plaint till date of payment with a direction that, if the sum with interest thereon is not paid within six months from this date, the property will be sold.

The decree must also be amended by giving interest on costs allowed from date of decree.

APPELLATE CIVIL.

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

SANKARAN (DEFENDANT No. 1), APPELLANT,

v.

PARVATHI AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 6),
RESPONDENTS.*

Civil Procedure Code, s. 13, Explanation 2, s. 43—Ground of defence not raised in previous suit—Relief not asked for in previous suit—Circumstances giving right to such relief not known at date of previous suit.

The plaintiffs, who were the junior members of a Malabar edom of which

* Second Appeal No. 39 of 1895.

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1885.
October 15.

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defendants Nos. 3 to 5 were the senior members, sued to recover with mesne profits possession of certain property offering to pay the amount of a kanom advanced by defendant No. 1. It appeared that the land had been the subject of a kanom demise in 1865, that defendant No. 3, the then karnavan, had obtained in 1878 a decree for its redemption, the right to execute which he assigned to a stranger, who executed it, and took possession of the property, taking from the karnavan a new kanom deed. Subsequently defendants Nos. 4 and 5 obtained a decree for possession and the cancellation of both the assignment and the kanom deed; but this decree was attached in execution proceedings in another suit and purchased by defendant No. 1, who executed it, purchased the property, deposited the kanom amount and took possession on 8th March 1884. The plaintiffs, who had meanwhile taken abortive proceedings to defeat the first defendant's title, instituted a suit in August 1884, praying for a decree that the sale to him be set aside, without praying for possession. It was now found that the plaintiffs at that time were not aware that defendant No. 1 was in possession and he did not plead that fact as a defence to the suit for a declaration merely:

Held (1) that the plaintiffs were not affected by constructive notice of the defendant's possession in 1884 by reason of the fact that their karnavan, with whom they were not acting, was aware of the defendant's previous application for execution, and that the suit was not barred by Civil Procedure Code, s. 43;

(2) that, defendant No. 1 was not a trespasser merely, and the plaintiffs were entitled to a deduction of the profits for the whole period during which he was in possession in computing the amount payable by them before they recovered the land.

Seemle, that, apart from the question of the plaintiffs' notice of the first defendant's possession, since he had not pleaded possession in the suit of 1884, he could not fall back upon the fact that his possession dated from March 1884 as a ground of defence to the present action.

SECOND APPEAL against the decree of R. S. Benson, District Judge of South Malabar, in appeal suit No. 174 of 1893, modifying the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 8 of 1891.

The plaintiffs sued to recover with mesne profits certain land to which they claimed to be entitled on paying, as they declared themselves ready and willing to do, a kanom amount deposited by defendant No. 1.

The property in question was the jenm of an edom, of which the plaintiffs and defendants Nos. 3 to 6 were members. In January 1865, the then karnavan of the edom demised the land on kanom to certain persons against whom the present defendant No. 3, his successor in the office of karnavan, obtained a decree for redemption, in 1878. The right to execute that decree was assigned to one Echu Menon, a new kanomdar, and he executed it and obtained possession, and also obtained a demise on kanom

from his assignor. The assignment was not approved of by defendants Nos. 4 and 5, who set themselves up as the managers of the edom, and in 1882 they obtained a decree whereby both the assignment and the kanom were set aside and the properties ordered to be surrendered to them. The present defendant No. 1 was the assignee of a personal decree against defendants Nos. 3 and 4, and in execution thereof he attached the decree of 1882, which was brought to sale in execution and purchased by him. Meanwhile the plaintiffs having objected without avail to the attachment, filed a plaint praying that it be released and subsequently added a prayer for the cancellation of the sale also. Their suit was ultimately dismissed on the ground that it was beyond the pecuniary jurisdiction of the Court in which the plaint was filed. The plaintiffs then filed a suit in August 1884 in the Subordinate Court and obtained a decree setting aside the sale which was the relief asked for no prayer for possession being added. Before the last-mentioned suit was instituted, defendant No. 1 had taken possession of the property on 8th March 1884, as purchaser at the Court sale in execution of the decree of 1882 having deposited Rs. 3,688 being the kanom amount.

The Subordinate Judge passed a decree that the plaintiffs be put in possession on their paying the amount of the kanom together with arrears of porapad for nine years and compensation for improvements. The District Judge on appeal modified this decree by increasing the amount payable by the plaintiffs to the defendants before they should take possession. With reference to a plea that the plaintiffs were not entitled to a decree for possession in the present suit by reason of their having omitted to ask for it in the suit of 1884, the District Judge held that that circumstance did not constitute a defence, because it was not proved that the plaintiffs or their edom were aware of the fact of the first defendant's possession. He found that defendants Nos. 3 to 5 were both in 1884, and at the date of the present suit the karnavan and the managers of the edom of which the plaintiffs were junior members.

The first defendant and the plaintiffs respectively filed a second appeal and a memorandum of objections against this decree.

Sundara Ayyar for appellant.

Bhashyam Ayyangar and *Govinda Menon* for respondents.

JUDGMENT.—It was open to the first defendant to plead in original suit No. 37 of 1884 that he was already in possession

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Held (1) that the plaintiffs were not affected by constructive notice of the defendant's possession in 1884 by reason of the fact that their karnavan, with whom they were not acting, was aware of the defendant's previous application for execution, and that the suit was not barred by Civil Procedure Code, s. 43;

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The plaintiffs sued to recover with mesne profits certain land to which they claimed to be entitled on paying, as they declared themselves ready and willing to do, a kanom amount deposited by defendant No. 1.

The property in question was the jenm of an edom, of which the plaintiffs and defendants Nos. 3 to 6 were members. In January 1865, the then karnavan of the edom demised the land on kanom to certain persons against whom the present defendant No. 3, his successor in the office of karnavan, obtained a decree for redemption, in 1878. The right to execute that decree was assigned to one Echu Menon, a new kanomdar, and he executed it and obtained possession, and also obtained a demise on kanom

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from his assignor. The assignment was not approved of by defendants Nos. 4 and 5, who set themselves up as the managers of the edom, and in 1882 they obtained a decree whereby both the assignment and the kanom were set aside and the properties ordered to be surrendered to them. The present defendant No. 1 was the assignee of a personal decree against defendants Nos. 3 and 4, and in execution thereof he attached the decree of 1882, which was brought to sale in execution and purchased by him. Meanwhile the plaintiffs having objected without avail to the attachment, filed a plaint praying that it be released and subsequently added a prayer for the cancellation of the sale also. Their suit was ultimately dismissed on the ground that it was beyond the pecuniary jurisdiction of the Court in which the plaint was filed. The plaintiffs then filed a suit in August 1884 in the Subordinate Court and obtained a decree setting aside the sale which was the relief asked for no prayer for possession being added. Before the last-mentioned suit was instituted, defendant No. 1 had taken possession of the property on 8th March 1884, as purchaser at the Court sale in execution of the decree of 1882 having deposited Rs. 3,688 being the kanom amount.

The Subordinate Judge passed a decree that the plaintiffs be put in possession on their paying the amount of the kanom together with arrears of porapad for nine years and compensation for improvements. The District Judge on appeal modified this decree by increasing the amount payable by the plaintiffs to the defendants before they should take possession. With reference to a plea that the plaintiffs were not entitled to a decree for possession in the present suit by reason of their having omitted to ask for it in the suit of 1884, the District Judge held that that circumstance did not constitute a defence, because it was not proved that the plaintiffs or their edom were aware of the fact of the first defendant's possession. He found that defendants Nos. 3 to 5 were both in 1884, and at the date of the present suit the karnavan and the managers of the edom of which the plaintiffs were junior members.

The first defendant and the plaintiffs respectively filed a second appeal and a memorandum of objections against this decree.

Sundara Ayyar for appellant.

Bhashyam Ayyangar and *Govinda Menon* for respondents.

JUDGMENT.—It was open to the first defendant to plead in original suit No. 37 of 1884 that he was already in possession

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and therefore that a suit for a declaration would not lie. He did not choose to do this, and therefore cannot fall back upon the fact that his possession dates from March 1884 as a ground of defence to the present action (section 13, Code of Civil Procedure, Explanation 2). Independently of this, however, it is found as a fact that plaintiffs did not actually know that first defendant had obtained possession. We cannot infer that they had constructive knowledge, because their karnavan had notice of the application for execution in December 1883. The plaintiffs are not acting with their karnavan, whose conduct has necessitated their acting independently of him, and therefore they are not affected by his knowledge if such knowledge be proved. We do not think the decision in *Kunhiamma v. Kunhunni*(1) expresses dissent from the ground on which *Ambu v. Kellilamma*(2) was decided, i.e., that section 43 only applies to cases in which the plaintiff had knowledge of the claim he was entitled to make; the only dissent expressed was to the view of the late Sir T. Muttusami Ayyar, J., that section 283, Code of Civil Procedure, gives a special right to sue in opposition to the provisions of section 42 of the Specific Relief Act.

The only other ground taken is as to mesne profits, and it is said that not more than three years' mesne profits could have been awarded. We do not think, however, that first defendant can really be regarded as a trespasser. He stood in the shoes of Echu Menon and was entitled to possession until redeemed. The plaintiff has deducted the arrears of michavaram from the kanom amount due, and thus the calculation has proceeded on the right basis, though the relief has been erroneously described as mesne profits. The second appeal therefore fails and the memorandum of objections is not pressed. The second appeal and memorandum of objections are dismissed with costs.

(1) I.L.R., 16 Mad., 140.

(2) I.L.R., 14 Mad., 23.

APPELLATE CIVIL.

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

RAMASAMI (APPELLANT), PETITIONER,

v.

STREERAMULU CHETTI AND OTHERS (RESPONDENTS),
COUNTER-PETITIONERS.*

1895.
December 20.
1896.
January 6.

Limitation Act—Act XV of 1877, sched. II, art. 36—*Misfeasance—Indian Companies Act*—Act VI of 1882, s. 214—*Application against directors for refund of money improperly distributed.*

An application was made in 1894 under Indian Companies Act of 1882, section 214, by an official liquidator appointed in 1891 praying that the directors of the company in liquidation be ordered to pay over to him a sum of money which had been improperly distributed among the shareholders :

Held, that the application was not barred by limitation.

APPEAL against an order of Mr. Justice Shephard in the matter of a limited company in liquidation dismissing an application under Indian Company's Act, 1882, section 214. The application was made by the official liquidator for the refund by the directors and trustees of a sum alleged to have been wrongfully distributed among the shareholders more than two years before the date of the application.

The official liquidator preferred this appeal.

Pattabhiramu Ayyar for appellant.

Mr. J. G. Smith for respondents.

JUDGMENT.—The learned Judge has written no judgment in this case, but, as far as we can gather his reasons for the dismissal of the application, he held that it was barred under article 36 of the second schedule of the Limitation Act. The application was made under section 214 of the Indian Companies Act, 1882, by the liquidator appointed by the Court in 1891 praying that the directors and trustees of the company be ordered to pay over to the liquidator the sum of Rs. 5,550 which had been distributed among the shareholders.

The application seems to have been before the learned Judge on several occasions, and on 27th February 1895 he had apparently

* Original Side Appeal No. 35 of 1895.

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decided to make an order against the directors, reserving for consideration the form of the order. But on the 7th March 1895 the objection was first started by Mr. R. F. Grant, the Counsel for the directors, that the application was barred under article 36, inasmuch as the act complained of was a misfeasance and not a breach of trust, and that the application was made more than two years after the liquidator became aware of the facts. The learned Judge allowed the objection and dismissed the application, but without costs.

It appears to have escaped the notice of the learned Judge that article 36 of the second schedule of the Limitation Act refers only to suits and not to applications. A clear distinction is drawn under the Limitation Act between suits, appeals and applications. They are treated in three distinct divisions of the second schedule. The present case is not a suit, but it is an application under section 214, Act VI of 1882, to compel the directors to repay money which has been misapplied. Article 36 has therefore no application.

On the question whether the act complained of was a breach of trust or not we may point out that in an application under section 165 of the English Companies Act, 1862 (which corresponds with section 214 of the Indian Companies Act, 1882), it was held that the relationship of trustee and *cestui que trust* subsists between the directors of Joint Stock Companies and the shareholders; see *In re Exchange Banking Company*(1); also *In re National Funds Assurance Company*(2), and *In re Oxford Benefit Building and Investment Society*(3). In the *New Fleming, Spinning and Weaving Company v. Kessowji Naik*(4) it was held that the misfeasance of a director was a breach of trust. The case referred to by the learned Counsel *Poole's case*(5) is one of an entirely different character.

We must reverse the order of the learned Judge and remand the application to the original side in order that a fresh order may be passed. The appellant is entitled to the costs of this appeal and the costs on the original side will follow the result.

(1) L.R., 21 Ch. D., 519.

(2) L.R., 10 Ch. D., 118.

(3) L.R., 35 Ch. D., 502.

(4) I.L.R., 9 Bom., 373.

(5) L.R., 9 Ch. D., 322.

[Reporter's Note.—The same point is decided in *Connell v. Himalaya Bank*, I.L.R., 18 All., 12.]

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

1895.
October 1

PAYA MATATHIL APPU (PLAINTIFF), APPELLANT,

v.

KOVAMEL AMINA (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 32, 559, 537—Addition of parties on appeal—Transfer of Property Act—Act IV of 1882, s. 91—Right to redeem.

A verumpattom tenant in Malabar claiming under a lease from the ottidar is entitled to redeem the prior kanom.

The Court on second appeal is competent to bring on to the record persons who had been originally joined in the suit but were not joined in the Lower Appellate Court.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 331 of 1893, reversing the decree of S. Subbayyar, Subordinate Judge of Tellicherry, in original suit No. 7 of 1893.

The plaint sets forth that the properties described in the plaint schedule which were once the Jenm of Chikkikalath Illath Govindan Nambudiri, are now according to a Jenm deed granted by his heirs on the 22nd February 1891 the Jenm of the first defendant; that one Kovamel Muthan the father of defendants 3 to 5 and grandfather of defendants 6 and 7 had held the properties under the said Nambudiri on a kanom of Rs. 600 and 3 puramkadams of Rs. 200, 142 and 250 under deeds granted by him in Kumbhom 1027 (February-March 1852), 25th Tulam 1030 (9th November 1855), 12th Makaram (23rd January) and 25th Kadakam 1034 (8th August 1859) respectively; that after the death of the said Muthan, the defendants 4 to 7 transferred their right to the third defendant, that the latter is now in possession of the properties by virtue of the said transfer deed dated Vrichigom 1068 (November-December 1892) or thereabouts as mortgagee, and that defendants 8 and 9 are occupants of the properties, that the said Govindan Nambudiri having received a further sum of Rs. 158 from the second defendant's predecessor, the deceased Udaya Varma Rajah of Edavalath Kovilagam, executed to him in 1031 (1855-1856) a deed

* Second Appeal No. 873 of 1894.

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demising these properties on an otti for Rs. 900 including the amount of prior charges and authorizing him to recover possession from the tenants; that on the strength of this otti deed the said Udaya Varma Rajah and Govindan Nambudiri jointly instituted O.S. No. 119 of 1856 in the Munsif's Court of Kadathanad against the said Muthan and others for recovery of these properties, and on the 6th February 1861 obtained a decree ordering restoration of the properties on payment to them of the kanom and puramkadam amounts, that the properties were, subsequent to the decree, leased to plaintiff by the second defendant on 27th Dhanu 1068 (9th January 1893) on a Parapad of 10 dangalies of paddy and that on the strength of this deed the plaintiff is now entitled to recover these properties on payment of the said kanom and puramkadam amounts.

The Subordinate Judge held that the plaintiff's averments were established overruling an objection that the instrument of the 7th August 1856 was, on its right construction, a deed of conditional sale, finding that it was a puramkadam deed merely and he passed a redemption decree on the terms that the plaintiffs should pay the kanom and puramkadam amounts. The District Judge reversed this decree on the ground that the plaintiff was not entitled to redeem. He referred on this point to Transfer of Property Act, section 61, and to *Radha Pershad Mieser v. Monohur Das*(1) and *Kasumunnissa Bibee v. Nilratna Bose*(2). He also referred to Transfer of Property Act, section 98, and observed that a Malabar kanom is an anomalous mortgage and that the local Malabar usage afforded no justification of the plaintiff's claim to redeem.

Plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Sankara Menon* for appellant.

Sankaran Nayar and *Kannan Nambiar* for respondents.

JUDGMENT.—We think it is competent to the Court to add parties who were defendants in the Court of First Instance though not joined as respondents in the Lower Appellate Court. In the case referred to, *Raman Nambiar v. Kapali*(3), the party was not added by the Court, but by the appellant himself. Section 559 occurs in the chapter of the Code relating to appeals from original decrees, and it is by section 587 that this section is so far as may

(1) I.L.R., 6 Cal., 317.

(2) I.L.R., 8 Cal., 79.

(3) S.A., 185 of 1894 unreported.

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AMINA.

be made applicable to second appeals. We do not think it was intended to preclude the Court from adding in second appeal persons who had been originally joined in the suit. We are unable to follow the decision in *Chunni v. Lala Ram*(1).

The Judge considers that a verumpattom tenant claiming under a lease executed by the ottidar is not in a position to redeem the prior kanom. He observes that the lessee is not mentioned specifically in section 91 of the Transfer of Property Act as belonging to the class of persons entitled to redeem, and that under a lease, as defined in section 105, he is not described as taking an interest in the property, but only a right to possession.

In our opinion the word 'interest' is not necessarily confined to right of ownership, but is sufficiently large to include any minor interest such as that of a tenant or a person having a charge.

No doubt there has been no precedent for this suit in Malabar; but that circumstance is not conclusive. The general principle is laid down by Fry, L.J., in *Tarn v. Turner*(2). "According to the general law of the land a person who claims as lessee under a mortgagor after the mortgage, and has thereby derived an interest in the equity of redemption, has the right to redeem." The Calcutta cases only illustrate the rule and do not form any exception. So long as the plaintiff has an interest validly entitling him to possession, he is in a position to redeem.

We must therefore reverse the decree and remand the appeal for disposal.

Respondents are to pay costs of this appeal. The other costs will follow the result.

(1) I.L.R., 16 All., 5.

(2) I.L.R., 39 Ch. D., at page 468.

APPELLATE CIVIL.

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

1895.
December
5, 18.

THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS
(PLAINTIFFS), APPELLANTS,

v.

SARANGAPANI MUDALIAR (DEFENDANT), RESPONDENT.*

*Limitation Act—Act XV of 1877, s. 23, sched. II, arts. 144 and 149—Encroachment
on public highway—Once a highway always a highway—Suit by municipality
to remove encroachment—Prescriptive right.*

The Municipality of Madras sued to recover, as forming part of a highway, a strip of land adjoining the house of the defendant on which a pial had been erected more than forty five years before the suit:

Held, assuming that the land in question was originally included in the street, that the defendant had acquired a title by adverse possession against the Municipality, which was not entitled to call in aid the provisions of Limitation Act, sched. II, art. 149.

APPEAL against the decree of P. Strinivasa Rau, Judge of the Madras City Civil Court, in original suit No. 160 of 1894.

The plaintiffs were the Municipal Commissioners for the City of Madras, and they sued to recover a piece of land in the possession of the defendant as forming part of Mint Street. It was alleged that the defendant had wrongfully encroached upon the land in question, which was 53 feet long 9 feet wide, and had erected a pial and pavement thereon in front of his house. The defendant pleaded that the land was never the property of the plaintiffs, that he had acquired a title thereto by prescription if not otherwise, and that the suit was barred by limitation. The defendant and his predecessors in title had long been in possession of the house above mentioned for which they held the Collector's certificate, and also of the land in dispute, for which until 1893 no certificate had been issued. In February 1893 he applied for such certificate, admitting that his title-deeds did not include the land in question. The plaint averred that the encroachment complained of came to their knowledge on or about the last-mentioned date, that the encroachment complained of constituted a continuous wrong, and that the defendant could acquire no statutory title in respect of the

* City Civil Court Appeal No. 14 of 1895.

land encroached on for the reason that it formed part of a public highway.

The Court of first instance dismissed the suit.

The plaintiffs preferred this appeal.

Mr. R. F. Grant for appellants.

Mr. K. Brown for respondent.

JUDGMENT.—This is a suit in ejectment brought by the Municipal Commissioners for the Town of Madras for the purpose of recovering from the defendant a small piece of ground in Mint Street now covered by the pavement and pial in front of the defendant's house. The plaintiffs allege that this piece of ground was originally included in the street which, by successive Acts of the Legislature, has been vested in the Municipal Commissioners for the use of the public. They are unable to state the exact date of the encroachment, but say the same came to their knowledge in February 1893 when the defendant applied for a certificate for the said ground from the Collector of Madras. They allege that the defendant could acquire no statutory title to land which forms part of the public highway, but that even if the Act of Limitation does apply, the suit is not barred.

The defendant bought the house in 1861 and it is admitted that the site now covered by the pial and pavement is not included in the measurements given in his title-deeds. It is clear, however, that this pial and pavement were in existence long before the defendant's purchase. The City Civil Judge finds that they have been certainly in existence for forty-five years and probably for a much longer period. No witnesses have been called who can recollect the house without them. The earliest Collector's certificate for the house (exhibit F) is dated 9th June 1824 and this mentions a previous possession of twenty years; so that it may be taken that the house at all events has been in existence since 1804. The plan on the reverse of the certificate gives the 'Salay Street' as the western boundary of the house, and this description is repeated in the sale-deed F, dated the 2nd of December 1830. Accepting the finding of the Judge that the pial has been in existence at any rate for forty-five years, it follows that it existed for at least eighteen years before any legislation in India vested the streets of Madras in the Municipal Commissioners of the City.

The next question is whether the ground now covered by the pavement and pial was ever really part of the street at all. The

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City Civil Judge has found that this is not proved, and we agree with him that there is no evidence that the actual site now so occupied has ever been used by the public as part of the street. No doubt if the survey plan C was conclusive, the inference might be drawn that the measurements of the street should be taken from main wall to main wall which would include the site in question in the street. But it is not shown under what authority the measurements were so calculated, and it is certain that the pial was in existence long before this survey plan was made in 1858. At the same time there is no doubt that the boundaries given in exhibit F₁ do favour the plaintiffs' contention, and had the inference from this document been supported by any evidence of user, we should have been disposed to hold that the land must originally have formed part of the street. The evidence does not enable us to come to any certain conclusion, but we are able to dispose of the suit upon other grounds.

Assuming therefore for the purpose of the argument that the site was originally included in the street, we have no doubt that, if the general rules of prescription and limitation apply, the defendant has long ago acquired a title by adverse possession. The site would at any rate have become vested in the municipality by Act IX of 1865, and we agree with the City Civil Judge that a corporation is not entitled to claim the benefit of article 149, schedule II of the Limitation Act. That article only applies to suits brought by or on behalf of the Secretary of State, and there is no authority for the proposition that when the Crown has once ceded property to an individual or corporation, it does (or can) also cede at the same time any right or privilege inherent in the Sovereign Power. The grantee of the property stands in respect of the property granted in the same position as any other proprietor.

An attempt, however, is made to distinguish the present case on the ground that the municipality as trustee of the public for the street is entitled to claim the benefit of the English maxim 'once a highway always a highway' and to contend that no lapse of time can convert part of a street into private property, since the obstruction to the public is a common nuisance and continuing injury, section 23 of the Limitation Act.

The English maxim 'once a highway always a highway' is based on the theory that the property in a highway is in the owner of the soil subject to an easement in favour of the public. In the

case before us this legal fiction peculiar to English law cannot arise, for there is no question of any easement whatever. The street itself and the soil thereof is vested in the municipality in trust for the public, so that there is no question of a dominant or servient heritage. Both are united in the same person, i.e., in the proprietor, and we are referred to no authority for holding that the public, any more than a private proprietor, is to be exempted from the consequences of its own laches. The principles laid down in *Mann v. Brodie*(1) seem entirely applicable. The question is not really one of a continuing wrong, but of a completed trespass. It is a contest between adjacent proprietors of whom one has, it is said, acquired by adverse possession some portion of the land of the other. If there had been any question of user, it would have been sufficient to say that there is no evidence of any user by the public as a highway of that portion of the property now covered by the pavement and pial. As laid down by Lord Blackburn in *Mann v. Brodie*(1) "the question in short is as to possession by the public or against the public for a period of forty years, and not, as in England, as to user by the public for such an undefined time, and in such a manner and under such circumstances as to justify the inference that an owner in fee had dedicated."

Holding therefore that the defendant has, by adverse possession for over twelve years, acquired a legal title, we must confirm the decree of the learned Judge and dismiss the appeal with costs.

Wilson & King attorneys for appellants.

Branson & Branson attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

KELU MULACHERI NAYAR AND OTHERS (PLAINTIFFS),
APPELLANTS,

v.

CHENDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, ss. 562, 566—Order of remand when legal—Duty of Appellate Court when addition of parties and amendment of issues is necessary.

In a suit by mortgagees to redeem a prior mortgage, issues were framed and tried and disposed of in favour of the plaintiffs as to the questions whether the

(1) L.R., 10 App. cases, 387.

* Appeal against Order No. 3 of 1894.

THE MUNICI-
PAL COMMIS-
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1895.
March 12.
April 18.

KELU MULA-plaintiffs' mortgage was valid, whether the mortgage sought to be redeemed had
CHERI NAYAR been discharged, and whether the suit was barred by limitation; the Court of
v. First Appeal was of opinion that these questions had not been properly con-
CHENDU. sidered, and set aside the decree for the plaintiffs and directed that a fresh trial
be held, certain fresh parties being brought on the record:

Held, (1) that the order of remand was illegal;

(2) that the Lower Appellate Court should have joined the persons neces-
sary for the suit, and should have so altered or added to the issues as to raise all
questions properly arising, and should have referred them for trial to the Court of
First Instance.

APPEAL against the order of O. Chandu Menon, Subordinate
Judge of South Canara, in appeal suit No. 50 of 1893, reversing
the decree of J. Lobo, District Munsif of Kasaragod, in original
suit No. 225 of 1892.

Suit for redemption. In 1874 the land in question was mort-
gaged by one Chendakelakara to the ancestor of defendants Nos. 1
and 2. In 1878 the land was again mortgaged to defendants
Nos. 1 and 2 by Chendakelakara's brother. In 1889 the land was
mortgaged for a term of sixty years to the plaintiffs Nos. 1 and
2 and the ancestor of plaintiff No. 3 by an instrument which
provided that the mortgagees were to discharge the mortgage of
1874. The defendants Nos. 1 and 2 questioned the title of the
plaintiffs' mortgagors, and pleaded that in March 1879 Chenda-
kelakara, who was admittedly the head of the family, executed a
further mortgage in their favour for Rs. 1,000, which included the
prior mortgages and consequently that the present suit which was
brought to redeem the mortgage of 1874 should be dismissed.
The District Munsif passed a decree for the plaintiffs.

On appeal the Subordinate Judge held that the question of the
validity and effect of the mortgage of 1879 had not been duly tried,
nor the questions raised as to the title of plaintiffs' mortgagor and
as to limitation, and in the result he said: "I set aside the decree
"of the Lower Court and direct that the suit be restored to the
"file and that the person or persons whom the defendants allege to
"be the successors of Chendakelakara, and also the plaintiffs' mort-
"gagors be made parties to the suit, and a fresh trial be held with
"reference to the foregoing remarks and a decision *de novo* on the
"merits of the case be passed."

The plaintiffs preferred this appeal under Civil Procedure Code,
section 588, clause 28.

Madhava Rau for appellants.

Narayana Rau for respondents.

JUDGMENT.—As laid down in *Ramachandra Joishi v. Hazi*
Kassim (1) the condition necessary to a remand under section
562 as the section now stands is the omission to determine the
merits. This condition did not exist in the present case as the Dis-
trict Munsif had disposed of the case on the merits. The order
of remand passed by the Subordinate Judge must, therefore, be held
to be illegal. The case to which I was referred on behalf of the
respondent is distinguishable from the present case, inasmuch as
there the order of remand was passed by the High Court, which
could not deal with the merits under section 565, the provisions
whereof have to be read with those of sections 562 and 564. And
these sections are under section 587 applicable to second appeals
only as far as may be. There is thus in the matter in question
no analogy between the position of the High Court hearing a
second appeal and that of a Court hearing a first appeal (*Ganesh*
Bhikaji Juvekar v. Bhikaji Krishna Juvekar (2)). The next con-
tention on behalf of the respondents was that, as the Subordinate
Judge found it necessary to direct that certain persons who had not
been impleaded in the Court of First Instance be joined as parties
to the suit, the proper thing to do was to remand the case. There
is, however, nothing in section 562 to warrant this contention.
In the circumstances of the case, the proper course for the Subor-
dinate Judge was to join the person whom he found necessary as
parties to the suit, to alter or amend the issues already framed, or
frame fresh issues so as to raise all questions properly arising in
the suit as it stands after the addition of the said persons as parties,
and refer them for trial to the District Munsif under section 566
(see the observations of the Judges in *Ganesh Bhikaji Juvekar v.*
Bhikaji Krishna Juvekar (2)).

The order of the Subordinate Judge should, therefore, be set
aside. The appeal should be restored to the file and proceeded
with according to law.

The costs of this appeal will be costs in the cause.

(1) I.L.R., 16 Mad., 207.

(2) I.L.R., 10 Bom., 398.

KELU MULA-CHERI NAYAR v. CHENDU. plaintiffs' mortgage was valid, whether the mortgage sought to be redeemed had been discharged, and whether the suit was barred by limitation; the Court of First Appeal was of opinion that these questions had not been properly considered, and set aside the decree for the plaintiffs and directed that a fresh trial be held, certain fresh parties being brought on the record:

Held, (1) that the order of remand was illegal;

(2) that the Lower Appellate Court should have joined the persons necessary for the suit, and should have so altered or added to the issues as to raise all questions properly arising, and should have referred them for trial to the Court of First Instance.

APPEAL against the order of O. Chandu Menon, Subordinate Judge of South Canara, in appeal suit No. 50 of 1893, reversing the decree of J. Lobo, District Munsif of Kasaragod, in original suit No. 225 of 1892.

Suit for redemption. In 1874 the land in question was mortgaged by one Chendakelakara to the ancestor of defendants Nos. 1 and 2. In 1878 the land was again mortgaged to defendants Nos. 1 and 2 by Chendakelakara's brother. In 1889 the land was mortgaged for a term of sixty years to the plaintiffs Nos. 1 and 2 and the ancestor of plaintiff No. 3 by an instrument which provided that the mortgagees were to discharge the mortgage of 1874. The defendants Nos. 1 and 2 questioned the title of the plaintiffs' mortgagors, and pleaded that in March 1879 Chendakelakara, who was admittedly the head of the family, executed a further mortgage in their favour for Rs. 1,000, which included the prior mortgages and consequently that the present suit which was brought to redeem the mortgage of 1874 should be dismissed. The District Munsif passed a decree for the plaintiffs.

On appeal the Subordinate Judge held that the question of the validity and effect of the mortgage of 1879 had not been duly tried, nor the questions raised as to the title of plaintiffs' mortgagor and as to limitation, and in the result he said: "I set aside the decree of the Lower Court and direct that the suit be restored to the file and that the person or persons whom the defendants allege to be the successors of Chendakelakara, and also the plaintiffs' mortgagors be made parties to the suit, and a fresh trial be held with reference to the foregoing remarks and a decision *de novo* on the merits of the case be passed."

The plaintiffs preferred this appeal under Civil Procedure Code, section 588, clause 28.

Madhava Rau for appellants.

Narayana Rau for respondents.

JUDGMENT.—As laid down in *Ramachandra Joishi v. Hazi Kassim*(1) the condition necessary to a remand under section 562 as the section now stands is the omission to determine the merits. This condition did not exist in the present case as the District Munsif had disposed of the case on the merits. The order of remand passed by the Subordinate Judge must, therefore, be held to be illegal. The case to which I was referred on behalf of the respondent is distinguishable from the present case, inasmuch as there the order of remand was passed by the High Court, which could not deal with the merits under section 565, the provisions whereof have to be read with those of sections 562 and 564. And these sections are under section 587 applicable to second appeals only as far as may be. There is thus in the matter in question no analogy between the position of the High Court hearing a second appeal and that of a Court hearing a first appeal (*Ganesh Bhikaji Juvekar v. Bhikaji Krishna Juvekar*(2)). The next contention on behalf of the respondents was that, as the Subordinate Judge found it necessary to direct that certain persons who had not been impleaded in the Court of First Instance be joined as parties to the suit, the proper thing to do was to remand the case. There is, however, nothing in section 562 to warrant this contention. In the circumstances of the case, the proper course for the Subordinate Judge was to join the person whom he found necessary as parties to the suit, to alter or amend the issues already framed, or frame fresh issues so as to raise all questions properly arising in the suit as it stands after the addition of the said persons as parties, and refer them for trial to the District Munsif under section 566 (see the observations of the Judges in *Ganesh Bhikaji Juvekar v. Bhikaji Krishna Juvekar*(2)).

The order of the Subordinate Judge should, therefore, be set aside. The appeal should be restored to the file and proceeded with according to law.

The costs of this appeal will be costs in the cause.

(1) I.L.R., 16 Mad., 207.

(2) I.L.R., 10 Bom., 398.

APPELLATE CIVIL.

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

ARUMUGAM PILLAI (PLAINTIFF), APPELLANT,

v.

PERIASAMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Mortgage in consolidation of prior mortgages—Want of registration—Secondary evidence—Extinction—Decree to redeem prior mortgages.

In a suit to redeem a mortgage of 1867 which had been lost and admittedly had not been registered it appeared that it had been executed in consolidation of two prior mortgages, dated 1856 and 1860, respectively:

Held, that the plaintiff was not entitled to a decree on the footing of the unregistered mortgage which could not be proved, but that he was entitled to redeem the two previous mortgages if they were found to be genuine and valid.

SECOND APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East) in appeal suit No. 225 of 1894, reversing the decree of A. David, District Munsif, Tirumangalam, in original suit No. 434 of 1892.

Suit to redeem a mortgage dated 14th May 1867 and executed to secure repayment of Rs. 655.

The mortgage document was not produced having been lost and it was admitted that it had not been registered. It appeared that it had been executed in consolidation of two previous mortgages for Rs. 316 and Rs. 35, dated respectively, 1856 and 1860. The District Munsif passed a decree as prayed on the mortgage sued on and with regard to the plaintiff's title he said:

"It is true that the mortgage of 1867 was not registered, but the admissions of the second defendant and of the first defendant's grandfather above noticed are, I think, sufficient to justify a finding in favour of the genuineness of the mortgage. On the principles laid down in *Madhava v. Narayana*(1), *Sankaran v. Periasami*(2) and *Maidin Saiba v. Nayapa*(3), I hold that the first defendant acquired by possession for more than twelve years the limited interest of a mortgagee and that his mortgage right has become valid.

* Second Appeal No. 163 of 1895.

(2) I.L.R., 13 Mad., 467.

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

(3) I.L.R., 7 Bom., 96.

Whatever defect there was at the inception of the mortgage was subsequently removed by lapse of time. I am of opinion that the mortgages set up by the plaintiff are genuine and valid as against the defendants."

The Subordinate Judge reversed his decree holding that the want of registration prevented the admission of secondary evidence and was fatal to the suit.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar and *Krishnasami Ayyar* for appellant.

Mr. Parthasaradhi Ayyangar for respondents.

JUDGMENT.—We agree with the Subordinate Judge that the mortgage of 1867 could not be proved inasmuch as it was not registered, but we do not consider that the previous mortgages of 1856 and 1860 were altogether extinguished by the mortgage of 1867. They were no doubt consolidated in that mortgage. But when that mortgage is found to be inoperative owing to non-observance of the registration law, the two previous mortgages can be revived for the purpose, at least, of showing that the possession of the defendants is that of mortgagees of the plaintiff, the mortgagor. If this relationship is established between the parties, the plaintiff has clearly a right to redeem the earlier mortgages as his right of redemption has not been lost through the sixty years' bar of limitation. This is the principle laid down in *Kunhi Kutti Nair v. Kutty Maraccar*(1), and followed again in *Unnian v. Rama*(2), and we do not think it has been departed from in the case of *Krishna Pillai v. Rangasami Pillai*(3). In this latter case, the learned Judges would not allow a mortgage that had not been pleaded and that had only been admitted in other proceedings to be set up in lieu of the plaintiff mortgage when that failed. But that is not the case here. The plaintiff pleaded the two previous mortgages, upon which he now wishes to rely, and the second issue had reference to their existence and genuineness and was accordingly framed in the plural number, showing that all the three mortgages were considered by the Court of First Instance. Indeed, the finding of the District Munsif is that the mortgages, again in the plural number, set up by the plaintiff were valid and binding as against the defendants. If then the Subordinate Judge should find that the two previous mortgages, viz., those of 1856 and 1860 are genuine and valid

(1) 4 M.H.C.R., 359.

(2) I.L.R., 8 Mad., 415.

(3) I.L.R., 18 Mad., 462.

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either by independent proof or by admissions of the defendants or their predecessors in title, we think the plaintiff is entitled to redeem them. We, therefore, reverse the decree of the Lower Appellate Court and remand the appeal for re-hearing on the issue above indicated and the other issues arising in the case. If a decree for redemption should follow, it will be left for the Subordinate Judge to determine what amount should be paid by the plaintiff to the defendants as the mortgage amount. The sums due on the mortgages of 1856 and 1860 are Rs. 316 and Rs. 35, respectively. But the amount due according to the inoperative mortgage of 1867 is Rs. 655, and we observe that the plaintiff has offered to pay this larger amount.

As we have allowed the second appeal on the ground stated, it is unnecessary for us to determine the other point raised as to the interest of the defendants in the property being in any case the limited interest of a mortgagee and therefore liable to redemption.

The costs hitherto incurred will abide and follow the result and be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Shephard.

RAJESWARA RAU AND OTHERS (PLAINTIFFS),
APPELLANTS.

v.

HARI BABANDHU AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Decree payable by instalments—Default in payment—Waiver—Civil Procedure Code, s. 258.

A decree was passed for the payment of a sum of money in four annual instalments, the first payment to be made on 11th October 1888; and it was further provided that if default were made in the payment of any instalment then without reference to the other instalments the whole amount should be paid with interest. The decree-holder applied in October 1893 for execution in respect of the instalments for 1890 and 1891:

Held, that the application was not barred by limitation, if default in respect of the instalment of 1889 had been waived, and acceptance of part-payment was material as evidence of such waiver and should be considered, although payment had not been certified under Civil Procedure Code, s. 258.

* Appeal against Appellate Order No. 40 of 1895.

APPEAL against an order of J. P. Fiddian, District Judge of Ganjām, reversing the order of the District Munsif of Berhampur in execution petition No. 622 of 1893 in original suit No. 308 of 1887.

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v.
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BABANDHU.

In original suit No. 308 of 1887 on the file of the District Munsif of Berhampur a razinama decree was passed in favour of plaintiff for Rs. 208 payable in four instalments of Rs. 52 each due on 11th October of years 1888 to 1891. It was further provided that interest was payable every month, and that on failure to pay any one instalment, the whole amount was to be paid at once. Defendants contended that the first two instalments were not paid and therefore the whole amount became due on the 11th October 1888, and that if the first instalment only was paid, the balance became due on the 11th October 1889, and the present application made on the 7th October 1893 is time-barred. The Munsif found the payments were made and the petition not barred.

On appeal the District Judge reversed the order apparently on the ground (i) that the evidence did not show that the full amount due was paid in 1888 or 1889, and (ii) on the ground that these payments were not certified to the Court under section 258 of the Civil Procedure Code.

The petitioner appealed to the High Court.

Mr. H. G. Wedderburn and Ranga Chariar for appellant. The decree-holder may waive the default. The clause is for the benefit of the decree-holder. The provision as to the whole amount being recoverable at once if default is made does not affect the admissibility of the application for execution, because that provision has never been enforced and the obligation to pay is still subsisting (*Appayya v. Papayya*(1)). The creditor waived the default by accepting an overdue instalment (*Ramculpo Bhattacharyi v. Ramchunder Shome*(2) and *Mon Mohun Roy v. Durga Churn Gooee*(3)). The Judge should have recognized the payments, although not certified to the Court under section 258, Civil Procedure Code.

Ethiraja and Sivagnanam for respondents.

JUDGMENT.—The decree passed on the 11th October 1887 provided for the payment of a certain sum in four annual instalments, the date fixed being the 11th of October 1888 and the following years; and it was further provided that if default were

(1) I.L.R., 3 Mad., 256. (2) I.L.R., 14 Cal., 352. (3) I.L.R., 15 Cal., 503.

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made in the payment of any instalment, then, without reference to the succeeding instalments, the whole amount should be paid with interest at Rs. 1-8-0 per cent. per mensem. The present application for execution of the decree in respect of the instalments due in 1890 and 1891 was made on the 7th October 1893. This application is clearly not barred by the law of limitation if payment was made of the first two instalments, or if the decree-holder waived the judgment-debtor's default. The decree-holder adduces evidence to show that payments were made in 1888 and 1889, and this evidence was accepted by the District Munsif.

The District Judge's finding on the point is not a positive finding, and as a finding in the reversal of a Court of First Instance is most unsatisfactory. Apparently the District Judge considers that some payments may have been made in those years, although the whole instalments were not paid. The proof of any payment made in respect of the instalment of 1889 is, however, clearly material, because such payment accepted by the decree-holder would be evidence of waiver by the latter. If there was waiver of the default in that year, the balance payable under the decree did not become payable until default was made in the next year, and that default would fall within three years of the date of the application. I think the Judge was also wrong in refusing to recognize payments, because they were not certified to the Court under the 258th section (*Hurri Pershad Chowdhry v. Nasib Singh*(1)). If there was no payment in 1888 and 1889, and no waiver of the default, I think the Judge was right in dismissing the application. The case just cited is an authority for this position which, in my opinion, is clearly the right one, and I do not think that the decision in *Appayya v. Papayya*(2) obliges me to take the contrary view. The point which arises here was not the actual point decided in that case. The decision in *Venkatasami v. Sanyasi*(3) to which I was referred is consistent with the view which I adopt.

I must reverse the order and remand the appeal to the District Court for disposal. Costs will follow the result.

(1) I.L.R., 21 Calc., 542.

(2) I.L.R., 3 Mad., 256.

(3) Appeal against Order No. 100 of 1893 unreported.

APPELLATE CIVIL.

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

THE SECRETARY OF STATE FOR INDIA (DEFENDANT),
APPELLANT,

v.

KOTA BAPANAMMA GARU (CLAIMANT), RESPONDENT.*

*Forest Act—Act V of 1882, Madras—Burden of Proof—Shifting of burden of proof—
Limitation Act—Act XV of 1877, art. 149.*

Portions of certain land, which had been taken up by Government as forest reserve, were claimed by one who had admittedly been in possession and enjoyment of them for thirty years. The Government failed to establish any subsisting title of its own:

Held, (1) that the burden of proof had been shifted on to the Government and had not been discharged and accordingly that the claim should be allowed.

(2) Article 149 of the Limitation Act applies only to suits brought by, or on behalf of, the Secretary of State.

SECOND APPEAL against the decree of H. T. Ross, District Judge of Godavari, in appeal suit No. 20 of 1893, reversing the decisions of the Forest Settlement-officer, Godavari, in the matter of certain claims by the owner of the Gangole estate to various plots of land recently taken as forest reserve belonging to a Government village.

The District Judge decided in favour of the claimant.

This second appeal was preferred on behalf of the Secretary of State represented by the Forest officer of the Godavari district.

The Government Pleader (Mr. E. B. Powell) for appellant.

Pattabhirama Ayyar and Sriramulu Sastri for respondent.

JUDGMENT.—The question in this appeal is whether the plots three and four in the plan which have been taken up as forest reserve belong to the Government village of Pedda Kopalli or to the claimant's village of Lakshminarayana devupeta. The District Judge found in favour of the claimant.

It is admitted that the two plots have, for the last thirty years, been in the possession of the claimant, but the Government Pleader contends that, under the Madras Forest Act, it is for the claimant to make out his title in the first instance; that claimant has not produced his sale-deed, nor has he proved as against Government an

* Second Appeal No. 2 of 1895.

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adverse possession of sixty years. It is alleged that the Bhubund accounts prove Government possession up to 1854, and therefore that the presumption that claimant's thirty years' possession continued from an earlier period is rebutted.

There is, however, a clear finding of the District Judge in paragraph 15 of his judgment that there is no satisfactory proof of possession at any time, or of title, in the Government. We may point out that the limitation of sixty years prescribed by article 149 of the Limitation Act only applies to suits brought by, or on behalf of, the Secretary of State. The presumption of the Madras Forest Act is that all *unoccupied* land is at the disposal of Government, but if the land be really occupied when a notification is published under section 4, it will be ground for presuming that the occupant is the *prima facie* owner and shifting the onus on to Government (see the remarks of this Court in the *Periya Kalrayen case*(1)). Granted that it is incumbent upon the claimant in the first instance under sections 4 to 10 to prove some *prima facie* ground of ownership before Government can be called upon to disprove his title or prove its own, the onus is certainly shifted when the claimant starts with an admitted possession and enjoyment for thirty years. The Government could not compel the claimant to prove sixty years' possession, but must show a subsisting title of its own. *Secretary of State v. Vira Rayan*(2), *Secretary of State for India v. Bavotti Haji*(3) and the presumption in favour of Government is only as regards unoccupied land.

Even assuming the Bhubund accounts X and XI to be genuine documents, exhibit G shows cultivation of these three hamlets in 1865 by the claimant, and the omission of their names in exhibits VIII and IX is no more significant than the omission of Jillellagudem, which is admitted to belong to claimant. It is not however necessary to consider the documents since the onus has been shifted on to Government, and the finding is that no subsisting title has been proved.

The District Judge states that there is no dispute as to boundaries, and that the tracts comprised in the notification admittedly fall within the three hamlets.

The second appeal is dismissed with costs.

(1) S.A., 190 of 1888 unreported.

(2) I.L.R., 9 Mad., 175.

(3) I.L.R., 15 Mad., 315.

APPELLATE CIVIL.

Before Mr. Justice Best.

TIMMANNA BANTA (COUNTER-PETITIONER), PETITIONER,

v.

MAHABALA BHATTA (PETITIONER), RESPONDENT.*

Civil Procedure Code, ss. 311, 588, clauses 16, 28 and s. 622.

Land having been sold in execution of decree, one claiming that it had been held by the judgment-debtor benami for him applied that the sale be cancelled under section 311. He was not a party to the decree, and on that ground his petition was dismissed. The Appellate Court was of opinion that it had been wrongly dismissed and remanded the case to be disposed of on the merit:

Held, on revision, (1) that the order remanding the case was not appealable, and consequently that the petition for revision was maintainable;

(2) that the fact of the petitioner being a stranger to the decree did not preclude him from obtaining the relief sought under section 311.

PETITION under Civil Procedure Code, section 622, praying the High Court to revise the proceedings of O. Chandu Menon, Subordinate Judge of South Canara, on miscellaneous appeal No. 25 of 1894, setting aside the order of the District Munsif of Kasargode on miscellaneous petition No. 27 of 1894. By the proceedings sought to be revised the Subordinate Judge directed the District Munsif to restore to his file and dispose of on the merits a petition under section 311 of the Civil Procedure Code, which prayed that the auction sale of certain land should be cancelled. The petitioner was not a party to the decree, in execution of which the land in question was attached and sold, and his case was that the land was his property and that the execution proceedings had been carried on by the decree-holder and judgment-debtor in collusion. The District Munsif dismissed the petition on the ground that the petitioner being a stranger to the decree was not entitled to relief under section 311. This Subordinate Judge held that this view was wrong and made the order now sought to be revised.

The present petition was preferred by the purchaser at the auction sale.

Narayana Rau for petitioner.

Sankaran Nayar for respondent.

* Civil Revision Petition No. 604 of 1894.

1895.
August 19,
20, 27.

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BHATTA.

JUDGMENT.—The preliminary objection is taken that, as the order sought to be revised is one remanding the case and therefore appealable under clause 28 of section 588 of the Code of Civil Procedure, this petition for revision under section 622 is not maintainable. On the other hand, it is contended for the petitioner that the order in question being one passed under section 588 (article 16), any further appeal is barred by the last paragraph of the same section, which says that "orders passed in appeals under this section shall be final."

Clause 28 must, I think, be read with the final paragraph, and so read, it must, I think, be held not to apply to orders of remand made in appeals under the same section.

The preliminary objection is therefore disallowed. Then the question is whether the Subordinate Judge is wrong in holding that the counter-petitioner has a *locus standi* under section 311 of the Code. The case in *Abdul Huq Mozoomdar v. Mohini Mohun Shaha*(1), on which the Subordinate Judge rests his order, has no doubt been overruled by a subsequent decision of a full bench of the Calcutta High Court, which is to be found in *Asmutunniisa Begum v. Ashruff Ali*(2), and this latter decision was followed by this Court in *Subbarayadu v. Pedda Subbarazu*(3). But as is pointed out by Petheram, C.J., in the recent case of *Abdul Gani v. Dunne*(4), the Full Bench decision in *Asmutunniisa Begum v. Ashruff Ali*(2) does not exclude the right to come in under section 311 of any person whose interest would pass by the sale. As remarked by Ghose, J., in the same case, the test is "whether the petitioner would be entitled to bring a suit to contest the sale or to recover the property," and it has been held that the beneficial owner is bound by a decree passed against the benamidar.

The case of the counter-petitioner is, that the first defendant in the suit against whom the decree was obtained was merely a benamidar of the village, and that lands therein which belong to the petitioner have been sold without proper proclamation, &c.

The decision in *Asmutunniisa Begum v. Ashruff Ali*(2) and *Abdul Gani v. Dunne* (4) are both authorities for upholding the Subordinate Judge's order.

This petition is dismissed with costs.

(1) I.L.R., 14 Cal., 240.

(3) I.L.R., 16 Mad., 476.

(2) I.L.R., 15 Cal., 488.

(4) I.L.R., 20 Cal., 418.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

THE BRITISH INDIA STEAM NAVIGATION COMPANY
(DEFENDANTS), APPELLANTS,

1895.
September 5,
17, 25.

v.

IBRAHIM SULAIMAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Bill of lading—Cargo unclaimed on arrival of ship—Rights of shipowner to land goods—Damages by rain—Harbour Trust Act (Madras)—Act II of 1886.

The defendants' steam ship arrived at Madras on 4th December 1891, bringing bags of grain consigned to the plaintiffs who on that date were not authorised to receive them. The plaintiffs set up a custom that cargo of this description ought to be landed on the beach; but, as this could not be done in the absence of the consignees, the defendants landed it the same day on the pier and delivered it into the custody of the Madras Harbour Trust for storage pending delivery to the consignees. On the 8th of December 1891, heavy rain fell, and on the same date plaintiffs learnt that the cargo had been delivered on the pier. When the plaintiffs came to take delivery on that day, a considerable portion had been damaged by rain for which they now sued the defendants:

Held, (1) that where the consignees were unable to take delivery in the ordinary way on the beach, the master of a ship has the option of landing and warehousing the goods, and that delivery to the Harbour Trust for custody was not wrongful;

(2) that in the absence of proof that the defendants were negligent, or that they failed to deliver the goods, the suit must be dismissed.

APPEAL under section 15 of the Letters Patent against the decision of *Muttusami Ayyar, J.*, under section 617, Civil Procedure Code, upon a case stated by the Chief Judge of the Presidency Small Cause Court under section 69 of Act XV of 1882.

The facts appear sufficiently from the letter of reference which was as follows:—

"The plaintiffs claim Rs. 709-3-11 as damages sustained by them between the 4th and 8th December 1891 in respect of 248 bags of grain, part of a shipment of grain per S.S. *Futtalah*, consigned to plaintiffs at Madras, and which the defendants were employed by the plaintiffs to land, and which, owing to the defendants' neglect and default by allowing them to be exposed to rain, became damaged.

* Letters Patent Appeal No. 42 of 1894.

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The defendants deny the employment to land as alleged, or that they did land, that the damage, if any, was caused by plaintiffs' own conduct, that the damages claimed are excessive and plead that they are not indebted.

The facts of the case are that plaintiffs were the consignees of a cargo of grain from Calcutta per S.S. *Fultalah*, a ship belonging to the defendants' company, which arrived at the port of Madras on the 4th December 1891, that, prior to the arrival of the steamer, Messrs. Binny and Company, the agents of the defendants' company here, directed Messrs. P. Ramanjulu Naidu and Sons to be in readiness to land the cargo from the *Fultalah*, and that on the arrival of the *Fultalah* the said Messrs. P. Ramanjulu Naidu and Sons, acting under such directions, landed the *Fultalah's* cargo including that portion of it which included plaintiffs' consignment, and that this landing of cargo by Messrs. P. Ramanjulu Naidu and Sons was according to the custom of the defendants at this port, and that it was acquiesced in by the plaintiffs. Landing of "coast or bag cargo," the evidence establishes according to the custom of the port of Madras, is effected by landing it on the beach, but in this case a portion of the cargo of the *Fultalah* including the bags as to which plaintiffs claim damages were, for the convenience of the ship, landed at the pier—a proceeding which entails extra expense, &c. This landing on the pier of portion of plaintiffs' cargo was on the 4th December 1891.

On the 4th December plaintiffs had no authority to receive their consignment, and Messrs. P. Ramanjulu Naidu and Sons had no authority to deliver to them any goods. The authority to deliver plaintiffs' consignment to them was signed by Messrs. Binny and Company on the 7th December and is marked No. 4.

I find on the evidence that the first intimation given to plaintiffs that part of their consignment had been landed on the pier was on the 8th December, and that rain fell on the morning of the 8th December between 3 and 4 A.M., and that when plaintiffs' people first saw their bags, some of them had been damaged by rain.

It is a further fact that no delivery of any of the bags landed on the pier was taken by plaintiffs till 11th December, and it is proved that rain fell on and off for a week from 8th December. There is no evidence to show the specific damage suffered up to 8th December, nor of its increase up to the 11th December.

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On these facts I have given a judgment for the plaintiffs for Rs. 100 damages holding that the landing was the act of the defendants, and that the landing of a portion of plaintiffs' consignment on the pier was an unusual and unauthorized act, and damage was in consequence caused.

The defendants, however, contend that, under clause 1 of the Bill of Lading No. 1, they had the right to land the cargo, and that the contract for delivery was completed by the discharge from the ship into the boats of their agent. Landing during the argument was admitted by defendants' professional advisers to include delivery. The defendants' attorney having required me to state a case for the opinion of the High Court, I beg to submit the following question:—

"Whether, upon the facts as stated and found by me and 'above recited, my judgment deciding that plaintiffs are entitled 'to Rs. 100 damages by reason of the defendants' conduct in the 'landing and delivery of a portion of plaintiffs' consignment is 'correct.'"

The material portion of the bill of lading was as follows:—

"The company to have the option of delivering these goods 'into receiving ship or landing them at consignee's risk and 'expense, as per scale of charges to be seen at the agents' offices, 'the company having a lien on all or any part of the goods, 'against expenses incurred on the whole shipment. The company's liability shall cease as soon as the packages are free of the 'ship's tackle, after which they shall not be responsible for any 'loss or damage however caused.'"

Branson & Branson for plaintiffs.

Mr. K. Brown for the defendants.

MUTTUSAMI AYYAR, J.—This is a case stated for the opinion of this Court by the learned Chief Judge of the Court of Small Causes at Madras. The plaintiffs are the consignees of a cargo of grain shipped from Calcutta to Madras per S.S. *Fultalah*, which belongs to the defendants' British India Steam Navigation Company, Limited. The ship arrived at the port of Madras on the 4th December 1891, and prior to its arrival Messrs. Binny and Company, defendants' agents at Madras, had directed Ramanjulu and Company to land the cargo. Accordingly Ramanjulu and Company landed the cargo. So far as the landing was concerned, it is found to be in accordance with the custom of the port and to have been

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acquiesced in by the plaintiffs. But, according to that custom, landing is ordinarily effected by landing the cargo on the beach; but, for the convenience of the ship, Ramanjulu Nayudu and Company landed a portion of the plaintiffs' consignment at the pier on the 4th December 1891, though by so doing greater expense was entailed on the consignee. On the 4th December Ramanjulu Nayudu and Company had no authority to deliver, and the plaintiffs had no authority to receive the consignment, the authority to deliver being signed by Binny and Company only on the 7th December. It was on the 8th December that intimation was given to plaintiffs for the first time that a portion of their consignment was landed on the pier, but on the morning of that day between 3 and 4 A.M. there was rain. When the plaintiffs' men first saw the bags of grain, some of them were damaged; the cargo landed on the pier was only delivered to the plaintiffs on the 11th December. For one week after the 8th December, rain continued to fall off and on. There is no evidence to show the specific damage suffered up to 8th December or its increase up to 11th December. On these facts the learned Chief Judge gave judgment for plaintiffs for Rs. 100 damages, contingent on the opinion of this Court upon the case stated for its decision. He held that the landing was the act of the defendants, that the landing of a portion of the consignment on the pier was unauthorized and that damage resulted therefrom. He disallowed the defendants' contention that, under clause (1) of the Bill of Lading No. 1, the defendants' obligation to deliver was fully satisfied when the cargo was discharged from the ship into boats. The contention before me is that defendants' obligation was fulfilled upon the true construction of the bill of lading when the cargo left the ship's tackles. But the bill of lading provides that the company is to have the option of delivering the goods into the receiving ship or of landing them at consignee's risk and expense as per scale of charges to be seen at the agents' office, the company having a lien on all or any part of the goods against expenses incurred on the whole shipment, and that the company's liability shall cease as soon as the packages are free of the ship's tackle, after which they shall not be responsible for any loss or damage however caused. It goes on to state that, "If stored in receiving ship, godown, or upon any wharf, all risks of fire, dacoity, vermin or otherwise shall be with the merchant, &c." Under the bill

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of lading the defendants clearly had the option of landing, and in the case now before me they elected to land, but landed a portion of the consignment on the pier for the ship's convenience contrary to the custom of the port. It was admitted by the defendants' solicitors that landing included delivery and Ramanjulu Nayudu and Company are found by the learned Chief Judge to be defendants' agents. I am of opinion that the decision of the learned Chief Judge is correct, and I answer the question referred to this Court in the affirmative.

Against this decision the defendants preferred an appeal under section 15 of the Letters Patent.

Mr. J. G. Smith for the defendants. Appellants contended that it is the duty of the consignee to take delivery of cargo, and if he does not within reasonable time, shipowner may warehouse the goods (*Meyerstein v. Barber*(1)). The consignee may demand delivery into boats and, if he does so, shipowner will be liable for wharfage charges (*Syeds v. Hey*(2)), that the plaintiffs had no delivery telegram and made no demand. The shipowner is not bound to give notice of the ship's arrival to the consignee (*Harman v. Clarke*(3)). After the cargo left the ship's tackling, defendants not responsible (*Mackinnon v. Minchin*(4)), (*Bullock Brothers v. Toay Aung*(5)). Defendants delivered the goods to the Harbour Trust to be stored, subject to the ship's lien for freight—Madras Act II of 1886, section 52.

Mr. W. Grant for respondents. No appeal lies. This decision under section 617, Civil Procedure Code, by *Muttusami Ayyar, J.*, is not a judgment. Defendants are carriers and were bound to land according to custom of the port. The custom is to land in the beach and not in the pier. Landing at the pier entailed extra expense on the consignees, and they did not authorise such landing. There was no delivery to consignees (*Bourne v. Gatliffe*(6)).

JUDGMENT.—This is an appeal under the Letters Patent against the decision of Sir T. Muttusami Ayyar, J. upon a case referred to the High Court by the Chief Judge of the Presidency Small Cause Court. It was objected on the plaintiffs' behalf that no appeal lay; but we were of opinion that the decision was a judgment within the meaning of the clause of the Letters Patent. Moreover, it has to be observed that, under the rules of the High

(1) L.R., 2 C.P., 38.

(2) 4 T.R., 260.

(3) 4 Camp., 159.

(4) 6 M.H.C.R., 353.

(5) 24 W.R., 74.

(6) 7 Manning and Granger, 850.

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Court, the reference ought, in the first instance, to have been heard before a bench of two Judges.

The question raised is whether under the circumstances stated the defendants' company is liable for damage suffered by goods in consequence of their being exposed to rain on the pier where they were landed by the company. The opinion of Sir T. Muttusami Ayyar, J. which was in accordance with that expressed by the learned Chief Judge, was based on the finding that the landing of the goods by the company on the pier was an unusual and unauthorized act. It is found that the steamer arrived at Madras on the 4th December 1891, and that the defendants' agents unloaded the cargo and landed the plaintiffs' bags of grain on the pier. Under the bill of lading, the company has the option of landing the goods. From the date when the goods were so landed till the 11th December, when the plaintiffs took delivery of them, the goods remained in the custody of the Harbour authorities, and it was in that interval of time that the mischief which gives rise to the action occurred. At the time when the ship arrived and the goods were landed, it appears that the plaintiffs were not possessed of the bill of lading; they did not know of the landing of the goods until the 8th December, and we infer that before that day they had taken no action with regard to them. We also infer from the absence of any finding to the contrary, that it was not the fault of the company that the plaintiffs did not have the bill of lading at an earlier date. This being so, the case is one in which the company were not in a position to deliver the goods immediately to the plaintiffs either at the ship's side or on the beach. The master of a ship on its arrival in port is clearly not bound to seek out the consignees of cargo, nor is he bound to wait more than a reasonable time. His responsibility cannot be prolonged for the convenience of consignees. If they are not in a position to take delivery in the ordinary way, which, as appears in this case, is on the beach, the master has the option of landing the goods and warehousing them (*Meyerstein v. Barber*(1)).

The existence of the option possessed by the company under the circumstances of this case appears to have been overlooked both by the learned Chief Judge and by Sir T. Muttusami Ayyar J. when they say that the landing of the goods was an unauthorized and unusual act. Neither in the judgment of the former, nor

in the case, which does not give a complete statement of the facts, is it explained what would have become of the goods if they had been landed on the beach, and it is not easy to understand what difference it can make to consignees whether their goods, having to be warehoused, are taken to their destination by the route adopted in this case or by the beach. The only difference apparently lies in the expense. It would be most unreasonable to hold that under no circumstances masters of ships landing cargo in Madras can use the facilities which the Harbour Trust Act affords. The course may be unusual, but it is another thing to say that custom prohibits it, and we do not think it was intended so to find. There are two grounds on which the defendants might be held liable. Negligence might be proved against them, or it might be charged that they had failed to deliver the goods.

There is no evidence of negligence on their part in their handling of the goods, nor is it suggested that the Harbour authorities are not persons to whom goods may be properly entrusted. It is true that the latter did not take good care of the bales, but that circumstance cannot make the defendants liable, if otherwise they were free from blame.

The other ground of liability also fails when once it is admitted that, in the absence of the consignees, the company were entitled to land the goods and put them in the charge of some third person. No other delivery is, under the circumstances, possible. The learned Chief Judge referred to the case of *Bourne v. Gatliffe*(1). The decision in that case, which turned upon the pleadings, rests upon a ground which is absent in the present case. The plea was held to be bad, because it did not show that the captain had a right to land the goods, or that a reasonable time had elapsed to enable the consignees to come and receive them. Under these circumstances, it is intelligible that the delivery not being shown to be at a usual place, was held not to be a delivery to the consignees. That decision affords no authority for the position that the delivery in the circumstances of the present case was not in accordance with the contract. The case of *Mackinnon v. Minchin*(2) resembles more closely the present case, the bill of lading appears to have been similar and there too the consignee did not present himself to take delivery. We think that the

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(1) L.R., 2 C.P., 38.

(1) 7 Manning and Granger, 850.

(2) 6 M.H.C.R., 353.

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conclusion at which the Chief Judge arrived is wrong and that judgment ought to have been given for the defendants. The costs in this Court will be costs of the suit and follow the result.

APPELLATE CIVIL.

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

KUNHI MAMOD (DEFENDANT No. 1), APPELLANT,

v.

KUNHI MOIDIN (PLAINTIFF), RESPONDENT.*

Muhamadan law—Relinquishment of rights of inheritance—Relinquishment executed before ancestor's death.

A Muhamadan sued to recover his share of the property by his mother deceased. It appeared that before her death he had by a registered deed in consideration of Rs. 150 renounced all his claims on her estate :

Held, that the renunciation was binding on the plaintiff.

SECOND APPEAL against the decree of A. Venkataramana Pai, Subordinate Judge of Calicut, in appeal suit No. 535 of 1894, modifying the decree of P. Govinda Menon, District Munsif of Betutnad, in original suit No. 432 of 1892.

The plaintiff sued to recover his one-half share in the estate of his mother who died in 1890. The first defendant was the plaintiff's brother and he pleaded that by a registered document, dated the 15th March 1884, and executed by the plaintiff in favour of his mother, the plaintiff had in consideration of Rs. 150 paid to him in respect of the share in her estate to which he would become entitled on her death acknowledged satisfaction of all his claims thereto and admitted that he had no longer any right whatever to her properties.

The District Munsif held that this instrument was invalid for the reason that the rights thereby renounced had not then vested and he passed a decree for plaintiff. This decree was confirmed with a slight modification by the Subordinate Judge.

* Second Appeal No. 132 of 1895.

Defendant No. 1 preferred this second appeal.

Subramania Sastri for appellant.

Respondent was not represented.

JUDGMENT.—The Courts below have allowed plaintiff a share in items 1, 3, 5, 6, 7 and 9 in schedule A on the strength of the decision in *Mussummant Khanum Jan v. Mussummant Jan Beebee*(1). We have referred to the report itself, and are of opinion that the case is not one of any great authority. It is true that the majority of the Muhamadan Law officers expressed the opinion that the renunciation was not valid on the ground that the right had not vested, but the opinion was not unanimous, and eventually the Sadr Court held that the receipt of the money had not been satisfactorily proved. Here, however, it is not denied that plaintiff received the money, and there is the further difference that the right had vested, but that provision was made for the mother by setting apart some property for her maintenance for her life, after which the plaintiff accepted the money value of his share. *Primâ facie* there is nothing illegal in the transaction and in the absence of clear proof that it is forbidden by Muhammadan law we think plaintiff should be held to be bound by it.

The only other point taken is as to the movables, but this is a question of fact on which the Subordinate Judge has given a finding, though the evidence upon which it is based is rather vague.

The decree must be modified by disallowing plaintiff's claim to items 1, 3, 5, 6, 7 and 9 in schedule A and in other respects confirmed.

The appellant will be allowed the costs of the appeal.

We do not interfere with the award of costs in the Courts below.

(1) 4 S.D.A., 210.

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ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

KUPPUSAMI NAIDU, PLAINTIFF,

v.

SMITH AND COMPANY, DEFENDANTS.*

*Building Contract--Breach--Power of re-entry--Certificate of architect,
how far conclusive.*

By a building contract entered into between plaintiff and defendants, it was agreed that plaintiff should erect certain premises on behalf of the defendants at the rates specified in the bill of quantities annexed. The agreement provided that defendants should pay the plaintiff at the rate of 90 per cent. upon the value of work executed and materials laid down as certified by the architect, and that should defendants make default in so doing for a period beyond fourteen days after the amount thereof should have been certified, plaintiff should be at liberty to suspend the works and require payment of all works executed and materials laid down. The agreement further provided that, if the contractor should suspend or delay the performance of his part of the contract, the defendants might through their architect give notice requiring the works to be proceeded with and in case of default on the part of the contractor for a period of twenty-eight days might enter upon and take possession of the premises. It was further provided that the decision of the architect with respect to the amount, state, and condition of the works actually executed or in respect to any questions that may arise shall be final. During the continuance of the works disputes arose as to the amount due to the plaintiff although certified by the architect as agreed which the defendants did not pay, and in consequence plaintiff refused to continue the work. Whereupon defendants after giving due notice entered upon the premises. Plaintiff sued for damages in consequence of the defendants having taken possession and for the balance due on the accounts:

Held, (1) that the defendants committed a breach of the contract by refusing to pay the full amount due under the architect's certificate;

(2) that the plaintiff having thereupon rescinded the contract which he was not entitled to do, the defendants were entitled after due notice to enter and take possession;

(3) that in the absence of proof of collusion between the architect and the plaintiff, the defendants were bound by the architect's certificate as to the amount due to the plaintiff.

The plaintiff agreed to build for the defendants certain premises under a written contract, dated 21st August 1893, whereby William Norman Pogson was appointed architect. The following portions of the said contract are material:—

Paragraph 13. "If the contractor shall suspend or delay the performance of his part of this contract, Messrs. W. E. Smith and Company by and through their architect may give to the contractor notice requiring the works to be proceeded with, and in case of default on the part of the contractor for a period of twenty-eight days, it shall be lawful for Messrs. W. E. Smith and Company by their architect to enter upon and take possession of the works.

Paragraph 14. "When the value of the works executed and materials laid down upon the site for use in executing the works and not included in any other former certificates shall, from time to time, amount to the sum of Rs. 3,000 (but not exceed Rs. 6,000 per mensem) at the architect's reasonable discretion, the contractor shall receive payment at the rate of ninety per cent. upon such value certified for by the architect.

Paragraph 16. "If Messrs. W. E. Smith and Company shall make default in paying any moneys to which the contractor may become entitled for a period beyond fourteen days after the amount thereof shall have been certified, the contractor shall be at liberty to suspend the works and to require payment for all works executed and all materials laid down on the site and for any loss which he may sustain upon any goods or materials purchased for the works, and in such case the contractor shall not be bound to proceed further with the works contracted for. The contractor shall be entitled to such interest and at such rate as the architect shall certify upon all moneys payable to him, payments of which have been unduly delayed.

Paragraph 17. "The decision of the said William Norman Pogson with respect to the amount state and condition of the works actually executed, or in respect to any and every question that may arise concerning the construction of the present contract or the said plans or drawing specification, bill of quantities for or in anywise relating thereto shall be final and binding and without any appeal whatever."

The work appears to have been in progress from October 1893 to May 1894 when the plaintiff stopped building. In February 1894, certain iron columns for the building works arrived in Madras, and at the instance of Mr. Pogson the defendants advanced Rs. 1,000 to enable plaintiff to pay for them, and it was agreed that the amount so advanced should be adjusted at the time of the next certificate, although there was a dispute

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with regard to the mode in which the adjustment was to be made. The next certificate for Rs. 6,840 was granted on the 4th April 1894, and was presented to defendants who paid on the 6th April Rs. 200, and on the 7th April Rs. 3,500; but further payments were postponed pending the receipt of some information from the architect, who furnished an account showing that, after deducting Rs. 10,226 already received by the plaintiff up to 4th April including the Rs. 1,000 paid on 16th February for the iron columns, the balance due to plaintiff was Rs. 7,082-8-0. With regard to further payment on this certificate, disputes arose and eventually on 14th April defendants paid the plaintiff a further sum of Rs. 2,140, making up the total payments on this certificate to Rs. 5,840 out of Rs. 6,840, the total amount due under the certificate less ten per cent. provided by the contract. The deficiency of Rs. 1,000 seems to have arisen from the fact that the defendants deducted this amount from the money due under this certificate, while the plaintiff alleged as the Court found, that credit had already been given to defendants for this Rs. 1,000 by the architect when giving his previous certificate. Further correspondence ensued in which the architect tried to convince the defendants of their mistake but without effect; and on the 21st May the plaintiff gave notice to the defendants that he suspended work and asked for the settlement of all his accounts within ten days. On the 31st May plaintiff wrote insisting on payment of the amount of the certificate in full, and defendants wrote to the architect asking him to tell the plaintiff that they would pay him Rs. 1,000 less 10 per cent. On the 1st June plaintiff wrote to the architect that he wanted to be paid the full amount as per bill of works. On the 5th June the defendants wrote to the plaintiff that if he delayed in proceeding with the work for twenty-eight days they will take possession of the premises and proceed to complete the work. On the 6th July the defendants offered through the architect to pay the plaintiff Rs. 2,500 on condition he resumed work at once. On the 9th July plaintiff replied saying that the matter was in the hands of his solicitor. On the 10th July, defendants took possession of the premises.

Mr. J. H. M. Ryan and Mr. F. H. Bakewell for plaintiff.

Mr. K. Brown and Mr. R. F. Grant for defendants.

JUDGMENT.—The plaintiff Coopooswamy Naidu sues the defendants Messrs. Smith and Company for the sum of Rs. 21,984-13-4

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said to be due to him in consequence of their having broken the contract entered into by him with them on the 23rd August 1893, with reference to the construction of their new premises on which he had been working from October 1893 till May 1894 when he stopped building. The defendants deny the breach alleged and their liability to pay the amount claimed. The main questions for determination are (1) Did the defendants break the contract? (2) What amount if any are they bound to pay? These questions involve the decision of certain subsidiary points which will be dealt with in their proper place under the respective heads. Now as to the first question the facts, so far as they are material to it, appear so clearly in the written communications, which passed from time to time between the parties and between one or other of them, and Mr. Pogson appointed as the architect of the building that for a clear comprehension of them I need scarcely do more than set out the correspondence quoting the words of the particular communications when necessary and add my own observations as to the two or three circumstances about which there is some dispute.

It is sufficient to begin with what occurred since February 1894. In that month, certain iron columns which had been ordered by the plaintiff arrived at Madras. Though according to the contract the defendants were not bound to pay the plaintiff any money except for work actually executed or materials laid down upon the site of the building and certified to by the architect, yet, at the instance of Mr. Pogson, the defendants advanced to the plaintiff on the 16th February Rs. 1,000 to enable him to pay for the said columns. That the amount was to be adjusted at the time of the next certificate is admitted by both parties, although there is a dispute as to the particular mode in which the adjustment was to be made. On behalf of the plaintiff it is sought to be established that Mr. Pogson was to give credit for the said amount and give a certificate for the balance, whilst on behalf of the defendants it is urged that the understanding was that they themselves should deduct the amount when payment on account of the next certificate is made. Oral evidence has been adduced in support of these respective contentions. But I am not inclined to accept either version. My opinion is that at the time the advance was made neither party thought it necessary to define that in adjusting the amount the procedure was to be the one

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or the other. And considering that the adjustment was to take place without much delay, it is hardly likely that the parties felt any necessity for being so precise in the matter as they are now anxious to make out. If any distinct arrangement was entered into about the money, some writing would have passed stating the exact understanding which would not have been left to depend upon mere memory. I believe there was no definite agreement in the matter, a view which is confirmed by Mr. Pogson's letter of the 15th February, wherein he asks the defendants to pay the amount on account as well as by exhibit 41, the plaintiff's receipt for it dated the 16th, in which the payment is endorsed in similar terms.

The next certificate previously spoken of was granted on the 4th April, 1894, exhibit C, and was presented by the plaintiff to the defendant, who paid him on the 6th Rs. 200 and on the 7th Rs. 3,500. They appear to have postponed further payment pending the receipt of some information for which they had applied to Mr. Pogson. He says that he sent them exhibit D D which is headed "items of works comprising the third instalment of payment" and which shows that, after deducting Rs. 10,226 received by the plaintiff up to the 4th April including the Rs. 1,000 paid on the 16th February for the iron columns, the balance due to him was Rs. 7,082-8-0. The defendants say that exhibit D D never reached them, but it seems to me they are wrong in saying so. I think that this is the enclosure referred to in exhibit C C written by the defendants to Mr. Pogson on the 9th April and which runs "with reference to the enclosure and at the request of Mr. Cormac (the clerk of the works appointed by the defendants) we have to return the certificate and to ask that you will be so good as to alter the amount to Rs. 5,385." For these figures appeared to have been arrived at by deducting from Rs. 7,082-8-0, the sum of Rs. 1,000 and the 10 per cent. (a deduction provided for under paragraph 13 of the contract) on the balance Rs. 6,082-8-0. The exact sum would be Rs. 5,374-8-0 instead of Rs. 5,385. What the small difference of Rs. 10-8-0 consisted of does not appear, but the language of exhibit C C clearly points to the enclosure being different from the certificate which the defendants wanted to be modified. However this may be on the very next day Mr. Pogson addressed the defendant exhibit E E which ought to be quoted. He writes "I measured up the works and send you the bill of quantities (exhibit F F).

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"The present value of the works is Rs. 19,491 accordingly the certificate I granted for Rs. 7,600 is quite reasonable and fair. I trust, under these circumstances, you will pay the amount certified for. I went over the amount with Mr. Cormac here yesterday and this morning my measurements show that my certificate valuation is below the value." On the 14th April the defendants paid the plaintiff Rs. 2,140, which brought up the total payment to Rs. 5,840. On the same day they wrote to Mr. Pogson "we have paid to Mr. Coopposawmy as per your certificate. We have done this under protest there being several items in the bill (F F) that will have to be adjusted on your return to Madras." In making the statement "we have paid Coopposawmy as per your certificate," the defendants seem to have ignored the fact that Mr. Pogson had already included the Rs. 1,000 paid in February in the Rs. 10,226 for which he gave credit to the defendants in arriving at the balance in exhibits D D and F F, and to have thought that they were entitled to treat that amount as a payment towards the amount of exhibit C. For otherwise the defendants would have had to pay the plaintiff Rs. 6,840, i.e., the amount of the certificate less 10 per cent. The plaintiff, however, was not satisfied and he wrote to the defendants on the 21st April complaining that he had not received full payment (exhibit D). The defendants' reply to this dated the same day runs. "In reply to your docket we consider the amount of Mr. Pogson's certificate has been fully paid. As regards the Rs. 1,000 advanced you for iron work, Mr. Pogson at the time said it was to be deducted from your next bill, this we have done; until Mr. Pogson's return we can do nothing in the matter." On the 28th April the plaintiff wrote to Mr. Pogson that he had received only Rs. 5,840, and asked him to give a fresh certificate to enable him to get full amount for works done up to that date. In forwarding the said letter, Mr. Pogson wrote on the same day to the defendants thus: "I herewith enclose a letter from your contractor, wherein he says that he has only received part of the payment of my certificate, I cannot understand this, for on the 21st instant you write to me and say that you have paid him the full amount of Rs. 6,700 (Rs. 7,600) less of course 10 per cent. as per agreement. I think there must be some misunderstanding, so kindly explain." The defendants do not appear to have answered Mr. Pogson at once. They however wrote to him on the 14th

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May (exhibit J J) wherein after taking objection to several items mentioned in the bill of works conclude with the observation that they had deducted out of the amount of the certificate Rs. 1,000 advanced for the iron work. On the 7th May, Mr. Pogson replied by exhibit K K, in which he enters into an explanation as to the items objected to by the defendants, which it is unnecessary to repeat. But his observations as to the Rs. 1,000 ought to be quoted. He says "In regard to the Rs. 1,000 advance for "iron works, the figure your clerk gave me from your ledger was "Rs. 10,226, which included this advance. In consideration that "I granted only Rs. 7,600, in lieu of the actual amount of Rs. "9,265-9-11. I fail to see why you should dispute my certificate "at all. The contractor complained bitterly, because I would not "grant him the full amount of Rs. 9,265-9-11 and says it is "impossible for him to advance the works unless his dues are paid "in whole, however I refused to listen to his pleadings. You may "fully depend upon me that I will not be too lenient in granting "him excess payment as I fully know and feel that I am respon- "sible for all money spent. On the other hand, I must ask you "to remember the terms of the agreement, wherein, it says, that "the architect shall decide the amount due to the contractor and "that his decision shall be final and binding and without appeal. "See clause 17. The keeping back of the payments on certificate "beyond fourteen days exposes you to the contractor's enforcing "clause 16 and breaking the agreement, and this is what I seriously "wish to avoid." But the explanation had no immediate effect upon the defendants, and the plaintiff on the 21st May gave notice to the defendants that he suspended work and asked for a settlement of all his accounts within ten days (exhibit G). On the next day Messrs. Barclay, Morgan and Orr replied on behalf of the defendants stating that the latter had committed no default (for which a reason is assigned by the solicitors which I shall consider later on) and calling upon the plaintiff to proceed with the works at once, and on his failing to do so, that will be treated as a breach of his agreement and the contract put an end to. On the 31st May, the plaintiff answered by exhibit J, wherein he insisted upon compliance with his previous demand. The defendants relented and wrote to Mr. Pogson asking him to tell the plaintiff that they would pay him Rs. 1,000 less 10 per cent. if he would call on them (exhibit K). But the plaintiff on the 1st June wrote to Mr.

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Pogson that he wanted to be paid the full amount as per bill of works FF. On the 5th June the defendants wrote to the plaintiff that, if he delayed in proceeding with the work for 28 days, they will take possession of the premises and proceed to complete the work. The plaintiff, however, took no notice of the communication. On the 6th July the defendants offered through Mr. Pogson to pay the plaintiff Rs. 2,500 on condition he resumed work at once. On the 9th July, the plaintiff replied to say that the matter was in the hands of his solicitors Messrs. Branson and Branson (exhibit P). This was sent by Mr. Pogson to the defendants on the 11th, and they took possession on the 12th.

Having thus stated, though at some length, nearly all that appears to me to be necessary for the proper understanding of the question under consideration, I shall now proceed to deal with the points at issue.

Now the plaintiff's contention is that the defendants broke the contract by withholding payment of the Rs. 1,000 required to make up the Rs. 6,840 due to him under the certificate (exhibit C) less 10 per cent. and secondly by taking possession of the premises on the 12th July and proceeding with the work. I shall first take up the former contention. The answer of the defendants to this is that, according to the proper construction of the 14th paragraph of the contract, the plaintiff was not entitled to claim in any one month payment of more than Rs. 5,400, i.e., Rs. 6,000 less 10 per cent. The portion of the said paragraph material for the present purpose runs, "when the value of the works executed and materials "laid down upon the site for use in executing the works and not "included in any other former certificate shall, from time to time, "amount to the sum of Rs. 3,000, but not exceed Rs. 6,000 per "mensem at the architect's reasonable discretion, the contractor "shall receive payment at the rate of 90 per cent. upon such value "certified by the architect until the value of the works actually "executed shall amount to 50 per cent. of the full amount of the "contract." The manifest and immediate object of the clause is to point out how the architect should, in granting certificates during the progress of the building, distribute the value of the work done or materials laid down upon the site over the period that may elapse between the commencement of the work and the time when the value of the works actually executed comes up to 50 per cent. of the full amount of the contract, as is unquestionably shown by

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the existence in the clause of the term "*per*." That the above is the correct interpretation of the term will appear from the judgment of Lord SELBORNE in *Pryce v. Monmouthshire Canal and Railway Companies*(1) where in construing the words "per ton per mile not exceeding" the following passage occurs: "And I agree with Lord Justice James that the Latin preposition '*per*,' as it is adopted into our popular language and as it is, here used, properly and primarily signifies the distribution of the charge over the whole aggregate weight of goods for the whole aggregate distance that they are conveyed tons and miles being mentioned only as common measures of weight and distance convenient for the measurements which this maximum scale would necessarily require." And it is hardly necessary to say that the term has the same meaning when it is used, as it here is, with reference to a word denoting time, as it has when it governs words indicating quantity or distance as it did in the case above referred to.

To illustrate my meaning, suppose the plaintiff had laid down upon the premises, in the very first month he commenced to work, materials of the value of Rs. 12,000. The architect would have had to distribute the amount over that and the next month, and give to the plaintiff, if he applied for it, one certificate for half the amount in the former and another for the remainder in the latter month. But suppose the plaintiff had chosen to wait and asked at the end of the two months one certificate for the whole amount, could the architect have refused to comply with the request? On the face of the clause in question, I fail to see anything to prevent the grant of such a certificate. And considering that, by multiplying the maximum mentioned in the clause by the number of months which have expired since the commencement of the work, the defendants could ascertain the possible limit of their liability to the contractor, I do not see what reasons there are for thinking that they were not expected to be ready to meet such liability. If, however, the intention was as alleged on behalf of the defendants that whatever the amount of a certificate or certificates granted in accordance with the rules laid down for the architect's guidance may be, the defendants had not to pay more than a certain amount in any one month, why was that not stated in plain and unambiguous language? A few words such as

(1) L.R., 4 App. Cases, 216.

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"provided Messrs. Smith and Company shall not be liable to pay in any one month a sum exceeding" would have aptly conveyed the alleged intention. But why, instead of that simple course, this round-about and to my mind almost unintelligible way of expressing the alleged intention was adopted, I find it difficult to understand. It is quite true that the direction to the architect to distribute the amounts to be certified in the manner prescribed would, in some measures, affect the amounts to be paid until the 50 per cent. limit is reached. But that would be only as an indirect result of the provisions which were inserted for a different purpose. The construction suggested on behalf of the defendants makes what would thus be consequential and secondary the primary object and involves a serious modification of the sense of the clause according to its ordinary and grammatical interpretation. Moreover the conduct of the defendants themselves shows that the construction suggested on their behalf is an afterthought. During the cross examination of the plaintiff the learned Senior Counsel for the defendants wanted to be allowed to prove by oral evidence that the words "but not exceed Rs. 6,000" in the paragraph in question were inserted for the express purpose now alleged. If this were a fact one would expect that the defendants would have taken the present objection the moment the certificate (exhibit C) was presented for payment. But singularly enough in none of the letters to the plaintiff or to Mr. Pogson is there a word about it. It was left for their solicitors to make the discovery for the construction in question is first suggested in their letter to the plaintiff, dated the 22nd May 1894, exhibit H, already referred to. I have therefore no hesitation in holding that the defendants' contention is unsustainable, and that in refusing to pay for more than fourteen days allowed by the contract the Rs. 1,000 due to the plaintiff under exhibit C even after it was pointed out by Mr. Pogson that the advance for the iron columns had been included in Rs. 10,226 for which he had given the defendants' credit in framing the certificate, they broke one of the terms of the contract.

The second point is whether there was a further breach of contract on the part of the defendants in their having entered into possession in the middle of July for the purpose of taking steps to complete the works, which had been at a standstill since 22nd May. The contention of the plaintiff is that in consequence of the

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defendants' failure to pay the Rs. 1,000 he suspended the work, but temporarily under paragraph 16 of the contract and that the defendants' interference during the period of suspension was not lawful. The contention on the other side is that the suspension was not merely temporary that there was a complete cessation of work and rescission of the contract and that their taking possession was lawful. I agree with the defendants on grounds which I shall now consider *seriatim*.

In the first place I am of opinion that the plaintiff did not merely suspend the work for a time, but that he, in consequence of the defendants' default, rescinded the contract as he was empowered to do under the paragraph referred to, which after providing that the plaintiff may suspend the work and demand payment of moneys due to him adds "and in such case the contractor shall not be bound to proceed further with the works." That the plaintiff did enforce this clause is clear from exhibit G, wherein on the 21st May he wrote to the defendants "I beg you will take notice that I have suspended all works connected with your new building as you have failed to fulfil several considerations written in the agreement, dated 21st August 1893, and I am also afraid to continue the work further as you have more than once interfered with me against the agreement, and I therefore beg you will be pleased to settle all my accounts connected with the above work within ten days from this day, after which I am not responsible for the loss or damage sustained by your property, in the new premises." Even if I were in error in inferring from the said letter that the plaintiff intended to enforce the clause of paragraph 16 quoted above, it seems to me that the letter coupled with his subsequent conduct brings the case within the latter part of the rule laid down in *Mersey Steel and Iron Company v. Naylor Benzon and Co.*(1) where Lord Selbourne states it thus "according to the authorities, and according to sound reason and principle the parties might have so conducted themselves as to release each other from the contract and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a further performance of the contract." Admittedly subsequent to the date of G the plaintiff was requested several times to go on

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with the work; but he persistently refused to comply with the demand. The fair inference to be drawn from it is that he treated the contract as at an end in consequence of the default of the defendants, who though, of course, liable to pay him according to the contract what was till then due to him, were, however, thereby released from liability to future performance. Another ground on which the resumption of possession is justified is that the defendants being dissatisfied with the suspension of the work gave the plaintiff under paragraph 13 of the contract notice (exhibit N) on the 5th June calling upon him to go on with the work, and as the plaintiff did nothing for more than the 28 days specified in the paragraph, the defendants had every right to enter into possession which they accordingly did. These facts are admitted and the provisions relied upon in my opinion entirely support the defendants' contention. Should it however be thought that paragraph 16 of the contract must be read independently of 13 and that the provisions of the latter are inapplicable to suspension under the former, even then, it cannot, I think, be rightly argued that the plaintiff was entitled to stop the work as long as he pleased, simply because paragraph 16 specifies no time during which such suspension may last. For "the fact that time is not specified or not so specified as to be of the essence of the contract does not affect the general right of either party to require completion on the other part within reasonable time and give notice of his intention to rescind the contract if the default is continued." Pollock on Contracts, 6th edition, 488, *Green v. Sevin*(1). Moreover it having been held that the court may infer from the nature of a contract, even though no time be specified for its completion, that time was intended to be of its essence to this extent, that the contracting party is bound to use the utmost diligence to perform his part of the contract, *Macbryde v. Weekes*(2) having regard to the fact that any delay in cases like the present would prove detrimental to the building owner and taking also into consideration that in cases falling within paragraph 13, delay for more than four weeks after notice is expressly made improper, I think the refusal by the plaintiff to go on with the work from 22nd May to the middle of July was, according to the authorities, such as to entitle the

(1) L.R., 9 App. Cases, 434.

(1) L.R., 13 Ch. D., 599.

(2) 22 Beav., 533.

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defendants to rescind the contract and enter into possession. I accordingly hold that there was no breach of contract on the part of the defendants in having done so.

The next question is as to the amount to which the plaintiff is entitled. The claim for Rs. 12,000 stated to be the damages due to the plaintiff in consequence of the defendants having taken possession in July fails, as I have arrived at the conclusion, that the resumption of possession was rightful.

The remaining question is what is the amount due to the plaintiff by the defendants on account of their failure to pay the Rs. 1,000, the balance due under the certificate (exhibit C) and the consequent breach of contract. The plaintiff's right in this respect is clearly defined in paragraph 16 of the contract itself, which entitles him only "to payment for all works executed and for all materials laid down on the site and for any loss which he may sustain upon any goods or materials purchased for the works." These explicit provisions, however, have, for some reason or other, not been attended to in framing the plaint, the schedule to which does not state the value of work done or the materials laid down upon the site or loss sustained; but instead gives the prices of materials alleged to have been purchased and details of other expenses said to have been incurred by the plaintiff in connection with the building in general. And nearly half the time taken up by the trial was spent in investigating the question of the truth and correctness of the statements in the said schedule. In thus departing from the plain directions of the contract the plaintiff has followed an entirely erroneous course and consequently I refrain from discussing the evidence adduced with respect to this part of the case. I would only observe that, even if I were of opinion that the claim thus made by the plaintiff were regular, I should hesitate very much to allow it without considerable reductions, since the oral evidence in support of it, which is chiefly that of the plaintiff, has to be received with great caution as his cross examination clearly shows, and since the accounts (exhibit 2 series) produced to corroborate the oral testimony appear to be books not kept in the usual course of business, but prepared in view to this litigation. (His Lordship, after discussing the evidence for plaintiff, as to the amount due and declining to act upon it, continued as follows):—

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I now pass to consider that of Mr. Stephens, called on behalf of the defendants. I am unable to accept this either, except as to the items appearing at the end of exhibit 44, and amounting to Rs. 2,960-12-7, the correctness of which I see no reason to question. In coming to this conclusion, I am not to be understood as in any way doubting Mr. Stephens' veracity; for he appeared to me to be a disinterested and straightforward witness. But as observed by Denman, J., in *Stevenson v. Watson* (1), "it frequently happens that there will be skilled architects called on one side and on the other, who very often honestly differ as to the proper mode of measuring up and disagree to the extent of hundreds of pounds as to what is owing under a bill of quantities." Further the evidence of architects as to valuation is in truth expert testimony, which the court has little means of testing except perhaps where the conduct of the parties interested furnishes some sort of guide to forming an opinion in the matter as, I think, is the case in the present instance. Testing it in this way, though Mr. Stephens' measurements appear to be very accurate, his rates, I conclude, are lower than they should be. For, if, as Mr. Stephens thinks, that up to the 10th April the work executed and materials laid down upon the site amounted to only about Rs. 13,600 in round numbers, it is scarcely likely that the defendants who, from the correspondence produced in this case, appear to have exercised great watchfulness over the works, notwithstanding the employment by them of Mr. Pogson and a competent clerk of the works Mr. Cormac, lately an Assistant Engineer in the Public Works Department, would not only have paid the plaintiff over Rs. 15,000, but also consented to give him the further sum of Rs. 2,500, which they offered through Mr. Pogson on the 6th July (exhibit O).

It remains for me to deal with exhibit FF, dated the 10th April, submitted by Mr. Pogson in his capacity of architect under the contract to the defendants in consequence of the objections taken by them to exhibit DD and the certificate (exhibit C) and which (FF) was clearly intended to be a decision (see exhibit KK) under paragraph XVII of the contract, whereby the architect's decision "with the respect to the amount, state and condition of the works actually executed or in respect to any and every question that may arise concerning the construction of the

(1) L.R., 4 C.P.D., 161.

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"present contract or the said plans or drawing specification bill of quantities for or in anywise relating thereto shall be final and binding and without any appeal." The defendants impeach this valuation on the ground of collusion between Mr. Pogson and the plaintiff. The only allegation made in support of the plea of collusion is that there was, unknown to the defendants, a contract between Mr. Pogson and the plaintiff, that the latter was to pay the former 2½ per cent. on the estimated value of the buildings for his services as a quantity surveyor and that such contract gave Mr. Pogson an interest which rendered him incompetent to give a binding decision. On behalf of the plaintiff the existence of the alleged agreement is denied. But assuming for argument that there was such an agreement, I fail to see how it was likely to render Mr. Pogson partial to the plaintiff as against the defendants who were under a contract to pay Mr. Pogson at the rate of 5 per cent. On the contrary, I should think the alleged agreement would only go to reduce somewhat the "unindifferency" (as it was called in *Ranger v. Great Western Railway Company*(1)), that Mr. Pogson would otherwise, upon the defendants' theory, have shown to them. Be this as it may, the point is whether, supposing that Mr. Pogson acquired in consequence of the alleged contract an interest as stated, it affects the validity of his decision as contended on behalf of the defendants. In this connection their counsel, during the argument, treated Mr. Pogson as if he were an arbitrator. The authorities on this point are not however very decisive as will be seen from a few to which I shall refer. In *Scott v. Corporation of Liverpool*(2) Lord Chelmsford, L.C., observes—"But where the contract provides for the determination of the claims and liabilities themselves of the contractor by the judgment of some particular person this would be incorrectly called a provision for submission to arbitration as no dispute can exist in such a case as everything being dependent upon the decision of the individual named and till he has spoken no rights can arise which can be enforced either at law or in equity."

In *Wadsworth v. Smith*(3) Cockburn, C.J., says "I am of opinion that in section 17 by 'an agreement or submission or arbitration by consent' is meant an agreement by which it is intended by the parties that the matter shall be submitted to a judicial enquiry

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"before a person chosen between them instead of being left to the ordinary proceedings of a court of law and not merely left to the uncontrolled and off hand decision of some architect or surveyor to be appointed by one of the parties only. Here the clause in question gives the defendant power to put an end to the agreement if there is unreasonable delay or unsatisfactory conduct on the part of the plaintiff, such delay or unsatisfactory conduct to be ascertained and decided in writing by Messrs. Scargill and Clarke, the defendants' architects, for the time being against whose decision there shall be no appeal. I am by no means disposed to say that this amounts to a submission to arbitration, although it is certainly wider and different from many of the ordinary clauses as to the certificates of architects which have occurred in cases under building contracts and which have been determined to be binding on the builder and not to be clauses of arbitration." *Blackburn, J.*, remarks "where by an agreement the right of one of the parties to have or do a particular thing is made to depend upon the determination of a third person that is not a submission to arbitration nor is the determination an award; but where there is an agreement that any dispute about a particular thing shall be enquired of and determined by a person named that may amount to a submission to arbitration and the determination though in the form of a certificate be an award." *Hannen, J.*, says "I think this is not an agreement or submission to arbitration. The clause in question seems to me no more than an extension of the ordinary clause in building contracts, that the certificate of the architect shall be conclusive as to the work done and the mode of doing it." Perhaps the statement most favourable to the contention put forward on behalf of the defendants is a dictum of *Denman, J.*, in *Stevenson v. Watson*(1) already referred to, wherein the architect's duties are stated to be "very analogous to the duties of an arbitrator;" but this is qualified by the statement "I do not intend to hold that he is to all intents and purposes an arbitrator." But supposing that the being interested is necessarily a disqualification in arbitrators in the strict legal sense a question on which I express no opinion—it does not follow that the same is true with reference to persons occupying the position which Mr. Pogson occupied here. In support of this view it is sufficient to refer to the observations of Baron

(1) 5 H.L.C., 88.

(2) 3 D.G. & J., 368.

(3) L.R., 6 Q.B., 336.

(1) L.R., 4 C.P.D., 161.

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Bramwell in *Ellis v. Hooper*(1) in which, a dispute having arisen as to the result of a horse race, the stewards (who by the rules of the course were to be arbiters of all disputes) decided against a horse against which one of them had made a bet, it was held that the decision of the stewards was not invalid on the ground of one of them being an interested arbitrator. Baron Bramwell said "the question put by my brother *Watson* in the course of the argument seems to be decisive, viz., is there any implied condition that the appointed arbitrators or judges shall be without power if one of them becomes interested in the event of the race? If none exist, then, is there any general proposition of law that whenever a dispute referred to one or several persons, his or their power shall cease if any of them becomes interested on the event. I know of no such rule. When the parties agree to refer a matter they may, if they please, insert a condition to that effect; but if they do not why should we make such a condition for them?" (*Ellis v. Hooper*(1)). And these observations were referred to with approval by Muttusawmi Ayyar, J., in *The Secretary of State for India v. Arathoon*(2). Since, in the contract here, there is no condition that Mr. Pogson should not be interested, the agreement set up cannot take away his power to act or in any way render his decision not binding. Though such is the conclusion at which I have arrived with reference to the legal aspect of the question, I wish to add that in point of fact no such agreement has been proved. It is quite true that Mr. Pogson says he is entitled to receive, in addition to what he gets from the defendants, 2½ per cent. from the plaintiff, in consideration of the latter making use of the bill of quantities prepared by him (Mr. Pogson). He however does not base his right to this remuneration on any express promise by the plaintiff, but in an indefinite way refers it to a usage prevailing in England which, Mr. Pogson thinks, has been adopted in Madras also. The usage relied on (upheld by Mathew and A. L. Smith, JJ., in *North v. Bassett*(3) and the contract implied in consequence of it are "that the builder pays the quantity surveyor and puts the amount of the fees upon the amount of his tender. First of all the building owner agrees to hand over the money for the quantity surveyor's fees to the builder and the builder agrees to hold it for the quantity surveyor and the latter agrees that

(1) 3 H. and N., 767. (2) I.L.R., 5 Mad., 181. (3) 1 Q.B.D. (1892), 386.

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"he shall hold it." In the present case there is really no evidence to show that the above usage has been imported into and prevails in this city and as to whether the plaintiff's tender contained any reference to the 2½ per cent. in question, there is an irreconcilable conflict of evidence which makes it difficult to determine what the truth is. But even assuming that the usage and the tender in accordance with it have been made out, I fail to see how they help the defendants. For, as pointed out in the case cited, the contract to be implied from those facts is a tripartite contract which brings all the parties—the builder, the building owner and the surveyor together and to which consequently defendants would necessarily be parties; but not, as alleged here, an arrangement entered into behind the back and without the knowledge of the building owner. The charge of collusion therefore fails, and exhibit F F must be held to be binding upon the defendants, subject to an unimportant modification with reference to the item of Rs. 526, which includes a sum allowed for stained glass admittedly not delivered upon the premises a modification that is permissible, since the architect's certificate can be attacked not only for fraud but for evident mistake also (*Hennessey v. Metzger*(1)).

Even if my view as to the conclusive character of exhibit F F be wrong, I am inclined to hold that the amount therein mentioned represents the cost of the work done and materials delivered at the site more correctly than either the subsequent valuation of Mr. Pogson or that of Mr. Stephens and exhibit B prepared by the plaintiff about the time of exhibit F F and checked by Mr. Cormac goes to confirm my view, because, even after making allowance for one or two items not checked by Mr. Cormac, there is not much difference between the amount of exhibit B and that of exhibit F F. No doubt Mr. Cormac did not take any accurate measurements when he checked the amount, but considering his long experience as an Engineer of some standing and the zeal which he appears to have throughout displayed in the interest of his employers, I am inclined to think that the figures in exhibit B, as altered by Mr. Cormac, substantially corroborate those in exhibit F F which, accordingly, I adopt subject to the disallowance on account of the stained glass, not supplied, of Rs. 263, which in the absence of any evidence on the point is, in my opinion, the proper

(1) 48 American State Reports, 270.

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amount to deduct being a moiety of the sum allowed for the stained glass windows. With reference to the loss sustained on articles purchased for use in the defendants' premises, there is no satisfactory evidence, as I entirely disbelieve what the plaintiff says as to the amount alleged to have been advanced to Chander Singh, which is possibly the only item that can be said to fall under this head, though even that is extremely doubtful.

Upon these findings the amount to which the plaintiff is entitled is Rs. 6,992 as shown below :—

	Rs.
Total amount specified in F F	19,491
Deduct	263
Balance	19,228
Add the amount at the end of exhibit 44	2,960
Total	22,188
Deduct the amount already received by the plaintiff	15,196
Balance	6,992

There will be a decree for the plaintiff for the sum of Rs. 6,992, with interest at six per cent. per annum from the 31st July 1894, the date of the plaint to the date of payment.

As to costs the plaintiff on the one hand has failed to establish the breach alleged to have taken place in July and his claim to the Rs. 12,000 said to be damages sustained by him in consequence of such breach. Further the course adopted by him in putting the other portion of his claim on a footing different from that on which it ought to have been put has led to the irrelevant enquiry which took up a considerable time. On the other hand, there was a breach of contract on the part of the defendants who, moreover, have not succeeded in proving the plea of collusion. In these circumstances the proper order to make is to direct that the plaintiff pay his own costs and the defendants theirs.

Branson & Branson, attorneys for plaintiff.

Barclay, Morgan & Orr, attorneys for defendants.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

VIJENDRA TIRTHA SWAMI, PETITIONER,

v.

SUDHINDRA TIRTHA SWAMI AND OTHERS, RESPONDENTS.*

Civil Procedure Code, ss. 407, 409.

On hearing a petition under s. 409 for leave to sue *in forma pauperis*, the Court must decide whether the petitioner has at the date of the petition a subsisting cause of action capable of enforcement, and where the cause of action is barred by *res judicata* or limitation, the petition must fail.

PETITION under section 622 of the Civil Procedure Code praying the High Court to revise the order of O. Chundu Menon, Subordinate Judge of South Canara, in miscellaneous petition No. 278 of 1893.

Petitioner applied for leave to sue *in forma pauperis* for a declaration that he was the guru of the Puttige Mutt in Udipi and to recover from the counter-petitioner, the present guru, all the property, movable and immovable, belonging to the mutt. The counter-petitioner pleaded that the suit was *res judicata*, because it had been decided by the High Court in appeal suit No. 66 of 1881 that petitioner (a minor at that time) was a bastard and unfit to be ordained as swami by the guru, and that petitioner as well as his guru had been ex-communicated from caste by proper authority. He further alleged that petitioner was a party to that decree, being represented by a proper guardian, and that, after attaining majority, he applied for review without success. The counter-petitioner further pleaded that the suit was barred by limitation, since more than nine years had elapsed since the date of that decree (26th October 1883) and more than six years from the date on which petitioner attained his majority.

The Subordinate Judge considered that it was competent for him to consider these questions at this stage, relying on *Chattarpal Singh v. Raja Ram*(1), *Dulari v. Vallabdas Pragji*(2), *Tarramoney*

* Civil Revision Petition No. 31 of 1894.

(1) I.L.R., 7 All., 661.

(2) I.L.R., 13 Bom., 126.

1895.
March 26.

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Dabee v. Hurro Mohun Chatterjee(1) and *Gunga Dass Adhikaree v. Baboo Khettur Nath Bose*(2) and, on consideration of the facts, finding that the plaintiff's right was barred by *res judicata* and limitation, dismissed the petition.

The petitioner appealed to the High Court.

Pattabhirama Ayyar for petitioner.

Ramachandra Rau Saheb for respondents.

JUDGMENT.—It is contended for the petitioner that the Subordinate Judge acted illegally and without jurisdiction in taking evidence and going into the questions whether the plaintiff's claim was *res judicata* and whether it was barred by limitation. I cannot accept this contention. Section 409, Civil Procedure Code, permits the Court to take evidence and hear the parties for the purpose of determining whether the applicant is or is not subject to any of the prohibitions specified in section 407. Under the latter section, the application may be refused if the appellant fails to satisfy the Court that he has a right to sue. This has been construed to mean that the appellant should show that he has a good subsisting cause of action capable of enforcement in Court—*Chattarpal Singh v. Raja Ram*(3).

I think, therefore, the Subordinate Judge was empowered to consider the questions raised before him by the counter-petitioner. The case of *Koka Ranganayaka Ammal v. Koka Venkatachellapati Nayudu*(4) is not really in conflict with this view. I do not understand that case to lay down that the Court is bound by the allegations in the application and can hold no inquiry whatsoever as to whether there is any foundation for those allegations or not. Such a view would be opposed to the provisions of section 409, which permits the Court to take evidence.

It is next argued that even if the Subordinate Judge had power to consider the questions of *res judicata* and limitation, his conclusion against the petitioner is unwarranted by the circumstances of the case. I am unable to take this view. It is true that in a case where there is ground for reasonable doubt, leave should be granted and not refused. But this case I consider is a very clear case. I therefore hold that the Subordinate Judge was right in concluding that the claim was *res judicata*. I dismiss the petition with costs.

(1) 11 B.L.R., App., 23. (2) 14 W.R., 281. (3) I.L.R., 7 All., 661.
(4) I.L.R., 4 Mad., 323.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

RAMA REDDI (PETITIONER), APPELLANT,

v.

PAPI REDDI AND ANOTHER (COUNTER-PETITIONERS),
RESPONDENTS.*

Succession Certificate Act—Act VII of 1889, ss. 6, 19—Appeal.

Where a minor petitioner represented by the Court of Wards applied for a succession certificate under Act VII of 1889, and the District Court granted the certificate, but ordered security to be given by the Court of Wards:

Held, that no appeal lay from the order requiring security.

THE petitioner, the minor son of one Tippi Reddy deceased, represented by the Court of Wards, applied to the District Court for a certificate to collect debts due to the estate of his undivided paternal uncle Papi Reddy and also other debts due to the estate of his late undivided cousin Venkata Reddy deceased. The petition was opposed by Kamatchi Ammal, widow of the late Venkata Reddy, who alleged an adoption to her deceased husband.

The District Judge passed the following order:—"Adoption by deceased is alleged by counter-petitioner and denied by petitioner. I cannot decide this summarily. Certificate to petitioner on security by Court of Wards or Collector. Time two months."

The petitioner appealed on the ground that the District Judge was wrong in demanding security.

The Government Pleader (Mr. Powell) for appellant.

Mahadeva Ayyar, for respondent, objected that no appeal lay.

JUDGMENT.—The District Judge passed an order directing that a certificate do issue in favour of the appellant, a minor under the Court of Wards on security being given on his behalf. This appeal is against so much of the order as relates to security. The respondent takes the preliminary objection that no appeal lies against that portion of the order which is appealed against.

Referring to a contention that an appeal lies in such cases, *Muttusamy Ayyar, J.*, in *Sundara Ammal v. Kullappa Chetti*(1), observed as follows:—

* Appeal against Order No. 8 of 1894.
(1) Appeal against Order No. 15 of 1894, unreported.

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"Having regard to the language of section 19, it does not appear that an appeal is allowed. It suggests an intention to allow no appeal except as to the grant of certificate as was held with reference to Act 27 of 1860 in *Monmohinee Dassee v. Khetter Gopaul Dey*"(1). Following this view I hold that the objection taken by the respondent is good. The appeal fails and is dismissed with costs.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

1895.
September 5.

THE MADRAS HINDU MUTUAL BENEFIT PERMANENT
FUND, PLAINTIFFS,

v.

RAGAVA CHETTI AND ANOTHER, DEFENDANTS.*

*Indian Companies Act—Act X of 1866, s. 4—Unregistered association—Mortgage
illegality of—Estoppel.*

In 1868 The Madras Hindu Mutual Benefit Permanent Fund was created for the purpose of enabling Hindus to assist one another and invest their savings chiefly on landed property, and the doing all such other things as are incidental or conducive to the attainment of the above objects. By the rules of the said fund, which was not registered under the Indian Companies Act X of 1866, it was provided that the members should pay subscriptions at the rate of Rs. 2-8-0 per share per mensem for seven years from the date of admission and that at the end of the seven years Rs. 250 shall be paid in full discharge of each share. It was further provided that subscribers shall be entitled to borrow money from the said fund at interest that a reserve fund be formed and distributed once every five years to the subscribers and that surplus collections be distributed among the subscribers annually. In 1868 defendant's father borrowed money on mortgage from the fund in accordance with the rules, and the amount was admittedly due at the time of suit. The fund was wound up under an order of the High Court, dated 15th September 1877, during the lifetime of defendant's father, who, however, took no active part in those proceedings. It further appeared that, on the execution of the mortgage, the defendant's father (the mortgagor) took a lease from the mortgagees of the houses mortgaged and retained possession of them as tenant:

Held, that the association had for its object the acquisition of gain, that as the association consisted of more than twenty members and was not registered, its formation was forbidden by the Indian Companies Act X of 1866, s. 4, that the

(1) I.L.R., 1 Cal., 127

* Civil Suit No. 118 of 1894.

suit mortgage having for its object the carrying out of the illegal purpose of the association was an illegal transaction and that the suit must fail.

Held further, that the defendants were not estopped from setting up the plea of illegality either by the order of 1877 or by reason of their predecessor in title having attorned to the fund.

The facts of the case are as follows:—

The plaintiffs, the official liquidators of an association, called the Madras Hindu Mutual Benefit Permanent Fund, sue for the recovery of Rs. 4,845-4-0 by the sale of two houses in Triplicane mortgaged to the fund under an instrument, dated 16th December 1868, and executed by one Parthasaradhi Chetti, the father of the defendants, and at or about the same time he executed an agreement with the association by which he became tenant of the mortgaged property on payment of a monthly rental. The late Parthasaradhi Chetti was a member of the association, and the principal amount secured by the mortgage was lent to him as such member under the rules of the association. The loan and the mortgage were admitted, and the suit was decided on questions of law. The association was wound up by order of the Court, dated 15th September 1877.

Mr. K. Brown for plaintiff.

Mr. J. H. M. Ryan for defendants.

JUDGMENT.—This is a suit by the official liquidators of an association, called the Madras Hindu Mutual Benefit Permanent Fund for the recovery of Rs. 4,845-4-0 by the sale of two houses in Triplicane mortgaged under an instrument, dated the 16th December 1868, executed by the father of the defendants, the late Parthasaradhi Chetti, a member of the association, for Rs. 3,750 lent to him as such member under the rules of the association. The loan and the mortgage are admitted, and it is only on questions of law that the parties are at issue.

The first of the questions is whether the mortgage sued upon is an illegal transaction as is contended on behalf of the defendants. The validity of this contention depends upon the answer to the question whether the said association is one falling within the latter part of section 4 of the Indian Companies Act, which runs as follows:—

"No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act; for the purpose of carrying on any business (other than

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"banking) that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act or of Letters Patent." Now the Madras Hindu Mutual Benefit Permanent Fund, which was not formed for carrying on the business of banking, consisted of more than twenty persons. It was formed after the said Act had come into force, and not in pursuance of any other Act, or of Letters Patent. Consequently, if its purpose or one of its purposes was to carry on business that had for its object the acquisition of gain by the association or by the individual members thereof, it became an absolutely illegal association since it was not registered as a company under the Act, the words of section 4 being in the language of Brett, L. J., imperative and prohibitory and negative (*in re Padstow Total Loss and Collision Assurance Association*(1)), otherwise the association must be held to have been a lawful one.

To obtain a complete and accurate idea of the purpose for which the association was formed, not only paragraph 3 of the memorandum of association, which purports to describe it, but some of the rules framed by the association have also to be taken into consideration. The said third paragraph states the objects to be "to enable Hindus to assist one another and invest their savings chiefly on landed property, and the doing all such other things as are incidental or conducive to the attainment of the above objects." Rule 6 provides for the payment of subscriptions of Rs. 2-8-0 per mensem per share by the members of the association. Rule 27 renders subscribers falling into arrears liable to pay interest on such arrears. Rule 12 directs that the account of the share or shares of every subscriber shall be closed on the expiration of seven years from the date of his admission, and Rs. 250 per share shall be paid in full discharge of his claim. Rules 13 to 25 and Rule 30 relate to the grant from the funds of the association of loans to such of the subscribers as are desirous of borrowing from it and to other matters connected with such loans. Rule 31 prescribes the rates of interest to be charged on arrears of subscription and on the loans to be granted to the subscribers. Rule 37 provides for the closing of the accounts of the association for setting apart a certain amount of money

(1) L.R., 20 Ch. D., 146.

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towards the formation of a reserve fund, and for the distribution of the surplus collections among the subscribers annually. Rule 39 directs that the reserve fund shall be broken up once in five years and be divided among the subscribers.

The observations relied upon on behalf of the defendants, made by Brett, M. R., in *Shaw v. Benson*(1), the circumstances of which are very similar to those of the present case are exactly in point. There the M. R. says "If a man lends money to a friend on one occasion even at interest, he is not carrying on a 'business,' but if he forms a fund of £1,000 and, from time to time lends money out of it, he is then lending money to different persons at interest. Every one would say that this is the 'business' of lending money, for it is carried on so long as any profit can be made. The object is to lend money at intervals upon successive contracts, therefore the Thornhill Arms Society carries on a 'business.' A society is not within section 4 of the Companies Act, 1862, unless its business has for its object the 'acquisition of gain.' But Thornhill Arms Society lends money at interest; therefore it is an association carrying on a 'business' having for its object the 'acquisition of gain.' Perhaps the association itself does not 'gain' any profit by the 'business,' but the individual members do, and this seems to be sufficient to bring the society within the prohibition of the section The Thornhill Arms Society carries on a business producing a gain, of which each shareholder may partake. The members are divided into members who lend and members who borrow money. I do not see what the borrowing members gain; but lending members gain and each member has the possibility of acquiring gain. Therefore the Thornhill Arms Society is prohibited by the Companies Act, 1862, section 4, and is illegal." The argument which might be suggested against the above view that the words in section 4 "by the individual members thereof" mean "by all the individual members thereof" is referred to and noticed by the M.R. as well as by the Lords Justices and is rejected as pointed out by Fry, L.J., on the ground that too minute or hypercritical a consideration of the terms of the section was not to be adopted, and that the Act should be so construed as to carry out the manifest intention of the Legislature." Upon the authority of this decision and on that of the *Jennings v. Hammond*(2)

(1) L.R., 11 Q.B.D., 570.

(2) L.R., 9 Q.B.D., 225.

approved of therein, I must hold that the Hindu Mutual Benefit Permanent Fund falls within section 4 of Act X of 1866 (which is almost identical in its terms with section 4 of the English Statute) and is illegal. In *re Siddall*(1) was strongly relied upon on behalf of the plaintiff. There the association was formed for the object of purchasing a freehold estate and reselling it in allotments to the members of the association. The deed was executed by all the members, the name of each, the number of his allotment, the total amount he was to pay, and the amount of his monthly payment to be made in respect of it being specified in the schedule to the deed. The property was vested in trustees and its management was vested in a President, Vice-President, Secretary and a committee. The deed contained provisions for the conveyance to the members of their allotments when they had paid up the whole amount payable in respect of them and for the forfeiture and sale of the allotments of defaulting members. Powers were given to the committee to make roads, drains, &c., on the land and the trustees were given the powers of borrowing money on mortgage with the consent of a general meeting. When all the mortgages had been paid off and all the allotments had been conveyed the society was to come to an end. It was held by the Court of Appeal (Baggallay, Bowen and Fry, L. JJ.) that the association was not formed for the purpose of carrying on any business that had for its object the acquisition of gain. The Lords Justices express themselves, however, in terms which seem to indicate that their decision might have been different but for earlier cases of *Crowther v. Thorley*(2) and *Smith v. Anderson*(3) by which they were bound. And Baggallay, L. J., observed, "I must confess that, if I had had to decide *Smith v. Anderson*, I possibly should not have entirely agreed with all that was decided in it. My views would to some extent have gone with those of the late Sir George Jessel whose decision was reversed." Further, even assuming that the decisions in *re Siddall*(1) and the cases, which it followed, were sound in themselves, it is clear that they are quite distinguishable from the present case inasmuch as in none of them the object of the association was to carry on the business of lending money for the acquisition of gain as is the case here.

(1) L.R., 29 Ch. D., 1.

(2) 32 W.R., 330.

(3) L.R., 15 Ch. D., 247.

In this respect as well as in many others the present case very closely resembles *Jennings v. Hammond*(1) and *Shaw v. Benson*(2) cited above which, therefore, notwithstanding the doubt expressed by Lindley, L.J., I think in the absence of any decisions on section 4 of the Indian Act I shall not be justified in declining to follow. Having arrived at this conclusion I must also hold that the mortgage on which this suit is based is an illegal transaction inasmuch as it had for its object the carrying out of the illegal purposes of the association and it was exactly for similar reasons the promissory notes sued upon in *Jennings v. Hammond*(1) and in *Shaw v. Benson*(2) were held to be illegal. The plaintiffs however contend that the defendants are estopped from setting up the plea I have dealt with above and seek to support that contention in two ways.

First, it is said that the order of Busteed, J., dated the 15th September 1877, directing that the association in question be wound up bars the defendants from raising the question of illegality herein as much as it was open to their father to raise it before the order was passed. Now there is nothing to show that the late Parthasaradhi Chetti, either directly or indirectly, took any part in the judicial proceedings which resulted in the said order. But it is urged on behalf of the plaintiffs that Parthasaradhi could have as a member of the association intervened if he wished in the said proceedings, and, therefore, the circumstances that he was not actually a party to the order does not affect the binding character of the adjudication. No authority was, however, cited in support of that proposition. Assuming that the principle that a party who has had full notice and has had the opportunity of availing himself of the contest, but has omitted to take advantage of such opportunity will be bound by the decision is applicable to proceedings connected with the winding up of companies, the point for consideration in the present case is in what circumstances an order like that of the 15th September 1877 is to be held to be conclusive.

The authorities on this point seem to be very few. In *ex-parte Hargrove & Co.*(3), Sir George Jessel, M.R., says "As I understand the decision in the case of the *London Marine Insurance*

(1) L.R., 9 Q.B.D., 225.

(2) L.R., 11 Q.B.D., 563, 572.

(3) L.R., 10 Ch. App., 545.

"Association(1) (which followed other cases), where the application is to strike out a debt or to obtain an order for a call or anything which may be called a subsidiary application on the winding up, it is not open to any party to say that the winding up order ought not to have been made. Therefore an objection which amounts to this that there was no jurisdiction to make the winding up order, or that the winding up order for some other reason ought not to have been made is not in the present case admissible." The only other authority that I am aware of is a passage in the judgment of Lord Halsbury in the case of *in re Bowling and Welby's contract*(2) to which my attention was drawn on behalf of the plaintiffs. Lord Halsbury observes "that leads me to consider what is the effect of the order that has been made for winding up, and which in some senses may be said to have been *res judicata*. I should think it probable that the order appealed against is binding on the association as an association and on every body claiming under it or taking title under it." Now the present suit is certainly in no sense a subsidiary application or proceeding in the winding up of The Madras Hindu Mutual Benefit Permanent Fund within the meaning of the ruling of Sir G. Jessel quoted above. And with reference to the dictum of Lord Halsbury cited on behalf of the plaintiffs, it is difficult to understand how the defendants are properly to be held as claiming under or taking title under the association represented by the plaintiffs, since the former are the representatives of the mortgagor whilst the latter are the mortgagees and since in truth it is the latter that derive their title from the person whom the defendants represent. I think, therefore, that the contention that the defendants are estopped from pleading the illegality in question fails in so far as it is based on the order of September 1877.

The second way in which the plea of estoppel is sought to be supported on behalf of the plaintiffs is this. The mortgage instrument sued upon having provided that the possession of the mortgaged property should pass to the mortgagees, the mortgagor at the same time executed another instrument whereby he agreed to retain possession of the property as their tenant on a rent of Rs. 18-8-0 per mensem. It is argued that as such tenant the late mortgagor was and the defendants his representatives are

(1) L.R., 8 Eq., 176.

(2) 1895, 1 Ch., 667, 668

precluded from questioning that the plaintiffs have a valid title as mortgagees as it was in that capacity they let the property in December 1868.

As a matter of fact there is no doubt that the two contracts are parts of one and the same transaction. In point of law, however, they are either distinct from each other and separate or are connected with one another and inseparable. The contention in question has to be dealt with with reference to both these aspects.

I shall first take up the view that the mortgage is distinct and separate from the letting.

So far as the latter is concerned, there is no doubt that the defendants are prevented from saying that their landlord had no right to let the houses, and it is also quite clear that the estoppel applies to all matters connected with, or arising out of the contract by which the relation of landlord and tenant was created. The estoppel could not, however, extend further and affect matters quite outside that contract. In *Carpenter v. Buller*, PARKE, B. said, "If a distinct statement of a particular fact is made in a recital of a bond or other instrument under seal and a contract is made with reference to that recital, it is unquestionably true that, as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital. But there is no authority to show that a party to the instrument would be estopped in an action by the other party not founded on the deed and wholly collateral to it, to dispute the fact so admitted; though the recitals would certainly be evidence"(1). Yet the principle underlying the rule so laid down and followed in numerous cases, of which *in re Simpson*(2) is, I believe, the latest, seems to me to be fully applicable to this case also. For the right to recover the amount in question by the sale of the property mortgaged accrues under the contract of mortgage and is absolutely unconnected with the letting, which *ex-hypothesi* is distinct from the mortgage. In the view under consideration, therefore, the plaintiff's argument on the point cannot be upheld.

I shall now examine the point with reference to the other view, viz., that the two contracts are inseparable parts of one and the same transaction. If this be correct, it follows that the illegality which affects the mortgage taints the letting also. And in the face

(1) 8 M. & W., 212, 213.

(2) L.R., 2 Ch. D., 89.

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of a clear legislative enactment like section 4 of the Companies' Act, the law recognises no estoppel as between persons who are *in pari delicto*, as the parties in the present case are. In *Fairtill v. Gilbert*(1), which related to a case of mortgage by trustees, who had no power, according to the Act of Parliament under which they purported to act, to grant the mortgage, Ashurst, J., said, "This deed, therefore, cannot operate in direct opposition "to an Act of Parliament which negatives the estoppel." The observations of Lord Denman, C.J., *Levy v. Horne*(2), with reference to the statement of the law made by Ashurst, J., in *Fairtill v. Gilbert*(1) would seem to confine the rule laid down in the latter decision to cases in which the parties were aware or ought to be presumed to have been aware of the provisions of the enactment which prohibits the transaction impeached. In the present case it is unquestionable that the mortgagees as well as the mortgagor as members of the association must be taken to have known the provisions of section 4 of the Act X of 1866, making the registration of such associations compulsory and rendering unregistered associations illegal. *Barrow's case*(3) is another authority for the proposition that in a case like the present there is no estoppel. There Bacon, V. C., says "But the doctrine of estoppel "cannot be applied to an Act of Parliament. Estoppel only "applies to a contract *inter partes*, and it is not competent to "parties to a contract to estop themselves or anybody else in the "face of an Act of Parliament. . . . I am of opinion that, as "between the parties to this contract, there was no estoppel; they "contracted to do a thing which in the result it was unlawful to "do and which could only have been made lawful by registration."

It thus appears to me that whichever of the two views discussed above is taken the contention of estoppel urged on behalf of the plaintiffs is unsustainable, and the suit must fail on the ground of illegality relied upon on behalf of the defendants.

The result is the suit is dismissed but without costs, since the defendants are the legal representatives of one who was a party to the illegality that has led to the dismissal of the suit.

Champion & Biligiri, attorneys for plaintiffs.

Wilson & King, attorneys for defendants.

(1) 2 T.R., 169, 171.

(2) 3 Q.B., 757.

(3) L.B., 14 Ch. D., 441.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Davies.

QUEEN-EMPRESS

v.

BHASHYAM CHETTI. *

1896.
January 11

Madras City Police Act—Act III of 1888, ss. 42, 45, 47.

Where a Magistrate has recorded that an accused person has pleaded guilty, an affidavit to the contrary sworn to by the accused is not admissible in evidence on revision by the High Court.

In Madras City Police Act III of 1888, s. 47, the words "all or any of the other articles seized" include money or securities for money seized by the police under s. 42. The Magistrate is not bound to hold any enquiry as to whether the money and other things seized were used or intended to be used for the purpose of gaming.

APPEAL against the sentence of Sultan Mohidin Sahib, Presidency Magistrate, Black Town, and petition under sections 435 and 439, Criminal Procedure Code, praying the High Court to revise the order of the said Magistrate in Calendar Case No. 19476 of 1895 directing the forfeiture of certain jewels and money found, and seized under section 45 of the Madras City Police Act.

In this case the accused were charged before Sultan Mohidin Sahib, Presidency Magistrate, under section 45 of the Madras City Police Act III of 1888.

The Magistrate recorded that both the accused pleaded guilty and fined the first accused Rs. 300 and the second accused Rs. 100. He further ordered that certain of the jewels and the money found should be forfeited and the cards destroyed.

The first accused filed this petition to revise the proceedings of the Magistrate and tendered in evidence an affidavit executed by himself setting forth that he did not plead guilty.

The following are the material sections of the Act referred to:—

Section 42.—If the Commissioner has reason to believe that any enclosed place or building is used as a common gaming house, he may by his warrant give authority to any Police officer above the rank of a constable to enter, with such assistance as may be found necessary, by night or by day and by force if necessary, any such enclosed place or building and to arrest all persons found therein, and to seize all instruments of gaming and all moneys and securities for money and articles of value reasonably suspected to have been used or intended

* Criminal Appeal No. 618 of 1895, and Criminal Revision Case No. 571 of 1895.

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to be used for the purpose of gaming which are found therein, and to search all parts of such enclosed place or building and also the persons found therein.

Section 45.—Whoever opens, keeps, or uses or permits to be used any common gaming house or conducts or assists in conducting the business of any common gaming house, or advances or furnishes money for gaming therein, shall be liable on conviction to fine not exceeding five hundred rupees, or to imprisonment not exceeding three months, or to both.

Section 47.—On conviction of any person for keeping a common gaming house, or being present therein for the purpose of gaming, all the instruments of gaming, found therein may be destroyed by order of the Magistrate, and such Magistrate may order all or any of the other articles seized, or the proceeds thereof, to be forfeited.

Krishnama Chariar for (appellant) petitioner.

The Crown Prosecutor in support of the conviction and order.

JUDGMENT.—We cannot admit the affidavit of the petitioner which it is sought to use for the purpose of showing that he did not plead guilty. If there was any mistake about the matter, it is the Vakil and not the client who ought to have made an affidavit.

We cannot say that the sentence is excessive and must therefore dismiss the appeal.

With regard to the articles forfeited it is argued that money and securities for money being specially mentioned in section 42 of the Act cannot be intended to be denoted by the term 'articles' used in section 47. In our opinion, however, the phrase "all or any of the other articles seized" is large enough to cover money or securities for money when seized. The narrow construction which it is sought to put on section 47 would have the effect of making the seizure of money under section 42 an useless ceremony.

It is then said that the Magistrate ought to have enquired as to whether the money and other things seized were used or intended to be used for the purpose of gaming. Section 47, however, under which the Magistrate is empowered to order a forfeiture, does not require that he should make any such enquiry. It is sufficient that the articles have, in fact, been seized by the Commissioner of Police under circumstances of reasonable suspicion entertained by him.

The Magistrate has a discretion in the matter, and, while he is entitled to presume that the action of the Police authorities has been regular, he would, no doubt, not order a forfeiture in a case where he had reason to believe that the seizure had been irregularly made. In the present case there does not appear to have been any ground for the Magistrate doubting the correctness or regularity of the proceedings of the Police. We must dismiss the petition.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

ALAGAPPA MUDALIAR (PLAINTIFF), APPELLANT,

v.

SIVARAMASUNDARA MUDALIAR AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1894.
September
26.
1895.
July 9.

Suit for specific performance of agreement for partition—Alienation of the management of a public charity—Illegal—Effect of partial illegality—Civil Procedure Code, s. 28.

In a suit for specific performance of an agreement for partition, it appeared that amongst other property considered liable to partition, was the huk right of a public choultry and certain other lands alleged to belong to the same charity. The said huk right had been sold by auction to that member of the family who bid the highest price and was purchased by the plaintiff. On a suit being brought to enforce the terms of the arrangement:

Held, that the sale by auction of the huk right was illegal, but that as such illegality did not affect the other terms of the arrangement, it might be enforced as to the rest of the property;

Held further, with reference to section 28 of the Civil Procedure Code, that the third defendant a minor was properly included as a party to the suit, though he was not a party to the arrangement.

APPEAL against the decree of S. Gopalachariar, Subordinate Judge of Tinnevely, in original suit No. 36 of 1889.

The plaintiff and defendants Nos. 1 and 2 are brothers. Defendant No. 3 is the son of defendant No. 1. The suit was brought by the plaintiff against the defendants to enforce, by execution of a partition deed, the terms of an arrangement as to partition come to by the brothers in the presence of mediators in May 1888 and to declare the rights of the parties. The property set forth in the schedules to the plaint included *inter alia* two items, viz., certain lands in Vachakarapatti described in schedule II-B and the chattram of Vachakarapatti and the lands attached thereto described in schedule II-C. With regard to the other items of property set forth in the plaint schedules, the Subordinate Judge found them liable to partition, and there was no appeal against this finding of fact. Part of the arrangement sought to be enforced by the plaintiff was to the effect that the three brothers had agreed that the following plaint properties should be sold by auction and that to that brother who bid the highest amount, the other two brothers should relinquish their right in the property sold,

* Appeal No. 23 of 1894.

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that out of the auction purchase money the debts due by the family should be deducted and the balance if any divided into three equal parts amongst the three brothers. The property so auctioned consisted of—

- (1) the private right in the property in schedule II-B;
- (2) the huk and all other rights in the properties in schedule II-C;
- (3) Rs. 81,700 the sum remaining in first defendant's hands out of the said charity funds;
- (4) the outstandings due in that village.

The auction took place and plaintiff purchased for Rs. 7,750. There were certain other particulars arranged in the draft partition deed which are immaterial.

The Subordinate Judge found the arrangement established, but held that, inasmuch as it purported to transfer rights in regard to the charity properties in schedule II-C and the right of managing them to the plaintiff, it was illegal, and further held that, as the arrangement could not be upheld with regard to such charity properties, the plaintiff was not entitled to any relief with regard to the other properties included in the arrangement. He therefore dismissed the suit.

Plaintiff preferred this appeal.

Subramania Ayyar and Krishnasami Ayyar for appellant.

Ramachandra Rau Saheb, Bhashyam Ayyangar, Ramakrishna Ayyar, Tiruvenkatachariar, and Seshachariar for respondents.

The Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.) made the following order:—

ORDER.—This is an appeal from the decree of the Subordinate Judge dismissing the suit without costs. The judgment of the Subordinate Judge which, on the substantial issues of fact (the first, second, third and sixth), is in the plaintiff's favour, proceeds upon certain grounds of law upon which also the arguments in the hearing of the appeal turned. The Judge's findings on the facts were not questioned. It is found as a fact that by agreement between the three brothers a sale of certain properties by auction was effected and the plaintiff became the purchaser. The terms of the whole arrangement are set out in exhibit E. This sale included among other things the huk right of Vachakarapatti choultry, the lands attached to the choultry and certain other lands, the *kudivaram* of which is vested in the family. As to these latter, it is asserted on

the defendants' behalf that they also are part of the charity property. There has been no finding on the point.

The Vachakarapatti choultry is one of several charities managed by the family to which the parties belong. It is admittedly a public charity. There is no direct evidence as to the conditions fixed by the founder for the management of the choultry and its property or for the devolution of the right of management. In the inam statement made by the plaintiff's father Thitharappa, Chidambaranatha, who is described as the latter's great grandfather and manager of the charity, appears under the heading 'name of the original holder.' In another column it is said "the inam was granted to my ancestors by the Carnatic Rajahs for the purpose of conducting charity in the choultry, &c." Thitharappa, it appears, was one of three brothers, who, having previously divided among themselves their family property, in 1871 proceeded to divide the family charities. It is recited in the deed of 26th May 1871 that it was at first settled to manage in common the charities attached to the family, but that they had since come to another arrangement with regard to the same. Under that arrangement the choultry now in question fell to the share of the plaintiff's father. He died in July 1877 leaving two sons Alagappa and Sivaramasundra, the plaintiff and defendant No. 1, and a third, then a minor, now defendant No. 2. In the same year it was agreed between the two adult brothers that, although the hukdarship was common to the three, it should be registered in the name of the eldest, the defendant No. 1. This is all the evidence adduced with regard to the management of the choultry, and it is not likely that more would be forthcoming, inasmuch as it appears from the pedigree that the grandfather and the great grandfather of Thitharappa each left only one son. Judging from the scanty materials available, we think it must be taken to have been the intention of the founder of the choultry that the office of management should be held in common by the family of the original holder. No other rule of succession can well be suggested. The fact that in 1871 a division of the charities then belonging to the family took place is by itself no ground for holding that any other rule than that above stated holds good with regard to this choultry. It was argued by the plaintiff's *vakil* that, although the office of superintending religious or charitable institutions cannot be alienated like ordinary property, it is competent to any one member of the family

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interested to renounce or waive his right in the matter (*Mancharam v. Pranshankar*(1)). Our attention was also called to the cases in which it has been held that one person may, by force of the law of limitation, lose his right to such an office and another may in the same manner acquire it. It is true that there is an apparent inconsistency in holding that by operation of law an alienation may be effected which cannot be effected by an act of the party. It may be suggested that the explanation lies in the fact that the law of limitation is a law of a general and positive character and that no exemption from it is allowed in the case of charitable or religious offices. It is well settled that such offices cannot be alienated by the act of parties. The question then is whether the arrangement made in the present case amounts to an alienation. If it was a mere arrangement for the more convenient management of the choultry, reserving to the plaintiff's brothers their right of control, and, if necessary, of resumption of actual management, then it might be said that there would be no interference with the supposed will of the founder and that the arrangement would be lawful. To that extent it seems clear that any coparcener jointly entitled to management may waive his rights. But the transaction now before us is of a very different character. It is clearly intended that the brothers other than the plaintiff shall divest themselves altogether of all right of control over the choultry. For the future it was intended that the right of management should devolve in the line of the plaintiff and his heirs to the exclusion of his brothers. In our opinion it makes no difference that the alienee is a member of the same family (see *Kuppa v. Dorasami*(2) and *Narayana v. Ranga*(3)). We think the Subordinate Judge was right in holding the alienation to be invalid.

The next question is whether the Judge was right, in consequence of this ruling and for the other reasons given by him, in dismissing the suit altogether. His main reason for dismissing it was that in his view the stipulation that a formal document should be drawn up and registered showed that neither party intended to be bound until that was done. The Judge refers to *Ridgway v. Wharton*(4). In our judgment the Subordinate Judge has misunderstood the law and the observations made in the case cited.

(1) I.L.R., 6 Bom., 298.

(3) I.L.R., 15 Mad., 183.

(2) I.L.R., 6 Mad., 76.

(4) 6 H.L.C., 238.

The plain question is whether in fact the terms of the agreement have been definitively settled, or whether the matter rests in the stage of negotiation. Here there is no doubt that the terms of the arrangement had been finally determined. There was a full and complete agreement between the parties, and they must, as observed by Lord Cranworth, be bound by it, notwithstanding that they intended to have a formal agreement drawn up.

Then it is said that, as part of the agreement is void and therefore cannot be enforced, the plaintiff ought not to have a decree for specific performance as to the remainder. But for the offer made before us by the plaintiff's vakil there would certainly be a difficulty in decreeing specific performance in part. The plaintiff is by the contract under an obligation to pay Rs. 7,500 as the price of two properties. It is not clear whether he has paid the money or not. However he is willing to pay it as the price of the one property only in respect of which the agreement is lawful. That being so, no question arises as to the apportionment of the money between the legal and the illegal parts of the transaction. The plaintiff being content to pay the whole consideration, we see no reason why the defendants should not be compelled to perform that part of the contract which is lawful. The defendants' vakil could not suggest that there would be anything inequitable in such a decree; he only objected that the plaintiff's offer was not made in the Court below. This is a matter with which we can deal in our order as to costs.

On behalf of the defendant No. 3, the minor son of defendant No. 1, a further objection is taken to the frame of the suit. It is said that he was improperly made a party to a suit for specific performance, because he was not a party to the contract and no other cause of action could properly be joined in this suit. It is clear that against him there can be no decree for specific performance, and indeed the plaintiff does not ask for such relief against him. But the plaintiff is interested in having him before the Court in order to obtain an adjudication against him as well with regard to the existence of the contract as with regard to the question whether the contract is of such a nature as to be binding on him. The objection that such a decree as is required against the defendant No. 3 is one which cannot be combined with a decree for specific performance against the other defendants appears to us to be met by section 28 of the Code of Civil Procedure. According to that

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section all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter. The reasons for giving this latitude are explained in *Honduras Railway Company v. Tucker*(1), where also specific performance was part of the relief claimed. We observe that this authority is not mentioned in *Luckumsey Ookerda v. Fazulla Cassumbhoy*(2), a case somewhat resembling the present. It appears to us that there is here one and the same matter, namely, the contract between the plaintiff and his adult brothers, in respect of which he has a right to relief against them and also against the minor defendant. It is immaterial that the relief is not the same in both cases (see *Janokinath Mookerjee v. Ramrunjun Chuckerbutty*(3) and *Rajdhur Chowdhry v. Kali Kristna Bhattacharyya*(4)). Certainly the present case is within the reason of the rule, for it would be most inconvenient to leave to be decided in another suit against the minor defendant the questions above mentioned. Of these questions, the latter has been left undetermined, although in the written statement of the minor defendant there is an allegation that the arrangement between the three brothers is prejudicial to his interests. If the plaintiff desires to have any decree against the minor defendant, there must be a finding on the issue whether the said arrangement was made in fraud of the interests of the minor defendant. There must also be findings on the eighth, ninth, tenth and eleventh issues.

As to the memoranda of objections, we see no reason to interfere in the matter of costs, in which the Subordinate Judge has exercised his discretion.

The following were the issues sent back for a finding :—

Is item B in second schedule the property of the family or of the chattram?

Are the debts mentioned in plaint schedule true?

Have plaintiff and second defendant misappropriated properties mentioned in the schedule to the first defendant's written statement?

Has plaintiff paid first defendant Rs. 1,529-5-4 and second defendant Rs. 1,598-13-6?

(1) L.R., 2 Ex. D., 301.

(3) I.L.R., 4 Calc., 949.

(2) I.L.R., 5 Bom., 177.

(4) I.L.R., 8 Calc., 963.

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The Subordinate Judge found that the kudi right belonged to the family and not to the choultry, that the debts in plaint schedule are true, that the misappropriation was not proved and gave no finding as to the eleventh issue. With regard to the new issue he said "the first defendant must be deemed to have acted as the "manager in respect of his branch, and in such capacity it was "competent to him to enter into an arrangement for division with "his brothers, and such arrangement is binding on third defendant "in the absence of fraud or detriment, neither of which is proved."

On receipt of the above finding the case came on for final hearing before SHEPHARD and BEST, J.J.

Krishnasami Ayyar for appellant.

Ramachandra Rau Saheb, Bhashyam Ayyangar, Ramakrishna Ayyar, Tiruvenkatachariar and Seshachariar for respondents.

JUDGMENT.—The eighth issue raises the question whether the family of the parties possesses any interest in the lands comprised in schedule II-B. The plaintiff's contention is that, while the *melvaram* is admittedly part of the charity estate, the *kudivaram* in those lands belongs to the family. According to the memorandum made on the 26th May 1888, the property declared to have been purchased by the plaintiff for Rs. 7,750 was the choultry at Vachakarapatti. It is more particularly described in exhibit D as "the *huk* right of Vachakarapatti choultry, the lands the registry of which stands in the names of Alagappa Mudaliar and Shanmugasundara Mudaliar in No. 6, the decree razinamah, and all other deeds in respect of the said choultry, Rs. 747 being in possession of Sivaramasundara Mudaliar, and Rs. 70 from the *tirvah* of Sekanapuram and all the lands pertaining to Vachakarapatti choultry together with all the rights and privileges thereof."

The property now claimed as family property consists of the lands registered in the names of Alagappa Mudaliar and Shanmugasundara Mudaliar. The circumstance that they are specifically mentioned in exhibit D is regarded by the Subordinate Judge as indicating that they were not chattram lands. In our opinion the language is equivocal, and, taking exhibit D with exhibit E, we do not think that any inference in the plaintiff's favour can be drawn from it; rather the contrary. Similarly with regard to the security bond (exhibit R), the language of it is consistent with either view. Seeing that the writer styled himself *hukdar*, we think he might, with perfect honesty, describe the charity lands as

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his lands. The fact that he so designates them in such a document is no ground for the inference that he treated the lands as his own to the exclusion of the right of the charity. The fact is that the family treated the charity and its property as their own.

There is no documentary evidence distinctly showing that the family claimed the *kudivaram* of these lands. No patta or village accounts are produced. The Subordinate Judge refers to the evidence of certain witnesses. The third witness is the only witness who has no direct interest in these lands. His evidence is not specific as to the lands in question; the plaintiff's *vakil* was unable to show what the receipts mentioned by him proved. The other two witnesses are the parties themselves.

The defendant No. 1 says that the lands were previously entered in the name of the *chattram* and that he was no party to the transfer to the names of the plaintiff and defendant No. 2. The plaintiff on the other hand is unable to say in whose name the lands stood in his father's time, and he has no voucher to show that they stood in his father's name. He professes not to know how they came to be transferred to himself and the second defendant. It cannot therefore be according to him that the transfer was made by common consent as the plaintiff's *vakil* contends.

We cannot agree with the Subordinate Judge in thinking that the evidence as to enjoyment proves the alleged possession of the *kudivaram* by the family.

The result is that we must hold that so much of the agreement as relates to the auction sale in consideration of the Rs. 7,750 cannot be enforced.

As, however, this arrangement is clearly separate from the rest of the agreement, we see no reason why the plaintiff should not have partial relief. There is no dispute as to the findings on issues 1, 2, 3 and 6. It is unnecessary to decide the issues numbered 9, 10 and 11. The finding on the new issue is not challenged.

The decree of the Lower Court must be reversed and the plaintiff must have a decree as prayed except so far as regards the property included in schedules II-B and II-C attached to the plaint, as to which property the plaintiff must be declared to be jointly entitled to management with the defendants Nos. 1 and 2.

Under the circumstances we think each party should pay his own costs.

• APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

NARAYANA KOTHAN (DEFENDANT No. 2), APPELLANT,

v.

KALIANASUNDARAM PILLAI (PLAINTIFF No. 2),
RESPONDENT.*

Sale in execution—Insanity of judgment-debtor intervening before—Civil Procedure Code, ss. 456, 459, 460—Act XXXV of 1858.

A suit was brought by V. to have it declared that the sale of his property in execution of a decree was void owing to the fact that subsequent to decree and prior to sale he has been declared insane under Act XXXV of 1858. The second defendant was the auction purchaser:

Held by Best, J., that objection can be taken under s. 311, Civil Procedure Code, on the above grounds before the sale has been confirmed and certificate granted.

Held by Subramania Ayyar, J., that these facts only amounted to a material irregularity within s. 311, Civil Procedure Code, and that the plaintiff must prove substantial injury.

SECOND APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in appeal suit No. 824 of 1892, reversing the decree of V. T. Subramania Pillai, District Munsif of Kumbakonam, in original suit No. 275 of 1889.

Ramasami Sastri, defendant No. 1, herein obtained an ex-parte decree on 24th June 1887 against Vythilingam, the first plaintiff, herein in original suit No. 58 of 1887 on the file of the District Munsif of Kumbakonam for Rs. 1,198 on the basis of three promissory notes. Ramasami Sastri put the decree in execution. The District Collector as Agent to the Court of Wards filed a petition on 22nd October 1888 asking for stay of execution on the ground that Vythilingam was of unsound mind, that he was not represented by a guardian and that a suit was going to be filed to have the said decree set aside. This petition was rejected on 22nd November 1888. On 29th July 1889, the Collector brought the present suit against Ramasami Sastri and one Narayana Kothan, second defendant, who had purchased Vythilingam's house in execution of the said decree, but it was dismissed on 17th April 1890. On 16th July 1891, Vythilingam presented a review

* Second Appeal No. 46 of 1894.

1895.
April 24.
August 28.

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petition against this dismissal and joined his adopted son as second plaintiff and the assignee of the decree in original suit No. 58 of 1887 as third defendant. Whereupon the suit was restored to the file.

In the plaint it was alleged that the three promissory notes had been fraudulently got up by Ramasami Sastri and others, that Vythilingam was sued on them when he was of unsound mind and a decree obtained, that, in execution, Vythilingam's property worth Rs. 1,000 was irregularly sold for Rs. 100, that, as Vythilingam's estate including the property sold was under the Collector's management and as he (the Collector) was not made a party either to the suit or to the execution proceedings, the decree and the sale were invalid and would not bind him (Vythilingam), and that they should therefore be set aside.

Ramasami Sastri, first defendant, contended that the suit was bad for misjoinder of causes of action that the promissory notes were executed by Vythilingam in his proper senses for sums borrowed for family purpose, that as the suit No. 58 of 1887 was brought and decree obtained after Vythilingam was declared by the District Court to be sane, the Collector could not ask for the cancellation of that decree, that, at the time when his property was attached in execution of the decree, Vythilingam objected but his objection was not allowed, and that there was no reason to set aside the decree which was properly obtained, or the sale which was regularly conducted.

Second defendant, the auction purchaser, supported the first defendant.

Third defendant is the assignee from the first defendant of the latter's interest in the decree in suit No. 58 of 1887. The assignment was made on 14th March 1891 and was accepted by the Court on 23rd September 1891.

It appeared from the record that Vythilingam Pillai was found to be insane on 13th March 1885, but was subsequently certified by the District Surgeon to have recovered and was released from confinement.

The Munsif found that (1) on 15th October 1886, Vythilingam was declared sane and his property, which was under the management of the Court of Wards, was ordered to be restored to him; (2) that when original suit No. 58 of 1887 was brought, viz., on 12th February 1887 and when decree was passed on 24th June 1887

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Vythilingam was sane; (3) that on 25th July 1888, Vythilingam was again declared to be insane by the District Court, subsequent to which the attachment and sale took place; (4) that the execution proceedings were conducted without a guardian being appointed for him, but that this only amounted to an irregularity which did not vitiate the sale in execution. He found that the second defendant purchased *bonâ fide* and that there was no evidence that the property was sold for less than the real value as alleged. He therefore dismissed the suit with costs.

On appeal the Subordinate Judge found that the promissory notes sued on in original suit No. 58 of 1887 were binding, but reversed the decree and set aside the sale. The material portion of his judgment is as follows:—

"It is conceded that the first plaintiff was not represented on the record at the time the execution of the decree was proceeded with. He was declared a lunatic and was in the eye of the law not capable of acting for himself. He was in the same position as a minor at that time. Under sections 456, 459 and 460, Civil Procedure Code, he should have been represented by a guardian. The proceedings, therefore, were null and void being *ultra vires*. It is not, I think, a mere irregularity as noticed by the District Munsif. I am inclined to hold that the Court had no jurisdiction to sell the property in the absence of any body to represent the defendant on record. See *Ramasami v. Bagirathi*(1) and *Krishnayya v. Unnissa Begam*(2) and especially the observation at page 400. If, therefore, the Court had jurisdiction, then second defendant is protected and his purchase will be unquestionable within the principle laid down by the Privy Council in *Rewa Mahton v. Ram Kishen Singh*(3). The fact that second defendant is a *bonâ fide* purchaser, does not, therefore, affect the present question. I differ from the District Munsif on the second question and hold that the execution sale was made without jurisdiction, i.e., without legal authority."

Defendant No. 2 preferred this second appeal.

Rajagopala Ayyar and *Tiruvenkata Chariar* for appellant.
Sankaran Nayar for respondent.

ORDER—BEST, J.—The question for decision in this appeal is whether the Subordinate Judge is right in setting aside the sale

(1) I.L.R., 6 Mad., 180. (2) I.L.R., 15 Mad., 399. (3) I.L.R., 14 Calc., 18,

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held in execution of a decree (in original suit No. 58 of 1887) obtained by one Ramasami Sastri against the respondent's father Vythilingam Pillai. Appellant is the purchaser of the property at the said sale.

The Subordinate Judge's order proceeds on the ground that, at the time of attachment and sale of the property, Vythilingam Pillai was a person adjudged under Act XXXV of 1858 to be of unsound mind and therefore a person who should have been represented by a guardian *ad litem* as required by sections 456 and 460 of the Code of Civil Procedure; and not having been so represented, the sale must be held to be null and void.

In *Ramasami v. Bagirathi* (1) and *Krishnayya v. Unnissa Begam* (2), it has been held that even where the judgment-debtor dies *after attachment* but before sale, and the sale takes place without making the representatives of the deceased parties to the proceedings, the sale is illegal and must be set aside. If so, *a fortiori* the absence of legal representatives throughout execution proceedings in a case where the judgment-debtor is dead or incapacitated at the date of the attachment, must invalidate the sale. The above Madras cases have, however, been dissented from by a Full Bench of the Allahabad High Court in *Sheo Prasad v. Hira Lal* (3). See also *Aba v. Dhondu Bai* (4). But appellant rests his case, not so much on the above decisions of the High Court at Allahabad and Bombay as on the ruling of the Privy Council in *Rewa Mahton v. Ram Kishen Singh* (5), to the effect that, when a Court having jurisdiction orders a sale in execution of a decree, a purchaser of the property sold is not bound to inquire into the correctness of such order any more than into the correctness of the judgment upon which the execution issues. See also *Mothura Mohun Ghose Mondul v. Akhoy Kumar Mitter* (6) and *Rangasami Chetti v. Periasami Mudali* (7), where the law is stated to be that, where the defendant is a *bonâ fide* purchaser at a Court sale, any irregularity in the proceedings, which led to the sale, cannot be relied on as a ground for setting aside the sale *after it has been confirmed and a certificate issued*.

Before it is confirmed objection can, of course, be taken under section 311 of the Code of Civil Procedure.

(1) I.L.R., 6 Mad., 180. (2) I.L.R., 15 Mad., 399. (3) I.L.R., 12 All., 440.
(4) I.L.R., 19 Bom., 276. (5) I.L.R., 14 Calc., 18. (6) I.L.R., 15 Calc., 557.
(7) I.L.R., 17 Mad., 58.

Before we can dispose of this appeal findings are required on the following issues:—

(1) Was the sale confirmed and certificate issued under sections 314 and 316 of the Code prior to objection being taken to the same?

(2) Was the appellant a *bonâ fide* purchaser?

Additional evidence may be admitted on either side and the findings are to be submitted within a month from the date of the receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court.

SUBRAMANIA AYYAR, J.—The question raised before us is as to the validity of the sale of certain immovable property held in execution of the decree in original suit No. 58 of 1887, obtained by the first defendant against the first plaintiff, the alleged adoptive father of the second plaintiff (respondent), the second defendant (appellant) being the purchaser at such sale.

The contention on behalf of the plaintiffs was that, from a time prior to that when the property was attached until long after the sale, the first plaintiff was a lunatic; that the first defendant though aware of the fact took no steps to bring on record a proper person to represent the first plaintiff in the execution proceedings, but proceeded with the execution as if the first plaintiff was of sound mind; that the property was sold for about one-tenth of its proper price and consequently the sale could not bind them. That, as alleged, the first plaintiff was of unsound mind and was not represented in the execution proceedings which culminated in the sale are found by both the lower Courts. The District Munsif held, however, that the latter circumstance made the sale only irregular and, as it was not shown that the plaintiff sustained any injury by reason of the irregularity, the sale could not be cancelled. The Subordinate Judge being of opinion that the absence of any body to represent the first plaintiff in the execution proceedings rendered the sale one made without jurisdiction or legal authority, reversed the District Munsif's decree and set aside the sale.

On behalf of the second defendant, the purchaser, great stress was laid in the Courts below, as well as here, upon the ruling of the Privy Council in *Rewa Mahton v. Ram Kishen Singh* (1), where Sir B. Peacock observed that "If the Court has jurisdiction, a purchaser

(1) I.L.R., 14 Calc., 18.; 13 I.A., 106.

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"is no more bound to enquire into the correctness of an order for execution than he is as to the correctness of the judgment on which the execution issues." In laying down the rule in the wide terms just quoted, the judicial committee was, I think, only repeating the English law, respecting sales by Court, as it stood before the passing of the Conveyancing and Law of Property Act of 1881, section 70 of which provides that "an order of the Court under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of want of jurisdiction or want of any concurrence, consent, notice or service whether the purchaser has notice of any such want or not." The principle of the rule laid down by the Privy Council is that, so long as a Court is acting within its jurisdiction, *bonâ fide* purchasers at Court sales ought not to be affected by errors or irregularities in the decree or order for sale or other proceedings connected therewith. For, as observed by Sir Edward Sugden, L. C. in *Bowen v. Evans*(1). "It would be extremely dangerous to impress upon the minds of purchasers under decrees that that which had escaped the vigilance of the Court, its officers and of the Bar would form a sufficient ground to set aside a sale." The following passage in the same judgment may also be usefully quoted as indicating the extent of protection accorded by law to a purchaser at such a sale. "A purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties and that it has on that investigation properly decreed a sale; then he is to see that this is a decree binding the parties claiming the estate; that is to see that all proper parties to be bound are before the Court and he has further to see that taking the conveyance, he takes a title that cannot be impeached aliunde. He has no right to call upon the Court to protect him from a title not in issue in the cause and no way affected by the decree: but, if he gets a proper conveyance of the estate so that no person whom the decree affects can invalidate his title, although the decree be erroneous and therefore to be reversed, I think the title of the purchaser ought not to be invalidated. If we go beyond this, we shall introduce doubts on sales under the authority of the Court which would be highly mischievous." Looking to the reason of the rule, as explained in the above extracts, it appears to me that the language

(1) 1 Jo. and Lat., 178.

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of the judicial committee already quoted is to be understood, not as limited to the circumstances of the particular case then before it, but, as intended to lay down a broad rule applicable to judicial sales in this country.

Applying the rule, thus enunciated, to the present case, the first point is to see whether the sale was as held by the Subordinate Judge made without jurisdiction. That the Court which passed the decree in original suit No. 58 of 1887 had jurisdiction to pass it and that the decree was in force and capable of execution when the sale took place, are not questioned. The only fact said to vitiate the sale, as already stated, is that the first plaintiff, though insane, was not, after he became so afflicted, represented in the execution proceedings. It is difficult to understand how that fact could be said to have divested the Court of the jurisdiction, which it unquestionably had, to execute the decree before the first plaintiff lost his reason, whatever other effect such fact may have upon the validity of the execution proceedings conducted against him during the period of insanity. I am therefore unable to agree with the Subordinate Judge that the sale was made without jurisdiction.

The next point for consideration is how far, if at all, does the circumstance that the plaintiff was not represented in the execution proceedings which terminated in the sale, affect its validity. In dealing with this point, it may be observed that though the Code of Civil Procedure requires no special notice to be given to a judgment-debtor of an intended sale of his immovable property, yet it does not appear to treat such a sale as a purely ex-parte proceeding. Most probably the legislature thought that, as every proclamation of sale has under section 289 to be published at some place on or adjacent to the property to be sold and a copy thereof has to be fixed up in a conspicuous part of such property (*Kalytara Chowdhraim v. Ramcomar Goopta*(1)), the judgment-debtor would thereby get sufficient notice of the proposed sale. However this may be, there can be no doubt as pointed by Ránadé, J., in *Aba v. Dhondu Bai*(2) that the code contemplates the necessity of a judgment-debtor being a party to the sale proceedings. See also the observations in *Sheo Prasad v. Hira Lal*(3). The provisions of the code referred to by the learned Judge show that even after a

(1) I.L.R., 7 Calo., 466. (2) I.L.R., 19 Bom., 276. (3) I.L.R., 12 All., 440.

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decree the law gives the debtor many reasonable facilities for saving his property from sale, and if a sale has become inevitable, the law further enables him under proper restrictions to complain of irregularities in connection with it if he could show they have proved prejudicial to his interest. Now how could the interest of a judgment-debtor, who has become insane after the decree was passed, be effectually protected in execution, if it is to go on without his being represented therein. And why should the judgment-creditor in a case like this stand on a different footing from that occupied by a plaintiff or appellant, seeking relief against persons under such disability, neither of them being allowed by law to proceed without taking proper steps for the due representation of the defendant or respondent in the suit or appeal. Though section 463, Civil Procedure Code, is not expressly made applicable to execution proceedings, yet, I think, the procedure laid down therein ought, in reason, to be followed in cases like the present also, as otherwise serious harm might be done to judgment-debtors under such disability, whose helpless condition entitles them to peculiar protection at the hands of the Court directing the sale of their properties in execution. I am of opinion, therefore, that first defendant was bound to see that the first plaintiff was duly represented in the sale proceedings. And as he omitted to do so the sale must be held to have taken place without the due observance of the requirements of law on the point.

Is such a sale void or is it only liable to be set aside at the instance of the party affected? We have not been referred to any direct authority on this point. In England it is quite settled that a contract by a person of unsound mind is not void, but only voidable (See Pollock on Contracts, 6th edition, page 89, and the cases therein cited). When such is the case in respect of transactions into which private parties enter directly with insane persons, it is difficult to see how a different rule is to be laid down with reference to public sales held under the authority of a Court of Justice, it being of the greatest importance, as Sir Edward Sugden observes in the case already referred to that such sales should not be lightly set aside. Against this view it may perhaps be urged that the Indian law as to contracts by persons of unsound mind is different from the English law and that such contracts according to the proper construction of section 12 of the Indian Contract Act are void and not merely voidable. It is not, however, necessary in

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this case to express any opinion on this point, for assuming for argument's sake that this construction of the section is correct, the ground on which it rests, viz., incompetency to enter into a contract, is quite inapplicable to proceedings in execution where property of judgment-debtors, whether competent to contract or not, is equally liable to be seized and sold. And considering that in such proceedings Courts could and would hold the scales evenly between judgment-creditors and purchasers on the one hand and judgment-debtors on the other, the proper course is not to treat sales like the present as entirely null, but to hold that they are liable to be set aside for good cause shown (compare *Jungee Lall v. Sham Lall*(1)). My view is strongly confirmed by the general tenor of the observations of Muttusami Ayyar, J., in appeal against order No. 128 of 1892 where he appears to consider that in cases concerning the validity of sales under the Civil Procedure Code, the real question is whether the defect in the sale to the confirmation of which objection is taken, resulted in substantial injury to the party affected by the same, it being, in the opinion of the learned Judge, immaterial whether the defect in question is an illegality or something less. I arrive, therefore, at the conclusion that the sale in the present instance is not void but only irregular.

The cases of *Ramasami v. Bagirathi*(2) and *Krishnayya v. Unnissa Begam*(3) relied upon on behalf of the plaintiffs, are not, in my opinion, in conflict with the above conclusion. The question in both cases was whether a sale of the property of a deceased judgment-debtor without his representative being brought on the record was valid. This Court held it was not. After the death of the judgment-debtors in these cases there was no one that could be said to have been a party to the subsequent proceedings held therein, the representatives of the deceased parties not having been brought on the record; here, however, the judgment-debtor continued to be a party, though he came under a disability. Consequently these cases do not seem to me to be on all fours with the present. Apart from this, the language employed by the Judges who decided the later of the two cases, is hardly consistent with the view suggested by the words used by the Judges who decided the earlier case. In *Krishnayya v. Unnissa Begam*(3), PARKER and

(1) 20 W.R., 120. (2) I.L.R., 6 Mad., 180. (3) I.L.R., 15 Mad., 899.

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WILKINSON, JJ., say that "The sale without notice to him of "property belonging to a person not a party to the suit was a "material irregularity and must necessarily cause him substantial "injury." I do not think that I shall be warranted in supposing that in adding the words "must necessarily cause him substantial injury," the learned Judges intended to use the phrase "material irregularity" to denote something that rendered the sale absolutely null and void, a sense so different from the generally accepted interpretation of the term as used in sections 311 and 312 of the Civil Procedure Code. I doubt whether the learned Judges intended to go further than to hold that the defect in the sale they had to deal with was from its nature such as to raise a strong presumption that it was calculated to cause loss to the party whose property was sold without his knowledge (compare *Gur Buksh Lall v. Jauahir Singh*(1)). Moreover in *Aba v. Dhonda Bai*(2), already referred to, Jardine and Ránade, JJ., after considering the above two cases, treat the sale without the legal representative of a judgment-debtor being made a party as an irregular and not a void proceeding.

The third and last point to be noticed is that urged on behalf of the second defendant to the effect that, upon the view that the sale was not void, it is not open to the plaintiffs to impeach it on the ground of irregularity as he, second defendant, is a *bonâ fide* purchaser and the sale has been confirmed and sale certificate issued to him.

The facts necessary to determine this point are not before us. In concurring with my learned colleague in calling for the necessary findings I wish to draw attention to an aspect of the order confirming a sale that has in my view an important bearing upon the question of second defendant's *bonâ fides*. I refer to the circumstance that an order of confirmation is more than a mere ministerial act, and is a judicial determination, between the purchaser and the judgment-debtor, that none of the objections on which the latter could have sought to set aside the sale before confirmation, exist in the particular case (sections 311 and 312, Civil Procedure Code). Now to hold that the order of confirmation in the present case is binding upon the first plaintiff, notwithstanding the fact that he was not represented at the time it was

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passed as he ought to have been, would be to disregard the principle *audi alterum partem*. The disregard of even such a principle seems to be justifiable, provided it is necessary for the protection of *bonâ fide* purchasers at execution sales. But before the second defendant asks the Court to uphold an order obtained in violation of so fundamental a rule of judicial procedure as that stated above, it is incumbent upon him to satisfy the Court that, notwithstanding the exercise of due diligence on his part, he was ignorant that the first plaintiff had become a lunatic; especially, as about the time the sale in question took place, he had been declared to be such under Act XXXV of 1858, and the fact that there was an adjudication to that effect appears to have been communicated to the Court executing the decree by the Collector's petition, dated 22nd October 1888. For, when the second defendant's bid was accepted, he, as one of the persons interested in securing a valid confirmation, became responsible for the regularity of the subsequent proceedings and consequently was, in my opinion, bound to see that the first plaintiff was duly represented therein. From this responsibility he could not escape except by showing that his ignorance of the condition and circumstances of the first plaintiff at the time of the sale and confirmation was not due to any omission on his part to examine the record in the execution proceedings and otherwise to make reasonable enquiries in the matter. In the absence of such proof the second defendant would, I think, fail to establish that he exercised the care and attention necessary to make out he is a *bonâ fide* purchaser as alleged. I agree in requiring the Subordinate Judge to submit findings on the matter specified in the judgment of my learned colleague. Should the findings be against the second defendant, the Subordinate Judge should also record a finding upon the contention raised by the plaintiffs that they sustained substantial injury by the irregularity in the sale.

[On return of findings the parties filed a *razinama* petition and the suit was compromised.]

(1) I.L.R., 20 Cal., 599.

(2) I.L.R., 19 Bom., 276.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

RAMA AYYAN (COUNTER-PETITIONER), APPELLANT,

v.

SREENIVASA PATTAR (PETITIONER), RESPONDENT.*

Civil Procedure Code, ss. 244, 258.

On an application for execution of a decree being presented by a transferee decree-holder, the judgment-debtor opposed alleging in his petition that he had transferred certain immovable property to the petitioner in consideration of his paying the judgment debt to the original decree-holder and that the petitioner had discharged the debt, but subsequently having got the decree transferred to himself instead of entering up satisfaction of the decree, fraudulently applied for execution. Satisfaction had not been entered up under section 258, Civil Procedure Code:

Held, that there must be an enquiry into the truth of the judgment-debtor's allegations, and if proved the petition for execution must be dismissed, and further that section 258, Civil Procedure Code, was inapplicable to the present case, since that section applies only to the case of parties who stand in the relation of judgment-debtor and judgment-creditor at the date of the transaction.

APPEAL against the order of R. S. Benson, District Judge of South Malabar, passed on civil miscellaneous appeal No. 102 of 1893, reversing the order of V. Rama Sastri, District Munsif of Temelprom, in civil miscellaneous petition No. 1762 of 1893.

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

Sundara Ayyar for appellant.

Respondent was not represented.

JUDGMENT.—In original suit No. 77 of 1883 on the file of the Temelprom District Munsif's Court, a decree was passed against the present respondent. The appellant applied to that Court to execute the decree as transferee thereof. The respondent put in a petition wherein he stated that he had transferred certain immovable property to the appellant in consideration of his paying the judg-

* Appeal against Appellate Order No. 6 of 1894.

ment debt to the original decree-holder, that the appellant accordingly had discharged the debt, that subsequently, however, he (the appellant) had got the decree transferred to himself, and that, having thus become the assignee, instead of entering up satisfaction, he has fraudulently applied for execution of the decree against the respondent. He therefore prayed that the application for execution be rejected. The District Munsif, without taking evidence, dismissed the petition on grounds which I think it unnecessary to notice. The District Judge on appeal came to the conclusion that, if the allegations contained in the respondent's petition be true, the appellant should be taken to have become a trustee for the discharge of the judgment debt in 77 of 1883, and the appellant's application to execute the decree is an abuse of the trust. Consequently he reversed the order of the District Munsif whom he directed to record, after admitting evidence, a finding on the question of trust raised and to pass a fresh order.

It was urged before me that the District Judge's view, that a trust was undertaken by the appellant when the property was transferred to him, is erroneous, and therefore his order should be set aside and that of the District Munsif, rejecting the respondent's petition, restored. I think, however, that the District Judge's order should not be disturbed, as I hold that it is right in so far as it considers that an enquiry into the allegations of the respondent is necessary.

Now assuming these allegations to be well founded, whether, when the appellant became the transferee of the property in consideration of his paying off the debt due by the respondent, the former became trustee, as suggested in the order of the District Judge, may be open to doubt. But there can be no doubt that the appellant thereby undertook an obligation to discharge the debt. Having undertaken that duty, it follows he has certainly now no right to execute the decree. This would be still clearer if, as alleged by the respondent, the appellant did in fact pay the original judgment-creditor the amount due to him. In such circumstances the application made by the appellant, praying for the execution of the decree, must be held to be a fraud against which the respondent is entitled to redress. And now that the appellant has been allowed to appear on the record as the assignee of the decree, the question whether the application to execute it is fraudulent or not is one relating to execution arising between the decree-

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holder and the judgment-debtor, and consequently it can and ought to be investigated under section 244, Civil Procedure Code (*Paranjpe v. Kanade*(1), *Subbaji Rau v. Srinivasa Rau*(2), *Viraraghava Ayyangar v. Venkatacharyar*(3)).

As, however, the agreement between the appellant and the respondent about the former paying the decree amount to the original judgment-creditor is said to have taken place so far back as 1883-84, it might perhaps be suggested that the transaction in question cannot, under the last paragraph of section 258, Civil Procedure Code, be recognized by the Court in execution proceedings, inasmuch as it was not certified by the appellant and inasmuch as the respondent's application was, with reference to the date of the agreement, made after ninety days, the period prescribed for an application by a judgment-debtor under that section. I consider, however, that the said paragraph of the section has no application to this case, because at the date of the transaction, which, if proved, would prevent the appellant from executing the decree, he was not himself the decree-holder. As I understand the said provision of the law, it is only when the parties to a transaction entered into for the purpose of satisfying or adjusting a decree stand at the date of such transaction in the relation of judgment-creditor and judgment-debtor to each other that a Court executing the decree is prohibited from recognizing such transaction unless duly certified. That this must be so is clear when the object of section 258 is considered—compare *Ramji Pandu v. Mahomed Walli*(4) following *Yella v. Munisami*(5). The first paragraph of the section imposes on judgment-creditors the duty of certifying to the Court any payment out of Court on account or any satisfaction or adjustment in respect of the decree. The second paragraph enables judgment-debtors to apply to Courts to compel judgment-creditors to certify if they had failed to do so and empowers Courts to hold an enquiry into the matter. The last paragraph prohibits judgment-debtors, who omit to apply under the second paragraph or having applied fail to establish their case, from relying in execution proceedings upon any payment, satisfaction or adjustment not duly certified. Manifestly therefore the enquiry under the said second paragraph can take place only between persons standing in the relation of judgment-debtor and judgment-creditor.

(1) I.L.R., 6 Bom., 148. (2) I.L.R., 2 Mad., 264. (3) I.L.R., 5 Mad., 217.
(4) I.L.R., 13 Bom., 671. (5) I.L.R., 6 Mad., 101.

If the former has entered into a contract, not with the latter, but with a third party, with reference to the satisfaction or adjustment of a decree, the judgment-creditor cannot make any application against such third party under section 258, and consequently the latter cannot on principle be permitted to take advantage of the prohibition imposed by the concluding paragraph of that section as a penalty for the judgment-debtor's omission to apply to the Court under the previous paragraph, or for his failure to prove his case if he did apply. The circumstance that the third party, subsequently to the contract, becomes the transferee of the decree which he contracted to satisfy, can have no retrospective effect, so as to deprive the judgment-debtor of his right to establish that the transferee is, by the anterior contract, precluded from realizing the judgment debt.

It is hardly necessary to observe that it is not the case of the respondent that, subsequent to the appellant being recognized by the Court as transferee of the decree, anything transpired which the respondent is entitled to rely upon as a satisfaction or an adjustment of the decree. As regards the appellant's getting himself recognized as transferee of the decree, there is nothing on the record before me to show whether, at the time when he applied for it, the respondent had notice of the application, and whether the latter then raised any objection to its being granted and with what result. Consequently it is not now possible to pronounce any opinion upon the question how far the order of the Court permitting the name of the appellant to be put on the record as that of the transferee affects the right of the respondent to object to the appellant's being allowed to execute the decree. This and any other question that might be raised against the sustainability of the respondent's present petition will have to be determined at the enquiry which has been ordered, and which I think was rightly ordered.

The appeal fails and is dismissed.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

KUNHAN MAYAN AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

THE BANK OF MADRAS (DEFENDANT), RESPONDENT.*

Indian Contract Act—Act IX of 1872, s. 171—Banker's lien.

The plaintiff deposited certain jewels with the defendant bank to secure certain debts. Afterwards, he paid the secured debts and demanded the return of the jewels being then otherwise indebted to the bank:

Held, that the plaintiff was not entitled to recover the jewels without discharging the other debts unless he proved that the defendant had agreed to give up its general lien.

APPEAL against the decree of S. Subba Ayyar, Subordinate Judge of North Malabar, in original suit No. 58 of 1893.

Suit for the return of certain jewels pledged by the first plaintiff on different dates with the defendant as security for loans made to him or their value. The first plaintiff alleged that at the date of the said pledges and loans the defendant was informed that the jewels pledged did not belong to the first plaintiff, but belonged to plaintiffs Nos. 2 and 3, and further that it was agreed that whenever first plaintiff tendered the principal and interest due on the respective loans the jewels pledged therewith were to be returned to him. The plaintiffs alleged that the first plaintiff, on 30th June 1893, tendered the amount due on the loans and demanded the return of the jewels pledged, but that defendant refused to return the jewels alleging that the jewels will not be delivered until the first plaintiff discharges his other liabilities to the bank. The defendant by its agent admitted the loans and pledges of the jewels in question, but denied that at the time the pledges were made, the defendant was informed that the jewels did not belong to the first plaintiff, and the defendant denied that it was agreed that whenever plaintiffs tendered the principal and interest due on the said loans the jewels were to be returned. The defendant further denied the tender and the defendant further set up that in addition to the amounts for which the jewels were pledged to the defendant the first plaintiff was indebted to the said defendant in a large sum of money and that the

* Appeal No. 206 of 1894.

defendant has the right to retain any property belonging to the first plaintiff and in defendant's possession, in exercise of his general right of lien on such property for the amount due. The Subordinate Judge by his decree directed that, on payment of the loans by the plaintiffs with interest thereon within one month together with defendant's costs, the defendant should return the jewels pledged.

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The plaintiffs appealed and the defendant filed a memorandum of objections on the ground that the Lower Court erred in law in finding that the defendant was not entitled to a general lien on the jewels, the subject of the suit for all money due to it, and that it should have found that the defendant was entitled to hold the said jewels until all moneys due to it from the plaintiffs on any account whatever were paid.

Mr. C. Krishnan for appellants.

Mr. J. H. M. Ryan for respondent.

SHEPHARD, J.—The real question to be decided in this appeal is whether, under the circumstances, the defendant had a general lien on the jewels and was at liberty to retain them until the other debt owing by the plaintiff Kunhan Mayan was paid off. I see no reason to differ from the Subordinate Judge in his opinion on the evidence given with reference to the second issue, but the alleged fact of notice having been given to the agent that the jewels belonged to other persons, is not, in my opinion, material, for it is not said that Kunhan Mayan was acting otherwise than with their consent in pledging the jewels. Indeed the evidence in the case of one pledge is to the effect that the real owner was actually present and took part in the transaction; in another case, the husband of the alleged owner is said to have been present. Under these circumstances and seeing that the bank agent was, as the discharged cash-keeper admits, careful to deal with the plaintiff Kunhan Mayan only, I do not think the right of the bank in respect of the pledge would be in any way prejudiced by the agent's knowledge, if it had existed. The question as to the bank's general lien is important, because; by his letter of the 22nd August 1893, the agent declined to give up the jewels until the other liabilities of the plaintiff were discharged. In this letter, referring to the plaintiff's letter of the previous day, the agent in effect told the plaintiff that he would not take the money offered

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on the terms indicated in the plaintiff's letter. If, therefore, the plaintiff was right in insisting on those terms, he was entitled to say that there was, on the part of the bank, a waiver of his actual tender of the money. The rule of law with regard to general liens is clearly laid down in the 171st section of the Contract Act. Bankers have such a lien on things bailed with them unless there is a contract to the contrary. It was for the plaintiff in this case to prove the existence of such a contract. It was argued that the plaintiff had discharged that burden of proof by showing that a fresh deposit of jewels was made as each loan was advanced. Each loan, with the pledge of jewels accompanying it, must, it was said, be taken as a separate transaction so that the bank could not retain the jewels pledged to secure one of the loans as security for any other of the three loans. The evidence before us as to the relations between the plaintiff and the bank is meagre. All we know is that besides these three loans there were other loans by the bank to the plaintiff, a list of which with interest was made up to the 31st May 1893. On the 28th June, a deed of hypothecation was given as security. The bank books were not produced, but perhaps it may be inferred that the loans on jewels and the other loans were not entered in one account. This circumstance, however, is not inconsistent with the bank's claim to a general lien. The evidence of the cash-keeper, which is extremely brief, shows that he at least thought there was nothing special about the plaintiff's loans and that therefore the jewels might be retained until all debts were paid off. It being incumbent on the plaintiff to show that the bank had agreed to give up the general lien to which by law a bank is *prima facie* entitled, I must say that in my opinion the plaintiff has failed in his proof. There was, it may be observed, no proper issue on the question, and no attempt made to prove a special contract except by the evidence of the witnesses which was discredited by the Judge. Holding that the bank was entitled to retain the jewels until the other debts owed by the plaintiff were paid off, I think the suit ought to have been dismissed. I would accordingly reverse the decree and dismiss the suit with all costs.

BEST, J.—Plaintiff appeal against so much of the decree as directs payment of (1) interest subsequent to 21st August 1893, (date of the letter D) and (2) defendant's costs of the suit, while defendant has taken objection under section 561 of the Code of

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Civil Procedure to the disallowance of his claim to a general lien on the jewels pledged.

Plaintiffs' case is that the amount due on the pledge of the plaint jewels was first tendered on 30th June 1893 and again the tender was repeated in writing on 21st August following, by letter D, to which was received the reply E from the defendant bank's agent, saying that the jewels could not be given up "until full value for same has been received, unless you first discharge your other liabilities to the bank."

The question, therefore, is, had the defendant a lien on the jewels for debts of the first plaintiff other than those for which they were pledged?

The law on the point is contained in section 171 of the Contract Act, which says that bankers may "in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them." The burden of proving "a contract to the contrary" is, in the present case, clearly on the plaintiffs, who allege that at the times of deposit of the jewels the then agent was informed that the jewels belonged to second and third plaintiffs and should be returned to them on their paying the moneys due on the particular pledge. The Subordinate Judge's finding as to this special agreement, which is against the plaintiffs, is in accordance with the evidence. Mr. Black, the then agent, denies that there was any such agreement, or that he was informed that the jewels belonged to the second and third plaintiffs. The only witnesses who give evidence to the contrary are the first plaintiff and his first witness Achuden, a dismissed cash-keeper of the bank, who, however, admits that it was "against the rules of the bank" to advance money on the pledge of jewels known not to belong the pledger.

Agreeing with the Subordinate Judge in his findings as to the facts, I would dismiss the appeal. But on these same findings the conditional decree in favour of plaintiffs cannot be supported. The suit should have been dismissed in its entirety.

The respondent's objection must, therefore, be allowed and the suit dismissed with costs throughout.

Messrs. Barclay, Morgan & Orr, attorneys for the respondents.

APPELLATE CRIMINAL.

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

QUEEN EMPRESS

LAKSHMI NAYAKAN.*

*Cattle Trespass Act—Act I of 1871, ss. 22-25.—No appeal—Criminal
Procedure Code, s. 404.*

There being no appeal from a conviction under Cattle Trespass Act, the High Court refused to revise the proceedings of the lower court under ss. 435, 438, Criminal Procedure Code, since there being evidence to support the conviction to adopt such a course would be to substantially allow an appeal.

Imprisonment cannot be inflicted in default of payment of the compensation awarded under the Cattle Trespass Act.

CASE referred for the orders of the High Court by A. W. B. Higgins, District Magistrate of Tinnevely, under section 438, Criminal Procedure Code.

The case was stated as follows:—

“In Calendar Case No. 169 of 1895 on the file of the Sub-Magistrate of Vilatikulam, the complainant charged the accused with having seized his master’s cattle and impounded them, and also with having beaten him owing to some enmity between the accused and his (complainant’s) master. The complaint was under section 22 of the Cattle Trespass Act I of 1871 and section 323 of the Indian Penal Code. The Sub-Magistrate entertained the complaint and tried both the offences together. The complainant examined two witnesses to prove his allegation. The accused pleaded that the cattle grazed on his field and that, for this reason, he impounded them, and that this complaint was got up against him because he impounded the cattle. He pleaded also that the complainant was beaten by his own men for having allowed the cattle to stray on another man’s land. The accused cited four witnesses to prove his defence. The Sub-Magistrate believed the prosecution and disbelieved the defence and sentenced the accused to pay Rs. 12 as compensation under

* Criminal Revision Case No. 633 of 1895.

“section 22 of the Cattle Trespass Act and a fine of Rs. 5 under section 323, Indian Penal Code, or, in default, to undergo rigorous imprisonment for ten days and five days respectively.

“An appeal was preferred by the complainant and the Joint Magistrate found that there was not sufficient evidence as to the illegal impounding, and, as regards the assault, he held that there was no reason to believe the prosecution rather than the defence. He therefore quashed the sentence under section 323, Indian Penal Code, but, as no appeal is provided against the award of compensation under section 22 of Act I of 1871, he has made a reference under section 435, Criminal Procedure Code.

“The Cattle Trespass Act I of 1871 does not provide for any appeal, and, under section 404, Criminal Procedure Code, there was no appeal against the order of compensation. As observed by the Joint Magistrate, the evidence about the illegal seizure of the cattle is apparently insufficient. I consider, therefore, that the award of compensation is unjust, and request that the High Court will be pleased, in exercise of its powers of revision, to order the refund of the amount of compensation levied. I have also to remark that the order of the Sub-Magistrate awarding imprisonment in default of payment of compensation is illegal.”

Parties were not represented.

JUDGMENT.—The District Magistrate is right in stating that no appeal lies against an order under section 22 of the Cattle Trespass Act (I of 1871), *Queen-Empress v. Raja Lakshma*(1) and *Dhiku v. Deno Nath Deb*(2).

There is evidence that the seizure was illegal and the Sub-Magistrate believed it. The Joint Magistrate however considered it ‘insufficient.’ The High Court, as a Court of Revision, will not, in such a case, weigh the evidence, for to do so would, in effect, be to admit an appeal where the law does not allow it. So much, however, of the Sub-Magistrate’s order as directs that imprisonment be awarded in default of payment of compensation is illegal, and is set aside.

(1) I.L.R., 10 Bom., 230.

(2) I.L.R., 15 Cal., 712.

[Reporter’s Note: See *In re Khadar Khan*, I.L.R., 11 Mad., 359.]

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NAYAKAN.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Davies.

1896.
January 9.

QUEEN-EMPRESS

v.
RAYAPADAYACHI.**Penal Code, s. 448—Criminal Trespass—Intent.*

Although a trespasser knows that his act, if discovered, will be likely to cause annoyance, it does not follow that he does the act with that intent.

CASE referred for the orders of the High Court by R. D. Broadfoot, Acting Sessions Judge of Trichinopoly, under section 438, Criminal Procedure Code.

The facts of this case appear from the letter of reference which is as follows:—

“The Stationary Second-class Magistrate of Udaiyarpalaiyam convicted one Rayapadayachi accused in calendar case No. 677 of 1895 on his file under sections 451 and 75, Indian Penal Code, and sentenced him to four months’ rigorous imprisonment.

“The accused appealed against this conviction to the Deputy Magistrate of Aryalur, who altered the conviction to one under section 448 and upheld the conviction.

“In this case, there is a distinct finding by the Stationary Sub-Magistrate that the intention of the accused in entering the house was to have sexual intercourse with the complainant’s unmarried sister. The Deputy Magistrate agrees with the said Sub-Magistrate and with the said finding; while admitting that it is no offence to have intercourse with an unmarried woman, he adds that in this case the accused should be presumed to have acted with a criminal intent as ‘nothing can be more annoying and insulting to complainant than such an entry.’ I think this is not a correct and proper interpretation of the law. Criminal revision case No. 544 of 1885 quoted in page 329, *Weir’s Criminal Rulings*, third edition, is in point. This ruling is a clear authority for holding that, in the circumstances stated and found, the accused has committed no offence; for his primary intent, and to that alone we should look, was not to insult or annoy the brother but to meet the sister.

* Criminal Revision Case No. 602 of 1895.

“Again on the facts found, it is no more than likely that, as alleged by the accused, he was enticed into the house in order to be beaten and falsely charged with theft. Under these circumstances I have the honour to request their Lordships to quash the conviction and to order that the accused who has been this day ordered to be released on bail be set at liberty.”

Counsel were not instructed.

JUDGMENT.—We agree with the opinion of the Sessions Judge based on a decision of this Court in *re Sivaratri Guruvaiya* (1) which, however, is not in accordance with a previous decision in *re Veda Gurukkal* (2). In our opinion the accused, though he may have known that, if discovered, his act would be likely to cause annoyance to the owner of the house, cannot be said to have intended either actually or constructively to cause such annoyance. It is one thing to entertain a certain intention and another to have the knowledge that one’s act may possibly lead to a certain result. The section (441) defining criminal trespass is so worded as to show that the act must be done with intent and does not, as other sections do (e.g., section 425), embrace the case of an act done with knowledge of the likelihood of a given consequence.

The conviction must be set aside and the prisoner who is on bail released from his bond.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.
SUBBANNA.*

Madras District Municipalities Act—Act IV of 1884, s. 179—Criminal Procedure Code, s. 433.

By section 179, Madras District Municipalities Act IV of 1884, it is provided “the external roofs, verandahs, pandals, and walls of buildings erected or renewed

(1) Criminal Revision Case No. 544 of 1895, *Weir’s Criminal Rulings*, Third Edition, 329.

(2) Criminal Revision Case No. 249 of 1882, *Weir’s Criminal Rulings*, Third Edition, 328. * Criminal Revision Case No. 532 of 1895.

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YACHI.

1896.
February 14.

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"after the coming into operation of this Act shall not be made of grass, leaves, mats or other such inflammable materials except with the written permission of the Municipal Council."

Held, that the word "renewed" includes repairing.

CASE referred for the orders of the High Court by J. N. Atkinson, District Magistrate of Kistna, under section 438, Criminal Procedure Code.

The case was stated as follows:—

"One Kowludu Subbanna of Bezwada repaired a portion of his thatched roof without the permission of the Municipal Chairman. The Sanitary Inspector of the Bezwada Municipality prosecuted him under section 179 of the Madras District Municipalities Act, 1884. But the Bench acquitted the accused under section 245, Criminal Procedure Code, on the following grounds:—

"This is neither erection, nor renewal contemplated by the Act. Only a portion of the roof was repaired. This is not within the purview of the Act."

"The Bench is clearly wrong. Section 179 of the Municipal Act covers all 'external roofs of buildings renewed.' My Head Assistant Magistrate comments on the case as follows:—

"Repair is renewal and further the contention is not technical. The section places in the hands of the Municipal Council a means of preventing fire through thatched roofs; since the substitution of tiles can, at its discretion, be made a condition of the grant of the license. By decisions such as this, that discretion is taken away, since so long as a vestige of the old roofs remains the plea of repairs will be successful."

Parties were not represented.

JUDGMENT.—We have no doubt that the interpretation put by the Bench of Magistrates upon the meaning of the word 'renewed' is wrong. It includes repairing. The acquittal is set aside and the accused must be retried.

APPELLATE CIVIL.

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

VELU PANDARAM (PLAINTIFF), APPELLANT IN APPEAL
No. 115 of 1894,

v.

GNANASAMBANDA PANDARA SANNADHI AND ANOTHER
(DEFENDANTS), RESPONDENTS,

GNANASAMBANDA PANDARA SANNADHI (DEFENDANT No. 1),
APPELLANT IN APPEAL No. 120 of 1894,

v.

VELU PANDARAM AND ANOTHER (PLAINTIFF AND DEFENDANT
No. 2), RESPONDENTS.*

Religious endowment—Hereditary trustee—Invalid alienation—Limitation.

In a suit brought by a hereditary trustee to set aside certain alienations of the trust property made by his predecessors in title and to have it declared that he was entitled to the sole management of the trust property, it appeared that the property was held jointly by plaintiff's father and by the mother of the first defendant. On 17th September 1868 first defendant's mother alienated her right to the joint management to the first defendant, who however never got possession until 13th February 1869, on which date plaintiff's father alienated his right to joint management to first defendant; the plaintiff was born in 1875:

Held, that the hereditary right of plaintiff was a personal right accruing on the death of his predecessor, viz., his father, and that as limitation ran from that date, the suit was not barred.

APPEALS against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in original suit No. 42 of 1892.

This suit was brought by the plaintiff as hereditary trustee of the Nakshatramalai Kattalai charity against the first defendant, the adhinamdar of the Dharmapuram mutt, for a declaration to establish plaintiff's right to the sole management of the said charity of Sri Amerthagateswaraswami temple at Thirukadaiyur and to direct the first defendant to surrender up to the plaintiff the plaint properties. It was further prayed that should the Court

* Appeals Nos. 115 and 120 of 1894.

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17, 23.
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hold that the first defendant had acquired the second defendant's right in respect of his half share in the management of the said charity, a decree might be passed declaring plaintiff to have the right to hold the plaint properties jointly with the first defendant and to have jointly with him the right to the management of the said charity.

The charity in question was alleged to have been founded by the ancestors of the plaintiff and second defendant and the lands described in the plaint schedule attached to it were granted by them for the use of the charity in order that the income thereof might be appropriated and employed for the worship and the celebration of certain festivals. It was further alleged that it had been arranged that the management of this charity and the property so granted should vest in the members of their own family from generation to generation. While this charity was thus under the management of the family of the founders, the Government took charge of it and the properties thereto attached, but Government disconnected itself from all direct management of this institution and delivered it to plaintiff's grandfather Velu Pandaram in 1850-57. Since then the charity was managed by the said Velu Pandaram and his divided coparcener Kuppa Pandaram (the father of defendant No. 2) until their death, and they were succeeded in the management by the plaintiff's father. In the years 1868 and 1869 the plaintiff's father and one Visalakshi, mother of defendant No. 2 and widow of Kuppa Pandaram, accepted each Rs. 2,000 from the Pandara Sannadhi of Dharmapuram (first defendant's predecessor in title) and transferred to him all their rights to the management and to the lands pertaining to the kattalai, and since that date the Dharmapuram mutt agents have been managing the lands and affairs of the charity. The plaintiff's father died in August 1884. The plaint set forth that the plaintiff and defendant No. 2 have the right of management according to the family arrangement and custom, but alleged that defendant No. 2, having left the management in the hands of the first defendant, and being even after having attained majority unwilling to assume it, the plaintiff has succeeded to the sole management of the entire charity. Plaintiff attained his majority on 26th February 1891, and has since frequently requested the first defendant to surrender the office of trustee and the lands pertaining to it but without success.

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The first defendant traversed the allegations in the plaint and pleaded that the suit was barred by limitation. He further stated that this trust and charity had been attached to the Dharmapuram Adhinam and were handed over to his predecessors in office in 1842 by the Government, that the plaintiff's father having put forward a claim of right in 1867, his claim was purchased for Rs. 2,000. The first defendant further raised some other pleas, which are not now material.

The second defendant filed a written statement supporting the plaintiff's case, but seeking to have joint management with him.

The Court of first instance found that, though the origin of the institution was involved in obscurity, there was no doubt that the management of this kattalai was vested in the plaintiff's family, and that its affairs were managed subsequent to the Government management by the plaintiff's grandfather Velu Pandaram and his nephew Kuppa Pandaram, and after the death of Velu Pandaram by his adopted son Nataraja (plaintiff's father) and nephew till the death of the latter. It was also proved that, in August 1868 and February 1869, it passed to the Dharmapuram mutt under two registered conveyances, the one (exhibit A) executed by the second defendant's mother as guardian of defendant No. 2 and the other (exhibit H) executed by plaintiff's father.

In the result the Lower Court held that the alienations were illegal, that the suit was not barred by limitation, and that the plaintiff was entitled to joint management of the office and the lands forming its endowment along with defendant No. 1. The Lower Court further held that the plaintiff's claim to the half share of second defendant's father was barred by limitation.

The plaintiff appealed in appeal No. 115 of 1894 on the ground that he is entitled to the whole property and management.

Defendant No. 1 appealed in appeal No. 120 of 1894, contending that plaintiff's claim is barred in respect of his father's half share.

Bhashyam Ayyangar and *Sundara Ayyar* for appellant in appeal No. 115 of 1894.

Krishnasami Ayyar for respondents in the above.

Krishnasami Ayyar for appellant in appeal No. 120 of 1894.

Bhashyam Ayyangar and *Sundara Ayyar* for respondents in the above.

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JUDGMENT.—The ancestors of plaintiff and of second defendant were hereditary trustees of the charity called Nakshathramalai Kattalai attached to a temple of Thirukadaiyur, and were jointly entitled to its management. It was at one time taken under the control of Government, but was redelivered in 1850-57 to Velu Pandaram, plaintiff's grandfather, as hereditary audinakarta, since which time Velu Pandaram and his divided coparcener Kuppa Pandaram continued in joint management. In 1868 Velu Pandaram had been succeeded by his son (plaintiff's father), and Kuppa Pandaram had also died, leaving a minor son (second defendant) and a widow, Visalakshi. On 17th September 1868 Visalakshi, on behalf of her minor son, executed a registered deed of conveyance of his share in the joint management to first defendant's predecessor, the then Pandara Sannadhi of Dharma-puram mutt (exhibit A), and in the following year (February 13, 1869) plaintiff's father executed a similar deed in respect to his half share in the management (exhibit H). Since that time the Pandara Sannadhi for the time being (now first defendant) has managed the charity. Plaintiff's father died in August 1884 and plaintiff brought this suit on 17th August 1892 as the successor of his father in the hereditary trusteeship to recover the properties of the charity and for a declaration of his right to sole management.

Various issues were framed in the Court below, almost all the allegations made in the plaint having been disputed. In the result the Subordinate Judge found that plaintiff was entitled to recover his father's half share in the management, but that his claim to the half share, which had belonged to second defendant's father, was barred. A decree was, therefore, passed, giving plaintiff joint possession of the management and property with the first defendant.

Against this decree both sides have appealed, the plaintiff in appeal No. 115 of 1894 contending that he is entitled to the whole property and management, while the first defendant in appeal No. 120 of 1894 contends that plaintiff's claim is barred in respect to his father's half share as well as to the half share of second defendant's father.

Before us the original hereditary right of plaintiff's family has not been contested, nor is it denied that the alienations of the

trust property in 1868 and 1869 were illegal. The sole points argued have been the questions of limitation.

Taking first defendant's appeal (No. 120), first, it is argued time began to run against plaintiff's father in 1869 before plaintiff was born (in 1875) and hence that the right was barred long before plaintiff had any claim, which could only have accrued on the death of his father in 1884. The first defendant's pleader complains that the Subordinate Judge has treated the case as if it resembled one of an alienation made by a widow, which would be valid for the life-time of the alienor, and in which the successor's right would only be infringed when the succession opened. In support of this contention he referred to *Bahwant Rao Bishwant Chandra Chor v. Purun Mal Chaube*(1) and other cases in which that Privy Council decision has been followed—*Kannan v. Nilakandan*(2), *Karimshah v. Nattan*(3), *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran*(4), *Nilakandan v. Padmanabha*(5), and *Sankaran v. Krishna*(6).

No doubt the right of plaintiff's father to set aside his own alienation or that of his kinswoman Visalakshi would have been barred long before his death in 1884, but the question is, when did the right to sue as hereditary trustee accrue to plaintiff. It seems to us clear that it did not accrue till his father's death in 1884, and he has brought his suit within eight years of that date. Against plaintiff there could be no adverse possession till his right accrued; the act of his father was a fraud on the trust, but plaintiff was not in a position to question it till 1884; the time will therefore run from the date of his predecessor's death. See *Mahomed v. Ganapati*(7), *Jamal Saheb v. Murgaya Swami*(8), and *Modho Kooery v. Tekait Ram Chunder Singh*(9).

Another argument put forward was, that since second defendant had permitted his right to sue to become barred by limitation, the plaintiff is also barred, since plaintiff and second defendant were jointly entitled to sue, and we were referred to the cases reported in *Seshan v. Rajagopala*(10), *Narayanan Nambudri v. Damodaran Nambudri*(11), and *Moidin Kutti v. Beevi Kutti Ummah*(12). We

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| (1) L.R., 10 I.A., 90. | (2) I.L.R., 7 Mad., 337. | (3) I.L.R., 7 Mad., 417. |
| (4) I.L.R., 10 Mad., 375, at page 477. | (5) I.L.R., 14 Mad., 153. | |
| (6) I.L.R., 16 Mad., 456. | (7) I.L.R., 13 Mad., 277. | (8) I.L.R., 10 Bom., 34. |
| (9) I.L.R., 9 Cal., 411. | (10) I.L.R., 13 Mad., 236. | (11) I.L.R., 17 Mad., 189. |
| (12) I.L.R., 18 Mad., 38. | | |

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do not think these cases apply. The personal right of trusteeship is not joint, though the rights of trustees against strangers are joint. Any one of the joint trustees as against a stranger has a right to claim the whole property, and as plaintiff has brought his suit to recover the properties within twelve years of the accrual of his right, he is not barred by the fact that his co-trustee may have suffered his right to become extinct.

On these grounds the appeal by first defendant (appeal No. 120) must be dismissed with costs.

Passing to the appeal preferred by plaintiff (appeal No. 115) the Subordinate Judge held that plaintiff's father had a right of suit in August 1868, as soon as Visalakshi alienated her son's share in the management, that that right of suit become barred in six years, and hence was barred before plaintiff was born, and that, whether the limitation was six years or twelve, time ran against plaintiff's father, and thus the bar against him was equally a bar against his successor.

In this view of the case we are not able to agree. It appears to us doubtful, in the first place, whether the widow Visalakshi was able to give possession to the purchaser, though, no doubt, the then Pandara Sannadhi sent his men to reap the crops and set up a claim under colour of the document executed by the widow. The Pandara Sannadhi was a far more influential man than plaintiff's father, and he was consequently able to bring pressure upon the latter and induce him to execute the deed H, which was a fraud upon the trust. But we do not think the evidence establishes that between September 1868 and February 1869 the two were in joint possession. The possession seems to have been with plaintiff's father, though efforts were made forcibly to oust him. Exhibit H states that possession was given under that document.

There is then no question of the Pandara Sannadhi having acquired as against plaintiff a right by adverse possession to a joint share in the management, and the cases referred to *Kannan v. Nilakandan*(1), *Madhava v. Narayana*(2) and *Radhabai v. Anantrao Bhagvant Deshpande*(3) do not apply. As no limitation with respect to joint management ran against plaintiff's

(1) I.L.R., 7 Mad., 337.

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

(3) I.L.R., 9 Bom., 198, at page 231.

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father none ran against plaintiff: and as has been pointed out above, his right to follow the property is not barred, since the suit is brought within twelve years of the accrual of the right.

The appeal must therefore be allowed and the plaintiff be declared entitled to the sole right of management and the possession of the properties attached to the kattalai must be delivered to him.

The first defendant must pay plaintiff's costs in this appeal.

PRIVY COUNCIL.

SRI RAJA PAPAMMA RAO (DEFENDANT), APPELLANT,

v.

SRI VIRA PRATAPA H. V. RAMACHANDRA RAZU AND
ANOTHER (PLAINTIFFS), RESPONDENTS.

P.C.*
1896.
February
12, 22.

[On appeal from the High Court at Madras.]

*Simple mortgage—Remedy of mortgagee upon default made—Act IV of 1882,
section 58—Construction of decree.*

On default made in payment on a simple mortgage, a Court, instead of decreeing the proper relief, had made a decree (which, however, had afterwards become final, and had been executed) for possession by the mortgagee after a period of grace. That decree would rightly have been for a judicial sale (Transfer of Property Act, 1882, section 58).

In this suit, brought by the mortgagor for an account to be rendered by the mortgagee, and for re-delivery of possession, alleging that the account would show payment of the debt already made out of the rents and profits:

Held, that the decree for possession did not amount to a decree for foreclosure or preclude redemption, the possession of the decree-holder having only been as mortgagee, and having involved liability to account to the mortgagor.

APPEAL from a decree (21st February 1893) of the High Court, reversing a decree (5th September 1891) of the Subordinate Judge at Elore.

This appeal arose out of a suit filed on the 10th March 1891 by the representatives of mortgagors against the representatives of the mortgagee, claiming re-delivery by them of possession of a

* Present: Lords WATSON, HOBHOUSE, SHAND and DAVEY and Sir R. COUCH.

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talukhdari village, the mortgaged property, on an account being taken of the rents and profits realized by the mortgagees, from the year 1880.

No facts were in dispute, and the only question was as to the effect to be given to a decree of the District Court of Gódvári of the 16th July 1876, under which the mortgagees had taken possession; and as to whether that decree had effect to deprive the mortgagors of their title to redeem.

The mortgage was executed on the 15th June 1870 by the father and elder brother of the plaintiff in this suit to the ancestor of the first and second defendants, of whom one now appealed.

The mortgagors undertook in the deed, which was specially registered, to repay a sum of Rs. 2,011 with interest by four annual instalments, mortgaging, as security, the talukhdari village of Khandrika Sitaranavaram, their ancestral estate.

The condition of the mortgage was this:—

"If the debt is not discharged according to the instalments, you should recover the same by means of the mortgaged property, the crops of our cultivation, and our other property and from our person according to your wish."

The mortgagee sued the mortgagors upon this bond in 1876, and prayed for a decree directing the defendants to pay the amount then due with subsequent interest, "by means of the undermentioned property and other property." The District Judge of Gódvári decreed on the 16th September 1876 in favour of the plaintiff, stating in his judgment: "In accordance with the custom prevailing in the Courts in this Presidency three months' time will be allowed to the defendants within which to pay up the whole sum now decreed, principal and interest and costs; failing which, the plaintiff shall be put in possession of the immoveable and moveable property specified in the bond sued upon, and in the plaint and schedule, as provided in the terms of the bond." The decree followed in the same words.

On the 26th August 1879 notice was given to the mortgagors to show cause why this decree should not be executed. On the 16th September following, stay of execution was applied for, on the ground that the decree was neither according to the terms of the mortgage deed, nor was according to what had been asked; and that the mortgagors were about to apply for a review. This

application, founded on the Judges having wrongly treated the mortgage as one of conditional sale, was rejected on the 10th November 1879 as being out of time; and in 1880 the mortgagees obtained possession. In 1883 the village was sold to a person who again sold it to the present appellant in 1884.

On the 10th March 1891 the representatives of the mortgagors brought this suit for an account alleging that the whole mortgage debt had been discharged by the rents and profits received by the mortgagees down to 1885; and that they were entitled to restitution of the property. The defendants representing the mortgagee by their written statement insisted that the village had become absolutely their property in virtue of the decree of 1876, behind which no Court could go.

On the 5th September 1891 the Subordinate Judge at Elore dismissed the suit.

In his judgment he said:—

"I understand from the provision of three months' grace allowed in the decree for discharging the debt the District Judge of Gódvári meant that the mortgage would be foreclosed on the default made, and that afterwards the land could be delivered to the decree-holders unconditionally as was subsequently done."

On the plaintiff's appeal the High Court, (MUTTUSAMI AYYAR and HANDLEY, JJ.) on the 21st February 1893, reversed this decree of dismissal, remanding the suit for decision on the merits. The reason assigned for this result was that the true construction of the decree of 1876 was that the District Judge of Gódvári intended to put the mortgagee into possession, only that he should recoup himself the mortgage debt and interest out of the usufruct of the mortgaged property as provided for in the deed, and remain in possession until the debt and interest should have been thereby liquidated; and not that he should retain possession as if on foreclosure.

On an appeal preferred by the representative of the original mortgagee Mr. J. D. Mayne appeared for the appellant.

The respondent did not appear.

The argument for the appellant, in brief, was that the decree of 1876 had not received due effect. The effect intended, although that was not the right decree upon a simple mortgage on which default had been made, was that the mortgage after the three months of grace had expired should, on the further default, be

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foreclosed. Further default occurred; and that the decree in itself was wrong was no ground at the present day for its not receiving effect. The mortgagors, who might have had the decree reversed or amended by taking proceedings in due time, had, after the expiration of the three months' grace, lost all title to the land mortgaged, of which by the necessary effect of the decree of 1876 the lawful possession had passed to the mortgagee. The respondents should have sought their remedy, if they had any, by petition when the execution proceedings were pending in the suit decreed in 1876. No separate suit would lie for the construction, and virtually for the setting aside, of that former decree.

Their Lordships' judgment was, on the 22nd February 1896, delivered by Lord Hobhouse:—

JUDGMENT.—The plaintiffs in this suit, who are respondents in the appeal, represent the mortgagors of the property in dispute; and the defendants, who are appellants, represent the mortgagees. The present question is, what was the effect of a decree of the District Judge which was passed on 16th September 1876, and which directed that the mortgagees should be put into possession of the property.

The mortgage was effected by deed dated 15th July 1870 for securing Rs. 2,011 and interest. The debt was to be paid by four instalments. On failure to pay "you should recover the same by means of the mortgaged property, the crops of our cultivation, and our other property, and from our person." Though it is not here expressed that the mortgagee's remedy is to be by sale under decree, the mortgage falls within the class of 'simple mortgages,' as classified in Sir A. Macpherson's work on Mortgages, page 12, and in the Transfer of Property Act, 1882. In such a mortgage there is no transfer of ownership, and the mortgagee must enforce his charge by judicial sale.

In the year 1876 the mortgagee, being unpaid, filed a plaint, and prayed for a decree directing the mortgagors to pay debt and costs and interest until realization of the money by means of the mortgaged property and other property. That is precisely the relief to which a simple mortgagee is entitled, whether before the Act of 1882 or since.

The difficulty has arisen from the decree which the Court thought fit to make on this plaint. After affirming the mortgagee's right to a decree for the money, the District Judge said

that: "In accordance with the custom prevailing in the Courts in this Presidency, three months' time will be allowed to the defendants within which to pay up the whole sum now decreed, principal and interest and costs, failing which the plaintiff shall be put in possession of the immoveable and moveable property specified in the bond sued upon and in the plaint and schedule as provided in the terms of the bond." And he made a decree accordingly.

That decree was not according to law. In default of payment, a simple mortgage gives to the mortgagee a right, not to possession but to sale, which he must work out in execution proceedings. In referring to a Madras custom, the District Judge probably meant only a practice of the Courts to give three months for payment. If he meant a custom to give possession on a simple mortgage as the High Court think he did, there is no such custom. And Mr. Mayne frankly admitted that the mortgagee was not entitled to the relief given; and that there is no ground for thinking that the decree was agreed on in Court, or consented to by the mortgagor.

The mortgagor however did not appeal and did not seek relief by way of review until it was too late. The decree therefore stands and is binding on the parties; and the mortgagee took possession under it. He has since sold the property, but that does not affect the rights of the mortgagor. The question is in what character was the possession taken. If in the character of a mortgagee, the mortgagor had a right to redeem, which was not barred by time when this suit began.

Mr. Mayne contends that the decree was intended as a foreclosure, and is so in effect. The only other kind of possession which can be suggested is usufructuary possession, lasting until the debt is discharged by the profits of the estate; and Mr. Mayne urges that there is nothing in the judgment to suggest such a possession, and that "the terms of the bond" do not warrant possession of any kind. All that is true; but it does not compel the inference that the decree amounts to a foreclosure. There is nothing in the judgment to suggest a foreclosure any more than usufructuary possession; nothing indeed to throw light on the terms of the decree. All we know is that possession was given, and given under some error.

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PRATAPA
H. V. RAMA-
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CHANDRA
RAU.

If it were necessary to speculate nicely on the meaning of the Judge, their Lordships would be disposed to agree with the High Court, who consider that when the Judge used the expression "as provided in the terms of the bond" he was thinking that the right given by the mortgage to recover by means of the mortgaged property and the crops meant a right to enter and take the profits. That is certainly more in accordance with "the terms of the bond" than is a foreclosure; which is not a recovery of the debt by means of the property, but a substitution of the property for the debt. If indeed the matter were new, it might reasonably be argued that the terms of a simple mortgage justify usufructuary possession; but long practice, now embodied in a statute, has settled that the remedy of the mortgagee is a judicial sale.

It is however hardly necessary to follow the High Court into this speculation. It is sufficient that the mortgagee, not being entitled to foreclosure, and not asking for it, got a decree which did not purport to work foreclosure. It purported to give possession "as provided in the terms of the bond." That was impossible, for there were no such terms; but it purported to do that, and did not purport to put an end to the bond and to the relations of mortgagor and mortgagee altogether. It could, though subject to correction on appeal, give possession, and did so. The mortgagee thereupon, became mortgagee in possession; and as such he must submit to be redeemed.

Their Lordships will humbly advise Her Majesty to dismiss this appeal.

Appeal dismissed.

Solicitors for the appellants—*Messrs. Burton, Yeates & Hart.*

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

SURYANARAYANA (PLAINTIFF), APPELLANT,

v.

NARENDRA THATRAZ (DEFENDANT), RESPONDENT.*

Regulation V of 1804, s. 17—Powers of Agents to Court of Wards—Contract Act, s. 25, clause 3—Promise to pay a time-barred debt.

A Collector, as Agent to the Court of Wards, has no authority to bind a ward of the Court of Wards by a promise under Contract Act, s. 25, clause 3, to pay a debt which is barred by limitation.

APPEAL against the decree of E. C. Rawson, Acting District Judge of Vizagapatam, in original suit No. 1 of 1893.

The plaintiff sued to recover a sum of money advanced in 1879 by his father to the deceased father of the defendant, who was a minor under the Court of Wards and was represented in the suit by the agent to the Court of Wards.

The District Judge dismissed the suit as barred by limitation.

The plaintiff preferred this appeal.

Sankaran Nayar and Sundara Ayyar for appellant.

Mr. E. B. Powell for respondent.

JUDGMENT.—The suit is to recover a sum of Rs. 6,583-13-6 as balance due under the document A, alleged to have been executed by the defendant's father to plaintiff's father on the 29th September 1879, for Rs. 7,000 repayable on 21st July 1880 with interest at 6 annas per cent. per mensem. The Judge has dismissed the suit, finding (1) that the genuineness of A is not proved; and (2) that the claim is barred by the law of limitation.

A number of letters were produced before the Judge as containing acknowledgments of the debt, and therefore saving the suit from the time bar. The Judge rejected these letters as inadmissible by reason of their not bearing a one-anna stamp under article 1 of schedule I of the Stamp Act. It is contended for appellant that, in thus holding, the Judge was in error—a contention that must be allowed to be good, see *Bishambar Nath v. Nand Kishore*(1),

* Appeal No. 181 of 1894.

(1) I.L.R., 15 All., 56.

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Fatechand Harchand v. Kisan(1). It is, however, also found by the Judge that even if admitted, the letters would not help the plaintiff, as "there is no evidence worthy of the name" that the defendant's father authorized the writing of the letters. To be of use for saving from the bar of limitation, under section 19 of the Act (XV of 1877) the acknowledgment must be signed "either personally or by an agent duly authorized on this behalf." It is admitted that none of the letters produced are signed by defendant's father, and we agree with the Judge that the evidence is altogether insufficient to support a finding, that those who signed the letters were in fact authorized to do so.

Stress is laid on behalf of appellant on exhibits B to H, in which the debt in question is acknowledged by the Governor's Agent on the death of defendant's father. When the estate was taken charge of by the Court of Wards, and, as appears from exhibits C and G, a sum of Rs. 2,135 was actually paid to the Jeypore Estate "on account of debts due by Srinivasa Bakshi Patro (plaintiff) from Rs. 8,000," which the Bisamkatak Estate (*i.e.*, defendant's estate) owes to him (plaintiff)."

But neither can this payment nor the acknowledgments contained in these letters be of use to plaintiff under section 19 or section 20 of the Limitation Act, as they were not made till after the claim had become barred. It remains to consider whether they are sufficient to revive the plaintiff's claim (supposing it ever to have existed) under section 25 of the Contract Act (clause 3), which makes enforceable a "promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits." The question here is, can the Governor's Agent be held to have been the agent of the defendant "generally or specially authorized" to make promises to pay barred debts? Section 17 of Regulation V of 1804, no doubt, authorizes Collectors to liquidate debts due to private creditors from the estates of disqualified proprietors; but the same section contains a proviso "that the permission of the Court of Wards in writing shall have been had and obtained in every instance previously to the payment of any private debt." In the present case the Court

(1) I.L.R., 18 Bom., 614.

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of Wards declined to admit the debt and told plaintiff to establish his claim by suit (see Exhibit I). It is clear, therefore, that the Governor's Agent, the officer in the Vizagapatam Agency, corresponding to Collector in the regulation districts, had not authority to bind the minor defendant by promise under clause 3 of section 25 of the Contract Act to pay the plaintiff debt.

The above findings make it unnecessary to consider whether A is genuine or not. Had it been necessary, we should agree with the Judge in holding that the evidence is altogether insufficient to justify a finding in favour of the plaintiff.

The appeal, therefore, fails and is dismissed with costs.

[REPORTER'S NOTE.—The defendant's estate, Bisamkatak, is situated in the Jeypore Zamindari, which is a scheduled district—*vide* Act XIV of 1874, schedule I. By Act XV of 1874, Section 4 and the second schedule, it is enacted that Regulation V of 1804 is not applicable to the scheduled districts. See also the revised rules framed for the guidance of the Governor's Agents in Ganjam and Vizagapatam under the authority of Madras Act XXIV of 1839.]

APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice
Subramania Ayyar.*

PALANI CHETTI (DEFENDANT No. 2), APPELLANT,

v.

SUBRAMANYAN CHETTI AND ANOTHER (PLAINTIFF AND
DEFENDANT No. 1), RESPONDENTS.*

*Mortgage—Effect of foreclosure decree passed by a foreign Court—"Lis pendens"—
Transfer of Property Act—Act IV of 1882, s. 52.*

In 1887 K., who resided at Singapore, mortgaged certain lands in the Madura district to S., who sued and obtained a conditional foreclosure decree on 13th June 1892 in the Supreme Court of Singapore. This decree became absolute on the 3rd October 1892. On 12th August 1892, K. hypothecated the said land to P. In a suit brought by S:

Held, that the decree of a foreign Court cannot directly affect land situated in British India; that at the date of the mortgage there was no decree purporting to operate upon the land; that the doctrine of *lis pendens* was inapplicable.

* Appeal No. 154 of 1895.

1896.
March 25.

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Quere: Whether P. would have been bound if he had had notice of the existence of the conditional decree at the date of his mortgage.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in original suit No. 11 of 1894.

The facts set forth in the plaint were briefly as follows:—

The first defendant, who was residing and carrying on business at Singapore, executed to the plaintiff there on the 2nd April 1887 an indenture whereby, in consideration of a sum of 3,000 dollars received, the former mortgaged to the latter certain property situated in the Trippatur Taluk of Sivaganga Zemindari in the Madura District with a covenant, among other things, to repay the amount with 12 per cent. interest per annum on the 2nd May next, and that, if the said sum should not be so paid, then to pay by equal payments on the 2nd day of each and every month with interest at the above-mentioned rate of 12 per cent. per annum during the first 12 months from the date of the document, and thereafter at the rate of 13½ per cent. per annum on the said 3,000 dollars or on so much thereof as should, for the time being, remain owing until the same should be wholly paid up. The mortgage was in the English form and evidenced by Exhibit A; but it was not registered, and an application for registration made to the Sub-Registrar of Trippatur in the Madura District on the 4th December 1891, was rejected by that officer on the ground that the document was not presented for that purpose within four months after it was received in British India (Exhibit I). The first defendant had paid interest on the amount up to the 2nd March 1890 and also by a document (Exhibit M) of the 8th April 1891 agreed to pay the balance of interest and principal, but, not having done so, plaintiff brought Suit No. 44 of 1892 on the file of the Supreme Court of the Straits Settlements at Singapore and obtained a decree (Exhibit B) on the 13th June 1892 by which it was ordered that the plaintiff do recover against the defendant the sum of dollars 3,793-12, and it was further ordered that it be referred to the Registrar to take an account of principal and interest due on the mortgage and of the costs, and it was further ordered that on payment of such amount found due and costs within one month that the plaintiffs do re-convey the property mortgaged clear of all incumbrances, but in default that defendants should be foreclosed from all equity of redemption in the mortgaged premises.

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In pursuance of the aforesaid decree, the amount ascertained by the Registrar as due to the plaintiff was dollars 4,159-72 and the same made payable on the 19th September 1892 (Registrar's certificate, Exhibit D), and by a subsequent order of the Court (Exhibit E) the time for payment was extended to 26th idem. Defendant not complying with the above orders, the Court passed the final foreclosure decree (Exhibit C) on the 3rd October 1892, whereby it was "ordered that the defendant do from henceforth stand absolutely debarred and foreclosed of, and from, all equity of redemption of, and in, the mortgaged premises in the statement of claim mentioned."

The second defendant is made a party to the present suit on the ground that the first defendant has, for no consideration and with a view of defrauding plaintiff, executed to that defendant a hypothecation deed of the property on the 12th August 1892, and the plaintiff also alleges that the defendants who had notice of the pendency of the aforesaid suit, are bound by the proceedings therein.

The plaintiff, therefore, prayed that, in the above circumstances, the Court be pleased to decree that—

- (i) plaintiff do get possession of the aforesaid property;
- (ii) if the Court holds that the plaintiff is not entitled to possession, then to direct the first defendant to pay plaintiff the sum of dollars 4,159-72 (a dollar being priced at Rs. 2-4-0) with interest thereon at 12 per cent. per annum from 26th September 1892;
- (iii) if the Court holds that both the aforesaid reliefs cannot be granted, then to direct the first defendant to pay to the plaintiff the sum of 3,000 dollars and interest or Rs. 10,455-12-0 as particularized in the plaint; and
- (iv) the hypothecation-deed aforesaid executed by the first to the second defendant is not binding upon plaintiff.

First defendant admitted his execution of the bond of the 2nd April 1887, but denied that of the agreement of the 8th April 1891 and contended that the debt due under the former bond had been wholly discharged. He further stated that he had received no summons in, nor notice of, the suit or of the proceedings in Suit No. 44 of 1892 on the file of the Supreme Court of the Straits Settlements at Singapore; that the plaintiff fraudulently recovered judgment in that case by effecting a false service and false return;

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that he was a subject of British India and not of Singapore; that the *ex-parte* judgment passed against him by that Court was not valid nor binding on him; that he had moved the said Court to set aside the decree passed in the case; that the Court had no jurisdiction to pass any decree affecting immovable property situated in British India; that the plaint has not been properly framed and was opposed to the provisions of the Code of Civil Procedure, and that the same was further bad for misjoinder of parties and of causes of action. It was also pleaded that the plaintiff was not entitled to the alternative reliefs claimed in the plaint; that the suit was barred by limitation; that the plaintiff never became entitled, and could have never become entitled, to the plaint properties; that the mortgage relied on by plaintiff was not valid in law, not having been registered in accordance with the Indian Registration Act, and that the hypothecation-deed to second defendant was *bonâ fide* executed for full consideration.

Second defendant supported the above defence.

On the 4th September 1894, the issues were framed of which the following only are now material, viz., 6th, 9th, 10th and 12th.

The sixth issue—whether the Singapore Court had jurisdiction to pass a foreclosure decree in respect of the plaint property situated in British India?

The ninth issue—whether the hypothecation-bond of the 12th August 1892 by the first to the second defendant was *bonâ fide* executed for consideration as alleged by the defendants? And even if it was so, is not the said deed binding on the plaintiff on account of pendency at the time of the suit before the Singapore Court?

The tenth issue—is the mortgage relied upon by plaintiff not valid in law and binding on the plaint property by reason of the deed not being registered according to the Indian Registration Act?

On the 3rd July 1894, first defendant applied to the Supreme Court of the Straits Settlements to set aside its judgment, dated 13th June 1892, on the grounds that he had no notice of the suit and that the debt had been fully discharged, and that Court, after recording evidence, found for the plaintiff with costs and passed an order (H) on the 27th November 1894 declaring “that there was money due from the defendant to the plaintiff on the 13th day of June 1892 upon the mortgage in the statement of claim mentioned and that no part of what was so due had been

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paid or discharged” and directing that the application of the defendant to set aside the judgment and the proceedings thereunderstand dismissed with costs. On plaintiff’s application No. 9 of 1895 stating these further proceedings of the Supreme Court, the Subordinate Judge framed the following additional issue:—The twelfth issue—“Whether the defendants are entitled to question the foreign judgment at all, after the passing of the order, dated the 27th November 1894 by the Supreme Court of Singapore?”

On the sixth issue the Lower Court found that the Singapore Court had jurisdiction to pass the foreclosure decree and that the defendants are now estopped from denying its jurisdiction.

On the ninth issue the Lower Court found as follows:—

Suit No. 44 was filed before the Singapore Court on the 31st May 1892 and the preliminary decree (B) directing foreclosure of the equity of redemption, if the amount were not paid by a certain day was passed on the 13th June 1892, while the hypothecation bond to the second defendant was only executed on the 12th August following or some two months afterwards. The second defendant pleads ignorance of the proceedings before the Supreme Court at Singapore, but the doctrine as to *lis pendens* affecting a purchaser or mortgagee is not founded upon any doctrine of actual or constructive notice, but upon the fact that the law does not allow litigant parties to grant, pending the litigation, rights in the property in dispute, so as to prejudice the opposing party. A purchaser *pendente lite* cannot, of course, be in a better position than his vendor, and the second defendant is bound by the suit, proceedings and decree of the Supreme Court against the first defendant, as if he (second defendant) was himself a party thereto. *Sam v. Appundi Ibrahim Saib*(1), *Sami Aiyar v. Ammai Ammal*(2) and *Manual Fruval v. Sanagapalli Latchmidevamma*(3).

With regard to the tenth issue the Court found that the foreclosure decree had the legal effect of absolutely passing the plaint-properties to the plaintiff as the defendants are debarred from redeeming and that the plaintiff is entitled to possession; and on the twelfth issue he found that the defendants are not now entitled to question the judgment of the Supreme Court of the Straits Settlements in Original Suit No. 44 of 1892. The Lower Court gave a

(1) 6 M.H.C.R., 75. (2) 6 M.H.C.R., 234. (3) 7 M.H.C.R., 104.

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decree "that defendants make over to plaintiff the plaint-properties with meane profits, from date of plaint till restoration at such rate as may be found due in course of execution and costs of suit payable by first defendant; and in case of the Appellate Court holding that the plaintiff has derived no valid title to such property, then the decree of this Court will be that first defendant do pay plaintiff dollars 4,159-72 or Rs. 9,359-5-20 with 12 per cent. interest thereon from 26th September 1892 (Exhibits C and E) up to date of decree costs of suit and further interest on the aggregate amount at 6 per cent. per annum from decree till payment."

Defendant No. 2 appealed.

Sankaran Nayar for appellant.

Ramasubba Ayyar and *Sundara Ayyar* for respondents.

JUDGMENT.—On the 12th August 1892 there was executed in the appellant's favour by the other defendant a mortgage of certain property in the Madura district which, at the time, was the subject of proceedings in a suit brought by the plaintiff in Singapore. This latter suit was founded upon an hypothecation of the property, which, as it was not registered, would not in itself create any charge. The Subordinate Judge has decreed in favour of the plaintiff on the ground that the mortgage taken by the appellant was taken subject to the result of the suit in the Singapore Court. He considers that the doctrine of *lis pendens* applies.

We are unable to agree with him. The 52nd section of the Transfer of Property Act expressly limits the operation of the doctrine to suits in British India. Moreover, on general principles it is clear that a purchaser cannot be effected immediately by proceedings in a foreign Court. The decree of a foreign Court cannot directly affect land situated in British India. It can only create an obligation notice of which might possibly affect third parties. In the present case at the date of the appellant's mortgage there was no decree purporting to operate upon the land and it is not alleged that the appellant had had notice of such decree as had been passed.

The Subordinate Judge has not decided the ninth issue which raises the question whether there was really a mortgage. We must reverse the decree so far as the appellant is concerned and remand the case for trial. Costs to abide and follow the result.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

MANIKAM AND OTHERS.*

1896.
February 23.
March 8

Criminal Procedure Code, s. 555—Magistrate personally interested—Magistrate giving evidence before himself.

Where a Magistrate, in whose Court a complaint of rioting and mischief had been filed, made a personal inspection of the *locus in quo*: *Held*, that by so doing he had made himself a witness in the case and had thereby rendered himself incompetent to try it: *Held*, further that where a Judge is the sole Judge of law and fact in a case tried before himself, he cannot give evidence before himself or import matters into his judgment not stated on oath before the Court in the presence of the accused.

PETITION under sections 435 and 439, Criminal Procedure Code, against the conviction and sentence passed under section 147, Indian Penal Code, by the Second-class Magistrate of Musiri and confirmed on appeal by the Head Assistant Magistrate of Trichinopoly.

The accused were charged with rioting and committing mischief to the paddy sprouts of complainant. It appeared from the record that the said Second-class Magistrate on the day subsequent to the filing of the complaint made a personal inspection of the *locus in quo*.

Mr. Bakewell for petitioners.

The Magistrate was personally interested in the case within the meaning of section 555 of the Code of Criminal Procedure and was therefore not competent to try it. *Girish Chunder Ghose v. Queen-Empress*(1), *Hari Kishore Mitra v. Abdul Baki Miah*(2), *Queen v. Meyer*(3), *Sergeant v. Dale*(4). A Magistrate has power to inspect before receiving complaint, sections 159 and 202, but not after. There is a special provision for inspection by jurymen and assessors, section 293. The Magistrate had a legal interest in the decision of the case and therefore was incompetent to try it.

* Criminal Revision Case No. 596 of 1895.

(1) I.L.R., 20 Calc., 857.

(2) I.L.R., 21 Calc., 920. (3) L.R., 1 Q.B.D., 173. (4) L.R., 2 Q.B.D., 558.

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Serjeant v. Dale(1). The Magistrate being the sole Judge of law and fact could not be a witness before himself (*Queen-Empress v. Donnelly*(2)), as the accused had no power to cross-examine him. In civil cases the evidence seems to be admissible. *Joy Coomar v. Bundhoo Lall*(3).

Mr. Wedderburn and Rangachariar for counter-petitioner.

It is open to the Magistrate to inspect the scene of offence and this course is frequently adopted. There is no special provision giving the Magistrate power to do so. There is no provision for inspecting instruments which have caused wounds. Inspection of a place comes under what is called real or material evidence, which appeals directly to the senses of the Judges. The Evidence Act does not contemplate such inspection but the definition of the word 'proved,' Evidence Act, section 3, seems clearly to contemplate more than what is included in the word 'Evidence'. *Joy Coomar v. Bundhoo Lall*(3). Criminal Procedure Code, section 526, lays down the desirability of inspecting the *locus in quo* as a ground for granting a transfer. The conviction has been upheld on other evidence and the irregularity must be taken to have been cured.

ORDER.—In this case certain persons—five and more in number—were convicted of rioting under section 147 of the Indian Penal Code, in that they forcibly entered upon the land of one Kandikkaruppan and there committed mischief by destroying some of his young paddy plants. It appears that on the day after the complaint in the case was filed, the Second-class Magistrate who tried the case went to make a local inspection of the scene of the alleged offence, not because he distrusted the truth of the complaint, for he had issued process against the accused, but apparently for the purpose of seeing what damage was done. The following is the account given by the Magistrate of the result of his inspection: "As alleged in the complaint the said two fields were in a very disorderly and pitiable state. The young paddy plants and sprouts in the said fields were lying trodden down. There were innumerable pits in the field caused by the feet of the people. A greater part of the said fields was dug up with spades and several heaps of earth were lying promiscuously all over the said fields. The spectacle was truly pitiable." The Magistrate then proceeds in his judgment to say "under the above circumstances

(1) L.R., 2 Q.B.D., 558. (2) I.L.R., 2 Cal., 405. (3) I.L.R., 9 Cal., 363.

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"the thoughtless attempt made by the defence to prove that no mischief was committed to the plants and sprouts of paddy in the fields in question is utterly futile. Nothing has been adduced by the accused or their witnesses to show how the said seedlings and sprouts in the said fields were damaged. The whole defence therefore falls to the ground." In the appeal against the conviction to the Court of the Head Assistant Magistrate, Trichinopoly, objection was taken to this inspection by the Magistrate, on the ground that the Magistrate was making himself a witness in the case and that his evidence should therefore have been open to cross-examination and also that the Magistrate, after conducting such a local enquiry, should not have tried the case. The objections were overruled by the Head Assistant Magistrate, because he found that the Magistrate's evidence was not the only evidence on the point and because he considered that the Magistrate was perfectly right in satisfying himself that the complaint was well founded. It is clear from the facts stated, that the Magistrate's view of the *locus in quo* was what influenced him in finding that the complaint of actual damage being caused was true and that the defence, that no damage was caused, was false. The question now before us is whether the Magistrate, having made himself a witness in the case, rendered himself incompetent to try the case. The Privy Council has observed in *Hurpurshad v. Sheo Dyal*(1): "It ought to be known, and their Lordships wish it to be distinctly understood, that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts." There is no provision in the Code of Criminal Procedure, which authorizes a Magistrate to make a local inspection in a case which is being tried by himself, and therefore there is no provision as to what is to be done in regard to his examination, in case he should make such local inspection by which he becomes personally acquainted with relevant facts in the case, such as is made in section 294 of the Code, in the case of a juror or assessor who is personally acquainted with any relevant fact, that is for his being sworn, examined, cross-examined and re-examined in the same manner as any other witness. As it is not possible, therefore, for the Magistrate to be so examined in a trial held before himself, it follows that he cannot comply with the rule of the Privy Council

(1) L.R., 3 I.A., 259.

requiring that he should give evidence as a witness. That being so, we agree with the Calcutta High Court in holding that when a Judge is the sole Judge both of law and fact, he cannot give evidence before himself and that the accused are entitled to have nothing stated against them in the judgment which was not stated on oath in their presence and which they have no opportunity of testing by cross-examination and of rebutting. (See *Girish Chunder Ghose v. Queen-Empress*(1) and *Hari Kishore Mitra v. Abdul Baki Miah*(2)). A Magistrate by making himself a witness has a legal interest in the decision of the case which disqualifies him from trying it, no matter how small that interest may be (see *Serjeant v. Dale*(3)). The learned Judges Mellor and Lush, J.J., therein observed that "the law in laying down this strict rule has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away every thing which might engender suspicion and distrust of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security." Although the law makes no provision for a local inspection by a Magistrate of the *locus in quo* in a case being tried by himself, we do not go the length of saying that under no circumstances may local inspection be made. But we are satisfied that such inspection should only be made for the purpose of enabling the Magistrate to understand the better the evidence which is laid before him, and it must be strictly confined to that. This is the view taken by the learned Chief Justice (Petheram, C.J.) of the Calcutta High Court in the case already quoted. (*Hari Kishore Mitra v. Abdul Baki Miah*(2)). To this we would add that when any inspection is made with the object stated, the Magistrate should invariably be accompanied by both parties or their representatives.

Holding as we do for the reasons above given that the Second-class Magistrate rendered himself incompetent to try this case, we must set aside the conviction and sentences of fine and direct that a new trial be held by another Magistrate in the case of those of the accused whose conviction was confirmed by the Appellate Court.

(1) I.L.R., 20 Cal., 857. (2) I.L.R., 21 Cal., 920. (3) I.L.R., 2 Q.B.D., 558.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

SUBRAMANYA CHETTYAR (PLAINTIFF), APPELLANT,

1896.
March 19.

v.

PADMANABHA CHETTYAR AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu law—Alienation of part of family property by one brother—Suit by another brother for partition of his share of the property alienated.

The plaintiff sued for partition and delivery to him of his share of a plot of land sold by defendant No. 1 his undivided brother to defendant No. 3. The land in question formed only part of the property of the family of the plaintiff and defendant No. 1 :

Held, that the plaintiff was entitled to maintain the suit.

APPEAL against the decree and judgment of D. Broadfoot, Acting District Judge of Trichinopoly, in original suit No. 4 of 1894.

The plaintiff sued his two brothers, defendants Nos. 1 and 2 and defendant No. 3, representing the Society of Jesus for the partition of certain property admittedly only a portion of the ancestral property in which he was entitled to share.

The father of plaintiff and defendants 1 and 2 died in 1860, leaving a large estate consisting of movable and immovable property, which was managed by the plaintiff's mother during the minority of her three sons until the eldest of the sons, viz., defendant No. 1, attained his majority.

On the 28th June 1882, the first defendant sold the property, the subject-matter of the present suit, and the third defendant purchased it on behalf of the Society of Jesus, such property being alleged to be portion only of the ancestral estate. The third defendant set up a defence that the suit was not maintainable, as it was brought to enforce partition of a particular parcel of family property.

The remainder of the pleadings are not now material.

The District Judge relying on *Koer Hasmat Rai v. Sunder Das*(1), dismissed the suit holding that a suit for partial partition is not maintainable.

* Appeal No. 145 of 1895.

(1) I.L.R., 11 Cal., 396.

SUBRAMANYA
CHETTYAR
v.
PADMANABHA
CHETTYAR.

Plaintiff preferred this appeal.

Sankaran Nayar for appellant.

Mr. H. G. Wedderburn, Mr. K. Brown and Patabhirama Ayyar
for respondents.

JUDGMENT.—The District Judge ought to have followed the ruling in *Venkatachella Pillay v. Chinnaiya Mudaliar*(1), which is clearly in point.

At first sight it may seem strange that a purchaser may not bring a suit for partition in circumstances in which a member of the family other than the vendor may bring such a suit. There are reasons, however, why the one suit for partial [partition should be allowed and the other not.

To allow the purchaser from one member of a family to bring a suit for the partition of the particular property purchased might facilitate members of an undivided family in dealing with the property in fraud of the rights of the family. It is not unreasonable that the purchaser should have no greater powers against the family than his vendor. On the other hand, it is to the advantage of the family to be able to ascertain by partition the particular property which the purchaser may retain and to be freed from all relations with a stranger to the family. Nor is the ability to sue for a partition of the particular property altogether disadvantageous to the purchaser, for if all the family property were brought into the suit it might turn out that the purchaser took nothing. The decision in *Venkatachella Pillay v. Chinnaiya Mudaliar*(1) is not, in our opinion, shaken by the observations, in the case in *Venkayya v. Lakshmayya*(2).

We must reverse the decree and remand the case for disposal according to law.

Costs to be provided for in the revised decree.

(1) 5 M.H.C.R., 166.

(2) I.L.R., 16 Mad., 98.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

GOPAL GOUNDAN.*

*Criminal Procedure Code—Act X of 1882—ss. 260 (d), 355, 537—Record
in summons case.*

A Native Sub-Magistrate, who had not been authorized to take down evidence in English, recorded the memorandum of the substance of the evidence taken under section 355 in that language:

Held, that there was no provision in the Code prohibiting this procedure and that at any rate it was merely an irregularity which would not vitiate the trial.

CASES reported for the orders of the High Court under section 438 of the Criminal Procedure Code by J. Twigg, Acting District Magistrate of Madura.

The case was stated as follows:—

“In calendar case No. 450 of 1895 on his file, the Second-class Stationary Magistrate of Periyakulam convicted the accused of “the offence of theft under section 379, Indian Penal Code, and “sentenced him to a fine of Rs. 20, in default to one month’s “rigorous imprisonment.

“The accused appealed to the Joint Magistrate of Madura “who set aside the finding of the Lower Court and ordered a “retrial on the ground that the only record in the case is a memo- “randum of the evidence made in English by the Magistrate.

“The Sub-Magistrate recorded the memorandum under the “provisions of section 355, Criminal Procedure Code, read with “section 260, clause (d), but the Joint Magistrate following a deci- “sion of the Sessions Court has found that there is no legal “record of evidence, as the memorandum has been written in “English, while the Sub-Magistrate has not been authorized to “take down evidence in the English language. I venture to think

* Criminal Revision Cases Nos. 658 and 659 of 1895.

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"that it is not illegal for a Native Magistrate to make the memorandum in English as nothing is said in the Code about the language in which the memorandum is to be made."

The Public Prosecutor (Mr. Powell) for the Crown.

Vencata Subbayyar for the accused.

ORDER.—In all these cases, the Joint Magistrate has set aside the findings and sentences of a Second-class Sub-Magistrate and has ordered a retrial on the ground that, as the Sub-Magistrate made a memorandum of the evidence in English instead of in the Vernacular, there is no legal record of the evidence, and the trial was therefore wholly irregular and illegal. He refers to a judgment of the Sessions Court of Madura, in which the same view was taken.

We are of opinion that the decisions of the Joint Magistrate are erroneous.

The Sub-Magistrate was trying cases of the classes mentioned in section 355, Criminal Procedure Code. That section does not require him to record the evidence of the witnesses, but only to make a memorandum of the substance of the evidence of each witness as it proceeds. Section 357, Criminal Procedure Code, carefully prescribes the language in which the evidence of witnesses in the trials and inquiries referred to in section 356 shall be taken down, but the Code is silent as to the language in which a memorandum of the substance of the evidence in the less important cases enumerated in section 355 is to be recorded.

We are not aware of any provision of law which renders it illegal for a Native Second-class Magistrate to record the memorandum referred to in section 355 in English, any more than it is illegal for an English Magistrate to do so.

Even if the procedure were irregular, there is nothing to show that the accused were in any way prejudiced by the Magistrate's procedure, or that any failure of justice was thereby occasioned, and that being so, the irregularity would not justify the reversal of the convictions (section 537, Criminal Procedure Code).

We must set aside the order of the Joint Magistrate in all these cases and direct that the appeals be restored to his file and decided in accordance with law.

APPELLATE CIVIL.

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

MANIKA GRAMANI (DEFENDANT, No. 3) APPELLANT,

v.

ELLAPPA CHETTI (PLAINTIFF), RESPONDENT.*

*Hindu Law—Mortgage—Pendency of maintenance suit—"Lis pendens"—Transfer of
Property Act—Act IV of 1882, s. 52.*

Where a member of a Hindu family during the pendency of a suit for maintenance which resulted in a decree charging the plaintiff house together with other property with the maintenance claimed, mortgaged the plaintiff house to the plaintiff:

Held, that he was entitled so to do and that the validity of the mortgage was not affected by the doctrine of *lis pendens*.

APPEAL against the decree of P. Sreenivasa Rau, City Civil Judge, in original suit, No. 346 of 1894.

The facts of the case were as follows:—

The plaintiff sued for Rs. 390 as principal and interest on a mortgage bond said to have been executed to him by the first defendant on the 2nd July 1888 for Rs. 250, and for the sale of the mortgaged house for the satisfaction of the said debt.

The second defendant was made a party to the suit by reason of her having brought the said house to sale in execution of the decree obtained by her for maintenance against her step-son, the first defendant, in original suit, No. 34 of 1888 in the High Court and became herself the purchaser.

And the third defendant was made a party to this suit upon the representation made by the second defendant that she had since sold the house to the third defendant.

The first defendant admitted the plaintiff's claim.

The second defendant pleaded that the plaintiff's mortgage was not a *bonâ fide* one, it having been made by the first defendant in order to deprive her (second defendant) of the means of recovering her maintenance; that further the said mortgage having been made after the institution of the second defendant's suit No. 34 of 1888

* Appeal No. 22 of 1895.

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in the High Court for her maintenance, was not valid ; and that she (second defendant) having purchased the house at the Court-sale in execution of the decree obtained in the said suit, sold it to the third defendant.

The third defendant reiterated the assertions contained in second defendant's statement ; and added a plea of limitation not now material.

The Lower Court framed issues of which the two following are material :—

(i) Whether the plaint mortgage was *bonâ fide* or otherwise ?

(ii) Whether the mortgage is invalid by reason of the pendency of suit No. 34 of 1888 on the file of the High Court on the date of the said mortgage ?

As to the first issue the Judge found the mortgage was *bonâ fide* and as to the second issue that suit No. 34 of 1888 was a suit brought by the second defendant against the first defendant in the High Court for maintenance and was actually pending at the date of the suit mortgage bond, but he held that the title to the mortgaged house was not directly and specifically in question in the said suit, and that consequently the doctrine of *lis pendens* (Transfer of Property Act, section 52) had no application. Further that though the decree passed in that suit created a charge for maintenance against the plaint house, still as such decree was subsequent to the plaintiff's mortgage, it could not affect it and he decreed for the plaintiff, that first defendant do pay the principal and interest and costs within six months of decree and in default the mortgaged property be sold.

The third defendant appealed.

Krishnasami Ayyangar for appellant.

Ethiraja and Sivagnanam for respondent.

JUDGMENT.—The only point urged in appeal is that the decision of the Lower Court on the first and second issues is incorrect.

The Lower Court has dealt fully with the evidence in regard to the first issue, and we concur in the finding.

As regards the second issue we are also of opinion that the finding is correct. There is nothing in the plaint in original suit No. 34 of 1888 to show that the then plaintiff desired to charge the present plaint property with her maintenance. She merely enumerated it and the other property of the then defendant in order to enable the Court to determine what amount of maintenance might

fairly be given. There was not then any right to immovable property directly and specifically in question, and consequently the doctrine of *lis pendens* has no application.

It would obviously be most inconvenient, if a man, no matter what his wealth might be, should be debarred from dealing with any of his immovable property, merely because a suit for a petty sum as maintenance, not sought to be charged on any specific part of his property, were pending at the time.

We concur in the findings of the Lower Court and dismiss this appeal with costs.

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APPELLATE CRIMINAL.

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

REV. FATHER CAUSSAVEL,

v.

REV. SAUREZ.*

1896.
March 20.
April 18.

Indian Christian Marriage Act—Act XV of 1872, ss. 5, 10, 12, 13, 38,
68, 70, and 73.

S., an Episcopally-ordained Priest of the Syrian Church, under the jurisdiction of the Patriarch of Antioch, solemnized two marriages according to Roman ritual without publishing or causing to be affixed the notices of such marriages required by Part III of the Act. It was proved that S. used the Roman ritual with the sanction of his Bishop who was appointed by the Patriarch :

Held, that S. having received Episcopal ordination was authorized to solemnize the marriages according to the rules, rites, ceremonies and customs of his church and that it was not shown that a marriage solemnized with the Roman ritual under the sanction of the Bishop of the Syrian Church was not solemnized according to the rules, rites, ceremonies and customs of the Syrian Church :

Held, further that Part III of the Act only applies to ministers of religion licensed under the Act and not to Episcopally-ordained persons.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of A. W. B. Higgins, District Magistrate of Tinnevely, discharging the accused under section 253 in calendar case No. 6 of 1895.

* Criminal Revision Petition No. 62 of 1896.

REV. FATHER CAUSSAVEL v. REV. SAUREZ. The material sections of the Act XV of 1872 are printed in the foot-note.

REV. SAUREZ. The order of the District Magistrate discharging the accused was as follows:—

"The complaint in this case was lodged on the 4th March 1895 by the Rev. A. Caussavel, S.J., Superior of the Roman Catholic Church, Palamcotta, against the Rev. L. M. Saurez, charging the latter with having performed two marriages between Roman Catholic Christians at a chapel at Vellapati not being authorized to solemnize such marriages, and with having in consequence committed offences under several sections of the Christian Marriage Act XV of 1872. The complainant was examined, and he confirmed his complaint. As the complaint was laid upon information received by the complainant and not on facts known to him personally, I referred it to the Superintendent of Police for investigation.

"The chief point raised in the complaint was that Father Saurez had not received Episcopal ordination as required by section 5 (1) of the Act, and could not claim the right to perform marriages

Section 5.—Marriages may be solemnized in India—

- (i) by any person who has received Episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the church of which he is a minister;
- (ii) by any clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites ceremonies and customs of the Church of Scotland;
- (iii) by any minister of religion licensed under this Act to solemnize marriages;
- (iv) by, or in the presence of, a Marriage Registrar appointed under this Act;
- (v) by any person licensed under this Act to grant certificates of marriage between Native Christians.

Section 10.—Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening; provided that nothing in this section shall apply to—

- (i) a clergyman of the Church of England solemnizing a marriage under a special license permitting him to do so at any hour other than between six in the morning and seven in the evening under the hand and seal of the Anglican Bishop of the Diocese or his Commissary; or
- (ii) a clergyman of the Church of Rome solemnizing a marriage between the hours of seven in the evening and six in the morning, when he has received a general or special license in that behalf from the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is so solemnized, or from such person as the same Bishop has authorized to grant such license.

under any other clause of that section and had therefore committed an offence under section 68 of the Act. The Superintendent of Police accordingly directed his attention to the question whether Father Saurez had received Episcopal ordination. He received information by means of the following letters A, dated 13th April 1895 from the Most Rev. Mar Dionysius, Syrian Metropolitan of Malabar, Travancore and Cochin: B, dated 27th May 1895, from the Right Rev. Mar. George Gregorius, Syrian Metropolitan of Niranam and C., dated 13th June 1895 from the author of A. This information showed that the writer of A was in 1875 made Metropolitan over six Bishoprics in the Jacobite Syrian Church in Malabar by the Patriarch of Antioch, and that the writer of B. was one of the Bishops under him and that in May 1889 the writer of B. ordained Father L. M. Saurez first as Deacon and then as Priest under the orders of the writer of A. The Superintendent accordingly reported that Father Saurez had received Episcopal ordination and was consequently entitled to solemnize marriages in India under section 5 (1) of the Act. I agreed with him and considered that it would not be right to issue process for the appearance of Father Saurez to answer a charge under section 68 of the Act.

Section 12.—Whenever a marriage is intended to be solemnized by a minister of religion licensed to solemnize marriages under this Act, one of the persons intending marriage shall give notice in writing, according to the form contained in the first schedule hereto annexed, or to the like effect, to the minister of religion whom he or she desires to solemnize the marriage, and shall state therein—

- (i) the name and surname, and the profession or condition of each of the persons intending marriage;
- (ii) the dwelling place of each of them;
- (iii) the time during which each has dwelt there, and
- (iv) the church or private dwelling in which the marriage is to be solemnized.

Provided that, if either of such persons has dwelt in the place mentioned in the notice during more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

Section 13.—If the persons intending marriage desire it to be solemnized in a particular church, and if the minister of religion to whom such notice has been delivered be entitled to officiate therein, he shall cause the notice to be affixed in some conspicuous part of such church.

But if he is not entitled to officiate as a minister in such church, he shall, at his option, either return the notice to the person who delivered it to him or deliver it to some other minister entitled to officiate therein, who shall thereupon cause the notice to be affixed as aforesaid.

Section 38.—When a marriage is intended to be solemnized by, or in the presence of, a Marriage Registrar, one of the parties to such marriage shall give notice in writing, in the form contained in the first schedule hereto annexed, or to the like effect, to any Marriage Registrar of the district within which the parties have dwelt or, if the parties dwell in different district shall give the like

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"In regard to the ritual employed by Father Saurez in the marriages in question, he admitted that it was the Roman ritual; but pleaded that he was authorized by the Patriarch of Antioch to use such ritual. There is nothing to show that this is not the case. In regard to his position in India he produced a commission extending from Trichinopoly to Cape Comorin granted to him by Dom Antonio Francisco Xavier Alvares Julio I. Archbishop under the See of Antioch. The Jesuit Mission very naturally repudiates any such commission, but it has apparently no ground for the objection which can be recognised by the law other than the ecclesiastical law of the Roman Church to which Father Saurez is not amenable.

"Though on the principal point urged against Father Saurez his admitted conduct in marrying two couples at Vellapatti did not appear to render him liable to punishment under section 68 of the Act, yet it appeared to me on what was apparently a too hasty reading of section 73 coupled with Part III of the Act, that under those sections he might have rendered himself liable to prosecution, if he had not, before performing the marriages, posted up a notice on the church at Vellapatti as required by section 13 of the Act. I accordingly directed enquiries to be made on this point, and it

notice to a Marriage Registrar of each district, and shall state therein the name and surname, and the profession or condition, of each of the parties intending marriage, the dwelling place of each of them, the time during which each has dwelt therein, and the place at which the marriage is to be solemnized:

Provided that, if either party has dwelt in the place stated in the notice for more than one month, it may be stated therein, that he or she has dwelt there one month and upwards.

Section 68.—Whoever, not being authorized under this Act to solemnize a marriage in the absence of a Marriage Registrar of the district in which such marriage is solemnized, knowingly solemnizes a marriage between persons, one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to ten years, or (in lieu of a sentence of imprisonment for seven years or upwards, with transportation for a term of not less than seven years, and not exceeding ten years, or, if the offender be a European or American, with penal servitude according to the provisions of Act No. XXIV of 1855 (to substitute penal servitude for the punishment of transportation in respect of European and American convicts, and to amend the law relating to the removal of such convicts), and shall also be liable to fine.

Section 70.—Any minister of religion licensed to solemnize marriages under this Act, who, without a notice in writing, or, when one of the parties to the marriage is a minor and the required consent of the parents or guardians to such marriage has not been obtained within fourteen days after the receipt by him of notice of such marriage, knowingly and wilfully solemnizes a marriage under Part III, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

was ascertained by the Superintendent that no such notice was posted up on the Vellapatti chapel in reference to the marriages in question. The fact of the marriages and the failure to post up a notice or publish banns was not denied by Father Saurez. I then summoned Father Saurez, in view to enquire into his conduct in this particular. He had in the meanwhile gone away to Ceylon and it was not until the 28th January 1896 that I was able to procure his attendance.

"On his appearance a preliminary question was raised as to whether admitting that no notice was posted up on the chapel as required by section 13 of the Act, which is the portion of Part III, which had been assumed to govern his conduct, he could as a fact be charged on that account with an offence under section 73.

"Now Father Saurez is, as has been found, 'a person authorized under this Act to solemnize a marriage,' in that he has the qualification of Episcopal ordination required by section 5 (1), and he is not a clergyman of the Church of England, Scotland or Rome and it would, therefore, appear that he should, before solemnizing a marriage, publish or affix the notice as directed in Part III. But, when Part III of the Act is more closely examined, it appears, both from the heading of the part and from the opening sentence of section 12, that it applies exclusively to ministers of religion

Section 73.—Whoever, being authorized under this Act to solemnize a marriage, and not being a clergyman of the Church of England solemnizing a marriage after due publication of banns or under a license from the Anglican Bishop of the Diocese or a Surrogate duly authorized in that behalf, or, not being a clergyman of the Church of Scotland, solemnizing a marriage according to the rules, rites, ceremonies and customs of that church, or, not being a clergyman of the Church of Rome, solemnizing a marriage according to the rites, rules, ceremonies and customs of that church, knowingly and wilfully issues any certificate for marriage under this Act, or solemnizes any marriage between such persons as aforesaid, without publishing, or causing to be affixed, the notice of such marriage as directed in Part III of this Act, or after the expiration of two months after the certificate has been issued by him;

or knowingly and wilfully issues any certificate for marriage, or solemnizes a marriage between such persons when one of the persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage Registrar, or, if there be more Marriage Registrars than one, to the senior Marriage Registrar of the district;

or knowingly and wilfully issues any certificate, the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue;

or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same;

shall be punished with imprisonment for a term which may extend to four years and shall also be liable to fine.

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REV. FATHER CAUSSAVEL v. REV. SAUREZ. licensed under the Act, and I take it that the minister of religion mentioned in section 13 is also a minister of religion licensed under this Act, because the notice which should be delivered to him and which he should cause to be affixed on the church is evidently the notice delivered to the minister of religion mentioned in section 12, who is a minister of religion licensed under this Act. Father Saurez is not a minister of religion licensed under this Act, but has obtained his authority to marry from the fact of his ordination. It follows that Part III (and its constituent sections 12, 13 and others) does not apply to him. He is accordingly not liable to punishment under section 73 for a breach of the directions given in Part III regarding the affixing of the notice.

"According to the commission under which he worked in India Father Saurez was empowered to dispense with all ecclesiastical impediments to matrimony and to dispense with the banns, and if he pleads this in view to excuse the apparent informality of his action in regard to these two marriages, whether from an ecclesiastical point of view he is justified in this plea I cannot say, but the informality, *i.e.*, the want of publication of banns does not appear to make him liable to punishment under the Indian Christian Marriage Act any more than the failure to affix a notice on the church.

"I am not in a position to say whether the conclusion now arrived at was that intended by the legislature. The very general terms of the opening portion of section 73 appear to indicate the contrary and the existence of these general terms is strongly urged on behalf of Father Caussavel as an argument for proceeding with the case. On mature consideration however I hold that the terms of Part III limiting the directions therein given to ministers of religion licensed under the Act, must be read in their literal and exclusive sense, and cannot be taken to include directions to a minister of religion who is not licensed but is episcopally ordained. It is therefore of no avail to examine witnesses.

"No case has been made out against Father L. M. Saurez, and he is discharged under section 253, Criminal Procedure Code."

Mr. Wedderburn and Rangachariar for complainant.

Mr. K. Brown for accused.

COLLINS, C.J.—This is a revision petition presented by the Rev. Father A. Caussavel, S.J., against the decision of the District Magistrate of Tinnevely, discharging an accused person, the Rev. L. M. Saurez, under section 253, Criminal Procedure Code.

The accused was charged under the Indian Christian Marriage Act with solemnizing marriages without authority and without publishing or causing to be affixed notices of such marriage, and thereby committing offences under the said Act. REV. FATHER CAUSSAVEL v. REV. SAUREZ.

It appears to be admitted that the accused did solemnize two marriages between Roman Catholic Christians according to the Roman Catholic ritual at a chapel at Vellapatti, and did not comply with the provisions of Part III of the Indian Christian Marriage Act. The District Magistrate has found that the accused has received Episcopal ordination, and that he is a Priest of the Syrian Church under the jurisdiction of the Patriarch of Antioch, and he is also satisfied that the accused is authorized by the Patriarch of Antioch to use the ritual of the Roman Catholic Church. The District Magistrate, therefore, held that the accused was not guilty of an offence under section 73 of the Act, although he had not given the notices as directed by Part III of the Act.

The only question that has to be decided in revision is—was the accused bound to publish the notices provided for in Part III of the Act?

The Indian Christian Marriage Act of 1872 modified by Act XII of 1891 enacts (section 5) that marriages may be solemnized in India—

(i) by any person who has received Episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the church of which he is a minister.

(ii) by any clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies, and customs of the Church of Scotland;

(iii) by any minister of religion licensed under this Act to solemnize marriages;

(iv) by, or in presence of, a Marriage Registrar appointed under the Act;

(v) by any person licensed under this Act to grant certificates of marriage between Native Christians.

Part II of the Act enacts the time and place at which marriages may be solemnized, with special provisos relating to clergymen of the Church of England, Rome, and Scotland.

Part III relates to marriages solemnized by ministers of religion licensed under this Act and, as I read the sections, does not apply to marriages solemnized by persons who have received

REV. FATHER CAUSSAVEL v. REV. SAUREZ. Episcopal ordination. It enacts, *inter alia*, that one of the persons intending marriage shall give notice in writing according to a certain form to the minister, and that such minister shall cause the notice to be affixed in some conspicuous part of the church, if the marriage is intended to be solemnized in a church, or if the marriage is intended to be solemnized in a private dwelling, the notice shall be forwarded to the Marriage Registrar of the district.

Part IV directs registration of marriages solemnized by ministers of religion, and points out how such registration shall be carried out by clergymen of the Church of England, Rome, and Scotland, respectively, and in section 32 refers to the case of a marriage solemnized by a person who has received Episcopal ordination, but who is not a clergyman of the Church of England, Rome, or Scotland.

Parts V and VI do not relate to the matter in question.

Part VII is headed 'Penalties' and section 70 provides a penalty, if any minister of religion licensed to solemnize marriages under the Act wilfully solemnizes a marriage under Part III of the Act without a notice in writing * * * and section 73 enacts that "whoever being authorized under this Act to solemnize a marriage,

"and not being a clergyman of the Church of England solemnizing a marriage after due publication of banns, or under a license from the Anglican Bishop of the Diocese or a Surrogate duly authorized in that behalf,

"or, not being a clergyman of the Church of Scotland solemnizing a marriage according to the rules, rites, ceremonies and customs of that church,

"or, not being a clergyman of the Church of Rome solemnizing a marriage according to the rites, rules ceremonies and customs of that church,

"knowingly and wilfully issues any certificate for marriage under this Act, or solemnizes any marriage between such persons as aforesaid, without publishing or causing to be affixed, the notice of such marriage as directed in Part III of this Act, or after the expiration of two months after the certificate has been issued by him :

"or knowingly and wilfully issues any certificate for marriage, or solemnizes a marriage between such persons when one of the

persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage Registrar, or, if there be more Marriage Registrars than one, to the senior Marriage Registrar of the district :

"or knowingly and wilfully issues any certificate, the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue :

"or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same, shall be punished with imprisonment for a term which may extend to four years and shall also be liable to fine."

It is contended by the counsel for the petitioner, that the accused has brought himself under this section, by neglecting to publish and causing to be affixed *the* notice of such marriage as directed by Part III of the Act, and consequently is liable to imprisonment for four years and also fine.

I cannot assent to this contention. The Act authorizes a person Episcopally ordained to solemnize a marriage according to the rules, rites, ceremonies and customs of the church of which he is a minister. It directs (section 10) with certain provisions, within what hours such marriages shall be solemnized. It directs (section 32) that if such person, although Episcopally ordained, is not a clergyman of the Church of England, Rome or Scotland, how he shall register such marriage. The Act is silent as to notices of marriage being given or published by such a person, and it would be contrary to the ordinary rules of construing a statute to hold, that although no obligation is imposed to publish notices of marriage, yet a penalty is incurred if such notices are not published—the penal section uses the words "*the* notice" and not "*a* notice" of such marriage as directed in Part III; and holding, as I do, that Part III only applies to ministers of religion licensed under the Act, and not to Episcopally-ordained persons, I think the District Magistrate was right in discharging the accused and I would dismiss this revision petition.

BENSON, J.—I think that the order of the District Magistrate was right, and that it was so for the reasons stated by him.

The learned counsel for the petitioner does not, as I understand, now press the contention that the Rev. Father Saurez is guilty of an offence punishable under section 68 of the Indian

REV. FATHER CAUSSAVEL v. REV. SAUREZ. Christian Marriage Act, 1872, (as amended by Act II of 1891). The question, as I understand it, that we have to decide is this:— Assuming that Father Saurez has received Episcopal ordination in the Græco-Syrian Church of Malabar, is he liable to a penalty under section 73 of the Act because he solemnized a marriage between Christians without having published a notice as directed in Part III of the Act? I think the answer to this question must be in the negative. Part I of the Act relates to the persons by whom marriages may be performed and section 5 enumerates them by classes. In some the right is recognized independently of appointment under the Act; in others the right is recognized as a consequence of license, or appointment, under the Act. Under the former head are the first two classes in section 5, viz.—

- “(i) Any person who has received Episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the church of which he is a minister—” under this class would fall ordained clergymen of the English, Irish, Roman or Syrian Churches;
- “(ii) Any clergyman of the Church of Scotland, provided &c.,” as before;
- under the second head fall the remaining three classes, viz.;
- “(iii) Any minister of religion licensed under this Act to solemnize marriages;
- “(iv) A Marriage Registrar appointed under this Act,” or any person in his presence (section 38);
- “(v) any person licensed under this Act to grant certificates of marriage between Native Christians.”

Sections then follow authorizing Government to license or appoint persons of these last three classes.

Parts III to VI then deal with the three classes licensed or appointed under the Act.

Part III deals with class 3, viz., ministers of religion licensed under the Act.

Parts IV and V deal with marriages by, or in the presence of, Registrars, and Part VI deals with the marriages of Native Christians.

The Act prescribes (sections 12 and 38) that when a marriage is intended to be solemnized by a minister of religion licensed

under the Act, or by a Marriage Registrar appointed under the Act, due notice must be given and must be published in a formal manner, but there is no similar obligation imposed, when the marriage is intended to be solemnized by a person who has received Episcopal ordination, or by a minister of the Church of Scotland. Section 5 merely says that such person must solemnize the marriage “according to the rules, rites, ceremonies and customs” of the church to which he belongs. Part VII prescribes penalties in connection with the Act. Penalties are prescribed for solemnizing a marriage without being authorized to do so by the Act, and for solemnizing marriages at other than the hours prescribed, or in the absence of witnesses. Penalties are also prescribed if a minister of religion, licensed under the Act, solemnizes a marriage without having received a notice, and if a Marriage Registrar commits certain offences against the Act; and then follows section 73 which enacts that “whoever being authorized under this Act “to solemnize a marriage, and not being a clergyman of the Church “of England * * * * or of Scotland * * * * or of “Rome * * * * solemnizes any marriage * * * * without “publishing or causing to be affixed, the notice of such marriage as “directed in Part III of this Act” * * * * shall be liable, &c. It is urged for the prosecution that Father Saurez is liable under this section, inasmuch as he has solemnized a marriage without notice, and is not one of the persons excepted. I do not think that this is so. As already observed, the Act nowhere imposes on a person who has received Episcopal ordination the duty of receiving, or of publishing a notice of an intended marriage, though this duty is expressly imposed on ministers of religion licensed under the Act, and on Marriage Registrars appointed under the Act. The imposition of a penalty is correlative to the imposition of a duty, and if no obligation exists there can be no penalty for its breach. But it is argued that the section itself, by prescribing the penalty, impliedly imposes the obligation. In order that the section should be so construed its terms should be such as to convey the intention in a clear and unambiguous manner, but it cannot be said that this is so in the present case. The words “as directed in Part III” refer, on their face, to Part III, but that part deals only with the procedure to be adopted by “ministers of religion licensed under the Act.” There is no ground whatever for supposing that section 13 refers to a larger class than section 12, for it expressly

REV. FATHER CAUSSAVEL v. REV. SAUREZ. refers back to that section by the employment of the word "*such* notice," i.e., the notices which under section 12 must be given by the candidate for marriage to the minister of religion licensed under the Act. If the words in section 73 had been "a notice of such marriage as directed in Part III" there might be some ground for contending that the words "as directed in Part III" merely mean "in accordance with a procedure similar to that directed in Part III," but the use of the word '*the*' before 'notice' precludes this construction, and refers us back to the notice prescribed in section 12, that is, the notice which the candidate for marriage presents to the minister of religion licensed under the Act. It was suggested that the words of section 73 could not refer to the latter class of minister, because a penalty was previously imposed by section 70 on such a minister solemnizing a marriage without notice. I observe, however, that section 70 provides a penalty for solemnizing a marriage "without notice" that is, without having *received* a notice, as required by section 12, whereas section 73 provides a penalty for solemnizing a marriage without *publishing* the notice. Thus section 73 finds an appropriate subject and application in the minister of religion licensed under the Act, and is, in fact, necessary as a supplement to section 70 in order to provide a complete sanction for the obligations imposed by Part III on such ministers.

It may be also observed that the words "*See sections 12 and 38*" after the heading in schedule I, which contains the form of notice under Part III, point to the fact that it was intended to apply to those sections only. Had it been intended to apply to section 73 also, I would have expected a reference to be made to that section, as well as to sections 12 and 38. In my opinion, then, section 73 does not require that a person who has received Episcopal ordination (and who is not one of the classes specially excepted by that section) should publish a notice of any marriage which he intends to solemnize. Section 73 is a highly penal section, and must be construed strictly, and in favour of the liberty of the subject. If it is asked why an exception is made in favour of such persons, it may, perhaps, be suggested that the legislature regarded the control which is exercised, or which is supposed to be exercised, by the Bishops in such churches, as a sufficient safe-guard. Under section 5 such a person is allowed to solemnize a marriage only provided he does so "according to the rules, rites, ceremonies and customs of the church of which he is a minister." Under section

10 he can solemnize a marriage only during certain hours, and under section 32 he is bound to register the marriage in a prescribed manner. In the present case Father Saurez alleges that he has registered the marriage. It is admitted that he used the Roman ritual, but he says that he had the permission of his Bishop to do so. There is nothing to show that a marriage solemnized with this ritual under sanction of a Bishop of the Syrian Church is not solemnized according to the "rules, rites, ceremonies and customs" of the Syrian Church of which Father Saurez is an ordained minister. Father Saurez apparently had the approval of his own ecclesiastical superiors. The prosecution was instituted by a Priest of a rival church. In my opinion the District Magistrate was justified in refusing to proceed with the prosecution. I would dismiss the petition.

APPELLATE CIVIL.

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

SOMASUNDARA MUDALIAR, PETITIONER,

1896.
March 9.

v.

VYTHILINGA MUDALIAR AND ANOTHER, RESPONDENTS.*

Religious Endowments Act—Act XX of 1863, s. 5.

Where a hereditary trustee of a temple died and application was made by the Collector as Agent of the Court of Wards, in whom the management of deceased's estates, during the minority of the sons of the deceased, had vested, to be appointed trustee on behalf of the said sons:

Held, that the case fell within s. 5 of Act XX of 1863, and that the Court had jurisdiction to make the appointment.

PETITION under section 622 of the Code of Civil Procedure praying the High Court to revise the order of T. M. Horsfall, District Judge of Tanjore, passed on civil miscellaneous petition No. 639 of 1895.

* Civil Revision Petition No. 34 of 1896.

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The facts of this case are as follows :—

The three petitioners represented by the Acting Collector of Tanjore as Agent to the Court of Wards presented a petition under section 5* of Act XX of 1863 (the Religious Endowments Act) setting forth that one Bava Chokkappa Mudaliar together with Bava Krishnasami Mudaliar and Somasundara Mudaliar were trustees of the Sri Tyagarajaswami temple at Tiruvalur, that Bava Chokkappa Mudaliar was a hereditary trustee until his death in April 1894, leaving three minor sons, the petitioners, that the Collector and Agent to the Court of Wards, who is now in charge of the estate of the petitioners, is entitled to the management of the temple as hereditary trustee on behalf of the said minors and is willing to accept the management on their behalf and praying that the Collector may be appointed trustee of the temple on behalf of the minor sons of deceased. This petition was opposed by Somasundara Mudaliar, one of the trustees, stating that the Court had no jurisdiction under section 5 of Act XX of 1863 to pass the order prayed for and alleging that the deceased was not a hereditary trustee and that his appointment was only personal. The District Judge granted the petition as prayed.

Somasundara Mudaliar filed the present petition.

Ramasubba Ayyar for respondents took the preliminary objection that an appeal lay from the order of the District Judge and therefore this petition must be dismissed, citing *Sultan Akeni Sahib v. Shaik Bava Malimiyyar*(1), but the Court overruled the objection.

Bhashyam Ayyangar, *Krishnasami Ayyar* and *Desikachariar* for petitioner.

Ramasubba Ayyar for respondents.

* Whenever from any cause a vacancy shall occur in the office of any trustee, manager, or superintendent, to whom any property shall have been transferred under the last preceding section, and any dispute shall arise respecting the right of succession to such office, it shall be lawful for any person interested in the mosque, temple, or religious establishment to which such property shall belong, or in the performance of worship, or of the service thereof, or the trusts relating thereto, to apply to the Civil Court to appoint a manager of such mosque, temple, or other religious establishment: and thereupon such Court may appoint such manager to act until some other person shall by suit have established his right of succession to such office.

The manager so appointed by the Civil Court shall have and shall exercise all the powers which, under this or any other Act, the former trustee, manager, or superintendent in whose place such manager is appointed by the Court had or could exercise, in relation to such mosque, temple, or religious establishment or the property belonging thereto.

(1) I.L.R., 4 Mad., 295.

JUDGMENT.—Mr. Ramasubba Ayyar for the counter-petitioners in this Court raises the preliminary objection that an order under section 5, Act XX of 1863, is appealable, and that an application for revision under section 622, Civil Procedure Code, is therefore inadmissible. He relies on *Sultan Akeni Sahib v. Shaik Bava Malimiyyar*(1); but we are of opinion that this case is, in effect, overruled by the decision of the Privy Council in *Minakshi v. Subramanya*(2). That decision was, no doubt, given with reference to an order made under section 10 of Act XX of 1863. But we think that the principle on which that decision was based, is also applicable to an order like the present made under section 5 of Act XX of 1863.

We are therefore of opinion that no appeal lies.

We have now to consider whether we should interfere under section 622, Civil Procedure Code.

The petitioner in this court contends that the District Judge had no jurisdiction to pass an order under section 5, Act XX of 1863, on the ground that no dispute respecting the right of succession to the trusteeship had arisen, and that the office was not hereditary and that there could, therefore, be no "right of succession." The record does not show clearly what is the constitution of the trust, but the counter-petitioner, in his petition to the lower Court, claimed the office as hereditary trustee, and his claim was opposed by the petitioner. We think that this constituted a dispute respecting the right of succession to the office, and it is admitted that the institution is one falling under section 4 of the Act. The District Judge, therefore, had jurisdiction to make the appointment. It has also been suggested that, as two trustees still remain, there is not such a vacancy as is contemplated by section 5. We, however, are of opinion that as there were three trustees for many years prior to the death of the counter-petitioner's father in 1894, a vacancy such as is contemplated by the section arose when that death occurred.

It is also argued that the Judge acted with material irregularity in not having held an enquiry as to whether the office was of an hereditary character or not. Looking at the fact that the counter-petitioner's father and grandfather before him held the office of trustee, and that the Judge's proceeding was of a summary

(1) I.L.R., 4 Mad., 295.

(2) I.L.R., 11 Mad., 26.

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character, intended merely to provide for the vacancy, pending the decision by regular suit of the right of succession, we are unable to hold that the enquiry was defective or that our interference under section 622, Civil Procedure Code, is necessary.

The petition fails and is dismissed with costs.

APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice
Subramania Aiyar.*

1896.
April 10.

UPPALAKANDI KUNHI KUTTI ALI HAJI
(DEFENDANT), APPELLANT,

v.

KUNNAM MITHAL KOTTAPRATH ABDUL RAHIMAN
(PLAINTIFF), RESPONDENT.*

Suit on a Kanom—Registration Act III of 1877, s. 17, cl. (n).

Although under the Registration Act III of 1877, s. 17, cl. (n) a receipt given by a mortgagee purporting to extinguish the mortgage debt does require registration :

Held, that the language of the receipt in the present case did not indicate any intention to extinguish or limit the mortgagor's interest and that therefore registration was unnecessary.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 259, of 1894, modifying the decree of B. Cammaran Nayar, District Munsif of Tellicherry, in original suit No. 381 of 1893.

Suit to redeem a kanom granted by plaintiff's assignor to the defendant's Karanavan in September 1877 for Rs. 600. The principal point in dispute was whether a sum of Rs. 500 had been paid in July, August, 1890 by the plaintiff to the defendant. The Munsif found that this sum had not been paid and that a receipt for Rs. 500 (exhibit A) was a forgery and he decreed that the kanom be extinguished on payment by plaintiff of Rs. 600 together with costs of suit. The District Judge reversed the decree of the Munsif finding that the sum of Rs. 500 had been paid, that the receipt (exhibit A) was genuine, and ordered that the kanom be redeemed

* Second Appeal No. 298 of 1895.

on payment of Rs. 100. Defendant to pay plaintiff's costs in both Courts.

The receipt (exhibit A) was as follows :—

" Receipt granted by Uppalakandi Kunhi Kutti Ali to Kottapurathu Antharuman, on behalf of Kottapurathu Antharuman."

" Out of the amount due to me by Antharuman, under the decree in original suit No. 354 of 1887 in the Court of the District Munsif of Tellicherry, you have already paid me Rs. 400 through my paternal uncle Puthenpurayil Kunhi Kutti Ali, and have returned to me two subsidiary deeds on Kunnammethal paramba. Deducting this sum of Rs. 400, the remaining sum due to me according to the decision of arbitrators is Rs. 200, of which you Pokkar, have paid to me this day Rs. 100, and you shall pay me the remaining sum of Rs. 100 within one month from this date and shall obtain back the said two documents. On receipt of this sum of Rs. 100, I shall submit a petition to the Court, stating that the matter of the decree has been adjusted. I affix my signature to this in presence of witnesses."

Mr. K. Brown and Mr. C. Krishnan for appellant.

Exhibit A acknowledges receipt of consideration in partial extinction or limitation of the mortgage interest on immovable property of over Rs. 100 in value. It should have been registered and not being so it is inadmissible in evidence (section 17 and 49, Registration Act). There is no other evidence to prove payment of Rs. 500 of the mortgage money. Exhibit A is not a mere acknowledgement of payment of a debt. But it acknowledges receipt of a consideration as the person who gives it has to return two documents and put in a petition, see *Venkayyar v. Subbayyar* (1) and *Venkatarama Naik v. Chinnathambu Reddi* (2). Clause (n), section, 17, added by Act VII of 1886 shows exhibit A required to be registered as it extinguishes the mortgage *pro tanto*. It evidences part-payment of the mortgage money and releases the claim on the property secured by the mortgage to that extent, see *Basawa v. Kalkapa Sharbana* (3) and *Jivan Ali Beg v. Basamal* (4). Exhibit A specially refers to the mortgage debt which formed the subject of original suit No. 34 of 1887.

(1) I.L.R., 3 Mad., 53.
(3) I.L.R., 2 Bom., 489.

(2) 7 M.H.C.R., 1.
(4) I.L.R., 9 All., 108.

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Sankaran Nayar and Ryru Nambiar for respondent.

JUDGMENT.—The only question is whether the receipt required registration under clause (n) of section 17 of the Registration Act.

It may be doubted whether in view of the decision of this Court in *Venkatarama Naik v. Chinnathambu Reddi*(1) and *Venkayyar v. Subbayyar*(2) the money received in discharge of a mortgage can be deemed to be a consideration within the meaning of the clause. Since those decisions, however, the law has been amended, a clause is now added (clause n) which, as it might be argued, indicates that receipts given by a mortgagee purporting to extinguish the mortgage do require registration. In the present case, assuming that this is the effect of the amendment, we do not think that the language of the receipt indicates any intention to extinguish or limit the mortgagor's interest. The instrument, therefore, did not require registration. We must dismiss the appeal with costs.

The memorandum of objection is also dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

1896.
March 7.

KRISHNA PANDA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

BALARAM PANDA (DEFENDANT), RESPONDENT.*

Suit for partition—Prior arbitration and award, effect of.

Disputes having arisen in a joint Hindu family, the parties submitted the question of partition to arbitrators, who passed an award thereon. Both parties objected to the award, and it was never carried into effect. On a suit for partition being filed:

Held, that such an award is equivalent to a final judgment and binding on the parties in the absence of positive evidence that both parties agreed that the former state of things should be restored and that therefore the present suit for partition could not be maintained.

APPEAL against the decree of J. P. Fiddian, District Judge of Ganjam, in original suit No. 2 of 1894.

(1) 7 M.H.R., 1. (2) I.L.R., 3 Mad., 53. * Appeal No. 123 of 1895.

Suit for partition.—The facts were as follows:—

The grandfathers and fathers of the parties were members of a joint Hindu family until the year 1875, when disputes arose and a separation was effected. In the year 1882, plaintiffs' father and the defendant appointed three persons as arbitrators to divide the property, and the arbitrators passed an award to which neither party agreed, and it was never enforced. The property consisted of movables and immovables, portions of which were in the possession of both parties. The plaintiff raised various other questions not now material. The cause of action was alleged to have arisen in 1892, when the plaintiffs demanded partition. The defendant pleaded, *inter alia*, that the suit is barred by the submission to arbitration in 1882 and the award passed thereunder. The District Judge finding that the dispute was submitted to arbitration in 1882 and that an award was passed thereon, but that the plaintiffs objected to the award, and that no action has been taken under it, held with reference to Specific Relief Act, sections 21 and 30, and on the authority of *Palaniappa Chetti v. Rayappa Chetti*(1), *Rani Bhagoti v. Rani Chandan*(2) and *Muhammad Newaz Khan v. Alam Khan*(3) that the present suit for partition was barred by the submission to arbitration and dismissed it with costs.

Pattabhirama Ayyar for appellant cited *Tahal v. Bisheshar*(4).

Mr. Parthasaradhi Ayyangar for respondent.

JUDGMENT.—The effect of an award has been entirely misunderstood. An award duly passed in accordance with a submission of the parties is equivalent to a final judgment. To give effect to it, the subsequent consent or approval of neither party is required. After an award made for a partition of joint property neither party can sue for partition any more than he could if a decree in a suit for partition had been passed. In order that the parties should be remitted to their previous rights, it is not enough that the award was not enforced or that even both parties objected to it. There must be positive evidence that both parties agreed that the former state of things should be restored. There is no such evidence in this case. The appeal must, therefore, be dismissed with costs.

(1) 4 M.H.C.R., 119.
(3) I.L.R., 18 Cal., 414.

(2) I.L.R., 11 Cal., 386.
(4) I.L.R., 8 All., 57.

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APPELLATE CIVIL.

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

[In appeal No. 10 of 1895.]

FISCHER (PLAINTIFF), APPELLANT,

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), RESPONDENT.*

[In second appeal No. 1245 of 1895.]

ORR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

FISCHER (DEFENDANT), RESPONDENT.*

Suit for declaration—Specific Relief Act—Act I of 1877, s. 42—Act I of 1876
(Madras) s. 2—"Concur in applying."

A suit was brought by F against the Secretary of State for India in Council for a declaration that the order of the Madras Government directing the Collector to cancel the separate registration and assessment of a village in the Sivaganga Zamindari in his name was *ultra vires* and illegal. The plaintiff's claim to be separately registered as the holder of the said village depended upon the proper construction to be put on a grant of the village contained in two documents, the one dated 13th December 1872 and the other being a document, dated 14th May 1877, executed by the Rani and her children. Subsequent to the grant referred to, an application was preferred by the Rani and addressed to the Collector requesting him to separately assess the village and register it in the name of F. This application was never presented owing to the death of the Rani, who was succeeded by the father of the present Zamindar who executed on 22nd February 1883 a deed of release in favour of F ratifying the grant above mentioned in the following terms:—

"Whereas the village of Kondagai of my Zamindari has
"been granted to you in perpetuity by the late Rani Kattama Nachiyar and
"others and has been in your possession according to the terms of the documents
"executed by them to you therefor on the 13th December 1872 and on the 14th
"May 1877, and whereas I have received from you Rs. 2,000 as the consideration
"for my ratifying your rights in accordance with the terms of the said documents
"and for relinquishing whatever rights I possess therein, I hereby ratify your
"rights of every description in the said village and relinquish all my rights
"therein in your favour. Wherefore as per the terms of the said documents, dated
"13th December 1872 and 14th May 1877, you and your heirs and assigns shall
"hold and enjoy the said Kondagai village in perpetuity
"with full powers of alienation by sale, gift or otherwise. You shall pay to my

* Appeal No. 10 of 1895 and Second Appeal No. 1245 of 1895.

"Zamindari the sum of Rs. 3,500, the *poruppu* fixed on the said village, as well
"as road-cess, *magamai*, &c., according to custom," and he applied to the Collector
for separate assessment and registration of the village in the name of F on 25th
March 1883.

On 29th March 1883 F also made a similar application but pending disposal,
the present Zamindar's father died, and was succeeded by his son the present
Zamindar who raised objections and the application was not granted. On 23rd
May 1887 the present Zamindar granted a lease of the Zamindari to O, S, and
R who executed a release guaranteeing F undisturbed possession and enjoyment
of the village and accepted his position such as it may have been at or prior to the
date of the execution of the lease. On 23rd January 1890 the Zamindar executed
in favour of F a deed of release which after reciting the grant from the Rani, the
deed executed by the Zamindar's deceased father, dated 22nd February 1883 and
a further payment of Rs. 3,500 by F contained the following covenant:—

"Therefore I forfeit and relinquish the right I profess to have in me to
"question the said permanent lease or the terms of the said lease deeds, and
"I hereby ratify your right. You and your heirs shall hold and enjoy the said
"villages absolutely according to the terms of the aforesaid permanent lease
"deeds." F then applied by petition, dated 13th March 1890, to the Collector
for separate registration and assessment of the said village, but on notices
being sent to the Zamindar and the lessees, they filed objections which after
due enquiry were overruled by the Collector who ordered separate registra-
tion and fixed the assessment. On appeal, the Board of Revenue supported the
action of the Collector. Whereupon the lessees appealed to the Government of
Madras on 21st September 1891, and the Government of Madras on 14th Novem-
ber 1891 cancelled both the separate registration and the separate assessment.
Under the circumstances F claiming to be the duly registered holder of the said
village sued the Secretary of State for a declaration that the order of the Madras
Government, dated 14th November 1891, directing the Collector to cancel the
separate registration and assessment of the said village was *ultra vires* and
illegal—and the lessees sued F for the balance of *poruppu*, *magamai* and road-
cess with interest alleged to be due on the said village for fasli 1300:

Held, that F was bound to pay the lessees Rs. 3,500 *poruppu* with *magamai*
and road-cess whether his village was separately registered and assessed or not:

Held, that the suit by F for a declaration that the order of the Madras
Government directing the Collector to cancel the separate registration and
assessment of the village previously made by him was illegal and *ultra vires*
could not be maintained with reference to section 42, Specific Relief Act, inasmuch
as the order had been already carried out:

Held, also that if the general words of the prayer "for such other relief as the
circumstances of the case may require" were to be taken as including a prayer
for consequential relief, then the suit was bad for misjoinder, inasmuch as the
Zamindar and the lessees who were interested parties were not joined:

Held, also that not only the person applying under Act I of 1876, section 2
for separate assessment and registration must be entitled thereto, but also that
the parties to the alienation must concur in the application.

APPEAL against the decree of C. Gopalan Nayar, Subordinate
Judge of Madura (East) in original suit No. 14 of 1892, and

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Second appeal against the decree of W. Dumergue, District Judge of Madura reversing the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East) in original suit No. 20 of 1893.

From the Judgment of the High Court reported below in which the facts of these two cases are set out at length, it appears that the parties interested agreed that the evidence taken in original suit No. 14 of 1892, on the file of the Court of the Subordinate Judge of Madura (East) should be also treated as evidence in original suit No. 20 of 1893, on the file of the same Court and the present appeal from the judgment in original suit No. 14 of 1892 and the present second appeal from the judgment of the District Court of Madura reversing the decree of the Subordinate Judge in original suit No. 20 of 1893, were accordingly argued together.

[In appeal No. 10 of 1895.]

Mr. Wedderburn, Sankaran Nayar, T. Rangachariar and V. Rangachariar for appellants.

The Government Pleader (Mr. Powell) for respondent.

[In second appeal No. 1245 of 1895.]

Mr. Norton for appellants.

Mr. Wedderburn, Mr. K. Brown, Mr. Parthasaradhi Ayyangar, T. Rangachariar and V. Rangachariar for respondents.

JUDGMENT.—In original suit No. 14 of 1892 on the file of the Subordinate Court of Madura (East), Mr. R. Fischer, claiming to be the duly registered holder of the village of Kondagai in the Sivaganga Zamindari, sued the Secretary of State for India in Council, for a declaration that the order of the Madras Government No. 1088, dated 14th November 1891, directing the Collector to cancel his separate registration and assessment of the village, was *ultra vires* and illegal.

The Subordinate Judge dismissed the suit with costs, and the plaintiff now appeals (appeal suit No. 10 of 1895) to this Court against that decree.

In original suit No. 20 of 1893 on the file of the same Subordinate Court, the plaintiffs, who are the present lessees of the Sivaganga Zamindari, sued Mr. R. Fischer for the balance of *poruppu*, *magamai* and road-cess, with interest, alleged to be due on the said village of Kondagai for fasli 1300. The Subordinate Judge gave a decree for the sum which he found to be due, but in appeal the District Judge of Madura found that nothing was due and

dismissed the suit with costs. Against this decree the plaintiffs now bring this second appeal No. 1245 of 1895.

The evidence in original suit No. 14 was, by consent, taken as evidence in original suit No. 20 also, and both appeals were argued together.

In order to understand the matters in issue, it is necessary to set forth the transactions which preceded the present litigation. These may be stated as follows, adopting, with but slight variations, the words of the District Judge:—

“For some years prior to 1872, Rani Kattama Nachiyar was Zamindarni of Sivaganga and in 1869 one Dhorasinga Tevar instituted a suit in the District Court of Madura (original suit No. 2 of 1869) against the Rani, her son, and three daughters, in order to establish his right of succession to the Zamindari. A decree was passed in his favour and the Rani and her children, after appealing unsuccessfully to the Madras High Court, preferred an appeal to the Privy Council. Mr. Fischer proceeded to England in order to assist in the prosecution of this appeal and on the 13th December 1872, the Rani, her son and three daughters executed in favour of Mr. Fischer an indenture (exhibit A) of which the following are the terms material to the suit: ‘In consideration of the sums the said Robert Fischer is to spend on the appeal and in consideration of the services he has rendered and is to render in future, we hereby convey and sell to the said Robert Fischer, his heirs and assigns the village of Kondagai attached to the Tiruppuvanam Taluk, Sivaganga Zamindari, Madura District, Sub-District of Madura to be enjoyed by him from generation to generation as long as the sun and moon endure without any obstruction and with full powers of alienation by way of gift, sale or otherwise, subject to a payment to the circar, of Rs. 3,500 every year as peishcush We hereby bind ourselves jointly and severally to deliver possession of the said village to the said Robert Fischer, his heirs and assigns and to inform the Collector of the said District and get the said village subdivided under Regulation XXV of 1802 and registered in the name of the said Robert Fischer, his heirs and assigns, and to arrange for receiving every year the amount of peishcush above fixed from the said Robert Fischer, his heirs or assigns as soon as judgment is obtained in the appeal above mentioned, or as soon as the said litigation comes to a close in any other manner

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We do hereby empower the said Robert Fischer jointly and severally to conduct the said appeal . . . and to do all that is necessary in the said appeal and to pay the necessary sums from his own funds towards the fees and all other expenses of the said appeal and agree to accept and consider all sums to be paid on account of the said appeal by the said Robert Fischer as the consideration money for this agreement as mentioned above as payments directly made to each and all of us.”

On Mr. Fischer's return from England after the successful prosecution of the appeal in the Privy Council, the Rani put him in possession of the village in 1874 and on the 14th May 1877 she, her son and her three daughters executed in favour of Mr. Fischer another instrument which is called a Deed of Release (exhibit B). This document, after reciting, *inter alia*, that by the agreement, dated the 13th December 1872 (exhibit A) * as well as by another agreement, dated the 12th April 1872, the right to the village of Kondagai and all its lands and hamlets had been given to Mr. Fischer, that Mr. Fischer had paid the Rani and her children according to the terms of the said agreements the sum of Rs. 20,000 for the expenses of the appeal to the Privy Council, that the decree of the District Court of Madura and of the Madras High Court had been set aside by the Privy Council and that the executants had obtained, for the lifetime of the Rani, all the benefits that could be derived according to law in the matter of the said suit, proceeds in the following terms:—“Whereas you have agreed to pay to the Zamindari the peishoush that may be fixed according to law upon the said Kondagai village and whereas we have agreed to get the said village of Kondagai inclusive of its hamlets, registered in your name in the Collector's office under Regulation XXV of 1802; now in consideration of all the considerations detailed above, we hereby agree to you, your son and grandson from generation to generation, holding and enjoying the said village of Kondagai together with the eight kinds of products of an estate and with full powers of alienation by sale, gift or otherwise: and we hereby agree to relinquish to you all the rights and connections which Kattama Nachiyar, one of us, now possesses in the village and all the rights and connections which any of us may acquire after her lifetime.”

* All the exhibits referred to were filed in O.S., No. 14 of 1892, in the Subordinate Judge's Court, Madura (East).

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In pursuance of these instruments and admittedly on or about the 14th May 1877, an application (exhibit C) addressed to the Collector of Madura was prepared by Rani Kattama Nachiyar and was expressly stated to be an application under section 1 of Act I of 1876 and section 8 of the Istimirar Sannad and section 9 of Regulation XXV of 1802. This application runs as follows:—“The village of Kondagai attached to the Tiruppuvanam Taluk of my Zamindari was given to Mr. R. Fischer and has been in his enjoyment. As it has been arranged to pay through me the amount that might be assessed separately on the village with reference to the accompanying statement showing the beriz of the Zamindari and the said village, I pray you will separately assess the said village and register the village in the name of the said Mr. R. Fischer.” This application, however, was never presented to the Collector, because Rani Kattama Nachiyar died a few days after signing it and was succeeded by Dhorasinga Tevar as Zamindar of Sivaganga.

There is no record of any transaction relating to the village of Kondagai during the next five years, but on the 22nd February 1883, Dhorasinga Tevar, the present Zamindar's father, executed in favour of Mr. Fischer a deed of release and agreement of ratification (exhibit D) in these terms:—“Whereas the village of Kondagai . . . of my Zamindari . . . has been granted to you in perpetuity by the late Rani Kattama Nachiyar and others and has been in your possession according to the terms of the documents executed by them to you therefor on the 13th December 1872 and on the 14th May 1877; and whereas I have received from you Rs. 2,000 as the consideration for my ratifying your rights in accordance with the terms of the said documents and for relinquishing whatever rights I possess therein, I hereby ratify your rights of every description in the said village and relinquish all my rights therein in your favour. Wherefore, as per the terms of the said documents, dated 13th December 1872 and 14th May 1877, you and your heirs and assigns shall hold and enjoy the said Kondagai village . . . in perpetuity . . . with full powers of alienation by sale, gift or otherwise. You shall pay to my Zamindari the sum of Rs. 3,500, the *poruppu* fixed on the said village, as well as road-cess, *magamai*, &c., according to custom.”

This instrument was followed by an application (exhibit E) presented to the Collector of Madura by Dhorasinga Tevar on the

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25th March 1883 under Act I of 1876. In that application Dhorasinga Tevar, after stating that the village of Kondagai had been granted in perpetuity to Mr. Fischer by the late Rani, said, "I have also ratified the same by means of a document, dated 22nd February 1883, and therefore, request you will get the separate assessment fixed thereon according to the Act. I herein enclose a statement showing the 10 years' bariz of the Zamindari for the purpose."

Mr. Fischer himself presented a similar application (exhibit I) for the separate assessment and registration of the village on the 29th March 1883, but these applications were not disposed of until the 22nd September 1883. By that time Dhorasinga Tevar was dead and had been succeeded by the present Zamindar, who objected, by a petition, dated 27th August 1883, to the sub-division. On this the Collector held, in his proceedings [exhibit I (a)], dated 22nd September 1883, that Mr. Fischer's application must fail "because it is opposed by the *ipso facto* Zamindar who was the eldest son of the Zamindar lately deceased."

The next event connected with this suit in chronological order is the acquisition of a lease of the Sivaganga Zamindari by the present lessees on the 23rd May 1887. Within three months of that date, that is to say, on the 12th August 1887, the lessees executed a deed of release (exhibit F) guaranteeing Mr. Fischer, in consideration of services rendered to them by him, undisturbed possession and enjoyment of the village of Kondagai, so far as they are concerned, during the term of their lease and 'accepted his position such as it may have been at or prior to the date of the execution of the lease and were prepared in any formal way which it may be agreed necessary and expedient to confirm this guarantee.'

Then on the 23rd January 1890 the present Zamindar executed in Mr. Fischer's favour a deed of release (exhibit G) and after expressly mentioning therein the deeds executed by Rani Kattama Nachiyar on the 13th December 1872 and the 14th May 1877 (exhibits A and B) and the deed executed by his father Dhorasinga Tevar on the 22nd February 1883 (exhibit D) and reciting that he himself had received Rs. 3,500 in cash from Mr. Fischer as the consideration for ratifying Mr. Fischer's "permanent lease, without questioning it" made the following covenant:—Therefore I forfeit and relinquish the right I profess to have in me to

question the said permanent lease or the terms of the said lease deeds, and I hereby ratify your right. You and your heirs shall hold and enjoy the said villages absolutely according to the terms of the aforesaid permanent lease deeds."

Mr. Fischer then applied by a petition (exhibit III) framed under Regulation XXV of 1802 and Act I of 1876 to the Collector of Madura for the separate registration and assessment of the village of Kondagai.

On this the Collector, acting in conformity with the provisions of Act I of 1876, sent notices [exhibits O and O (i)] to the Zamindar of Sivaganga and to his lessees. The Zamindar and the lessees both filed objections (exhibits IV and V) to the grant of Mr. Fischer's application. After due enquiry the Collector, in accordance with section 2 of Act I of 1876, ordered the separate registration of the village of Kondagai in Mr. Fischer's name, fixed the assessment on the portion thus subdivided at Rs. 2,757-4-1 per annum and reported his proceedings to the Board of Revenue in his letter (exhibit VI), dated 13th November 1890 for sanction as to the apportionment of assessment.

In its proceedings (exhibits VI), dated 5th December 1890, the Board of Revenue sanctioned the separate assessment of the peishcush as proposed by the Collector, and the lessees thereupon appealed [exhibits VII and VII (a)] to the Board against the Collector's order directing the separate registration and assessment. On this the Board of Revenue, in its resolution (exhibit VIII), dated 21st April 1891, held that it had "no power to interfere with the Collector's orders as to the separate registration of the village, which can only be set aside by a suit in Civil Court, *vide* section 5 of Madras Act I of 1876," but called for a further report as to the apportionment of assessment and, on receiving it, proceeded on the 17th August 1891, under section 7 of Act I of 1876, to revise its original order on this point and fixed the assessment at Rs. 3,027-2-8 instead of at Rs. 2,757-4-1.

Dissatisfied with this result, the lessees appealed (exhibit IX) on the 21st September 1891 to the Government of Madras against the resolution of the Board of Revenue and, by its order (exhibit X), dated the 14th November 1891, the Madras Government, without giving any notice to Mr. Fischer, cancelled both the separate registration and the separate assessment of the Kondagai village and its hamlets.

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These being the facts of the case, the suits out of which the present appeals arise were instituted with the results already stated in the first two paragraphs of this judgment.

We do not think it necessary to decide, or to discuss, the many difficult questions dealt with by the Courts below. It seems to us that the rights of the parties, so far as they are properly raised in the suits before us, may be decided on comparatively simple grounds. The claim of the lessees for balance of *poruppu*, *magamai* and road-cess due by Mr. Fischer forms the subject of second appeal No. 1245 and its validity evidently depends upon the terms under which Mr. Fischer holds the village of Kondagai from the Zamindar. Those terms are contained in exhibits A, B and D, and the first question for our consideration is as to what was the real agreement evidenced by these documents. The Subordinate Judge held that they evidenced merely the grant of a permanent lease of the village subject to a payment of Rs. 3,500 as quit-rent (his translation of the word "*poruppu*" in exhibit D) together with *magamai* (contributions to the landlord for maintenance of temples and charities) and road-cess. The District Judge, however, held that the transaction was an absolute sale of the village, with an agreement that the village should be separately registered and assessed by the Collector in Mr. Fischer's name, after which he would be liable to pay the assessment so determined whether more or less than Rs. 3,500, but that until such separate assessment should be made, Mr. Fischer should pay Rs. 3,500, to the Zamindar that being the proportionate assessment which the parties estimated would be payable by the village when separately assessed. The Subordinate Judge observed that even if exhibits A and B evidenced a contract of sale, they were ineffectual to bind the Rani's successor as she had only a life interest (like that of a Hindu widow) in the estate, while her children had no interest at all, and he held that exhibit D was intended to materially limit the extent of the estate contemplated to be given by exhibits A and B. In support of this view he referred to the substitution of the word "*poruppu*" in exhibit D for "*peishcush*" in exhibits A and B, and to the absence in exhibit D of any reference to separate registration and assessment. The District Judge appears to regard the use of the word "*poruppu*" as unimportant and as meaning no more than "*peishcush*" when the sum was paid not direct to the revenue authorities but to the Zamindar. We agree with the Dis-

trict Judge in concluding that the omission of all reference to separate registration and assessment in exhibit D is of no special import, since such registration and assessment was expressly agreed to in exhibits A and B which were confirmed by exhibit D, and the latter was immediately followed by an application (exhibit E) from the Zamindar to the Collector reciting the deeds and adding "I, therefore, request that you will get the separate assessment fixed thereon according to the Act."

We do not think that either the Subordinate Judge or the District Judge has correctly understood the full force of exhibit D. We do not think that it was intended by that document to limit the quality of the estate conveyed by exhibits A and B, or to disown the agreements therein that application should be made to the Collector for the separate assessment and registration of the village; but in exhibits A and B there was manifestly an uncertainty as to whether Mr. Fischer was to pay the sum of Rs. 3,500 (exhibit A) or was to pay the *peishcush* which might be fixed by the Collector (exhibit B) and there was no provision at all in exhibits A and B for payment of *magamai* and road-cess. It was, we think, mainly to define and provide for these matters that exhibit D was written. In it the Zamindar accordingly accepts all that is in exhibits A and B, and relinquishes all his own rights in the village, but adds at the end, as if to clear up the uncertainty of exhibits A and B as to the payments, "you shall, as usual, pay into my Zamindari Rs. 3,500, being the *poruppu* fixed for the said village, as also road-cess, *magamai*, &c." It is to be observed that even in exhibits A and B the agreement is that the *peishcush* is to be paid "to the Zamindari," and the same condition occurs in exhibit C where the Rani says "It has been arranged to pay through me the amount that might be separately assessed, &c." Thus though the village was to be separately registered and assessed, the assessment, even after such separate registration, was to be paid not direct to the Collector, but to the Zamindar. The separate registration and assessment was of importance to the parties, and especially to Mr. Fischer, since it would save each party from liability except in respect of his own portion; but the fact that the sum due by Mr. Fischer is all through stipulated to be payable to the Zamindar supports the view that the parties intended the sum to be fixed permanently at Rs. 3,500, and not to be liable to alteration according to the apportionment which the Collector might make. We

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think it is impossible to hold that the express sum named in exhibit D as payable by Mr. Fischer can be held to be controlled by the indefinite terms of exhibit B. It seems to us clear that, instead of accepting those indefinite terms, exhibit D fell back on the definite terms of exhibit A, and re-affirmed them, with an addition regarding *magamai* and road-cess, regarding which there is now no dispute. Exhibit D with the subsidiary instruments exhibits A and B are the title deeds by which Mr. Fischer is bound. Exhibits F and G by which the lessees and the present Zamindar confirmed Mr. Fischer's title do not introduce new terms.

On the true construction, then, of exhibits A, B and D, we are of opinion that Mr. Fischer is bound to pay the lessees Rs. 3,500, with *magamai* and road-cess, whether his village is separately registered and assessed or not. On this finding the decree of the Subordinate Judge in original suit No. 20 was right, and the decree of the lower appellate court was wrong.

In second appeal No. 1245, we reverse the decree of the District Judge with costs, and restore that of the Subordinate Judge.

Turning now to appeal suit No. 10, we do not think that it is necessary for us to say anything further on the disputed question as to the character of the estate conveyed by exhibits A, B, D, F and G. Looking to the special agreements in exhibits A and B, which are confirmed in the subsequent instruments, and which specially provided for separate registration and assessment, and looking to the importance to Mr. Fischer of these agreements, it may well be that, in a suit properly framed for the purpose, under section 6, Act I of 1876, the Civil Court would grant him a "declaration that separate registration ought to be made" if the Collector refused such registration on application being made to him. But this is not what Mr. Fischer has sued for. His suit is for a declaration that the order of the Madras Government (exhibit X) directing the Collector to cancel the separate registration and assessment of the village previously made by him is invalid and *ultra vires*. No consequential relief is sought, unless, indeed, it be in the general words of prayer "and for such other relief as the circumstances of the case may require." If these words contain a prayer for a declaration that the registration and assessment of the Collector ought to be restored, the suit is clearly bad for non-joinder of parties. It is, as now framed, against the Secretary of State for India only; but if the Collector's order is to be restored, it is clear that the lessees

and the Zamindar should have been made parties and given an opportunity of contesting a claim which they regard as injurious to them.

If, however, the above words are mere surplusage, and the suit is really for a bare declaration that the order of the Madras Government is *ultra vires* and illegal, it is clear that the suit is not sustainable with regard to the provisions of section 42 of the Specific Relief Act, for long before the date on which the suit was filed (7th March 1892), the order had been communicated to the Collector and had been carried out by that officer on the 13th January 1892 (exhibit X). Mr. Fischer, therefore, when he filed the suit ought to have asked for substantial relief and not for a mere declaration. It is suggested that he would not ask for this relief lest he should be met by a plea of limitation founded on the Collector's refusal in 1883 (exhibit I) to grant separate registration and assessment. Whatever the reason for the omission, we are of opinion that, under the circumstances, the suit for a mere declaration was not sustainable. These considerations are sufficient to justify the Subordinate Judge's dismissal of the suit and our dismissal of this appeal. We do not think it necessary to go at length into the questions which were debated in both the lower courts as to the powers of the Collector and of Government under Act I of 1876 and under the old Regulations XXV of 1802 and III of 1803. We think it is clear, for the reasons stated in paragraph 20 of the Subordinate Judge's judgment in original suit No. 14, that when the Collector ordered the separate registration and assessment (exhibit VI), all the parties to the alienation had not concurred in applying therefor. It is beside the mark to say that the Zamindar's father had applied in 1883. That application was refused. It is also idle to say that under exhibits A and B the Zamindar was bound to join in the application. Section 2 of Act I of 1876 does not require that the party should be merely entitled to registration, but that the parties to the alienation should "concur in applying" for it. It is equally idle to say that the objection was not so much to separate registration as to the amount of assessment to be fixed. Whatever the cause was, it is clear that the Zamindar and the lessees not only did not concur in the application but opposed it. That being so, we are of opinion that the Collector ought to have refused registration and left the party aggrieved to his remedy by suit under section 6 of the Act.

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The Collector, however, granted separate registration and assessment; but afterwards, under the orders of Government, cancelled the registration. This cancellation must be regarded as a final refusal by the Collector to grant the separate registration applied for by Mr. Fischer. If the latter was aggrieved by this refusal, his remedy was by a suit under section 6 of the Act against the Secretary of State as the authority in whose name the Collector acted, and against the Zamindar and lessees, as persons whose interests would be affected by the declaration to be made. He has not thought fit to adopt the remedy prescribed by the Act, and for the reasons already stated we are of opinion that he cannot be granted the relief for which he has asked in the present suit.

We, therefore, confirm the decree of the Subordinate Judge and dismiss this appeal with costs.

APPELLATE CIVIL.

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

VOLKART AND OTHERS (PLAINTIFFS),

v.

SABJU SAHEB AND OTHERS (DEFENDANTS).*

Presidency Small Cause Courts Act, s. 69—Jurisdiction—Divisible contract.

Where a contract provided for delivery of goods in two monthly shipments by the plaintiffs and the defendants refused to take delivery or pay for either of the shipments of the goods in accordance therewith; it appeared that the total amount of the damages sustained by reason of the two breaches, if added together, exceeded Rs. 2,000, whereas if taken separately they were respectively less than that amount. The contract provided that each shipment was to be treated as a separate contract:

Held, that the plaintiff was entitled to bring separate suits for the damages sustained in respect of each shipment and that therefore the Presidency Small Cause Court had jurisdiction.

CASE stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act and section 617 of the Code of Civil Procedure by R. B. Michell, Chief Judge of the Presidency Court of Small Causes, in Small Cause suit No. 11487 of 1895.

* Referred case No. 17 of 1895.

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The case was stated as follows:—

"This is a suit for damages for loss sustained by plaintiffs 'through defendants' alleged breach of contract in not taking 'delivery and paying for 24 cases of nainsooks in accordance 'with the contract between the parties made on 25th October '1894. The contract referred to is the indent (exhibit A) bearing that date, and admittedly signed by first defendant in the 'name of the defendants' firm and bearing the word 'accepted' 'written on it, which the plaintiffs' second witness, their manager, 'Mr. Scholl, has sworn was written by him, and means that the 'indent is accepted by plaintiffs. By this indent the defendants 'agree to purchase 50 cases of white cambrics; shipment to be in 'two monthly lots. The 50 cases were brought out by plaintiffs 'from England by two shipments—one of 24 cases, the other of '26 cases. Exhibit A contains, amongst others, a stipulation 'that 'each shipment ^{or} _{and} item under this contract is to be 'treated as a separate contract.' Acting upon this, the plaintiffs 'have instituted two suits—one in respect of the shipment of 24 'cases, being the suit in which this reference is made, the other 'in respect of the shipment of 26 cases being suit No. 12179 of '1895. On the application of defendants' attorney the two suits 'were heard together, the witnesses to be examined and most of 'the documentary evidence to be adduced in both suits being the 'same. The defendants' attorney pleaded in both suits (i) that 'this court had no jurisdiction, as there was only one contract in 'respect of which the two suits were brought and the amount of 'the two claims together exceeded the pecuniary limits of the 'jurisdiction of this court; (ii) defendants put plaintiffs to proof 'of the contract; (iii) goods were not according to contract; (iv) no 'notice of re-sale was given to defendants; (v) damages claimed 'are excessive. After the evidence on both sides had been taken 'the defendants' attorney applied under section 69 of the Presidency Small Cause Courts Act for a reference being made to the 'High Court for its opinion upon the question whether, with 'reference to the provision in the contract (exhibit A) 'that each 'shipment ^{or} _{and} item under this contract is to be treated as a 'separate contract,' the plaintiffs are entitled to bring two separate suits, as they have done in respect of the subject matter 'of exhibit A or are bound to bring one single suit in respect 'thereof. This question, therefore, I refer, under section 617,

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"Civil Procedure Code, and section 69, Presidency Small Cause Courts Act, for the opinion of the High Court, and reserve judgment until the disposal by the High Court of this reference.

"Upon the question referred, I had, after the pleas were put in and before the examination of witnesses began, ruled in plaintiffs' favour, being of opinion that the stipulation in question on which they relied in exhibit A entitled them, and indeed bound them, to treat each shipment as a separate contract, and that therefore they were entitled to institute separate suits in respect of such separate contracts."

Mr. K. Brown for plaintiffs.

Mr. R. F. Grant for defendants.

JUDGMENT.—Our answer to the question referred to us is that the terms of the contract in exhibit A are clear, and under it the plaintiffs are, in our opinion, entitled to bring two separate suits as they have done one in respect of each shipment.

Attorneys for plaintiffs *Wilson & King*.

Attorney for defendants *James Short*.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

MUTHUNARAYANA REDDI (DEFENDANT No. 1),
APPELLANT,

v.

BALAKRISHNA REDDI AND OTHERS (PETITIONER AND
PLAINTIFFS Nos. 1 AND 2), RESPONDENTS.*

*Assignment of decree by one of two decree-holders valid—Civil Procedure
Code, s. 232.*

There is no prohibition in law against one of several decree-holders assigning his interest under the decree :

Held, that the assignee is entitled to execute under section 232, unless the judgment-debtor can show that such a proceeding is prejudicial to his interest.

APPEAL against the order of H. H. O'Farrell, Acting District Judge of South Arcot, passed in civil miscellaneous petition No. 168 of 1895.

* Appeal against order No. 10 of 1896.

Petition presented under section 232 of the Civil Procedure Code by Balakrishna Reddi, son of Andi Reddi, of Vikravandi in Villupuram taluk, being the assignee of plaintiff No. 1, Lakshminarayana Reddi, in respect of his rights under the decree in this suit.

Plaintiff No. 1 is entitled to half of the rights due under this decree. The said plaintiff No. 1 transferred to this petitioner the rights due to him under the decree, on the 14th May 1895, by a registered deed upon receiving, in consideration therefor, Rs. 3,500 including interest due up to 14th May 1895.

The assignee claimed to be entitled to execute the decree for recovery of the amount in lieu of the first plaintiff. Defendant No. 1 objected that the assignment was by one plaintiff only while there were two plaintiffs on the record.

The Acting District Judge overruled the objection.

Defendant No. 1 appealed.

Pattabhirama Ayyar for appellant.

Krishnasami Ayyar for respondents.

JUDGMENT.—The objection taken is that, unless all the decree-holders join in assigning the whole of the interest possessed by them under the decree, no order should be passed under section 232, Civil Procedure Code. The decision in *Kishore Chand Bhakat v. Gisborne and Company*(1) is an authority against this contention. Following that case, I hold that there is no prohibition in law against one of several decree-holders assigning his interest under the decree. Whether such an assignment ought to be recognised under the section of the code referred to above and the assignee permitted to take out execution must depend upon the circumstances of each case. Here, however, I see no objection to the first respondent being permitted to execute the decree according to law. The appellant was not able to show how he would have been prejudiced by the respondent being allowed to execute the decree. The order of the District Judge was right. The appeal is rejected with costs of the first respondent.

(1) I.L.B., 17 Cal., 341.

APPELLATE CIVIL.

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

KAMALAMMAL (DEFENDANT No. 1), APPELLANT,

1896.
March 30.
April 1.

RAJU NAICKER AND OTHERS (PLAINTIFFS AND DEFENDANT No. 2),
RESPONDENTS.*

*Suit for declaration—Regulation XXV of 1802, s. 8, and Madras Act I
of 1876, ss. 2, 6.*

An alienee of a portion of a zamindari is entitled to separate registration and assessment under Madras Act I of 1876. A Court has power to order separate registration and assessment under s. 6, although all the parties concerned do not concur in applying within the meaning of s. 2.

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura (West) in original suit No. 89 of 1894.

The facts of the case are as follows:—

One Kamaraja Pandiya Naicker was the zamindar of Bodinayakanur. He died in December 1888 and was succeeded by his widow the first defendant. After his death one Kanthasami Naicker, whose father and the zamindar's father were brothers, brought a suit for recovery of the zamindari in original suit No. 16 of 1889 on the file of this Court against the present defendants. Plaintiffs' father, Sundra Pandiya Naicker, who was then the eldest paternal uncle of the said Kanthasami and the late Kamaraja Pandiya Naicker, asserted some claim in the zamin. The claims of all the parties were settled in that suit by a compromise, which is exhibit D in this suit. A deed of gift, dated 6th May 1890, (exhibit I) was executed by first defendant to the said Sundra Pandiya Naicker, father of these plaintiffs. Under that document the plaint village was absolutely given to plaintiffs' father by first defendant. In original suit No. 33 of 1890 the plaintiffs' father brought a suit against first defendant for recovery of this village and other properties comprised in exhibit I, got a decree and was put in possession of the village. But he could not exercise his right as landlord without separate registry being entered in his name in the Collector's register as shown by

* Appeal No. 100 of 1895.

exhibits B and C. Plaintiffs' father then applied to the Collector for separate registry under Madras Act I of 1876, and the Collector passed an order in his favour as per exhibit E. But the Revenue Board cancelled that order as is seen from F. Hence this suit for separate registry under section 6 of the said Act. As ruled by the Madras High Court in *Mangamma v. Timmapaiya* (1) and *Virasami v. Rama Doss* (2), the Collector representing the Secretary of State as second defendant is a necessary party to a suit of this nature. The cause of action arose under section 6 of Act I of 1876 only after refusal to separately register and assess.

Sankaran Nayar for appellant.

The Government Pleader (*Mr. Powell*) for respondent No. 5.

Krishnasami Ayyar for respondents Nos. 1 to 4.

JUDGMENT.—Plaintiffs, as the alienees of two villages of the first defendant's zamindari under exhibit I, applied to the Collector under Act I of 1876 to have the two villages registered in their names. Owing to the first defendant's objection the Revenue authorities refused to make the transfer of registry. Plaintiffs, as persons aggrieved by this order, sued first defendant and the Secretary of State for India (second defendant) under section 6, Act I of 1876, for a declaration that such separate registry ought to be made. The Lower Court decreed that it ought, and, first defendant now appeals against that decree. The Government Pleader, on behalf of the second defendant, states that Government is indifferent to the result of the suit. It is urged by appellant that under the terms of exhibit I the first defendant (appellant) alone and not the plaintiffs (respondents 1 to 4) are liable, notwithstanding the alienation, to pay the land revenue to Government, and that there is, therefore, no occasion for separate registry, and that Act I of 1876 is inapplicable to the case, as its purpose is to make better provision for the separate assessment of revenue on alienated portions of estates. We cannot admit that this is so. Section 8 of Regulation XXV of 1802 allows the proprietors of zamindaries to transfer their proprietary rights in the whole or in part of their zamindaries and Regulation XXVI of 1802 and Act I of 1876 provide for the separate registry and assessment of the alienated portions. Without such separate registry the alienee cannot collect rents as a landlord under Act VIII of 1865,

(1) 3 M.H.C.R., 134.

(2) I.L.R., 15 Mad., 350.

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Valamaramayyan v. Virappa(1) and *Ayyappa v. Venkatakrishnamarasu*(2), and without separate assessment he is liable to have his property sold at any time for arrears accruing on the other parts of the zamindari. It is, therefore, essential that he should get separate registry at least in order that he may enjoy the fruits of the alienation. Government, in order to maintain the security for the public revenue due from the estate, apportions the revenue separately as a natural result of the alienation and this Government will do notwithstanding any arrangement between the parties as to which of them is to be responsible for the revenue. It is argued that under section 2 of Act I of 1876 the Collector cannot transfer the registry unless all the parties concur. That section relates to transfer of registry by agreement of parties on application to the Collector. It does not control or affect the power of the Civil Court under section 6 of the Act to direct separate registration. The right to registry follows the title, and under exhibit I the title is in the respondents 1 to 4. The decree of the Lower Court was, therefore, right. This appeal fails and is dismissed with costs.

Two sets of costs will be allowed—one to the respondents 1 to 4, and one to respondent 5.

APPELLATE CRIMINAL.

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

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*Penal Code—Act XLV of 1860, s. 224—Escape from lawful custody—Salt Act
(Madras)—Act IV of 1889, ss. 46, 47.*

The Madras Salt Act 1889, only authorises searches for contraband salt and arrests of the parties concerned in the keeping of such salt to be made by officers of the Salt department without search warrant in cases where the delay in obtaining such search warrant will prevent the discovery of such contraband salt:

Held, that where the circumstances did not justify the officer in believing that the delay in obtaining a search warrant would prevent the discovery of contra-

(1) I.L.R., 5 Mad., 145.

(2) I.L.R., 15 Mad., 484.

* Criminal Appeal No. 702 of 1896.

band salt, he had no power to search or arrest persons without such warrant and the escape by the persons so arrested from custody was no offence within the meaning of s. 224, Indian Penal Code.

APPEAL under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed in Appeal Case No. 50 of 1895 by the Head Assistant Magistrate of South Arcot against the conviction and sentence passed by the Stationary Sub-Magistrate of Chidambaram.

The facts of the case are as follows:—

About 2 A.M. on the morning of 18th March a party consisting of the Salt Sub-Inspector, Mannargudi (first prosecution witness), three petty officers (witnesses 2 and 3 and another), about 32 Salt peons, the Station-house officers of Mannargudi and Komaratchi and four police constables, in all about 42, went from Mannargudi to the Cheri of Puthur, a village some few miles from Mannargudi, and searched the houses of the Pariahs for contraband salt, &c. Twenty-eight houses were thus searched and twenty-one individuals were arrested. The complaint is that while the Salt officers were taking these persons to Mannargudi station in default of their giving security, they, under the instigation of a mob of some 200 villagers headed by one Velu Pillai, made their escape from the custody of the Salt officers in spite of the efforts of the latter to retain them in custody. The Salt Sub-Inspector of Mannargudi deposed that he received information at about 9 P.M. on the night of the 17th March from his petty officers and peons with reference to the existence of contraband salt in the village of Puthur, and that having recorded his reasons for dispensing with the search warrants he proceeded to make search without them. He stated that to obtain a search warrant he would have had to wait until next morning, that he was informed the contraband goods would be destroyed by that time, and that as some 20 or 30 warrants would have to be prepared by the Sub-Magistrate's clerks the matter would certainly come out.

It appeared, however, that the body of police, which took part in this search was on requisition made by him almost a week before to his Inspector and by the latter to the Inspector of Police summoned for the night of March 17th for the express purpose of searching for contraband salt in villages. Witness stated that he made this requisition, as there were one or two villages in his range notorious for the existence of contraband salt, but that he had no

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definite information before the 17th, on the night of which he got information of the houses in Puthur with their owners' names. The Head Assistant Magistrate came to the conclusion that the Sub-Inspector was aware of the state of things in Puthur, and intended to institute a search there some time before the night of 17th March and that the evidence of Arunachellam, a petty officer in Salt department, to the effect that he did not inform the Sub-Inspector of the existence of contraband salt in Puthur until the latter asked him for information on the night of 17th March was false. He found that the Sub-Inspector intended prior to the night of the 17th to search Puthur, that he ought therefore according to the law as it stands to have applied to the Magistrate for a warrant, that, as he failed to do so, his subsequent action was *ultra vires*, and that as the appellants were not therefore in lawful custody, their escape from that custody was not an offence.

Against this acquittal the Public Prosecutor (Mr. Powell) for the Crown appealed.

Mr. Wedderburn and *Krishnasami Ayyar* for the accused.

JUDGMENT.—The Stationary Sub-Magistrate of Chidambaram convicted eighteen Pariahs of Puthur, who had been arrested by officers of the Salt department on the 18th March 1895, of having escaped from lawful custody on the same day, an offence punishable under section 224, Indian Penal Code.

On appeal, the Head Assistant Magistrate acquitted them on the ground that the Salt officers had made the arrest unlawfully, and that escape from such custody was no offence.

Against this acquittal the Public Prosecutor now appeals on behalf of Government.

It is admitted that the Sub-Inspector of the Salt department had no other authority to make the arrests than that given by section 47 of the Madras Salt Act, 1889. The question is whether under the circumstances, his action was in accordance with the provisions of that section. It empowers an officer of the Salt department whenever he "has reason to believe that contraband salt is being . . . kept in any place and that the delay in obtaining a search warrant will prevent the discovery thereof" after certain formalities to search such place, seize any contraband salt therein, and arrest any person concerned in the keeping of such salt. The Sub-Inspector has sworn that he got information that there was contraband salt in the paracheri of Puthur about

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9 P.M. on the 17th March; that he had no time to get a search warrant from the Magistrate before the next morning, and that had he waited until the next morning to obtain a search warrant the matter would undoubtedly have come out, as twenty or thirty warrants would have to be prepared by the clerks, and that the salt would have been destroyed. He admits that he applied for police aid a week previously, but says it was to aid in searching villages generally, and that there were several notorious villages in the neighbourhood. He says he only got definite information of the houses and the owner's names on the night of the 17th. These statements are not contradicted by any evidence, and we are not disposed to regard them as false. We think, however, that there can be little doubt but that the Sub-Inspector could have obtained the information sooner had he cared to do so, and that, in any case, he could have applied to the Magistrate for a search warrant even after he got the information, and was not justified, under all the circumstances, in making the search and arrest without doing so. The Sub-Inspector asked for police aid a week before the 17th. It was not, in fact, used for any search except that of Puthur. The Sub-Inspector's petty officer, Arunachella Pillai, knew that there was contraband salt in Puthur for two or three days before the 17th; but he says that he did not tell the Sub-Inspector until the night of the 17th and adds "I do not volunteer information "to my superiors, but if they ask me I inform them." It seems to us clear that the Sub-Inspector knew in a general way that there was contraband salt in the paracheri of Puthur for some days before the 17th, and that he could have learned full particulars had he chosen to enquire of his petty officer. It can hardly be believed that he was in ignorance that the latter was in possession of detailed information. The Sub-Inspector says that during the past four years he has conducted some two-hundred searches, but has never once applied to the Magistrate for a warrant. It seems to us that this indicates the existence of a system whereby the intention of the Legislature is habitually frustrated. It is clear from section 46 of the Act that it contemplates searches being ordinarily made under the authority of warrants issued by a Magistrate. Section 47 was intended to be availed of only in cases where "the delay in obtaining a search warrant" from a Magistrate would prevent the discovery of the salt. The Act does not allow a salt officer to make a search without warrant

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because he fears that the *publicity* involved in asking for a warrant will prevent the discovery of the salt. He has power to make the search only when the *delay* involved in getting a warrant would prevent such discovery. Apparently, however, the system of this Sub-Inspector is never to get definite information until just before the time of the intended search, and then to make the search himself without warrant, alleging in justification that the delay in obtaining the warrant would lead to the destruction of the salt. We think that this system, if it exists, as it appears to do, is an abuse of the powers given by the Act which calls for the attention of Government and of the Superior officers of the Salt department.

In the particular case now before us, the evidence shows that the Sub-Inspector could have obtained the Magistrate's warrant without causing any delay whatever in conducting the search. The Sub-Inspector received detailed information at Mannargudi at 9 p.m. on the 17th March. He and his men did not start for Puthur until 2 a.m. the next day. He thus had five hours wherein to have gone to the Magistrate and got a warrant. The Magistrate lived only "one or two furlongs" away from where the Sub-Inspector was, so that the time that would have been required would not have been more than a few minutes. It is suggested that twenty or thirty warrants would have had to be written, and that the Magistrate could not be asked to do this at night and without the aid of his clerks. We observe that there are twenty-eight houses, and only twenty-eight, in the Puthur paracheri, and all of these were searched. The Sub-Inspector, therefore, had reason to believe that there was contraband salt in every house in the paracheri, and intended to search them all. He could, therefore, have asked for a single warrant to search all the houses in the paracheri. This could have been granted by the Magistrate and written with his own hand in a few minutes. A Magistrate is always on duty, and must be prepared to act, on urgent occasions, at other than the ordinary office hours. We think that in the present case no delay ought to, or would have resulted, had the Sub-Inspector applied to the Magistrate for a warrant. That being so, he was bound by law to have obtained the warrant before making the search, and the search without warrant, and the arrests which followed it, were both illegal. We cannot admit the contention of the Public Prosecutor that the exercise of the power given by section 47 is "left entirely to the discretion" of the

officer concerned, and that the wrongful exercise of the discretion does not make the arrest invalid. The officer has power only within the limits allowed by law, and must exercise his powers strictly in accordance with law. When he fails to do so his action is illegal, and the arrest is unlawful. If the arrest is unlawful, there is no offence under section 224, Indian Penal Code, in escaping from it. In the present case we find that the Sub-Inspector failed to comply with the law, and that his arrest of the accused was unlawful. They were, therefore, rightly acquitted, and we dismiss this appeal.

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APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice
Subramania Ayyar.

JAYINILABDIN RAVUTTAN (COUNTER-PETITIONER, PLAINTIFF
AND PURCHASER), APPELLANT,

v.

VIJIA RAGUNADHA AYYARAPPA MAIKAN GOPALAR
(DEFENDANT, PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 311—Setting aside a sale on the ground of material irregularity—Non-disclosure amounting to fraud.

A creditor had obtained a decree on the footing of a mortgage and in execution brought the property of his judgment-debtor to sale. At the time of sale the decree-holder, who had obtained leave to bid, entered into an agreement with P to the effect that if P would dissuade other persons from bidding, he (the decree-holder) would purchase the whole property for Rs. 83,000 and convey it on certain terms to P. P thereupon exerted his influence and succeeded in persuading would-be purchasers from bidding and in consequence the property was sold on 11th April 1891 for Rs. 83,000, which was a little more than half its actual value. The sale was confirmed on 29th June 1891 and the judgment-debtor who at the time of the sale was a minor under the Court of Wards, attained his majority on 21st April 1894 and filed this petition praying to set aside the sale on the 15th May 1894:

Held, that the omission on the part of the decree-holder to disclose the agreement to the Court amounted to a fraud upon the Court entitling the judgment debtor to say that in point of law no leave to bid was granted and that the

* Appeal against Order No. 131 of 1895.

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withholding of information is no less a ground for cancelling a sale than actual misrepresentation on the part of the applicant who becomes the purchaser, and that therefore the sale must be set aside.

APPEAL against the order of C. Venkobachariar, Subordinate Judge of Tanjore, passed on civil miscellaneous petition No. 487 of 1894.

The petitioner (defendant in original suit No. 85 of 1882) presented a petition dated 15th May 1894 under section 311 of the Code of Civil Procedure, asking the Subordinate Court of Tanjore to set aside the auction sale dated 11th April 1881 of a portion of his samindari for a debt of about Rs. 42,306 incurred by his father, which sale was confirmed on 29th June 1891. At the time of the sale petitioner was a minor under the Court of Wards and attained his majority on 21st April 1894. The petition was opposed by Jayinilabdin (the auction purchaser) as counter-petitioner. The following objections to the validity of the auction sale were relied upon by the petitioner.

(1) That the sale took place before the expiration of thirty days from the dates on which the sale notices were alleged to have been published in the villages (the dates of publication in the villages were 13th and 15th March 1891).

(2) That the proclamations of sale were not as a matter of fact published in the villages.

(3) That the interest of the Zamindar in the villages was not properly described in them.

(4) That on the date of sale an agreement was entered into between Papanad Zamindar and Jayinilabdin, in consequence of which intending purchasers were dissuaded from bidding at auction.

(5) And lastly that the petitioner sustained damages, as the villages were sold for prices much below what they were worth.

The counter-petitioner denies that there was any fraud in the sale, and says that it took place after thirty days from the date of the affixing of the notification of sale in the Court-house, and that the notifications were published in the villages. He further states that he did not dissuade intending purchasers from bidding at auction, that he entered into no agreement with Papanad Zamindar, that there was no agreement that he should purchase the villages for low prices, that the prices fetched were fair, and that petitioner suffered no damage. It is contended further that the petition is barred and that it is unsustainable.

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With regard to the points thus raised for decision the Subordinate Court found that the proclamation of sale was made and duly published in the villages; but that there was material irregularity within the meaning of section 311, Civil Procedure Code, inasmuch as thirty days did not intervene between the posting up of the proclamation in the villages and the date fixed for the sale. He held on the authority of *Tasadduk Rasul Khan v. Ahmad Husain*(1) and *Arunachellam v. Arunachellam*(2) that though this material irregularity occurred, the sale ought not to be set aside in the absence of proof of substantial damage of the petitioner. As to the third objection the Subordinate Judge found that the interest of the Zamindar in some of the villages was not properly described in the sale proclamations, but held on the authority of *Olpherts v. Mahabir Pershad Singh*(3), *Arunachellam v. Arunachellam*(2) that this was not a sufficient ground for setting aside the sale. He also held that it was not proved that this irregularity caused any damage to the petitioner. As to the fourth ground of objection the Subordinate Judge held that the agreement (exhibit C) was made on the date of sale between Papanad Zamindar and Jayinilabdin (counter-petitioner) as follows:—

"Agreement executed on the 6th April 1891 to Sabhapati Pillai Avergal, son of Sivachithambaram Pillai of Kilappaluvor of Trichinopoly district, residing in Maharnombu Chavadi, Pookkara Street, Third Division, Tanjore, by Chinnayya Rowther alias Zainoolabdin Rowther, son of Mohamed Meeru Rowther, residing at Okkur, Pattukottai taluk, Tanjore district. Execution petitions having been put in for the purpose of the realization of the decree amounts in these two suits, namely, original suits Nos. 85 of 1882 and 21 of 1883 on the file of the Subordinate Court of Tanjore, the decrees whereof hold liable these eight villages as hypotheca, namely, Karakkottai, Kambarkovil, Omakkavayal, Kuttangudi, Irambavayal, Sirukottaiyur, Vennathur and Kodamangalam comprised in the Zamindari of Singavanam of Pattukottai taluk, this day has been set down for the sale of the said eight villages which are held liable for the decrees. Consequently, if I should purchase the said villages at auction sale as agreed upon in our conversation, I shall, as per request made by you to me, convey to you at your expense the said eight villages to be purchased

(1) I.L.R., 21 Cal., 68. (2) I.L.R., 12 Mad., 19. (3) L.R., 10. I.A., 25.

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at auction sale on my receiving from you payment in cash on any date within one year, Rs. 85,000 being the price of the said eight villages as agreed to now, together with interest thereon at three-fourth per cent. per mensem from this day to the 1st April of the ensuing year 1892, that is to say, within one year and every sort of expenditure incurred in respect of the said villages with interest thereon at the rate aforesaid. If any other than myself should purchase at auction some (any) of the said eight villages, the sale amount in respect of the villages which may be so purchased at auction shall be deducted from the said sum of Rs. 85,000 and the remaining sum together with interest, &c., thereon as set forth above shall on payment on any date within one year be received by me and the villages which may be purchased by me at auction will be conveyed to you. If, as set forth above, the amount, &c., be not paid and sale deed obtained within one year, this agreement shall stand null and void."

The Subordinate Judge held that the above agreement was made for the benefit of the Papanad Zamindar and counter-petitioner, and that in consideration of the counter-petitioner consenting to reconvey the villages if he should purchase them, the Papanad Zamindar undertook to prevent bidders from competing with him in the auction, and that the agreement was verbal and was a condition precedent to the agreement (exhibit C).

With regard to the value of the villages the Subordinate Judge found that they were worth $1\frac{1}{2}$ lakhs of rupees or about Rs. 70,000 more than the amount realized by the auction, and that this loss was attributable, not to pure accident, but to want of fair competition in the auction due to the compact between the Papanad Zamindar and counter-petitioner to dissuade people from bidding.

The Subordinate Judge therefore set aside the sale on the condition of petitioner paying Rs. 83,000 due to the counter-petitioner within six months from the date of his order (15th March 1895). Each party to bear their own costs.

Both parties appealed to the High Court. The counter-petitioner against the order setting aside the sale in civil miscellaneous appeal No. 131 of 1895 and the petitioner against the order to pay Rs. 83,000 within six months in civil miscellaneous appeal No. 120 of 1895.

The other points argued appear sufficiently from the order of the High Court.

Bhashyam Ayyangar and Desikachariar for appellant.

Pattabhirama Ayyar for respondent.

ORDER.—The appellant is the purchaser of eight villages sold on the 11th April 1891 at an auction sale held in execution of decrees passed against the respondent and his father. The respondent, who was at the date of sale a minor, has obtained an order setting aside the sale, and against that order this appeal is brought.

The material facts found by the Subordinate Judge and forming the ground for his order are as follows:—

One of the decrees, in execution of which the sale was held, was a mortgage decree obtained by the appellant himself. The amount due under that decree at the time of the sale was about Rs. 60,000. The other decree was held by a third person whose agent, as it will appear, was Sundaram Chetti. The amount due under that decree was about Rs. 17,000. On the day for which the sale was advertised, the 6th of April, an agreement was made between the appellant and a person representing the Papanad Zamindar to the effect that the former should purchase the whole property for Rs. 85,000 and convey it on certain terms to the Zamindar. On the same day the appellant obtained from the Court leave to bid. So far there is no doubt as to the facts. But the Judge further finds that it was part of the agreement between the Zamindar and the appellant that the Zamindar shall dissuade other persons from bidding at the auction and that the Zamindar acted in accordance with the undertaking with the result that the eight villages were finally knocked down to the appellant at an aggregate price which was substantially below their real market value. The price which the appellant paid was Rs. 78,070, with the expenses of sale and the like amounting to Rs. 83,000. The real value of the property is according to the Judge's estimate about Rs. 1,50,000. This estimate is attacked by the appellant's vakil mainly on the ground that the statement (exhibit xxxi) on which the Subordinate Judge relies under-estimates the proportionate peishkash payable by the eight villages. The evidence with regard to the statement which purports to show the income of the villages for five years and the peishkash payable on each is not altogether satisfactory. The witness who speaks to it does not say for what purpose it was prepared, nor does he mention the materials on which he worked. It must be

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assumed that the calculation of the peishkash payable by the purchaser is correct, and that accordingly the figure given in exhibit xxxi is much lower than it should be. The inference naturally arising is that the other figures representing the income are also too low. We cannot accede to the suggestion that we must accept the figures representing the income as correct and reject the figures supposed to represent the peishkash, and thus arrive at the conclusion that the net income of the villages is less than what exhibit xxxi would make it appear to be. There is, however, other evidence in support of the Subordinate Judge's finding. There is the evidence of the same witness who speaks to exhibit xxxi, namely, the late manager under the Court of Wards, with reference to another statement made by him regarding the value of the villages. His evidence with regard to this statement in which the value is put at a figure exceeding Rs. 1,50,000 is much more satisfactory. There is other evidence as to the prices which witnesses say they were prepared to give for single villages, and there is the circumstance of large claims being made by the appellant for melvaram payable in respect of some of the villages. On the whole there is, in our opinion, ample evidence to support the Judge's finding as to the value of the villages.

In regard to the other matters of fact on which the Subordinate Judge has recorded findings we also agree with him. The sale began on the 6th April and each village was put up as a separate lot. No village was sold on that day, but the biddings were by order of the Court carried on from day to day till the 11th, when finally all the eight villages were sold and bought by the appellant. This seemingly extraordinary way of conducting a sale is said not to be unusual. Looking at the reports of the bids on the 11th of April, which of course was the only day on which serious bids were made, we find that in the case of Kambarkovil, Ilambavayal, Kodamangalam, Karakottai and Sirukottaiyur there was only one bidder besides the two decree-holders, one of whom was represented by Sundaram Chetti. In the case of Vennattur those two were the only bidders. In the case of Kuttangudi there were two other bidders. For the most valuable village Karakottai the two decree-holders were the only bidders whose bids could be regarded as serious.

Sheik Ismail Sahib was one of the most frequent bidders. The account he gives of himself when examined as a witness for the

respondent is not very satisfactory, and it seems doubtful whether in his bids he really meant business. Sundaram Chetti, the agent of the other decree-holder, was not examined, and it is not certain whether his employer had obtained leave to bid. The probability is that the bids were made merely with the view of raising the price to such a figure as to secure the payment of the debt due under that decree as well as the debt due to the respondent. This remarkable absence of competition, notwithstanding the fairly full attendance at the auction, might, if otherwise unexplained, be attributed to the fact that there were two decree-holders in the field. But there is evidence that effort was made to prevent competition. There is the evidence of several persons present at the sale whom the Judge has believed. Their story is strongly corroborated as well by the evidence with regard to the terms on which the agreement of the 6th April was made, especially the evidence of the District Registrar, as by the fact that the public did abstain from competing. There is in addition the significant fact that the vukil Srinivasa Pillai is not prepared to deny positively the conversation to which the District Registrar speaks.

The question then is whether, on the facts as found by the Subordinate Judge, the order was rightly made. The order is made under section 311 of the Code, and it is based on the ground of irregularity in the conduct of the sale. In our opinion there has been no irregularity within the meaning of the section. No charge is made against the person conducting the sale. The charge is made against the respondent and those who acted in concert with him, and it amounts to this: that they acted in such a way as to prevent the best price being obtained and thus caused loss to the judgment-debtor. So far as this particular charge is concerned we are further of opinion that it does not amount to a charge of fraud. Putting aside for the present the fact that the purchaser was the decree-holder and confining our attention only to the agreement made before and the conduct of the parties at the sale, we do not think that any fraud was established. There is some authority for the position that an agreement between two persons not to bid against each other will constitute sufficient ground for opening the biddings. (Bigelow on Fraud, p. 580. *Pachayappan v. Narayana*(1) founded on Sugden's "Vendors and Purchasers,"

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old edition, p. 93.) But according to the better opinion, that is not good law. It was distinctly held in "*In re Carew's Estate Act*" (1) that such an agreement, made with the view of dividing the land between the two parties to it, was no ground for setting aside the sale (see *Doorga Singh v. Shea Pershad Singh* (2)). The object of such an agreement and the means by which the object is gained are alike lawful and innocent, and the number of persons who enter into the agreement can make no difference. It is not suggested that there was any intimidation practised or any obstruction offered to possible bidders, nor again is it said that any misrepresentations were made at the auction in order to deter people from bidding. Probably the zamindar is a man of influence in the neighbourhood and there was some sympathy for the family of the judgment-debtor. These circumstances, together with the presence of the decree-holders as bidders, account for the facility with which other rivals were kept out of the field. The means by which competition was discouraged at the auction were clearly of an innocent character. In employing them, as in making the agreement with the zamindar, the purchaser did not go beyond the limit of what he was entitled to do in order to make a good bargain. (*Mogul Steamship Company v. McGregor, Gow & Co.* (3)).

The case, however, against the purchaser assumes a different complexion when it is remembered that he was not a stranger to the property, but a mortgagee holding a decree who, without special leave to bid, could not become purchaser. The case illustrates the importance of exercising the discretion to grant leave sparingly, and only in cases where it is made clear that the sale will be advantaged thereby. Ordinarily it is not to the advantage of a sale that a person who has enjoyed special opportunities of knowing the property and its value should be allowed to compete with strangers. They are naturally led to think that his bid represents the extreme value of the property (*Tennant v. Trenchard* (4)).

The agreement of the 6th April was clearly material to the consideration of the question whether leave to bid should be granted. The effect of the agreement was practically to preclude the appellant from going beyond Rs. 85,000. It was supposed to be made for the benefit of the judgment-debtor, and the friends of the

(1) 28 L.J. Ch., 218.
(*) L.R., 28 Q.B.D., 614.

(2) L.L.R., 16 Calc., 194.
(4) L.R., 4 Ch., 547.

latter concurred in it on that supposition. But it is plain that in reality the agreement, if carried out, left the judgment-debtor at the mercy of the zamindar. Had he become the purchaser, he could not have been compelled to convey the property to the judgment-debtor. The arrangement was of such a nature that it could not possibly have been countenanced by any Court having regard to the interest of the minor judgment-debtor. It is admitted that nothing was said about it when application for leave was made. That the agreement was in existence at that time there is no manner of doubt. In our opinion the omission on the appellant's part to disclose the agreement to the Court amounted to a fraud upon the Court entitling the judgment-debtor to say that, in point of law, no leave to bid was granted. The case is one in which there was a duty incumbent on the appellant to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid. Without such disclosure it is impossible for the Court to exercise its discretion. The withholding of information is, in our judgment, no less a ground for cancelling a sale than actual misrepresentation on the part of the applicant who becomes the purchaser. In the foregoing remarks we have laid no stress on the fact that the judgment-debtor was a minor. We have only assumed that there was no consent on his part, as a person *se iuris* to the arrangement under which the sale took place. Obviously a judgment-debtor, who being of full age, had consented to the arrangement, could not afterwards have challenged the sale. But the judgment-debtor was a minor and he is entitled to challenge the sale if it is shown that his interests were not duly protected by those whose duty it was to have regard to them. If, independently of any decree, the minor's property had been put up to auction and bought by the mortgagee under an arrangement similar to that actually made, there can be no doubt that on his coming of age the mortgagor would have been entitled to repudiate the transaction. Had the guardians of the minor done their duty by him, a reserve price would probably have been fixed on the property, the application of the decree-holder for leave to bid would have been resisted, and they certainly would not have acquiesced in a plan so perilous to the minor's interest as that which with their approval, was conceived and carried out. For these reasons we agree that the sale must be set aside.

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v.
VIJIA
RAGUNADHA
AYYARAPPA
MAIKAN
GOPALAR.

JAYINI-
LADDIN
RAYUTTAN
v.
VIZIA
RAGUNADHA
ATTARAPPA
MAIKAN
GOPALAR.

Both the above questions may, in our judgment, be properly raised between the judgment-debtor and the purchaser who is a party to the decree.

In modification of the order appealed against we direct as follows :—

Unless the respondent pays into Court the sum of Rs. 83,000 within one week from the re-opening of the Subordinate Court, the eight villages must be advertised again for sale to the highest bidder at the upset price of Rs. 83,000. The effect of this will be that, if there is no higher bidder, the appellant will be held to his bargain. As the appellant has been in possession lawfully, he is entitled to the mesne profits in lieu of interest up to the date of payment or that of the fresh sale if any. There will be no order against the appellant with regard to mesne profits nor any in his favour as to interest. Each party to bear his own costs of the appeal.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

1896.
April 23.

TIRUMALASWAMI AYYANGAR (PLAINTIFF), APPELLANT,

**TIRUMALAI GOUNDAN AND ANOTHER (DEFENDANTS),
RESPONDENTS.***

Patta, grant of—Effect of reversal—Appeal to Board of Revenue.

The grant of a patta by a Collector is conditional on the result of an appeal against such grant to the Board of Revenue.

SECOND APPEAL against the decree of T. Weir, District Judge of Coimbatore, in appeal suit No. 39 of 1893, reversing the decree of G. Ramaswami Ayyar, District Munsif of Coimbatore, in original suit No. 206 of 1891.

Suit for possession of lands and damages for loss of produce.

The facts of the case were as follows :—

The plaintiff and first defendant, both darkhasted in or about June 1887 for the lands in dispute. The Tahsildar appears to

* Second Appeal No. 528 of 1895.

have been of opinion that the plaintiff, Tirumalaswami Ayyangar, had a preferential right to the lands, but passed no order on the subject, confining himself to a recommendation to this effect.

The then Collector, being at the time on jamabandi, did not accept the Tahsildar's recommendation, but held that first defendant, Tirumala Goundan, had the preferential right and ordered that the land must be given to him (exhibit III).

The Collector's decision (exhibit III) that the lands should be given to first defendant is dated 9th June 1887. On the 22nd June following a patta was accordingly issued in the name of the first defendant. On the 11th August 1887 the first defendant sold the land to second defendant under the sale deed (exhibit I).

In the meantime, the plaintiff had preferred an appeal against the Collector's decision awarding the land to first defendant to the Board of Revenue. The appeal was pending before the Board of Revenue until March 1888. On 12th March 1888 the Board, after considering the report of the Collector and Head Assistant Collector (exhibit H on the record) passed a resolution that the lands darkasted for be given to the plaintiff Tirumalaswami Ayyangar. The plaintiff, having been refused possession by the second defendant, has brought this suit to establish his right and the District Munsif has given him a decree.

The District Judge held that the Board of Revenue were precluded from interfering in appeal with the patta presented to the first defendant by the Collector by the fact that that patta had already issued on the following grounds :—

"In *Collector of Salem v. Rangappa*(1) the High Court accept "the view that on a construction of the Board's own Standing "Order a patta can be (ought to be) issued only after the expira- "tion of the time allowed for appeal. In this case the patta was "issued as a fact on 22nd June, that is, thirteen days after the "date of the Collector's decision. The patta may be taken to "have been wrongly or mistakenly issued, that is to say, in "apparent disregard of the rules; but as a matter of fact it was "issued, and it was issued by a competent authority, viz., Col- "lector. To apply the language of that case to the present case "it may be that the Collector would not have issued the patta "had he paid a due regard to the rules, but he did, as a fact,

(1) I.L.R., 12 Mad., 404.

TIRUMALA-
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TIRUMALA. "issue it. This being so, the decision in *Collector of Salem v.*
SWAMI "Rangappa(1) seems clearly in point, viz., that such a mistake
ATTANGAR "(that is, one not arising from fraud or incompetency and the
"like) does not justify the cancelment of a patta issued by a
TIRUMALAI "competent officer in favour of one who has come into occu-
GOUNDAN. "pation of the land under it."

With regard to the contention that the patta was only issued conditionally he held: "I am unable to find, however, that there is any thing in the evidence beyond the fact that an appeal might be made to show that the patta in the present case was issued conditionally."

"A subsequent order of the Board, dated 10th June 1892, expressly providing that pattas granted by subordinate officers shall be considered conditional, cannot have retrospective effect, and the fact that such an order was found necessary affords, it may be said, some additional grounds for the view that grants of pattas theretofore made were not held to be conditional."

The decree of the plaintiff was therefore reversed with costs.

Plaintiff preferred this second appeal.

Mr. Parthasaradhi Ayyangar for appellant.

Desikachariar and Seshachariar for respondents.

JUDGMENT.—In our opinion the grant of a patta must, as long as an appeal against the decision of the Collector remains possible, be held to be conditional and subject to the result of the appeal. Here an appeal was presented within due time, and it was ultimately successful. Even under the old Standing Order (*Collector of Salem v. Rangappa(1)*) this is clearly implied.

We must reverse the decree of the District Judge and remand the appeal for disposal on the other issues.

Costs to abide and follow the result.

(1) I.L.R., 12 Mad., 404.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

ARUNACHELLA CHETTI (PLAINTIFF), APPELLANT,

1896.
April 20.

SITHAYI AMMAL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Mortgagee and mortgagor—Right of mortgagee in possession to execute repairs—Transfer of Property Act IV of 1882, s. 72.

Transfer of Property Act, s. 72 (b) does not permit a mortgagee in possession to effect improvements. Consequently in a suit for redemption the costs of such improvements cannot be legally charged against the mortgagor seeking to redeem.

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of Bellary and Salem, in appeal suit No. 46 of 1894, modifying the decree of Y. Krishna Rau, District Munsif of Salem, in original suit No. 535 of 1893.

The plaint set forth that plaintiff sold the plaint house to the defendants on the 25th April 1889 for Rs. 600 and delivered possession to them; that, on the same day, the defendants executed an agreement to plaintiff stipulating that, if the plaintiff paid the said Rs. 600 back to defendants on any day within three years from the date of the agreement, the defendants should at once deliver possession of the house to the plaintiff; that, as the house was worth Rs. 800 at the time of the sale and as the sale and agreement were executed at the same time, the sale was made subject to the conditions mentioned in the agreement; that, within the three years aforesaid, i.e., on the 8th April 1892, the plaintiff was ready to pay Rs. 600 to the defendants and asked the defendants to come to the registrar's office, receive the said amount and execute a reconveyance to the plaintiff, but the defendants made delay with a fraudulent intention and said that the sale deed was mortgaged to a third party and that they would at once redeem the mortgage and then execute the sale deed, that plaintiff was then and now is ready to pay the said amount, and that, subsequently, the plaintiff asked the defendants to receive the said amount and to execute the conveyance, but the defendants have not done so. Hence the suit to compel the defendants to execute

* Second Appeal No. 413 of 1895.

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ANMAL.

a reconveyance of the house to the plaintiff after receiving Rs. 600.

The defendants admit the execution of the agreement, but deny the other allegations in the plaint.

They further alleged that after the expiry of the term plaintiff was told the house needed repairs and was asked if he would repay the mortgage and take it back; but that plaintiff said he did not want it, that defendants have repaired the house at the cost of Rs. 200, and that if it be found that the house should be reconveyed to plaintiff, he be ordered to pay Rs. 200 to defendants for the cost of repairs which were indispensable.

The Munsif found that the agreement in question amounted to a mortgage and that the present suit was a suit for redemption, and finding that repairs to the extent of Rs. 200 had been executed, decreed that on payment of the principal sum due under the agreement, together with Rs. 200, the cost of the repairs, within six months, the defendant should be entitled to redeem and that each party should bear his own costs.

The Subordinate Judge confirmed this decree except as to costs:—

"With regard to the nature of the repairs effected, the Subordinate Judge found as follows:—

"The repairs effected are raising a wall, renewal of tiling, putting up a tiled verandah for a thatched one, and building some pials for the protection of the house. These repairs cannot be said to be either additions or improvements. Putting a tiled verandah in place of a thatched one may, in some circumstances, appear absolutely necessary for preservation of the house. There is no evidence that it was unnecessary for preservation.

"I think the work done comes more appropriately under the head of substantial repairs than under either improvements or additions."

He also found it proved that after the expiry of the term, viz., 25th April 1892, the first defendant went and requested plaintiff to pay her due and take the house, as it was badly in want of repairs, and that the tenants threatened to quit; that plaintiff told her he had no money, that he did not want the house, and that she could repair it.

Plaintiff preferred this second appeal.

Sadagopachariar for appellant contended that a mortgagee in possession has no power to lay out money for repairs and add it to

the mortgage amount. Transfer of Property Act, section 72, clause (b) does not cover improvements of this description.

Sundara Ayyar for respondents argued that in this case there was evidence that the plaintiff consented to the repairs being done and the money spent.

ORDER.—The finding of the Subordinate Judge is very unsatisfactory. In one passage he says that the work done by the defendant was in the nature of repairs, and in another place he uses language implying that substantial improvements were effected. What has to be determined is whether the expenditure was necessary to preserve the house from destruction. (See Transfer of Property Act, section 72.) A mortgagee is not at liberty to effect improvements and charge the mortgagor therewith.

It is suggested that the plaintiff is liable because he consented to the work being done. But this consent would not make him liable unless given under circumstances to make it equivalent to a promise to reimburse the cost to the defendants.

We must ask the Subordinate Judge to find

(i) whether the expenditure was necessarily incurred for the preservation of the property;

(ii) whether, if not, the plaintiff agreed to repay the cost.

The findings are to be submitted within one month after the re-opening of the Court after the recess. Seven days will be allowed for filing objections after the findings have been posted up in this Court.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

MULLAPUDI BALAKRISHNAYYA (DEFENDANT), APPELLANT,

v.

VENKATANARASIMHA APPA RAU (PLAINTIFF), RESPONDENT.*

Suit for kattubadi and karnam's emoluments—Provincial Small Cause Courts Act—Act IX of 1887, sched. (13)—Civil Procedure Code—Act XIV of 1882, s. 586—No second appeal.

Where plaintiff sued for arrears of kattubadi and karnam's emoluments, the value of the suit being less than Rs. 500:

* Second Appeal No. 397 of 1895.

ARUNA-
CHELLA
CHETTI
v.
SITHAYI
ANMAL.

1896.
April 21.

MULLAPUDI
BALA-
KRISHNAYYA
v.
VENKATA-
NARASIMHA
APPA RAU.

Held, that kattubadi and karnam's emoluments are neither a charge on or interest in immovable property, and that no second appeal lay.

SECOND APPEAL against the decree of E. C. Rawson, Acting District Judge of Kistna, in appeal suit No. 918 of 1893, modifying the decree of A. Ramaswami Sastri, District Munsif of Gndivada, in original suit No. 218 of 1892.

Suit to recover arrears of kattubadi for faslies 1297, 1298 and 1299 and karnam's emoluments due by the defendants as owners of kattubadi inama. Plaintiff set up an agreement to convert the rate in existence at the time of the permanent settlement, viz., Rs. 4 per putti of grain into a money rate, and he also relied on an alleged custom to pay money rent. The Munsif found neither the contract to accept money rates nor the custom proved, but held that the plaintiff was entitled to a decree both as regards the kattubadi and also the karnam's emoluments based on the rate in existence at the time of the Permanent Settlement in 1802.

The District Judge varied the decree in certain particulars, which are not now material.

Sadagopachariar for respondent raised the preliminary objection that the suit was of a Small Cause nature and that therefore no second appeal lay under section 586 of the Civil Procedure Code; he also contended that the question of the karnam's emoluments did not fall within second schedule (13) to Act IX of 1887, Provincial Small Cause Court's Act.

Sriramulu Sastri for appellants.

JUDGMENT.—This is a suit of a Small Cause nature, being a suit for kattubadi. The mere fact that the plaintiff asserted that the kattubadi was chargeable on land cannot be taken to alter the nature of the suit when, in fact, it was not so chargeable. Notwithstanding the decision in *Venkatarama Doss v. Maharajah of Visianagram*(1) we must say that in our opinion kattubadi is not, in the absence of any custom or contract to the contrary, chargeable on land. The plaintiff, it is to be observed, abandoned the claim for a charge and obtained a decree for money only. Then it is argued that the claim for the money due on account of emolument payable to karnams is a claim within article 13 of the schedule to the Small Cause Court's Act. It is said that it is a due payable to the plaintiff by reason of his interest in immoveable

(1) I.L.R., 19 Mad., 108.

property. If the claim were made by the karnam, it would not be of that character, although it might come under other words of the same article. As the claim is made by the zamindar, it must rest on some custom or contract. It is certainly not a claim made by reason of any interest in land. For these reasons we must hold that no second appeal lies, and we, therefore, dismiss the appeal with costs.

[REPORTER'S NOTE.—The same point is decided in Second Appeal No. 1061 of 1894 referred to in I.L.R., 19 Mad., 104].

APPELLATE CIVIL.

Before Mr. Justice Shephard.

VASUDEVA UPADYAYA (DEFENDANT No. 2), APPELLANT,

VISVARAJA TIRTHASAMI AND ANOTHER (PLAINTIFF AND
DEFENDANT No. 1), RESPONDENTS.*

Civil Procedure Code, ss. 244, 232, 235—"Judgment-debtor."

T's predecessor in interest had a mortgage on certain land and was made a party to a partition suit, in which a share in the land was allotted to a member of the family subject to a proportionate share of T's mortgage and also subject to a proportionate share of a certain decree debt. The then plaintiff got his share of the property made over to him. After the date of the decree, i.e., the decree in the partition suit, T purchased the equity of redemption in the mortgaged property from certain members of the family. In a subsequent execution of the partition decree, part of the land was sold for money due as costs and mesne profits by T's vendors of the equity of redemption and T was ejected. T objected under section 332 of the Code, but the Court refused to order redelivery; in a suit brought by T for possession: Held, that T was not a judgment-debtor within the meaning of ss. 244, 232 and 235, Civil Procedure Code, and that the suit was not barred by the provisions of s. 244.

APPEAL against the order of W. C. Holmes, District Judge of South Canara, in appeal suit No. 279 of 1893, remanding original suit No. 188 of 1892 to the Court of the District Munsif of Mangalore.

By a usufructuary mortgage, dated 1864, three undivided brothers, Narasimha Upadya, Venkatarama Upadya and Lakshmi-

* Appeal against order No. 64 of 1895.

MULLAPUDI
BALA-
KRISHNAYYA
v.
VENKATA-
NARASIMHA
APPA RAU.

1895.
November
12.
1896.
February
20, 25.

VASUDEVA
UPADYAYA
v.
VISVARAJA
TIRTHABAMI.

Narayana Upadya, mortgaged certain lands to plaintiff's predecessor in title.

Vasudeva, one of Venkatrama's sons, obtained a partition decree, in original suit No. 352 of 1876, on the file of the Mulki Munsif Court for his one-fifteenth share in the family property including the lands now in dispute, subject to the payment of the proportionate share in the usufructuary mortgage debt and also the proportionate share of a certain decree debt. In this suit plaintiff's predecessor in title, the mortgagee, was impleaded as the fourth defendant. The plaintiff in the partition suit got his share of the property made over to him in 1878-79. After the date of the decree in the partition suit the plaintiff purchased the equity of redemption in the mortgaged property from certain members of the family. In 1889, the first defendant, as the assignee of the decree in favour of Vasudeva Upadya in the partition suit, original suit No. 382 of 1876, took out execution against the judgment-debtors and their representatives including the present plaintiff who was the ninth counter-petitioner, and part of the land was sold for money due for mesne profits and costs payable by defendants Nos. 1, 2, 3, the uncles of the Vasudeva Upadya, who were the plaintiff's vendors of the equity of redemption. Plaintiff was ejected and raised objections under section 332, Civil Procedure Code, but the Court refused to order redelivery. Whereupon the plaintiff filed the present suit, and the munsif held that under section 244 no suit lay. On appeal the District Judge reversed the decree of the munsif and remanded the suit for disposal on the merits. The material portions of his judgment is as follows:—

"The question is whether the plaintiff went into Court properly under section 332, or whether he really went into Court under section 244. Was he a person other than the judgment-debtor within the meaning of section 332, Civil Procedure Code? 'Judgment-debtor' is defined in section 2 to mean any person against whom a decree or order has been made. 'Decree' and 'order' are both defined, and for the purpose of this case, we may consider the expression 'judgment-debtor' to mean any person against whom a decree has been made using the word decree to mean the formal expression of an adjudication on any right claimed when the adjudication decides the suit. If there had been no decree at all against the plaintiff, he could not be held to be a person against whom a decree had been made, and so in that case he

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"would not have been a 'judgment-debtor.' In this case there was a decree against him. But the part of the decree that was being executed, was not against him, and so far as that part of the decree was concerned, he was a stranger. To speak of a man as a 'judgment-debtor' with reference to a part of the decree that has no application to him, will be to give the words a strained meaning. I am inclined to think on the wording of the Act that the plaintiff should be classed as a person other than the judgment-debtor within the meaning of section 332 or 335. There may be many decree-holders and judgment-debtors created by one decree and the same party may be a decree-holder and a judgment-debtor under the same decree. No doubt, section 244 is very wide in the wording of paragraph (c) and includes questions arising between parties to the suit relating to the satisfaction of the decree, but sections 332 and 335 would appear to be of the nature of provisos to this section."

Defendant No. 2 appealed.

Narayana Rau for appellant.

Ramachandra Rau Saheb for respondents.

JUDGMENT.—The first respondent (hereinafter referred to as the respondent) being plaintiff in the suit claims certain property in virtue of a sale effected in 1879 by the appellant's uncles in his favour. The appellant claims the same property as purchaser at a subsequent sale held in execution of a decree, dated the 9th July 1877, and passed in a partition suit in which the appellant was plaintiff. In that suit the appellant's father and uncles were defendants and the respondent was also joined as a mortgagee of part of the family property. By the decree in the partition suit the respondent was made liable with his co-defendants for certain moneys payable to the appellant; there were other matters in the decree in regard to which the defendants other than the respondent were made liable. In 1889 application was made by the appellant for execution of the decree as against all the judgment-debtors including the respondent; and in pursuance of that application the abovementioned property was sold to satisfy the appellant's claim as against the judgment-debtors other than the respondent. The respondent took objection to this and made a claim which was unsuccessful. Accordingly, the present suit was brought to raise the question whether the property claimed by the respondent belongs to him in virtue of his purchase or

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v.
VISVARAJA
TIRTHANAMI.

whether it was the property of the judgment-debtors and as such liable to be seized and sold in execution of the decree against them. It is contended on the appellant's behalf that this question is one relating to the execution of the decree to which both appellant and respondent are parties, and that therefore it cannot be made the subject of a fresh suit. On the other hand, it is pointed out by the respondents' vakil that the particular application which led to a sale of the property was not directed against the respondent but against other persons, and the decision in *Nagamuthu v. Savarimuthu*(1) was cited. In my opinion the present case is not in principle distinguishable from the case cited. I do not think it makes any difference that the application for execution was made at one and the same time against the respondent and other judgment-debtors. The liability of the latter under the decree, in discharge of which the sale took place, was a distinct liability which did not in any way concern the respondent. *Nagamuthu v. Savarimuthu*(1) decides that, if against one defendant there is no liability under the decree, any question arising out of the execution against the other defendants is not, as between the first-named defendant and the decree-holder, a question relating to the execution of the decree within the meaning of section 244 of the Code of Civil Procedure. In the present case the decree was capable of being executed against the respondent. He was not a stranger to the execution proceedings altogether, but it was an accident that he had notice of the application which led to the sale. It might have happened that he had no notice, or again that against them the decree might have been satisfied before the application against the others was made. In the latter case I conceive it could not be said that there was any question as between him and the decree-holder as to the execution of the decree. The District Judge refers to the language of sections 332 and 335, and suggests that these sections should be read with section 244. The suggestion appears to me a sound one and it confirms me in the view taken of the law in *Nagamuthu v. Savarimuthu*(1).

I am of opinion that the suit being instituted by one who was no party to the particular proceeding in execution is not barred by the section 244 of the Code. I therefore dismiss the appeal with costs.

(1) I.L.R., 15 Mad., 226.

APPELLATE CIVIL.

Before Mr. Justice Subramania Aiyar.

MUTHUVIJAYA RAGHUNADHA RAJU TEVAR
AND OTHERS (PLAINTIFFS), APPELLANTS,

1896.
March 17, 20.

CHOCKALINGAM CHETTI AND OTHERS (DEFENDANTS
Nos. 1 TO 86) RESPONDENTS.*

Joinder of plaintiffs—Wrongful act affecting the rights of the several plaintiffs.

Where certain persons were alleged to have committed a wrongful act by evicting the plaintiffs from certain land in which the first plaintiff claimed to be entitled to the melvaram and the other plaintiffs to the kudivaram:

Held, that a suit brought by the plaintiffs jointly was not bad for misjoinder.

APPEAL against the order of C. Gopalan Nayar, Subordinate Judge of Madura (East), passed in original suit No. 47 of 1893. This is a suit by the Zamindar of Sivaganga and five Mahajanams of the hamlet of Peria Pudukulam in the village of Oruchirangamadai in the said zamindari to obtain a declaration that cheis 96-13-10 of nanja lands in that hamlet are the property of the plaintiffs, and to recover their possession from the defendants Nos. 1 to 85, together with Rs. 3,101-5-6 for mesne profits for the faslies 1299 to 1301. The first plaintiff's claim is based on his title as melvaramdar of the hamlet by virtue of his position as hereditary trustee of the Vayal Chari Sattram, while the plaintiffs Nos. 2 to 6 and 86th defendant are said to be its kudivaram tenants. It is alleged in the plaint that the defendants Nos. 1 to 8 are the owners by right of purchase of the Dharmasanam village of Rangian, which lies to the east and south of the plaint lands; that the hamlet of the Peria Pudukulam being uninhabited, plaintiffs Nos. 2 to 6 used to cultivate its lands with the assistance of defendants Nos. 12 to 85, who belong to the Rangian village; that these defendants raised the crops on these lands in fasli 1298 with the permission of these plaintiffs, but, at the instigation of the defendants Nos. 1 to 11 and without plaintiff's permission such crops were unlawfully cut, carried away and misappropriated by all the defendants; that the produce for the subsequent faslies 1299 to

* Appeal against Order No. 44 of 1894.

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v.
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LINGAM
CHETTI.

1800 has also been similarly misappropriated by them and that they, defendants Nos. 1 to 85, are keeping wrongful possession of the lands against the plaintiff's wishes. Defendants Nos. 1 to 4, among other pleas, object to the suit on the ground of multifariousness as the causes of action of all the plaintiffs are distinct and several. They also deny all the main allegations in the plaint, the plaintiffs' title to the lands and the trespass or wrongful possession alleged in the plaint and claim the plaint lands of cheis 96-18-0 as constituting the waterspread of the Rangian tank and, as such, belonging to that village.

Mr. P. A. DeRosario, *Bhashyam Ayyangar* and *Desika Chariar* for appellants.

Mr. Parthasaradhi *Ayyangar* for respondents.

JUDGMENT.—The plaintiffs sue for possession of certain lands from which they state they have been wrongfully evicted. Their case is that the first plaintiff holds the melvaram right and the plaintiffs Nos. 2 to 6 the kudivaram right in the village of Peria Pudukulam, that the lands in dispute form part of the said village, that the defendants Nos. 12 to 85, who had been cultivating the lands under the plaintiffs Nos. 2 to 6, had, at the instigation of the defendants Nos. 1 to 11, cut and carried away the crops that had been raised for the fasli 1298, and that ever since the defendants Nos. 1 to 85 have combined together and retained possession of the lands, alleging that the same form part of the village of Rangian belonging to defendants Nos. 1 to 11.

The Subordinate Judge held that the plaint was, on the face of it, bad for misjoinder of parties and causes of action.

Now when two persons are interested in a piece of land—one as melvaramdar and the other kudivaramdar—and a third party commits a wrongful act which affects the rights of the persons so interested, it may, I think, properly be held that the land is common to both to the extent of entitling them to sue jointly in respect of the wrongful act, treating such act as giving rise to but one cause of action affecting the two persons more or less (compare the observations in *Venkatachelam Chetti v. Andiappan Ambalam* (1). This view would, of course, prevent the unnecessary multiplicity of suits which would otherwise result. For, taking this very case, and even supposing that the plaintiffs Nos. 2 to 6 do not hold

all the lands jointly sharing the crops only, but that they hold definite parcels of lands on account of the share of each, and that each of these plaintiffs brings a suit against the defendants in respect of so much of the lands in question as belongs to him, the point to be decided in each of such suits would be whether the respective lands form part of the Peria Pudukulam village. This point would have to be tried in the first plaintiff's suit also, since that suit would embrace every one of the lands comprised in the various suits supposed to be instituted by the plaintiffs Nos. 2 to 6. It is therefore difficult to see what useful purpose can be served by refusing to permit the first plaintiff, the melvaramdar, and the other plaintiffs, the kudivaramdar, to sue together and have the question whether the whole or any and which part of the disputed lands is attached to Peria Pudukulam village tried and settled once for all.

As to the objection that the various defendants themselves claim or are likely to claim portions of the disputed land as their separate property, I think that is altogether immaterial, because the point to be decided is not what the interests of the defendants are should the plaintiffs fail to establish their case, but whether the plaintiff's case is true.

The order of the Subordinate Judge seems, therefore, to be wrong, and I reverse it and direct that the plaint be restored to the file and dealt with according to law.

The costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

KOLANDAYA SHOLAGAN (DEFENDANT No. 2), APPELLANT,

v.

VEDAMUTHU SHOLAGAN (PLAINTIFF), RESPONDENT.*

Hindu Law—Suit by reversioner to set aside alienations by widow—

Fraudulent consent given by nearest reversioner.

In a suit brought by the nearest reversioner of a Hindu widow who had alienated portions of her husband's estate with the consent of the nearest reversioner alive at the date of the alienation (since deceased), it was found that

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RAGHUNADHA
RAJU TEVAR

v.
CHOCKA-
LINGAM
CHETTI.

1896.
March 6, 31.

(1) I.L.R., 2 Mad., 233.

* Second Appeal No. 233 of 1895.

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SHOLAGAN.

the alienations were colourable transactions fraudulently got up for the purpose of defeating the plaintiff's claim:

Held, that the consent of the nearest reversioner, who must have been aware of the fraud, was of no avail to validate the transactions impeached, and that they were therefore invalid as against the plaintiff.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 400 of 1893, confirming the decree of N. Sambasiva Ayyar, District Munsif of Tiruvadi, in original suit No. 321 of 1892.

Suit by plaintiff as the nearest reversioner of one Sangamalam, the deceased husband of the first defendant, for a declaration that a sale deed and a mortgage, executed on the 17th March 1881, were executed fraudulently and not for proper purposes, and were therefore invalid beyond the life time of the first defendant.

The defendants pleaded that the alienations were made in order to discharge the debts of Sangamalam, the deceased husband of the first defendant, and for money borrowed by the first defendant for necessary and proper purposes, and that the transactions in question were assented to by the then nearest reversioner Vengu Solagan, and that the plaintiff was entitled to no relief. The munsif found that the sale of 17th March 1881 in favour of the second defendant was an unreal transaction, and that the mortgage in his favour of the same date was a fraudulent and colourable transaction except as to a small portion.

With regard to the consent given by Vengu Solagan to the said transactions, the munsif found that the consent was given, but that it could not validate them as they were fraudulent and collusive transactions. He held that, where the transaction impeached is found to be collusive and fraudulent, no amount of consent on the part of the next reversioner will validate it as against remote reversioner. On appeal filed by the second defendant, the District Judge agreed with the Lower Court on the result of the evidence, and with regard to the consent given by Vengu Solagan, the judgment is as follows: "The only point that remains is whether the next reversioner's consent validated the transaction. He is the second defendant's father and must have been aware of the fraudulent nature of the transaction. His consent was therefore a fraudulent consent and is thereby vitiated." The appeal was accordingly dismissed with costs.

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v.
VEDAMUTHU
SHOLAGAN.

Defendant No. 2 appealed.

Sivasami Ayyar for appellant.

S. Subramania Ayyar for respondent.

JUDGMENT.—The finding is that the transfers made by the widow in favour of the appellant were not made, as alleged by him, for purposes binding upon the respondent, a reversioner. It was, however, contended on behalf of the appellant that, notwithstanding the above finding, the alienations should be upheld on the principle of Hindu law recognised by the Judicial Committee in *Behari Lall v. Madholal Ahir Jaya Wall*(1), since the intention of the widow in transferring the lands in dispute was to benefit the appellant and the transfers were made with the assent of the person who was the nearest reversioner then. Now to admit of the doctrine of law laid down in the case cited being applied, it should be shown that the widow's estate was completely withdrawn, so that the whole estate should get vested at once in the grantee as effectually as if the widow had renounced in favour of the nearest reversioner and the latter as full owner had conveyed the property to the grantee. But that is not the case here, as one of the items of the property in question purports to have been transferred by way of mortgage only. Even if the transaction were really a mortgage, the widow would be interested as the holder of the equity of redemption. Moreover both the Courts find that the debt, on account of which the mortgage is said to have been executed, was never due. Consequently the land comprised in the instrument of mortgage must be taken to be her property still. Her life estate not being at an end, the foundation for the application of the rule of law relied upon on behalf of the appellant fails and the second appeal is dismissed with costs.

(1) I.L.R., 19 Calc., 236.

APPELLATE CIVIL.

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

KOLLIPARA PULLAMMA (PLAINTIFF),
APPELLANT,

MADDULA TATAYYA AND OTHERS (DEFENDANTS
Nos. 1, 3, 4, 5 AND 9), RESPONDENTS.*

*Limitation Act, s. 20—Payment of interest as such—A mere credit of interest
made in accounts of defendants.*

In a suit brought by a creditor against certain persons to whom she had lent money on interest:

Held, that, in order to save the bar of limitation, a mere credit of interest entered in the accounts of the defendants was not a sufficient payment of interest as such under s. 20, Limitation Act, to save the bar.

SECOND APPEAL against the decree of N. Saminadha Ayyar, Subordinate Judge of Ellore, in appeal suit No. 125 of 1894, modifying the decree of E. J. S. White, District Munsif of Ellore, in original suit No. 317 of 1892.

The first four defendants are brothers, and they, with the other defendants, admittedly lived until lately in union and carried on business jointly, the first defendant Tatayya being the manager. The plaintiff lent them some money, and on the 18th December 1888, her account was adjusted by the first defendant, who signed an acknowledgment on her account for a sum of Rs. 4,181-8-7½ (exhibit C^s). Various sums are said to have been paid subsequently to and by the plaintiff. The account was again adjusted on the 9th April 1891, when the second defendant (admittedly not the manager of the family) signed an acknowledgment for Rs. 2,924-12-1½. After allowing for several subsequent debits and credits, the suit is brought for a balance, alleged to be due to the plaintiff of Rs. 1,592-11-10½. The defendants plead that the debt has been discharged and that it has become barred by limitation. The adjustment referred to on 9th April 1891 was not proved, and no evidence was adduced to prove that the suit

* Second Appeal No. 460 of 1895.

account was in the nature of a banking account; it appears, therefore, to be simply an ordinary account for money lent for the purpose of saving the bar of limitation. The plaintiff relied on an entry which appears in her own account as well as in that of defendants, showing a payment to her of Rs. 200 on account of interest on the 6th October 1891. On the evidence the munsif found that the sum of Rs. 200 was paid by the defendants jointly to the plaintiff on 6th October 1891, and that the suit was therefore not barred. On appeal the Subordinate Judge found that the sum of Rs. 200 was not paid by the first defendant or under his orders to the plaintiff towards interest as such, and that the suit was barred by limitation as to the main portion of the amount claimed, but gave a decree for Rs. 103-1-0, the amount of four items admitted to be due by the defendants with interest up to date of plaint.

From the accounts filed in the suit by plaintiff and defendants (exhibit D²) and (exhibit E¹), it appeared that the plaintiff was credited by the defendants with Rs. 303-13-3 on 12th October 1890, being interest at 12 annas per cent. for fourteen months and seventeen days, namely, from 23rd July 1889 to 10th October 1890.

The plaintiff preferred this second appeal.

Pattabhirama Ayyar, Ethiraja and Sivagnanam for appellant.

Mr. Parthasaradhi Ayyangar and Sivasami Ayyar for respondents.

JUDGMENT.—The plaintiff lent certain sums to the defendants, and the account between them was last settled on the 18th December 1888. In November 1892, the plaintiff sued for the balance of principal and interest due. In order to take the case out of the statute of limitations, certain alleged payments were relied on. The District Munsif found that one of these, viz., of Rs. 200 on the 6th October 1891, was true, and that there was no bar by limitation. The Subordinate Judge, however, found that the payment was not made and dismissed the plaintiff's suit, except as regards a small sum admitted by defendants. The finding of the Subordinate Judge as regards this payment is a finding of fact, and although we do not regard his reasons for the finding as altogether satisfactory, we have no power in second appeal to go behind it.

It has, however, been found by both Courts that a sum of Rs. 303 was credited in the defendants' books (Day book and

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TAKARA.

Ledger) to the plaintiff's account with them on the 10th October 1890 as interest due on her loan to date, and it is strongly urged before us that this amounts to a payment to her sufficient, under section 20 of the Limitation Act, to give a new starting point for limitation. No authority in support of this construction of the section has been brought to our notice, and the current of English decisions on the English statute is opposed to it (*Amos v. Smith*(1), *Mober v. Mober*(2), *Hart v. Nash*(3)). The broad rule deducible from those cases seems to be that though the payment need not be in money, but may be in goods, or even by a settlement of account between the parties, yet the payment must be of such a nature that it would be an answer in a suit brought by the plaintiff to recover the amount. If that test be applied to the present case, can it be said that the credit of the sum by the defendants in their books to the plaintiff's account with them is such a payment to her as would be an answer in a suit brought by her to recover the money and the interest? Clearly it would not. We find, too, that in a case (very like the present case) the Bombay High Court has decided that such a credit of interest is not a payment within the meaning of section 20 (*Ichha Dhanji v. Natha*(4)). We, therefore, find that this credit is not sufficient to remove the bar by limitation.

The only other grounds urged on us is that the transaction was not a loan, but a deposit, by plaintiff, in which case limitation would only run from the date of demand for payment under article 60, schedule 2 of the Act, and the suit would not be barred. The District Munsif expressly states that this plea was given up before him, and there is no affidavit to show that this statement is incorrect. The mere reference to it in the written arguments filed before the District Munsif is no proof that it was not given up after that paper was put in.

In the result, the second appeal fails and is dismissed with costs.

(1) 1 H. & C., 238.

(2) 2 C., M. & R., 327.

(3) L.R., 2 Ex., 153.

(4) I.L.R., 13 Bom., 338.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

BAVA SAIB AND ANOTHER (DEFENDANTS), APPELLANTS,

1896.
July 14.

v.

MAHOMED (PLAINTIFF), RESPONDENT.*

Muhammadian law—Hibbat—Incomplete gift.

Where a Muhammadan woman made an oral gift of a house to her nephew on the occasion of his marriage, but subsequent to the gift continued to live with him in the house:

Held, that the gift was null and void, as there was no entire relinquishment of the house by the donor and the case did not fall within the exceptions allowed by Muhammadan law.

SECOND APPEAL against the decree of E. J. Sewell, Acting District Judge of Tanjore, in appeal suit No. 418 of 1894, reversing the decree of A. Kuppuswami Ayyangar, District Munsif of Negapatam, in original suit No. 179 of 1893.

The facts of the case were as follows:—

Plaintiff sued to recover a house, of which he had been dispossessed by defendants, which was given to him at the time of his marriage as *hibbat* under the Muhammadan law by his mother's sister Beebee Sa. Beebee Sa had bought the house in 1879 from her husband Mahomed Madar, who had bought it in 1869 from one Avva Nachiar.

The first defendant pleaded that the sale by Mahomed Madar to his wife Beebee Sa was a nominal transaction to defeat Mahomed Madar's creditors, denied the gift to plaintiff by Beebee Sa, and claimed to hold the house under Golusan Beebee, third defendant, another wife of Mahomed Madar.

The second defendant is the husband of the third defendant.

The District Munsif found that the conveyance to Beebee Sa by her husband was a nominal one to defeat creditors, and that the gift by Beebee Sa was genuine, but was not valid because it was not reduced to writing and registered as required by

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v.
MAHOMED. the Transfer of Property Act. He decreed against plaintiff who appealed.

The District Judge on appeal found that the gift was really made, that the provisions of the Transfer of Property Act did not apply (see section 129), and that the donee accepted the house and took possession, but that Beebee Sa, the donor, lived with him in the house until her death some four or five months afterwards. With reference to the rule of Muhammadan law that a gift to be valid must be accepted and accompanied by delivery of possession (MacNaughten's Principles, chapter v, clauses 2 and 4), and that if the donor continues to live in the house, the delivery of possession is not complete (MacNaughten's Precedents, chapter iv, case xxii), he held that, considering the relationship of the donor to the donee, and that she was maintaining him, the fact of her remaining in the house could not be held to detract from her entire relinquishment of the house given, and that the gift was valid according to Muhammadan law.

He also found that the sale by Mahomed Madar to the donor was a valid sale and gave a decree for the plaintiff with costs.

The defendants appealed.

Mr. J. G. Smith for appellants referred to *Ameeroonissa Khatoon v. Abedoonissa Khatoon*(1), *Mohinidin v. Manchershah*(2) and *Mogulsha v. Mahamad Saheb*(3).

Mr. N. Subramaniam for respondent.

JUDGMENT.—The rule of Muhammadan law in regard to *hibbat* is that the gift must not be implied. It must be express and unequivocal and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it.

Where, as in this case, a house is the subject of the gift, if it continues to be occupied by the giver, there is no complete gift. (See case xxii at page 231 of MacNaughten's Precedents, 4th edition.)

The only exceptions are where the house gifted is given by a husband to a wife, or by a father or guardian to his minor child or ward (*vide* MacNaughten's Principles of Muhammadan Law,

(1) L.R., 3 I.A., 104. (2) I.L.R., 6 Bom., 662. (3) I.L.R. 11 Bom., 517.

4th edition, chapter v, page 51, and *Ameeroonissa Khatoon v. Abedoonissa Khatoon*(1)). In this case the donee is not shown to come within the exceptions, and we must, therefore, hold that the District Judge was wrong in finding the gift was valid.

We accordingly reverse the decree of the Lower Appellate Court and restore that of the Court of First Instance. The respondents must pay the appellant's costs in this and the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

SUBBARAYA MUDALI (FIRST DEFENDANT), APPELLANT,

v.

MANIKA MUDALI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Suit for partition—Death of plaintiff subsequent to decree—Right of survivorship vested in defendant—Vested right of plaintiff's representative not affected.

M., a minor and only son by his next friend, sued his father and certain alienees of the family property for partition and obtained a decree. Subsequent to decree and pending appeal, the plaintiff died and M.'s mother was brought on the record as deceased plaintiff's legal representative:

Held, that as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, so the defendant can raise no other defence against him than he could have raised against the deceased plaintiff, and that a decree for partition operates as a severance of the joint ownership.

APPEAL against the decree of W. F. Grahame, District Judge of South Arcot, in original suit No. 1 of 1892.

Plaintiff sues in *formâ pauperis* by his next friend and grandfather for partition and delivery to him of his half share in the family immovable and movable properties specified in the plaint and to recover mesne profits. The suit is valued at Rs. 4,199-8-0.

The first defendant was plaintiff's father. Defendants 2 to 12 were alienees of certain portions of the family property under alienations created by the first defendant, the particulars of which were set forth in the plaint and schedules thereto.

(1) L.R., 2 I.A., 104.

* Appeal No. 63 of 1895.

BAVA SAIB
v.
MAHOMED.

1896.
March 23, 24,
27.

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v.
MANTHA
MUDALI.

The District Judge held that the plaintiff, though a minor, was entitled to sue for partition (*Kamakshi Ammal v. Chidambara Reddi*(1)), that the property in suit was joint family property, that certain sales of the family property, viz., those in favour of defendants 4, 5, 7, 8 and 11 could not be set aside, but that the plaintiff was entitled to one-half of the purchase money realised by such sales amounting in all to Rs. 423-12-0 from the first defendant. The Court also held that plaintiff was entitled to mesne profits for three years, and also to one-half of the movables or their value Rs. 429-8-0, and the decree also granted certain other reliefs not material for the purposes of this report.

The first defendant appealed to the High Court and pending appeal the plaintiff died, and his mother was brought on the record as his representative by an order dated 22nd July 1895.

Ethiraju and Sivagnanam for appellant.

Mahadeva Ayyar and Masilamani Pillai for respondents.

JUDGMENT.—The first point taken is, that inasmuch as the plaintiff has died since the date of decree and after the filing of the appeal, leaving only his mother who has been brought on the record as the representative, the father is entitled by survivorship. It is said that the partition effected by the decree is not absolute, so long as the decree remains appealable. The rights of the party are accordingly liable to be affected by events happening subsequently. There can be no question that the mother of the plaintiff is the person who represents him on his death and would therefore be entitled to the benefit of the decree. The right to continue a suit for partition after the death of the plaintiff would, of course, not devolve on his widow or other heir not being a coparcener with the defendant, because immediately on the death happening before decree, the right of survivorship would take effect. It would not be the ordinary case of a suit abating on the ground of the right to sue not surviving, but it would be the case of a right extinguished by confusion owing to the fact that all the rights in respect of the property became vested in one and the same person. The further prosecution of the claim would be as impossible as it is when the right to demand a debt and the liability to pay it coincide in the same individual. But after decree for partition once

(1) 3 M.H.C.R., 94.

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made it is difficult to understand how the vested right of the plaintiff's representative can be affected or destroyed.

The general rule is that, as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, so the defendant can raise no other defence against him than he could have raised against the deceased.

By the decree in all suits relating to property, the rights of the parties are determined and the death of one of them merely has the effect of putting a representative in his place. It seems strangely anomalous to hold that such a representative may be recognized, but that his position is not identical with that enjoyed by the deceased. Authorities were, however, cited in support of the view contended for. In *Padarath Singh v. Raja Ram*(1) it was held that the plaintiff, who sued to set aside an alienation made by his father, having died after decree obtained, his mother, who was made respondent in the appeal, could not continue the suit. The terms of the decree in the plaintiff's favour are not given, but there can be no doubt that it was a decree for the son's share of the property. More recently in a case, which appears to be precisely similar, the contrary conclusion was arrived at by the Full Bench of the same Court (*Muhammad Hussain v. Kuskelo*(2)). In Bombay in *Sakharam Mahader Dange v. Hari Krishna Dange*(3) at page 115 upon a different state of facts, the principle has been laid down that a decree for partition so long as it remains under appeal does not effect a severance of joint estate. It was accordingly held that, by reason of the death of one of the defendants during the pendency of the second appeal, the plaintiff's share was enlarged. If this decision is correct, it must follow that, as the share given under the decree may be varied, so it may be extinguished altogether.

In the Madras case decided in the Privy Council (*Chidambaram Chettiar v. Gauri Nachiar*(4)) the point did not arise, because there was no appeal against the decree for partition. It is merely an authority for the position that such a decree may operate as a severance of joint estate. The two cases cited appear to us to lay down a rule which is not only inconsistent with the general principle that the rights are fixed by the decree and that the decree can only be attacked on grounds which were available to the

(1) I.L.R., 4 All., 235.
(3) I.L.R., 6 Bom., 113.

(2) I.L.R., 9 All., 132.
(4) I.L.R., 2 Mad., 83.

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MUDALI.

unsuccessful party in the Court of First Instance, but would also lead to most inconvenient results.

If the decree by itself effects no partition and does not operate as a conveyance to each party of his share in the estate, then however just and right, however unimpeachable it may have been when made by the Court of First Instance, it must, for an indefinite length of time, remain uncertain what rights the parties possess under it. A new peril would be added to the position of a purchaser *pendente lite*. He would not only have to consider the merits of the case in which the decree had been passed, but would also have to consider the chances of his vendor surviving the period over which the appeal might continue. The purchaser from the party who had obtained a decree for his share of the joint estate would be no better off according to this view than the purchaser from a member of an undivided family in its normal condition. By the birth of children into the family or by the destruction of part of the family estate the share purchased by him might come to be diminished, or, as in the present case, the death of the vendor might put an end to it altogether. These difficulties are avoided by adhering to what we consider the right principle, viz., that, by the decree in a partition suit, a severance of the joint ownership is effected, the operation of a decree among parties not consenting to a division being equivalent to that of mutual conveyances among parties consenting to a partition of the joint estate.

On the question of fact we agree with the District Judge. The property purchased by the father, it is clearly proved, was not bought by his self-acquired funds. With regard to the property sold by the father before the suit in respect of which the Judge has made the father liable for half the purchase-money, we do not find that it is clear that the proceeds still remain in the father's hands. The plaintiff, therefore, has no claim to a share of them. In this respect, viz., as to Rs. 483-12-0, the appeal must be allowed.

As to the mesne profits and movables we see no reason to differ from the District Judge. Subject to the above modification we must dismiss this appeal—proportionate costs.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Boddam.

QUEEN-EMPRESS

v.

PUKOT KOTU AND OTHERS.*

1896.
July 28.

Abkari Act—Act I of 1886 (Madras), ss. 31, 36—Penal Code, ss. 99, 147 and 353.

A Sub-Inspector of Salt and Abkari attempted, without a search warrant, to enter a house in search of property, the illicit possession of which is an offence under the Madras Abkari Act and was obstructed and resisted:

Held, that having regard to section 99 of the Penal Code, even though the Sub-Inspector was not strictly justified in searching a house without a warrant, the persons obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of their obstruction as it was not shown that that officer was acting otherwise than in good faith and without malice.

APPEAL under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed by J. Hewetson, District Magistrate of Malabar, in criminal appeal No. 13 of 1895.

The judgment of the District Magistrate was as follows:—

"The four appellants, together with two women who have not appealed, have been convicted of rioting and using force to a public servant while in execution of his duty. The Sub-Inspector, a petty officer and five peons went to the first appellant's house and found him, as they swear, selling toddy. Thereupon the Sub-Inspector wanted to search his house, drew his sword, and tried to effect his object by force.

"Now, before a search could be legally made without warrant, the Abkari officer must, under section 31 of Act I of 1886, 'record his reasons and the grounds of his belief.' Under section 36 he is also bound by the proceedings of the Criminal Procedure Code, i.e., before commencing the search, he must secure the presence of, at least, two respectable witnesses. The Sub-Inspector did neither of these things. His procedure was therefore grossly illegal. He was not acting in the execution of his duty, and the appellants were justified in preventing the search until the requirements of the law were fulfilled. It does not appear that they used more force than was requisite for the purpose. The

* Criminal Appeal No. 138 of 1896.

1899.
January 31.

1899.
January 31.

"Sub-Inspector's sword was damaged, his cap lost, and his coat torn, but no wounds or bruises are alleged. As soon as the Adhikari came, the search was made without opposition. It, therefore, seems to me that even if the appellants did all that the prosecution alleges, they committed no offence, and must be acquitted. I reverse the finding and sentence of the Lower Court and cancel the appellant's bail bonds."

The Acting Public Prosecutor (Mr. Subramaniam) for the Crown.

The prisoners were not represented.

JUDGMENT.—The District Magistrate appears to have had no ground for his finding that the Sub-Inspector acted irregularly in making the search. But, assuming the Magistrate's finding had been correct, the irregularity would have afforded no justification for the defendants' acts.

When the Magistrate states that the defendants were 'justified' in their resistance, we presume he means by the right of private defence (for we can conceive of no other justification), but the Magistrate has overlooked the provisions of the first and second clauses of section 99 of the Penal Code, which do not allow of the exercise of that right when an act such as this is done by a public servant or under the direction of a public servant which the Sub-Inspector was.

We must therefore reverse the District Magistrate's order of acquittal and direct that the appeal be restored to the file and heard and disposed of upon its merits. Ordered accordingly.

[Reporter's note: See *Reg v. Vyankatray*, 7 B.H.C.R., Crown cases 50.]

APPELLATE CIVIL.

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

In re MAKKI, APPELLANT IN S.R. No. 11703.

In re RAMAN, APPELLANT IN S.R. No. 13187.*

Court Fees Act—Act VII of 1870, sched. I—Appeal—Stamp leviable for costs.

When apart from, and independently of, any other reliefs which an appellant seeks in an appeal from a decree, he seeks distinct relief on the ground that by

* Referred Case No. 1 of 1893.

In re
MAKKI.

the decree under appeal the costs of the parties in the proceedings which terminated with the decree have not been properly assessed or apportioned, the value of such distinct relief should be reckoned as part of the subject-matter in dispute for the purposes of the first schedule of the Court Fees Act.

CASE referred for the decision of the High Court under section 5 of Act VII of 1870 by H. W. Foster, Registrar of the High Court, Appellate Side, Madras.

The case was stated as follows:—

"The question which has given rise to this reference is whether, under certain circumstances, costs awarded by the decree of a Court should not be regarded as part of the 'value of the subject-matter in dispute' for the purpose of calculating the fees payable under schedule I of the Court Fees Act on a memorandum of appeal against the decree.

There are two second appeals now pending admission in which the point has been directly raised.

The first of these arises out of original suit No. 24 of 1889 on the file of the Subordinate Court of Calicut. In this case the plaintiff sued fifteen defendants to recover a paramba with mesne profits and damages amounting to Rs. 363, and he tendered Rs. 30 as compensation for improvements. The Subordinate Judge gave a decree against first defendant (who alone contested the suit) for surrender and for payment of Rs. 136 as damages and mesne profits, but fixed the compensation for improvements at Rs. 140. The decree also directed the first defendant to pay the whole of the plaintiff's costs.

The first defendant appealed to the District Court (App. 1017 of 1890), and took express objection to the order as to costs. The District Judge of South Malabar confirmed the decree except as to costs regarding which he ordered that each party should bear his own.

Against this decree the plaintiff has presented a second appeal in which, amongst other grounds, he contends that "the District Judge having accepted the findings of the Subordinate Judge, that the first defendant was guilty of committing waste and of forging receipts should not have interfered with the Subordinate Judge's order as to costs," and that "the plaintiff is under the circumstances at least entitled to proportionate costs."

The second case arises out of appeal No. 338 of 1891 on the file of the Subordinate Court of North Malabar. In this appeal the

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Manna

Subordinate Judge, reversing the decree of the District Munsiff, who dismissed the suit with costs (original suit No. 72 of 1891 on the file of District Munsiff of Cannanore), gave a decree for plaintiff as prayed for with costs throughout payable by first defendant. The first defendant has now preferred a second appeal, of which one of the grounds is that "under the peculiar circumstances of this case the Lower Appellate Court ought not to have decreed the payment of costs of this suit."

As a rule, costs decreed by a Lower Court are not computed as part of the subject-matter in dispute for the purpose of assessing Court fees on an appeal, but when an appellant expressly questions the propriety of the order as to costs, when he treats the costs awarded as a matter separate and independent from the other reliefs given by the decree, and contends that even if the rest of the decree is upheld, the order as to costs should be modified in his favour, it is the practice in this office to add the amount of the costs in respect of which there is a contention to the value of the other matter in respect of which the appeal is made for the purpose of arriving at the total value of the "subject-matter in dispute." Each of the above two cases being of this nature the appellant has been called upon to pay Court fee on the amount of costs disputed.

Each urges that he is not liable to this payment on the general ground that costs form no part of the subject-matter in dispute. The authorities relied on for this contention are *Doorga Doss Chowdry v. Ramanauth Chowdry*(1), *Nilmadhub Doss v. Bishumber Doss*(2) and High Court Proceedings, dated 10th November 1875, No. 2739.

The first case cited *Doorga Doss Chowdry v. Ramanauth Chowdry*(1) was an application to the Privy Council to admit an appeal without a certificate from the High Court. The substantive amount of the decree was below the minimum limit at which an appeal was allowed by the rules, but for the appellant it was argued that he was entitled to add the costs awarded against him by the decree, such addition would have brought the figure up to the minimum limit, but the Privy Council held that "the costs of a suit are no part of the subject-matter in dispute, and cannot be used for the purpose" for which the appellant sought to use them.

In the second case *Nilmadhub Doss v. Bishumber Doss*(2) a similar opinion seems to be indicated, though the necessity for

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Manna

deciding the point did not arise. The third authority is a Proceeding of the High Court passed on a question referred by the Acting District Judge of South Canara as to whether "when the objection taken by the respondent under section 348 (561) of the Code of Civil Procedure has reference only to so much of the Lower Court's decree as disallows costs, any additional fee is payable under section 16 of the Court Fees Act." The Court, while pointing out that its answer was not authoritative, stated in reply the opinion that no additional fee was authorized in the case referred, and quoted the dictum in the Privy Council case above cited, that "costs are no part of the subject-matter in dispute."

This Proceeding seems exactly in point supposing the expression "subject-matter of the suit" used in section 16 of the Court Fees Act to be equivalent to "subject-matter in dispute used in schedule I of the Act. The plaintiff obtained a decree as prayed for, but his costs were disallowed and he appealed against that part of the decree disallowing his costs by putting in a memorandum of objections.

My reasons for not accepting the decision as final, however, are first, that the Proceeding disclaims any authoritative force, and, secondly, that the practice of the Registrar's office has never been brought into conformity with the rule laid down. The Privy Council ruling cited in the Proceeding does not appear to be on all fours with the cases referred. In the case before the Privy Council it would appear that costs followed the result in the High Court, and consequently an appeal against the amount absolutely allowed by the decree involved an appeal against the order as to costs. In such cases, it is not the practice in the High Court to reckon in costs in computing the value of the subject-matter. If costs are in no cases to be regarded as part of the subject-matter in dispute, it would seem to follow that costs ought not to be permitted to be made a separate and independent subject of appeal. But if a separate ground of appeal on the subject of costs is permitted, then the apportionment of costs might be the only question raised in appeal, and then on the construction contended for an appeal might be filed free from Court fees.

The point is of importance since it is of frequent occurrence, and as there is some doubt in the matter, I make this reference.

The question for decision is as follows:—

(1) 8 M.L.A., 262.

(2) 13 M.L.A., 85, s.c., 3 B.L.R., 27.

In re
Mazze.

"When apart from, and independently of, any other reliefs which an appellant seeks in an appeal from a decree, he seeks distinct relief on the ground that by the decree under appeal the costs of the parties in the proceedings, which terminated with the decree have not been properly assessed or apportioned, should the value of such distinct relief be reckoned as part of 'the subject-matter in dispute' for the purposes of the first schedule of the Court Fees Act, or should the said value be excluded from computation?"

Byre Nambiar for appellant in S.B. No. 13187.

Mr. Wedderburn for the Government Pleader *contra*.

Decision.—The appellant has made the costs the subject-matter of dispute, and therefore a Court fee stamp is leviable.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Boddam.

QUEEN EMPRESS

v.

VASUDEVAYYA.

Criminal Procedure Code, Act X of 1882, s. 419—'Presented.'

The Criminal Procedure Code, s. 419, requires that a criminal appeal shall be delivered to the proper officer of the Court either by the appellant or his pleader. Where a petition of appeal was not presented to the Court, but was deposited in a petition box kept for the convenience of parties within the Court precincts and intended for the deposit of papers for the Court:

Held, that it had not been presented and was rightly returned for legal presentation.

CASE reported for the orders of the High Court under section 438 of the Code of Criminal Procedure by L. C. Miller, Acting District Magistrate of South Canara.

The case was stated as follows:—

"I have the honour to forward the petition of pleader M.R.Ry. Pungal Subba Row on behalf of Vasudavayya, accused in calendar case No. 510 of 1895, on the file of the Stationary Second-class Magistrate of Udipi, against the order of the Acting Head Assistant Magistrate, rejecting the appeal against the finding and sentence of the Sub-Magistrate, for the order of the High Court.

* Criminal Revision Case No. 286 of 1896.

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"The petition of appeal was first placed in the petition box kept within the precincts of the Head Assistant Magistrate's Court within the prescribed time. The Head Assistant Magistrate returned the petition with the following endorsement, dated 11th January 1896:—

"'Criminal appeals must be personally presented or by pleader.'

"The appeal was again presented in person, but on this occasion the Magistrate passed orders, dated 29th January that 'the appeal is out of time and is therefore rejected.'

"The High Court has held in the Criminal Revision Case 316 of 1884(1) and in *Queen Empress v. Arlappa*(2), that the transmission of an appeal *by post* was not a sufficient compliance with section 419, Criminal Procedure Code. But in this case the appeal petition was placed in a receptacle kept for the convenience of parties within the Court precincts intended for the deposit of papers for the Court. If this be considered duly presented and a sufficient compliance with the provisions of the section, I request that the appeal may be ordered to be taken on the file and heard on its merits."

Counsel did not appear.

ORDER.—As ruled by the learned Chief Justice in *Queen Empress v. Arlappa*(2) the word 'presented' in section 419 of the Code of Criminal Procedure "evidently means that such petition shall be delivered to the proper officer of the Court either by the appellant or his pleader."

It is clear that what the law requires is that the petition of appeal be presented by one or other of those two persons, and not by any body else. In order to secure this, it is necessary that the presentation be made in person. So that the same reason applies for not recognizing a petition found in a petition box as to one sent by post, namely, that it might have been deposited there by a third person who could not legally present it. The Head Assistant Magistrate was, therefore, right in returning the petition of appeal in this case for legal presentation, and when that presentation was made, the appeal being time-barred was rightly rejected.

(1) Weir's Criminal Rulings, 3rd edition p. 1006.
(2) I.L.R., 15 Mad., 137.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar, Mr. Justice Davies, and
Mr. Justice Benson.

QUEEN EMPRESS

v.

KALIYANI*.

Penal Code—Act XLV of 1860, s. 304—Act done with the knowledge that
death would be a probable result.

Where the prisoner by gripping and squeezing the testicles of deceased
reduced them to a pulpy condition thereby causing an injury which resulted in
death due to the shock so inflicted on the nervous system:

Held PER DAVIES, J., that the death was an unforeseen result for which prisoner
could not be held liable, and that she ought to be convicted under s. 323, Penal
Code.

Held, PER SUBRAMANIA AYYAR AND BENSON, JJ., that death was a probable
consequence of the prisoner's act, and that she was guilty under s. 304, Penal
Code, of culpable homicide not amounting to murder.

CASE referred by T. Weir, Sessions Judge of Coimbatore, for
confirmation of the sentence of death passed upon the prisoner in
sessions case No. 44 of 1896 under section 374, Criminal Proce-
dure Code, and APPEAL by the prisoner against the said sentence.

Mr. Travers Draper for the prisoner.

Mr. J. G. Smith for the Acting Public Prosecutor in support
of the conviction.

On the 4th June 1896 the case was sent back to the Sessions
Judge by Davies and Benson, JJ., for the evidence of Dr. Lancaster
to be taken, and on receipt of the said evidence called for and upon
hearing the arguments of counsel, the Court delivered the following
judgments.

The same counsel appeared as on the previous hearing.

Davies, J.—Upon the further evidence given by the District
Medical officer, Dr. Lancaster, who was present at the *post-mortem*,
we have no reason to doubt that the death of Kalan was due to
the injuries done to his testicles, and not to disease or other cause.
And the evidence, as well as the admissions of his wife, Kaliyani,
the prisoner, make it clear that it was she who caused those injuries
by squeezing the testicles with her hand.

But in convicting her of murder and sentencing her to death,
the Sessions Judge has not sufficiently taken into consideration
whether the woman could have been aware that her act would in
all probability lead to a fatal result, and so intended it.

The gripping and squeezing of the testicles is well known to be
a very common form of assault in this country among the lower
classes of the people, but in a lengthened experience of twenty-
seven years as a Magistrate and Judge, I have never heard until
now of a single case in which that particular form of assault,
unattended by other violence, has proved fatal. And in the various
works on Medical Jurisprudence that I have consulted, I have
been able to find only one reported case of the kind.* How then
can we rightly attribute to this woman a knowledge that by her
act—one so frequently committed among people of her class with-
out ill effects—she would cause death or even be likely to cause
it? In my opinion, it is impossible to hold her responsible for so
unforeseen a result, and I would acquit her altogether of any
charge of culpable homicide.

The next question is whether she ought to be found guilty of
causing hurt or grievous hurt. The only kind of grievous hurt
that she might have intended to cause was emasculation, but that,
like causing death is not shown to be at all a probable result of
squeezing the *testes* merely by the hand, and therefore it cannot be
taken that she contemplated it.

The fact is that she and her husband were having a fight, in the
course of which she attacked him in the way stated. That has
been her account from the beginning, and here again it seems to
me the Sessions Judge has done her scant justice in not giving
some weight to the provocation she undoubtedly received. Her
husband was ill and was troublesome in consequence. She tried to
keep him quiet by pushing him down. He bit the little finger of
her right hand, and they fell together by a raggi stone where a
knife lay. Her husband seized this knife and made a dash at her
throat with it. She then proceeded to maul him in the way de-
scribed while he tore at her hair, and it was in this encounter that
they were seen by the two eye witnesses and separated. The rest
of the woman's story is well corroborated by the eye-witnesses and
the medical evidence. The second witness, Aaroni, admits that the

* The case of Moobrack in 1845 (*vide* page 479 of Chevers' Medical Juris-
prudence).

* Referred Trial Case No. 24 of 1896.

woman complained to him that her thumb (it really was the little finger) had been bitten, and, though he professes to have seen no marks of the bite, the Hospital Assistant did find marks on her little finger which he says may have been caused by a bite. The third witness, Karuppan, further states that the woman told him that her husband had cut her with a knife on the throat and that he saw a slight mark there which was bleeding—and the Hospital Assistant, who saw this mark also, says it may have been inflicted with a knife. There was, in fact, a knife lying at the spot, which the prisoner at once pointed out as the knife that had been used. Though the Hospital Assistant is of opinion that the wound on the neck was self-inflicted, because it was 'fine,' his opinion is entitled to no weight in the face of the fact that the wound was seen in existence by the third witness at the termination of the fight before there was time for concoction, and after the fight the woman was kept under guard and had no opportunity to cause the wound without being detected. So that I am satisfied that the woman's story is substantially true.

The only point remaining is whether in the circumstances she was justified in using the violence she did to her husband. The effect of that violence, according to the evidence of Dr. Lancaster, was much bruising of the glands and their reduction to a pulpy condition. Considering that her husband was admittedly in an enfeebled condition and not fit to move about according to the prisoner's own statement, that she appears to have commenced the assault, and that the injuries she received were trifling and her husband was not strong enough to do her any serious harm, I consider that she was not entitled to resort to the extreme measure she adopted to defend herself from his feeble attacks—she being as described a woman of strong physique. Whatever provocation she received from her husband, she appears to have brought upon herself by a too hasty temper (I am taking her own account, the only one we have of the origin of the quarrel) and that provocation was not really grave enough to excuse her in inflicting what must have been the most excruciating pain upon a man already suffering from severe sickness. I would, therefore, find her guilty of the offence of voluntarily causing hurt under section 323 of the Penal Code and sentence her to six months' rigorous imprisonment, to count from this date. The maximum sentence for the offence is one year and she has already been in jail for more than four months.

Benson, J.—In this case a woman named "Kaliyani" has been convicted of having murdered her husband, Kalan, and has been condemned to death.

The facts of the case are briefly as follows:—

Kalan was a postal runner, and lived with his wife, the accused, on the Coffee Estate of Mr. Beaver at Kollakombe. The wife worked as a cooly on the estate. On the 22nd of February last Kalan was seized with violent vomiting and purging which continued up to the 28th February. At 6 A.M. on that day Aaron, the second witness, who lives within five or six yards of Kalan's house, and who is both a school master and a writer on the estate, heard Kalan cry out "Ey-Eyoh, she is biting my testicles," and on running to Kalan's hut, saw him lying at the entrance on his back. The accused was sitting on Kalan's chest, holding his throat with her right hand and twisting and pulling his testicles with her left hand. Her hair was waving in Kalan's face, and he was pulling it and crying out "Ey—Eyoh!" Aaron called on her three times to let go her hold of her husband's testicles, but she would not. He then threatened to send in the Pariah, Karuppan, (third witness), who had come with him, and finally did send him to the door, whereupon she loosed her hold. Kalan then stood up, with difficulty, and reached the door, where he fell down with a cry of pain, pointing to his testicles and saying "See, sir, she has bitten me." This is the account given by Aaron. He looked at the testicles and noticed some bleeding. Substantially the same account of the occurrence is given by the cooly, Karuppan, (third witness) who ran to the spot at the same time with Aaron, but he denies that Kalan said his testicles were bitten. He says that the words used by Kalan were "Sir, she had seized and twisted the testicles: they are paining and wounded: bring some water that I may pour it on the wound." Aaron adds that he asked the accused what was the cause of the quarrel, and she replied "Look at my thumb: he has bitten me." He looked at her thumb, but could not notice any mark of a bite on it, or any injuries on the woman. Aaron then ordered Karuppan to keep watch over Kalan and his wife, and he himself went to call the roll on the estate. After he had gone, Karuppan asked Kaliyani why she had acted in this way to her husband, who was already sick, and she replied "Sir, he came to cut me with a knife: it is true I twisted his testicles," and she pointed to the front part of her throat where there was a slight slit, which was slightly

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bleeding. She also showed a knife near the door with which she said that Kalan came to stab her. After roll call Aaron told Mr. Beaver what had happened, and they then, at 8 A.M., went to Kalan's hut. Mr. Beaver found him in a very weak state. Kalan told him that "his wife had assaulted him grievously that morning—sitting on his chest and strangling him with one hand, and subsequently biting him on his testicles." Mr. Beaver asked the accused if she had done so, and she said that she had pinched but not bitten them. Mr. Beaver asked Kalan the reason of the assault, and he said that, being very cold in the morning, he asked his wife to make a fire for him, whereupon she got in a great temper and assaulted him as above described. The accused did not say to Mr. Beaver that she had been assaulted by her husband, and made no complaint of ill-treatment by him, and, though present when Kalan told his story, made no objection to it except by denying that she took certain money. Mr. Beaver thought that Kalan was dying, and, knowing that he had saved money, asked him if he wished him to take charge of it. Kalan said that he had Rs. 300 in two tins in the house. They searched for it, but could not find it. Kalan then accused his wife for having made away with it, but she emphatically denied knowing anything about it. Kalan was then removed to the Post office and died the same morning at 11-30 o'clock. Karuppan was left in charge of the accused at Kalan's hut. About noon she asked leave to go and ease herself, and, on her return, she showed Karuppan two tins of rupees saying, "This is the money we have earned: I have got it with me." The tins contained over Rs. 200, and were made over to the Magistrate who arrived soon afterwards. Kalan's body was taken to Coonoor, and a *post-mortem* examination was made by the Hospital Assistant and Surgeon-Lieutenant-Colonel Lancaster, the District Medical officer of the Nilgiris. Only the former was examined at the trial before the Sessions Court, but, after the case was referred to this Court, we desired the Sessions Judge to obtain the evidence of Dr. Lancaster also. It shows that there was a wound on the front part of the scrotum, probably produced by a wrench or twist. There were no marks of any teeth on the scrotum, but the wound was covered with dried blood. On opening the scrotum, the testicles, or glands proper, were found to be "very much bruised and reduced to a pulpy condition." There was no apparent disease of the testicles. Their condition was due not to disease but to injury, and Dr. Lancaster considered that a pro-

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longed severe squeeze of the testicles, even with the left hand of the accused, would have been sufficient to produce the appearance which he saw at the *post mortem*. He considered that the injury to the testicles was the cause of Kalan's death, and added that, even if the man had been in sound health, the injury would have caused his death. The Hospital Assistant says that the testicles were "almost absolute pulp. No solid parts remained," and was positive that shock from injury to the testicles was the sole cause of death.

Such is the evidence for the prosecution. The accused called no witnesses for her defence, but it is now necessary to examine her various statements. Those made to the witnesses have been already noticed. On the 28th February, just after Kalan's death, she was examined by the Magistrate, and she then stated that Kalan was leaning against the wall and she hit him on the shoulder to make him lie down. She adds, "He bit the last finger of my right hand on account of anger. I pressed and seized his cheek, mouth, asking him to let off my hand. As soon as I seized his mouth he seized the hair of my head with his right hand, sat down and pushed me down. I had placed the knife now shown me on the raggi stone. He took that knife and wounded me in the neck. I felt, saying 'he cuts the neck.' Nothing was got. His testicles came in contact with my hand. I pinched the testicle with my nail and pulled." On the 25th March she again made a statement to the Magistrate. In it she said nothing about having hit her husband, but stated that he fell more than once in the fire, and that, on her picking him up a second time, he bit her little finger, and she then details the quarrel in much the same language as before. Her statement at the trial was to the same effect.

As to the character of the offence committed by the accused, it must be determined mainly by reference to her intention and the knowledge which she had as to the probable effect of her violence. The Sessions Judge has found her guilty of murder, being of opinion that "the horrible nature of the injury (having regard especially to the relationship of the parties), and the persistent force which must have been used, point clearly to an intention to cause death." He also thought that some weight should be given to the fact that Kalan, after having eaten of food prepared by the accused on the 22nd February, at once showed signs of having been poisoned, and to the fact that traces of arsenic were found in his stomach and

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kidneys and liver after death. Apparently the suggestion is that the accused intended to poison Kalan, and that it is therefore to be inferred that she intended to kill him when she grievously assaulted him. On this point I think the Judge is in error. The accused was not charged with having given poison to her husband, and had no opportunity of meeting the suggestion or of explaining the symptoms indicative of poison. It may be that the deceased was taking some native medicine in which, as is well known, arsenic often forms an ingredient. No doubt Aaron says that Kalan refused medical aid, and seemed to think that his wife was killing him, and it may be that enquiry would elicit sufficient grounds for charging Kaliyani with having attempted to poison him. But for the purpose of the present trial, I think the indications of poisoning should be put aside altogether, for the reasons already stated, and the intention and knowledge of the accused should be gathered from the other facts and probabilities of the case.

I agree with the Sessions Judge in finding that the accused's version of the affair, viz., that she acted in self-defence when her husband pushed her down and attempted to cut her throat with a knife, cannot for a moment be accepted. It is to be observed that she said nothing about the knife to Aaron when he questioned her as to the cause of the quarrel, but drew his attention to an alleged bite on her thumb, of which, however, Aaron could find no trace. It was not until after Aaron had gone away that she apparently saw a knife lying by the raggi stone, and then told Karuppan that the deceased had come to cut her with the knife, and pointed to a slight bleeding scratch on the front of her throat. The nature of this injury is accurately stated in the certificate and evidence of the Hospital Assistant who examined the woman. In his certificate he describes it as consisting of "six very fine linear scratches in front of the throat, $1\frac{1}{2}$ inches long, but very superficial, and another linear scratch below it," and he gives a diagram of the injury thus—

In front of throat.

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In his evidence the Hospital Assistant described them as "like thread marks," and he saw no blood on them. I examined the knife in Court and found the edge smooth and incapable of inflicting such a wound, apart from the extreme improbability of an angry man being able to do so much, and no more, when armed with a knife and engaged in a deadly struggle with a woman. I have no doubt at all but that these scratches were inflicted with the human nail, rough and serrated as it would probably be in the case of persons of the accused's rank in life. They may have been self-inflicted as the Hospital Assistant thought, or they may, as I think is more probable, have been inflicted by Kalan in struggling with the woman. It is to be observed that the accused said nothing about the knife when Mr. Beaver questioned her as to the cause of the quarrel. Mr. Beaver understands *Canarese*, the language of the parties, well, and spoke to them in that language. He was the employer of the accused, and she would certainly have told him if she had any such justification for her assault. She not only made no such plea, but did not deny the version given in her presence by Kalan, viz., that when he asked her to make a fire she got in a great temper and assaulted him in the manner stated. Lastly, I observe that she makes no reference to the knife in the account of the occurrence given in her appeal memorandum. I conclude then that the allegation regarding the knife is wholly false. As to the minor injuries, she complains of having been bitten by the deceased, but Aaron did not see any injury on her. She made no complaint of injury to Mr. Beaver, and the Hospital Assistant describes the so-called bite as "three small bruises on the little finger," which he thinks might have been a bite, or might have been caused in the struggle. The bruises, however caused, were quite trifling injuries, and could form no justification for the grievous assault committed by her. There is, apparently, no reason to doubt the truth of the statement made by the deceased to Mr. Beaver that when he asked the accused to light the fire for him she got into a great temper and assaulted him. The reason for the assault no doubt seems hardly sufficient, but I think it probable that she was angry with him for his intention of sending away his money to his village instead of giving it to her. He seems to have known that he was going to die, and he asked Aaron on the previous evening to send the money to his village by Post office order. The accused's statements show that she claimed the money

jointly with her husband, and was only prepared to let his brother have a little of it as a matter of grace. Even on the morning of the assault, and before Kalan's death, she had made away with the money, though protesting that she knew nothing about it. Throughout her statements the money has occupied a most prominent place. It may well have occurred to her that if her husband should die, she would be able to secure all the money, instead of allowing it to be sent away to Kalan's village in Mysore. However that may be, it is certain that in the quarrel with Kalan she resorted to a form of attack not very uncommon among women of her class, and did so with such force and persistence that she reduced the man's testicles to pulp and killed him by the shock thus given to the nervous system. If she was then thinking of the money, and intended to kill the man or knew that death would most probably result from the act, she would be undoubtedly guilty of murder. It was, however, suggested that this form of attack is so common and so rarely fatal that she could have had no such intention or knowledge and ought to be found guilty only of having voluntarily caused hurt. Norman Chevers, however, says that this form of assault is "extremely liable to prove fatal" (Medical Jurisprudence, p. 478, Ed. of 1870), and Surgeon-Lieutenant-Colonel Lancaster says that the injuries would have proved fatal even "if the man had been in sound health." I think, too, that great weight must be given to the fact that the man was then in an extremely weak condition, having been vomiting and purging continuously for six days. All this was well known to the accused. He was so weak, as she herself says, that he fell several times that morning when trying to move about before the assault. When the woman seized his testicles she must have done so because she knew that they were a vulnerable part where she could cause him the maximum of pain, and when she continued to squeeze and pull and twist them, notwithstanding his cries, and notwithstanding the interference of Aaron and Karuppan, it seems difficult to say that she did not intend to cause his death or know that she was likely to do so. Looking, however, to the ignorance of women of her class, and to their indifference to physical pain, I am disposed to give her the benefit of the doubt, and to acquit her on the graver charge of murder. She may, perhaps, not have intended to kill her husband, or have known that death would most probably result from her assault. She must, however, in

my opinion, have known that death would be a *probable*, if not the *most probable*, result of her act. She was therefore, in my judgment, guilty, at the least, of culpable homicide not amounting to murder. I would alter the conviction accordingly, and, looking to all the facts of the case, I would sentence her to seven years' rigorous imprisonment.

In consequence of the difference of opinion between their Lordships the Honourable Mr. Justice Davies and the Honourable Mr. Justice Benson, the case was referred to a Third Judge, the Honourable Mr. Justice Subramania Ayyar, as provided by sections 378 and 429 of the Criminal Procedure Code.

Mr. Travers Draper for the prisoner.

The acting Public Prosecutor (Mr. N. Subramaniam) for the Crown.

Subramania Ayyar, J.—The facts of the case have been so fully referred to by my learned colleagues that it is unnecessary for me to repeat them. It is indisputably established that Kalan died in consequence of the injuries inflicted upon him by his wife, the accused, on the 28th February last. As to the charge of murder as well as the question whether the accused intended to cause Kalan's death, my learned colleagues are agreed that the finding should be in her favour. Though my mind is not quite free from doubt on the point, yet I assume that the unanimous conclusion arrived at by my colleagues is binding upon me. Even if it were otherwise, considering that the circumstances which chiefly create the doubt in my mind, viz., the fact that the violent vomiting and purging from which the deceased suffered for several days commenced shortly after he took the food given to him by the accused on the 22nd February, his belief that he was poisoned and lastly the discovery of traces of arsenic in his stomach, kidney and liver, were in the course of the preliminary enquiry and the trial not directly brought forward by the prosecution, as they ought to have been, so as to give the accused a full and proper opportunity of meeting them, I feel I cannot but, particularly at this very late stage of the case, leave those circumstances entirely out of my consideration. The chief question is what offence then did the accused's act amount to? In determining this question it is necessary to bear in mind the nature and extent of the injuries, together with the circumstances in which they were inflicted, and the knowledge to be attributed to the accused with

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reference to the consequences likely to flow from such injuries, according to general experience. Now at the time the deceased was attacked by the accused he was, she well knew, in an extremely weak state of health, since he had been suffering from violent vomiting and purging continuously from the 22nd up to the date of the offence. The evidence shows that he was scarcely able to move about. In this very enfeebled condition he was found on the morning of the day of his death stretched on the ground, with the accused, a woman of strong physique, sitting on his chest, pressing his throat with one hand and twisting his testicles with the other. The witnesses, Aaron and Karuppan, who came to the spot in consequence of the cries of the deceased, asked her to desist, but she would not and did not stop the twisting until Karuppan went in for the purpose of preventing further injury. That the pulling and wrenching by the accused must have been attended with considerable force and persisted in for a comparatively long time is manifest from the almost absolutely pulpy condition in which the medical witnesses found the parts injured. In acting so as to produce such an extraordinary result, can it be reasonably said that the accused did not know she was likely to cause the death of her husband? The argument on her behalf is that similar assaults are frequent in this country, but yet they rarely, if at all, prove fatal, and therefore a knowledge that death will probably result from such injuries ought not to be attributed to the accused. I am unable to accede to this argument, for it is impossible to deny, as pointed out by Dr. Chevers in his work on Medical Jurisprudence, that this form of assault is extremely liable to prove fatal. That such assaults have resulted in death is shown by the cases referred to in the work above cited and by others which have come to my notice. One specific recent instance which I have been able to trace is Criminal Appeal No. 391 of 1893, and curiously enough it came from the very district in which the present case happened. There the body of the deceased bore marks of violence on the throat and the scrotum, which latter was swollen to the size of a cocoanut. The Hospital Assistant, who conducted the post-mortem examination, thought that the immediate cause of death was strangulation, but he added that the swelling in the scrotum should have resulted from squeezing, which was enough to have caused death independently of any other violence. The first accused in the case who, the evidence showed, must have had a

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share in the infliction of the injury was convicted of murder by the Sessions Judge. On appeal, the learned Chief Justice and Shephard, J., upheld the conviction, observing that the medical evidence showed that the man, in all probability, died of injury to the scrotum. I should also not omit to remark that the knowledge that injuries like those in question are highly dangerous to life is not confined to medical men, since the same is shared widely by other people as well. I doubt whether any person of ordinary sense and understanding, even among the lower orders in this country, is really ignorant that violent blows or kicks administered on the parts in question might and would probably result in death.

In these circumstances, it seems to me unsafe to hold that a person who so effectually destroys the delicate parts of a man's body, as the accused did here, does nothing more than what in law would amount to hurt. There may be cases in which the Courts would be bound to say that a person who inflicts such injury should be taken to have known that death would be the most probable consequence. In such cases the act may amount to murder. Here I certainly think that the accused should be held to have known that death would at all events be a *probable*, if not the most probable, consequence, and I have, therefore, no hesitation in agreeing with Benson, J., that she should be found guilty of culpable homicide not amounting to murder.

Next as to the question of sentence. Here also I am unable to take a lenient view of the case against the accused. No doubt her story that she was acting in self-defence was put forward from the very commencement. But the different versions given by her from time to time as to what is said to have taken place are, in some very material respects, contradictory. The most important of her allegations, viz., that the deceased attacked her with a knife and hurt her, I totally disbelieve, and I think that the superficial scratches found on her throat and said to have been caused by the knife were, probably, as surmised by Benson, J., produced by the deceased's nails in the course of the struggle. The probable explanation for the slight wound on one of her fingers is perhaps similar. And, considering the extremely poor condition in which the deceased was on the 28th in consequence of his prolonged and exhausting illness, it is difficult to suppose he could have then done anything so as to produce on her mind the apprehension that he was about to do serious harm to her person. What, in truth,

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displeased and prompted her to attack the deceased appears to have been the direction given by him on the 27th to one of the witnesses in the case to send away to his (the deceased's) brother the cash in the house amounting to over Rs. 200. This direction the accused seems to have much resented and the fact that, before she attacked him, she had without his knowledge taken possession of the money and secreted it, suggests that her brutal treatment of the man was not altogether really due to any grave provocation given by him at the time of the attack. In these circumstances, any punishment less than that proposed by Benson, J., would, in my opinion, be inadequate.

The result is the conviction of the accused must be, and is hereby, altered into one under Section 304, Indian Penal Code, and the accused is sentenced to rigorous imprisonment for seven years.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

SIMON AND OTHERS (PLAINTIFFS),

v.

HAKIM MAHOMED SHERIFF (DEFENDANT).*

1896.
August 10.

Promissory note—Contemporaneous collateral agreement consistent with the terms of the promissory note—Suit properly brought under Chapter XXXIX, Civil Procedure Code.

The plaintiffs advanced money to defendant for the supply of certain goods. On defendant's failure to supply the goods, plaintiffs pressed for repayment and a promissory note payable on demand for the amount due was executed, at the same time an agreement was entered into by defendant to liquidate the amount due on the promissory note by fortnightly consignments, the first consignment to be made within fourteen days of the date of the promissory note. On defendant's failure to send the consignments as promised a suit was brought under Chapter XXXIX, Civil Procedure Code:

That that the suit was rightly filed under Chapter XXXIX that the agreement to liquidate the amount due by fortnightly consignments was a collateral undertaking consistent with the existence of the note containing an absolute promise to pay, that such collateral agreement was no answer to the suit on the promissory note and that the plaintiff was entitled to a decree.

* Civil Suit No. 117 of 1896.

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Suit under Chapter XXXIX, Civil Procedure Code, for Rs. 7,881-8-7 being principal and interest due on a promissory note, dated 2nd May 1896, payable on demand and executed by the defendant. Demand was made on 19th May 1896. The plaint was filed on 6th July 1896. On 24th July 1896 the defendant moved on a petition for leave to defend under section 533, Civil Procedure Code, supported by an affidavit to the following effect:—"I admit the promissory note of the 2nd May 1896, but say that, when I executed the same, I gave an undertaking in writing to the plaintiffs in pursuance of an agreement come to with the latter at the time through their attorneys Messrs. Wilson & King, whereby I agreed to ship fortnightly through the plaintiffs' free consignments of not less than Rs. 2,000 in value each until the note should be liquidated, the first of such consignments to be made at the expiration of fourteen days, from the date of the promissory note.

"I further admit that, owing to untoward circumstances over which I had no control, I was not in a position to make a shipment as per terms of the foregoing written undertaking on the date mentioned therein; but say that on the 30th May last I sent two respectable persons, C. Ghulam Muhammad Sahib, a merchant and Inayat Hussain Sahib, Manager, Registration Department, Deputy Collector's Office, to treat with the fourth plaintiff in view to substitute a new agreement more favourable to me in the place of that mentioned in the previous paragraph, the terms of the new agreement being that a sum of Rs. 1,000 was to be paid down at once and monthly payment of Rs. 500 to be made on the 1st July, 1st August and 1st September 1896, and thereafter payments of Rs. 1,000 monthly to be made on the 1st day of every calendar month commencing from 1st October next. This arrangement was to cover the plaint promissory note and all anticipated shortfalls, and the fourth plaintiff, as I am informed and believe the same to be true, accepted the proposed terms on behalf of his firm and received Rs. 1,000 then paid into his hands by the aforesaid persons on my behalf and faithfully promised to give me through them a letter embodying the foregoing terms, together with a receipt for the sum of Rs. 1,000 then paid into his hands on the Monday following.

"But in breach of the foregoing agreement, the plaintiffs' firm failed to send me the promised letter embodying the new terms, but sent instead a receipt for Rs. 1,000 on account of a re-draft for Rs. 1,869-11-10, of which I had no previous notice.

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"I charge the plaintiffs have acted in bad faith. I am advised that this is a good case for me to enter my defence on merits." In reply thereto the fourth plaintiff filed an affidavit denying the alleged substituted agreement and admitting the receipt of Rs. 1,000 paid on behalf of the defendant, but alleging that it was paid by a Muhammadan without any instructions as to the account against which it was to be placed and that consequently the plaintiff had appropriated it towards another re-draft which was due and had been presented to the defendant more than once for payment.

Mr. Ryan for defendant (petitioner).

Mr. Norton for plaintiffs.

The Court refused leave to defend.

Mr. Ryan for the defendant moved on the 27th July 1896 for an order precluding the plaintiffs from proceeding with this suit under Chapter XXXIX, Civil Procedure Code, on an affidavit sworn by defendant as follows:—"I admit the plaint promissory note of the 2nd May 1896, but say that, when I executed the same, I gave an undertaking in writing to the plaintiff in pursuance of an agreement come to with the latter, at the time through their attorneys Messrs. Wilson & King, whereby I agreed to ship fortnightly through the plaintiffs' free consignments of not less than Rs. 2,000 in value each until the note should be liquidated—the first of such consignments to be made at the expiration of fourteen days from the date of the promissory note.

"The promissory note was a part only of the agreement entered into between me and the plaintiffs and my obligation under the said promissory note is modified by the agreement in writing referred to in paragraph 1."

Mr. Ryan for defendant. There was a written agreement at the time of the promissory note that modified the liability under the so-called note and made it not a promissory note under the Negotiable Instruments Act. To see what the agreement was, we must look at the whole contract and construe both documents together. The agreement made at the time of the note shows how the note was to be liquidated, viz., by consignments and in no other way.

[By Court.—What if you made no consignments.]

Mr. Ryan.—Then the money would be due. But looking at the whole agreement the liability to pay money is conditional on the failure to consign. In that view, the note is not unconditional. You cannot paste a piece of paper over one part of an agreement.

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[By Court.—Suppose you fail to consign for five years, what is the plaintiffs' position; can he sue?]

Mr. Ryan.—Yes, but not on the note; this is not a promissory note. It never was a promissory note. Negotiable Instruments Act XXVIII of 1881, section 4. There is here a contract to deliver goods in lieu of paying money in other words a sale.

[By Court.—Then he could only sue for damages for breach.]

Mr. Ryan.—On failure to deliver. He has a right of action on the agreement.

[By Court.—Was this promissory note delivered as an escrow?]

Mr. Ryan.—No. There was an immediate liability controlled by the contemporaneous agreement. He cited. *Bowerbank v. Monteiro* (1) and *Carr v. Stephens* (2).

Mr. Norton for plaintiff. The contemporaneous agreement is collateral to the promissory note. There is only an agreement not to sue on the note if consignments were made. The note can be sued on by itself.

JUDGMENT.—The plaintiffs advanced a sum of money to the defendant on his promising to supply certain goods. He, however, having failed to do so, the plaintiffs instructed their solicitors, Messrs. Wilson & King, to take steps for the recovery of the amount advanced. When the defendant learnt this, he requested the solicitors, through his vakil Mr. Ambrose, that they should defer taking legal proceedings. Thereupon Messrs. Wilson & King addressed to Mr. Ambrose, on the 2nd May 1896, exhibit I which is as follows:—

"With reference to my conversation with you this morning regarding Messrs. Carl Simon's claim against Ghouse Sheriff Sahib and Co., I am instructed to inform you that they are prepared to stay proceedings on your clients giving them an on-demand promissory note for the amount due up to date, viz., Rs. 7,189-9-11, plus Rs. 21, costs already incurred by them, such promissory note to carry interest at 9 per cent., and on your client undertaking to ship fortnightly through our clients, free consignments of not less than Rs. 2,000 in value each, until the note is liquidated. The first of such consignments to be made at the expiration of fourteen days from the date. If these terms are agreeable to your client, please send us a promissory note in the terms above mentioned signed by

"your client and a letter also signed by your client undertaking to make the above shipments. The above offer is open until 3 p.m. to-day and is made without prejudice to our clients' strict legal rights." This offer was accepted by the defendant, who executed exhibit A and forwarded with it exhibit II which runs thus:— "With reference to the promissory note (exhibit A) executed by us this day in your favour for Rs. 7,210-9-11, we undertake to ship fortnightly through you free consignments of not less than Rs. 2,000 in value each, until the promissory note is liquidated, the first of such consignments to be made within fourteen days from this date." Admittedly, the defendant did not send any consignment as he promised to do.

The present suit for the recovery of the amount due under exhibit A was instituted under Chapter 39 of the Civil Procedure Code. The defendant applies for leave to defend on the ground that if exhibit A and exhibit II are taken together, it will be seen that the former was not a mere promissory-note and the suit would not lie under the chapter quoted.

Of course parties to what purports to be a mere promissory note may, contemporaneously with its execution and delivery, enter into another agreement with reference to such instrument. The terms of that agreement may, on the one hand, be so inconsistent with the terms of the document, purporting to be a promissory note, as to render it clear that the parties never intended to invest what seems a promissory note with the attributes of an instrument really of that description. On the other hand, the terms of the agreement may go to show that it was not intended that the document which on the face of it is a promissory note, should not operate as such. In the former class of cases, the two agreements must be construed to be parts of but one contract, not severable by the Court for the purpose of giving to one of the two parts, an effect, that it would have had, if such part alone formed the whole contract. In the latter class of cases the agreements are treated as distinct contracts capable of standing side by side.

The contention on behalf of the defendant seemed to be that the present case fell under the first class of cases. Now if, as in *Hardley v. Wilkinson*(1), the unconditional promise to pay contained in exhibit A were qualified into a conditional one by exhibit II, the

(1) 4 Camp., 127.

former instrument cannot of course be held to be a promissory note. Manifestly, however, no such qualification is found to exist in exhibit II. Again if, as in *Leeds v. Lancashire*(1), the effect of exhibit II were to render the amount mentioned in exhibit A a sum not certain that also would be fatal to the view that the latter document is valid as a promissory note. But it cannot be pretended that exhibit II affects in any way the certainty of the amount payable under exhibit A. Yet again, if the provisions to be found in exhibit II had been inserted in the same paper as exhibit A and as a part of the contract to pay the amount therein mentioned, then the instrument would of course have had to be declared to be one containing more than what a proper promissory note should contain, and therefore not a negotiable instrument (compare *Kirkwood v. Smith*(2). For, in the case just supposed, the circumstance that all the provisions were thus linked together in one and the same document would by itself lead, almost irresistably to the conclusion that the intention was to make the promise to pay the money and the agreement to send the free consignments, terms of the same indivisible contract. Here, however, the two agreements are evidenced by separate documents, and the fact that the parties thought it necessary to make the undertaking set forth in exhibit II, quite distinct from the promise to pay money, contained in exhibit A, is pregnant against the suggestion that the parties meant to qualify the negotiable character of the latter instrument. That the requisition that free consignments should be sent by the defendant emanated, not from him, but from the plaintiffs, is strongly in favour of the view that so far as the latter were concerned, the arrangement about these consignments was merely a supplemental provision made for securing a speedy realization of the debt due to them, and by no means intended to derogate in any way from their right, as payees under the promissory note, to demand unconditional payment of the sum due. As to the defendant's intention, the circumstance that, until the present contention was put forward about three weeks ago, he had spoken of exhibit A as a promissory note and acted upon the footing that it was such, cannot but lead to the inference that he also intended it to be a valid promissory note.

Such being my opinion of the transaction with reference to the circumstances in which the two documents came into existence, is

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(1) 2 Camp., 205.

(2) 1896 I.Q.B.D., 582.

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there anything in the provisions contained in exhibit II, which compels me, in spite of the obvious intention of the parties as explained above, to decide that exhibit A is not in reality a promissory note? The learned counsel for the defendant seemed to argue that, reading the documents, in question, together, it must be held that the plaintiffs agreed not to enforce payment of the amount of the note until the defendant had had time to send free consignments sufficient to discharge the debt. I have no doubt that the plaintiffs meant to wait and would have waited if the defendant was at all inclined to keep his engagement to forward such consignments. But I should hesitate to say that they entered into a legally binding arrangement not to claim payment before the expiry of the period during which the consignments were to be sent. I think it would be scarcely reasonable to hold that the plaintiffs entered into such a contract with the defendant, simply because they were prepared to afford him facilities for his repaying the money due to them, in the manner contemplated by exhibit II. But suppose that the plaintiffs legally bound themselves to wait, as suggested on behalf of the defendant, it is difficult to see how that renders exhibit A the less a promissory note. The reasoning on which the decision of the House of Lords in *Salmon v. Webb and Franklin*(1) rests, is clearly in favour of the view that an agreement by the payee not to enforce payment of the debt due under a promissory note, for a limited time does not, in any way, trench upon the negotiable character of the instrument. In that case, it was found that the payees of a promissory note, payable on demand, had entered into a contract with the maker of the note and with certain other parties who, like the maker himself, had an interest in the money, lent under the note, that no suit should be brought thereon till the youngest of the persons, so interested, had arrived at a certain age. Nevertheless, the payees sued on the note during the life time of the specified individual and before he had attained the age fixed. The agreement referred to was pleaded by the maker as a defence to the claim. *Baron Parke* in stating the opinion of the majority of the Judges, who were consulted on the occasion, expressed himself thus: "My brother Erle thinks that upon the facts stated in the plea, the defendant did not intend to deliver the note so as to make himself liable until the happening of one of the contingencies there specified.

(1) 3 H.L. Cases, 510.

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"The other Judges think that the meaning of the phrase 'contemporaneously with and at the same time' is merely that the agreement alleged in the plea was made at the same time with the promissory note, not that it was part and parcel of the same instrument and to be treated and construed as if it was written on the same paper. We consider it, therefore, to be a collateral undertaking, perfectly consistent with the existence of a note containing an absolute promise to pay; and such a collateral agreement is no answer to the declaration; because it is an agreement not to sue for a limited time only and a covenant not to sue for a limited time is no answer to an action." The House of Lords agreed with the view taken by the majority of the Judges as expounded by the learned Baron, and held that the plea set up by the maker was bad in substance.

I am, therefore, of opinion that the ground of defence urged by the defendant is unsustainable, and I refuse to grant leave to defend. The application is dismissed with costs. There will be a decree for the plaintiffs as prayed.

Wilson & King—Attorneys for plaintiffs.

Ramanuja Chariar—Attorney for defendant.

APPELLATE CRIMINAL.

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

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v.

VIRASAMI.*

1896.
March
26, 27, 31.
August 3.

Witness—Committed for trial for offence under s. 193, Penal Code—Criminal Procedure Code, ss. 282, 428, 477, 526.A—Incompetence of juror—New trial—Application for transfer.

On the trial of certain prisoners on a charge of dacoity, a witness gave false evidence and was committed under section 477, Criminal Procedure Code, for trial on a charge under section 193, Penal Code. After such committal it was discovered that one of the jurors empanelled in the dacoity case was deaf and partly blind; and thereupon under section 282, Criminal Procedure Code, the case was tried *de novo* before a competent jury.

* Criminal Appeal No. 704 of 1895.

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The trial of the charge under section 193, Penal Code, was fixed for the November sessions, but on the 17th October 1895 on prisoner's application the trial was adjourned to 2nd December 1895. On 20th November the prisoner's vakil put in a petition, alleging that he had moved the High Court for a transfer of the case. On this petition coming on for disposal, the prisoner's vakil moved orally for an adjournment under section 526-A, Criminal Procedure Code, which was refused. On the 30th November the prisoner's vakil put in a petition in which he prayed for an adjournment under section 526-A. This petition was refused and the trial began on 2nd December and judgment was written and pronounced on 5th December. In the meantime application had been made to the High Court for a transfer and that petition was disposed of on 4th December granting the transfer prayed, the High Court apparently being not aware that the trial was at that time proceeding before the Sessions Court. On 5th December after the trial in the Sessions Court was concluded and before judgment was delivered, a fresh petition was presented for an adjournment on the ground that a telegram had been received from the High Court transferring the case, but the Sessions Judge refused to act upon it in the absence of orders from the High Court and delivered judgment convicting the prisoner. During the trial before the Sessions Court the prisoner applied for an adjournment on the ground that two witnesses for the defence were absent, one being too ill to attend, the other not having been served with the summons, but the Sessions Judge considering the application was made merely for purposes of delay and to defeat the ends of justice and that their evidence would not be material, refused to adjourn for their evidence to be recorded:

Held, first that the fact that the trial for dacoity had to be commenced *de novo* did not exonerate the prisoner from the obligation to speak the truth imposed by section 14 of the Indian Oaths Act X of 1873 in the first trial, which became abortive owing to the incompetency of one of the jurors.

Secondly, that section 526-A, Criminal Procedure Code, is imperative, but that the object of sections 344 and 526 when read together is merely to give a party reasonable time to move the High Court and obtain its orders and that in the present case there was sufficient time for such application to have been made, if due diligence had been observed.

Thirdly, that the order for transfer made on 4th December, which, in fact, did not reach the Judge till after judgment was pronounced did not vitiate the proceedings; and that the Sessions Judge was not wrong in refusing to adjourn the case on the strength of a telegram said to have been received by prisoner's vakil stating that the High Court has ordered a transfer.

Fourthly, that the Sessions Judge ought not to have refused to adjourn the case in order to obtain the evidence of the two absent witnesses that their evidence was material and must be recorded and certified to the High Court under section 428, Criminal Procedure Code.

APPEAL against conviction and sentence passed on prisoner by F. H. Hamnett, Sessions Judge of Kistna, in sessions case No. 35 of 1895.

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

Sriramulu Sastri for accused.

The Public Prosecutor (Mr. Powell) for the Crown.

ORDER.—The accused, G. Virasami, is a police constable.

During the trial of a dacoity case, sessions case No. 26 of 1895 of Kistna, he was examined as a witness and made statements which the Sessions Judge considered to be false. The Sessions Judge, therefore, immediately after the evidence was given, committed the accused for trial before his own Court under section 477, Criminal Procedure Code. The trial of sessions case No. 26 then proceeded, and after the Judge had summed up to the jury, but before they gave their verdict, a juror stated that he was deaf and partly blind. The Judge then chose a new jury, and commenced the trial of the dacoits *de novo* under section 282, Criminal Procedure Code, and they were eventually convicted. The present accused was afterwards tried in due course and convicted of an offence punishable under section 193, Indian Penal Code, and was sentenced to two years' rigorous imprisonment.

Against this conviction he now appeals, both on the merits, and on several preliminary grounds.

The first ground is that, as the trial of sessions case No. 26 had to be commenced *de novo*, it must be regarded as null and void for all purposes, and any statement made therein by a witness, cannot be the subject of offence under sections 191 or 193, Indian Penal Code. We cannot admit this contention. The accused was legally affirmed, and was bound under section 14 of the Indian Oaths Act X of 1873 to speak the truth. The Sessions Judge was a Court, and had jurisdiction to try the case in the course of which the accused gave the evidence that is said to be false. The fact that one of the jurors was afterwards found to be deaf, and, therefore, incapable of doing his duty as a juror, necessitated the examination of the witnesses *de novo* before a competent jury. This was in fairness to the persons then accused, but it did not and could not, in any degree, diminish the obligation which lay on the present accused, as a witness in the case, to speak the truth. Can it be contended that if, owing to the death of a juror during the trial, the witnesses had to be examined *de novo*, their prior statements, if false, could not be made the subject of a prosecution for giving false evidence? Again, if, in the cases under consideration, a witness, having been duly examined, should die in the interval between his examination and the retrial necessitated by the death

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or incapacity of a juror, can it be contended that his evidence could not be used in the retrial under section 33 of the Indian Evidence Act? We apprehend that these questions must be answered in the negative. It follows, we think, that there was nothing in the retrial of sessions case No. 26 to absolve the present accused from the obligation under which he lay to speak the truth when examined as a witness in the first trial.

The next preliminary objection is that when the accused made an application under section 526-A, Criminal Procedure Code, on the 30th November 1895 for the adjournment of the case in order that an application might be made to the High Court to transfer it, the Sessions Judge illegally refused any adjournment, though he was absolutely bound by law to grant an adjournment. In support of this view, attention is drawn to the words of the section and to the decision of the Calcutta High Court in *Queen-Empress v. Gayitri Prosunno Ghosal*(1). Under this section, which was added to the law by Act III of 1884, the complainant or the accused has the right, before the commencement of the hearing, to notify to the Court his intention to make an application to the High Court for transfer of the case; and, if he does so, the section goes on to provide "the Court shall exercise the powers of postponement or adjournment given by section 344 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon before the accused is called on for his defence." These words the Calcutta High Court held to be obligatory, and, in the case before it, it held that the Magistrate's refusal to grant the adjournment asked for was illegal, and it consequently set aside all the proceedings which followed that illegal refusal. We are asked to follow that decision, and to set aside the present trial in consequence of the Sessions Judge's refusal to grant the adjournment asked for on the 30th November. The trial of the case was fixed for the 2nd December, and if the application of the 30th November was the first application made under section 526-A, we think that the Sessions Judge would have been bound to have granted an adjournment, since it would not have been possible to have made an application to the High Court and obtained its order, in the interval between the 30th November and the 2nd December.

(1) I.L.R., 15 Calc., 455.

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We find, however, that on the 20th November the accused put in a petition stating that he had applied to the High Court for a transfer of the case, and a verbal application was then made for an adjournment of the trial on that account, but was refused on the ground that the case had already been adjourned, on the accused's application, from the November sessions to the December sessions, and that a further adjournment was unnecessary. The contention that is pressed upon us by the accused's vakil is that the Sessions Judge had no discretion in the matter, and that the words of the section "shall exercise the powers of postponement" simply mean "shall postpone" and rendered some postponement, were it only for a day, absolutely necessary, in order to comply with the provisions of the section; and this, whether, when the application was made, there was, or was not, time enough, before the trial, to make the application to the High Court and obtain its orders. We cannot admit this interpretation of the section, nor do we think that the ruling of the Calcutta High Court can be taken as necessarily sanctioning such an interpretation. No doubt the words "shall exercise," &c., are obligatory, but the obligation is not, necessarily and under all circumstances, to grant a postponement, but only to give the party a reasonable time for obtaining the orders of the High Court. The postponement is no part of the essence of the obligation. By itself a postponement might be either useless, if it were for too short a time, or superfluous, if there was sufficient time without any postponement. The essence of the obligation is that the party should have a reasonable time to move the High Court and obtain its orders. If he has such reasonable time when the application is made, there is no obligation to grant any further time. We think that this is clear not only from a common sense appreciation of the object which the Legislature had in view, but also from a consideration of the language of the section and the reference to section 344. This section gives the Court power to postpone a trial, with certain formalities, if, for certain reasons, "it becomes necessary or advisable" to do so. Thus the necessity, or at least the advisability, of granting a postponement, is, under section 344, a condition precedent to the existence of the power of postponement. When, therefore, section 526-A says that, under certain circumstances, the Court shall exercise the powers of postponement given by section 344, it carries with it the limitation contained in that

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section to cases in which it is necessary, or at least advisable, to grant the postponement, in order to attain the object which section 526-A has in view, viz., to obtain the orders of the High Court on the application for transfer. In the Calcutta case the application for transfer was made on the 19th November, and the case was heard, and judgment given on the 21st idem. Evidently in that case the interval was insufficient to move the High Court and obtain its orders, and the Magistrate, in refusing the adjournment, neglected the essential obligation laid on him by the section. In the present case, if the application of the 30th November were the first application, we should hold that the Sessions Judge was legally bound to have granted on adjournment, inasmuch as the interval between that date and the 2nd December (the date fixed for the trial) was insufficient to admit of an application to the High Court. But as a fact, the application for postponement under section 526-A was first made on the 20th November, and the interval between that and the 2nd December was, in our opinion, a time reasonably sufficient for the accused, with due diligence, to have moved the High Court for a transfer, and to have obtained its orders thereon. The Sessions Judge was, therefore, justified in refusing an adjournment on the application of the 20th November, and nothing occurred subsequently to render it necessary for him to grant on the 30th the application which he refused on the 20th, for we must hold that the accused's act in making his first application to the High Court with an insufficient affidavit was want of diligence on his part. The result is that, under the circumstances, the refusal of the Sessions Judge to grant an adjournment was not illegal, and the second preliminary objection fails.

A third preliminary objection is that the Sessions Judge, having, before he pronounced judgment, learned that the High Court had transferred the case, ought to have adjourned the case, instead of pronouncing judgment. This objection is untenable. The trial began on the 2nd December, and the judgment was written and pronounced on the 5th December. The order of the High Court was made on the 4th December in ignorance, apparently, that the trial had commenced two days previously, but the order did not reach the Sessions Judge until after the judgment was pronounced. We cannot say that he was wrong in refusing to adjourn the case, at so late a stage, on the strength of a

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telegram said to have been received by the accused's vakil to the effect that the High Court had passed an order to transfer the case.

The fourth preliminary objection is that the Sessions Judge ought not to have refused to adjourn the case in order to obtain the evidence of two absent witnesses. One of these witnesses was proved to be too ill to travel, and the other was not served with a summons. The Sessions Judge held that the witnesses were "persons of very ordinary status, whose evidence would in no case carry much weight," and added "The accused wishes to call them to speak to the same facts as other witnesses of just as much respectability whom I have discredited. I rule that the witnesses are not material witnesses." For this reason, and because he thought that the application was made "to delay the case and defeat the ends of justice," the Sessions Judge refused the adjournment. We cannot agree with the Sessions Judge that the witnesses were not material witnesses. From the accused's statement on the 3rd December 1895 it appears that one of the witnesses, Subbarayadu, was to prove that Appi Reddi took food with him at Prattipadu on the night of the 5th June, and the other witness, Kotayya, was to prove that he saw Appi Reddi at the police station and at the search of Pichanna's house on that day. If those statements are true, the whole case against the accused must fail, for the whole question at issue is whether Appi Reddi was, or was not, taken to Prattipadu on the 5th June. The matters as to which the witnesses were to speak were, therefore, the very matters on which the guilt or innocence of the accused depended, and were obviously material. It was not open to the Sessions Judge to decide on the credit to be attached to their evidence before he had an opportunity of hearing it. The Sessions Judge, therefore, exceeded the discretion given to him by section 216, Criminal Procedure Code, and it is obvious that the accused has been prejudiced in his defence by the Sessions Judge's refusal to obtain the evidence of these witnesses. We do not, however, think it necessary on this account to set the trial aside; but we resolve under section 428 to direct the Sessions Judge to now take the evidence of these two witnesses and certify the same to this Court. We also resolve to direct the Sessions Judge to take the evidence of the station-house officer of Prattipadu, as he, of all others, must be in a position to say with certainty whether Appi Reddi was or was not kept in his station on the 5th June, as

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alleged by the accused. The fact that this witness was absent from the district is no sufficient reason for neglecting to obtain his evidence. As a public servant he might have been departmentally required to return to the jurisdiction of the Court, or a commission under section 503, Criminal Procedure Code, might have been issued for his examination.

It is not clear whether the evidence expected of the police writer of Kakiman referred to in paragraph 10 of the judgment is relevant. If the Judge finds that it is so, his evidence should also be taken. The evidence now called for may be taken by the Judge himself, or, if there is sufficient reason, on commission under section 503.

It must be certified to this Court within three weeks from this date.

This case coming on for re-hearing this day after the receipt of the fresh evidence called for in the order of this Court, dated the 31st March 1896, the Court delivered the following

JUDGMENT.—The further evidence now recorded makes it certain that the finding of the Sessions Judge that Appi Reddi was never taken to Prattipadu is correct. It follows that the three statements specified in the charge are false and that the appellant was rightly convicted. We agree with the Sessions Judge that a police officer who gives false evidence in a dacoity case deserves exemplary punishment. We confirm the conviction and sentence and dismiss the appeal.

Ordered accordingly.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

1896.
January
16, 17.

NARANAPPA AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

SAMACHARLU (PLAINTIFF), RESPONDENT.*

Suit to set aside a sale effected by a mortgagee prior to Transfer of Property Act—Act IV of 1882, ss. 2, 99.

In a suit brought to set aside a sale effected by a mortgagee prior to the date when Act IV of 1882 (Transfer of Property Act) came into force:

* Second Appeal No. 112 of 1895.

Held, that the Transfer of Property Act (ss. 2, 99) has no retrospective effect, so as to invalidate an order for sale which constituted a legal relation between the defendants passed before that Act came into force.

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SAMACHARLU.

SECOND APPEAL against the decree of L. Moore, District Judge of Bellary, in appeal suit No. 104 of 1893, reversing the decree of K. Murtirazu, District Munsif of Penukonda, in original suit No. 643 of 1892.

The facts of this case were as follows:—Defendant No. 2 had against the first defendant a money decree in original suit No. 456 of 1881, and a mortgage deed, dated 6th October 1875, exhibit I. In execution of that money decree, defendant No. 2 got the mortgaged land attached and sold subject to the mortgage (exhibit I) and he having himself bought them by permission of the Court obtained delivery and subsequently transferred some of the lands to the defendants Nos. 3 and 4. The plaintiff, in execution of a money decree obtained against defendant No. 1 in original suit No. 464 of 1881, attached the same lands already sold in original suit No. 456 of 1881, but the attachment was removed by the Court upon claims preferred by defendants Nos. 2, 3 and 4.

The plaintiff has brought this suit to set the Court's order releasing the lands from attachment in original suit No. 464 of 1881 and to justify his own attachment of the lands in execution of the decree in that suit.

The District Munsif held with reference to section 2 of the Transfer of Property Act that the sale by defendant No. 1 to defendant No. 2 was effectual as against the plaintiff and dismissed the suit with costs.

On appeal the District Judge reversed this decree and gave judgment for the plaintiff with costs relying on *Durgayya v. Anantha*(1).

Defendants Nos. 2 and 3 appealed.

Mr. Parthasaradhi Ayyangar and Narasimhachariar for appellants.

Seshachariar for respondent.

JUDGMENT.—Sufficient attention has not been paid to the dates in this case. Before the 1st of July 1882 when the Transfer of Property Act came into force the appellants had obtained their decree, dated 20th November 1881; they had got the property

(1) 1.L.R., 14 Mad., 74.

NARANAPPA attached on the 9th March 1882, and in the month of April had obtained orders for sale.

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"This being so, we are of opinion that a legal relation was constituted between the appellants and their judgment-debtor before the Act came into force and that out of this relation arose a right to have the order for sale carried out. They are entitled to sell under the order, whereas if section 99 of the Transfer of Property Act is applicable they cease to be so entitled when the Act came into force.

We are therefore of opinion that the plaintiff is not entitled to rely on section 99, and we are supported in this view by the decision in *Dinendra Nath Sanyal v. Chandra Kishore Munshi*(1).

The decree of the District Judge must be reversed and that of the District Munsif restored with costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

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

KUNHI CHANDU NAMBIAR (PLAINTIFF), APPELLANT,

v.

**KUNKAN NAMBIAR AND OTHERS (DEFENDANTS),
RESPONDENTS ***

1895.
September 5.
1896.
January 6,
July 17.

Suit to redeem Kanom—Malabar compensation for Tenants' Improvements Act—Act I of 1887 (Madras), s. 3.

The sum to be allowed for tenants' compensation for improvements under Act I of 1887 (Madras) is to be calculated in proportion to the extent to which the estate has been permanently improved. The improvement for which compensation is payable as defined in s. 3 † of the Act is not the tree itself, but the work of planting, protecting and maintaining it. The calculation must not be based on the future produce of the tree.

(1) I.L.R., 12 Cal., 436.

† Section 3 is as follows:—

* Second Appeal No. 1742 of 1894.

(1) For the purposes of this Act, the term 'Improvement' means any work which adds to the value of the holding which is suitable to the holding and consistent with the purpose for which it was let.

(2) Until the contrary is shown, the following shall be presumed to be improvements within the meaning of this Act:—

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 465 of 1893, modifying the decree of A. Annasami Ayyar, District Munsif of Panur, in original suit No. 60 of 1893.

The facts of this case are as follow:—

Plaintiff sues the defendants to recover possession of 8 items of parambas with the improvements in them held by the defendants 1 and 2 under a registered kanom and kuikanom marupat, dated 30th Magaram 1055 (11th February 1880) granted to him by the latter on payment of the kanom and the value of the improvements, and for payment of Rs. 15 as rent in arrears and of future rent at Rs. 100 a year and costs.

He alleges the plaint parambas are his jenm property, defendants 3 to 9 are tenants of defendants 1 and 2 in possession of the parambas.

Defendants 1 and 2 admit plaintiff's title to the kanom kuikanom marupat of 1055 (1880) and the holding of the parambas under the marupat. They answer that the plaintiff's claim for payment of the rent sued for is premature, his claim for payment of future rent at Rs. 100 a year is irregular, and cannot be allowed, they have made improvements in the parambas of considerable value, they have no objection to surrender the parambas to plaintiff on receiving the kanom and the value of their improvements, and they are not liable for his costs in the suit.

Defendants 5, 8 and 9 state they are in possession of the parambas items 3, 4, 2, 6 and 7 as tenants of second defendant, they

(a) the erection of dwelling houses, buildings appurtenant thereto and farm buildings;

(b) the construction of tanks, wells, channels, dams and other works for the storage or supply of water for agricultural or domestic purposes;

(c) the preparation of land for irrigation;

(d) the conversion of one-crop into two-crop land;

(e) the drainage, reclamation from rivers or other waters, or protection from floods, or from erosion or other damage by water, of land used for agricultural purposes, or waste land which is culturable;

(f) the reclamation, clearance, enclosure or permanent improvement of land for agricultural purposes;

(g) the renewal or reconstruction of any of the foregoing works, or alterations therein or additions thereto;

(h) the planting, protection or maintenance of fruit trees, timber-trees and other useful trees and plants;

(i) the protection or maintenance of such trees, the same having grown spontaneously during the tenancy.

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have effected improvements in them of considerable value, and they should be paid the value of their improvements before eviction.

Sixth defendant states he is not in possession of any of the plaint parambas, and he is a necessary party to the suit.

The remaining defendants do not appear.

The point for decision in the suit is: "To what compensation are the tenant-defendants entitled for their improvements in the parambas?"

The District Munsif after referring the matter to a Commissioner for report for the purpose of fixing the value of the defendant-tenants' improvements and with regard to the compensation awarded for the trees (the only matter now in dispute) gave judgment as follows:—

The average annual produce of the bearing cocoanut trees, with the exception of one tree in the paramba item No. 1, may not exceed 25 or 30 nuts. The one good tree may yield about 50 nuts a year. It is an aged tree, considering the ages of the bearing trees, I think three years' purchase would be ample compensation for such trees. I allow Rs. 2 for each of the first mentioned trees and Rs. 3 for the one good tree. The arecanut trees in the parambas inspected are not young ones. The bearing areca trees cannot be paid for at more than 3 annas each. Each of the cocoanut trees which are just bearing must be paid for at least one rupee each. The costs of planting and cultivating a cocoanut tree up to a bearing age cannot be less than one rupee. One of the jack trees in the paramba item No. 1 shown as Jenmi's property should be included in the tenant's property. They should be paid its value Rs. 2. There is only one aged jack tree found in the paramba item No. 1. The admitted marupat exhibit A shows the jenmi had two aged jack trees in the paramba. Possibly the remaining one was lost or cut and removed subsequent to the date of the marupat. The average annual cocoanut produce of the paramba item No. 2 may be about 2,000 nuts. First defendant says the paramba will yield about 2,500 nuts a year. But I think his estimate is one made by an out-going and interested tenant and is too high. The Commissioner has omitted to include in this account a young and bearing jack tree worth Rs. 1-8-0—the property of first and second defendants in the paramba item No. 2.

The parambas items 3 and 4 are situated on the slope of a hill. Their soil is very dry. The fruit trees, &c., do not seem to thrive

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in them. Of the bearing cocoanut trees shown in the Commissioner's account eight are useless, and will bear no fruit at all. Their head portions have become very thin, and they have only a few leaves on them. The tenant can be paid no value for them. The remaining bearing cocoanut trees may bear 5 or 10 nuts a year. The jack trees are stunted in growth. They are unfit to be used as timber. They cannot also yield plenty of fruit. The bearing cocoanut trees and jack trees in the parambas items 3 and 4 cannot be paid for at the rate of more than one rupee each. The bearing cocoanut trees in the parambas items 6 and 7 seem to be good and should be paid for Rs. 3 and Rs. 2 as their least value instead of Rs. 2 and Rs. 1-4-0 each given by the Commissioner in his account; and he decreed that on the payment of the amount of the kanom and compensation awarded to each tenant the kanom should be redeemed.

On appeal the District Judge disallowed the compensation awarded for the two jack trees and confirmed the decree in other respects.

Ryru Nambiar for appellant.

Narayanan Nambiar and *Kannan Nambiar* for respondent No. 1.

The Court (*Collins, C.J.* and *Parker, J.*) made the following

ORDER.—The Courts below have apparently calculated the value of the trees upon the capitalized value of their net produce for the estimated period of the life of the trees. This principle was *Shan-gunni Menon v. Veeruppan Pillai* (1) held to be erroneous. A copy of the decision in that appeal—which was from South Malabar—will be forwarded to the District Judge and his attention will also be called to the decision in *Valia Tamburatti v. Parvati* (2).

As several of the trees for which compensation is asked are very old trees, it would seem that they must have been planted and in bearing condition long before the present tenancy which only dates from 1880. This being so, the question will arise whether the tenant is entitled to any compensation for improvements at all, except perhaps for the protection of the trees under section 3, clause (h), of Madras Act I of 1887. These trees, which were already fruit-bearing, must have been included in his lease and the rent fixed accordingly, and it may be that the *jenmi* has already paid compensation to the predecessor in the tenancy.

(1) I.L.R., 18 Mad., 407.

(2) I.L.R., 13 Mad., 454.

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With these remarks we will ask for as a revised finding upon the issue in the case.

The finding is to be submitted within six weeks from the date of the 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 District Judge submitted the following.

FINDING.—This suit has been remanded by the High Court for a revised finding to be returned as to the value of improvements to be awarded to the defendants in respect of the trees standing on the plaint parambas.

I am referred to two rulings of the High Court as to the principle to be followed in awarding compensation for improvements, viz., the ruling in *Shangummi Menon v. Veerappan Pillai*(1) and that in *Valia Tamburatti v. Parvati*(2).

In their remand order in the present suit the High Court observe: "As several of the trees for which compensation is asked are very old trees, it would seem that they must have been planted and in bearing condition long before the present tenancy which only dates from 1880. This being so, the question will arise whether the tenant is entitled to any compensation for improvements at all, except perhaps for the protection of the trees under section 3, clause (h), of Madras Act I of 1887 * * * and it may be that the *jenmi* has already paid compensation to the predecessor in the tenancy."

Exhibit A, the *marupat* sued on, clearly shows that the value of improvements has not been paid by the *jenmi* and that the tenants are entitled to get it on surrendering the land. Exhibit A enumerates the trees and fixtures belonging to the *jenmi* at the time of its execution and expressly stipulates that the tenants are to be paid the value of all the improvements which they were in possession of then and which they might make subsequently.

Exhibit A shows that the first and second defendants were in possession of the property before the date of its execution. There is a recital by the first defendant in a statement put in by him and plaintiff jointly that the well in *paramba* No. 4 was dug by first defendant in 1847. Exhibit B, which is a revenue account, shows that *paramba* No. 1 was assessed in first defendant's name in 1868.

(1) I.L.R., 18 Mad., 407.

(2) I.L.R., 13 Mad., 454.

It is clear, therefore, that the first defendant was connected with the property some sixty years ago and it can be gathered from exhibit A that all the trees, except those specified as belonging to the *jenmi*, were planted either by him or by his immediate predecessor and that compensation for them has not been paid by the *jenmi*.

It remains to be considered what compensation is due to the tenants for the trees. I take it that they are entitled to receive compensation in proportion to the extent to which the estate has been permanently improved and that this is represented by the market value of the trees at the time of the surrender. The original outlay incurred may be taken to have been recouped by long enjoyment of the produce.

It seems to me that the Munsif has given the correct market value of the trees as they stood at the time of valuation. He has taken their age and fruit-bearing capacities into account and his estimate seems by no means too high.

I find that the market value of the trees has been correctly fixed by the Munsif and that the tenants are entitled to get the amount awarded by him.

On this second appeal coming on for hearing on return to the order of this Court.

Ryru Nambiar for appellant.

Narayanan Nambiar and *Kannan Nambiar* for respondents.

The Court (*Collins, C.J.* and *Parker, J.*) made the following

ORDER.—We must accept the District Judge's finding that no improvements have yet been paid for and therefore that the tenant is entitled to be compensated for all improvements that have been made.

The District Judge is right in stating that the tenant is entitled to compensation in proportion to the extent to which the estate has been permanently improved; but when he goes on to say that 'this is represented by the market value of the trees at the time of the surrender,' he is clearly in error. The 'improvement' for which compensation is payable as defined in section 3 of Madras Act I of 1887 is not the tree itself, but the 'work' of planting, protecting, and maintaining the tree—vide clause h. Any calculation based on the future produce of the tree must assume that the tenant is entitled to be compensated for the loss of the use of the land; but to this he is obviously not entitled,

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since he can have no equity for the enjoyment of the land beyond the period of his lease.

The difficulty arises from the use of the expression 'market value' in the title of the Act. The market value of a fruit tree, apart from the soil in which it grows, would be almost nil; but the 'improvement' to be paid for is the 'work' of planting and nurturing the tree, and not the tree itself—which is the result of the work.

The compensation payable under section 6 is the amount by which the value of the holding has been increased by the 'work' and in ascertaining this the condition of the 'work' and the probable duration of its effects should be considered; but it should be borne in mind that it is the 'work' as defined in section 3, which is to be paid for, and not the result of the work.

With these remarks we must ask the present Acting District Judge to return a revised finding upon the issue.

Further evidence may, if necessary, be taken.

The finding is to be submitted within six weeks from the date of the 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 District Judge submitted the following

FINDING.—This appeal has been remanded to ascertain the value of improvements calculated on the cost of planting and protecting the trees, constituting the 'work' to be paid for.

The issue was: "To what compensation are the tenant-defendants entitled for their improvements?"

The only dispute is as to the value of trees—cocoanuts, jacks, pepper-vines and areca-nuts. The District Munsif allowed Rs. 3 for one good cocoanut tree, and Rs. 2 for the bearing cocoanut trees, As. 3 each for the areca-nuts, Re. 1 for cocoanut trees just bearing, and Re. 1 to Rs. 2 for jack trees. My predecessor, Mr. A. Thompson, considered the District Munsif's valuation to be reasonable.

The plaintiff (appellant) has examined three witnesses and the respondents' three witnesses. They agree in stating that an acre of ground can raise as its main crop about fifty or sixty cocoanut trees, and also fifty areca-nut trees, four jack trees and about fifty pepper vines.

Plaintiff's first witness gives the cost of raising trees on an acre till they bear fruit at Rs. 35. The second witness fixes it at Rs. 25

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or Rs. 30 and the third witness at Rs. 30. From their position they evidently speak from a *jenmi's* point of view and underestimate the cost of the necessary work.

For the respondents' first defendant gives the cost for cocoanuts at Rs. 5 a tree or about Rs. 300 per acre. The second witness, a mappila, gives the cost at Rs. 3 or Rs. 4 per cocoanut tree.

They seem inclined to over-estimate the cost. The third witness is M. Gopala Menon, a pleader of this Court, who gives a more reasonable estimate, corresponding very nearly with that given by the District Munsif.

Seeing that the work consists of raising walls, digging pits, watering for a year or two, manuring and watching for a period of at least twelve years for cocoanut trees, I find that the District Munsif's estimate for improvements is reasonable.

I, therefore, agree with the former appeal decree of this Court on the finding in question.

On the return of the above finding, the Court (Collins, C.J., and Benson J.) delivered the following.

JUDGMENT.—We accept the finding of the District Judge as to the amount of compensation to be paid. His order as to costs is correct.

We extend the time for redemption to three months from this date. With this modification we confirm the decree of the District Judge.

The appellant must bear the respondent's costs in this appeal.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

CHINNATAMBI GOUNDEN (DEFENDANT No. 1),

APPELLANT,

v.

CHINNANA GOUNDEN (PLAINTIFF), RESPONDENT.*

Contract—Continuing breach—Limitation—Civil Procedure Code, ss. 588 (28), 586.

T, who was the uncle of the first defendant and the father of the second defendant, agreed with C to sell certain land to him for consideration received and to cause the land, then standing in the name of a third party, to be registered in

* Appeal against order No. 21 of 1896.

1896.
April 27.
July 8.

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C's name. It was further agreed that if T failed to convey and cause the change of the revenue registry, T should return the purchase money. C was put in possession, but in 1890 the second defendant conveyed the land to one M, who ejected C.

Held, that the right of appeal conferred by section 588, Civil Procedure Code, is not controlled by section 586, that the breach did not occur prior to November 1890, and that the suit was not barred.

APPEAL against the order of W. J. Tate, District Judge of Salem, in appeal suit No. 94 of 1895, reversing the decree of V. Malhari Rau, District Munsif of Salem, in original suit No. 791 of 1893 and remanding the suit for trial.

This is a suit for refund of Rs. 238, being the purchase money with interest under a contract for sale of certain lands entered into about ten or eleven years before date of plaint.

The plaintiff's case was that the lands in the plaint schedule belonged to the second defendant's father, Tanda Gounden, who received from the plaintiff Rs. 175 and delivered possession of the lands to him some ten or eleven years ago. Tanda Gounden promised to get the patta transferred to his own name from that of one Nallan in whose name he (Tanda Gounden) had bought the lands at a revenue sale and then to transfer it to the plaintiff's name. The patta was transferred to Tanda Gounden's name on the 13th July 1882. Sometime after this the vendor Tanda Gounden was convicted for giving false evidence in the Salem riot cases about the year 1883 or 1884. In 1888 or 1889 he was released from jail after he had worked out his term of imprisonment and died one year after his release. The plaintiff further says that after Tanda Gounden's death he asked the first defendant, the head and manager of the family, to transfer the patta, but the latter put him off with excuses and that the cause of action arose in December 1890, when he was dispossessed by one Muttu Payyan claiming to be second defendant's purchaser. The defendants deny that the lands ever belonged to them or to Tanda Gounden named by plaintiff, and plead that the claim is barred by limitation.

The Munsif held that under the arrangement relied on by the plaintiff the patta was to be re-transferred to him as soon as it was transferred to the name of the vendor, that the transfer to the vendor was made on the 13th July 1882, that the cause of action arose on that day, that the present suit for compensation fell under article 115, Limitation Act, and was therefore barred.

On appeal the District Judge holding that the contract was a continuing one, and that the limitation under article 115 would run from the time when the defendants put it out of their power to fulfil their contract, that is, from the date of the sale to Muttu Payyan and relying on *Imdad Ali v. Nijabat Ali* (1) reversed the decree of the Munsif with costs and remanded the suit for disposal on the other issues.

Defendant No. 1 appealed.

Sundara Ayyar for appellant.

Sivasami Ayyar for respondent.

JUDGMENT.—The objection, that the suit being one for the recovery of a sum of money less than Rs. 500 and of a nature cognizable by a Court of Small Causes, no appeal against the order of the District Judge remanding the suit lies, is unsustainable, as the right of appeal conferred by section 588 in a case like this is unaffected by section 586 of the code, *Collector of Bijnor v. Jafar Ali Khan* (2) and *Mahadev Narsinh v. Ragho Keshav* (3).

It was contended on behalf of the appellant (the first defendant) that the suit was barred by limitation. No evidence having been taken, it is necessary in dealing with the said contention, to consider what the allegations relied upon on behalf of the plaintiff are. As I understand the plaint, the oral contract for compensation for the breach of which the suit was brought, was this. Tanda Gounden, uncle of the first defendant and father of the second defendant, about 1882 agreed to sell to the plaintiff certain land for Rs. 175, received the amount from him and put him in possession of the land. No sale-deed was, however, executed, as the land then stood registered in the public revenue accounts in the name of a third party. But Tanda Gounden agreed to execute a sale-deed and cause the land to be registered in the plaintiff's name after the registry was transferred to that of Tanda Gounden himself. It was further expressly agreed that if he failed so to convey and cause a change of the revenue registry he shall return the Rs. 175, the price received by him. The breach alleged was that in November 1890 the defendants on the death of Tanda Gounden fraudulently conveyed to one Muttu Payyan by a registered deed the land alleged to have been sold to the plaintiff, that in the next month Muttu Payyan ejected the plaintiff from possession and

(1) I.L.R., 6 All., 457. (2) I.L.R., 3 All., 18. (3) I.L.R., 7 Bom., 292.

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that the defendants failed to repay the Rs. 175, notwithstanding demand made upon them for the refund thereof. The District Munsif held that the claim was barred by limitation inasmuch as the registry in the revenue accounts was transferred to the name of Tanda Gounden admittedly more than three years prior to the institution of the suit and the breach of contract on the part of Tanda Gounden should, therefore, be taken to have occurred then. No doubt after Tanda Gounden's name was registered in the accounts it was open to the plaintiff to call upon his alleged vendor to give effect to the promise about the execution of the sale-deed, &c. But, considering that the plaintiff was said to have been left in possession till December 1890, it can hardly be said that there was a breach of contract on the part of the vendor, unless and until further performance was distinctly refused. (Compare the observations of Garth, C.J., in *Ahmed Mahomed Pattel v. Adjein Dooply* (1), and there is nothing in the plaint to support the view that the date of transfer of the revenue registry to Tanda Gounden's name was agreed between the parties to be the date fixed for the execution of the conveyance to the plaintiff. The plaint allegations on this point convey nothing more than that the understanding was that until the land came to be registered in Tanda Gounden's name the plaintiff had no right to claim the execution of a conveyance. But it does not follow that the moment Tanda Gounden's name was inserted in the registers a cause of action accrued to the plaintiff *ipso facto*. As already observed, a refusal to complete the contract was necessary to give the plaintiff the right to sue. But, according to the plaint, there was no refusal prior to November 1890. The District Judge's view that the breach alleged was subsequent to that period and therefore the claim cannot, upon the plaint itself, be held to be barred appears to be right. His order reversing the District Munsif's decree must be upheld and the appeal dismissed with costs.

(1) I.L.R., 2 Cal., 326, 327.

APPELLATE CIVIL.

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

KALIYANARAMAYYAR (RESPONDENT), APPELLANT,

v.

MUSTAK SHAH SAHEB (PETITIONER), RESPONDENT.*

1896.
August 4

*Religious Endowments Act—Act XX of 1863, ss. 3, 11—Suit by manager for rent—
Muchalkas granted by the committee.*

Where the committee of a religious institution governed by Act XX of 1863 obtained muchalkas in its own name from the tenants of land belonging to the institution instead of in the name of its manager :

Held, that this fact constituted a mere irregularity and that a suit brought by the manager on such muchalkas is maintainable.

APPEAL under Letters Patent, section 15, against the judgment of Subramania Ayyar, J., in Civil Revision petition No. 160 of 1894.

The facts of the case were as follows :—

The suit is brought by the manager of a Muhammadan temple called the Durga of Goripalayam to recover Rs. 107-5-11 being principal and interest at one per cent. per mensem due on 3 muchalkas executed by defendant to plaintiff for faslis 1299, 1300 and 1301.

The defendant objects to the maintainability of this suit on the grounds that the committee members had no right to issue pattahs and take muchalkas; that the plaintiff was not the manager during the 3 faslis in question; that the muchalkas were not given by defendant and that those who have signed them were not authorized by defendant to exchange pattah and muchalka on his behalf.

The Subordinate Judge dismissed the suit.

The material portion of his judgment is as follows :—

Under section 11 of Act XX of 1863, no member of a committee shall be capable of being or shall act as the trustee of a temple for the management of which such committee shall have been appointed, and it is the lawful trustee or the manager of the temple, for the time being that is entitled to the possession of its properties

* Letters Patent Appeal No. 18 of 1896.

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and to the receipt of its income, and the members are not at liberty to claim to be put in his place. Consequently the suit cannot be maintained on the pattahs and muchalkas exchanged by the committee members. Again the manager who now sues as plaintiff was appointed in faaly 1302, and there was no manager during the faalis for which rent is claimed and the muchalkas sued on were not executed by defendant and consequently plaintiff has no cause of action against defendant *Ponturanga v. Nagappa*(1).

The plaintiff preferred this petition to the High Court.

Krishnaswami Ayyar for plaintiff.

Sundara Ayyar for defendant.

Subramania Ayyar, J.—The plaintiff, the present manager of a durga (a Muhammadan religious institution) sued upon certain muchalkas alleged to have been executed to the members of the committee, exercising supervision over the durga under Act XX of 1863 by the agent of the defendants for rent due by him to the durga for certain years. The Subordinate Judge, being of opinion that under section 11 of the Act, it was the manager and not the committee that should have obtained the muchalkas from the defendants, held the plaintiff could not maintain this suit upon such muchalkas.

The question is whether the decision of the Subordinate Judge on the point is right.

In dealing with this question it must be remembered that members of committee and managers constitute the different parts of the machinery provided by Act XX, for the due administration of the affairs of the religious institution falling within section 8 of that enactment. And of these two parts members of committees are the persons in whom the general superintendence and control of such institutions are vested. In exercising such general control, it is an unquestionable duty of theirs to see that the rents payable to the institutions are punctually collected and all steps legally necessary for their collection are duly taken. In the performance of this duty, however, the procedure to be observed by them is to get the managers to make the collection and perform all acts necessary for the purpose. Now, if in deviation from this course, they take upon themselves to obtain muchalkas in their own names, what is it but an act done in the discharge

(1) I.L.R., 12 Mad., 388.

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of their duty to see to the realization of the rents? Such an act done *prima facie* in the interests of the institution can hardly be said to be illegal or wrongful so as to make it void as is contended on behalf of the defendant. In my view it is an act which falls within their powers as the controlling authority though, in performing it, they acted in a manner which is not in strict conformity with the procedure prescribed by the law.

Moreover, in the face of the provisions of section 12 of Act XX, it is scarcely possible to contend that there is anything in the nature of the act of collecting rents, considered by itself which renders such an act inconsistent with the proper performance by members of committees of their duties as the supervising authority. For, by the last part of that section, committees are empowered to collect rents directly in the case of lands transferred to them by or under the authority of the Board of Revenue. This provision, though confined to the case of such lands, shows that in the opinion of the framers of the Act, direct participation in actual management by collecting rents is not so outside the legitimate functions of committees as to compel Courts to decide that an act perfectly valid, if done by them with reference to the portion of the endowments consisting of lands transferred by the Board, is utterly void when it is done with reference to other portions of the landed endowments. It seems to me more reasonable to hold that, though the members of the committee in the present case deviated from the strict procedure in taking the muchalkas in their own names instead of having them taken by the manager in his name, yet their action is not absolutely illegal. In a case where a mortgage taken by a bank was questioned on the ground that the mortgagees had no right to take a mortgage concurrently with the loan in order to secure it, as their charter only authorized them to take mortgages 'for debts previously contracted,' Chancellor Kent observed: "and if they should pass the exact line of their power it would rather belong to the Government * * * to exact a forfeiture of their charter, than for this Court in this collateral way, to decide a question of misuser by setting aside a just and *bona fide* contract." (*Silver Lake Bank v. North*(1)) (see also *Collman v. Collman*(2)). Similarly here the fact that the members of the committee overstepped the precise limits of their

(1) 4 Johnson, Second Edition at p. 373.

(2) L.R., 19 Ch. D., 64.

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authority in obtaining the muchalkas in question may be a ground for charging them with misfeasance under Act XX of 1863, but not for impeaching the documents executed for the rents justly due to the institution under their control.

In short, the obtaining of these documents is not a nullity, but is only an irregularity which could be waived by the defendant, and which he must be taken to have waived, if, as is alleged on behalf of the plaintiff, the defendant got his agent to execute them. The Sub-Judge's view that the suit failed on the ground that the muchalkas stand in the names of the members of the committee is therefore unsustainable.

It is next contended for the defendant that as he denied that the muchalkas were executed with his authority, and as the plaintiff failed to prove such authority, the Sub-Judge's decree should not be disturbed. The language of the judgment of the Subordinate Judge satisfies me that he decided the suit on the preliminary point discussed above, and did not call upon the parties to go into evidence. The decree must therefore be set aside. The suit should be replaced on the file and dealt with according to law. The costs here will abide and follow the result.

Against this judgment the present appeal (under section 15 of the Letters Patent) was preferred.

Sundara Ayyar for appellants.

Respondent did not appear.

JUDGMENT.—The case relied on (*Ramanadon v. Rangammal*(1)) is not in point. The order of the learned Judge is right. We reject the appeal.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

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Indian Contract Act—Act IX of 1872, s. 63—Consideration.

An agreement, extending the time for the performance of a contract falling under s. 63, Contract Act, does not require consideration to support it.

(1) I.L.R., 12 Mad., 286.

* Civil Suit No. 110 of 1895.

Suit for damages for breach of contract and interest.

The plaintiff set forth that one R. S. Sheppard is the author of, and was the owner of, the copyright in four books and that his copyright was duly registered in accordance with law; that the said books were printed, published and sold at different periods by different publishers and lastly by Messrs. V. J. Manickavaloo Moodeliar and Company under agreement; that by the said agreement, dated the 21st day of April 1888, and registered on the same day the said R. S. Sheppard on certain terms and conditions transferred to Messrs. V. J. Manickavaloo Moodeliar and Company, the right to print certain editions of the aforesaid books, the said editions being limited as therein provided; that in and by a document duly executed at Madras on the 12th November 1892 and registered on the 19th November 1892, and also by a previous document executed on the 26th April 1890 the said R. S. Sheppard in consideration of the sum of Rs. 500 paid to him by the plaintiff, sold to the plaintiff the copyright in each of the aforesaid books, subject to the rights of the said Messrs. V. J. Manickavaloo Moodeliar and Company; that under a document executed on the 19th November 1892 and registered on the same day the plaintiff sold to the said O. Cundasami Mudali the copyright in the aforesaid books, subject to the rights of the said Messrs. V. J. Manickavaloo Moodeliar and Company, under the agreement of 21st April 1888, on the defendant agreeing to pay to the plaintiff the sum of Rs. 10,000 in four equal instalments on the 10th April 1893, 10th October 1893, 10th April 1894 and 10th October 1894; that the conditions contained in the said document of 19th November 1892 in so far as the plaintiff is concerned have been fully complied with by the plaintiff; that the defendant has not up to date paid any money towards and on account of the amount which was agreed to be paid to the plaintiff under the document of 19th November 1892, and the said amount is now overdue; that the plaintiff charges the defendant is liable to pay interest on the said instalments on the expiration of the respective dates fixed for payment thereof at the rate of 12 per cent. per annum. Plaintiff prayed for a decree for Rs. 11,050 being the amount due as aforesaid. Plaintiff prayed that he may be decreed to have a lien on the copyright of the said books for the amount that may be decreed; that the defendant be decreed to pay further interest on the principal sum of Rs. 10,000 at 12 per

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cent. per annum from date of filing plaint to date of decree; that the defendant, his servants and agents be restrained by injunction from dealing with the copyright of the books in any manner whatsoever; that the defendant be decreed to pay the costs and further relief.

The defendant admitted the agreement, but submitted that subsequent to the execution of the document referred to in the plaint, that is, on the 1st December 1892 the plaintiff and defendant had agreed in writing that the instalments in the said deed referred to were to commence and become payable on the accrual of the right in plaintiff to print and publish any one of the books in reference to the printing, publication and sale of which the said R. S. Sheppard had contracted with Messrs. V. J. Manickavaloo Moodeliar and Company in terms of the agreement, dated 27th April 1888; that the said writing was signed by the plaintiff and addressed to the defendant and a fresh starting point for the payment of the instalments was thereby substituted for the period originally fixed; that the right to print and publish any one of the said books has not accrued to defendant as the contract of the 27th April 1888 is still in force.

That consequently plaintiff is not entitled to bring this suit and defendant denied his liability to pay interest.

Mr. K. Brown for plaintiff.

Masilamani Pillai for defendant.

JUDGMENT.—Some years ago one Mr. R. S. Sheppard published four books, viz., 'Manual of English for Matriculation Candidates,' 'English Lessons for F.A. and B.A. Candidates,' 'Middle School Manual of English' and 'Lower Fourth Class Manual of Grammar.' On the 21st April 1888 Mr. Sheppard executed exhibit II to Manickavaloo and Company authorizing them to print and publish and sell at their own risk and expense and for their own advantage the seventh, eighth and ninth editions of the 'Manual of English for Matriculation Candidates' at 6,000 copies per edition, the fifth, sixth and seventh editions also at 6,000 copies each edition, and the third edition of 'English Lessons for F.A. and B.A. Candidates' to consist of 1,500 copies. Further by this contract he bound himself, whilst the contract remained in force, not to publish or arrange with any others for the publication of the above books, or of any other books that may prejudicially affect the sale of any of the three books. It also appears that at

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the date of the said contract, the whole of the copies of the first edition of the 'Lower Fourth Class Manual of Grammar,' which was the only edition of the book published, had been assigned to Manickavaloo and Company on the understanding that until those copies were disposed of no further edition of the book should appear.

Between 1888 and 1892, the plaintiff, who is the mother-in-law of Mr. Sheppard, became the assignee of the right of publishing all further editions of the four books. And she executed on the 19th November 1892 exhibit A transferring her right to the defendant in consideration of Rs. 10,000 made payable in four half-yearly instalments commencing from the 10th April 1893. On the 1st December 1892, however, she addressed to the defendant a letter (exhibit I) whereby she agreed that the first instalment should not become due until the defendant, by the expiry of the contract with Manickavaloo and Company, was enabled to issue a fresh edition of any one of the four books.

The present suit was instituted for the recovery of Rs. 10,000 with interest, on the footing that the instalments had become payable as specified in exhibit A, apart from exhibit I. The defence was that under the contract, as modified by exhibit I, time for the commencement of payment had not arrived; since the contract with Manickavaloo and Company remained in operation, a large number of copies of the latest editions of all the four books being in their hands unsold.

The questions for determination are (1) Was there any consideration for the agreement (exhibit I) to extend the time for payment? (2) If not, is the agreement valid? (3) If the agreement is found valid, whether the condition laid down in exhibit I for the arrival of the time for payment has happened.

As regards the first question the defendant's contention was that though exhibit I bears a date posterior to that of exhibit A, in point of fact, the letter was written and handed to him in pursuance of an understanding come to between him and the plaintiff prior to exhibit A being actually signed and delivered. To support this allegation, there is nothing but the uncorroborated word of the defendant.

Moreover the opening lines of exhibit I itself, referring to a conversation of the 30th November 1892 which appears to have led up to the letter being sent, are scarcely consistent with the truth

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of the defendant's story. I find, therefore, that there was no consideration for the agreement.

As to the second question, its determination depends upon the construction to be put upon section 63 of the Indian Contract Act which provides, among other cases for one like the present, of an agreement to extend the time for the performance of a promise. Before considering the provisions of the section, it would tend to a clear comprehension of them if I briefly refer to the state of the English Law on the subject. Under that law the rule, rigorously followed out, that every agreement, relating to the discharge of a contract, save the exception recognised by *Foster v. Dawber*(1) must, unless made under seal, be supported by consideration has not, as pointed out by Sir F. Pollock in his work on contracts (sixth edition, page 177), been productive of very happy results. The learned author attributes such results to the carrying out of a general principle beyond the bounds within which it is reasonably applicable; or in other words to the doctrine of consideration, instead of governing the formation of contracts, being made to regulate and restrain their discharge also.

Now the question arises whether the Indian Legislature intended to perpetuate such an unsatisfactory state of things in this country. I think that it did not, that in the Contract Act the doctrine of consideration was not extended to the regulation and restraining of the discharge of contract by agreement and that the Legislature laid down by section 63 a rule different from that of the English Law.

In the first place, the language of the section does not insist upon the presence of consideration in regard to the cases mentioned therein. This view is fully confirmed by the illustration b to the section. The case, put in that illustration, is that of a person entitled to a sum of money accepting a less amount than is due to him. Now according to *Poakes v. Beer*(2), cited for the plaintiff and which finally settled the law as to this matter in England, acceptance in full satisfaction of a debt of a smaller sum than the amount due does not operate as a complete discharge of the debt, even though such a discharge would result from the creditor similarly accepting some article, other than money, of less pecuniary value. But the law laid down by the illustration referred to is

(1) 6 Ex., 820.

(2) L.R., 9 App. Cases, 605.

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the reverse of the English rule. Now it being thus clear that in the above typical instance, a person is capable of legally binding himself without consideration to forego his right to the difference between the debt and the smaller sum accepted by him in full discharge of his debt and there being absolutely nothing in the language of section 63 to indicate the recognition, with reference to the matter under discussion, of any distinction between the different cases, comprised in the section, it follows that the necessity for any consideration is dispensed with alike in all the cases to which the section relates, including that of agreements to extend the time for the performance of a promise.

This conclusion is further strengthened by the purely artificial character of the reasoning by which English Judges have sought to prevent the rule, requiring consideration in cases like the present, operating in practice unreasonably; as will be seen from the observations of Lord Denman, C. J., in *Stead v. Dawber*(1) where he dissented from *Cuff v. Penn*(2) and laid down that it cannot be maintained, that although there was an agreed substitution of other days than those originally specified, still the contract remained. In meeting an objection, based on the absence of consideration, to the view which was taken by him, the Chief Justice argued thus "Nor does any difficulty arise from the want of consideration for the plaintiff's agreement to consent to the change of days; for the same consideration which existed for the old agreement is imported into the new agreement which is substituted for it." The resort to such a fiction is obviated, in this country, by section 63.

Here it may be asked whether section 62, which also refers to cases of agreements relating to the discharge of contracts and the language of which at first sight may appear broad enough to include the cases falling under section 63, is consistent with the view taken by me. From the mere fact that two sections were enacted on the subject, it must be taken that the legislature intended to draw a distinction between the set of cases comprised in section 62 and that in section 63. These sections therefore must be construed so as not to overlap each other. This would be done by holding that agreements referred to in section 62 are agreements which more or less affect the rights of both parties under the

(1) 10 Ad. & E., 66.

(2) 1 M. & S., 21.

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contract discharged by such agreements; whilst those referred to in section 63 are such as affect the right of only one of the parties. The former case *as hypothesi* necessarily implies consideration which is either the mutual renunciation of right or coupled with it the mutual undertaking of fresh obligations or the renunciation of some right on the one side and the undertaking of some obligation on the other, that forms the consequence of an agreement to rescind, substitute or alter mentioned in section 62. It is only when the agreement to discharge affects the right of only one party, that consideration might be found wanting and there alone the Indian Law departs from the English Law, by making provision, for every such possible case, in section 63.

The result is that the agreement set up by the defendant which, as already stated, falls under section 63 is binding though without consideration.

As to the third and the last question: In dealing with this, it is hardly necessary to say that the express undertaking given by Mr. Sheppard to Manickavaloo and Company under exhibit II that nothing will be done to the prejudice of the rights granted to them is fully binding on the defendant. Though this refers to only three out of the four books spoken of in exhibit I, the defendant does not stand in a different position as regards the remaining book, inasmuch as, in consequence of the express understanding between Mr. Sheppard and Manickavaloo with reference to the first edition of this book, the defendant is debarred from issuing a fresh edition of the work until the previous one has been exhausted. Therefore the sole fact to be found is whether, as alleged by the defendant, Manickavaloo and Company are still in possession of copies of all the four books so as to preclude him from publishing a new edition of any one of them. That that is the case is established by the uncontradicted evidence of one of the witnesses called for the defendant. It follows that the condition specified in exhibit I for the arrival of the time for payment has not yet happened.

The suit is premature and is dismissed with costs.

Rencontre—Attorney for plaintiff.

PRIVY COUNCIL.

E. O. MUTHUSAMI MUDALIYAR AND OTHERS, PLAINTIFFS,

AND

SIMAMBEDU MUTHUKUMARASWAMI MUDALIYAR,
DEFENDANT.

[On appeal from the High Court at Madras.]

*Inheritance according to the Mitakshara, Chap. II, s. 6.—Succession of bhandu—
Priority of mother's half-brother over sons of father's paternal aunt.*

The statement of bhandus entitled to inherit given in the Mitakshara, Chap. II, s. 6, is not an exhaustive one. The maternal uncle of the deceased is omitted, but the sons of that uncle are specified.

The omission to mention a maternal uncle does not signify that he is excluded from the first class of bhandus.

The grounds of the judgment in *Gridhari Lal Roy v. The Government of Bengal*(1) apply, not only to the heirship of a maternal uncle as against the claim in default of heirs, but also apply equally to questions between nearer and more remote bhandus. A maternal uncle is, accordingly, an heir, though not specified in the Mitakshara list, and he also has priority over the sons and grandsons of the paternal aunt of the father of the deceased, who are more remote than he is.

A mother's brother by the half-blood stands on the same footing as her whole brother in regard to priority over more remote bhandus. A half-brother may be postponed to a whole brother, but there is no ground for his postponement to more distant kinsmen.

APPEAL from a decree (5th May 1892) of the High Court, affirming a decree (12th May 1891) of the District Court of Chingleput.

The first and second appellants were the sons, and the third appellant was the grandson, of Parvatha Ammal, sister of Arumugatha Mudaliar, who was paternal grandfather of Muthuswami Mudaliar, the last male owner of the property, to which their suit laid claim.

The defendant (respondent) claimed under Nagappa Mudaliar, who was the half-brother of Muni Ammal, the mother of Muthuswami.

* Present: Lords WATSON, HOBHOUSE and DAVEY, and Sir RICHARD COUCH.
(1) 12 M.I.A., 448; 1 B.L.R., 51.

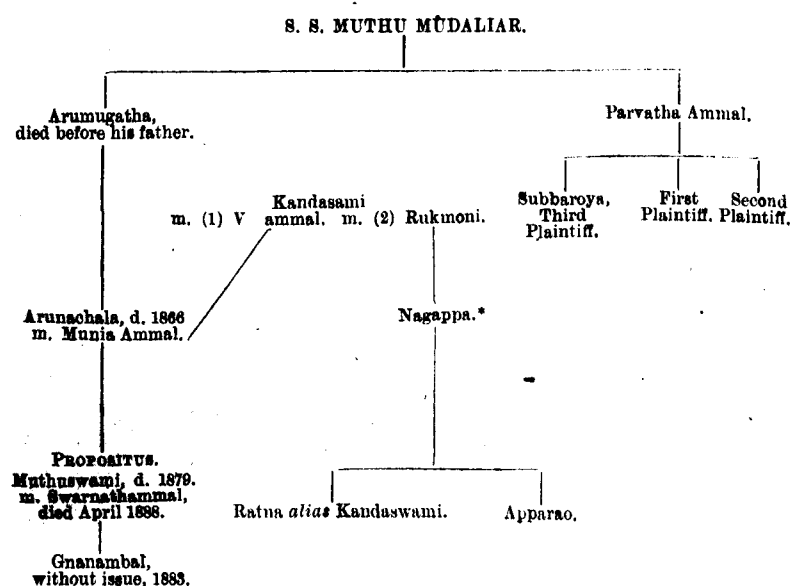
* P.C.
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The principal questions on this appeal were: (1) whether the sons and grandson of the aunt of the father of Muthuswami were entitled to inherit from the latter in priority over the descendant of the half-brother of Muthuswami's mother, Muni Ammal.

To answer the above involved the deciding another question (2) whether the maternal uncle's being of the half-blood made any difference as to whether he was an heir, and took priority over the other bhandus.

The relationship of the family, so far as it is material to this case, will appear from the following pedigree:—



The written statements of the parties, in effect, raised the question, stated in the first issue,—whether the plaintiffs, or Nagappa, were the reversionary heirs entitled to succeed on the death of the widow Swarnathammal. Evidence was adduced at the hearing as to other questions in other issues as to whether there had been certain releases, and a will executed conferring rights on the defendant. But with this the District Judge did not proceed, being of opinion that his decision should be governed by the preliminary question whether the maternal uncle of the 'propositus' was his heir, and preferred to the plaintiffs, who

* Nagappa in the above pedigree is the defendant's predecessor in title.

were the sons and grandsons of the paternal aunt of the father of the deceased. It was admitted in the Court of First Instance that Nagappa was only the half-brother of Muniyammal, and the suit proceeded on the basis that Parvatha Ammal was the full sister of Arumugatha.

The District Judge decided the question in favour of the defendant, upon the construction put by the Judge upon the text of the Mitakshara in chapter II, section 6. He held upon the construction, placed by him on the words, that a maternal uncle was a man's own bhandu (atma-bhandu), and was as such entitled to inherit in preference to a paternal grandfather's sister's son, who, according to this decision, was his father's bhandu (his pitri-bhandu). Upon this construction he held that Nagappa was, at the death of Swarnathammal, the nearest reversioner of Muthuswami. Thus, the title of the defendant was established, and the suit was dismissed.

The plaintiffs' appeal from this decision to the High Court was heard by a division Bench (Sir T. Muthuswami Aiyar, C.I.E., and Parker, J.J.). The judgment of the District Judge was affirmed by the High Court. *Muthuswami and others v. Muthukumaraswami*(1).

Sir R. T. Reid and Mr. J. H. A. Branson for the appellants. The following were the principal points urged: The High Court had not been right in their construction of the rules as to bhandus' succession given in the Mitakshara, chapter II, section 6; but should have held that an uncle on the mother's side was not preferred as an heir, taking in priority over the son of the father's paternal aunt. The Mitakshara in that section omitted the maternal uncle in the enumeration of bhandus entitled as heirs. He, at all events, did not take in preference to the son of the sister of the grandfather of the deceased.

Under the Dayabaga, those who could offer oblations to paternal ancestors, as a father's paternal aunt's son could do, were preferred, in successions, to those who, at the most, could only offer oblations to relations on the mother's side. To offer oblations to the latter was all that a maternal uncle could do. Under the Mitakshara these considerations might not be of direct weight, as the foundation of the rule of descent was not laid in ceremonial obligations

(1) I.L.R., 16 Mad., 23.

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under the system which the Mitakshara enforced. But the succession as much as possible in the male line was regarded under both systems as superior to that through the female line. Here the appellants could trace through more than one generation before resorting to the ancestress. Reference was made to *Bhaiya Ram Sing v. Bhaiya Jubray*(1).

In this case, there was another point,—that the uncle, through whom the respondent claimed,—Nagappa (whose mother was Rukmoni) was only half-brother to Muni Ammal, whose mother was Vedammal.

Mr. J. D. Mayne, for the respondent, was not heard.

On a subsequent day, 9th May, their Lordships' judgment was delivered by Lord HOBHOUSE.

The question in this appeal is one of pure law, relating to the inheritance of a Hindu gentleman who died in the year 1879. No facts are in dispute. He had no issue except a daughter who died without issue in 1883; his widow who became his heir died in 1888; at that time, when his inheritance opened, he had no collateral relatives of the same gotra with himself; both parties claim as bhandus or cognates; two of the plaintiffs are the deceased's first consins once removed, being sons of his father's father's sister; and the third plaintiff is one degree more remote; the defendants claim under a half-brother of the deceased's mother.

The text of the Mitakshara which governs the question raised on these facts (chapter II, section 6) is, as translated by Colebrooke, as follows:—

"On failure of gotrajas the bhandus are heirs. Bhandus are of three kinds, related to the person himself (atma-bhandu), to his father (pitri-bhandu), or to his mother (matri-bhandu) as is declared by the following text:—'The sons of his own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle must be considered his atma-bhandus. The sons of his father's paternal aunt, the sons of his father's maternal aunt and the sons of his father's maternal uncle must be reckoned as his pitri-bhandus. The sons of his mother's paternal aunt and the sons of his mother's maternal uncle must be reckoned as his matri-bhandus.'"

The commentator then says in the next verse:

(1) 5 B.L.R., 293.

"Here by reason of near affinity the bhandus of the deceased himself (his atma-bhandus) are his successors in the first instance: on failure of them, his father's bhandus (pitri-bhandus), or if there be none, his mother's bhandus (matri-bhandus)."

The plaintiffs, being the sons and grandson of the paternal aunt of the deceased's father, are expressly mentioned as falling within the second kind of bhandus who cannot succeed until after failure of the first kind. They are therefore reduced to contend that the quoted text contains an exhaustive list of bhandu successors, and that as the deceased's maternal uncle is not mentioned in it, he cannot succeed. Both Courts below have decided against that contention.

Their Lordships do not think it necessary to discuss the fanciful suggestion made in the Courts below and refuted there with much care and learning to the effect that the quoted text is addressed to religious ceremonies of purification rather than to positive rules of succession. To whatever extent rules of successions may have been founded on religious observances, or may now be explained by them, it is clear that fixed rules of law for successions have been established for ages, and equally clear that the Mitakshara professes to express such rules in the quoted text. Taking it to mean what it says, the question is whether its omission to mention a maternal uncle signifies that he is excluded from the first class of bhandus, or whether the writer is not rather classifying by sample without attempting to specify every member of each class.

Their Lordships are of opinion that, even if the quoted text stood alone, the only admissible construction would be the latter one; for no rational ground can be assigned for excluding the maternal uncle of the deceased while his more remotely allied sons are admitted to succeed. But in fact the text does not stand alone, and whatever difficulty might at one time have been felt in applying, it has now been removed by judicial decision.

In the case *Gridhari Lall Roy v. The Bengal Government*(1), the person claiming to be heir was the maternal uncle of the deceased's father. The High Court of Calcutta decided against his claim on the ground that he was omitted from the quoted text. On appeal, this Board referred to a passage in the Mitakshara, which is not translated by Colebrooke, but which was translated and used for

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the purpose of that suit. In that passage, which deals with the property of a trader dying abroad, his maternal uncle is included among bhandus capable of succeeding, though the order of succession is not there stated. The Board also referred to a passage of the Viromitrodaya as a work of high authority at Benares and properly receivable to explain things left doubtful by the Mitakshara. That passage states that maternal uncles are to be comprehended in the quoted text, noting how objectionable it would be to exclude them while admitting their sons. This Board held that a grand-uncle fell within the same reasoning, and upheld the plaintiffs' title.

It is true that in that case the dispute was between the person claiming as heir and the Crown claiming as in default of heirs. But the grounds of the judgment apply equally to questions between nearer and more remote bhandus. The decision is precisely in point, and as it entirely commands the assent of their Lordships, they examine this question no further.

The only other question raised is whether a mother's brother by the half-blood stands on the same footing as an uterine brother. This point also is decided in the Courts below against the plaintiffs on grounds in which their Lordships entirely concur. A half-brother may be postponed to an uterine brother; but there does not appear to be any authority, and certainly there is no reason for holding that he should be postponed to more remote kinsmen. In fact the point was not pressed by the appellants' counsel at this bar.

The result is that their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellants must pay the costs. Appeal dismissed with costs.

Solicitors for the appellants: Messrs. Pemberton, Garth & Cope.

Solicitors for the respondent: Messrs. Lawford, Waterhouse & Lawford.

APPELLATE CIVIL.

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

UDAYANA PILLAI (PLAINTIFF), APPELLANT,

v.

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

1896.
July 17, 80.

Usufructuary mortgage—Personal covenant to pay—Limitation Act—Act XV of 1877.

Where a usufructuary mortgage contains a personal undertaking to pay the amount secured thereby, the limitation applicable to a suit brought on the mortgage is governed by article 147, Limitation Act XV of 1877. *Sivakami Ammal v. Gopala Savundram Ayyan* (1) followed.

SECOND APPEAL against the decree of J. W. Dumergue, District Judge of Madura, in appeal suit No. 67 of 1894, reversing the decree of S. Authinarayana Ayyar in original suit No. 1636 of 1892.

The facts of this case were as follows:—

In this case the plaintiff sued on a mortgage deed to recover Rs. 200 being the principal, and Rs. 100 being damages from the defendants and by sale of the mortgaged property.

According to the plaint, the father of the first and second defendants executed a registered mortgage deed in favour of the plaintiff's father on the 8th October 1867. From that time until fasli 1298 (1888–89) the plaintiff's father and then the plaintiff were in possession and enjoyment of the mortgaged land. In fasli 1299 (1889–90) the first and second defendants agreed to cultivate the land themselves and to pay half varam to the plaintiff, but failed to do so from fasli 1299 to fasli 1301. The third and fourth defendants, being the cousins, and the fifth defendant, being the uncle of the first and second defendants' father, were impleaded as members of a joint family and liable for the debt.

The District Munsif exonerated the third, fourth and fifth defendants and their share of the property and found that there had been no such agreement in 1889 with the first and second defendants as alleged by the plaintiff. In the result he gave the

* Second Appeal No. 664 of 1895.

(1) I.L.R., 17 Mad., 131.

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plaintiff a decree for the recovery of the mortgage amount from the share of the mortgaged property belonging to the father of the first and second defendants in their hands, and, in case of failure of payment within six months, by sale of that share, but disallowed the plaintiff's claim to damages. The first and second defendants appealed to the District Court and the plaintiff filed a memorandum of objections against such part of the decree as found that plaintiff had no enjoyment of the plaint property within twelve years prior to the suit, and that there was no such letting as is alleged to the first and second defendants in 1889 and refused damages.

On the hearing of the appeal the only point raised had reference to the question of limitation, and it was contended that the District Munsif was wrong in holding that the suit was governed by article 147 and not by article 132 of the Limitation Act of 1877, and on this point the Lower Appellate Court reversed the decree of the District Munsif and dismissed the suit with costs.

The plaintiff appealed to the High Court.

Krishnasami Ayyar for appellant.

Sankaran Nayar for respondents.

JUDGMENT.—Plaintiff sued for recovery of Rs. 200 alleged to be due under an instrument of mortgage (exhibit A) by sale of the mortgaged property.

The District Munsif decreed for plaintiff, but the District Judge reversed the decree and dismissed the suit on the ground that exhibit A evidenced a usufructuary mortgage, pure and simple, containing no covenant to repay the mortgage money, but with an express contract that plaintiff's only remedy should be to remain in possession if defendants failed to repay the mortgage money.

Against this decree the plaintiff instituted this second appeal on the ground that the District Judge misconstrued exhibit A.

We think the appeal is well founded. Exhibit A is dated 8th October 1867. By it the defendant's father mortgaged certain lands for Rs. 200 to the plaintiff, and the contract between the parties is expressed as follows:—

"In lieu of interest on this sum of Rs. 200, you will, for three years from this year, raise any crops you like, including summer and season crops, pay Government assessment and enjoy the said lands. On the expiry of the term, I shall pay the said Rs. 200 and redeem the lands. If they are not redeemed in that manner,

"you will, till payment of the amount, enjoy them as under mortgage as mentioned above."

We think that these words contain a covenant to repay the mortgage money on a certain date, viz., on the 8th October 1870. If the words "on the expiry of the term, I shall pay the said Rs. 200 and redeem the lands" stood alone, there could be no question as to their meaning and effect, but the District Judge considers that the succeeding words indicate that the only covenant was that, in the event of non-payment, the plaintiff should continue to enjoy the lands. We do not think that this was the intention of the parties or is the true construction of the words. If that were the intention of the parties, it would have been easy to have stated it in appropriate language without the express contract, "on the expiry of the term I shall pay the said Rs. 200." This express contract is not, as the District Judge supposes, nullified by the words that follow it.

These latter words, no doubt, contain an agreement that until payment the plaintiff shall remain in enjoyment of the land, but they do not say or imply that this shall be the plaintiff's only remedy in case of non-payment. They, as well as the previous covenant, are for the benefit and protection of the mortgagee (plaintiff), but to give them the meaning suggested by the District Judge would be to nullify the previous express covenant to repay on a certain date and deprive the plaintiff of the benefit intended to be secured to him by those words.

The case is very similar to that decided lately by the Full Bench in *Sivakami Ammal v. Gopala Savundram Ayyan*(1). There the agreement was "I shall pay you the said mortgage amount" on a certain date in 1883, and a further clause provided "If I fail to pay you" on the said date, "you shall receive" it on the corresponding date "of whatever year I may pay it." The Full Bench held that the document clearly contained a covenant to pay and that a suit for sale therefore lay.

In the present case we are of opinion that exhibit A contains not merely a usufructuary mortgage, but such a mortgage with an express covenant to repay the mortgage money on a certain date now long since past.

(1) I.L.R., 17 Mad., 131.

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The contention of the respondents that the suit is barred under article 132 of schedule 2 of the Indian Limitation Act is untenable. The article applicable is No. 147, and the time allowed for sale is sixty years.

In the result we must reverse the decree of the District Judge and restore that of the District Munsif. The plaintiff must have his proper costs in all Courts.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

BALAJI RAU (PLAINTIFF No. 1), APPELLANT,

v.

SITHABHOY AND OTHERS (DEFENDANTS AND PLAINTIFF
No. 2), RESPONDENTS.*

Civil Procedure Code, s. 560—No application for rehearing—s. 584 (c)—
Power of High Court to interfere.

Where an appeal was heard *ex parte* by a Lower Appellate Court and the decree of the Court of First Instance reversed in the absence of the respondent, on whom notice of appeal had not been duly served and who was not aware of the proceedings till after the time for applying for a rehearing under s. 560 and Limitation Act, sched. II, art. 169 had expired:

Held, that the High Court in second appeal had power to interfere under s. 584 (c), Civil Procedure Code.

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of North Arcot, in appeal suit No. 278 of 1893, reversing the decree of T. A. Krishnasami Ayyar, District Munsif of Arni, in original suit No. 283 of 1892.

The facts of the case were as follows:—

The suit was instituted by plaintiff No. 1 alone against the defendants who are respectively his maternal grandmother, mother, and maternal grandfather's brother for a declaration of his reverend title to the plaint properties which belonged to his maternal grandfather deceased.

* Second Appeal No. 688 of 1895.

Upon the objection of the third defendant who alone appeared and contested the suit, the second plaintiff, another grandson of his brother by another daughter, was brought on the record.

The substance of plaintiffs' case is that the maternal grandfather having died 20 years ago without male issue, his widow, the first defendant, inherited the properties to the value of Rs. 2,000 left by him, and though possessing only a life interest has conveyed, the lands, &c., in dispute to the third defendant under a deed, dated 21st May 1892, for a nominal consideration of Rs. 832, and that the second defendant is colluding with them.

The Munsif found (*inter alia*) that the sale to defendant No. 3 was not binding on the plaintiff, but that the third defendant is entitled to be recouped by the plaintiff Rs. 135, which had been paid by him to first defendant for her maintenance.

On appeal the Subordinate Judge reversed the decision of the Munsif, the respondent not appearing in person or by pleader, and dismissed the suit with costs.

The plaintiff preferred an appeal to the High Court and filed an affidavit, which was not contradicted, containing the following allegations:—

"That the said appeal was heard and decided *ex parte*, the respondents not appearing in person or by pleader.

"That I did not know of the filing of the appeal at all and I was not served with any summons or other process of Court in connection with said appeal.

"That the endorsement on the summons that the duplicate was affixed to the outer door of the house in which my family was then residing at Sathia Vijianagaram, can only mean, if at all, the house in which either my mother or grandmother was living; and these are respectively the second and third defendants in the suit brought by me.

"That, on the 21st March 1895, for the first time I was told at Ambur that there was an appeal against the decree in my favour in original suit 283 of 1892 on the file of the Court of the District Munsif of Arni, and that the same was decided against me *ex parte*."

Ranga Rau for appellant.

Ramachandra Rau Sahib for respondent No. 3.

ORDER.—The appellant's remedy under section 560 of the Code of Civil Procedure being barred by limitation through no

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fault of his own, we think we have the power to afford him an alternative remedy in second appeal under clause (c), section 584. So that we shall call upon the Lower Appellate Court to take evidence and find whether the appellant was or was not duly served with notice of the appeal. The report with the notice and return in original and the evidence are to be submitted as early as possible.

APPELLATE CIVIL.

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

1896.
July 16, 30.

RANGAYYA APPA RAU (DEFENDANT No. 4), APPELLANT,

NARASIMHA APPA RAU (PLAINTIFF), RESPONDENT.*

Boundary Marks Act (Madras)—Act XXVIII of 1860, s. 25—Boundary Marks Act (Madras)—Act II of 1884, s. 9—Suit to set aside decision of the Survey officer—Plea of limitation abandoned.

A suit filed on 21st April 1891 to set aside the decision of the Settlement officer under the Madras Boundary Acts passed on 15th September 1890 was dismissed by the Munsif as being time-barred not having been brought within six months as provided by s. 25 of Act XXVIII of 1860. This decision was reversed by the District Judge, who remanded the suit for disposal on the merits, holding that the production by the plaintiff of a copy of the judgment, dated 25th October 1890, raised a presumption that the suit was in time and shifted the burden of proof to the defendant to show that an earlier copy was granted to plaintiff, or that the decision was pronounced in the plaintiff's presence. Against this remand order there was no appeal. At the rehearing the question of limitation was not again raised, and the Munsif gave a decree on the merits. An appeal was preferred to the District Court, but no mention was made of the question of limitation. On appeal to the High Court:

Held that the question of limitation had been put aside by the consent of the parties who desired to have the case decided on the merits, and that the appellant could not be allowed to fall back on this plea which he had abandoned in the Lower Courts.

SECOND APPEAL against the decree of E. A. Elwin, Acting District Judge of Kistna, in appeal suit No. 935 of 1892, modifying the decree of C. Rama Rau, District Munsif of Bezvada, in original suit No. 181 of 1891.

* Second Appeal No. 497 of 1895.

Plaintiff brought this suit alleging that the Survey department in their survey fixed the boundary stones improperly including 241 acres 92 cents of land belonging to him in Sunkollu village attached to the Sub-Registry of Nuzvid with Yanamadala village belonging to defendants, and praying for a decree establishing the red line on the marks A, B, C referred to in the plaint plan as the boundary limit and to fix boundary stones in the said site and to remove the stones improperly fixed at a cost of Rs. 10, establishing plaintiff's right to the lands marked from I to R and for possession of the same, and directing defendants to pay costs.

The District Munsif of Bezvada having dismissed this suit on the 19th March 1892 on the ground that it is barred by limitation, inasmuch as it was instituted after the expiration of six months from the date of the decision of the Survey officer, the plaintiff preferred an appeal. Thereupon the District Court, setting aside the judgment and decree of this Court, issued an order, dated 10th February 1893, remanding the suit for retrial.

On the hearing of the retrial the District Munsif passed a decree in favour of the plaintiff, which was confirmed with certain modifications not now material by the District Court on appeal.

The fourth defendant appealed to the High Court and took the objection that the original suit was barred by limitation under section 25 of Act XXVIII of 1860 (Madras Boundary Marks Act) as amended by section 9 of Act II of 1884 (Madras) not having been filed within six calendar months after the passing by the Settlement officer of his decision under the said Act.

Rama Subbayyar and Subramania Ayyar for appellant.
Sadagopa Chariar for respondent.

JUDGMENT.—Plaintiff sued to set aside a decision of the Survey officer passed under section 25 of (Madras) Act XXVIII of 1860 in regard to the boundary between two villages, and for a declaration that the boundary was as stated by him in the plaint, and for recovery of certain lands within that boundary alleged to have been taken possession of by defendants after the decision of the Survey officer.

The defendants pleaded that the suit was time-barred, and denied both the correctness of the boundary proposed by plaintiff and the alleged trespass.

The District Munsif dismissed the suit as time-barred on the ground that, under section 25 of Act XXVIII of 1860 (Madras) as

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amended by section 9 of Act II of 1884, a suit to set aside the decision of a Survey officer must be brought within six months of the passing of the decision, whereas the present suit was not brought until the 25th April 1891, though the decision was passed on the 15th September 1890.

At the appeal the plaintiff produced before the District Judge a copy of the Survey officer's decision, which copy was prepared in the Survey office on the 25th October 1890. The District Judge thought that this raised a presumption that the suit was in time, or at least threw on the other side the burden of showing that an earlier copy was granted to plaintiff, or that the Survey officer's decision was pronounced in the presence of plaintiff. He therefore remanded the suit for a fresh trial.

We observe that these proceedings of the District Judge were not warranted by law. The Act does not require that the Survey officer's decision should be pronounced in the presence of the parties, but merely that they should be informed of it after it has been duly recorded. Neither can the date on the copy raise any presumption at all that it was on that date that the holder was first made aware of the decision. Any number of earlier copies may have been made and given to the plaintiff, and it was not for the defendants to prove that plaintiff had the information earlier; but it was for the plaintiff, when the plea of limitation was raised, to show that his suit was in time. He took no steps to do this before the District Munsif, and the District Judge should not have admitted the copy before him as proof that plaintiff was first informed of the decision on the date it (the copy) was made. Further the District Judge, even on his own view of the effect of the copy, should not have remanded the suit for a fresh trial, but he should have first called for further evidence as to the date on which plaintiff was informed of the order, and he should then have himself decided the issue as to limitation.

Having noticed these irregularities, we follow the further progress of the case. When it was remanded the District Munsif's successor recorded that neither party pressed the question of limitation before him, and he proceeded to dispose of the suit on the merits.

Against that decree the plaintiff appealed to the District Judge, but, though nine grounds of appeal were stated by the appellant and two grounds of objection were notified by the respondents, no

reference was made by either side to the question of limitation, and the District Judge gave a decision on the merits. The fourth defendant now appeals, and the only ground urged before us is that the suit is time-barred for the reason stated by the District Munsif in the first trial. From what has been stated it is manifest that the question of limitation was put aside by the consent of the parties, and that they desired to have the case decided, not with reference to any such plea, but on the merits; and it was so decided in both the Courts below. This being so, it is impossible to allow the appellant now to fall back on the plea which he abandoned in both the Lower Courts, and, the more so, since it is a plea dependent on a variety of facts on which findings would have to be obtained before a decision could be given on it. It would be impossible to deal with the litigation of the country if such procedure were countenanced.

We confirm the decree of the Lower Court and dismiss this appeal with costs.

APPELLATE CIVIL.

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

APPASAMI NAYAKAN (DEFENDANT No. 2), APPELLANT,

v.

VARADACHARI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, s. 375—Power of Court to frame additional issues as to an alleged compromise effected subsequent to the institution of the suit.

The Civil Procedure Code, s. 375, was intended to meet cases where the parties having agreed to compromise subsequently fall out. The original Court has power to frame an additional issue to decide whether a lawful compromise had been effected between the parties subsequent to the institution of the suit.

SECOND APPEAL against the decree of S. Russell, District Judge of Chingleput, in appeal suit No. 206 of 1893, reversing the decree of M. Visvanatha Aiyar, District Munsif of Conjeeveram, in original suit No. 640 of 1892.

The facts of this case were as follows:—

* Second Appeal No. 717 of 1895.

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APPA RAU
v.
NARASIMHA
APPA RAU

1896.
July 24.

APPASANI
NAYAKAN
v.
VARADA-
CHARI.

This is a suit to have the plaintiffs' right established to a certain site and to recover with costs possession thereof from the defendants after getting the thatched shed erected thereon by the first and second defendants removed.

In the plaint presented on 6th October 1892, the plaintiffs allege that the site mentioned at the foot of the plaint belongs to them, a part of it being their ancestral property and the remaining having been acquired by purchase on 16th March 1880 by their deceased undivided brother Narasimha Chari, that it forms part of the backyard of their house, that the said Narasimha Chari first let out the ancestral portion of the site on 14th June 1878 to one Aulai as per rental agreement, and subsequently on 15th July 1880 let out the whole site to the first defendant taking from him also a rent bond that the first plaintiff also allowed the second defendant to live on the site taking a rent bond from him also on 16th May 1885, that the first and second defendants have been accordingly living on it having erected a thatched shed thereon, that the defendants have no right whatever to the site in question, that although the defendants Nos. 1 and 2 had been repeatedly asked, both orally and through writing, to vacate the site and to surrender it to the plaintiffs, they did not do so.

In the written statement presented on 21st November 1892 by the defendants' pleader, it is alleged that the plaintiffs' suit is fraudulent, that the allegation that the first and second defendants executed rent bonds to the plaintiffs is false, that the defendants' family have been living in the thatched shed on the site in dispute for the past sixty years, that the site in dispute has been in their exclusive enjoyment during that period, and that the plaintiffs have brought this false suit because the defendants filed a criminal complaint against them before the Sreeperumadur Magistrate for having tried to remove their thatched shed.

The following issues were recorded on 21st October 1892 :—

- (1) Are the rent bonds relied upon by the plaintiffs genuine?
- (2) How long have the defendants been in occupation of the site sued for and under what title?

The following additional issue was recorded on 21st March 1893 :—

Did the plaintiffs sell the site sued for along with an adjacent site for Rs. 80 on 25th October 1892, and

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execute a sale deed and receive that sum and agree on 21st October 1892 to withdraw this suit?

The Munsif found that the rent bonds relied on by the plaintiffs are genuine and that defendants had been in occupation as the tenants of the plaintiffs, but that the plaintiffs sold the site sued for for Rs. 80 on 25th October 1892, by an unregistered sale deed of that date, that the said sale was accompanied by possession and was valid in law. On these findings the suit was dismissed with costs.

On appeal the District Judge in reversing this decree remarked as follows :—

"The documents, exhibits A, B, C and D, which have, I think, very properly been found to be genuine establish the title of the plaintiffs beyond any doubt.

"The defendants also in a manner, admit the title, for their present case is that they have during the course of the suit purchased from plaintiffs the site in dispute for Rs. 80.

"The procedure adopted by the District Munsif in recording the additional issue is not in accordance with any procedure which has been pointed out in appeal. The third issue is not framed on the pleadings of the parties.

"The procedure which might have been followed, that, namely, sanctioned by section 375, Civil Procedure Code, has not been followed; so that it appears to me the plaintiff is still at liberty to prosecute his suit to a conclusion on the merits."

On a consideration of the sale deed of 25th October 1892, the District Judge held that, as it was not registered, it was not valid in law and passed a decree for possession without costs.

The defendant No. 2 appealed to the High Court.

Srirangachariar for appellant.

Rangaramanujachariar for respondents.

ORDER.—We do not understand the grounds on which the District Judge objects to the procedure of the District Munsif in framing the third issue. When the defendants alleged a compromise for consideration in the course of the suit and the plaintiffs denied it, an issue arose between them, and the District Munsif was right to record it and determine it, so as to enable him to deal with the suit under section 375, Code of Civil Procedure. That section 375 was intended to meet cases in which the parties,

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having agreed to compromise subsequently fall out, has been held in *Karuppan v. Ramasami*(1) and *Appasami v. Manikam*(2). The District Munsif found that Rs. 80 was paid by the defendants as consideration for the promised withdrawal of the suit by plaintiffs, but that plaintiffs failed to fulfil their promise. We do not think that there is any necessity to consider the validity of the sale deed which is said to have been executed. The only question is whether the defendants paid the plaintiffs Rs. 80 on the plaintiffs' promise to withdraw the suit. If they did, the compromise ought to be enforced.

We must ask the District Judge to return a finding on this issue, on the evidence already recorded, within three weeks of the receipt of this order. 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 Benson.*

VENGANAYYAN AND OTHERS (DEFENDANTS), APPELLANTS,

v.

RAMASAMI AYYAN (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 588, cl. 28—Appeal against order of remand—

Finding of fact—Letters Patent, s. 15.

Where an appeal is preferred against an appellate order under section 588, Civil Procedure Code, the finding of fact by the Lower Appellate Court is conclusive as between the parties on the proper construction of sections 584 and 588, Civil Procedure Code.

There is no appeal under the Letters Patent, s. 15 against an order of a single judge passed under Civil Procedure Code, s. 588, cl. 28.

APPEAL under Letters Patents, section 15, from the judgment of Mr. Justice Muttusami Ayyar, in appeal against order No. 96 of 1893.

The facts of this case were as follows :—

The plaintiff, sued as reversioner to recover certain movable and immovable properties, valued at Rs. 2,548, said to have

(1) I.L.R., 8 Mad., 482.

(2) I.L.R., 9 Mad., 103.

* Letters Patent Appeal No. 55 of 1894.

belonged to one Sitaramayyan of Sinanipatty in the Sivaganga Zamindary, and last held by Sitaramayyan's widow, Subbalakshmi Ammal, who died at Sinanipatty in November 1881.

The principal fact in dispute was comprised in the first issue, viz., whether the plaintiff is related to Sitaramayyan as alleged by him, and is he the next reversionary heir after Subbalakshmi Ammal? Several other issues were framed by the Subordinate Judge, but he dismissed the suit with costs holding with regard to first issue that the plaintiff failed to prove that he is the dayadee of Sitaramayyan or that there was any common link between him and Sitaramayyan so as to constitute him the next heir after the death of Subbalakshmi Ammal.

On appeal the District Judge reversed the judgment of the Lower Court, and remanded the suit for trial for a fresh decree after findings are recorded on the other issues framed in the suit. Against this order of remand the defendants filed an appeal under section 588, clause 28, Civil Procedure Code.

Ramachandra Rau Saheb and Rangachariar for appellants.

Desikachariar for respondent.

MUTTUSAMI AYYAR, J.—The first issue recorded for decision in this case was whether the plaintiff was the next reversionary heir of Sitaramayyan, deceased. The Court of First Instance determined the question against the plaintiff and dismissed the suit without deciding the other issues. On appeal the District Judge found upon the evidence that the plaintiff was Sitaramayyan's reversionary heir and reversing the decree of the first Court, remanded the case under section 562 of the Code of Civil Procedure for disposal on the other issues. Hence this appeal from the order of remand under clause 28 of section 588, Civil Procedure Code. It is conceded that the order of remand satisfies the requirements of section 562 both in form and in substance. It was held in *Ramachandra Joishi v. Hazi Kassim*(1) that it was competent to the Lower Appellate Court to pass an order of remand under section 562 when the Court of First Instance records evidence on all the issues and at the final hearing dismisses the suit erroneously on some particular point without expressing any opinion on the other issues. It is contended, however, that the Judge's finding as to the plaintiff being the reversioner is contrary to the weight of

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NAYYAN
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(1) I.L.R., 16 Mad., 207.

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AYYAN.

evidence on the record and that this Court is bound to consider whether the Lower Appellate Court's finding is correct. The following cases were cited at the hearing—*Badam v. Imrat*(1), *Bhaubala v. Bapaji Bapuji*(2), *Abraham Khan v. Faizunnessa Bibi*(3), and *Sohan Lal v. Azizunnissa Begam*(4).

The question now raised for decision was not decided in any of those cases, the only point decided therein being whether the decision of the Lower Appellate Court on the preliminary point was on the facts found by it open to any legal objection. I am of opinion that section 584 defines the powers of the High Court in second appeals and that no reason can be conceived for larger powers being conferred in appeals from what is termed an order in an appeal, and what is in substance an appellate decree on a particular or preliminary point or issue. Sections 588 and 584 ought to be read together and on so reading them, I can discover no legal foundation for holding that in appeals from orders of remand made in regular appeals by District Courts, this Court is not bound by the findings of fact on which the decision of the Lower Appellate Court rests. Otherwise in second appeals preferred from appellate decrees, the High Court would be bound to accept the findings of fact recorded by the District Courts whilst in appeals from remand orders which are substantially second appeals from the decision of the District Judge on appeal on a preliminary or particular point, the High Court would not be bound to accept the findings of fact. This seems to me to be an anomaly.

I dismiss this appeal with costs.

The defendant preferred the present appeal under Letters Patent, section 15.

Rangachariar for appellants.

Desikachariar for respondent.

JUDGMENT.—No appeal is allowed by law in this case.

(1) I.L.R., 3 All., 675.

(3) I.L.R., 17 Cal., 168.

(2) I.L.R., 14 Bom., 14.

(4) I.L.R., 7 All., 136.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

CURSETJEE PESTONJEE BOTTLIWALLA (PLAINTIFF),
APPELLANT,

1896.
March
18, 24.

v.

DADABHAI EDULJEE AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Suit for a legacy and share in residue—Limitation Act, sched. II, art. 123—Time begins to run at the expiration of one year from the death of the testator.

A suit was brought in May 1894, by a legatee claiming under the will of a testator, who died in December 1881, against the executors of the will. The plaint did not specifically ask for payment of the legacy or for ascertainment of the share in the residue due to the plaintiff, but set forth certain alleged acts of misconduct on the part of the defendants with respect to their dealings with the property, and prayed the Court to call for an account to set aside certain sales of the property made by the defendants and for damages. The Court of first instance, without going into the merits, held that the suit was really for an account, and dismissed it as being barred. On appeal to the High Court:

Held, that the plaint should have been amended in order to show clearly that the plaintiff really was trying to recover his legacy from the defendants personally and that, therefore, the suit fell within art. 123, sched. II, Limitation Act, and that the same being payable one year after the testator's death on 8th December 1881, the suit was in time.

APPEAL against the decree of T. Weir, District Judge of Coimbatore, in original suit No. 15 of 1894.

The facts of the case appear from the plaint which was as follows:—

"One Pestonjee Nusserwanjee Bottlivala, late of Nilgiris, Parsee, inhabitant hereinafter called the testator, made his last will in writing in the English language dated the tenth day of June one thousand eight hundred and eighty, of which copy is hereto annexed, marked A.

"The said testator died at Mysore within the territories of the Maharaja on or about the eighth December one thousand eight hundred and eighty one, without having revoked or altered his said will, leaving considerable immovable and movable estate and

* Appeal No. 116 of 1895.

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"effects at (among other places) Ootacamund, Wellington, Calicut, Pothanur and Wynaad within the Presidency of Madras.

"The said testator at the time of his death, as aforesaid, left two sons, namely, one Phirozshaw Pestonjee *alias* Phirozshaw Framjee and the plaintiff, and three daughters, namely, Cursetbai (now widow of the late Muncherjee Shapurjee Mehta deceased), Soonabai (widow of the late Framjee Sorabjee Khumbata deceased) and Ratanbai (wife of Framjee Maneckjee Mhow) his only next-of-kin him surviving.

"Letters of administration to the estate and effects of the said testator (with his said will annexed) were, on or about the twenty-sixth day of August one thousand eight hundred and eighty two, granted by this Court to the defendants, the attorneys of John William Minchin, the sole executor of the will, of which copy is herein annexed, marked B.

"Before and after the grant of such letters of administration the defendants, as such administrators as aforesaid, took upon themselves the management, collection and administration of the estate and effects of the said testator, and they now purport to have fully managed, collected and administered the whole of such estate and effects, save and except outstandings to the amount of Rs. 6,000, which they allege they are unable to collect and four pieces of land, namely, one piece of land at Devala, two pieces of land at Kotagiri and one piece of land at Pothanur, which they allege for want of title and for other reasons, are unsaleable."

"The defendants have, as such administrators as aforesaid, made out an account of their alleged administration of the estate and effects of the said testator and filed the same in the office of this Court on or about the second day of July one thousand eight hundred and eighty six, but the plaintiff charges that such accounts are vague and incomplete and do not account for several of the outstandings due to the estate of the testator, and moreover that several items specified therein and hereinafter mentioned or referred to should not be allowed by the Court as being illegal.

"The said Pestonjee Nusserwanjee Bottlivala by his said will bequeathed to his daughter Cursetbai the sum of Rs. 3,000 and to each of his two other daughters, the said Soonabai and Ratanbai, the sum of Rs. 2,000, and to each of his two sons, the

"said Phirozshaw Pestonjee *alias* Phirozshaw Framjee, and the plaintiff, the sum of Rs. 2,100. And the said testator further declared that after all the claims and debts on his estate should have been paid off, his said trustees or trustee should be vested with all the surplus monies, rents, profits and income of his residuary estate *upon trust* to pay the same to his children in the following proportions, namely, one-fourth thereof to each of his two sons, the said Phirozshaw, Pestonjee *alias* Phirozshaw Framjee, and the plaintiff, another one-fourth thereof to be divided equally among his said three daughters, Cursetbai, Soonabai and Ratanbai, and the remaining one-fourth to go towards the fund for charitable purposes, thereafter mentioned.

"As the plaintiff, however, is informed and verily believes, the assignee of the said Phirozshaw Pestonjee *alias* Phirozshaw Framjee, and each of them, the said Cursetbai, Soonabai and Ratanbai, have on or about October or November 1893 for a small pecuniary consideration paid to them respectively by the defendants, executed to the defendants, releases in full satisfaction of all their respective claims to the legacies bequeathed to them respectively, and to all other their respective right, title and interest under the trusts of the said will in this paragraph referred to.

"The plaintiff submits that all the releases so taken by the defendants are for and must inure to the benefit of the said testator to which the plaintiff now claims to be alone entitled.

"Of the outstandings amounting to Rs. 6,000 (six thousand) referred to in paragraph 5 hereof, defendants admitted in their petition (miscellaneous petition No. 48 of 1885 on the file of the District Court of Coimbatore) that Rs. 3,000 were recoverable, but as far as plaintiff knows only Rs. 500 (a payment made by Mr. Chapman) has been collected and credited to the assets of the estate in March 1886, since which time no further accounts have been submitted by defendants and no explanation offered as to whether the balance of the said outstandings have been collected, or if not, why the defendants have not succeeded in doing so.

"Defendants have wrongfully paid to each of themselves a commission of 2½ per cent., or 5 per cent. in the aggregate, upon the amount of sales realized and collections made on account of the estate of the said testator and have charged the said estate

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"with the same, although the said testator by the terms of his will has expressly declared that a sum limited to Rs. 250 a year should be paid to the trustees or trustee managing his affairs. The sum so paid to themselves by the defendants amounted to Rs. 11,696, whereas the assets of the testator as disclosed by the latest accounts amount to only Rs. 10,708-3-6. Plaintiff submits that such payments are illegal and must be repaid to plaintiff with interest.

"Defendants were not justified in paying the solicitors of the estate such heavy fees. Although a wide discretion was allowed them, plaintiff submits that such discretion should be exercised with a zealous regard to the interests of the testator's estate. Most of the costs of conveyancing must have been borne by the purchasers and the other costs of conducting cases and winding up the affairs of the estate ought not to have amounted to so large a sum as Rs. 14,812-8-8. The accounts rendered by the solicitors of the estate Messrs. Cowdell & Co., as filed in Court at the time, were of a very general nature, and defendants must have had fuller details (not furnished to the legatees) rendered to them before approving the same.

"Dinbai, the late widow of the testator, pledged a very valuable emerald and other gold ornaments with one Soonabai, wife of Dirshaw Durabjee, maistry at Bombay, on or about November 1875, as security for the repayment of a loan of Rs. 5,000. Defendants have failed to recover these valuable jewels on the plea that they are of about the same value as the claim of the said Soonabai. Plaintiff denies this and declares the said emerald and jewels are worth considerably more than double the amount received on them. In token of his strong belief he paid in 1886 on the suggestion of this court a sum of Rs. 50 to the defendants for the appraisal of the same, but plaintiff has not been informed what the said emerald and ornaments were valued at, and believes that they have never been appraised.

"No attempt has been made to redeem the said emerald and jewels and the same are at present in the possession of the afore-said Soonabai. Plaintiff submits that by their laches in this respect, defendants have caused heavy loss to the estate of the testator and must be held responsible for the same.

"First defendant Dadabhai Eduljee took a lease of a shop at Devala and another shop at Wellington at a monthly rental of

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"Rs. 25 and 30, respectively, which is much below their proper value. The goods in these shops belonging to the estate of the testator were also purchased by the said defendant Dadabhai Eduljee at a depreciated value. Plaintiff submits that without the consent of the District Court, the said Dadabhai Eduljee as a trustee of the testator's estate, had no right to deal with the property for his own profit.

"The said Dadabhai Eduljee purchased on behalf of his nephew the premises known 'Charing Cross' situated in Charing Cross Road at Ootacamund for Rs. 6,750, which is much below its value at the time, the testator a year or two previously having refused Rs. 10,000 for the building. Within six months from the date of such sale, the said Dadabhai Eduljee purchased for himself the same property from his nephew.

"From the terms of the will it was obviously desired and intended by the testator that 'Khusroo coffee estate' should not be sold, but that it should be held in trust, the income thereof to be apportioned annually among the testator's children and for charitable purposes in the manner provided for in the said will. Messrs. Arbuthnot and Co. held a mortgage on this estate for over Rs. 40,000, but were willing, after the testator's decease, and at the earnest solicitations of plaintiff, to accept Rs. 35,000 in full liquidation of their claim, but defendants in spite of plaintiff's request to the contrary allowed the estate to be sold by public auction by the mortgagees who took the whole of the amount realised, which plaintiff is informed was over Rs. 40,000 in payment of their claim. The estate has thereby suffered a loss of Rs. 5,000 or more, in addition to legal costs amounting to Rs. 3,000 (approximately) in respect of a redemption suit and a suit for an injunction in connection with the same estate.

"Plaintiff submits that the charges of office establishment and rent amounting to Rs. 4,959 is excessive. No details of this or even other large items in the accounts have been furnished. Plaintiff believes that rent was charged by the first defendant for periods during which the business was carried on in his own premises and in premises belonging to the estate and at that time not disposed of. Plaintiff believes that if details of the accounts are submitted and scrutinized many items therein charged will be found to be unnecessary, unjustifiable and excessive.

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"The plaintiff assesses his claim for the purpose of stamping his present plaint at Rs. 40,000, but if, upon taking the account hereinafter prayed for, a larger amount is found due to him, the plaintiff offers to pay the additional stamp duty, sufficient to cover the excess.

"Plaintiff therefore prays for the following reliefs:—

"(i) That the defendants be ordered to refund to plaintiff the amount of commissions paid to themselves, namely, Rs. 11,696 with interest at 9 per cent. per annum from date of such payment to themselves to date of plaint.

"(ii) That the sale and purchase by first defendant of the house at Ootacamund known as 'Charing Cross' be set aside, with such further directions as to disposal of the same and as to the rents hitherto collected in connection therewith, as to the Court may seem just and proper.

"(iii) For such loss of rent on shops in Devala and Wellington and loss incurred by the goods therein having been purchased at a depreciated value, as may be disclosed in taking an account.

"(iv) Damages for losses in connection with Khurroo estate.

"(v) To value of emerald and jewels after deducting the debt due to Soonabai.

"(vi) That the defendants be directed to submit detailed accounts of expenditure and receipts of monies realized on debts due to the estate of the testator and on sales of the properties both movable and immovable belonging thereto, as well as of all payments to creditors and disbursements connected with the administration of the estate.

"(vii) That the defendants be held liable for any loss to the estate, which may be shown, on going through the accounts, to be due to laches and neglect on their part.

"(viii) That the defendants or any one of them be ordered to pay the costs of this suit."

The defendants filed a written statement traversing the main allegations in the plaint and pleaded limitation.

The District Judge posted the case for argument on the question of limitation and finding the suit barred dismissed it with costs.

The plaintiff appealed to the High Court.

Mr. B. F. Grant for appellant.

Mr. Johnstone and Gurusami Chetty for respondent No. 1.

Mr. Wedderburn for respondent No. 2.

JUDGMENT.—The suit having been dismissed on the ground of limitation and without any evidence being taken, it is necessary to see precisely what is the cause of action alleged in the plaint.

The defendants are the administrators with the will annexed of one Pestonjee Nusserwanjee who died in 1881. The plaintiff is entitled under the will to a legacy of Rs. 2,100 and to a share of the residuary estate. In the sixth paragraph of the plaint, the plaintiff takes exception to the account filed by the defendants in July 1886, and in the eighth and following paragraphs he makes certain charges against the defendants with regard to their administration of the estate. He assesses his claim at Rs. 40,000 and asks for relief in respect of the matters charged against the defendants. He does not ask for payment of his legacy, nor for the ascertainment of the share of the residue to which he is entitled. The District Judge has treated the suit as one for an account and has held that, assuming time to have run from the date when the account was filed in 1886, the suit is barred by limitation being instituted more than six years after that date. We agree with the District Judge that in a suit for an account the plaintiff is not entitled to go back more than six years (see *Saroda Pershad Chhattopadhyaya v. Brojo Nauth Bhattacharjee*(1) followed in *Hemangini Dasi v. Nobinchand Ghose*(2)). If, therefore, the administration was closed in 1886 and the functions of the administrators had then ceased, it would follow that the suit could not be maintained. But this does not appear to be the case. The plaint, in connection with one charge, assigns October or November 1893, as the date and it is not admitted by the plaintiff that all the other charges relate to acts done more than six years before the date of the suit. The plaintiff ought to have been asked to give dates in respect of the other charges. At any rate on the ground of limitation the suit ought not to have been dismissed altogether.

But there is another point that requires consideration and that is that the plaint does not explain on what principle the damages for which he asks can be granted to him. Assuming that the allegations are true and that no question of limitation arises the plaintiff can be entitled to no more than the amount of his legacy and his share of the residuary estate. It is only on the defendants pleading that they have no assets that it becomes material to

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(1) I.L.R., 5 Calc., 910.

(2) I.L.R., 8 Calc., 788.

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inquire whether the defendants have wasted the assets. On proof of such waste, the plaintiff could recover from the defendants personally, so far as they had or might have had, assets of the deceased.

Breach of duty on the part of the administrators may give a legatee or creditor the right to recover what is payable to him from the pockets of the administrators themselves, but it cannot, otherwise, we think give him any fresh right of demand against them. It is the debt, and not damages which only the creditor can obtain whether *de bonis testatoris* or *de bonis propriis* (see Williams on Executors and Administrators, Part V, Book II, Chapter 1.)

Without a material amendment of the plaint, we are of opinion that the plaintiff cannot obtain any relief. Leave to amend ought to have been asked for in the court below where, as it is clear, the frame of the plaint was discussed. Leave cannot therefore be granted except upon the terms of the appellant paying the respondents' costs of this appeal and also the costs of the hearing in the District Court. The plaint requires to be amended by stating that the plaintiff seeks to recover the legacies payable under the will from the defendants personally.

The suit was brought within thirteen years of the testator's death and therefore as a legacy is not payable for one year after the testator's death, the law of limitation would not apply (see *In re Johnson*(1). The one year's rule is recognized in the Succession Act and the decision of the Privy Council in *Mylapore Iyasamy Vaypooory Moodeliar v. Yeo Kay*(2) had reference to a case in which Hindu law and not the Succession Act had to be applied.

It is clear that in answer to a suit for a legacy the administrators cannot defend themselves by pleading their own wrong and alleging that more than six years before the suit they misappropriated or wasted the assets. In other words, if the suit is regarded as a suit for a legacy or a share of the residue, no question of limitation arises.

Subject to the above observations and assuming that the plaintiff is willing to amend, we think the decree ought to be reversed and the suit remanded; otherwise the appeal should be dismissed with costs.

(1) L.R., 29 Ch. D., 970.

(2) I.L.R., 14 Cal., 801.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

RAMAMIRTHA AYYAN (DEFENDANT No. 1), APPELLANT,

v.

GOPALA AYYAN (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, s. 123—Registered gift of land—Natural love and affection—Donor retracts consent prior to registration—Compulsory registration—Effect of.

Where a donor made a gift of land to the plaintiff, but prior to registration retracted his consent, upon which the District Registrar ordered compulsory registration:

Held, that the donor could not be compelled to register contrary to his wishes, and that the registration was void and the gift of no effect.

SECOND APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 12 of 1894, reversing the decree of T. M. Andinarayana Chetti, District Munsif of Mannargudi, in original suit No. 157 of 1892.

The plaint set forth that the property under attachment and some other property were owned by plaintiff's maternal uncle Sundrappa Ayyar; that he made a present or gift of the same to plaintiff under a deed, dated 6th January 1890 and plaintiff has been in possession and enjoyment of the same ever since; that the second defendant, who has fraudulently and collusively obtained a decree in a Small Cause suit against the first defendant, his relative, has placed the disputed property under attachment in execution of the said decree and at his (the first defendant's) instance that an application presented by plaintiff to remove the attachment was dismissed for default, and that the first defendant has no manner of title to the property. Hence the suit.

In his written statement the first defendant admits that the property in dispute and some other property were owned by Sundrappa Ayyar as in the plaint alleged, but he contends that Sundrappa Ayyar conveyed the same to him under a registered sale-deed on the 8th January 1890, and that he has been in possession and enjoyment ever since. He further impugns the genuineness of the deed of gift relied on by plaintiff and says that Sundrappa

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Ayyar, the alleged executant, denied its execution and denounced it as false before the Sub-Registrar of Athichapuram, and he argues that, even granting it be a genuine one, yet it cannot take effect as against the sale-deed which was passed before the gift-deed was registered and the gift was complete.

The deed of gift, though a registered document, was registered long after it was executed by order of the District Registrar, owing to the executant's denial of execution and refusal to register.

The District Munsif dismissed the suit. The lower Appellate Court found that both the deed of gift relied on by the plaintiff and the sale-deed relied on by the first defendant were genuine; but with regard to the third issue which raised the question of the validity of the deed of gift which was registered contrary to the wishes of the donor, proceeded as follows:—

“ Was the donor entitled to recall his gift after he did all that he was entitled to and the donee accepted it? I must of course answer this question in the negative. In regard to a gift which is usually made out of pure love and affection, all that the donee can do is to indicate his intention of accepting it, and when a gift is made and accepted, nothing more is needed to perfect it if the donor complied with all the requirements of the law. The statute requires a registered document for it, and if the donor write and give a deed to the donee and the latter accept it, whether or not the donor goes to register it voluntarily or not, he having placed it out of his power afterwards to recall it, he cannot retract or annul it. For the donee having the deed in his possession, has the power to enforce its registration under the law when the donor refuse to register it voluntarily. Having placed himself in such a position, he cannot be said to have the power to revoke it before it was registered. I think the gift was complete when it was written, signed and delivered to the plaintiff and plaintiff took it. No more than that is necessary to perfect it, unless the donor and donee both agree to rescind it and did not register it. That is totally a different case.”

Defendant No. 1 appealed to the High Court.

Rajagopala Ayyar for appellant.

Ramachandra Rau Sahab for respondent.

JUDGMENT.—We have no doubt that a deed of gift is not complete until it has been registered as required by section 123 of the Transfer of Property Act, and that it only operates upon

registration. In this case the deed of gift was not registered until the sale had been completed and, therefore, was not effectual as against the deed of sale.

We are further of opinion that a deed of gift being a voluntary transfer remains *nudum pactum* until the donor has done all that is necessary to make it legally complete. To do so, it is necessary, *inter alia*, that it should be registered; but he can be no more compelled to register the deed than to execute it in the first instance. The registration of the present deed contrary to the supposed donor's wishes, which was ordered by the Registrar, was therefore void. We accordingly hold there was no gift, and reverse the decision of the Subordinate Judge and restore that of the Munsif. The appellant's costs in this Court and in the first Appellate Court must be paid by the respondent.

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APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

CHINNA SEETAYYA (PETITIONER), APPELLANT,

v.

KRISHNAVANAMMA (COUNTER-PETITIONER), RESPONDENT.*

Execution—Partition by Collector—Civil Procedure Code, ss. 265, 360—Jurisdiction of Court to hear objections to the division ordered by Collector.

Where a decree for partition of an estate has been transmitted by the District Court to the Collector for execution under section 265, Civil Procedure Code, the Court that made the decree is not deprived of its judicial power to hear and decide objections to the division of the estate made by the Collector.

APPEAL against the order of G. T. Mackenzie, Acting District Judge of Godavari, dated 20th February 1895, passed in miscellaneous petition No. 53 of 1895.

The petitioner, who was a decree-holder in original suit No. 3 of 1867, on the file of the Court of the late Principal Sadr Ameen of Rajahmundry, filed a petition in the District Court, Godavari, praying that the Court would be pleased to order the Collector to complete the sub-division and partition of the village of Timmanagudam as early as practicable and deliver petitioner's share to him.

* Appeal against Order No. 183 of 1895.

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The District Judge passed the following order:—

"In 1885 an order was sent to the Collector to make the division under section 265 of the code. After correspondence for some years the Collector divided the village into six shares and reported the matter to the Board of Revenue.

"The Board in its proceedings No. 26, dated 17th January 1894, sanctioned the division and said that the six sharers might be asked to draw lots for the shares. The sharers object to the shares, protesting that they are unequal, and refused to cast lots. The Collector reports that he can do nothing in the matter.

"Petitioner now asks this Court to order the Collector to make a fresh division. Petitioner states that the division which the Collector has made is inequitable. The tank is given to one share. The tank bund is given to another share. The wet land is given to a third share. All the sharers object to the Collector's division and their objections were placed before the Collector by the Tahsildar's report, but the Collector refused to modify his decision and reported the division to the Board of Revenue for confirmation.

"I am of opinion that section 265 of that code gives to this Court no power to hear objections to the division made by the Collector or to direct the Collector to make a fresh division. Petitioner's pleader cites *Debi Singh v. Sheo Lall Singh*(1), but I think that does not go so far. Section 396 does give this Court such power, but section 265 does not. I must dismiss this petition.

"With reference to the Collector's letter I am of opinion that section 265 puts on the Collector the duty to carry out his division without the consent of the sharers. If they refuse to draw lots for the portions marked out by the Collector, the Collector must assign these portions to the various sharers and offer to place them in possession."

The petitioner appealed to the High Court.

Srirangachariar for appellant.

Respondent did not appear.

JUDGMENT.—We agree with the principle laid down in *Mahadaji Karandikar v. Hari D. Chikne*(2) that "the Court that has made a decree or judicial order which has then been transmitted

(1) I.L.R., 16 Calo., 303.

(2) I.L.R., 7 Bom., 332.

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for execution to a Collector is not deprived of the judicial powers with respect to it, which may still, at any particular time, be competent to such Court, and which it would have had had the order been placed in the hands of its own ordinary officer the Nazir."

This general power has been curtailed by special legislation so far as regards section 320 of the Code of Civil Procedure (see section 30 of Act VII of 1888). The amendments effected thereby are, however, not made applicable to section 265 of the code, as they should have been if it had been intended by the legislature to limit the natural jurisdiction of the Court in respect to this section.

We are, therefore, of opinion that the District Judge had power to hear objections to the divisions made by the Collector. His order declining to interfere is, therefore, reversed, and he is directed to replace the petition on his file and dispose of it.

No order is required as to costs.

APPELLATE CIVIL.

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

ANANTHA BHATTA (PLAINTIFF), APPELLANT,

v.

HOLEYA DEYYU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

*Limitation—Purchase by conditional sale—Vendor remaining in possession as
tenant holding over—Possession not shown to be adverse.*

In 1866 the plaintiff bought the plaint lands by conditional sale deed repayable in ten years from a third party, who, under the same document, became his tenant of the said lands. Before the expiration of the ten years the vendor died, and his widow sold her right in the lands and gave possession to G, the transferor of the second defendant. On the expiration of the ten years the sale to plaintiff became absolute and G continued to hold over after the expiry of the lease, but there was no evidence to show that G's possession ever became hostile to plaintiff:

Held, that the fact that plaintiff's title ripened into full ownership on the expiration of the ten years provided by the sale deed did not alter the character

* Second Appeal No. 319 of 1895.

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of the tenure of G, that his possession never became hostile to plaintiff, that G acknowledged the plaintiff's title in his sale deed dated 1881 to the second defendant, and that the suit was not barred.

SECOND APPEAL against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 345 of 1893, confirming the decree of I. P. Fernandes, District Munsif of Puttur, in original suit No. 21 of 1893.

Plaintiff sued to recover possession of a piece of rice land valued at Rs. 321-9-9, with buildings thereon valued at rupee one, forming portion of Muli Warg No. 2 of Layila village, and Rs. 172-15-0, being the produce for the three years ending on 30th March 1892.

The facts of the case were as follows :—

The plaint land originally belonged to Keshava Hebbara. He sold by exhibit A the land to the plaintiff conditionally on 5th March 1886, it being agreed that if Keshava Hebbara paid the purchase money within ten years of the date of sale, he was to have the land back. In 1875 Keshava Hebbara's widow Ganga Bai sold her right of repurchase to Gopala Bhatta, and Gopala Bhatta brought original suit No. 99 of 1876 on the file of the Buntwal Munsif for the cancellation of exhibit A on payment of the consideration money. The plaint was filed in April 1876. The suit was dismissed. In appeal (A.S. No. 33 of 1878) the lower Court's decree was confirmed. The appeal-judgment is dated 18th July 1879. On 7th February 1881 Gopala Bhatta transferred what rights he had under the sale deed he got from Ganga Bai to the second defendant Venketasha Bhatta. The first defendant was the tenant of the second defendant.

One of the terms of the conditional sale of the 5th March 1866 was that Keshava Hebbara was to remain in possession and cultivate the land for ten years under the mortgage and pay Rs. 27 *minus* the assessment every year. After Keshava Hebbara's death his widow Ganga Bai continued in possession as tenant as the plaintiff alleges. The chief contention was that by exhibit A the vendor was created a tenant, and that consequently it should be presumed that the tenancy continued till the contrary was shown.

The lower Court held that the plaintiff had not had constructive possession of the land in suit within the twelve years next

preceding the date of suit, that the second defendant had been in constructive possession and that the suit was barred by limitation.

Narayana Rau for appellant.

Ramachandra Rau Saheb for respondent No. 2.

Madhava Rau for respondent No. 1.

JUDGMENT.—The only question argued before us in this appeal is whether the suit is barred by limitation. The respondent's case is that the appellant having become absolute owner in 1876 (on the expiry of the ten years stipulated in exhibit A), his right to recover possession arose then, and as he was not then or afterwards in possession up to the date of suit, a period of more than twelve years, his right to recover was barred.

This argument is defective. Under exhibit A executed in 1866, the plaintiff was the landlord and Keshava Hebbara was his tenant and was in possession of the land as his tenant. Before the expiry of the ten years stipulated for in exhibit A Keshava Hebbara died and exhibit I was executed by his widow. It gave possession of the plaint land to Gopala Bhatta, who thus became a tenant in possession under the plaintiff.

The fact that in 1876, on the expiry of the ten years stipulated for in exhibit A, the plaintiff's title became that of absolute owner instead of merely conditional vendee or mortgagee did not alter the character of the possession held by Gopala Bhatta. He continued to be the plaintiff's tenant, holding over after the expiry of the term in the lease (exhibit A) and his possession was in no sense hostile. That this is so is clear from exhibit IV executed on the 7th February 1881, in which Gopala Bhatta recites all the prior transactions and admits the title of the plaintiff as landlord. The second defendant (second respondent) claims under this assignment.

It is clear, then, that the tenancy created under exhibit A has never been determined, and it was acknowledged in February 1881, *i.e.*, within twelve years prior to the suit. For both these reasons, then, the plea of bar by limitation is unsustainable.

We reverse the decrees of the Courts below and give judgment for plaintiff as sued for with costs throughout.

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DEYU.

APPELLATE CIVIL.

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

KUNHI PENNU (PLAINTIFF), APPELLANT,

v.

CHIRUDA (DEFENDANT), RESPONDENT.*

Makkatayam law—Thiyyas of Calicut—Succession.

Among the Thiyyas of Calicut governed by the Makkatayam Law, the widow of the deceased owner is a preferential heir to his mother.

APPEAL against the decree of A. Venkataramanapai, Subordinate Judge of Calicut, in original suit No. 4 of 1894.

The facts of the case were as follows :—

“Suit for a declaration that plaintiff is entitled to succeed to the plaint properties left by her deceased son Sankaran in preference to his widow, the defendant.

“Defendant pleads that the suit is precluded by the provisions of section 42 of the Specific Relief Act I of 1877, that plaintiff had been divorced by her husband Raman, and that she (the defendant) is heir to the plaint property left by her husband Sankaran.

“Issues for determination are—

“(1) Whether the suit for a mere declaration of title is maintainable?

“(2) Whether the plaintiff had been divorced by her husband Raman?

“(3) Whether plaintiff is entitled to succeed to the properties left by her son Sankaran in preference to his widow, the defendant?

“Plaintiff is the widow of one Edathodi Raman and defendant is the widow of their son Sankaran. The plaint property was acquired by Raman, on whose death it descended to his son Sankaran, who held it until his death in July–August 1893. The question is whether Sankaran’s mother the plaintiff or his widow the defendant is the preferential heir. The parties are Makkatayam Thiyyas of Calicut.”

* Appeal No. 50 of 1895.

The Subordinate Judge did not record a finding on the first issue; as to the second issue, he found that the plaintiff had not been divorced by her husband Raman; and as to the third, that the plaintiff was not entitled to succeed to the properties left by her son in preference to his widow, the defendant. He accordingly dismissed the suit with costs.

Plaintiff appealed.

Govindan Nambiar for appellant.

Mr. Krishnan for respondent.

The Court (COLLINS, C.J., and PARKER, J.) made the following

ORDER.—The Subordinate Judge has decided the suit on the ground that, in the absence of proof of a special custom, the ordinary Hindu law must be followed, and hence that the widow will succeed in preference to the mother.

But he holds at the same time that the family property belonging to Raman and Sankaran was impartible on the strength of the decision in *Raman Menon v. Chathunni*(1). If this be so, a special custom in deviation of the ordinary rule of Hindu law has so far been proved.

The question then arises—if the property be held as tarwad property in the marumakkathayam sense—who is to hold it on the death of the last male? Is it the senior surviving female, the property being impartible; or the widow of the last male-holder as in Hindu law? When once the Hindu law has been deviated from as to the nature of the property, it may be that the succession would go as in a tarwad. See *Rarichan v. Perachi*(2).

We think the following issues should be tried:—

(1) Was the property held by Raman and Sankaran as impartible tarwad property?

(2) If so, does the succession pass on the death of the survivor to his widow, or to the senior female in the family, or to both?

There should also be a finding on the first issue.

Further evidence may be taken.

The findings will be returned in three months from the date of the receipt of this order, and seven days will be allowed for filing objections after the findings have been posted up in this Court.

(1) I.L.R., 17 Mad., 184.

(2) I.L.R., 15 Mad., 281.

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In compliance with the above order, the Subordinate Judge submitted the following

"FINDING:—I am directed to try the following two additional issues and to submit my findings thereon, and also on the first issue tried at the original hearing:—

"(1) Was the property held by Raman and Sankaran as impartible tarwad property?

"(2) If so, does the succession pass on the death of the survivor to his widow, or to the senior female in the family, or to both?

"Plaintiff sues for a declaration that she is entitled to succeed to the plaint property left by her late husband Raman and inherited on his death by their son Sankaran, who died in July-August 1893. Plaintiff states (and the defendant admits) that the property belonged to Raman as his self-acquired property (see paragraph 1 of the plaint). It is the case of neither party that the property was held by Raman and his son Sankaran jointly whether as impartible tarwad property or otherwise. The son inherited the property on the death of his father, its sole owner.

"The argument seems to be that in the hands of Sankaran the property was family property, i.e., property belonging to the family of his father Raman, who was its sole owner, and that, as such family property, it was impartible tarwad property. On Raman's death, his family consisted of his widow, the plaintiff, and his son Sankaran, deceased husband of defendant. The son inherited the estate, subject, of course, to the interest possessed by the widow in her deceased husband's property. To this extent the property must be deemed to have been held by Sankaran as family property.

"It has been held that among Makkatayam Thiyyas of Calicut there can be no compulsory partition of family property—*Raman Menon v. Chathunni*(1). In the present case the defendant attempts to prove that partition is enforceable, but there is no satisfactory evidence as to the custom. Defence witnesses 6, 7 and 8 depose that partition can be enforced, but the 8th witness gives no instances of such partition, and though the remaining two witnesses refer to some cases, their evidence can

(1) I.L.R., 17 Mad., 184.

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"hardly be accepted as sufficient. The omission to call the parties to any such partition or their successors is not explained. Defendant cites three cases in which partition has been decreed by Courts, but these are inconclusive. One is a case of 1876 (exhibit XIX) in which an arbitrator's award was ordered to be passed into a decree of Court. In the other two cases (of 1887) in which partition was decreed no question appears to have been raised as to the right to seek compulsory partition. I am of opinion that the evidence adduced in this case is insufficient to support a finding, in opposition to the ruling quoted above, that partition is enforceable in respect of the property in dispute in this case.

"It follows, therefore, that the plaint property which belonged to Raman as his separate property, and inherited on his death by his son Sankaran, was held by the latter subject to the interest of his widow the plaintiff. Now what is the nature of plaintiff's interest in the property? It can scarcely be contended that property left by a Makkatayam Thiyya belongs to his widow and son jointly. The very term makkatayam signifies that the 'dayam' or succession belongs to the 'magan' or son.

"Assuming for the sake of argument that the plaint property was held by Raman and Sankaran as impartible tarwad property, and that on the death of the former the latter took it as the survivor, the question is whether, on the death of the survivor, it descends to his widow, or to her and to her mother-in-law, or to the senior of them. Is there any custom governing the succession? Neither party has cited any decision bearing on the point. The oral evidence in the case is not important. Plaintiff's witnesses depose that the property left by the son belongs to the mother in preference to the widow. On the other hand, the defendant's witnesses state that, according to custom, the widow takes the estate to the exclusion of the mother. Plaintiff's witnesses give no instances of the succession of the mother in preference to the widow. Defendant's witnesses 3, 6 and 7 do refer to some instances, but the parties concerned have not been called. I am unable to hold that this evidence is sufficient to prove the custom.

"In these circumstances, it appears to me that the question has to be decided on general principles assisted by any judicial decision in the case of communities similarly situated. In

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"Malabar the bulk of the population (chiefly Nayers) follow the
"marumakkathayam law of inheritance under which the tarwad
"holds the property as impartible family property. The Nam-
"budri Brahmans, who are of course subject to the Hindu law of
"inheritance, have, since their settlement in Malabar, adopted
"special customs modifying the Hindu law rules in certain
"matters. They have, for instance, adopted the local rule of
"impartibility of family property. The makkatayam Thiyyas of
"Calicut are also held to have adopted that rule; but the funda-
"mental basis of the makkatayam or Hindu law of inheritance,
"viz., that the succession belongs in the first instance to males
"(magans or sons) to the exclusion of females, does not appear to
"have been abandoned by either community in favour of the
"marumakkathayam rule, according to which male and female
"members have equal rights to family property. Thus, even
"where a widow was the sole surviving member of a (Nambudri)
"family, it was held that she is not at liberty to alienate the
"family property at her pleasure, and that it is not at her abso-
"lute disposal—*Vasudevan v. The Secretary of State for India*(1).
"This ruling implies that the widow has no equal rights of
"property with males. I do not see why the principle upheld
"in this ruling in the case of Nambudris should not be held to
"apply to makkatayam Thiyyas of Calicut, who, though subject
"to the Hindu law rule of succession from father to son (makkat-
"ayam), have, like the Nambudris, adopted the marumakkatha-
"yam rule of impartibility of family property.

"The position of females being thus substantially that of
"females under the ordinary Hindu law, and the inheritance
"being found to belong to males to the exclusion of females, it is,
"I think, reasonable to hold that the widow takes the inheritance
"in preference to the mother.

"I find, then, that the plaint property was not held by Raman
"and Sankaran as their joint tarwad property, though among
"these people joint family property would be impartible (first
"issue), and that, on the death of Sankaran, the succession passed
"to his widow the defendant (second issue).

"I have now to record my finding on the first issue raised at
"the original trial, viz., whether the suit for a mere declaration of

(1) I.L.R., 11 Mad., 157.

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"title is maintainable. I find that the suit is not maintainable.
"Plaintiff's own sixth witness states that the property is held by
"defendant. Defence first witness, Chathu Kutti, who has been
"karyastan since Sankaran's time, deposes that defendant is in
"possession, and that the taxes due on the property are paid by,
"or in behalf of, defendant. Defendant's brother (ninth witness),
"who manages her affairs, gives evidence to the same effect. This
"evidence is amply supported by documentary evidence. Im-
"mediately after Sankaran's death, the defendant appears to have
"paid assessment (see revenue receipts V) and granted leases (see
"exhibits VI to XII) in respect of his properties. The patta has
"also been transferred to defendant's name (exhibits XIII to
"XV). Plaintiff is thus in a position to seek further relief than
"a mere declaration, and her suit is unsustainable."

This appeal coming on again for final hearing on return to the
order of this Court dated 30th January 1896, the Court delivered
the following

JUDGMENT.—There being no memorandum of objections, we
accept the findings and dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

ZAMINDAR OF VALLUR AND GUDUR, PLAINTIFF,

v.

ADINARAYUDU, DEFENDANT.*

*Civil Procedure Code, s. 649—Provincial Small Cause Court's Act—Act IX of 1887,
s. 35(1)—Withdrawal of powers—Civil Courts Act—Act III of 1873 (Madras),
s. 28.*

Under Madras Act III of 1873, s. 28, a Munsif was invested with the powers of
a Small Cause Court's Judge for the trial of suits cognizable by such Court up to
Rs. 200 in value. Subsequent to decree but prior to execution, his powers as
Small Cause Court's Judge were withdrawn by notification in the Gazette:

Held, that application for execution must be made to the Court in which the
Small Cause Court's jurisdiction vested at the date of the application.

* Referred Case No. 4 of 1896.

1896.
August 1894.

ZAMINDAR OF
VALLUR AND
GUDUR
*
ADINABA-
YUDU.

CASE stated under section 617 of the Code of Civil Procedure by V. L. Narasimham, District Munsif of Masulipatam, in original suit No. 482 of 1889.

The facts of this case appear from the letter of reference, which was as follows:—

“This reference arose in the matter of execution of a decree, and the decision herein will be a guide to a lot of execution applications of its kind.

“My extended small cause jurisdiction being withdrawn by the recent notification No. 472, [published at page 1454, part I of the *Fort St. George Gazette*, dated 17th December last, and the Subordinate Court here being invested with small cause jurisdiction up to the amount of Rs. 500 over this Munsifi, I consider I am unable to execute the decrees passed by this Court in all suits of a small cause nature, whether passed by me under the extended powers or by my predecessors on the ordinary side for want of such powers. The pending execution applications and those decrees already transferred to the ordinary side, on application, under section 223 of the Code being exceptions to the view. The authority for this opinion is section 649 of the Code and section 35(1) of the Small Cause Act (IX of 1887).

“The decree-holder's vakil, relying on the opinion of the learned Chief Justice, expressed in *Latchman Pandeh v. Maddan Mohun Shyee*(1), a case decided under section 649 of the code, represents to me that I have still concurrent jurisdiction to execute all the decrees hitherto passed by this Court, and that it is optional with the decree-holders to present execution applications to this or the Subordinate Court, by the use of the words ‘shall be deemed to include’ in section 649 and ‘may be had’ in section 35(1) of the Small Cause Act. This is also the general opinion of the Bar, but I do not concur with them.

“It is clear from the notification quoted above that my extended small cause jurisdiction has ceased, and when there is such cessation, the Subordinate Court which was invested with such jurisdiction must, I think, be decided hereafter to be the only proper Court empowered to deal with all execution applications connected with suits of a small cause nature, being above Rs. 50 in value. The application under reference being one of

(1) I.L.R., 6 Calc., 513.

“them, I have passed orders thereon, contingent upon the opinion of the High Court, referring the party to the Subordinate Court.

“It is difficult to reconcile with the context the opinion of the Chief Justice quoted above, and I do not understand how a Court will be able to exercise a jurisdiction which is withdrawn, the jurisdiction of the Judge being that of the Court. It is incongruous to construe that two Courts would have concurrent jurisdiction when that of one Court has ceased, and in the same reported case Justice Field took a different view, to wit, that if the jurisdiction of one Court had ceased, the other Court would have jurisdiction (*vide* last para. of page 515 of the same case), this view being against concurrent jurisdiction.

“The facts of that case were different from the present. There the territorial jurisdiction was in question, and in fact there was no change of Court, excepting a few modifications, such as its removal to another station, and it was the self-same Munsif and the self-same Court. But here pecuniary jurisdiction is in question, and I believe my present case may be taken as an example of the cessation of jurisdiction, the peculiar one given at page 519 of the report not being exhaustive but permissive.

“I would not have referred this case but for the doubt entertained by me being one of general applicability. I could not also find any Madras reported case on the subject. I therefore beg to know the decision of the Honourable High Court upon the following point:—

“Whether this Court's jurisdiction to execute the decrees passed by it in all suits of small cause nature, whether passed under extended powers or on the ordinary side, has ceased on account of the establishment of the Subordinate Court with small cause jurisdiction, or whether this and the Subordinate Court have concurrent jurisdiction in respect to those decrees?

“My own opinion is that this Court's jurisdiction to deal with such execution applications has ceased, unless transferred to it under section 223 of the Code, and that this and the Subordinate Court have no concurrent jurisdiction.”

Parties were not represented.

JUDGMENT.—As regards suits tried by the Munsif under the extended small cause jurisdiction, which is now withdrawn, we

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are of opinion that execution proceedings in such suits must be had in that Court in which the jurisdiction now vests, that is the Subordinate Judge's Court.

APPELLATE CIVIL.

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

1896.
January 23.

SESHAGIRI RAU AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

RAMA RAU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Letters Patent, clause 12—Jurisdiction of High Court—Immovable property situated outside—Movable property situated within the jurisdiction—Leave granted by Registrar.

Where the plaintiffs brought a suit for their share of family property consisting of land situated outside the jurisdiction of the High Court and for movables situated within, leave having been granted by the Registrar :

Held, that the High Court had no jurisdiction as to the lands, and that the suit must be dismissed as to them :

Held, further, that leave to sue had been wrongly granted by the Registrar.

APPEAL against the judgment of *Shepherd, J.*, sitting on the Original Side of the High Court in civil suit No. 147 of 1894.

The facts of the case were as follows :—

This suit was brought on the Original Side of the High Court, Madras, by the first plaintiff and his two sons, plaintiffs Nos. 2 and 3, to recover his share in the ancestral property of his late father Cumbam Narasinga Rau. On the death of his said father, plaintiff's brother Cumbam Subba Rau, since deceased, took possession of and managed the family property until his death. After the death of Cumbam Subba Rau, the property came into the possession of his widow, the second defendant. The first defendant is the son of Cumbam Subba Rau (deceased).

The plaintiffs demanded their share from the defendants on 19th January 1891 of the family property consisting of immov-

* Appeal No. 48 of 1895.

able property situated in the Godavari and Cuddapah districts and certain movable property as specified in the plaint and schedule situated within the jurisdiction of the High Court.

Leave was granted to the plaintiff to sue in the High Court by an order of the Registrar, dated 21st August 1894.

The material portion of clause 12 of the Letters Patent is as follows :—“And we do further ordain that the said High Court “of Judicature at Madras, in the exercise of its ordinary original “civil jurisdiction, shall be empowered to receive, try and determine suits of every description, if in the case of suits for land or “other immovable property, such land or property shall be situated “or in all other cases if the cause of action shall have arisen, either “wholly, or, in case the leave of the Court shall have been first “obtained, in part, within the local limits of the ordinary original “jurisdiction of the said High Court or if the defendant at the “time of the commencement of the suit shall dwell, or carry on “business or personally work for gain within such limits.”

On the suit coming on for settlement of issues on the 7th March 1894 *Seshagiri Aiyar* for defendants took the preliminary objection that the High Court had no jurisdiction to try the suit under clause 12 of the Letters Patent as far as immovable property was concerned, inasmuch as no portion of the immovable property sued for was situated within the jurisdiction of the High Court. He further contended that the leave to sue was improperly granted by the Registrar and ought to be set aside.

S. Subramania Ayyar for the plaintiffs contended that the Court had jurisdiction and that the case was provided for by the words “in all other cases.”

SHEPHERD, J.—This suit is brought by the plaintiff against the son and widow of his late brother Subba Rau to recover his share of the family property. The defendants are said to reside in Madras and the property consists of cash and other movables, and also of lands situated in the Godavari district. Leave has been obtained under clause 12 of the Letters Patent to institute the suit in the High Court. It is objected on behalf of the defendants that, inasmuch as the only immovable property concerned is outside the limits of the jurisdiction of the Court, the Court has no jurisdiction in respect of it and leave ought not to have been granted.

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The question turns upon the construction of clause 12 of the Letters Patent. It is clear upon the decided cases *Prasanna Mayi Dasi v. Kadambini Dasi*(1) and *Jagadamba Dasi v. Padmamani Dasi*(2) that the provision as to leave applies as well to the case of land situated not wholly within the local limits as to the case of causes of action not wholly arising within those limits, and that it is not restricted to the former case as it might seem to be at first sight. In the present case, there being no immovable property within the jurisdiction, it is manifest that leave could not properly be granted, and that the Court could not assume jurisdiction, unless there were other property involved as the subject matter of the same cause of action.

Now as I read the clause with the aid of the interpretation put upon it by the abovementioned cases, it may be paraphrased as follows:—The Court has jurisdiction in respect of land situated wholly or subject to the proviso as to leave in respect of lands situated partly within the local limits; “in all other cases” it has jurisdiction, if the cause of action has arisen wholly or subject to the proviso as to leave, if the cause of action has in part arisen within such limits, I think that the phrase “in all other cases” must be read as excluding the case mentioned in the immediately preceding sentence, that is the case of suits for land—and that, therefore, the provision as to leave when applied to a case in which the cause of action has not wholly arisen within the local limits must relate to cases other than those of suits for land. If this be the correct view, leave could not rightly be granted in the present case, because the suit is in part a suit for land. Although the cause of action may have arisen in part within the local limits, the case is not within the category of “other cases” and, therefore, the provision as to leave does not apply.

This interpretation of the clause is in accordance with the decision of West, J., in *Jairam Narayan Raje v. Atmaram Narayan Raje*(3).

Accordingly I must hold that leave ought not to have been granted, and that the suit must be dismissed so far as regards the land.

Plaintiffs appealed.

(1) 3 B.L.R., O.C., 85. (2) 6 B.L.R., 686. (3) I.L.R., 4 Bom., 492.

Subramania Ayyar for appellants.

Seshagiri Ayyar for respondents.

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JUDGMENT.—We agree with the learned Judge in the construction he has placed on clause 12 of the Letters Patent. No portion of the immovable property is situated in Madras and therefore leave to sue in the High Court could not be granted. The appeal is dismissed with costs.

PRIVY COUNCIL.

MUTTUVAIDUGANADHA TEVAR, PLAINTIFF,

AND

PERIASAMI TEVAR, DEFENDANT.

P.C.*
1896.
June 17, 27

[On appeal from the High Court at Madras.]

Mitakshara law of inheritance—Impartible zamindari.

Heritage to an impartible zamindari is to be traced according to the ordinary rules of the Hindu law of inheritance, unless some further family custom exists, beyond the custom of impartibility, although the estate will be in the possession of only one heir at a time.

It was contended for the appellant that, in tracing the right heir to the proper stock entitled to the inheritance, a rule was applicable to an impartible estate, different from that applied to a partible one; and that when once the heritage to an impartible estate had become obstructed, on the death of each successive owner the true successor was the heir of the last owner of the originally unobstructed estate, though this did not apply to a partible estate. But for such a distinction no authority was cited, nor any principle suggested; and it was not upheld.

The parties to this suit, first cousins once removed, contested the right to inherit an impartible zamindari, which had been acquired by their common ancestor, who had left two daughters by two different wives. The plaintiff was the son of the younger daughter, the defendant's father was the son of the elder. The younger half-sister survived the elder, and in 1863 was judicially declared to have inherited alone the impartible zamindari. On her death the elder daughter's son, in litigation ending in 1881, made good his title to the impartible zamindari, being the descendant in the elder line:

Held, that this son of the elder daughter became, as the last male owner, the stock from which descent had now to be traced, and that the ancestor was no longer that stock. And held, that the son of this last male owner had a title to

* Present: Lords WATSON, HOBHOUSE and DAVEY, and Sir RICHARD COUCH.

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the zemindari on his father's death in consequence of the full and complete ownership of the latter, who had himself become a fresh root of title.

This decision disposed of the only question that was argued on this appeal. But the decision of the Courts below that the plaintiff could not claim the inheritance in virtue of survivorship was also affirmed. The judgment below, on this part of the case, was based on this that no family co-parcenary had existed to give rise to survivorship, as the sons of daughters could not form a family co-parcenary, which could only consist of the descendants of a paternal ancestor.

APPEAL from a decree (25th April 1892) of the High Court(1), affirming a decree (11th April 1890) of the District Judge of Madura.

This suit was commenced on the 19th August 1889 for the possession by right of inheritance of the impartible zamindari of Shivaganga in the Madura district, the plaintiff claiming the succession after the late zamindar, Dorai Singha Tevar, who died on the 19th July 1883, and whose son held the zemindari after him. The undisputed facts, and the issues framed in the Court of first instance, appear in the report of the appeal in this suit(1) to the High Court. The judgments concurring in the dismissal of the claim were given by the late Muttusami Ayyar, J., C.I.E., and by Best, J. The latter of these Judges stated the material facts, which also fully appear in the judgment on this appeal.

Since the death of the istemrari zamindar, or grantee of the estate from the Government, the line of the descent of the zamindari had twice been rectified by decisions of the Courts and settled by their Lordships. Once in 1863, when in *Kattama Natchiar v. The Zamindar of Shivaganga*(2), the younger daughter of the istemrari zamindar was declared, by the order of Her Majesty in council, the true heiress. And again in 1881 when Dorai Singha Tevar, son of Vela, the elder sister of Kattama, on the death of the latter in 1887, was declared, by order from the same authority, in *Muthuvaduganadha Tevar v. Dorai Singha Tevar*(3) to be heir.

The principal questions raised on the present appeal were whether under the Mitakshara in force in the Carnatic the heritage, to Shivaganga, was to be traced from the last male owner who was father of the defendant, or from the istemrari zamindar, the ancestor common to the parties; but to whom, the appellant his grandson, tracing to him as maternal grandfather, was one step

nearer than was the respondent, who was his great-grandson. The appellant was son of the younger of the ancestor's daughters, and the respondent was grandson of the elder daughter. A question, not argued upon this appeal, but decided below against the present appellant, was whether upon the death of Kattama Natchiar the zamindari had devolved upon Dorai Singha Tevar and the appellant, as joint family property, though held only by the former, so that on his death survivorship would have given the zamindari to the appellant. The decision by the Courts in India negating the possibility of there being co-parcenary between Dorai Singha Tevar and the appellant, on which alone the latter's right of survivorship could be founded, was affirmed in the judgment of their Lordships on this appeal.

The plaintiff, who had been defendant in the suit which ended in 1881 in favour of his cousin Dorai Singha Tevar, based his claim principally on this,—that he, the plaintiff, being the only surviving grandson of the istemrari zamindar, Gourivallabha Tevar, through the younger daughter Kattama Natchiar (who died in 1877 after having been declared entitled to the zamindari by order in council in 1863(1)) was nearer to the common ancestor than was Periasami, son of Dorai Singha Tevar, and only a great grandson of that ancestor. The defendant's written statement was that by the decision in 1881 his father had been declared full owner of the zamindari and that the heir was to be traced to no one but that owner.

On an issue whether, on the death of Dorai Singha Tevar, succession should be traced from the maternal grandfather, as alleged by the plaintiff, or from Dorai Singha himself, as contended by the defendant, the Subordinate Judge decided that, as a daughter's son inherited the full proprietary right, on his death his heir succeeded to the estate, so that the defendant was entitled. On another issue, the Subordinate Judge decided that Dorai Singha Tevar and the present plaintiff could not be considered to have been members of any joint family, possessing the estate in co-parcenary, with a right to possession successively. As the sons of different fathers, they were not members of a joint family. Therefore, there was no right by survivorship that could be claimed by the plaintiff.

(1) I.L.R., 16 Mad., 11.

(2) 9 Moore, I.A., 643.

(3) L.R., 8 I.A., 99; I.L.R., 3 Mad., 290.

(1) L.R., 8 I.A., 99; I.L.R., 3 Mad., 290.

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A divisional bench of the High Court, composed of the Judges above named, dismissed an appeal from the Subordinate Judge's decision dismissing the suit. The judgments are reported at length in the I.L.R., 14 Mad., 11.

The plaintiff now appealed.

Mr. H. H. Cozens Hardy, Q.C., and Mr. J. H. A. Branson, appeared for the appellant.

Mr. J. D. Mayne for the respondent.

The following is an outline of the argument for the appellant :— In the circumstances of this impartible estate, and of this family, it ought to have been held that Dorai Singha Tevar did not constitute the true stock of descent. On his death the appellant became entitled as the nearest heir to the istemrari zamindar, and as belonging to the same class as those claiming under Gourivalabha Tevar, who remained the root of title. Under the Mitakshara, the estate which a daughter took in property inherited by her from her father was only a qualified estate, and on her death the property descended to the heirs of her father, not to her heirs. *Chotay Lal v. Chunnoo Lal*(1).

There were grounds for the contention that, when the succession to an impartible estate had once become obstructed by the interposition of a female in the line of heirs, the impartible inheritance remained obstructed, so that on the deaths of successive owners the heir of the obstructed impartible inheritance was to be found by tracing him from the last male owner of the unobstructed inheritance. It was not the argument that this applied to ordinary partible family estates. But it was submitted that, in the case of the impartible inheritance after the succession of a daughter's son, the heritage had to be traced back to the last male owner. Again, daughter's sons taking as a class, it should have been held by the Courts below that all the members, to the last survivor of that class, should be exhausted, before resort could be had to another line. It was not insisted for the appellant on the argument derived from the law of survivorship which had been disposed of below; the strength of the appellant's case being the necessity of tracing back to the istemrari zemindar, as still the stock of descent.

(1) 14 Beng., L.R., 285; L.R., 6 I.A., 15.

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Reference was made to the Mitakshara, chapter II, section I, verse 1, and to chapter II, section II, verse 6, as to the estates taken by daughters, and daughters' sons; and to chapter II, section III, citing Menu 9,187, to the effect that to the nearest sapinda the inheritance next belongs.

Mr. J. D. Mayne's argument for the respondent was, in effect, as follows:—A daughter's son took exactly the same estate as if he were the son of the last male owner; and on the death of that daughter's son, the heir was ascertained by tracing to him. The defendant as the son of Dorai Singha Tevar was therefore entitled. As to the matter of the obstructed inheritance, every one taking after a widow or a daughter took an inheritance to which his right was said to have been obstructed, getting, as he did, no title from her. As one of their Lordships said, his title was neither from, nor through, but after her. The inheritance proceeded from the last male owner, and was to be traced to the limits of his progeny. Heirship under the Mitakshara depended upon corporeal affinity; a female inheriting for only a limited purpose to discharge certain duties to the estate. That text which said that no woman took an inheritance was still true in a certain sense, though she represented it for the time being, but a daughter's son took absolutely an estate of inheritance as an heir of the preceding male owner. Reference was made to Colebr. Dig., 494, and 502, Book V, Chapter IX.

An early case referring to this was reported in Sir Edward Hyde East's notes of cases, *Ramjoy v. Tarrachund*(1) decided in 1816. Another decision under the Mitakshara in the North-West Provinces was in *Sibta v. Badri Prasad*(2).

Mr. H. H. Cozens Hardy, Q.C., replied only that he relied on the arguments already adduced for the appellant.

Their Lordships' Judgment was delivered on the 27th June, by Lord Hobhouse.

Her Majesty in Council is called upon to decide yet another dispute arising out of the succession to the zamindari of Shiva-ganga. The nature of the dispute is best stated by reference to the pedigree set out in the case of the respondent, who was the defendant below :—

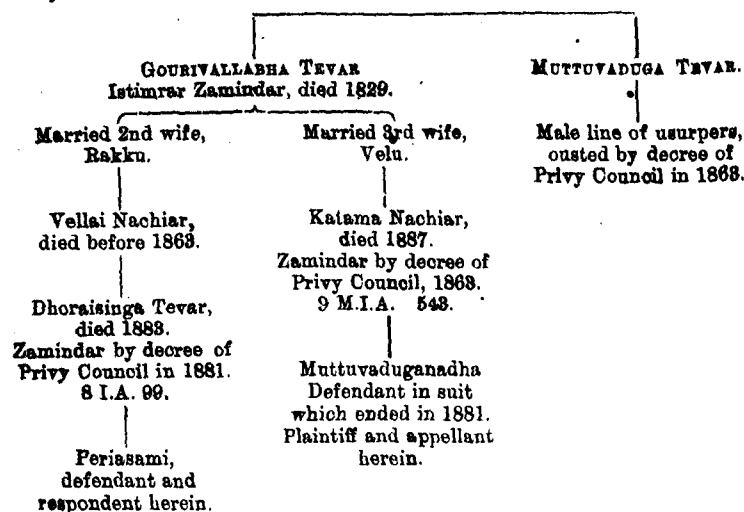
(1) 2 Morley's Digest, 79.

(2) I.L.R., 3 All., 134.

Pedigree.

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The effect of the litigation which ended in the year 1863 was to establish that the zamindari was the self-acquired property of the istimrar zamindar, and that it devolved upon his younger and only surviving daughter Kattama in preference to collateral heirs.

Kattama died in 1877, when her son the present appellant, who was plaintiff below, claimed to be entitled in preference to Dhoraisinga, the son of Kattama's sister, who was eldest daughter of the istimrar zamindar. In that litigation, which ended in the year 1881, it was established that though the zamindari was impartible, Kattama took it for the ordinary Hindu woman's estate, and that upon her death it devolved not on her heir but on the heir of her father.

Dhoraisinga being dead, the plaintiff has preferred a fresh claim to the zamindari. He maintains that the istimrar zamindar is still the root of title, and that he, being a grandson, is entitled to succeed in preference to the defendant who is a great-grandson. The defendant maintains that Dhoraisinga acquired full and complete ownership, and became a fresh root of title, so that the property descended to his son.

Both Courts below have decided that the defendant's contention is right. The plaintiff's claim is founded on the idea that the present question is the same as that which arose on Kattama's death. Then the istimrar zamindar was the root of title, whose heir was to be sought, therefore it is argued he is so now. That

argument loses sight of the difference between the imperfect or obstructed heritage of a female, and the full heritage of a male successor. It is not disputed by the appellant's counsel that, if the property were partible, Dhoraisinga would have taken an absolute ownership constituting him a new stock. But it is contended that a different rule is applicable to an impartible estate, and that if the inheritance of such an estate once becomes obstructed, it is always obstructed, so that on the death of each owner the true successor is the heir of the last unobstructed owner. They have not produced any authority, nor suggested any principle for such a distinction. When an estate is impartible it is enjoyed in a different mode from that prescribed by the ordinary Hindu law; but the inheritance is to be traced by the same mode, unless some further family custom exists beyond the custom of impartibility.

Their Lordships do not discuss the question of survivorship, because Mr. Cozens Hardy distinctly stated that he rests his claim not on survivorship between the plaintiffs and Dhoraisinga, but on the plaintiff's greater proximity to the true root of title. But on both points they express their agreement with the learned Hindu lawyer who presided at the hearing of this case in the High Court, and whose services have recently been lost to that Court.

Their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Appeal dismissed.

Solicitor for the appellant: Mr. R. T. Tasker.

Solicitor for the respondent: Messrs. Lawford Waterhouse, & Lawford.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

PAKIAM PILLAI (PETITIONER), APPELLANT,

v.

INNASI FERNAND (COUNTER-PETITIONER), RESPONDENT.*

Indian Succession Act—Act X of 1865, ss. 246, 261—Application for letters of administration—Caveator propounding a will—Effect of withdrawal of previous application for probate of same will without leave to apply again—Civil Procedure Code, s. 373.

Where a person applied for probate of a will but withdrew the application before the proceedings became contentious :

Held, that he was entitled as caveator to propound the same will in opposition to an application for grant of letters of administration to the estate of the deceased :

Held, further, that though the provisions of the Civil Procedure Code are applicable to suits under Act X of 1865, section 261, still in the present case, the application for probate had been withdrawn before the proceedings became contentious and that, therefore, section 373, Civil Procedure Code, was not applicable.

APPEAL against the order of B. Macleod, Acting District Judge of Tinnevely, passed on certificate petition No. 15 of 1895.

The facts of this case were as follows :—

The petitioner, the husband of one Santhai Kurusal, who died on 16th December 1893, applied for a grant of letters of administration to her estate under section 246 of Act X of 1865. The counter-petitioner entered a caveat and claimed probate of a will alleged to have been executed by the deceased on the day of her death. Probate of this will had been applied for a month after her death, but the petition was withdrawn without obtaining the leave of the Court to apply again. On the present petition, the District Judge ordered that probate of the will do issue to the counter-petitioner with costs.

The petitioner appealed.

Sundara Ayyar for appellant.

Ramakrishna Ayyar and *Seshachariar* for respondent.

ORDER.—The first objection urged on behalf of the appellant was that, as the respondent (caveator) to whom probate of the will propounded by him was granted by the District Court had withdrawn without the leave of the Court to apply again a previous petition for probate of the same will, he was precluded from making the present application. That the respondent did apply once before is not disputed, though the application itself has not been put on the record of this case. In the order of the District Court, dated the 20th September 1894, allowing that application to be withdrawn, it was described as one for letters of administration; whereas, in the order under appeal, it is referred to as an application for probate. However this may be, it is admitted that the application had reference to the will in dispute and taking that it is immaterial whether the application was for probate or for letters of administration, the question is whether the appellant's objection is good. Now, section 261 of the Indian Succession Act lays down that when in proceedings relating to applications for probate or letters of administration contention arises, "the proceeding shall take, as nearly as may be, the form of a regular suit according to the provisions of the Code of Civil Procedure."

This being so, the argument on behalf of the appellant was that section 373 of that code, which is based on the rule of public policy that it is the interest of the state that there should be an end to litigation, is as applicable to such proceedings as to other suits. In *Trower and Smedley v. Cox*(1), which is the only case I have been able to find as bearing on the point, Sir John Nicholl, referring to a similar argument urged before him, admitted that "in ordinary cases, where the parties, being present, declare they proceed no further, or duly authorize a practitioner to take that step for them, the Court, as far as it legally can, will hold them bound." The actual decision there that the executrix was not barred from calling upon the next-of-kin to bring in the administration and re-propounding the alleged will, though her attorney had previously withdrawn from the suit after propounding it and suffered the next-of-kin to take administration, was rested on the peculiar circumstances of the case. The argument on behalf of the appellant would seem, therefore, to be not without authority. But

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(1) 1 Addams, 225.

* Appeal against Order No. 166 of 1895.

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assuming the rule of law to be as stated on his behalf, it is clear that the facts necessary to warrant its application were not shown to have existed here. For it is only when contention arises that proceedings in connection with probate or letters of administration can take the form of suits; but that the proceedings had become contentious when the respondent withdrew his former application, there is nothing to prove. The objection in question must therefore be held to fail.

The second objection urged was that the evidence adduced on behalf of the respondent did not establish the genuineness of the will. But I am unable to accede to it, as I see no reason to differ from the District Judge who believed the testimony adduced on behalf of the respondent to the effect that the will was signed by the deceased when she was of sound and disposing mind. On the one hand the ill-feeling which had existed between the appellant and the deceased, who was his wife, and on the other the friendly terms on which the respondent, who was her grandson, had lived with her tend to show that the probabilities are in favour of the view that the will is true.

The third and last objection was that it did not appear that the attesting witnesses signed the will in the manner required by section 50 of the Indian Succession Act. As the evidence stands now this contention must prevail; but there is no reason to think that the omission to question the attesting witnesses on the point was wilful and intentional. I, therefore, direct the District Judge to take fresh evidence on the point and submit a finding on it within a month from the receipt of this order and objections may be filed within seven days from the date on which the receipt of such finding is notified in Court.

In compliance with the above order, the District Judge submitted the following

FINDING.—With reference to the above order of the High Court, "I have the honour to re-submit the records in the case and to state that, from the depositions of two of the attesting witnesses now examined by me, I am of opinion that they attested the will in the presence of the testatrix, after the latter had put her mark to it in their presence. The provisions of section 50 of the Indian Succession Act appear thus to have been complied with in this case."

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On receipt of the above finding the Court delivered the following

JUDGMENT.—Accepting the finding, I dismiss the appeal with costs.

APPELLATE CRIMINAL.

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

KARIYADAN POKKAR,

KAYAT BEERAN KUTTI.*

*Criminal Procedure Code, s. 488—Maintenance of children—Moplahs—
Personal law.*

The right of children to be maintained by their actual father is a statutory right, and the duty is created by express enactment independent of the personal law of the parties. If the children are illegitimate, the refusal of the mother to surrender them to the father is no ground for refusing maintenance. If the children are legitimate, the question of the mother's right to their custody would depend on the question whether the parties are governed by Muhammadan or Marumakkatayam law; because (1) if they are governed by Muhammadan law, the mother may have the right to custody until the children attain the age of seven years; (2) if by the Marumakkatayam law, it is doubtful if the father could be held to have neglected his duty to maintain his children if they were actually maintained by the karnavan of their mother's tarwad who is bound by law to maintain them.

CRIMINAL REVISION PETITION under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of A. F. Pinhey, Acting Joint Magistrate of Malabar, in maintenance case No. 1 of 1895.

The facts of this case appear from the Joint Magistrate's order, which was as follows:—

"The complainant, Kariyadan Pokkar, claims maintenance for the three children of his sister aged, respectively, 5, 3½ and 1½ years. Defendant is willing to maintain the mother and children if they live with him. It appears he has married again and is living in the new wife's house, and complainant urges

* Criminal Revision Case No. 458 of 1895.

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"that the wife under Muhammadan and Marumakkatayam laws has a right to the custody of the children till seven years of age. The evidence need not be discussed, as there is a ruling of the High Court on a similar case from this Court. It has been held that an order for separate maintenance cannot be made under the Criminal Procedure Code if defendant is willing to take the children. An action for maintenance under the Muhammadan law or Marumakkatayam law will lie in the Civil Court, but not under the Code. No order for maintenance can therefore be made."

The petitioner filed a revision petition against the above order. Mr. Krishnan for petitioner.

Narayanan Nambiar for counter-petitioner.

ORDER.—It is not denied that the defendant is the father of the three children for whom maintenance is sought. The complainant is the karnavan of the mother's tarwad and presumably comes forward as the *de facto* guardian of the children. The Joint Magistrate has dismissed the petition on the ground that there is a ruling of the High Court that an order for separate maintenance cannot be made against a father if he is willing to take the children. The ruling is not quoted, but apparently it is an order of Best, J., passed in *In re Kunhamavu** that is referred to. That is an order of a single Judge issued without any hearing in Court and without notice to the parties, and, with great respect, we venture to question the soundness of the decision.

In that case, like the present, the parties were Moplahs, and it was alleged that the defendant had divorced his wife. In the present case a divorce is also alleged, but it is not found whether the parties are governed by the Muhammadan or the Marumakkatayam law. The allegation of a divorce would seem to imply the former, whilst the fact that the petition is put in by the karnavan of the mother's tarwad would indicate the latter.

In *Ayyappattar v. Kallaniammal*(1) it was held by the Chief Justice and Mr. Justice Shephard that there was no foundation for the suggestion that section 488 of the Criminal Procedure Code did not apply to Malabar. That was a case from South Malabar, in which the Head Assistant Magistrate had, on the

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application of a Nair woman, granted an order against a Patter Brahman (with whom she had formerly 'sambandam') for the maintenance of her children, and the High Court upheld the order.

No doubt the expression 'legitimate' or 'illegitimate' in section 488, Criminal Procedure Code, seems at first sight to refer to issue born of parents subject to a law recognizing marriage of some sort; but the code is of general application, and the expression used may also indicate that the only condition laid down is that the person proceeded against is in fact the father. If the parties are governed by Marumakkatayam law as their personal law, it may be that the father is not in any degree of civil relationship and that the person primarily responsible for the maintenance of the children is the karnavan of their mother's tarwad—in this case, the petitioner; and under section 1, Criminal Procedure Code, nothing contained in the Act would affect such special law. Such right to be maintained by the karnavan depending upon the personal law of the parties is a right capable of being enforced and would properly form the subject of a suit in a Civil Court. But the right of a wife and of children to be maintained by the husband and by the actual father is a statutory right, and the duty is created by express enactment independent of the personal law. In *Luddun Sahiba in re*(1), a Muhammadan wife not entitled under the Shia law to maintenance was held entitled to it under the Criminal Procedure Code. And in *Rosario v. Ingles*(2), a married woman was held entitled under section 488 to claim maintenance for her illegitimate children from the putative father.

The questions that arise therefore are: (i) are the children the legitimate or illegitimate children of the defendant? and (ii) has he neglected or refused to maintain them? If the children be illegitimate, that is, the offspring of a connection which is not a legal marriage, the refusal of the mother to surrender them to the father is no ground for refusing an allowance for maintenance—see *Lal Das v. Nekunjo Bhaishiani*(3). But, if on the other hand, the children be legitimate, though the mother be divorced, it might be unfair to hold that the father had refused to maintain them if he was ready and willing to do so should they live with him. Should, however, Muhammadan law award the guardian-

* Criminal Revision Case No. 89 of 1893 unreported.

(1) Criminal Revision Case No. 328 of 1893 unreported.

(1) I.L.R., 8 Calc., 736. (2) I.L.R., 18 Bom., 468. (3) I.L.R., 4 Calc., 374.

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ship of the children to the divorced mother till they attain the age of seven years, the defendant might be bound in any case to pay maintenance for them until they attain that age.

It is necessary, therefore, that the Joint Magistrate should determine whether the parties follow Muhammadan or Marumak-katayam law. If the former, the question will arise as to the mother's right to retain the children till they are seven years of age. If the latter, the question will arise whether the father could be held to have neglected his duty to provide for his children if they were actually being maintained by the karnavan of their mother's tarwad who is bound by law to maintain them. Of course, a karnavan is not at liberty to neglect his own duty in order to make the father pay. This application is not made by the mother of the children but by the karnavan, and it may be questioned whether he would have any *locus standi* to make such an application when the law imposed the same duty on himself and when he himself had sufficient means to perform that duty.

We set aside the order and direct the Joint Magistrate to re-hear the case.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

QUEEN-EMPRESS,

v.

SAMINADHA PILLAI AND ANOTHER.*

Indian Penal Code, ss. 188, 290—Public nuisance—Cremation—Disobedience to an order duly promulgated by a public servant—Criminal Procedure Code, s. 143—Illegal order.

On the 11th August 1894, the District Magistrate promulgated an order prohibiting the people of the village of Thirukodikaval from using their burning grounds situated on the southern bank of the Cauvery and directing them to use other burning grounds which had been provided. On the 11th May 1895 certain persons, in defiance of this order, cremated a corpse at the spot interdicted, and were convicted under ss. 188, 290, Indian Penal Code, but the conviction under s. 188 was reversed on appeal:

* Criminal Appeals Nos. 554 and 555 of 1895 and Criminal Revision Petitions Nos. 226 and 227 of 1895.

Held, that when persons entitled to use a particular spot dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country, they cannot be convicted of a public nuisance on the ground that their act caused material annoyance and discomfort to persons near the place on the occasion referred to:

Held, further, that the order of the District Magistrate was not warranted by s. 143, Criminal Procedure Code, or by any other law and must, therefore, be set aside.

APPEALS under section 417 of the Criminal Procedure Code against the judgment of the Sessions Court of Tanjore in criminal appeals Nos. 42 and 67 of 1895, acquitting the accused Saminadha Pillai and Chokka Pillai, who had been convicted by the First-class Magistrate of Kumbakonam under sections 188 and 290, Indian Penal Code, and sentenced to undergo five weeks' simple imprisonment and pay a fine of Rs. 25, in so far as it acquits the appellants therein of an offence under section 188, Indian Penal Code.

Petitions under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Sessions Court of Tanjore in the same appeals Nos. 42 and 67 of 1895, in so far as it confirms the convictions of, and sentences passed on, the petitioners Saminadha Pillai and Chokka Pillai under section 290, Indian Penal Code.

The facts necessary for the purposes of this report appear from the judgment of the Sessions Judge of Tanjore which is as follows:—

"In olden times the Cauvery flowed south of the Thirukodikaval burning ground, and that ground had the river between it and the bathing ghaut of Thiruvaduthorai. A good while ago, however, the Cauvery shifted its bed, so that the burning ground was on the south bank and the bathing ghaut to be over the river at all was moved further north and was placed side by side with the burning ground at the river's edge. A public path or road was made from Thiruvaduthorai to the bathing ghaut. This state of affairs has continued without objection from the Thiruvaduthorai people for forty years and more.

"Of late, however, for some reason, which is not apparent on the record, the latter people, headed by the mutt, have taken a strong objection alleged to be on sanitary grounds to the burning

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"of corpses close to their bathing ghaut. On the 11th August 1894, the District Magistrate issued the following notification:—

"It is hereby notified for the information and guidance of the people of Thirukodikaval in Kumbakonam taluk and of the people of Thiruvaduthorai village, Mayavaram taluk, that to avoid danger to human health, they are from the date of publication hereof to cease using their burning grounds situated adjoining each other on the southern bank of the Cauvery and to use those otherwise provided and known to them. Disobedience of this order will entail prosecution under sections 290, 291 and 188, Indian Penal Code."

"This was published by beat of tom-tom and otherwise in the villages concerned, and all adults became aware of the prohibition.

"On the 11th May, however, in spite of this notification, the Thirukodikaval people burned the corpse of a Sudra on the burning ground. For doing this the Joint Magistrate has convicted and punished four people (appellants) under sections 188 and 290, Indian Penal Code."

The Sessions Judge found that the order above referred to was illegal and set aside the convictions and sentences under section 188, Indian Penal Code. With regard to the charge under section 290, Indian Penal Code, he acquitted Govinda Padayachi and Ganapati Dekshitar, two of the appellants before him, but confirmed the conviction and sentence passed against Saminadha Pillai and Chokka Pillai.

The Public Prosecutor on behalf of the Crown appealed under section 417, Criminal Procedure Code, against the order in so far as it acquitted the two accused now before the Court under section 188, and the two accused presented a revision petition under sections 435 and 439, Criminal Procedure Code, against the conviction under section 290. The appeals and revision petitions were heard and disposed of together.

The Acting Public Prosecutor (Mr. N. Subramaniam) for the Crown.

Sankaran Nayar and Sankaranarayana Sastri for the accused in all cases.

Pattabhirama Ayyar and B. A. Krishnasami Ayyar for the complainants in the revision cases.

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JUDGMENT.—The accused in this case, two of the residents of the village of Thirukodikaval, were convicted by the Magistrate under sections 188 and 290 of the Indian Penal Code. On appeal the Sessions Judge reversed the conviction under the former section, but confirmed that under the latter. The act for which they were convicted was the cremation of the corpse of one Vyapuri Pillai, father of the first accused, on a spot close to the ghaut on the Cauvery used by the inhabitants of the adjoining village of Thiruvaduthorai for bathing and other lawful purposes. Both the Courts find that the cremation caused substantial annoyance and discomfort to the persons who were at the ghaut and to the passers-by on the occasion. The spot where the body was burnt appears to have been used for such purpose by the Thirukodikaval people from time immemorial and to have been originally situated to the north of the river. But the place where the ghaut referred to now exists came to be used as a place of public resort only from the time when the river changed its course many years ago.

The questions are, whether the conviction under section 290 is right and whether the acquittal of the accused in respect of the offence under section 188 should be set aside. In determining these questions, it is necessary first to deal with the case independently of the notice of the District Magistrate, dated the 11th August 1894, to be more fully referred to hereafter, and then to examine the bearing of that notice on the alleged guilt of the accused.

Now, taking the case apart from the said notice, it is clear that the act of the accused falls under the limited class of cases sometimes designated as nuisances 'legalised.' In other words it seems to be an instance of those compromises belonging to social life [alluded to by Pollock, C.B., in *Bamford v. Turnley*(1)] upon which the peace and comfort of that life mainly depend and in which some apparent natural right is invaded or some enjoyment abridged to provide for the more general convenience or necessities of the whole community. In support of the above view, it is hardly necessary to observe that, not only the religious sentiments of all sections of the community, but also the requirements of general health and comfort, absolutely demand that corpses shall be disposed of as early as practicable, so as not to prove hurtful to

(1) 31 L.J.Q., B., 292.

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the living. It is this imperative necessity that, as a general rule, casts upon persons having charge of corpses not only as a matter of social, but also of legal obligation, the duty of arranging for the disposal of those corpses in a reasonably speedy, decent and inoffensive way—*c.f.* the observations of Denman, Chief Justice, in *Queen v. Stewart*(1) and of Lord Campbell, C.J., in *Reg. v. Vann*(2). And to facilitate the discharge of such an important duty, it has been, as is well known, the general and immemorial custom to set apart some spots for use by the public as places of sepulture or cremation. The absolute necessity for some such common provision will become apparent on a moment's reflection. It is sufficient to refer to but one—not an unimportant—consideration bearing on the matter, viz.: that the number of persons who are in a position to find for interment or cremation of the bodies of their deceased relations, friends or dependents, places of their own, which, while being convenient to those persons themselves, will not be a nuisance to others, is extremely small when compared with the millions of landless men and women who, if required to do so, would find it impossible to obtain such spots for similar use by them. Hence the existence of common burial and cremation grounds in almost every inhabited village in this presidency, except portions of the West Coast, where the conditions are somewhat different, owing to human dwellings not being crowded together as they mostly are elsewhere. In cases of this description, it is clear, adopting the language of Sir James Fitz James Stephen (*Digest of Criminal Law*, 5th edition, 140), "the fact that the act complained of facilitates the lawful exercise of their rights by part of the public shows that it is not a nuisance to any of the public." And when persons, like the accused entitled to use a particular spot dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country, it must be admitted that he does what is perfectly lawful. To hold that an act so properly done, not only in the exercise of a right of which the people of this country are generally so very tenacious, but also in the discharge of a serious duty, amounts, as the prosecution contends, to an offence, would be highly unreasonable and unjust. It follows

(1) 12 A & E., 778.

(2) 2 Den., 330.

therefore, that the conviction of the accused cannot be sustained simply on the ground that their acts caused material annoyance and discomfort to the Thiruvaduthurai people, who were near the place on the occasion referred to.

The next question for determination is whether the act of the accused was punishable in consequence of the notice issued by the District Magistrate on the 11th August 1894, addressed to the people of Thirukodikaval in general and prohibiting them from cremating any corpses in the place in dispute. If the above notice were valid, there can be no doubt that the conviction of the accused; not only under section 290, but also under section 188, would be warranted. But the order appears to be fundamentally invalid. The notice itself does not state under what provision of law it was issued. Our attention was not drawn to any special or local law empowering the District Magistrate to pass such an order. We were, however, referred by the Public Prosecutor to section 143 of the Criminal Procedure Code as the one under which the Magistrate acted. But under that section no Magistrate can prohibit what was lawful before the date of his order, and thereby make such an otherwise legal act, committed after the date of the order, punishable as a nuisance under the Indian Penal Code. For he is by that section empowered to enjoin a person from repeating or continuing only a public nuisance as defined in the Indian Penal Code or any special or local law. Since, however, it has been found, for reasons already stated, that to cremate on the ground in question was not a nuisance before the issue of the order of the 11th August 1894, the section relied on cannot be held to support that order. Nor have we been able to find any other provision of law under which it could have been rightly promulgated. No doubt before the District Magistrate made the order, another place, unobjectionable to the Thiruvaduthurai people, had been provided for the Thirukodikaval people to be used by them as their village cremation ground. Now some observations made by Innes and Muthusami Aiyar, JJ., in criminal revision case No. 86 of 1881(1) were cited to show that, in circumstances like those which existed here, it was within the powers of the Magistrate to prohibit the Thirukodikaval people from using the old spot as a place for cremation in future. The observations

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(1) Weir's Criminal Rulings, 3rd Ed., 764.

of the learned Judges, no doubt, support the contention. They are, however, but *obiter dicta*, for which no authority is cited and in which, with all deference to the learned Judges, it is difficult to agree. On the other hand, *Becharam Ghorooee v. Boistubnath Bhooyan* (1) seems to be a direct decision in support of the contrary view. There a Magistrate, purporting to act under section 308 of the Criminal Procedure Code of 1862, had prohibited cremation in a spot originally devoted for such a purpose on the ground that a more suitable place for it had been subsequently provided in another locality. Looh, J., who delivered the judgment of the Court, observed: "but here the public were charged with committing a nuisance by a private individual in the exercise of an admitted right, and we are not shown under what law the Magistrate proceeded when he prohibited the public from making use of this right." This appears to be the sound view to adopt, since it is not easy to see how the mere fact that another place has been set apart can empower a Magistrate, acting under the general law, to deprive a party entitled to use the existing cremation ground of his vested right to continue to use such ground for the purpose for which it was originally appropriated. It is obvious that difficulties, like those which have arisen in the present instance, can be met only by the extension of provisions similar to those contained in section 240 of the District Municipalities Act, to the rural parts of the country. In the absence of such a law applicable to tracts like that in which the villages in question are situated, the prohibitory order relied on on behalf of the Crown must be held to have been made without jurisdiction and void. In this view it is, of course, unnecessary to consider the other objections taken to the validity of the District Magistrate's order.

The result, is the convictions of the accused must be, and are hereby, set aside. The fines, if levied, must be refunded. The appeals against acquittal in respect of the offence alleged to have been committed under section 188 of the Indian Penal Code are dismissed.

* Ordered accordingly.

(1) 14, W.R.Criminal, 177.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

(In Appeal No. 179 of 1894.)

CHINNARAMANUJA AYYANGAR AND OTHERS (DEFENDANTS
Nos. 2 to 5), APPELLANTS,

1896.
February 24,
27.

PADMANABHA PILLAIYAN AND OTHERS (PLAINTIFFS
Nos. 1 to 3 AND DEFENDANT No. 1), RESPONDENTS.*

(In Appeal No. 186 of 1894.)

SORIMUTHU PILLAI AND OTHERS (DEFENDANTS Nos. 19 to 21),
APPELLANTS,

PADMANABHA PILLAIYAN AND OTHERS (PLAINTIFFS),
RESPONDENTS.*

Partnership—Payment to a partner in fraud of his co-partners not a valid
discharge—Constructive notice.

The defendants, other than the first defendant, styling themselves the 'agricultural association,' entered into three rental agreements, two of them dated April 23, 1891, and the third dated June 21, 1891, with the plaintiffs and the first defendant for the cultivation of certain lands belonging to an undivided family of which the plaintiffs and first defendant were members and took possession of and cultivated the said lands.

On the 17th June 1891 an agreement; of which the second defendant had notice, was entered into between the plaintiffs and first defendant to the effect that the first plaintiff should be the managing member of the family and should be entitled to receive the rent and give receipts for the same. Subsequently disputes arising between plaintiff and first defendant, the other defendants made payments of rent to first defendant alone:

Held, that these payments were not a valid discharge as against the claim of the plaintiffs on its being proved that second defendant had notice of the agreement of 17th June and that notice to him must be taken to be notice to his partners, the other defendants.

By an agreement between the defendants any one partner was empowered to take a lease, such lease to be binding on all the partners as if executed by them. The leases were not signed by the 13th defendant (now represented by appellants 19, 20 and 21) who was admittedly a partner and took actual part in the management of the affairs of the firm after the leases were executed:

* Appeals Nos. 179 and 186 of 1894.

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Held, that it was intended that the leases should operate as if all the members had executed them and that the representatives of 13th defendant were bound.

APPEALS against the decrees of S. Gopalachariar, Subordinate Judge of Tinnevely, in original suit No. 40 of 1892.

The facts of the case were as follows:—

Suit to recover from defendants 2 to 18 the sum of Rupees 9,180-6-7, being the balance of rent with interest due for kar and pisanam of Andu 1067 (July 1891 to July 1892) in respect of the properties described in schedules I to III under three separate rent agreements (counterparts of lease) executed by defendants 2 to 5 for themselves and on behalf of the other members of the agricultural association on 23rd April and 17th June 1891, in favour of first plaintiff and first defendant (who are uncle and nephew). Plaintiffs 2 and 3 are the younger brothers of the first defendant, who has been made a party defendant on the ground that he has declined to join plaintiffs in instituting the suit.

Defendants 19 to 21 were added as representatives of the 13th defendant upon his death after the institution of the suit.

The plaint sets forth that the family of plaintiffs and first defendant is a joint one, of which first plaintiff is the head and manager.

That the properties described in schedules I to III belong to the family.

That the properties in schedule I were leased out by first plaintiff and first defendant to defendants 2 to 5 as representing the agricultural association for a term of nine years from Chittirai 1066 (April 1891) under a registered lease deed and counterpart passed between the parties on 23rd April 1891.

That similarly the properties in schedule II were leased out under similar documents, also dated 23rd April 1891.

That similarly the properties in schedule III were leased out under similar documents, dated 17th June 1891, between first plaintiff and first defendant on the one hand and second defendant on behalf of the said association on the other.

That defendants 2 to 18 accordingly took up and held possession of the properties.

That on 17th June 1891, i.e., the date of the third lease, an agreement was executed between first plaintiff and first defendant

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with the attestation of second defendant and with the knowledge of the other defendants to the effect that first plaintiff was the head and manager of the family and that the said rent should be paid to first plaintiff who should give a receipt therefor.

That defendants 2 to 18 have not paid the rent even after repeated demand on the expiry of the due dates, and deducting the amount credited in plaint, which was collected by Government by attachment of paddy towards kist, the remaining portion of the paddy, money and straw due under the agreements is still due and unpaid, and interest is also payable thereon at one per cent. since the due dates.

Defendant No. 1 admitted the claim. Defendants 2 to 5 disputed the claim and alleged that the full amount of rent due had been paid.

Defendants 6 to 9, 12, 15 and 16 plead that, though they joined the association originally, i.e., in March 1889, they disconnected themselves from it with the consent of defendants 2 to 5 and 13 in April 1889 alone and executed a release deed subsequently, i.e., on March 1892, that they were not aware of the leases obtained by defendants 2 to 5 and 13, and were not members of the association at the time of the leases, that they never enjoyed the properties and are not liable for the rent, that defendants 2 to 5 have exceeded their authority in getting these leases, which are therefore not binding on them, that as more than the rent due at the time of the said release appears to have been paid up, nothing is due from them, and that plaintiffs have impleaded them while fully knowing of their disconnection from the association.

The 13th defendant denies his knowledge of the leases and enjoyment thereunder, charges the association with several irregularities, and states that he had told second defendant that he wanted to disconnect himself from the association, and that he is not bound by the leases and has been unnecessarily made a party.

On 13th defendant's death, defendants 19 to 21 were joined as his heirs. They have put in a written statement adopting his defence and stating that, in any event, they are not liable after his death.

The Subordinate Judge found that with regard to certain payments made by defendants 2 to 5 to defendant No. 1, that these payments were binding on the plaintiffs. He further found

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that a sum of Rs. 1,700 had not been paid to the plaintiffs, and that defendants were not entitled to a reduction owing to excessive rain if such excessive rain occurred. The Subordinate Judge decreed that part of the plaintiffs' claim was proved and ordered payment by defendants 2 to 5 of Rs. 3,915-2-8 with interest and proportionate costs. The Subordinate Judge exonerated defendants 6 to 12 and 14 to 18 on the ground that they had disconnected themselves with the agricultural association previous to the leases which formed the subject matter of the present suit, and held that defendants 19 to 21, the representatives of 13th defendant deceased were liable for the aforesaid amount with interest and costs to the extent of the 13th defendant's share in the assets of the agricultural association, and that the defendants 19 to 21 were liable to the extent of the assets, if any, received from the estate of the 13th defendant deceased.

Defendants 2 to 5 appealed, in appeal No. 179 of 1894 and the respondents 1 to 3 filed a memorandum of objections, contending that defendants 2 to 5 were not justified in making payments to the first defendant without the consent of the first plaintiff.

Sundara Ayyar for appellants.

Krishnasami Ayyar for respondents.

JUDGMENT.—The question is whether the appellants are liable on the rental agreements executed by four of the defendants, but not executed by the deceased person whom they represent. The plaintiff alleges that the documents were executed on behalf of the agricultural association of which the deceased was a member. The 13th issue raises the question "whether the defendants 2 to 5 executed the lease deeds on behalf of the defendants 6 to 18 also"; but there is no finding on that issue. Admittedly it is not stated in the documents that the executants were acting on behalf of others, nor do they sign in that capacity.

The only questions argued are with reference to the third issue. We see no reason for differing from the Subordinate Judge in his finding as to non-payment of Rs. 1,700, and in the finding that there was no such extraordinary rain as to make the special clauses applicable. The finding with regard to this point is that there was really no payment and no valid discharge. The appeal is dismissed with costs.

JUDGMENT ON MEMORANDUM OF OBJECTIONS:—It is admitted by the second defendant that a month after the arrangement made

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between his lessors he became aware of it, and that in February 1892 the defendant had express notice of the same arrangement. The Subordinate Judge also in effect finds that the defendant was aware of it from the outset. But he observes there is no evidence to show that this defendant or his co-lessees assented to the arrangement and agreed to pay the rent to the plaintiff only, and accordingly he holds that payments made to the first defendant are valid notwithstanding the arrangement. The Subordinate Judge is, in our opinion, mistaken in supposing that the assent of the lessees was necessary, that otherwise they were at liberty to disregard the arrangement. A payment made by a debtor to one of two joint-creditors, between whom it has been agreed that the other only shall receive the sum, cannot, when made with notice of the agreement and in defiance of it, be treated as a valid payment in discharge of the debt. (See *Phillips v. Ologett* (1).) Such a payment may properly be described as made in fraud of the person who was entitled to receive the money. The lessees, other than the second defendant, were his partners and must be held to be bound by the notice which he had. The plaintiffs have in their memorandum of objections claimed Rs. 4,590. They are entitled to the sum of Rs. 2,965, notwithstanding that on taking accounts between them and the first defendant the latter may prove to be entitled to some part of it. Each party will pay and receive proportionate costs. The memorandum of objections is, therefore, allowed.

In appeal No. 186 of 1894, defendants 19 to 21 and heirs of defendant No. 13 deceased appealed against the judgment and decree of the Subordinate Judge in so far as it affected their interest.

Sankara Menon for appellants.

Krishnasami Ayyar for respondents.

JUDGMENT.—The question is whether the appellants are liable on the rental agreements executed by four of the defendants, but not executed by the deceased person whom they represent. It is not denied that the deceased was a partner, nor was it argued in the Court below that the executants had exceeded their powers in taking the leases. There is satisfactory evidence that the deceased took part in the management of the affairs of the firm after the leases were taken. By the agreement under which the partners

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worked any one partner was empowered to take a lease and execute any necessary document, such documents being taken to be binding upon all the partners as if executed by them. In result, therefore, it must be taken that, although the other members of the firm are not mentioned in the agreements, and did not execute them, it was intended that they should operate as if all the members were parties to them.

We are unable to agree with the opinion expressed by Farran, J., in *Ragoonathdas Gopaldas v. Morarji Jutha*(1). In the case cited by him (*Walters v. Northern Coal Mining Company*(2)) it was sought to make the *cestui que trust* liable upon a covenant in a lease executed by the trustee. There was no remedy at law, because the covenant was contained in a deed, and, according to the rules of English law, no person who is not a party to a deed can be sued upon the covenant contained in it. All that was held was that the landlord could not treat the *cestui que trust* as liable to him in equity on the ground of the relation between him and his trustee. There is no relation of that character between the executants of the agreement in the present case and the deceased. We know of no authority for the position maintained by Farran, J., that there is an exception in the case of leases from the general rule laid down in *Beckham v. Drake*(3). The suggestion that in the case of a lease there is a transfer of property is met by the case of mortgage as to which there is no doubt that, although executed by one person, it may be binding upon the partner or others who have authorized the act (see *Juggeewunddas Keeka Shah v. Ramdas Brijbookundas*(4)). There is nothing to show an intention to make the executants only liable and to exclude the liability of the other partners. We must dismiss the appeal with costs.

The memorandum of objections is allowed.

(1) I.L.R., 16 Bom., 574.

(3) 9 M. & W., 79.

(2) 5 De G.M. & G., 629.

(4) 2 M.I.A., 487.

APPELLATE CIVIL.

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

RATNAGIRI PILLAI (DEFENDANT), PETITIONER,

v.

SYED VAVA RAVUTHAN (PLAINTIFF), RESPONDENT.*

Jurisdiction—Civil Procedure Code, s. 17—Provincial Small Cause Courts Act—
Act IX of 1887, s. 16.

1896.
September
11, 15.

Where a suit may be filed in more than one of several Courts, it is a general principle of law that the plaintiff may select the *forum* in which to bring the suit.

Where a plaintiff sued in a District Munsif's Court having jurisdiction, at the place where the money due under a contract was to be paid, there being no Small Cause Court having jurisdiction at such place:

Held, that the jurisdiction of the District Munsif was not ousted by the fact that there was in existence at the date of suit a Small Cause Court having jurisdiction at the place where the contract was made.

PETITION under section 622 of the Code of Civil Procedure praying the High Court to revise the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 369 of 1895, confirming the decree of T. Sadasiva Ayyar, District Munsif of Dindigul, in original suit No. 23 of 1895.

The facts of this case are fully set forth in the judgment of the High Court.

Krishnasami Ayyar for petitioner.

Mr. Subramaniam for respondent.

JUDGMENT.—The plaintiff sued the defendant on a promissory note. The parties reside at Palni and the money was to be paid there; but the note was executed at Dindigul, where the parties were on a temporary visit. The Subordinate Judge of Madura (West) has small cause jurisdiction over Dindigul, but not over Palni. One and the same District Munsif has ordinary original jurisdiction over both Palni and Dindigul. The question for decision is whether the suit was triable by the District Munsif, or whether it was triable exclusively by the Small Cause Court.

* Civil Revision Petition No. 123 of 1896.

MALLIKARJUNA *Held further, that as the irregularity might have affected the merits of the case, s. 578, Civil Procedure Code, was inapplicable.*

PATRAMENI. SECOND APPEAL against the decree of H. T. Ross, District Judge of Godavari, in appeal suit No. 120 of 1894, reversing the decree of B. Rajalingam, District Munsif of Amalapuram, in original suit No. 128 of 1893.

This was a suit for the recovery of a dwelling site with past profits Rs. 2 and subsequent profits at Rs. 2 per annum and ground. The plaintiff alleged that the defendants Nos. 1 and 2 executed a mortgage of the suit property to the plaintiff's uncle Bapirasu in 1860 and gave him possession, that in 1867 the defendants sold the same to Bapirasu and that the lands had been in his possession and in the possession of the plaintiff down to the year 1891 when they were usurped by defendants. The defendants denied the mortgage and sale and pleaded that they had always been in possession.

The District Munsif dismissed the suit holding exhibit B, the mortgage of 1860 not proved and refusing to admit in evidence a certain decree on the ground that it was produced too late.

The District Judge remanded the case for a revised finding with a direction that the decree should be admitted. Thereupon the District Munsif admitted the document and passed a decree in favour of the plaintiff.

On appeal the judgment of the District Court was as follows:—

"Defendant's pleader states he has no instructions and no objection has been filed by defendants to the Lower Court's finding."

"On these findings the Lower Court's decree must be reversed and plaintiff given a decree for the recovery of the suit property with costs throughout. There was no evidence for plaintiff as to 'mean profits.'"

The defendants appealed.

Mr. J. G. Smith for appellants.

The Lower Appellate Court had no power to remand the case as the suit had not been decided on a preliminary point *Subba Sastri v. Balachandra Sastri*(1) and *Kelu Mulacheri Nayar v. Ohendu*(2). The District Judge ought to have weighed the evidence himself. The effect of the Judge's procedure was to throw on the respondent the burden of supporting the Munsif's original judgment instead

of making the appellant show good cause for revising it. Section 578, Civil Procedure Code, cannot apply, as the appellants have been seriously prejudiced.

Sriramulu Sastriar for respondent.

JUDGMENT.—We are of opinion that the order of remand was *ultra vires* and illegal, since the District Munsif had decided the case on the merits, not on a preliminary point. The proper course was for the District Judge to have himself admitted exhibit B and to have considered its effect along with the other evidence in the case and to have then arrived at findings on the material issues. If further evidence was required, he might have called on the District Munsif to record it and certify it, or he might have himself admitted it, and he might then have considered it also before arriving at a finding on the issues (*Subba Sastri v. Balachandra Sastri*(1)).

We have considered how far the provisions of section 578, Civil Procedure Code, should effect our procedure in this case. If we were satisfied that the District Judge did himself consider the evidence and did himself arrive at findings thereon, we should be inclined to hold that, under section 578, Civil Procedure Code, the order of remand and the call for revised findings was merely an irregularity of procedure not affecting the merits and not, therefore, such as to require or to justify us in now remanding the case.

We, however, observe that in the present case the District Judge does not appear to have brought his mind to bear on the question whether the evidence did or did not justify the findings. He did not even state that he accepted them. He merely observed that no objection was taken to them, and that on those findings the decree of the Lower Court must be reversed. It may, perhaps, be that, if the District Judge had himself considered the evidence, he would have arrived at a different conclusion.

The irregularity was, therefore, one which may perhaps have affected the merits of the case.

This being so, we shall follow the procedure adopted in the authority already referred to, and, setting aside the decree of the District Judge, we remand the suit to him for disposal according to law.

Costs of this appeal will abide and follow the result.

(1) I.L.R., 18 Mad., 421.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

QUEEN-EMPRESS

RARU NAYAR AND ANOTHER.*

Confessions of co-accused—Corroboration—Material particulars—Evidence Act, s. 80.—Abetment—Penal Code, s. 109.

Where the only evidence against two prisoners, accused of murder directly implicating them in the commission of the crime consisted of confessional statements made by them before the committing magistrate, which were subsequently retracted, and the statements in such confessions were corroborated in material particulars by other evidence on the record:

Held, that the evidence was sufficient to support a conviction.

CASE referred by H. H. O'Farrell, Sessions Judge of South Malabar, for confirmation of the sentence of death passed on the prisoners in sessions case No. 28 of 1896.

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

The *Acting Public Prosecutor* (Mr. Subramaniam) for the Crown.

Sivasami Ayyar for the accused.

JUDGMENT.—Independently of the confessions, the evidence for the prosecution is admittedly not sufficient to warrant the conviction of either of the accused. But, if the confessions can be acted on as true, they do, if taken together (one prisoner's with the other's) conclusively prove the guilt of both. We see no reason to believe they were not true for the chief reason that they were not coerced, for, even when the prisoners retracted them, they did not allege that the confessions had been extorted from them by the police, nor is there any allegation that they were obtained by inducement. In withdrawing their confessions the prisoners still admitted that they obtained a gun on the night of the murder from the boy Velu Rutti, who, as sixth witness, confirms their statements, thereby corroborating their confessions in a most material particular. The fifth witness also corroborates the two prisoners in stating that they were in company together on the

* Referred Trial No. 44 of 1896.

night of the murder and proceeded together to get the gun from the sixth witness. The prisoners have given no evidence of what they wanted the gun for, and what they did with it—if they did not want it, and did not use it for killing the deceased. This is a strong circumstance against them which they have failed to explain. As to motive, it is shown that the deceased was at enmity with the first prisoner, who was also the person most interested in his death, circumstances going to confirm the truth of his confession that he was desirous of injuring the deceased. The second prisoner had no personal interest in the murder of the deceased, but both he and the first prisoner in their confessions explain how he came to be hired to commit the offence for a pecuniary consideration. We have not overlooked the fact that only one of the two prisoners could have fired the fatal shot, and that which of the two did it cannot be determined upon the mere confessions. But there is no doubt they were both present at the commission of the crime, aiding and abetting each other; consequently both are liable to be convicted for the substantive offence of murder. We therefore agree with the Sessions Judge and confirm the conviction and sentence of both prisoners.

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APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

QUEEN-EMPRESS

DUMA BAIDYA AND OTHERS.*

Penal Code, ss. 34, 56, 302—Murder—Sentence of penal servitude.

Where three prisoners assaulted the deceased and gave him a beating, in the course of which one of the prisoners struck the deceased a blow on the head, which resulted in death:

Held, that in the absence of proof that the prisoners had the common intention to inflict injury likely to cause death, they could not be convicted of murder.

The punishment of penal servitude is only applicable to Europeans and Americans.

APPEAL against the conviction and sentence of H. G. Joseph, Sessions Judge of South Canara, in sessions case No. 8 of 1896.

* Criminal Appeal No. 253 of 1896.

1896.
September 4.

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In this case the prisoners were charged with having on 10th February, 1896 at Mangalore lain in wait for one Koraga (with whom the first accused had a quarrel two days before) and assaulted him. They left him in a state of unconsciousness, from which he never recovered, dying in hospital two days later.

The evidence of two witnesses (prosecution second and third witnesses) who were with the deceased at the time of assault proved that first accused first struck deceased a heavy blow on the head with a bludgeon; that second accused struck him across the chest with a lighter cane; and that when he fell under these blows, third accused put his foot on him and pummelled him.

The medical evidence showed that the cause of death was the blow on the head which fractured the skull and ruptured one of the meningeal arteries.

The Sessions Judge, in finding all three prisoners guilty of murder, remarked as follows:—

"There is no ground for making any distinction between the three persons concerned in the commission of the offence, and since the blow struck by the first accused was one which must have in all human probability smashed the head of the deceased man, the three must be held to have acted with the knowledge that death was likely to result from their action."

He therefore convicted the three prisoners and sentenced them to penal servitude for life.

Narayana Rau for appellants.

The Acting Public Prosecutor (Mr. Subramaniam) for the Crown.

JUDGMENT.—We have no reason to doubt that the three appellants made an attack on the deceased Koraga in the manner described by the first and third prosecution witnesses. The effect of the blow given by the first appellant on the head of the deceased with a thick stick or 'bludgeon' was to cause his death, and we consider the first appellant was rightly convicted of murder. But the conviction of the second and third appellants for the same offence we cannot uphold. There is nothing to show that there was a common intention on the part of all the three accused to inflict such injury as would cause death; and no such intention as regards the second and third accused can be gathered from the particular acts of violence proved against them which in no way

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contributed to the death of the deceased. Though the object of all was no doubt to give the deceased a beating, the second and third accused neither instigated nor participated in the fatal blow dealt by the first accused. They cannot, therefore, be held responsible for the consequences of such act, and it is not easy to follow the reasons given by the Judge for holding these two persons also guilty of murder. We therefore alter the conviction of the second and third accused into one of voluntarily causing hurt under section 323 of the Penal Code and convert the sentence passed upon them to one of four months' rigorous imprisonment. The sentence passed by the Judge of 'penal servitude' for life on all the three accused was in itself illegal, as the punishment of 'penal servitude' is applicable only to Europeans and Americans, so that we must also alter the sentence passed on the first prisoner. In lieu of the sentence of the Judge we sentence the first appellant to transportation for life and dismiss his appeal.

APPELLATE CIVIL.

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

CHOCKALINGAM PILLAI AND OTHERS (DEFENDANTS
2 to 10, 13 AND 27 to 31), APPELLANTS,

v.

MAYANDI CHETTIAR (PLAINTIFF), RESPONDENT.*

Landlord and tenant—Ulavadai Mirasidars—Permanent tenancy—Lease by temple trustee—Long possession—Necessity for lease presumed—Civil Procedure Code, s. 584—Inference to be drawn from documents, question of law.

In 1813 the manager of a temple gave a permanent lease of one-half of certain lands to C, the ancestor of the defendants 1 to 14, and the other half to N. In 1820 N transferred his half share to V, the son of C. In 1831 V and S, the ancestor of the other defendants, addressed a petition to the Collector, the then manager of the temple. In 1832 V and S executed a fresh lease and a security bond in favour of the temple, in both of which documents V and S were described as Ulavadai mirasidars, that is, persons with an hereditary right to cultivate. There was no evidence adduced to prove for what purpose the lease

* Second Appeal No. 639 of 1895.

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of 1832 was executed, but the defendants held possession as tenants from 1832 to date of suit:

Held, that the words 'Ulavadai mirasidars' used in the deeds of 1832 as describing the tenants denoted that they were persons with hereditary right to cultivate, and that the lease was therefore of a permanent nature:

Held also, that after the lapse of so great a period of time, the Court would presume under the circumstances, that the original grants were made for necessary purposes and were binding on the temple:

Held further, that the proper inference to be drawn from the terms of a document is a question of law within the meaning of section 584, Civil Procedure Code and can be considered in second appeal.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 82 of 1894, confirming the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in original suit No. 1 of 1893.

the facts of this case were as follows:—

The plaintiff, as trustee of the temple of Kayarohanaswami at Negapatam, has brought this suit to eject the defendants from the possession of certain land in the village of Vadagudi, belonging to the temple and for mesne profits from date of plaint to date of delivery.

The lands in dispute belong to the temple referred to in the plaint. On the 10th January 1832, when the management of the affairs of the temple was exercised by the Government Vriddhachala Pillai, the ancestor of the defendants 1 to 14, and Subbayyan, the ancestor of the defendants 15 to 26, executed a muchilika (exhibit A, a translation of which appears, in the judgment of the High Court) in favour of the then Collector of Tanjore undertaking to cultivate the lands from fasli 1241 and to pay annually to the temple Rs. 520-7-9½.

Plaintiff's case was that Vriddhachala Pillai and Subbayyan and after their death their descendants continued to pay the rent as reserved in the muchilika until fasli 1279, and from faslis 1280 to 1283, 205 kalams of paddy were paid every year in addition to the rent, and from faslis 1284 to 1292 the additional rent was raised to 350 kalams per annum, and it was paid together with the prescribed rent and subsequently the defendants allowed it to fall into arrears; that the lands are now capable of fetching an annual net profit of Rs. 1,500 to the temple; that on the 6th November 1889 a notice was given by the plaintiff to the defendants demanding the payment of arrears in full and execution of a fresh lease-

deed at an enhanced rate of rent, and intimating that, if the defendants did not agree to his proposal, they were to quit the lands at the end of the fasli, but they sent no reply, though bound to give up the lands on demand, and that plaintiff is not willing to leave the lands any longer in their possession. Defendants 27 to 37 are impleaded as being in possession of a portion of the lands sought to be recovered.

The principal defence was that the entire lands set out in the plaint had belonged to the defendants' ancestors, who had given their mirasi right to the temple of Kayarohanaswami two hundred years ago, but retained the permanent right of cultivation, which they and the defendants had enjoyed for a period of two hundred years, paying the Ayan and the Svamibogham rent to the temple, and they were not therefore liable to be ejected. It was further contended that the muchilika contains no stipulation for eviction, and they are not in arrears, having paid away the rent until the end of the last fasli; that no additional rent was ever paid by them, and that the notice given by the plaintiff is not a proper notice to quit. It is also contended that the revenue and the proprietary dues have been fixed in perpetuity.

The following issues, *inter alia*, were framed:—

Whether under the terms of the muchilika of the 10th January 1832 Vriddachala Pillai and Subbayyan were tenants from year to year or acquired a right of permanent occupancy.

Whether defendants 1 to 26 allowed the rent to fall into arrears as alleged in paragraph 4 of the plaint.

Whether the defendants aforesaid are liable to be ejected for non-payment of the rent.

Is the plaintiff entitled to enhance the rate of rent.

Whether the notice to quit given by the plaintiff is a proper and legal notice.

To what relief is plaintiff entitled.

The Subordinate Judge held with regard to the first issue that the defendants had failed to prove that they had any title higher than that of cultivating tenants from year to year.

As to the second and third issues he held that there was no proof that the rent was allowed to fall into arrears by the defendants. Even supposing they were in arrears, they are not liable to

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be ejected, there being no stipulation in the muchilika that non-payment of rent should work a forfeiture of the lease.

As to the fourth issue he held that defendants' tenure being one from year to year, plaintiff was at liberty to enhance the rent (*Chockalinga Pillai v. Vythealinga Pundara Sunnady*(1) and *Thiagaraja v. Giyana Sambandha Pandara Sennadhi*(2)), and as to the fifth issue he said "that the notice given by the plaintiff contained 'an intimation that defendants should pay the enhanced rate of rent or quit the land at the end of the fasli. It is argued for the defendants that notice to quit should not contain a demand for enhanced rate of rent, and in support of the argument the ruling in *Mohamaya Goopta v. Nilmadhab Rai*(3) was cited. In that case it was merely doubted if such a notice was a good notice, and the question was not authoritatively settled in one way or the other. But such a notice was held to be valid in *Bokronath Mundul v. Binodh Ram Sein*(4) and *Janoo Mundur v. Brij Singh*(5). The issue must, therefore, be found in favour of the plaintiff." He accordingly decreed that plaintiff was entitled to eject the defendants and recover the land sued for.

On appeal the District Judge agreed with the lower Court, and with regard to the first issue he held that the trustee of the temple in 1813 and 1820 had no power to grant a permanent lease of the temple lands. His judgment on this point is as follows:—

"Even assuming that Vriddhachala Pillai had been given a permanent right under exhibits I and II and that his petition (exhibit H) could be explained away, and it was in consequence of that permanent right that he was granted the lease A, the question arises whether the trustee of the temple for the time being in 1813 and 1820 could have made a permanent alienation of the rights of cultivation. In a Privy Council case *Maharanees Shibessourcee Debia v. Motkooranath Acharjo*(6), it has been held (p. 275) 'that to create a new and fixed rent for all time, though adequate at the time in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in the trustee. That ruling as pointed out in *Tayubunnissa Bibi v. Kuwar Sham Kishore Roy*(7), is of course subject to the modification that such a permanent

(1) 6 M.H.C.R., 171. (2) I.L.R., 11 Mad., 77. (3) I.L.R., 11 Calc., 535.
(4) 10 W.R., 33. (5) 22 W.R., 548.
(6) 12 M.L.A., 270. (7) 7 B.L.R., 621.

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"alienation might be made by a trustee under special circumstances of necessity. Now in this case the consideration stated for the grant of the permanent lease (exhibit I) is that the lessees should make the village prosperous by building houses in the said village and living therein and apparently effecting improvements on the land demised. These considerations would no doubt be good ground for the grant of a lease for a long term, but they are not adequate for granting a lease for all time. I must, therefore, hold that even if Vriddhachala Pillai had had a permanent right granted to him previous to the lease (exhibit A) and that exhibit A recognized that right and continued it, it was not a valid grant. If the previous permanent leases (exhibits I and II) are invalid, as I find them to be, the Collector also in the position of trustee had no power to create a permanent tenancy himself for the same reason which I have given in regard to the previous leases."

The appeal was accordingly dismissed with costs.

Sankaran Nayar for appellants.

Notice to quit was necessary before ejecting the defendants. *Abdulla Rautan v. Subbarayyar*(1), *Subba v. Nagappa*(2), *Unhamma Devi v. Vaikunta Hegde*(3), *Mohamaya Goopta v. Nilmadhab Rai*(4). Transfer of Property Act, section 111(h). As to the power of the trustees to grant exhibits I, II and exhibit A, raised by the District Judge in the appeal, the question is barred by limitation under article 144, Limitation Act. *Sankaran v. Periasami*(5), *Nilmony Singh v. Jagabandhu Roy*(6), the question is also barred under article 134, Limitation Act. *Yesu Ramji Kalnath v. Balakrishna Lakshman*(7), and second appeal 613 of 1878 of this Court.

Ramachandra Rau Saheb for respondent.

Permanent tenancy under exhibits I and II was abandoned. Exhibit A is merely a tenancy from year to year. It is similar to the document in *Chockalinga Pillai v. Vythealinga Pundara Sunnady*(8), which was held not to create a permanent tenancy. The onus of proof that the tenancy is more than a tenancy from year to year is on the appellants and they have not discharged it.

(1) I.L.R., 2 Mad., 346.
(3) I.L.R., 17 Mad., 218.
(5) I.L.R., 13 Mad., 467.
(7) I.L.R., 15 Bom., 588.

(2) I.L.R., 12 Mad., 353.
(4) I.L.R., 11 Calc., 533.
(6) I.L.R., 23 Calc., 545.
(8) 6 M.H.C.R., 164.

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Thiagaraja v. Giyana Sambandha Pandara Sannadhi(1), *Rangana-sary v. Shappani Asary*(2), is distinguishable. All the pagodas in Tanjore were taken possession of by Government in 1812. *Ramiengar v. (J. Pandarasannada)*(3).

Sankaran Nayar in reply—If exhibits I and II were not surrendered under H, there is nothing in A to take away the perpetual tenure. *Chundrabati Koeri v. Harrington*(4). The inference to be drawn from the construction of a document is a question of law and the High Court in second appeal can therefore interfere with the construction put upon it by the lower Courts. *Ram Gopal v. Shamskhaton*(5). It is essential as part of the plaintiff's case to prove that proper notice to quit has been given, so the plaintiff cannot plead he has been misled by the defence. Exhibit A was executed because a money rent was not fixed under exhibits I and II.

JUDGMENT.—The plaintiff, as trustee of a certain temple at Negapatam, sued to recover from defendants certain lands which the plaintiff alleged they held under the temple as tenants, from year to year, under a lease (exhibit A). The defendants claimed to have a right of permanent occupancy in the lands, subject only to payment of rent to the temple.

Both the lower Courts have decreed for plaintiff.

Against those decrees the defendants now appeal.

The defendants claimed to have had permanent occupancy rights for the past two hundred years, but of this no proof was given. It is, however, clear from exhibit I that, so long ago as 1813, the then manager of the temple gave a permanent lease of one-half of the lands to Chokkanatha Pillai, an ancestor of the defendants 1 to 14, and of the other half of the lands to Nalla Pillai. It is also clear from exhibit II that in 1820 Nalla Pillai transferred his half share to Vriddhachala Pillai (the son of Chokkanatha Pillai), and that the manager of the temple then confirmed him as permanent lessee of the whole of the lands. On the 4th December 1831, this Vriddhachala Pillai and one Subbayyan, the ancestor of defendants 15 to 26, addressed a petition, (exhibit H), to the Collector of Tanjore, who was then the manager of the temple. It runs as follows:—

(1) I.L.R., 11 Mad., 77.

(2) 5 M.H.C.R., 375.

(3) 5 M.H.C.R., 53.

(4) L.R., 18 I.A., 27.

(5) L.R., 19 I.A., 229, 233.

"To N. W. Kindersley, Esquire, Principal Collector of Tanjore—*Darkhast* presented by Vriddhachala Pillai and Subbayyan of Vadagudi, who are Purakudies of the Tarap land "situated in that village belonging to Kayarohanaswami of Nega-patam attached to the Mahanam of Anthanapettai, Kivalur taluk. We offer to cultivate for fasli 1241 the 20 velis, 5 mahs and 40½ kulies of nanja land and 6 mahs and 81 kulies of punja land situated in the aforesaid village and to pay the Sircar kist and 51 kalams of paddy as Svamibhogam to the temple for one year, and also to furnish cash security for the payment. We pray that darkhast izara may be granted to us for one year." No reply to this petition is on record, but on the 10th January 1832 exhibit A was executed by Vriddhachala Pillai and Subbayyan. It is an agreement by them to cultivate the plaint lands, and is in the following terms:—"We, Vriddhachala Pillai and Subbayyan, Ulavadai (act of ploughing or right to cultivate lands) mirasidars of Vadagudi, having agreed to cultivate the said village Vadagudi according to the taram faisal (classification of the lands) thereof, do hereby execute this taram muchilika to N. W. Kindersley, Esquire, Principal Collector of Tanjore, under date 10th January 1832. We have taken up for cultivation the following lands:—Nanja lands yielding one crop a year, consisting of 107 numbers, comprising 134 acres ¾ kulies, equivalent to 20 velis, 5 mahs and 40½ kulies, and punja lands consisting of six numbers, comprising 2 acres and 16 kulies equivalent to 6 mahs and 81 kulies, the total of nanja and punja lands being 20 velis, 12 mahs and 21½ kulies. According to the pymash settlement made in fasli 1238, we bind ourselves to pay Sircar in the presence of the pattadar the sum of Rs. 520-7-9½ on account of Ayan and Svamibhogam. If there should fall any arrears in so paying, you shall realize the same by attaching and selling our private property according to law. We shall never pay to any one even a cash in excess of the said tirva fixed for the lands mentioned in this muchilika. If the pattadar, the village karnam and others should demand or collect from us any sum in excess, we shall then and there lodge a complaint to the huzur. If in any year we should plant betel, plantain trees, sugar-cane or raise any garden products, such as tobacco, onion, garlic, &c., with the Sircar water in the said village, we shall furnish the Sircar with a true account of the same, and not only

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"pay the taram tirva fixed for so much of the land as is cultivated with the said crops, but also pay tirvajasti in those years. If we should cultivate waste and poramboke lands, &c., in addition to those mentioned in the muchilika, we shall pay the taram tirva fixed on such lands during the years in which they may be cultivated."

(Here follow covenants to pay servants, execute repairs, &c.)

"If we should raise a second crop or the taladi in excess of the second crop lands mentioned in this muchilika, we shall pay the tirva thereof according to the rules of taladi. If perchance loss should be occasioned in any fasli by drought or inundation through accident, the Sircar should inspect the same and grant a reasonable remission according to mamul. We shall pay the melvaram of the nanja lands of the said village according to the permanent taram tirva which has been fixed at $3\frac{1}{16}$ fanams per kalam. If this price should either rise or fall, the gain or loss thereby accruing is ours and the Sircar shall have nothing to do with it. As the permanent tirva has been fixed, and as we have assented thereto as stated above from fasli 1241, we shall pay to the Sircar the taram tirva fixed on each numbervar field. Thus do we execute this taram muchilika."

It is to be observed that in this document the executants are described as 'the cultivating mirasidars' of the village. On the day after exhibit A was executed, the executants executed a security bond (exhibit VII) in which they are again described as 'the cultivating mirasidars' of the village, and it is recited that they have taken the land permanently on 'Darkhast izara.' The rights of the parties admittedly depend upon the construction of these documents and the inferences that are to be drawn from them. The Courts below have held that exhibit H shows that for some reason or other, not now known, the defendants' ancestors had lost, or had abandoned, their rights under exhibits I and II, and that their rights now must be held to have originated with, and to depend solely on, the lease of 1832 (exhibit A). They held, on the authority of the decision in *Chockalinga Pillai's* case(1) that exhibit A was merely a lease from year to year, and might be terminated at the end of any fasli. The learned Judge of the Lower Appellate Court further held that, even if exhibit H could

(1) 6 M.H.C.R., 164.

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be explained away, and if exhibit A were executed in consequence of the defendants' ancestors having the rights granted under exhibits I and II, still the latter would be invalid on the ground that a manager of a temple could not alienate temple lands by a permanent lease in the absence of proved necessity for such alienation.

We are unable to accept these conclusions; but, before discussing the documents, it is necessary to notice a contention that was strongly pressed upon us by the respondent's vakil. That contention is that both Courts have found that exhibit H shows that when it was written the defendants' ancestors had lost or abandoned their permanent rights under exhibits I and II, that that finding is one of fact, and that it is not open to this Court in second appeal to consider whether that finding is right or wrong. If the inference to be drawn from the document were, in truth, a finding of fact, we should consider ourselves bound in this second appeal by the finding of the Lower Appellate Court, however unsatisfactory it might be *Ramratan Sukal v. Mussumat Nandu*(1), but the finding as to the inference to be drawn from exhibit H is one of law, not of fact. It is not any fact that is in question, but the soundness of the conclusion drawn from the terms of the document. This is a matter of law, and, as such, it is a proper subject for consideration in second appeal *Ram Gopal v. Shamskhatoon*(2).

The learned District Judge has pointed out that exhibit A in the present case is (with one important exception to be presently noticed) in exactly the same words as the document which this Court in *Chokkalinga Pillai's* case(3) held to be a lease from year year. That case has been repeatedly followed by this Court, and we do not question its authority; but in our opinion it is inapplicable to the facts of the present case. In *Chokkalinga Pillai's* case(3) the tenancy began under the lease, and all that that case decided was that, when a tenancy rests on contract only, the duration of the tenancy is regulated by the terms of the contract, express or implied, and that neither the Rent Act nor the Regulations operate to extend its duration *Krishnasami v. Varadaraja*(4). In the present case we think there are sufficient grounds for finding that the tenancy began not under exhibit A, but under exhibit

(1) 19 I.A., 1.
(3) 6 M.H.C.R., 164.

(2) 19 I.A., 231.
(4) I.L.R., 5 Mad., 354.

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I, that exhibit H is not sufficient to prove that the tenancy under exhibits I and II was ever determined, and, finally, that the transaction evidenced by exhibit A was not a new lease, but a confirmation of the lease under exhibits I and II, with a modification as to the mode of paying the rent.

We have already referred to the fact that exhibit A in the present case differs in an important particular from the corresponding document in *Chokkalinga Pillai's* case(1). The difference is this, viz., that in exhibit A the executants are described as 'Ulavadai mirasidars,' that is, as persons with an hereditary right to cultivate. The Courts below have said that this description is inapplicable to Subbayyan, as he was not a lessee under exhibits I and II, and they, therefore, treat the description as of little importance; but it seems to us that the description is applied to both the executants, because all the land dealt with in the lease was the subject of permanent rights of cultivation under exhibits I and II and when, Vriddhachala Pillai, who had those rights under exhibits I and II allowed Subbayyan to join him in executing exhibit A, the description was applied to him also in order to mark the character of the tenure on which the land was held. Turning now to exhibits I and II, it is to be observed that the very same description of the tenure occurs in the operative words of those documents by which the permanent tenure was created, "you, your sons and grandsons shall, for all time to come, enjoy the land from generation to generation by 'right of Ulavadi Kani.'" This right of 'Ulavadi Kani' originated in the grants evidenced by exhibits I and II, for prior to exhibit I, Chokkanatha Pillai was a resident in another village, but under exhibit I he was brought with a following of cultivators to the village of Vadagudi belonging to the temple to build houses there and cultivate the temple lands. When, then, we find that the right of 'Ulavadi Kani' was created under exhibits I and II, and that the grantees under those documents are, a few years afterwards, when executing exhibit A in regard to the very same lands, described as 'Ulavadi mirasidars,' the inference is strong that the tenure under exhibit A was intended to be the same as under exhibits I and II. Nor is this all. In the security bond (exhibit VII) executed the next day the same description

(1) 6 M.H.C.R., 164.

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of the executants as 'Ulavadai mirasidars' is given and the transaction evidenced by exhibit A is recited as a taking of the land 'permanently on darkhast lease from fasli 1241.' Lastly, we find that for the next sixty years the defendants and their ancestors enjoyed the lands on the strength of those documents. The question then naturally suggests itself, what was the occasion for exhibits H and A if there was already an existing permanent tenancy under exhibits I and II. The answer is, we think, to be found in the fact that under exhibits I and II the rent was to be a share of the produce paid in kind, viz., 35 kalams in every 100 kalams nett, whereas in exhibit H an offer is made to pay not a percentage share of the crop, but a fixed quantity, viz., 51 kalams, and in exhibit A it is agreed that the rent shall be fixed permanently in money at Rs. 520 each year. It is well known that the English Revenue authorities always preferred a fixed rent to a share of the produce, and constantly aimed at obtaining a fixed rent paid, if possible, in money, rather than in kind. Exhibit H stands by itself, and we have not before us either the order passed upon it, or any correspondence which took place prior to it; but in exhibit VIII, dated the 14th February 1832, the Collector, in writing to the Tahsildar regarding this land, refers to a report of the Tahsildar, dated the 18th January 1832, in which that officer reported that Venkatachala Pillai and Subbayyan had 'according to order' applied to cultivate the plaint land for one year at a fixed rent of 51 kalams of paddy. It would appear from this that when the temple came under the Collector's management, he issued some order requiring or urging the tenants to agree to fix the rent on their lands instead of letting it depend on the varying out-turn from year to year. Exhibit H appears to have been the proposal made by Vriddhachala Pillai and Subbayyan in reply to this order, but they carefully restricted their offer to one fasli, and wished still to pay in kind as they had been accustomed to do. What negotiations took place after this we do not know, but that some negotiations took place seems to be clear, for exhibit A cannot have been executed as a compliance with the proposal in exhibit H. All the expressions used in exhibit A indicate that the parties intended the arrangement to last for many years, whereas exhibit H contains a proposal for one year only, and the rent offered in exhibit H is in kind, while that finally agreed to

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in exhibit A, six weeks later, is a sum permanently fixed in money. Thus exhibits H and A do not indicate that the rights under exhibits I and II had been lost or abandoned, but rather that they had been confirmed with a modification by the substitution of a fixed money rent for percentage share of the crop. That the original grants remained in force is rendered almost certain from the fact that the original documents evidencing the grants have remained in the hands of the grantees, and there is not before us a trace of any evidence in the temple or revenue accounts or otherwise to suggest that the land has ever been in the possession of any one but the grantees during the eighty years which have elapsed since the date of the first grant. The Lower Appellate Court has, however, held that, even on the above finding as to the documents and the transactions evidenced by them, the defence must fail, inasmuch as the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation. That no doubt is the ordinary rule, but in the present case there are special circumstances from which the propriety of the alienation may rightly be presumed. There is no suggestion that the grant under exhibit I was tainted with any fraud. It was made not to a member of the grantor's family, but to a stranger of different caste and from a different village. In consideration of the grant being permanent, the grantee was to come with a following of cultivators and build houses and cultivate the lands of the temple. It is well known that at the time when the grant was made the country was but slowly recovering from the depopulation and impoverishment resulting from centuries of internecine war, and the difficulty generally was not to provide land for the cultivators, but cultivators for the land. To cultivate wet lands, as these were, requires capital as well as labour, and these the grantees were to supply. It may well be that the trustee of the temple could not arrange for the cultivation of the temple lands on less onerous terms than those agreed to. That the terms were fair may be presumed from the fact that they were confirmed in 1820 (exhibit II) and again in 1832 (exhibit A) by the Collector, and have remained in force now for eighty years. In these circumstances, we do not think it is reasonable or equitable to throw on the defendants the onus of showing that the original grants were for a necessity binding on the temple. We think that, after so

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great a lapse of time and under the circumstances which we find in this case, such necessity may rightly be presumed.

The result of our findings, then, is that the grants under exhibits I and II are valid and still in force, and that the plaintiff land is still held under those grants as modified by exhibit A.

On these findings the plaintiff's suit must fail, and it is unnecessary for us to discuss the pleas of limitation and want of notice raised by the appellants.

We reverse the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

NARAYANASAMI (PETITIONER), APPELLANT,

v.

KUPPUSAMI (COUNTER-PETITIONER), RESPONDENT.*

1896.
March 30.

Succession Certificate Act—Act VII of 1889, s. 7—Joint certificate legal.

It is not illegal to grant a joint certificate to two persons who claim adversely to each other to be entitled to collect the debts due to the estate of the deceased under Succession Certificate Act, VII of 1889.

APPEAL against the order of T. M. Horsfall, District Judge of Tanjore, in civil miscellaneous petition No. 299 of 1895.

A petition was presented under the Succession Certificate Act (Act VII of 1889) by one Narayanasami Pillai, praying that a certificate might be granted to him to collect the debts due to one E. R. Sattaya Pillai deceased, the adoptive father of petitioner.

The petition was opposed by one Kuppusami, the alleged adopted son of one Nagalinga Pillai deceased, who was the undivided brother of E. R. Sattaya Pillai.

The District Judge ordered a joint certificate to issue in the name of both.

Petitioner appealed.

Sundara Ayyar for appellant.

Krishnasami Ayyar for respondent.

* Appeal against Order No. 175 of 1895.

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JUDGMENT.—The first contention on behalf of the appellant was that the debt mentioned in the appellant's application for the certificate was the property of the appellant's father Sattaya Pillai. But, as Sattaya Pillai, the appellant, and the respondent were members of an undivided family, the presumption is that the debt was one due to the joint family, and there is nothing on the record to rebut this presumption.

The next contention was that the Judge should not have directed the grant of the certificate in the joint names of the appellant and the respondent. No doubt the cases in *Shitab Dei v. Debi Prasad*(1) and *Lonachand Gangaram Marwadi v. Uttamchand Gangaram Marwadi*(2) show that ordinarily certificates should not be granted to rival claimants jointly. But in the present case it is clear that the real object of the application for certificate was to raise questions as to the validity of the adoption of the respondent, a matter which was the subject of litigation for many years (*Narayanasami v. Kuppusami*(3)) and which the appellant's vakil states is now also the subject of a suit brought to set aside the adjudications made in favour of the respondent. In these circumstances I do not think it proper to interfere with the order of the District Judge.

I reject the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

1896.
March 13, 17.

PERUMAL NAIK (DEFENDANT No. 2), PETITIONER,

v.

SAMINATHA PILLAI AND OTHERS (PLAINTIFFS Nos. 1, 2, 4 AND 5),
RESPONDENTS.*

*Suit for dismissal of members of devastanam committee—Act XX of 1863, s. 16—
Reference to arbitration.—Powers of arbitrators.*

Where a suit for dismissal of the members of a devastanam committee and damages was referred under Act XX of 1863, section 16, to arbitrators who passed an award dismissing them as prayed and decreeing a portion of the damages claimed with interest:

(1) I.L.R., 16 All., 21. (2) I.L.R., 15 Bom., 684. (3) I.L.R., 11 Mad., 43.
* Civil Revision Petition No. 136 of 1895.

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Held, that the Court had power to refer the matter to the arbitrators and award damages with interest, provided the amount, inclusive of interest, did not exceed the amount claimed in the plaint.

PETITION under section 622 of the Code of Civil Procedure praying the High Court to revise the decree of W. Dumergue, District Judge of Madura, in original suit No. 26 of 1891.

This was a suit under Act XX of 1863 in which the plaintiffs sued for the dismissal of the members of the Palni devastanam committee from office, together with damages assessed at over Rs. 6,000 for losses incurred and alleged misappropriation by the defendants. Under section 16 of the Act the suit was referred for decision to arbitrators, with the following issues:—

(1) Whether there has been any misfeasance, breach of trust, or neglect of duty on the part of the committee members or of any of them in relation to the items severally set out in the schedule attached to the plaint?

(2) To what reliefs, if any, are the plaintiffs entitled?

The award passed by the arbitrators was that the defendants should be dismissed from office, that the first and second defendants should be directed to pay to the devastanam Rs. 3,212-4-0 as damages with interest thereon at the rate of 6 per cent. per annum from the date of the plaint to the date of realization, the same being made recoverable from them personally and also from their movable and immovable properties, and that all the three defendants should be directed to pay to the first, fourth and fifth plaintiffs the full costs of the suit with interest thereon at 6 per cent. per annum from date of decree to date of realization and bear their own costs.

The District Court passed a decree in accordance with the terms of the award.

Defendant No. 2 appealed.

Ramachandra Rau Saheb for petitioner.

Subramania Ayyar for respondent.

JUDGMENT.—The learned vakil for the petitioner (second defendant) urged that the award of the arbitrators and the decree thereon were illegal in so far as they related to (i) the dismissal of the petitioner from his office as a member of the committee and (ii) the award of interest prior to the date of the plaint.

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PILLAI.

Whether, if the contention were sound, the petitioner's remedy was not by appeal I refrain from determining, as I have come to the conclusion that the contention is unsound. Now with reference to the first point mentioned, viz., the dismissal from office, it was argued that it was not competent for the Judge to refer the point to the arbitrators, as it involved virtually a question of criminal punishment, which was for the Judge and not the arbitrators to deal with. I however fail to see how the jurisdiction to remove a trustee exercised by the Civil Courts has any reference to crimes or their punishment. In the first place it is a purely civil jurisdiction exercised by the Courts as ancillary to its principal duty to see that the trusts are properly executed (*Letters-tedel v. Broers* (1)). Nor is it true that removal from office is decreed always as punishment. No doubt such relief is often granted when misconduct is proved. But, as pointed out by the Judicial Committee in the case above cited, a trustee may be removed even when no misconduct is established if the Court is satisfied that the continuance of the trustee would prevent the due execution of the trusts.

As to the second point the argument was that, inasmuch as the plaintiffs had not claimed interest prior to the date of the suit, neither the arbitrators nor the Judge had authority to award such interest. It is quite true that in the plaint schedule interest prior to the date of the suit is not specified as one of the items making up the amount claimed as damages sustained by the temple in consequence of the malversation committed by the petitioner and the other trustees. But, the sum awarded, including the interest in dispute, does not exceed that claimed as damages. And, except as fixing a limit beyond which recovery cannot be had, the averment of the amount of damages is not a material one (*Sedgwick on Damages*, Vol. III, sec. 1260, 8th edition). I am therefore of opinion that it was quite competent to the arbitrators and the District Judge to award to the temple the interest in question as part of the compensation due to it with reference to the amounts found to have been misappropriated. The petition fails and is dismissed with costs.

(1) L.R., 9 App. Cases, 386.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramanya Ayyar.

LAKSHMAKKA (DEFENDANT No. 1), APPELLANT,

1896.
April 1.

BOGGARAMANNA (PLAINTIFF), RESPONDENT.*

Hindu Law—Deed containing restrictions on inheritance invalid.

A deed which attempts to create a new line of inheritance by excluding all heirs other than direct male heirs is contrary to Hindu Law and invalid.

SECOND APPEAL against the decree of W. H. Welsh, District Judge of Cuddapah, in appeal suit No. 6 of 1893, modifying the decree of T. Ethiraja Mudaliar, District Munsif of Proddatur, in original suit No. 643 of 1891.

The plaint property originally belonged to one Bachu Lakshmakka, who conveyed all her property to Lingana Ramanna, plaintiff's predecessor in title by exhibit A, dated 25th September 1854, and died four days afterwards. On the occurrence of her death Devisetti Subbarayadu, brother of the donor, took possession of all the movable property belonging to the deceased and conveyed by her to Lingana Ramanna under exhibit A. In order to induce Subbarayadu to give up the movables Lingana Ramanna conveyed the plaint lands to Subbarayadu by exhibit I, dated 9th November 1854, in which Lingana Ramanna, after giving a list of the property of Lakshmakka, sets forth a definite arrangement as to how the lands belonging to deceased should be divided between them and as to how her debts should be paid. By this arrangement it was agreed that in consideration of Subbarayadu having given up certain property to Lingana Ramanna and agreeing to pay Lakshmakka's debts, he should always enjoy certain lands in Koilkuntla and Jammalamadugu taluks. Subsequently, on 5th December 1854, Subbarayadu executed another document B in Lingana Ramanna's favour by which he (Subbarayadu) agreed to hold the plaint lands for his life and his male heirs' lives, subject to Lingana Ramanna's right to succession and without right of alienation. The plaintiff claimed under exhibit B, the

* Second Appeal No. 407 of 1895.

could be set aside being that Subbarayudu's daughter-in-law, the first defendant, executed a deed of gift to the second defendant in 1890 and that her possession then became adverse.

The District Munsif dismissed the suit, holding that exhibit B, the basis of the plaintiff's title, was a forgery; but the District Judge, finding it to be genuine, gave a decree for the plaintiff with costs.

Defendant No. 1 appealed.

Rama Rau for appellant.

Sheshagiri Ayyar for respondent.

JUDGMENT.—The plaintiff can only recover on the strength of his title-deed (exhibit B). By that instrument Subbarayadu, the then owner, agrees to hold the property only so long as there is male issue in his family. On failure of such issue he agrees to hand it over to Boggaramanna under whom the plaintiff claims. The document is somewhat obscure, but the meaning appears to be that Boggaramanna should take on failure of male issue at any time, however remote. It is in fact an attempt to create a new line of inheritance by excluding all heirs other than direct male heirs. This being so, the instrument is invalid. The plaintiff must, therefore, fail. We must reverse the decree of the District Judge and restore that of the District Munsif. Respondent must pay appellant's costs in this Court only.

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ABKARI ACT—ACT I OF 1886 (MADRAS), ss. 31, 36—Penal Code, ss. 99, 147 and 353:

A Sub-Inspector of Salt and Abkari attempted, without a search warrant, to enter a house in search of property, the illicit possession of which is an offence under the Madras Abkari Act and was obstructed and resisted:—*Held*, that having regard to section 99 of the Penal Code, even though the Sub-Inspector was not strictly justified in searching a house without a warrant, the persons obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of their obstruction, as it was not shown that that officer was acting otherwise than in good faith and without malice.

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" IX:

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1873, III (MADRAS):

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1876, I (MADRAS), s. 2—"Concur in applying"—Specific Relief Act—Act I of 1877, s. 42—Suit for declaration.

A suit was brought by F against the Secretary of State for India in Council for a declaration that the order of the Madras Government directing the Collector to cancel the separate registration and assessment of a village in the Sivaganga Zamindari in his name was *ultra vires* and illegal. The plaintiff's claim to be separately registered as the holder of the said village depended upon the proper construction to be put on a grant of the village contained in two documents, the one dated 18th December 1872 and the other being a document, dated 14th May 1877, executed by the Rani and her children. Subsequent to the grant referred to, an application was preferred by the Rani and addressed to the Collector requesting him to separately assess the village and register it in the name of F. This application was never presented owing to the death of the Rani, who was succeeded by the father of the present Zamindar who executed on 22nd February 1883, a deed of release in favour of F ratifying the grant above mentioned in the following terms:—"Whereas the village of 'Kondagai' . . . of my Zamindari . . . has been granted to you in 'perpetuity' by the late Rani Kattama Nachiyar and others and has been 'in your possession according to the terms of the documents executed by 'them to you therefor on the 18th December 1872 and on the 14th May '1877, and whereas I have received from you Rs. 2,000 as the consideration for my ratifying your rights in accordance with the terms of the said documents and for relinquishing whatever rights I possess therein, 'I hereby ratify your rights of every description in the said village and 'relinquish all my rights therein in your favour. Wherefore as per the 'terms of the said documents, dated 18th December 1872 and 14th 'May 1877, you and your heirs and assigns shall hold and enjoy the said 'Kondagai village . . . in perpetuity . . . with full powers of alienation 'by sale, gift or otherwise. You shall pay to my Zamindari the sum of 'Rs. 3,500, the *poruppu* fixed on the said village, as well as road cess, 'magamai, &c., according to custom," and he applied to the Collector for separate assessment and registration of the village in the name of F on 25th March 1883. On 29th March 1883 F also made a similar application but pending disposal, the present Zamindar's father died, and was succeeded by his son the present Zamindar who raised objections and the application was not granted. On 23rd May 1887 the present Zamindar granted a lease of the Zamindari to O, S, and R who executed a release guaranteeing F undisturbed possession and enjoyment of the village and accepted his position such as it may have been at or prior to the date of the execution of the lease. On 23rd January 1890 the Zamindar executed in favour of F a deed of release which after reciting the grant from the Rani, the deed executed by the Zamindar's deceased father, dated 22nd February 1883, and a further payment of Rs. 3,500 by F contained the following covenant:—"Therefore I forfeit and relinquish the right I profess to have in me to question the said permanent lease or the terms of the said lease deeds, and I hereby ratify your right. You and your heirs shall hold and enjoy the said villages absolutely according to the terms of the aforesaid permanent lease deeds." F then applied by petition, dated 13th March 1890, to the Collector for separate registration and assessment of the said village, but on notices being sent to the Zamindar and the lessees, they filed objections which after due enquiry were overruled by the Collector who ordered separate registration and fixed the assessment. On appeal, the Board of Revenue supported the action of the Collector. Whereupon the lessees appealed to the Government of Madras on 21st September 1891, and the Government of Madras on 14th November 1891 cancelled both the separate registration and the separate assessment. Under the circumstances F claiming to be the duly registered holder of the said village sued the Secretary of State for a declaration that the order of the Madras Government dated 14th November 1891, directing the Collector to cancel the separate registration and assessment of the said village *ultra vires* and illegal—and the lessees sued F for the balance of *poruppu*, *magamai*, and road-cess with interest alleged to be due on the said village for fasli 1300:—*Held*, that F was bound to pay the lessees Rs. 3,500 *poruppu* with *magamai* and road-cess whether his village was separately registered and assessed or not—*Held*, that the suit by F for a declaration that the order of the Madras Government directing the Collector to cancel the separate registration and assessment of the village previously made by him was illegal

and *ultra vires* could not be maintained with reference to section 42, Specific Relief Act, inasmuch as the order had been already carried out:—*Held*, also that if the general words of the prayer "for such other relief as the circumstances of the case may require" were to be taken as including a prayer for consequential relief, then the suit was bad for non-joinder, inasmuch as the Zamindar and the lessees who were interested parties were not joined:—*Held*, also that not only the person applying under Act I of 1876, section 2, for separate assessment and registration must be entitled thereto, but also that the parties to the alienation must concur in the application.

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ARBITRATION—Suit for dismissal of Members of Devasthanam Committee—Act XX of 1886, s. 16—Reference to arbitration—Power of arbitrators:

Where a suit for dismissal of the members of a devasthanam committee and damages was referred under Act XX of 1863, section 16, to arbitrators who passed an award dismissing them as prayed and decreeing a portion of the damages claimed with interest:—*Held*, that the Court had power to refer the matter to the arbitrators and award damages with interest, provided the amount, inclusive of interest, did not exceed the amount claimed in the plaint.

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S. ———— Suit for partition—Prior arbitration and award, effect of:

Disputes having arisen in a joint Hindu family, the parties submitted the question of partition to arbitrators, who passed an award thereon. Both parties objected to the award, and it was never carried into effect. On a suit for partition being filed:—*Held*, that such an award is equivalent to a final judgment and binding on the parties in the absence of positive evidence that both parties agree that the former state of things should be restored and that therefore the present suit for partition could not be maintained.

Krishna Panda v. Balaram Panda 290

BILL OF LADING—Cargo unclaimed on arrival of ship—Rights of shipowner to land goods—Damages by rain—Harbour Trust Act (Madras)—Act II of 1886:

The defendant's steam ship arrived at Madras on 4th December 1891, bringing bags of grain consigned to the plaintiffs who on that date were not authorised to receive them. The plaintiffs set up a custom that cargo of this description ought to be landed on the beach; but, as this could not be done in the absence of the consignees, the defendants landed it the same day on the pier and delivered it into the custody of the Madras Harbour Trust for storage pending delivery to the consignees. On the 8th of December 1891, heavy rain fell, and on the same date plaintiffs learnt that the cargo had been delivered on the pier. When the plaintiffs came to take delivery on that day, a considerable portion had been damaged by rain for which they now sued the defendants:—*Held*, (1) that where the consignees are unable to take delivery in the ordinary way on the beach, the master of a ship has the option of landing and warehousing the goods, and that delivery to the Harbour Trust for custody was not wrongful; (2) that in the absence of proof that the defendants were negligent, or that they failed to deliver the goods, the suit must be dismissed.

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BOUNDARY MARKS ACT (MADRAS)—ACT XXVIII OF 1880, s. 25—Boundary Marks Act (Madras)—Act II of 1884, s. 9—Suit to set aside decision of the Survey officer—Plea of limitation abandoned:

A suit filed on 21st April 1891 to set aside the decision of the Settlement officer under the Madras Boundary Acts passed on 15th September 1880 was dismissed by the Munsif as being time barred not having been brought within six months as provided by section 25 of Act XXVIII of 1880. This decision was reversed by the District Judge, who remanded the suit for disposal on the merits, holding that the production by the plaintiff of a copy of the judgment, dated 25th October 1890, raised a presumption that the suit was in time and shifted the burden of proof to the defendant to show that an earlier copy was granted to plaintiff, or that the decision was pronounced in the plaintiff's presence. Against this decision there was no appeal. At the rehearing the question of limitation was again raised, and the Munsif gave a decree on the merits. An appeal was preferred to the District Court, but no mention was made

of the question of limitation. On appeal to the High Court:—*Held*, that the question of limitation had been put aside by the consent of the parties who desired to have the case decided on the merits, and that the appellant could not be allowed to fall back on this plea of limitation which he had abandoned in the Lower Courts.

R. Rangayya Appa Rau v. Narasimha Appa Rau 416

BUILDING CONTRACT—Breach—Power of re-entry—Certificate of architect, how far conclusive:

By a building contract entered into between plaintiff and defendants, it was agreed that plaintiff should erect certain premises for the defendants at the rates specified in the bill of quantities annexed. The agreement provided that defendants should pay the plaintiff at the rate of 90 per cent. upon the value of work executed and materials laid down as certified by the architect, and that should defendants make default in so doing for a period beyond fourteen days after the amount thereof should have been certified, plaintiff should be at liberty to suspend the works and require payment of all works executed and materials laid down. The agreement further provided that, if the contractor should suspend or delay the performance of his part of the contract, the defendants might, through their architect, give notice requiring the works to be proceeded with, and in case of default on the part of the contractor for a period of twenty-eight days might enter upon and take possession of the premises. It was further provided that the decision of the architect with respect to the amount, state, and condition of the works actually executed or in respect to any questions that may arise shall be final. During the continuance of the works disputes arose as to the amount due to the plaintiff, although certified by the architect as agreed which the defendants did not pay and in consequence plaintiff refused to continue the work. Whereupon defendants after giving due notice entered upon the premises. Plaintiff sued for damages in consequence of the defendants having taken possession and for the balance due on the accounts:—*Held*, (1) that the defendants committed a breach of the contract by refusing to pay the full amount due under the architect's certificate; (2) that the plaintiff having thereupon rescinded the contract which he was not entitled to do, the defendants were entitled after due notice to enter and take possession; (3) that in the absence of proof of collusion between the architect and the plaintiff, the defendants were bound by the architect's certificate as to the amount due to the plaintiff.

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CATTLE TRESPASS ACT—ACT I OF 1871, ss. 92-95—No appeal—Criminal Procedure Code, s. 404:

There being no appeal from a conviction under Cattle Tresspass Act, the High Court refused to revise the proceedings of the lower Court under sections 435, 438, Criminal Procedure Code, since there being evidence to support the conviction to adopt such a course would be to substantially allow an appeal. Imprisonment cannot be inflicted in default of payment of the compensation awarded under the Cattle Tresspass Act.

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CHRISTIAN MARRIAGE ACT—ACT XV OF 1872, ss. 5, 10, 12, 13, 38, 68, 70, 73:

S, an Episcopally-ordained Priest of the Syrian Church, under the jurisdiction of the Patriarch of Antioch, solemnized two marriages according to Roman ritual without publishing or causing to be affixed the notices of such marriages required by Part III of the Act. It was proved that S used the Roman ritual with the sanction of his Bishop who was appointed by the Patriarch:—*Held*, that S, having received episcopal ordination, was authorized to solemnize the marriages according to the rules, rites, ceremonies and customs of his church, and that it was not shown that a marriage solemnized with the Roman ritual under the sanction of the Bishop of the Syrian Church was not solemnized according

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to the rules, rites, ceremonies and customs of the Syrian Church:— <i>Held</i> , further that Part III of the Act only applies to ministers of religion licensed under the Act and not to Episcopally-ordained persons.	
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A bicycle with pneumatic tires, having two metal springs under the saddle, is liable to taxation as a vehicle with springs under the City of Madras Municipal Act, 1884.	
<i>Wilson v. The Madras Municipality</i>	83
CIVIL COURTS ACT (MADRAS)—ACT III OF 1878, s. 12—Suits Valuation Act—	
Act VII of 1887, s. 8—Suit for share of undivided property:	
Persons entitled to a share in certain lands of a village only part of which was held in severalty, executed a mortgage of part of the lands due to their share. The mortgage contained a description of the land comprised therein by paimash numbers and admeasurement. The mortgaged property was brought to sale in execution of a mortgage decree and was purchased by the present plaintiff. The plaintiff now sued for the apportionment and possession of the share to which he was entitled, and stated the value of the suit to be the value of the share claimed by him, viz., Rs. 1,870, and not that of the entire property. The defendants were the mortgagors and the other persons interested in the land, their respective shares not having been ascertained and demarcated: <i>Held</i> , that the suit was within the jurisdiction of a District Munsif.	
<i>Chakrapani Asari v. Narasinga Rau</i>	56
s. 28—Civil Procedure Code,	
s. 649—Provincial Small Cause Courts Act—Act IX of 1887, s. 35 (1)—Withdrawal of powers:	
Under Madras Act III of 1878, section 28, a Munsif was invested with the powers of a Small Cause Court's Judge for the trial of suits cognisable by such Court up to Rs. 200 in value. Subsequent to decree but prior to execution, his powers as Small Cause Court's Judge were withdrawn by notification in the Gazette:— <i>Held</i> , that application for execution must be made to the Court in which the Small Cause Court's jurisdiction vested at the date of the application.	
<i>Samudrar of Vallur and Gudur v. Adinarayudu</i>	445
CIVIL PROCEDURE CODE—ACT XIV OF 1882, ss. 2, 244, 311, 568—Order refusing to set aside a Court sale—Second appeal:	
A judgment-debtor, whose property had been sold in execution of a decree and purchased by the decree-holder, applied that the sale be set aside on the ground that the person, at whose instance execution had proceeded, had been improperly brought on to the record. The application was rejected by the Court of First Instance and an appeal by the applicant was dismissed:— <i>Held</i> , that no second appeal lay to the High Court.	
<i>Daisanayagam Pillai v. Rangasami Ayyar</i>	29
s. 11—Right to hereditary office	
of guru:	
The plaintiff as Anagundi Raja guru claimed to be entitled, and now sued for a declaration of his title, to the hereditary office of priest of Samayacharam. The defendants claimed the office and had collected voluntary contributions in the character of the holders of such office. The office was not connected with any particular temple; no specific pecuniary benefit was attached to it, and the alleged duties of the office were to exercise spiritual and moral supervision over persons wearing a certain caste mark in a certain tract of country:— <i>Held</i> , that the suit was not cognisable by a Civil Court.	
<i>Thalappala Charlu v. Venkata Charlu</i>	62

- s. 13, Explanation 2, s. 48—**
Ground of defence not raised in previous suit—Relief not asked for in previous suit—Circumstances giving right to such relief not known at date of previous suit:

The plaintiffs, who were the junior members of a Malabar edom of which defendants Nos. 3 to 5 were the senior members, sued to recover with meane profits possession of certain property offering to pay the amount of a kanom advanced by defendant No. 1. It appeared that the land had been the subject of a kanom demise in 1863, that defendant No. 3, the then karnavan, had obtained in 1878 a decree for its redemption the right to execute which he assigned to a stranger, who executed it, and took possession of the property, taking from the karnavan a new kanom deed. Subsequently defendants Nos. 4 and 5 obtained a decree for possession and the cancellation of both the assignment and the kanom deed; but this decree was attached in execution proceedings in another suit and purchased by defendant No. 1, who executed it, purchased the property deposited the kanom amount and took possession on 8th March 1884. The plaintiffs, who had meanwhile taken abortive proceedings to defeat the first defendant's title, instituted a suit in August 1884, praying for a decree that the sale to him be set aside without praying for possession. It was now found that the plaintiffs at that time were not aware that defendant No. 1 was in possession and he did not plead that fact as a defence to the suit for a declaration merely:—*Held* (1) that the plaintiffs were not affected by constructive notice of the defendant's possession in 1884 by reason of the fact that their karnavan, with whom they were not acting, was aware of the defendant's previous application for execution, and that the suit was not barred by Civil Procedure Code, section 43; (2) that defendant No. 1 was not a trespasser merely, and the plaintiffs were entitled to a deduction of the profits for the whole period during which he was in possession in computing the amount payable by them before they recovered the land. *Seem*, that, apart from the question of the plaintiffs' notice of the first defendant's possession, since he had not pleaded possession in the suit of 1884, he could not fall back upon the fact that his possession dated from March 1884 as a ground of defence to the present action.

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- s. 17—Jurisdiction—Provincial**
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When a suit may be filed in more than one of several Courts, it is a general principle of law that the plaintiff may select the forum in which to bring the suit. Where a plaintiff sued in a District Munsif's Court having jurisdiction, at the place where the money due under a contract was to be paid, there being no Small Cause Court having jurisdiction at such place:—*Held*, that the jurisdiction of the District Munsif was not ousted by the fact that there was in existence at the date of suit a Small Cause Court having jurisdiction at the place where the contract was made.

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- s. 28—Suit for specific performance of agreement for partition—Alienation of the management of a public Charity—Illegal—Effect of partial illegality:**

In a suit for specific performance of an agreement for partition, it appeared that amongst other property considered liable to partition, was the huk right of a public choultry and certain other lands alleged to belong to the same charity. The said huk right had been sold by auction to that member of the family who bid the highest price and was purchased by the plaintiff. On a suit being brought to enforce the terms of the arrangement:—*Held*, that the sale by auction of the huk right was illegal, but that as such illegality did not affect the other terms of the arrangement, it might be enforced as to the rest of the property:—*Held* further, with reference to section 28 of the Civil Procedure Code, that the third defendant a minor was properly included as a party to the suit, though he was not a party to the arrangement.

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- ... s. 306—Decree in accordance with
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of the High Court declared it to be necessary that a permanent appoint-
ment should be made of a receiver and manager of the estate allotted by
the Government to the family of the deceased Maharaja of Tanjore, and
directed that fresh appointments to the receivership should be made from
time to time as occasion might require during the life of the senior widow
under whose management the estate had been originally placed and the
lives of the co-widows surviving her, or for so long as the Court might
consider necessary:—*Held*, that the decree directing the permanent
receivership was not in variation of the judgment which it purported to
follow, that the Court had a discretion to make such an order when
necessary for the preservation of the estate; and that so doing was in
accordance with the practice; there being nothing to prevent the Court
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a party to a partition suit, in which a share in the land was allotted to a
member of the family subject to a proportionate share of T's mortgage and
also subject to a proportionate share of a certain decree debt. The then
plaintiff got his share of the property made over to him. After the date
of the decree, i.e., the decree in the partition suit, T purchased the equity
of redemption in the mortgaged property from certain members of the
family. In a subsequent execution of the partition decree, part of the land
was sold for money due as costs and means profits by T's vendors of the
equity of redemption and T was ejected. T objected under section 333
of the Code, but the Court refused to order redelivery; in a suit brought
by T for possession:—*Held*, that T was not a judgment-debtor within the
meaning of sections 333, 335, and 344, Civil Procedure Code, and that the
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10. ... ss. 344, 355:
On an application for execution of a decree being presented by a trans-
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that he had transferred certain immovable property to the petitioner in
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and that the petitioner had discharged the debt, but subsequently having
got the decree transferred to himself instead of entering up satisfaction of

the decree, fraudulently applied for execution. Satisfaction had not been
entered up under section 358, Civil Procedure Code:—*Held*, that there
must be an enquiry into the truth of the judgment-debtor's allegations, and
if proved the petition for execution must be dismissed, and further that
section 358, Civil Procedure Code, was inapplicable to the present case,
since that section applies only to the case of parties who stand in the
relation of judgment-debtor and judgment-creditor at the date of the
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11. ... s. 356—Decree payable by
instalments—Default in payment—Waiver:

A decree was passed for the payment of a sum of money in four annual
instalments, the first payment to be made on 11th October 1888; and it
was further provided that if default were made in the payment of any
instalment then without reference to the other instalments, the whole
amount should be paid with interest. The decree holder applied in
October 1893 for execution in respect of the instalments for 1890 and
1891:—*Held*, that the application was not barred by limitation if default
in respect of the instalment of 1889 had been waived, and acceptance of
part payment was material as evidence of such waiver, and should be
considered although payment had not been certified under Civil Procedure
Code, s. 356.

Rajenara Rau v. Hari Bahadhu ... 163

12. ... s. 355—Rateable distribu-
tion—Assets realised in execution:

A, B and C held money decrees against the same judgment-debtor. A
attached by a prohibitory order dated in December funds of the judgment-
debtor in the hands of D. In January, B attached in execution the same
funds. In February, they were paid into Court, and subsequently on the
same day C attached them as money due in the custody of the Court:—
Held, that the funds should be rateably distributed between A and B, and
that C was not entitled to participate therein.

Srinivasa Ayyangar v. Seetharamayyar ... 79

13. ... s. 311—Setting aside a
sale on the ground of material irregularity—Non-disclosure amounting to fraud:

A creditor had obtained a decree on the footing of a mortgage and in
execution brought the property of his judgment-debtor to sale. At the
time of sale the decree-holder, who had obtained leave to bid, entered
into an agreement with P to the effect that if P would dissuade other
persons from bidding, he (the decree-holder) would purchase the whole
property for Rs. 83,000 and convey it on certain terms to P. P thereupon
exerted his influence and succeeded in dissuading would-be purchasers
from bidding and in consequence the property was sold on 11th April 1891
for Rs. 83,000, which was a little more than half its actual value. The
sale was confirmed on 29th June 1891 and the judgment-debtor who at the
time of the sale was a minor under the Court of Wards, attained his
majority on 21st April 1894 and filed this petition praying to set aside the
sale on the 15th May 1894:—*Held*, that the omission on the part of the
decree-holder to disclose the agreement to the Court amounted to a fraud
upon the Court entitling the judgment-debtor to say that in point of law
no leave to bid was granted, and that the withholding of information is
no less a ground for cancelling a sale than actual misrepresentation on the
part of the applicant who becomes the purchaser, and that therefore the
sale must be set aside.

Jayinilabdin Ravuttan v. Vijia Ragunadha Ayyareppa Maikan Gopalar ... 315

14. ... ss. 311, 358, cl. 16, 36, and s.
359:

Land having been sold in execution of decree, one claiming that it had
been held by the judgment-debtor benami for him applied that the sale be
cancelled under section 311. He was not a party to the decree, and on
that ground his petition was dismissed. The Appellate Court was of

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petition that it had been wrongly dismissed and remanded the case to be decided on the merits.—Held, on revision, (1) that the order remanding the case was not appealable, and consequently that the petition for revision was maintainable; (2) that the fact of the petitioner being a stranger to the decree did not preclude him from obtaining the relief sought under section 311.

Subramanya Ayyar v. Mahabala Shastri

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s. 344—Insolvent judgment

Subramanya Ayyar v. Mahabala Shastri—Jurisdiction of Original Court to make decree of insolvency.

The suit for recovery was dismissed but on appeal the High Court passed a decree in favour of the plaintiff. The judgment debtor made an application to the Court of First Instance under Civil Procedure Code section 344, to be set aside. The Court held that the Court had jurisdiction to make the decree.

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s. 375—Power of Court to frame

Subramanya Ayyar v. Mahabala Shastri—Power of Court to frame additional issues as to an alleged compromise effected subsequent to the institution of the suit.

The Civil Procedure Code section 375 was intended to meet cases where the parties having agreed to compromise subsequently fall out. The original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties subsequent to the institution of the suit.

Appasami Nayagam v. Varadachari

419

ss. 407, 409

On hearing a petition under section 409 for leave to sue *in forma pauperis*, the Court must decide whether the petitioner has at the date of the petition a subsisting cause of action capable of enforcement and where the cause of action is barred by *res judicata* or limitation the petition must fail.

Vijendra Tirtha Swami v. Sudhendra Tirtha Swami

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ss. 440, 500—Hindu Law—Deva

Vijendra Tirtha Swami v. Sudhendra Tirtha Swami—Right of adoptive daughter—Evidence taken on remand.

The adoptive daughter of a temple dancing woman deceased to the trustees of the temple to permit the performance of a certain ceremony, in view to her entering on the duties and emoluments attached to the office of her adoptive mother. The plaintiff was 17 years old at the time she was adopted and she did not sue by a next friend. No evidence was taken by the defendants on the ground that the plaintiff was not a next friend, until the case came before the Court. On appeal at which time the plaintiff had attained majority. On appeal the High Court directed the return of a finding on the issue (which was framed but not tried) whether the plaintiff's adoption was made with the intention that the girl should be prostituted while she was a minor.—Held (1) that seeing no objection was taken to the suit on the ground that the plaintiff should have sued by a next friend until after she had attained her majority the irregularity was waived. (2) that the lower Court had power to take additional evidence on the issue remanded. (3) that the suit was not maintainable on the ground that the adoption of the plaintiff was made with a criminal intention.

Ramakrishna v. Ramasami Chetty

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ss. 456, 459, 460—Sale in execu

Ramakrishna v. Ramasami Chetty—Insolvency of judgment debtor intervening before—

A suit was brought by V to have it declared that the sale of his property in execution of a decree was void owing to the fact that subsequent to the sale and prior to sale he has been declared insane under Act XXXV of 1884. The second defendant was the auction purchaser.—Held, by

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BEST, J., that objection can be taken under section 311, Civil Procedure Code, on the above grounds before the sale has been confirmed and certificate granted.—Held, by SUBRAMANYA AYYAR, J., that these facts only amounted to a material irregularity within section 311, Civil Procedure Code, and that the plaintiff must prove substantial injury.

Narayana Kothan v. Kalkandasundaram Pillai

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90. Chap. XXXIX, s. 582—Suit properly brought under—Promissory Note—Contemporaneous collateral agreement consistent with the terms of the promissory note:

The plaintiffs advanced money to defendant for the supply of certain goods. On defendant's failure to supply the goods, plaintiffs pressed for repayment and a promissory note payable on demand for the amount due was executed, at the same time an agreement was entered into by defendant to liquidate the amount due on the promissory note by fortnightly consignments, the consignment to be made within fourteen days of the date of the promissory note. On defendant's failure to send the consignments as promised a suit was brought under Chapter XXXIX, Civil Procedure Code.—Held, that the suit was rightly filed under Chapter XXXIX that the agreement to liquidate the amount due by fortnightly consignments was a collateral undertaking consistent with the existence of the note containing an absolute promise to pay, that such collateral agreement was no answer to the suit on the promissory note and that the plaintiff was entitled to a decree.

Simon v. Hakim Mohamed Sherif

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91. s. 584 (c)—Power of High Court to interfere:

Where an appeal was heard *ex parte* by a Lower Appellate Court and the decree of the Court of First Instance reversed in the absence of the respondent, on whom notice of appeal had not been duly served and who was not aware of the proceedings till after the time for applying for a re-hearing under section 560 and Limitation Act, schedule II, article 169 had expired.—Held, that the High Court in second appeal had power to interfere under section 584 (c), Civil Procedure Code.

Balaji Rau v. Sithabhoy

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92. ss. 569, 568—Order of remand when legal—Duty of Appellate Court when addition of parties and amendment of issues is necessary:

In a suit by mortgagees to redeem a prior mortgage issues were framed and tried and disposed of in favour of the plaintiffs as to the questions whether the plaintiffs' mortgage was valid, whether the mortgage sought to be redeemed had been discharged, and whether the suit was barred by limitation; the Court of First Appeal was of opinion that these questions had not been properly considered, and set aside the decree for the plaintiffs and directed that a fresh trial be held, certain fresh parties being brought on the record.—Held, (1) that the order of remand was illegal; (2) that the Lower Appellate Court should have joined the persons necessary for the suit and should have so altered or added to the issues as to raise all questions properly arising and should have referred them for trial to the Court of First Instance.

Kola Malachari Nayar v. Chendu

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93. ss. 569, 568, 578—Order of Remand—Irregularity affecting the merits:

Where a District Court reversed the District Munsif's decree and remanded the case for a revised finding on the merits.—Held, that this procedure was *ultra vires* and illegal.—Held further, that as the irregularity might have affected the merits of the case, section 578, Civil Procedure Code, was inapplicable.

Mallikarjuna v. Pathanani

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14. *Ulavadai Mirasidars—Permanent tenancy—Lease by temple trustee—Long possession—Necessity for lease presumed—Inference to be drawn from documents, question of law :*

In 1813 the manager of a temple gave a permanent lease of one-half of certain lands to C, the ancestor of the defendants 1 to 14, and the other half to N. In 1820 N transferred his half share to V, the son of C. In 1831 V and S, the ancestor of the other defendants, addressed a petition to the Collector, the then manager of the temple. In 1832 V and S executed a fresh lease and a security bond in favour of the temple, in both of which documents V and S were described as Ulavadai mirasidars, that is, persons with an hereditary right to cultivate. There was no evidence adduced to prove for what purpose the lease of 1832 was executed, but the defendants held possession as tenants from 1832 to date of suit:—*Held*, that the words 'Ulavadai mirasidars' used in the deeds of 1832 as describing the tenants, denoted that they were persons with hereditary right to cultivate, and that the lease was therefore of a permanent nature:—*Held also*, that after the lapse of so great a period of time, the Court would presume under the circumstances, that the original grants were made for a necessary purpose and were binding on the temple:—*Held further*, that the proper inference to be drawn from the terms of a document is a question of law within the meaning of section 584, Civil Procedure Code, and can be considered in second appeal.

Chockalingam Pillai v. Mayandi Chettiar ... 486

15. *s. 588, cl. 28—Appeal against order of remand—Finding of fact—Letters Patent, s. 15 :*

Where an appeal is preferred against an appellate order under section 588, Civil Procedure Code, the finding of fact by the Lower Appellate Court is conclusive as between the parties on the proper construction of sections 584 and 588, Civil Procedure Code. There is no appeal under the Letters Patent, section 15, against an order of a single Judge passed under Civil Procedure Code, section 588, clause 28.

Vengandayyan v. Ramasami Ayyan ... 422

16. *ss. 588 (28), 586—Contract—Continuing Breach—Limitation :*

T, who was the uncle of the first defendant and the father of the second defendant, agreed with C to sell certain land to him for consideration and to cause the land, then standing in the name of a third party, to be registered in C's name. It was further agreed that if T failed to convey and cause the change of the revenue registry, T should return the purchase money. C was put in possession, but in 1890 the second defendant conveyed the land to one M, who ejected C:—*Held*, that the right of appeal conferred by section 588, Civil Procedure Code, is not controlled by section 586; that the breach did not occur prior to November 1890 and that the suit was not barred.

Chinnanna Gounden v. Chinnanna Gounden ... 391

17. *s. 608—Order for Security to be furnished by respondent in Privy Council—Order made after decree appealed against—Liability for mesne profits of persons giving security :*

The present plaintiff purchased land brought to sale in execution of a decree and was put in possession. The sale was set aside by the High Court and the purchaser was ousted. He preferred an appeal to the Privy Council, and the High Court directed that security be given for the mesne profits and the due delivery of the property without waste in the event of the appeal being successful. The present defendants furnished security and executed a document under which the plaintiff who had succeeded in the Privy Council, now sued to enforce his rights. It appeared that after the date of the instrument above mentioned a payment was made from the proceeds of the property in satisfaction of a decree obtained by the Zamindar against the present plaintiff for arrears of poruppu previously accrued. *Held*, (1) that the order of the High Court requiring security to be furnished was not ultra vires and that the instrument above mentioned was enforceable; (2) that the defendants who had given no personal guarantee

were not competent to put an end to the security under the provisions of the Contract Act relating to revocation of a surety; (3) that on the right construction of the instrument the period for the profits of which the defendants were chargeable was that between the date of the instrument and the date of the decision of the Privy Council; (4) that the defendants should be credited with the amount paid in satisfaction of the decree for poruppu.

Narayanan Chetti v. Arunachellam Chetti ... 140

28. *s. 648—Provincial Small Cause Courts Act—Act IX of 1887, s. 35(1)—Withdrawal of powers—Civil Courts Act—Act III of 1878 (Madras), s. 28 :*

Under Madras Act III of 1873, section 28, a Munsif was invested with the powers of a Small Cause Court's Judge for the trial of suits cognizable by such Court up to Rs. 200 in value. Subsequent to decree but prior to execution, his powers as Small Cause Court's Judge were withdrawn by notification in the Gazette:—*Held*, that application for execution must be made to the Court in which the Small Cause Court's jurisdiction vested at the date of the application.

Zamindar of Vallur and Gadur v. Adinurayudu ... 445

- COMPANIES ACT—ACT X OF 1866, s. 4—Unregistered association—Mortgage, illegality of—Estoppel :**

In 1868, the Madras Hindu Mutual Benefit Permanent Fund was created for the purpose of enabling Hindus to assist one another and invest their savings chiefly on landed property, and the doing all such other things as are incidental or conducive to the attainment of the above objects. By the rules of the said fund, which was not registered under the Indian Companies Act X of 1866, it was provided that the members should pay subscriptions at the rate of Rs. 2-8-0 per share per mensem for seven years from the date of admission and that at the end of the seven years Rs. 250 shall be paid in full discharge of each share. It was further provided that subscribers shall be entitled to borrow money from the said fund at interest that a reserve fund be formed and distributed once every five years to the subscribers and that surplus collections be distributed among the subscribers annually. In 1868 defendant's father borrowed money on mortgage from the fund in accordance with the rules, and the amount was admittedly due at the time of suit. The fund was wound up under an order of the High Court, dated 15th September 1877, during the lifetime of defendant's father, who, however, took no active part in those proceedings. It further appeared that, on the execution of the mortgage, the defendant's father (the mortgagor) took a lease from the mortgagees of the houses mortgaged and retained possession of them as tenant:—*Held*, that the association had for its object the acquisition of gain, that as the association consisted of more than twenty members of gain, that as the association was forbidden by the Indian Companies Act X of 1866, section 4, that the suit mortgage having for its object the carrying out of the illegal purpose of the association was an illegal transaction and that the suit must fail:—*Held further*, that the defendants were not estopped from setting up the plea of illegality either by the order of 1877 or by reason of their predecessor in title having attended to the fund.

Madras Hindu Mutual Benefit Permanent Fund v. Ragava Chetti ... 200

29. *s. 214—Application against directors for refund of money improperly distributed—Limitation Act, sched. II, art. 36—Misfeasance :*

An application was made in 1894 under Indian Companies Act of 1882, section 214, by an official liquidator appointed in 1891, praying that the directors of the company in liquidation be ordered to pay over to him a sum of money which had been improperly distributed among the shareholders:—*Held*, that the application was not barred by limitation.

Ramasami v. Streerumulu Chetti ... 149

COMPANIES ACT—ACT VI OF 1882, s. 4—Illegal association—Business carried on for the purpose of gain :

Persons more than twenty in number paid each a certain sum monthly to a stakeholder. The sum total of the subscriptions was then paid over as a loan free of interest to one of the subscribers chosen by casting lots, and he was thereupon required to execute a bond with a surety obliging him to continue his monthly subscriptions to the end of the period for which the arrangement was agreed to hold good—that period being as many months as there were subscribers. The bonds in question were executed in favour of the stakeholder and the subscribers. A suit was brought on one of such bonds to recover the amount payable for subscription on account of the period subsequent to its execution:—*Held*, that the obligees carried on business which had for its object the acquisition of gain within the meaning of Companies Act, 1882, section 4, and accordingly constituted an illegal association and that the suit was not maintainable.

Ramasami Bhagavathar v. Nagendrayyan ... 31

2. —, s. 182—Notices—Loan Society Liquidation—Previous withdrawal of member—Construction of rules—Distribution of assets :

One of the articles of association of a registered Loan Society provided that a member who has received no loan may withdraw from the association and receive the amount at his credit in calls minus the arrears, if any, and interest due thereon on giving one month's notice, such withdrawals to be paid from the first available funds. The society went into voluntary liquidation. By an extraordinary resolution it was resolved that the assets be rateably divided among the shareholders who had already withdrawn and those who were still in the fund. The liquidators applied to the Court under Companies Act, section 182, to determine the question how the assets should be distributed with reference to the above article. *SHEPHERD, J.*, ordered that notice of the application be given by advertisement on the notice board of the Court and in newspapers, and that a copy be posted at the society's office:—*Held*, affirming the judgment of *SHEPHERD, J.*, that those members who had given notice of withdrawal under the article quoted above were entitled to be paid out of the assets of the society in priority to the other members.

Adipurnam Pillai v. D'Sena ... 85

CONFESSIONS OF CO-ACCUSED—Corroboration—Material particulars—Evidence Act, s. 30—Abetment—Penal Code, s. 109 :

Where the only evidence against two prisoners accused of murder directly implicating them in the commission of the crime consisted of confessional statements made by them before the committing magistrate, which were subsequently retracted, and the statements in such confessions were corroborated in material particulars by other evidence on the record:—*Held*, that the evidence was sufficient to support a conviction.

Queen-Empress v. Baru Nayar ... 482

CONTRACT—Continuing Breach—Limitation—Civil Procedure Code, ss. 586, 588 (26) :

T, who was the uncle of the first defendant and the father of the second defendant, agreed with C to sell certain land to him for consideration received and to cause the land, then standing in the name of a third party, to be registered in C's name. It was further agreed that if T failed to convey and cause the change of the revenue registry, T should return the purchase money. C was put in possession, but in 1890 the second defendant conveyed the land to one M, who ejected C:—*Held*, that the right of appeal conferred by section 588, Civil Procedure Code, is not controlled by section 586, that the breach did not occur prior to November 1890, and that the suit was not barred.

Chinnasami Gounden v. Chinnasu Gounden ... 391

CONTRACT ACT—ACT IX OF 1872, s. 35, cl. 3—Regulation V of 1804, s. 17—Powers of Agents to Court of Wards—Promise to pay a time-barred debt :

A Collector has no authority to bind a ward of the Court of Wards by a promise under Contract Act, section 25, clause 3, to pay a debt which is barred by limitation.

Suryanarayana v. Narendra Thatras ... 355

2. —, s. 63—Consideration :

An agreement, extending the time for the performance of a contract falling under section 63, Contract Act, does not require consideration to support it.

Davis v. Cundasami Mudali ... 398

3. —, s. 171—Banker's lien :

The plaintiff deposited certain jewels with the defendant bank to secure certain debts. Afterwards he paid the secured debts and demanded the return of the jewels being then otherwise indebted to the bank:—*Held*, that the plaintiff was not entitled to recover the jewels without discharging the other debts unless he proved that the defendant had agreed to give up its general lien.

Kunhan Mayan v. The Bank of Madras ... 334

COURT FEES ACT—ACT VII OF 1870, ss. 6, 7 (ix), 17—Redemption suit against mortgagee in possession—Arrears of rent covenanted for, to be deducted from the mortgage amount :

In a redemption suit against a mortgagee in possession, when the mortgagee has not paid rent which has been stipulated for, and the plaintiff asks for an account in taking which the arrears of rent should be deducted from the mortgage amount:—*Held*, that the Court fee should be computed according to the principal sum expressed to be secured by the mortgage.

Eacharan Patter v. Appu Patter ... 16

2. —, Sched. I—Appeal—Stamp leviable for costs :

When apart from, and independently of, any other reliefs which an appellant seeks in an appeal from a decree, he seeks distinct relief on the ground that by the decree under appeal the costs of the parties in the proceedings which terminated with the decree have not been properly assessed or apportioned, the value of such distinct relief should be reckoned as part of the subject matter in dispute for the purposes of the first schedule of the Court Fees Act.

Makki, In re ... 350

CRIMINAL PROCEDURE CODE—ACT X OF 1882, ss. 87, 88, 89, 439, 537—Proclamation for person absconding—Attachment of his property—Irregularity in publication of proclamation—Revisional powers of High Court :

An accused person for whose arrest a warrant had been issued having absconded, a proclamation was issued and affixed to the Court house on the 6th of November requiring him to appear on the 11th of December 1893, and his property was attached. The proclamation was not published at the village where the accused resided until the 15th of November. The accused surrendered on the 25th of June 1894 and applied for restoration of the property under Criminal Procedure Code, section 89, and an order was made by which the restoration of his property was refused. The accused preferred a petition to the High Court for the revision of that order:—*Held*, that there was no legal proclamation under Criminal Procedure Code, section 87, and that the order should be set aside and the attachment declared void.

Queen-Empress v. Subbarayar ... 3

Queen-Empress v. Saminadha Pillai ... ss. 143—Illegal order: Penal Code—Disobedience to an order duly issued by a public servant ...

On the 11th August 1894 the District Magistrate promulgated an order prohibiting the people of the village of Thirukodikaval from using their burning grounds situated on the southern bank of the Cauvery and directing them to use other burning grounds which had been provided. On the 15th May 1895 certain persons, in defiance of this order, cremated a corpse at the spot interdicted, and were convicted under sections 188, 290, Indian Penal Code, but the conviction under section 188 was reversed on appeal:—*Held*, that when persons entitled to use a particular spot dedicated for the ceremonial purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country, they cannot be convicted of a public nuisance on the ground that their act caused material annoyance and discomfort to persons near the place on the occasion referred to:—*Held* further, that the order of the District Magistrate was not warranted by section 143, Criminal Procedure Code, or by any other law and must, therefore, be set aside.

Queen-Empress v. Saminadha Pillai ... 464

Queen-Empress v. Tirunarasimha Chari ... ss. 144, 435, 476—Enquiry before issue of an order under s. 144—Judicial proceeding—False evidence:

A Magistrate, making an enquiry before issue of an order under Criminal Procedure Code, section 144, is acting in a stage of judicial proceeding and has, therefore, jurisdiction to take action under section 476, if he is of opinion that false evidence has been given before him.

Queen-Empress v. Tirunarasimha Chari ... 18

ss. 161, 172:

At the beginning of a trial in the Court of a Presidency Magistrate, an application was made, on behalf of the accused, for a copy of the Police charge sheet which contained the whole of the prosecution evidence as set forth by the Police, and extracts from it not copies of the Police diary. The application was rejected by the Magistrate:—*Held*, that the High Court should not on revision interfere with the order of the Magistrate.

Queen-Empress v. Venkataratnam Pantulu ... 14

Record in summons case: ss. 260, (d), 355, 537—

A Native Sub-Magistrate, who had not been authorised to take down evidence in English, recorded the memorandum of the substance of the evidence taken under section 355 in that language:—*Held*, that there was no provision in the Code prohibiting this procedure, and that, at any rate, it was merely an irregularity which would not vitiate the trial.

Queen-Empress v. Gopal Goundan ... 269

ss. 282, 435, 477, 536—A witness committed for trial for offence under s. 193, Penal Code—Incompetence of juror—New trial—Application for transfer:

On the trial of certain prisoners on a charge of dacoity, a witness gave false evidence and was committed under section 477, Criminal Procedure Code, for trial on a charge under section 193, Penal Code. After such committal it was discovered that one of the jurors empanelled in the dacoity case was deaf and partly blind; and thereupon under section 282, Criminal Procedure Code, the case was tried *de novo* before a competent jury. The trial of the charge under section 193, Penal Code, was fixed for the November sessions, but on the 17th October 1895 on prisoner's application the trial was adjourned to 2nd December 1895. On 20th November the prisoner's vakil put in a petition, alleging that he had moved the High Court for a transfer of the case. On this petition coming on for disposal, the prisoner's vakil moved orally for an adjournment under

section 526-A, Criminal Procedure Code, which was refused. On the 20th November the prisoner's vakil put in a petition in which he prayed for an adjournment under section 526-A. This petition was refused and the trial began on 2nd December and judgment was written and pronounced on 5th December. In the meantime application had been made to the High Court for a transfer and that petition was disposed of on 4th December granting the transfer prayed, the High Court apparently being not aware that the trial was at that time proceeding before the Sessions Court. On 5th December after the trial in the Sessions Court was concluded and before judgment was delivered, a fresh petition was presented for an adjournment on the ground that a telegram had been received from the High Court transferring the case, but the Sessions Judge refused to act upon it in the absence of orders from the High Court and delivered judgment convicting the prisoner. During the trial before the Sessions Court the prisoner applied for an adjournment on the ground that two witnesses for the defence were absent, one being too ill to attend, the other not having been served with the summons, but the Sessions Judge considering the application was made merely for purposes of delay and to defeat the ends of justice and that their evidence would not be material, refused to adjourn for their evidence to be recorded:—*Held*, first that the fact that the trial for dacoity had to be commenced *de novo* did not exonerate the prisoner from the obligation to speak the truth imposed by section 14 of the Indian Oaths Act X of 1873 in the first trial, which became abortive owing to the incompetency of one of the jurors. *Secondly*, that section 526-A, Criminal Procedure Code, is imperative, but that the object of sections 344 and 526 when read together is merely to give a party reasonable time to move the High Court and obtain its orders and that in the present case there was sufficient time for such application to have been made, if due diligence had been observed. *Thirdly*, that the order for transfer made on 4th December, which, in fact, did not reach the Judge till after judgment was pronounced did not vitiate the proceedings; and that the Sessions Judge was not wrong in refusing to adjourn the case on the strength of a telegram said to have been received by prisoner's vakil stating that the High Court has ordered a transfer. *Fourthly*, that the Sessions Judge ought not to have refused to adjourn the case in order to obtain the evidence of the two absent witnesses that their evidence was material and must be recorded and certified to the High Court under section 428, Criminal Procedure Code.

Queen-Empress v. Virasami ... 375

7. ss. 419—'Presented.'

The Criminal Procedure Code, section 419, requires that a criminal appeal shall be delivered to the proper officer of the Court either by the appellant or his pleader. Where a petition of appeal was not presented to the Court, but was deposited in a petition box kept for the convenience of parties within the Court precincts and intended for the deposit of papers for the Court:—*Held*, that it had not been presented and was rightly returned for legal presentation.

Queen-Empress v. Vasudevarayya ...

8. s. 433.—Madras District Municipalities Act—Act IV of 1884, s. 179:

By section 179, Madras District Municipalities Act IV of 1884, it is provided "the external roofs, verandahs, pandals, and walls of buildings erected or renewed after the coming into operation of this Act shall not be made of grass, leaves, mats or other such inflammable materials except with the written permission of the Municipal Council":—*Held*, that the word 'renewed' includes repairing.

Queen-Empress v. Subbanna ... 241

9. s. 488—Maintenance of—children Moplahs—Personal law:

The right of children to be maintained by their actual father is a statutory right, and the duty is created by express enactment independent of the personal law of the parties. If the children are illegitimate,

the refusal of the mother to surrender them to the father is no ground for refusing maintenance. If the children are legitimate, the question of the mother's right to their custody would depend on the question whether the parties are governed by Muhammadan or Marumakkattayam law; because (1) if they are governed by Muhammadan law the mother may have the right to custody until the children attain the age of seven years; (2) if by the Marumakkattayam law, it is doubtful if the father could be held to have neglected his duty to maintain his children if they were actually maintained by the karnavan of their mother's tarwad who is bound by law to maintain them.

Koriyadan Pokkar v. Kayat Beeran Kutti ... 461

10. **INTERESTED—Magistrate giving evidence before himself:**

Where a Magistrate, in whose Court a complaint of rioting and mischief had been filed, made a personal inspection of the *locus in quo*:—*Held*, that by so doing he had made himself a witness in the case and had thereby rendered himself incompetent to try it:—*Held*, further that where a Judge is the sole Judge of law and fact in a case tried before himself, he cannot give evidence before himself or import matters into his judgment not stated on oath before the Court in the presence of the accused.

Queen-Empress v. Manikam ... 263

DECREE, CONSTRUCTION OF—Application for execution by defendant—Previous orders as applied for by defendant—Present objection by plaintiff to continued execution on behalf of defendant—'Res judicata':

Although a decree does not in terms give a certain relief yet if it is construed in orders passed upon it as having given that relief, it is not competent to the Court on subsequent applications to treat those orders as erroneous and put another construction on the decree.

Venkatanarasimha Naidu v. Papammah ... 54

DECREE PAYABLE BY INSTALMENTS—Default in payment—Waiver—Civil Procedure Code, s. 258:

A decree was passed for the payment of a sum of money in four annual instalments, the first payment to be made on 11th October 1888, and it was further provided that if default were made in the payment of any instalment then without reference to the other instalments the whole amount should be paid with interest. The decree-holder applied in October 1893 for execution in respect of the instalments for 1890 and 1891:—*Held*, that the application was not barred by limitation if default in respect of the instalment of 1889 had been waived, and acceptance of part payment was material as evidence of such waiver and should be considered although payment had not been certified under Civil Procedure Code, s. 258.

Bajewara Rau v. Hari Babandhu ... 162

EVIDENCE ACT—ACT I OF 1872, s. 30—Confessions of Co-accused—Corroboration—Material Particulars—Abetment—Penal Code, s. 109:

Where the only evidence against two prisoners accused of murder directly implicating them in the commission of the crime consisted of confessional statements made by them before the committing magistrate, which were subsequently retreated, and the statements in such confessions were corroborated in material particulars by other evidence on the record:—*Held*, that the evidence was sufficient to support a conviction.

Queen-Empress v. Baru Nayar ... 482

1862—Partition by Collector—Civil Procedure Code, ss. 265, 360—Jurisdiction of Court to hear objections to the divisions ordered by Collector:

When a decree for partition of an estate has been transmitted by the District Judge to the Collector for execution under section 265, Civil Pro-

cedure Code, the Court that made the decree is not deprived of its judicial power to hear and decide objections to the division of the estate made by the Collector.

Chinna Seetayya v. Krishnavanamma ... 435

FOREST ACT—ACT V OF 1882, MADRAS—Burden of proof—Shifting of burden of proof—Limitation Act—Act XV of 1877, art. 149:

Portions of certain land, which had been taken up by Government as forest reserve, were claimed by one who had admittedly been in possession and enjoyment of them for thirty years. The Government failed to establish any subsisting title of its own:—*Held*, (1) that the burden of proof had been shifted on to the Government and had not been discharged and accordingly that the claim should be allowed; (2) article 149 of the Limitation Act applies only to suits brought by, or on behalf of, the Secretary of State.

Secretary of State for India v. Kota Bapannamma Garu ... 135

HINDU LAW—Alienation of part of family property by one brother—Suit by another brother for partition of his share of the property alienated:

The plaintiff sued for partition and delivery to him of his share of a plot of land sold by defendant No. 1 his undivided brother to defendant No. 3. The land in question formed only part of the property of the family of the plaintiff and defendant No. 1:—*Held*, that the plaintiff was entitled to maintain the suit.

Subramanya Chettyar v. Padmanabha Chettyar ... 267

2. Deed containing restrictions on inheritance invalid:

A deed which attempts to create a new line of inheritance by excluding all heirs other than direct male heirs is contrary to Hindu Law and invalid.

Lakshmakka v. Boggarannamma ... 501

3. Devadasi—Adoption by temple dancing woman—Right of adoptive daughter—Civil Procedure Code, ss. 440, 568—Suit by infant without a next friend—Evidence taken on remand:

Suit by the adoptive daughter of a temple dancing woman, deceased, to compel the trustees of the temple to permit the performance of a certain ceremony, in view to her entering on the duties and emoluments attached to the office of her adoptive mother. The plaintiff was 17 years old at the time the suit was instituted and she did not sue by a next friend. No objection was taken by the defendants, on the ground that the plaintiff could not sue without a next friend, until the case came before the Court of first appeal at which time the plaintiff had attained majority. On second appeal, the High Court directed the return of a finding on the issue (previously framed but not tried) whether the plaintiff's adoption was valid. Fresh evidence was taken and the finding was that the adoption was made with the intention that girl should be prostituted while she was still a minor:—*Held*, (1) that seeing no objection was taken to the suit on the ground that the plaintiff should have sued by a next friend, until after she had attained her majority, the irregularity was waived; (2) that the Lower Court had power to take additional evidence on the issue remanded; (3) that the suit was not maintainable on the ground that the adoption of the plaintiff was made with a criminal intention.

Kamalakshi v. Ramasami Chetti ... 127

4. Inheritance—Obstructed heritage—Succession per capita—Succession on extinction of a divided branch of a family:

On the death, without issue, of a Hindu who was divided from the rest of his family, his property passed in succession to his widow and mother. On the death of the latter, the nearest surviving reversioners were the

plaintiff's husband and the first defendant's father, both since deceased, and their first cousin. The plaintiff now claimed a one-third share of the property abovementioned as the heiress of her husband who left no issue. It appeared that the plaintiff's husband and his co-reversioners were divided: *Held*, that the plaintiff was entitled to recover. *Semle*: that she would have been entitled to recover even if her husband had not been divided from his co-reversioners.

Saminadha Pillai v. Thangathanni ... 70

8. ———— *Stridhanam—Sister-in-law*:

A childless Hindu widow, who had been predeceased by her parents, died, leaving stridhanam property. Her brother's widow claimed to be entitled to inherit that property and sued to enforce her claim:—*Held*, that, whether the marriages of the deceased and her mother respectively had taken place in a superior or an inferior form, the plaintiff was not entitled to inherit the stridhanam property in question.

Thayammal v. Annamali Mudali ... 35

9. ———— *Inheritance according to the Mitakshara, Chap. II, s. 6—Succession of bhandu—Priority of mother's half-brother over sons of father's paternal aunt*:

The statement of bhandus entitled to inherit given in the Mitakshara, Chapter II, section 6, is not an exhaustive one. The maternal uncle of the deceased is omitted, but the sons of that uncle are specified. The omission to mention a maternal uncle does not signify that he is excluded from the first class of bhandus. The grounds of the judgment in *Gridhari Lal Roy v. The Government of Bengal* (12 M.I.A., 448) apply not only to the heirship of a maternal uncle as against the claim in default of heirs, but also apply equally to questions between nearer and more remote bhandus. A maternal uncle is, accordingly, an heir, though not specified in the Mitakshara list, and he also has priority over the sons and grandsons of the paternal aunt of the father of the deceased, who are more remote than he is. A mother's brother by the half-blood stands on the same footing as her whole brother in regard to priority over the more remote bhandus. A half-brother may be postponed to a whole brother, but there is no ground for his postponement to more distant kinsmen.

Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar ... 405

7. ———— *Mitakshara Law of inheritance—Impartible zamindari*:

Heritage to an impartible zamindari is to be traced according to the ordinary rules of the Hindu law of inheritance, unless some further family custom exists, beyond the custom of impartibility, although the estate will be in the possession of only one heir at a time. It was contended for the appellant that, in tracing the right heir to the proper stock entitled to the inheritance, a rule was applicable to an impartible estate, different from that applied to a partible one; and that when once the heritage to an impartible estate had become obstructed, on the death of each successive owner the true successor was the heir of the last owner of the originally unobstructed estate, though this did not apply to a partible estate. But for such a distinction no authority was cited, nor any principle suggested; and it was not upheld. The parties to this suit, first cousins once removed, contested the right to inherit an impartible zamindari, which had been acquired by their common ancestor, who had left two daughters by two different wives. The plaintiff was the son of the younger daughter, the defendant's father was the son of the elder. The younger half-sister survived the elder, and in 1863 was judicially declared to have inherited alone the impartible zamindari. On her death the elder daughter's son in litigation ending in 1881, made good his title to the impartible zamindari, being the descendant in the elder line:—*Held*, that this son of the elder daughter became, as the last male owner, the stock from which descent had now to be traced, and that the ancestor was no longer that stock. And *held*, that the son of this last male owner had a title to the zamindari

on his father's death in consequence of the full and complete ownership of the latter, who had himself become a fresh root of title. This decision disposed of the only question that was argued on this appeal. But the decision of the Courts below that the plaintiff could not claim the inheritance in virtue of survivorship was also affirmed. The judgment below, on this part of the case, was based on this that no family co-parcenary had existed to give rise to survivorship, as the sons of daughters could not form a family co-parcenary, which could only consist of the descendants of a paternal ancestor.

Muttuvaduganadha Tevar v. Periasami Tevar ... 461

8. ———— *Insolvency of managing member of a family—Insolvent Act—11 and 12 Vic., cap. 21, s. 7—Vesting order—Official Assignee's power to convey land*:

The managing member of a Hindu family was adjudicated an insolvent and a vesting order was made. The Official Assignee conveyed a house forming part of the family property of the insolvent to the plaintiff who now sued for possession. The second defendant, who was a leper, was the younger brother of the insolvent, the other defendants were the insolvent's sons. The plaintiff did not prove that the debts which led to the adjudication were incurred for the necessary purposes of the family, and the insolvent's sons did not prove that they were incurred for immoral purposes:—*Held*, (1) that the second defendant's disease, which was not of a virulent type, did not affect his co-parcenary rights; (2) that the Official Assignee could only convey the shares of those persons upon whom the debts of the insolvent were binding, and accordingly that the plaintiff was entitled to a moiety of the house and that the house should be sold and half the sale-proceeds paid to him.

Rangayya Chetti v. Thanikachalla Mudali ... 74

9. ———— *Mortgage—Pendency of maintenance suit—'Lis pendens'—Transfer of Property Act—Act IV of 1882, s. 52*:

Where a member of a Hindu family during the pendency of a suit for maintenance, which resulted in a decree charging the plaintiff house together with other property with the maintenance claimed, mortgaged the plaintiff house to the plaintiff:—*Held*, that he was entitled so to do and that the validity of the mortgage was not affected by the doctrine of *lis pendens*.

Manika Gramani v. Ellappa Chetti ... 271

10. ———— *Stridhanam—Estate of married daughter in stridhanam property of mother*:

Under the Hindu Law in force in Southern India, a married daughter, who succeeds to her mother's immovable stridhanam property, takes a life interest only, and after her death it passes to her mother's heir.

Venkataramakrishna Rau v. Bhujanga Rau ... 107

11. ———— *Stridhanam—Inheritance by a grand daughter for a limited estate—Succession by heir of last full owner*:

A Sudra (Lingayat) died in 1823 leaving his property to A, B and C, his daughters, who enjoyed it for some time jointly. In 1860 a settlement was made by (i) A, the sole surviving daughter, (ii) D, who was the daughter of B, and (iii) the present plaintiff, who was the only son of C, and also the stepson of D. Under the settlement two-thirds of the property was given to the present plaintiff and the rest was divided between A on the one hand and D and E on the other. E was the daughter of D. Subsequently D and E acquired A's share under a deed of gift of D. D died in 1883. E had died previously, leaving the dated 5th June 1863. The plaintiff now sued to recover the property which present defendant (her husband) and a daughter F, who died an infant without issue in 1891. The plaintiff now sued to recover the property which had passed to the line of B:—*Held*, (1) that the settlement of 1860 on its true construction gave to D and E a life interest only in the event of their having no descendants, but an estate of inheritance otherwise, and that that disposition was valid, and accordingly that in the event which

happened they took a heritable estate; (2) that under the settlement of 1860 and the deed of gift of 1863, D and E took as joint tenants with benefit of survivorship, and not as tenants in common, and accordingly that D became sole full owner of the property on the death of E, whose husband thus acquired no title as her heir; (3) that F inherited the property, but only for a limited estate, and that the plaintiff was entitled to succeed as heir to D, the last full owner.

Virasangappa Chetti v. Rudrappa Chetti 110

12. *Suit by reversioner to set aside alienations by widow—Fraudulent consent given by nearest reversioner:*

In a suit brought by the nearest reversioner of a Hindu widow who had alienated portions of her husband's estate with the consent of the nearest reversioner alive at the date of the alienation (since deceased), it was found that the alienations were colourable transactions fraudulently got up for the purpose of defeating the plaintiff's claim:—*Held*, that the consent of the nearest reversioner, who must have been aware of the fraud, was of no avail to validate the transactions impeached, and that they were therefore invalid as against the plaintiff.

Kolandaya Sholagan v. Vedamuthu Sholagan 337

13. *Wife's right of maintenance among Sudras—Continued unchastity and misconduct:*

In 1887 a suit was instituted against a Sudra by his wife and a decree was passed for her maintenance. The judgment-debtor now sued to have that decree set aside, alleging that his wife had since committed adultery and given birth to an illegitimate child. The wife denied the adultery and stated that her husband had become reconciled to her and that her child was legitimate. It was found that the plaintiff's case was established and that the defendant's misconduct had been recent, open and continuous:—*Held*, that the decree in the previous suit should be set aside, and that the defendant was not entitled to a bare maintenance—*Quere*: Whether apart from the other circumstances in the case, the fact of having given birth to an illegitimate child would have constituted a bar to the wife's claim to bare maintenance.

Kandasami Pillai v. Murugammal 6

INHERITANCE ACCORDING TO THE MITAKSHARA, Chap. II, s. 6—Succession of bhandu—Priority of mother's half-brother over sons of father's paternal aunt:

The statement of bhandus entitled to inherit given in the Mitakshara, Chapter II, section 6, is not an exhaustive one. The maternal uncle of the deceased is omitted, but the sons of that uncle are specified. The omission to mention a maternal uncle does not signify that he is excluded from the first class of bhandus. The grounds of the judgment in *Gridhari Lal Roy v. The Government of Bengal* (12 M.I.A., 448) apply not only to the heirship of a maternal uncle as against the claim in default of heirs, but also apply equally to questions between nearer and more remote bhandus. A maternal uncle is, accordingly, an heir, though not specified in the Mitakshara list, and he also has priority over the sons and grandsons of the paternal aunt of the father of the deceased, who are more remote than he is. A mother's brother by the half-blood stands on the same footing as her whole brother in regard to priority over more remote bhandus. A half-brother may be postponed to a whole brother, but there is no ground for his postponement to more distant kinsmen.

Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar ... 405

INSOLVENT ACT—11 & 12 VIC., Cap. 21, s. 7—Hindu Law—Insolvency of managing member of a family—Vesting order—Official Assignee's power to convey land:

The managing member of a Hindu family was adjudicated an insolvent and a vesting order was made. The Official Assignee conveyed a house forming part of the family property of the insolvent to the plaintiff who

now sued for possession. The second defendant, who was a leper, was the younger brother of the insolvent, the other defendants were the insolvent's sons. The plaintiff did not prove that the debts which led to the adjudication were incurred for the necessary purposes of the family, and the insolvent's sons did not prove that they were incurred for immoral purposes:—*Held*, (1) that the second defendant's disease, which was not of a virulent type, did not affect his co-parcenary rights; (2) that the Official Assignee could only convey the shares of those persons upon whom the debts of the insolvent were binding, and accordingly that the plaintiff was entitled to a moiety of the house only and that the house should be sold and half the sale-proceeds paid to him.

Rangayya Chetti v. Thanikachalla Mudali 74

IRIGATION-CESS ACT (MADRAS)—ACT VII OF 1866—Lands irrigated under Kistna anicut—Water-cess—Optional or compulsory use of water:

A raiyat occupying land in the Kistna delta made no application for the supply of water, but water from the irrigation channels flowed from the supply of water, but water from the irrigation channels flowed from the time to time on to his land from irrigated lands of a higher level, and he had no option as to whether to accept or refuse the supply. No increased benefit was derived from the water by the raiyat. A sum having been levied from him on account of water-cess, he now sued to recover the amount:—*Held*, that the plaintiff was entitled to recover.

Krishnayya v. Secretary of State for India 24

JOINDER OF PLAINTIFFS—Wrongful act affecting the rights of the several plaintiffs:

Where certain persons were alleged to have committed a wrongful act by evicting the plaintiffs from certain land in which the first plaintiff claimed to be entitled to the melvaram and the other plaintiffs to the kudivaram:—*Held*, that a suit brought by the plaintiffs jointly was not bad for misjoinder.

Muthuvijaya Raghunadha Raju Tevar v. Chockalingam Chetti 385

JURISDICTION—CIVIL PROCEDURE CODE, s. 17—Provincial Small Cause Court's Act—Act IX of 1887, s. 16:

Where a suit may be filed in more than one of several Courts, it is a general principle of law that the plaintiff may select the forum in which to bring the suit. Where a plaintiff sued in a District Munsif's Court having jurisdiction, at the place where the money due under a contract was to be paid, there being no Small Cause Court having jurisdiction at such place:—*Held*, that the jurisdiction of the District Munsif was not ousted by the fact that there was in existence at the date of suit a Small Cause Court having jurisdiction at the place where the contract was made.

Ratnagiri Pillai v. Syed Vava Ravuthan 477

LANDLORD AND TENANTS—ULAVADAI MIRASIDARS—Permanent tenancy—Lease by temple trustee—Long possession—Necessity for lease presumed—Civil Procedure Code, s. 584—Inference to be drawn from documents, question of law:

In 1813 the manager of a temple gave a permanent lease of one-half of certain lands to C, the ancestor of the defendants 1 to 14, and the other half to N. In 1820 N transferred his half share to V, the son of C. In 1831 V and S, the ancestor of the other defendants, addressed a petition to the Collector, the then manager of the temple. In 1832 V and S executed a fresh lease and a security bond in favour of the temple, in both of which documents V and S were described as Ulavadai mirasidars, that is, persons with an hereditary right to cultivate. There was no evidence adduced to prove for what purpose the lease of 1832 was executed, but the defendants held possession as tenants from 1832 to date of suit:—*Held*, that the words 'Ulavadai mirasidars' used in the deeds of 1832 as describing the tenants denoted that they were persons with hereditary right to cultivate, and that the lease was therefore of a permanent nature:—*Held* also, that after the lapse of so great a period of time, the

10. —————, Sched. II, art. 123—*Suit for a legacy and share in residuum—Time begins to run at the expiration of one year from the death of the testator:*
 A suit was brought in May 1894 by a legatee claiming under the will of a testator, who died in December 1881, against the executors of the will. The plaint did not specifically ask for payment of the legacy or for ascertainment of the share in the residue due to the plaintiff, but set forth certain alleged acts of misconduct on the part of the defendants with respect to their dealings with the property, and prayed the Court to call for an account to set aside certain sales of the property made by the defendants and for damages. The Court of First Instance, without going into the merits, held that the suit was really for an account, and dismissed it as being barred. On appeal to the High Court:—*Held*, that the plaint should have been amended in order to show clearly that the plaintiff really was trying to recover his legacy from the defendants personally and that, therefore, the suit fell within article 123, schedule II, Limitation Act, and that the same being payable one year after the testator's death on 8th December 1881, the suit was in time.
Ourseetjee Pestonjee Bottiwalla v. Dadabhoy Eduljee ... 425
11. —————, Sched. II, art. 132—*Suit for kattubadi—Whether kattubadi is rent merely or constitutes a charge—Resumption of service grant:*
 The plaintiff sued for possession of three villages granted by his predecessor to the ancestors of the defendants on the ground that the villages had been granted on service tenure and that he was entitled to resume them. He prayed in the alternative for a decree for six years' arrears of kattubadi:—*Held*, (1) on the evidence that the plaintiff was not entitled to resume the villages; (2) that the plaintiff was entitled to a decree for only three years' arrears of kattubadi.
Vizianagaram Maharajah v. Sitaramarazu ... 100
12. —————, art. 149—*Forest Act—Act V of 1882 (Madras)—Burden of proof—Shifting of burden of proof:*
 Portions of certain land, which had been taken up by Government as forest reserve, were claimed by one who had admittedly been in possession and enjoyment of them for thirty years. The Government failed to establish any subsisting title of its own:—*Held*, (1) that the burden of proof had been shifted on to the Government and had not been discharged and accordingly that the claim should be allowed; (2) article 149 of the Limitation Act applies only to suits brought by, or on behalf of, the Secretary of State.
Secretary of State for India v. Kota Bapanamma Garu ... 165
- LIMITATION—Boundary Marks Act (Madras)—Act XXVIII of 1860, s. 25—Boundary Marks Act (Madras)—Act II of 1884, s. 9—Suit to set aside decision of the Survey officer—Plea of limitation abandoned:**
 A suit filed on 21st April 1891 to set aside the decision of the Settlement officer under the Madras Boundary Acts passed on 15th September 1890 was dismissed by the Munsif as being time barred not having been brought within six months as provided by section 25 of Act XXVIII of 1860. This decision was reversed by the District Judge, who remanded the suit for disposal on the merits, holding that the production by the plaintiff of a copy of the judgment, dated 25th October 1890, raised a presumption that the suit was in time and shifted the burden of proof to the defendant to show that an earlier copy was granted to plaintiff, or that the decision was pronounced in the plaintiff's presence. Against this remand order there was no appeal. At the re-hearing the question of limitation was not again raised, and the Munsif gave a decree on the merits. An appeal was preferred to the District Court, but no mention was made of the question of limitation. On appeal to the High Court:—*Held*, that the question of limitation had been put aside by the consent of the parties

- who desired to have the case decided on the merits, and that the appellant could not be allowed to fall back on this plea of limitation which he had abandoned in the Lower Courts.
Rangayya Appa Rau v. Narasimha Appa Rau ... 416
2. ————— *Contract—Continuing Breach—Civil Procedure Code, ss. 588 (28), 586:*
 T, who was the uncle of the first defendant and the father of the second defendant, agreed with C to sell certain land to him for consideration received and to cause the land, then standing in the name of a third party, to be registered in C's name. It was further agreed that if T failed to convey and cause the change of the revenue registry, T should return the purchase money. C was put in possession, but in 1890 the second defendant conveyed the land to one M, who ejected C:—*Held*, that the right of appeal conferred by section 588, Civil Procedure Code, is not controlled by section 586, that the breach did not occur prior to November 1890, and that the suit was not barred.
Chinnatambi Gounden v. Chinnana Gounden ... 391
3. ————— *Purchase by conditional sale—Vendor remaining in possession as tenant holding over—Possession not shown to be adverse:*
 In 1866 the plaintiff bought the plaintiff lands by conditional sale deed repayable in ten years from a third party who, under the same document, became his tenant of the said lands. Before the expiration of the ten years the vendor died, and his widow sold her right in the lands and gave possession to G, the transferee of the second defendant. On the expiration of the ten years the sale to plaintiff became absolute and G continued to hold over after the expiry of the lease, but there was no evidence to show that G's possession ever became hostile to plaintiff:—*Held*, that the fact that plaintiff's title ripened into full ownership on the expiration of the ten years provided by the sale deed did not alter the character of the tenure of G, that his possession never became hostile to plaintiff, that G acknowledged the plaintiff's title in his sale deed dated 1881 to the second defendant, and that the suit was not barred.
Anatha Bhatta v. Holeyay Deyya ... 437
4. ————— *Religious Endowment—Hereditary trustee—Invalid alienation:*
 In a suit brought by a hereditary trustee to set aside certain alienations of the trust property made by his predecessors in title and to have it declared that he was entitled to the sole management of the trust property it appeared that the property was held jointly by plaintiff's father and by the mother of the first defendant. On 17th September 1868 first defendant's mother alienated her right to the joint management to the first defendant, who however never got possession until 13th February 1869, on which date plaintiff's father alienated his right to joint management to first defendant, the plaintiff was born in 1875:—*Held*, that the hereditary right of plaintiff was a personal right accruing on the death of his predecessor, viz., his father, and that as limitation ran from that date, the suit was not barred.
Velu Pandaram v. Gnanasambanda Pandara Sannadhi ... 243
- MADRAS CITY POLICE ACT—ACT III OF 1888, ss. 42, 45, 47:**
 Where a Magistrate has recorded that an accused person has pleaded guilty, an affidavit to the contrary sworn to by the accused is not admissible in evidence on revision by the High Court. In Madras City Police Act III of 1888, section 47, the words "all or any of the other articles seized" include money or securities for money seized by the police under section 42. The Magistrate is not bound to hold any enquiry as to whether the money and other things seized were used or intended to be used for the purpose of gaming.
Queen-Empress v. Bhashyam Chetti ... 209

MADRAS DISTRICT MUNICIPALITIES ACT—ACT IV OF 1884, ss 72, 97, 262: The plaintiff built a house at Nellore, the construction of which was completed on the 15th of August 1893. The municipal authorities of that place, being governed by Madras District Municipalities Act, gave notice of assessment on the 11th of September, levied the tax as assessed, and credited it as the tax due for the half-year ending on the 30th of September 1893. The plaintiff now sued to recover the amount paid by him as having been illegally levied:— <i>Held</i> , that under the provisions of District Municipalities Act, section 262, the suit was not maintainable. <i>Municipal Council, Nellore v. Rangayya</i>	10
2. Procedure Code, s. 433:, s. 179—Criminal By section 179, Madras District Municipalities Act IV of 1884, it is provided "the external roofs, verandahs, pandals, and walls of buildings erected or renewed after the coming into operation of this Act shall not be made of grass, leaves, mats or other such inflammable materials except with the written permission of the Municipal Council":— <i>Held</i> , that the word 'renewed' includes repairing. <i>Queen-Empress v. Subbanna</i>	241
MADRAS HARBOUR TRUST ACT—ACT II OF 1886—Bill of Lading—Cargo unclaimed on arrival of ship—Rights of shipowner to land goods—Damages by rain: The defendant's steam ship arrived at Madras on 4th December 1891, bringing bags of grain consigned to the plaintiffs who on that date were not authorised to receive them. The plaintiffs set up a custom that cargo of this description ought to be landed on the beach; but, as this could not be done in the absence of the consignees, the defendants landed it the same day on the pier and delivered it into the custody of the Madras Harbour Trust for storage pending delivery to the consignees. On the 8th of December 1891, heavy rain fell, and on the same date plaintiffs learnt that the cargo had been delivered on the pier. When the plaintiffs came to take delivery on that day, a considerable portion had been damaged by rain for which they now sued the defendants:— <i>Held</i> , (1) that where the consignees are unable to take delivery in the ordinary way on the beach, the master of a ship has the option of landing and warehousing the goods, and that delivery to the Harbour Trust for custody was not wrongful; (2) that in the absence of proof that the defendants were negligent, or that they failed to deliver the goods, the suit must be dismissed. <i>British India Steam Navigation Company v. Ibrahim Sulaiman</i>	169
MADRAS SALT ACT—ACT IV OF 1889, ss. 46, 67—Penal Code, s. 224—Escape from lawful custody: The Madras Salt Act, 1889, only authorises searches for contraband salt and arrests of the parties concerned in the keeping of such salt to be made by officers of the Salt department without search warrant in cases where the delay in obtaining such search warrant will prevent the discovery of such contraband salt:— <i>Held</i> , that where the circumstances did not justify the officer in believing that the delay in obtaining a search warrant would prevent the discovery of contraband salt, he had no power to search or arrest persons without such warrant and the escape by the persons so arrested from custody was no offence within the meaning of section 224, Indian Penal Code. <i>Queen-Empress v. Kalian</i>	310
MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT—ACT I OF 1887 (MADRAS), s. 3—Suit to redeem Kanom: The sum to be allowed for tenants' compensation for improvements under Act I of 1887 (Madras) is to be calculated in proportion to the extent to which the estate has been permanently improved. The improvement for which compensation is payable as defined in section 3 of the Act is not the tree itself, but the work of planting, protecting and maintaining it. The calculation must not be based on the future produce of the tree. <i>Kunhi Chanda Nambiar v. Kunkan Nambiar</i>	384

MALABAR LAW—Makkatayam rule of inheritance—Tiyans of South Malabar: On the death of a Tiyan of South Malabar following the Makkatayam rule of inheritance, his mother, widow and daughter are entitled to succeed to his property (acquired by himself and his father) in preference to his father's divided brothers. <i>Imbichi Kandam v. Imbishi Pennu</i>	1
2. Makkatayam Law—Tiyans of Calicut—Succession: Among the Tiyans of Calicut governed by the Makkatayam Law, the widow of the deceased owner is a preferential heir to his mother. <i>Kunhi Pennu v. Chiruda</i>	440
MORTGAGE—Effect of foreclosure decree passed by a foreign Court—"Lis pendens"—Transfer of Property Act—Act IV of 1882, s. 52: In 1887 K, who resided at Singapore, mortgaged certain lands in the Madura district to S, who sued and obtained a conditional foreclosure decree on 13th June 1892 in the Supreme Court of Singapore. This decree became absolute on the 3rd October 1892. On 12th August 1892, K hypothecated the said land to P. In a suit brought by S:— <i>Held</i> , that the decree of a foreign Court cannot directly affect land situated in British India; that at the date of the mortgage there was no decree purporting to operate upon the land; that the doctrine of <i>lis pendens</i> was inapplicable. <i>Quære</i> : Whether P would have been bound if he had had notice of the existence of the conditional decree at the date of his mortgage. <i>Palani Chetti v. Subramanya Chetti</i>	257
MORTGAGE IN CONSOLIDATION OF PRIOR MORTGAGES—Want of registration—Secondary evidence—Extinction—Decree to redeem prior mortgages: In a suit to redeem a mortgage of 1867 which had been lost and admittedly had not been registered, it appeared that it had been executed in consolidation of two prior mortgages, dated 1856 and 1860, respectively:— <i>Held</i> , that the plaintiff was not entitled to a decree on the footing of the unregistered mortgage which could not be proved, but that he was entitled to redeem the two previous mortgages if they were found to be genuine and valid. <i>Arunnugam Pillai v. Periasami</i>	160
MUHAMMADAN LAW—Hibbat—Incomplete gift: Where a Muhammadan woman made an oral gift of a house to her nephew on the occasion of his marriage, but subsequent to the gift continued to live with him in the house:— <i>Held</i> , that the gift was null and void, as there was no entire relinquishment of the house by the donor and the case did not fall within the exceptions allowed by Muhammadan law. <i>Bava Sahib v. Mahomed</i>	343
2. Relinquishment of rights of inheritance—Relinquishment executed before ancestor's death: A Muhammadan sued to recover his share of the property by his mother deceased. It appeared that before her death he had, by a registered deed in consideration of Rs. 150, renounced all his claims on her estate:— <i>Held</i> , that the renunciation was binding on the plaintiff. <i>Kunhi Mamod v. Kunhi Moidin</i>	176
PARTNERSHIP—Payment to a partner in fraud of his co-partners not a valid discharge—Constructive notice: The defendants, other than the first defendant, styling themselves the 'agricultural association,' entered into three rental agreements, two of them dated April 23, 1891, and the third dated June 21, 1891, with the plaintiffs and the first defendant for the cultivation of certain lands belonging	

to an undivided family of which the plaintiffs and first defendant were members and took possession of and cultivated the said lands. On the 17th June 1891 an agreement, of which the second defendant had notice, was entered into between the plaintiffs and first defendant to the effect that the first plaintiff should be the managing member of the family and should be entitled to receive the rent and give receipts for the same. Subsequently disputes arising between plaintiff and first defendant, the other defendants made payments of rent to first defendant alone:—*Held*, that these payments were not a valid discharge as against the claim of the plaintiffs on its being proved that second defendant had notice of the agreement of 17th June and that notice to him must be taken to be notice to his partners, the other defendants. By an agreement between the defendants any one partner was empowered to take a lease: such lease to be binding on all the partners as if executed by them. The leases were not signed by the 13th defendant (now represented by appellants 19, 20 and 21) who was admittedly a partner and took actual part in the management of the affairs of the firm after the leases were executed:—*Held*, that it was intended that the leases should operate as if all the members had executed them and that the representatives of 13th defendant were bound.

Chinnaramanuja Ayyangar v. Padmanabha Pillayan ... 471

PARTY-WALL: See TENANTS IN COMMON.

PATTA, GRANT OF—Effect of reversal—Appeal to Board of Revenue:

The grant of a patta by a Collector is conditional on the result of an appeal against such grant to the Board of Revenue.

Tirumalaswami Ayyangar v. Tirumalai Goundan ... 324

PENAL CODE, ss. 34, 56, 302—Murder—Sentence of penal servitude:

Where three prisoners assaulted the deceased and gave him a beating, in the course of which one of the prisoners struck the deceased a blow on the head, which resulted in death:—*Held*, that in the absence of proof that the prisoners had the common intention to inflict injury likely to cause death, they could not be convicted of murder. The punishment of penal servitude is only applicable to Europeans and Americans.

Queen-Empress v. Duma Baidya ... 483

2. —, ss. 99, 147, 353—Abkari Act, ss. 31, 36:

A Sub-Inspector of Salt and Abkari attempted, without search warrant, to enter a house in search of property, the illicit possession of which is an offence under the Madras Abkari Act and was obstructed and resisted:—*Held*, that having regard to section 99 of the Penal Code, even though the Sub-Inspector was not strictly justified in searching a house without a warrant, the persons obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of their obstruction, as it was not shown that that officer was acting otherwise than in good faith and without malice.

Queen-Empress v. Pukot Kotu ... 349

3. —, ss. 188, 290—Public nuisance—Cremation—Disobedience to an order duly promulgated by a public servant—Criminal Procedure, s. 143—Illegal order:

On the 11th August 1894 the District Magistrate promulgated an order prohibiting the people of the village of Thirukodikaval from using their burning grounds situated on the southern bank of the Canvery and directing them to use other burning grounds which had been provided. On the 11th May 1895 certain persons, in defiance of this order, cremated a corpse at the spot interdicted, and were convicted under sections 188, 290, Indian Penal Code, but the conviction under section 188 was reversed on appeal:—*Held*, that when persons entitled to use a particular spot dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident

to such an act as it is generally performed in this country, they cannot be convicted of a public nuisance on the ground that their act caused material annoyance and discomfort to persons near the place on the occasion referred to:—*Held* further, that the order of the District Magistrate was not warranted by section 143, Criminal Procedure Code, or by any other law and must, therefore, be set aside.

Queen-Empress v. Saminadha Pillai ... 464

4. —, s. 224—Escape from lawful custody—Salt Act (Madras)—Act IV of 1889, ss. 46, 47:

The Madras Salt Act, 1889, only authorises searches for contraband salt and arrests of the parties concerned in the keeping of such salt to be made by officers of the Salt department without search warrant in cases where the delay in obtaining such search warrant will prevent the discovery of the contraband salt:—*Held*, that where the circumstances did not justify such contraband salt, he had no power to search or prevent the discovery of contraband salt, and the escape by the persons so arrested from custody was no offence within the meaning of section 224, Indian Penal Code.

Queen-Empress v. Kalian ... 810

5. —, s. 304—Act done with the knowledge that death would be a probable result:

Where the prisoner by gripping and squeezing the testicles of deceased reduced them to a pulpy condition thereby causing an injury which resulted in death due to the shock so inflicted on the nervous system:—*Held*, per DAVIES, J., that the death was an unforeseen result for which prisoner could not be held liable, and that she ought to be convicted under section 323, Penal Code:—*Held* per SUBRAMANIA AYYAR and BENSON, JJ., that death was a probable consequence of the prisoner's act, and that she was guilty under section 304, Penal Code, of culpable homicide not amounting to murder.

Queen-Empress v. Kaliyani ... 356

6. —, s. 448—Criminal Trespass—Intent:

Although a trespasser knows that his act, if discovered, will be likely to cause annoyance, it does not follow that he does the act with that intent.

Queen-Empress v. Rayapadayachi ... 240

PRESIDENCY SMALL CAUSE COURTS ACT—ACT XV OF 1882, s. 37—Powers of Full Bench of Presidency Small Cause Court—Question of fact:

One of the Judges of the Presidency Small Cause Court in a suit tried by him delivered judgment for the plaintiff. The defendant made an application to the Full Bench under the Presidency Small Cause Courts Act, section 37, and the Court arrived at the conclusion that the judgment proceeded on a misappreciation of the evidence and reversed the decree:—*Held*, by COLLINS, C. J., and SHEPARD, J. (BEST, J., dissenting), that the Full Bench of the Presidency Small Cause Court had transgressed the limits of the jurisdiction conferred by Act XV of 1882, section 37, as the case was one on which different minds might not unreasonably have come to different conclusions.

Sadasook Gambir Chund v. Kannayya ... 96

2. —, s. 69—Jurisdiction—Divisible contract:

Where a contract provided for delivery of goods in two monthly shipments and the defendants refused to take delivery or pay for either of the shipments of the goods in accordance therewith; and it appeared that the total amount of the damages sustained by reason of the two breaches alleged, if added together, exceeded Rs. 2,000, whereas if taken separately they were less than that amount. The contract provided that each shipment was to be treated as a separate contract:—*Held*, that the plaintiff

REGISTRATION ACT—ACT III OF 1877, s. 17, cl. (n)—*Suit on Kanom* :

Although under the Registration Act III of 1877, section 17, clause (n), a receipt given by a mortgagee purporting to extinguish the mortgage debt does require registration:—*Held*, that the language of the receipt in the present case did not indicate any intention to extinguish or limit the mortgagor's interest and that therefore registration was unnecessary.

Uppalakandi Kunhi Kutti Ali Haji v. Kunnam Mithal Kottapraph Abdul Rahiman

REGULATION XXV OF 1802, s. 8—*Suit for declaration—Madras Act I of 1876,*
ss. 2, 6 :

An allience of a portion of a zamindari is entitled to separate registration and assessment under Madras Act I of 1876. A Court has power to order separate registration and assessment under section 6, although all the parties concerned do not concur in applying within the meaning of section 2.

[illegible]

REGULATION V OF 1804, s. 17—*Powers of Agents to Court of Wards—Contract Act, s. 25, cl. 3—Promise to pay a time-barred debt :*

A Collector as agent to the Court of Wards has no authority to bind a ward of the Court of Wards by a promise under Contract Act, section 25, clause 3, to pay a debt which is barred by limitation.

<i>Suryanarayana v. Narendra Thatraz</i>	...	...	...	...	...	...	255
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RELIGIOUS ENDOWMENT—*Hereditary trustee—Invalid alienation—Limitation:*

In a suit brought by a hereditary trustee to set aside certain alienations of the trust property made by his predecessors in title and to have it declared that he was entitled to the sole management of the trust property it appeared that the property was held jointly by plaintiff's father and by the mother of the first defendant. On 17th September 1868 first defendant's mother alienated her right to the joint management to the first defendant, who however never got possession until 13th February 1869, on which date plaintiff's father alienated his right to joint management to first defendant, the plaintiff was born in 1875:—*Held*, that the hereditary right of plaintiff was a personal right accruing on the death of his predecessor, viz., his father, and that as limitation ran from that date, the suit was not barred.

Velu Pandaram v. Gnanasambanda Pandara Sannadhi 243

2. _____ Specific Performance of agreement for partition—
Alienation of the management of a public charity—Illegal—Effect of partial
illegality—Civil Procedure Code, s. 28:

In a suit for specific performance of an agreement for partition, it appeared that amongst other property considered liable to partition, was the huk right of a public choultry and certain other lands alleged to belong to the same charity. The said huk right had been sold by auction to that member of the family who bid the highest price and was purchased by the plaintiff. (On a suit being brought to enforce the terms of the arrangement :—*Held*, that the sale by auction of the huk right was illegal, but that as such illegality did not affect the other terms of the arrangement it might be enforced as to the rest of the property :—*Held* further, with reference to section 28 of the Civil Procedure Code, that the third defendant a minor was properly included as a party to the suit, though he was not a party to the arrangement.

Alagappa Mudaliar v. Sivaramasundara Mudaliar 211

RELIGIOUS ENDOWMENTS ACT—ACT XX OF 1863, ss. 3, 11—*Suit by manager for rent—Muchalkas granted by the committee:*

Where the committee of a religious institution governed by Act XX of 1863 obtained muchalkas in its own name from the tenants of land

belonging to the institution instead of in the name of its manager—*Held*, that this fact constituted a mere irregularity and that a suit brought by the manager on such muchalkas is maintainable.

Kalyanaramayyar v. Mustak Shah Sahab 305

2. s. 5 :

Where a hereditary trustee of a temple died and application was made by the Collector as Agent of the Court of Wards, in whom the management of deceased's estates, during the minority of the sons of the deceased had vested, to be appointed trustee on behalf of the said sons:—*Held*, that the case fell within section 5 of Act XX of 1863, and that the Court had jurisdiction to make the appointment.

Somasundara Mudaliar v. Pythilinga Mudaliar 285

3. s. 16—Suit for Dismissal of Members of Devastanam Committee—Reference to arbitration—Powers of arbitrators :

Where a suit for dismissal of the members of a devastanam committee and damages was referred under Act XX of 1863, section 16, to arbitrators who passed an award dismissing them as prayed and decreeing a portion of the damages claimed with interest:—*Held*, that the Court had power to refer the matter to the arbitrators and award damages with interest, provided the amount, inclusive of interest, did not exceed the amount claimed in the plaint.

Perumal Naik v. Saminatha Pillai 408

RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865, ss. 7, 9, 10—Suit to recover arrears of rent—Proceedings in Revenue Court to enforce acceptance of patta tendered—Time from which period of limitation is computed—Limitation Act—Act XV of 1877, sched. II, art. 110 :

In a suit for rent for a period which had expired more than three years before the date of the plaint, it appeared that proceedings had taken place in a Revenue Court under Rent Recovery Act (Madras), 1865, to enforce acceptance by the defendant of the patta tendered by the landlord. These proceedings had terminated on appeal in favour of the landlord less than three years before the institution of this suit:—*Held*, that the period of limitation applicable to the suit was not computable from the date of the termination of the proceedings under the Rent Recovery Act and that the suit was barred by limitation. *Sobhanadri Appa Rau v. Chalamanna* (I.L.R., 17 Mad., 225) overruled.

Sriramulu v. Sobhanadri Appa Rau 21

RES JUDICATA—Decree, construction of—Application for execution by defendant—Previous orders as applied for by defendant—Present objection by plaintiff to continued execution on behalf of defendant :

Although a decree does not in terms give a certain relief, yet if it is construed in orders passed upon it as having given that relief, it is not competent to the Court on subsequent applications to treat those orders as erroneous and put another construction on the decree.

Venkatanarasimha Naidu v. Papammah 54

SALE IN EXECUTION—Insanity of judgment-debtor intervening before—Civil Procedure Code, ss. 456, 459, 460—Act XXXV of 1858 :

A suit was brought by V to have it declared that the sale of his property in execution of a decree was void owing to the fact that subsequent to decree and prior to sale he has been declared insane under Act XXXV of 1858. The second defendant was the auction purchaser:—*Held* by *BEST J.*, that objection can be taken under section 311, Civil Procedure Code, on the above grounds before the sale has been confirmed and certificate granted. *Held* by *SUBRAMANIA AYYAR*, that these facts only amounted to a material irregularity within section 311, Civil Procedure Code, and that the plaintiff must prove substantial injury.

Narayana Kotham v. Kaliasundaram Pillai 219

SIMPLE MORTGAGE—Remedy of mortgages upon default made—Act IV of 1888,
s. 58—Construction of decree:

s. 58—Construction of decrees:

s. 58—Construction of decree.—On default made in payment on a simple mortgage, a Court, instead of decreeing the proper relief, had made a decree (which, however, had afterwards become final, and had been executed) for possession by the mortgagee after a period of grace. That decree would rightly have been for a judicial sale (Transfer of Property Act, 1882, section 58). In this suit, brought by the mortgagor for an account to be rendered by the mortgagee, and for re-delivery of possession, alleging that the account would show payment of the debt already made out of the rents and profits:—*Held*, that the decree for possession did not amount to a decree for foreclosure or preclude redemption, the possession of the decree-holder having only been as mortgagee, and having involved liability to account to the mortgagor.

Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Rasu ... 249

SPECIFIC RELIEF ACT—ACT I OF 1877, s. 42—*Suit for declaration—Act I of 1876 (Madras), s. 2—“Concur in applying”:*

1876 (*Madras*), §. 2—Consent in applying to the Government of India in Conn.

1876 (Madras), s. 2.—Concern in applying.

A suit was brought by F against the Secretary of State for India in Council for a declaration that the order of the Madras Government directing the Collector to cancel the separate registration and assessment of a village in the Sivaganga Zamindari in his name was *ultra vires* and illegal. The plaintiff's claim to be separately registered as the holder of the said village depended upon the proper construction to be put on a grant of the village contained in two documents, the one dated 13th December 1872 and the other being a document, dated 14th May 1877, executed by the Rani and her children. Subsequent to the grant referred to, an application was preferred by the Rani and addressed to the Collector requesting him to separately assess the village and register it in the name of F. This application was never presented owing to the death of the Rani, who was succeeded by the father of the present Zamindar who executed on 22nd February 1883 a deed of release in favour of F ratifying the grant above mentioned in the following terms :—“Whereas the village of Kondagai mentioned in the following terms :—“Whereas the village of Kondagai of my Zamindari . . . has been granted to you in perpetuity “by the late Rani Kattama Nachiyar and others and has been in your “possession according to the terms of the documents executed by them to “you therefor on the 13th December 1872 and on the 14th May 1877, and “whereas I have received from you Rs. 2,000 as the consideration for my “ratifying your rights in accordance with the terms of the said documents “and for relinquishing whatever rights I possess therein, I hereby ratify “your rights of every description in the said village and relinquish all my “rights therein in your favour. Wherefore as per the terms of the said “documents, dated 13th December 1872 and 14th May 1877, you and your “heirs and assigns shall hold and enjoy the said Kondagai village. . . . “in perpetuity . . . with full powers of alienation by sale, gift or other- “wise. You shall pay to my Zamindari the sum of Rs. 3,500, the *poruppu* “fixed on the said village, as well as road-cess, *magamai*, &c., according to “custom,” and he applied to the Collector for separate assessment and regis- tration of the village in the name of F on 25th March 1883. On 29th March 1883 F also made a similar application but pending disposal, the present Zamindar's father died, and was succeeded by his son the present Zamindar who raised objections and the application was not granted. On 23rd May 1887 the present Zamindar granted a lease of the Zamindari to O, S, and R who executed a release guaranteeing F undisturbed possession and enjoyment of the village and accepted his position such as it may have been at or prior to the date of the execution of the lease. On 23rd January 1890 the Zamindar executed in favour of F a deed of release which after reciting the grant from the Rani, the deed executed by the Zamindar's deceased father, dated 22nd February 1883, and a further payment of Rs. 3,500 by F contained the following covenant :—“Therefore I forfeit and relinquish the right I profess to have in me to question the “said permanent lease or the terms of the said lease deeds, and I hereby “ratify your right. You and your heirs shall hold and enjoy the said “villages absolutely according to the terms of the aforesaid permanent “lease deeds.” F then applied by petition, dated 13th March 1890, to the Collector for separate registration and assessment of the said village, but

on notices being sent to the Zamindar and the lessees, they filed objections which after due enquiry were overruled by the Collector who ordered separate registration and fixed the assessment. On appeal, the Board of Revenue supported the action of the Collector. Whereupon the lessees appealed to the Government of Madras on 21st September 1891, and the Government of Madras on 14th November 1891 cancelled both the separate registration and the separate assessment. Under the circumstances F claiming to be the duly register holder of the said village sued the Secretary of State for a declaration that the order of the Madras Government, dated 14th November 1891, directing the Collector to cancel the separate registration and assessment of the said village was *ultra vires* and illegal—and the lessees sued F for the balance of *poruppu*, *magamai* and road-cess with interest alleged to be due on the said village for fasli 1800:—*Held*, that F was bound to pay the lessees Rs. 3,500 *poruppu* with *magamai* and road-cess whether his village was separately registered and assessed or not:—*Held*, that the suit by F for a declaration that the order of the Madras Government directing the Collector to cancel the separate registration and assessment of the village previously made by him was illegal and *ultra vires* could not be maintained with reference to section 42, Specific Relief Act, inasmuch as the order had been already carried out:—*Held*, also that if the general words of the prayer "for such other relief as the circumstances of the case may require" were to be taken as including a prayer for consequential relief, then the suit was bad for misjoinder, inasmuch as the Zamindar and the lessees who were interested parties were not joined:—*Held*, also that not only the person applying under Act I of 1876, section 2, for separate assessment and registration must be entitled thereto, but also that the parties to the alienation must concur in the application.

Fischer v. Secretary of State for India in Council

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STATUTE 11 & 12 VIC., Cap. 21:

See INSOLVENT ACT.

SUCCESSION ACT—ACT X OF 1865, ss. 246, 261—Application for letters of administration—Caveator propounding a will—Effect of withdrawal of previous application for probate of same will without leave to apply again—Civil Procedure Code, s. 373:

Where a person applied for probate of a will but withdrew the application before the proceedings became contentious:—*Held*, that he was entitled as caveator to propound the same will in opposition to an application for grant of letters of administration to the estate of the deceased:—*Held* further, that though the provisions of the Civil Procedure Code are applicable to suits under Act X of 1865, section 261, still in the present case, the application for probate had been withdrawn before the proceedings became contentious and that, therefore, section 373, Civil Procedure Code, was not applicable.

Pakiam Pillai v. Innasi Fernand

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SUCCESSION CERTIFICATE ACT—ACT VII OF 1889, ss. 6, 19—Appeal:

Where a minor petitioner represented by the Court of Wards applied for a succession certificate under Act VII of 1889, and the District Court granted the certificate, but ordered security to be given by the Court of Wards:—*Held*, that no appeal lay from the order requiring security.

Rama Reddi v. Papi Reddi

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2. s. 7—Joint certificate, legal:

It is not illegal to grant a joint certificate to two persons who claim adversely to each other to be entitled to collect the debts due to the estate of the deceased under Succession Certificate Act VII of 1889.

Narayanasami v. Kuppusami

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SUIT FOR PARTITION—Death of plaintiff subsequent to decree—Right of survivorship vested in defendant—Vested right of plaintiff's representative not affected:

M, a minor and only son by his next friend, sued his father and certain alienees of the family property for partition and obtained a decree. Subsequent to decree and pending appeal, the plaintiff died and M's mother was brought on the record as deceased plaintiff's legal representative:—*Held*, that as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, so the defendant can raise no other defence against him than he could have raised against the deceased plaintiff, and that a decree for partition operates as a severance of the joint ownership.

Subbaraya Mudali v. Manika Mudali

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3. Prior arbitration and award, effect of:

Disputes having arisen in a joint Hindu family, the parties submitted the question of partition to arbitrators, who passed an award thereon. Both parties objected to the award, and it was never carried into effect. On a suit for partition being filed:—*Held*, that such an award is equivalent to a final judgment and binding on the parties in the absence of positive evidence that both parties agree that the former state of things should be restored and that therefore the present suit for partition could not be maintained.

Krishna Panda v. Balaram Panda

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SUIT FOR SPECIFIC PERFORMANCE OF AGREEMENT FOR PARTITION—Alienation of the management of a public charity—Illegal—Effect of partial illegality—Civil Procedure Code, s. 28:

In a suit for specific performance of an agreement for partition, it appeared that amongst other property considered liable to partition, was the huk right of a public choultry and certain other lands alleged to belong to the same charity. The said huk right had been sold by auction to that member of the family who bid the highest price and was purchased by the plaintiff. On a suit being brought to enforce the terms of the arrangement:—*Held*, that the sale by auction of the huk right was illegal, but that as such illegality did not affect the other terms of the arrangement it might be enforced as to the rest of the property:—*Held* further, with reference to section 28 of the Civil Procedure Code, that the third defendant a minor was properly included as a party to the suit, though he was not a party to the arrangement.

Alagappa Mudaliar v. Sivaramasundara Mudaliar

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SUIT ON A KANOM—Registration Act III of 1877, s. 17, cl. (n):

Although under the Registration Act III of 1877, section 17, clause, (n) a receipt given by a mortgagor purporting to extinguish the mortgage debt does require registration:—*Held*, that the language of the receipt in the present case did not indicate any intention to extinguish or limit the mortgagor's interest and that therefore registration was unnecessary.

Uppalakandi Kunhi Kutti Ali Haji v. Kunnam Mithal Kottapath Abdul Rahiman

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SUITS VALUATION ACT—ACT VII OF 1887, s. 8—Suit for share of undivided property—Civil Courts Act (Madras)—Act III of 1873, s. 12:

Persons entitled to a share in certain lands of a village only part of which was held in severalty, executed a mortgage, of part of the lands due to their share. The mortgage contained a description of the land comprised therein by paimash numbers and admeasurement. The mortgaged property was brought to sale in execution of a mortgage decree and was purchased by the present plaintiff. The plaintiff now sued for the apportionment and possession of the share to which he was entitled, and stated the value of the suit to be the value of the share claimed by him, viz., Rs. 1,870 and not that of the entire property. The defendants were

the mortgagors and the other persons interested in the land, their respective shares not having been ascertained and demarcated :—*Held*, that the suit was within the jurisdiction of a District Munsif.

Chakrapani Asari v. Narasinga Rao ... 56

TENANTS IN COMMON—Party-wall—Erection on the wall by one tenant in common—Injunction at suit of other co-tenant :

One of two tenants in common of a party-wall raised the height of the wall with a view to building a superstructure on his own tenement. The other tenant in common, who had not consented to the alteration in the wall, but had suffered no inconvenience therefrom, now sued to enforce the removal of the newly-erected portion :—*Held*, that the plaintiff was entitled to the relief sought.

Kanakayya v. Narasimhulu ... 88

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, ss. 2, 99—Suit to set aside sale effected by a mortgagee prior to Transfer of Property Act :

In a suit brought to set aside a sale effected by mortgagee prior to the date when Act IV of 1882 (Transfer of Property Act) came into force :—*Held*, that the Transfer of Property Act (sections 2, 99) has no retrospective effect, so as to invalidate an order for sale which constituted a legal relation between the defendants passed before that Act came into force.

Naranappa v. Samachari ... 382

2. Mortgage—Pendency of maintenance suit—'Lis pendens' :

Where a member of a Hindu family during the pendency of a suit for maintenance, which resulted in a decree charging the plaint house together with other property with the maintenance claimed, mortgaged the plaint house to the plaintiff :—*Held*, that he was entitled so to do, and that the validity of the mortgage was not affected by the doctrine of *lis pendens*.

Manika Gramani v. Ellappa Chetti ... 271

3. foreclosure decree passed by a foreign Court—'Lis pendens' :

In 1887 K, who resided at Singapore, mortgaged certain lands in the Madura district to S, who sued and obtained a conditional foreclosure decree on 18th June 1892 in the Supreme Court of Singapore. This decree became absolute on the 3rd October 1892. On 12th August 1892, K hypothecated the said land to P. In a suit brought by S :—*Held*, that the decree of a foreign Court cannot directly affect land situated in British India; that at the date of the mortgage there was no decree purporting to operate upon the land; that the doctrine of *lis pendens* was inapplicable. *Quere* : Whether P would have been bound if he had had notice of the existence of the conditional decree at the date of his mortgage.

Palani Chetti v. Subramanya Chetti ... 257

4. Remedy of mortgagee upon default made—Construction of decree :

On default made in payment on a simple mortgage, a Court, instead of decreeing the proper relief, had made a decree (which, however, had afterwards become final, and had been executed) for possession by the mortgagee after a period of grace. That decree would rightly have been for a judicial sale (Transfer of Property Act, 1882, section 58). In this suit, brought by the mortgagor for an account to be rendered by the mortgagee, and for re-delivery of possession, alleging that the account would show payment of the debt already made out of the rents and profits :—*Held*, that the decree for possession did not amount to a decree for foreclosure or preclude redemption, the possession of the decree-holder having only been as mortgagee, and having involved liability to account to the mortgagor.

Sri Raja Popamma Rao v. Sri Vira Pratapa H. V. Ramachandra Rao ... 249

5. Mortgage and mortgagor—Right of mortgagee in possession to execute repairs :

Transfer of Property Act, section 72 (b), does not permit a mortgagee in possession to effect improvements. Consequently in a suit for redemption the costs of such improvements cannot be legally charged against the mortgagor seeking to redeem.

Arunachella Chetti v. Sithayi Ammal ... 327

6. mortgage—E extinguishment of prior mortgage—Title by possession—Limitation :

The trustees of a religious institution improperly mortgaged land forming part of its endowment, and put the mortgagee into possession on 27th June 1877 as usufructuary mortgagee. The mortgagee assigned his mortgage to defendant No. 1 on 7th December 1882. On 23rd December 1889 the mortgagors executed to the plaintiff a deed of usufructuary mortgage of the same land to secure Rs. 1,400; the deed stated that the money was borrowed with a view to discharge a prior mortgage and proceeded "as you have undertaken to pay Rs. 1,000 to the mortgagee, I credit you with Rs. 1,000 and receive Rs. 402 in cash." The plaintiff paid off the prior mortgage on 18th April 1890, but did not obtain possession, other persons having entered in the interests of the institution. The plaintiff now sued for possession and a declaration of his mortgage right, the persons in possession and the prior mortgagee, but not the mortgagors were joined as defendants :—*Held*, that Transfer of Property Act, section 74, was not applicable to the case, and that the plaintiff was not entitled to a decree.

Kooppia Sahib v. Chidambaram Chetti ... 105

7. ss. 87, 89, 92, 93 :

A mortgagor who has made default in payment of the mortgage money within the time limited by the decree in a suit for redemption, is not entitled to apply for execution of the decree after the time limited.

Vallabha Valiya Rajah v. Vedapuratti ... 40

8. Civil Procedure Code, ss. 32, 559, 587—Addition of parties on appeal :

A Verumpattom tenant in Malabar claiming under a lease from the ottidar, is entitled to redeem the prior kanom. The Court on second appeal is competent to bring on to the record persons who had been originally joined in the suit but were not joined in the lower Appellate Court.

Paya Matakul Appu v. Koramel Amina ... 151

9. s. 123—Registered gift of land—Natural love and affection—Donor retracts consent prior to registration—Compulsory registration—Effect of :

Where a donor made a gift of land to the plaintiff, but prior to registration retracted his consent, upon which the District Registrar ordered compulsory registration :—*Held*, that the donor could not be compelled to register contrary to his wishes, and that the registration was void and the gift of no effect.

Ramamirtha Ayyan v. Gopala Ayyan ... 433

USUFRUCTUARY MORTGAGE—Personal Covenant to pay—Limitation Act—Act XV of 1877 :

Where a usufructuary mortgage contains a personal undertaking to pay the amount secured thereby, the limitation applicable to a suit brought on the mortgage is governed by article 147, Limitation Act XV of 1877.

Sivakami Ammal v. Gopala Savundram Ayyan (I.L.R., 17 Mad., 131) followed.

Udayana Pillai v. Senthivelu Pillai ... 411

VENDOR AND PURCHASER—Covenant by a benamidar—Covenant for quiet enjoyment:

Land forming part of a zamindari was brought to sale in execution of a decree and was purchased by A *benami* for the zamindari. After the zamindari's death B, her son and supposed heir, together with A, sold the land under a conveyance, which contained a joint covenant to remove any hindrance in the vendee's enjoyment of the land. Persons claiming under the lawful successor of the deceased zamindari obtained an ejectment decree against the representatives of the vendee, then deceased, and they were permitted to retain possession only on a payment made to the decree-holders. They now sued A and B for the amount of the purchase money paid on the conveyance and the costs incurred in the ejectment suit:—*Held*, that the plaintiffs were entitled to the decree sought by them against A, notwithstanding that he was a *benamidar* merely.

Somasundaram Ayyar v. Fischer 60

